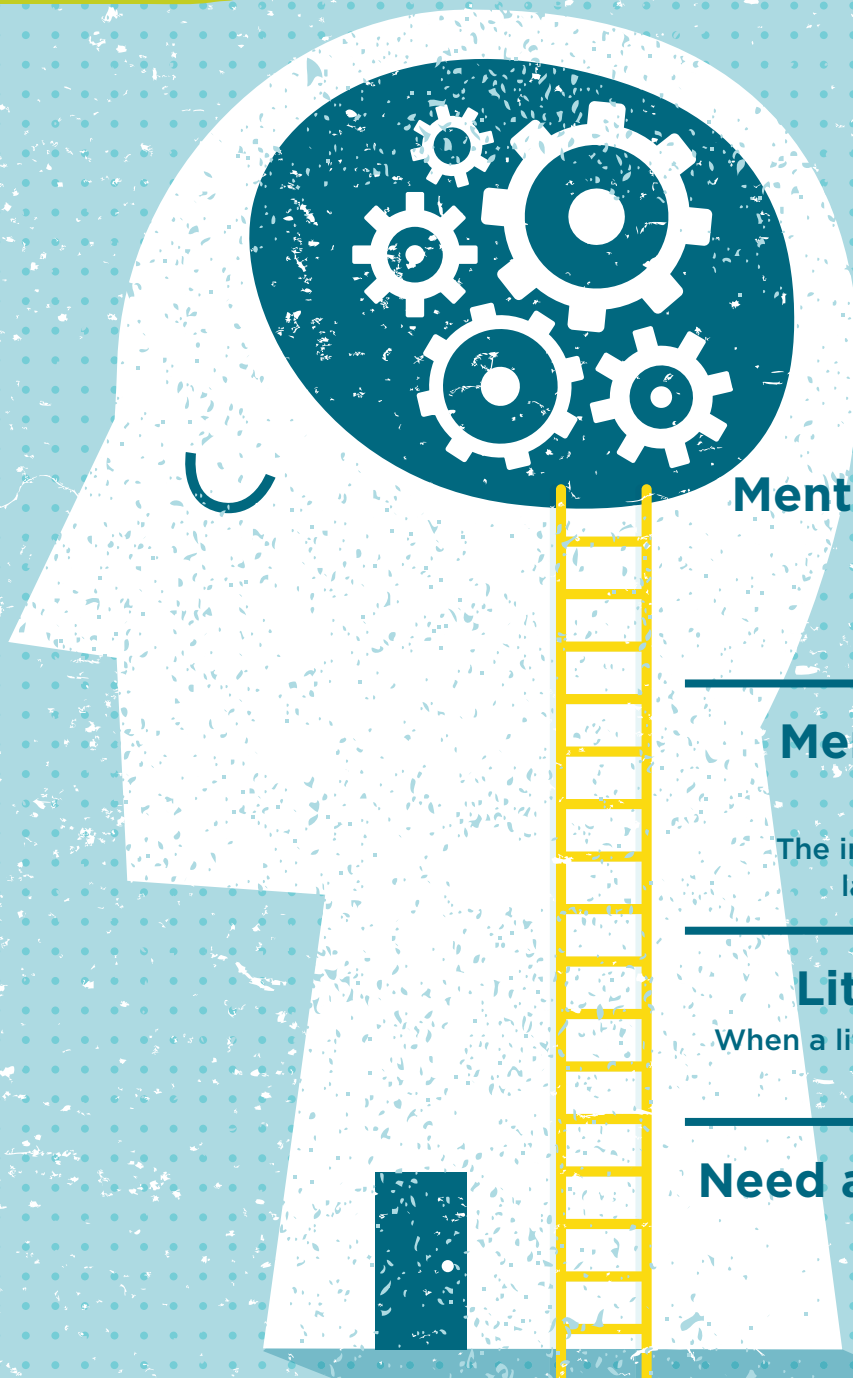




# For Life

NEWS AND ADVICE FROM BIRKETT LONG



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An employee's guide to a state of wellbeing.

## **Mental health and making a will**

The importance of instructing lawyers to draft your will.

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# An employee's guide to mental health in the workplace

According to the World Health Organisation, good mental health is “a state of wellbeing in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community”.

Good mental health is something that, in an ideal world, every individual should enjoy. The reality is that our mental health will fluctuate. At times we will have good mental health and at others our mental health suffers depending on what is going on in our lives. On the occasions our mental health is not so good, we need support from our network, including our employer and colleagues.

## Telling your employer

Making the decision to tell your employer is a difficult one. Just talking openly can really help. Statistics show that 49% of employees feel uncomfortable talking to their employer

about their mental health. Reasons for this can include fear of discrimination or appearing weak.

When faced with the decision whether or not to tell your employer, consider the following:

- You are not alone. 1 in 4 people experience a mental health issue each year, with up to 20% of adults suffering from a mental health issue at any given time
- You have the choice to tell your employer or not. If you decide to say something, you can tell them as little or as much as you feel comfortable with

- Your employer cannot help and support you if they do not know about and understand your situation
- Your employer has obligations to ensure your health, safety and welfare in the workplace
- You have rights. A mental health issue could be a ‘disability’ under the Equality Act 2010 and you have a right to ‘reasonable adjustments’ in the workplace and not to be discriminated against
- Your employer’s obligations, along with your rights, mean that your employer has to take steps to help and support you if you are experiencing difficulties with your mental health (whether the cause is home or work or a combination of both). These steps can be temporary or permanent and can include varying your role, changing your working hours or place of work or allowing you time off for appointments
- Talking to your manager or HR department in private and one-to-one or with a trusted colleague to support you, could make talking about sensitive issues easier

Many people nowadays overlook the importance of instructing lawyers to draft their wills. Why would you pay a lawyer to write a will when you can write one yourself for free?

## Mental health and making a will

As demonstrated by the famous case of Hodson v Barnes, a will can even be written on an egg, so why would you instruct a lawyer to write a will for you? Surprising to many, there is much more to will writing than just the drafting. You may be aware that nowadays, it is not uncommon to read in the local paper that a disappointed beneficiary is challenging a will. Sometimes, they do so under the inheritance family provision

legislation, but often a claimant will challenge the validity of the will for one of two reasons, alleging either:

- That the deceased lacked the necessary testamentary capacity to make a will or codicil when they signed it; or
- That the deceased was acting under duress or undue influence

- Plan what you want to say about your mental health condition, how it impacts your work and most importantly what they might be able to do to help you manage and improve your mental health
- The right help and support can improve your mental health and reduce the risk of you taking absences from work, which could impact your income. By talking to your employer, and working with them to agree the changes that will help you best, you stand the best chance of resolving the situation sooner or at least without it worsening further

Recognising a change in our own mental health and having the confidence to ask for support are important parts of protecting and improving our mental health.

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## Litigation friends

There are particular issues which arise if you want to issue divorce proceedings but are concerned that your spouse might not have capacity.

A person lacks capacity if they are unable to make a decision in relation to the matter because of an impairment of, or a disturbance in, the functioning of the mind or brain. This would be the case if a person cannot;

- Understand the information relevant to the decision, or,
- Retain that information, or,
- Use or weigh the information as part of the decision making process, or,
- Communicate their decision.

If it is not clear whether a person lacks capacity, the court will have to resolve this issue before the proceedings can continue and will usually seek expert evidence from a medical professional.

Where a person lacks capacity, they are called a “protected party” and a litigation friend must be appointed on their behalf. This might be a deputy authorised by the Court of Protection, the Official Solicitor or a Suitable Person. A Suitable Person might be a friend or relative of your spouse who can fairly and competently conduct proceedings on their behalf, has no adverse interests and promises to pay any costs awarded.

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If you were to seek professional legal advice, the lawyer would need to be satisfied that you had the necessary testamentary capacity to make the will. The leading case for capacity is *Banks v Goodfellow* which states that testators must:

- Understand the nature of making a will and its effects;
- Understand the extent of the property being disposed of;
- Be able to comprehend and appreciate the claims to which they ought to give effect; and
- Have no disorder of the mind which affects the terms of the will.

The lawyer will record the details of the meeting through the use of attendance notes. In the notes they would confirm that they had met with the client alone, so as to mitigate any claims of duress or undue influence and that the client had

the necessary mental capacity to sign the will. These attendance notes are then stored in the firm’s archives and can be extremely useful in the event of a claim.

If, during the meeting, the lawyer has any doubt that a testator does not meet the requirements under *Banks v Goodfellow*, the lawyer will follow ‘the golden rule’ of practice. The lawyer will request a doctor’s note from the testator’s GP to confirm that they are of sound mind and have the capacity to sign a will. Again, this evidence would rebut any claim of a lack of testamentary capacity.

Here at Birkett Long, we are experienced in dealing with clients whose wills might be questioned for lack of capacity. We have a whole team dedicated to deal with inheritance and will disputes. In many cases, these claims relate to homemade wills that can be easily

challenged. If you have a homemade will that needs reviewing or have any queries relating to making or amending your will, we offer a free consultation to set you on the right track. If you would like to take advantage of this service, please contact me to arrange an appointment.



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# Do you need a lasting power of attorney?

**Lasting powers of attorney (LPAs) allow you to appoint one or more people as your attorney(s) to look after your affairs, in the event you are no longer able.**

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There are two types of LPA. A property and financial affairs LPA allows attorneys to manage for example, your bank accounts, pay utility bills and deal with any pensions just as you would. A health and welfare LPA allows attorneys to make decisions regarding your healthcare, such as your medical treatment and care.

Once your LPAs have been registered with the court, a property and financial affairs LPA can be used straight away, whereas, a health and welfare LPA can only be used if you have lost mental capacity.

Unfortunately, if you lose mental capacity and you do not have LPAs in place, then your loved ones will be left with no choice but to apply to the Court of Protection for a deputy to be appointed to manage your affairs. This is a longer and more expensive process than making LPAs and you will lose the opportunity to choose who will manage your affairs.

Ensuring LPAs are in place before you lose capacity will give your loved ones peace of mind, knowing that your affairs can be dealt with immediately, without the hassle of applying to the court in what could be a time sensitive matter.

The Wills, Trusts and Probate team can advise on preparing and registering LPAs, so please do not hesitate to contact us.

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