



A SAFE PAIR OF HANDS

Lasting Powers of Attorney: Guidance for Clients

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1. What is the purpose of this guide?

This guidance has been written to support clients to make lasting powers of attorney (LPAs). It is not a substitute for using a suitably qualified professional, such as a STEP qualified solicitor, to assist with advising and drafting LPAs.

2. What is an LPA?

An LPA is a legal document that gives people you trust (in legal terms called the 'attorney(s)') recognised authority to make decisions on your behalf, at a time when you may not be able to make decisions for yourself.

There are two types of LPA: one for property and financial affairs and another for health and welfare.

An LPA must be registered with the Office of Public Guardian (OPG) for it to be valid.

If you do not have an LPA and lose mental capacity, someone will need to make an application to the Court of Protection to be appointed as financial deputy to act on your behalf. The Court decides who to appoint and what their powers should be. A deputy must take out a special annual insurance and provide written annual accounts to the OPG. A deputyship is more expensive than making an LPA.

It is rare for the Court to appoint a health and welfare deputy and even where they do, they do not have the same sort of powers as a health and welfare attorney.

3. What is a property and financial affairs LPA?

A property and financial affairs LPA allows your attorney(s) to assist you with practical financial matters such as:

- Paying bills
- Opening or closing bank accounts
- Claiming benefits
- Managing your investments
- Buying or selling property such as the family home

This type of LPA can be used when you have mental capacity, for example you need your attorney(s) to make decisions because you are not physically well enough to make your own decisions and when you lack capacity to make decisions.

You may choose to limit your attorney's authority to making decisions only when you lack mental capacity. Care should be taken with the second option because your attorney(s) may need to prove you do not have mental capacity each time they need to make a decision, which may mean getting medical evidence which usually involves a fee being paid.

4. What is a health and welfare LPA?

A health and welfare LPA enables your attorney(s) to decide:

- To give consent for medical procedures or treatment
- Where you live
- Who you have contact with
- How to support your care needs in the most appropriate way
- Everyday matters such as diet or daily routine
- To give or refuse consent to life sustaining medical treatment

Your attorney(s) can only make these decisions if you lack mental capacity to make these decisions for yourself.

5. Who needs LPAs?

LPAs are an important part of life planning, not least as you take control by deciding who you want to make decisions if you cannot, and how they must make those decisions.

In many financial transactions, for instance in banking, insurance, utility bills, benefits etc. a financial organisation will only take instructions from the account or policyholder directly. If for some reason, you cannot liaise with the organisation, there is potential for difficulties. E.g., being unable to renew car insurance, access an online account, make a payment, or arrange a new electricity tariff. These difficulties can be avoided by making and registering a property and financial affairs LPA.

An LPA enables financial organisation to recognise your attorney(s) and allow continuity in decision making so you can continue to live your life the way you want.

Similarly, a health and welfare LPA allows your attorney(s) to make health and welfare decisions for you. It creates certainty as to who can make decisions and reduces conflict and arguments. It is worth remembering that, in legal terms, there is no such thing as the “next of kin”. This term has taken on a common usage but, a next of kin has no legal powers, rights or responsibilities and cannot give consent for providing or withholding treatment. Such decisions can only be made by an attorney(s) under a registered health and welfare LPA.

6. Who can make an LPA?

Any adult can make an LPA, provided they have mental capacity (see below).

They can be made at any time, but many people choose to leave making one until they get older. The best time will depend on your personal circumstances, such as your health, marital status, dependents and so on. However, if you leave it until you have lost mental capacity, it will be too late. As loss of mental capacity is not always predictable, it is important to take steps to make your LPA sooner rather than later.

7. Understanding unfamiliar language

An LPA contains language and terms we do not use in everyday conversations, so we have set out some of the terms and what they mean to help you understand:

Person	Role
Donor	The person making the LPA (in this guide we have referred to the donor as 'you')
Attorney(s)	The person(s) who is chosen to make decisions on behalf of the donor
Replacement attorney(s) (optional)	If the original attorney(s) can no longer act on the donor's behalf a replacement attorney(s) can be chosen
Person to be notified	Someone you would like to know you are making an LPA
Certificate Provider	An adult, known to the donor for at least two years or with skills and expertise, such as a doctor or solicitor who confirms the donor is acting understands the LPA they are making and not being pressured into making it.
Witness	A witness to the donor's and the attorney's signatures. The witness can be anyone over the age of 18 and should be independent of the attorney and donor

8. Who should be the attorney(s)?

Your attorney(s) can be anyone you want, provided they are an adult, such as your spouse or partner, relative or friend. They must agree to be your attorney(s), as they will have to sign your LPA.

You should choose someone who is a good decision maker and will make the sorts of decisions you would want if you were able. They should be trustworthy, reliable and have the skills to act competently. For example, choosing an attorney that you trust but who is not very good at managing their own finances may not be a wise decision.

You can choose to have more than one attorney, but must set out how your attorney(s) make decisions. This could be jointly (i.e., always together) or decisions jointly and severally (either together or independently). You may also choose to give your attorney(s) the ability to make some specific decisions jointly and some jointly and severally, but if you choose this you should take legal advice. Remember that the more attorney(s) you choose the more difficult it might be for them to agree on decisions.

If your preferred attorney is an undischarged bankrupt or subject to a debt relief order, they cannot be named as an attorney under a property and financial affairs LPA but can under a health and welfare LPAs.

9. What is involved in being an attorney?

Attorney(s) must follow the Mental Capacity Act 2005, which sets out a framework for making decisions for people who cannot make decision for themselves. This means that:

- Your attorney(s) must assume you have mental capacity to make decisions for yourself, unless it is established that you cannot because you lack capacity
- Your attorney(s) must not treat you as unable to make a decision unless all practicable steps to help you to do so have been taken without success.
- Your attorney(s) should not treat you as unable to make a decision merely because you want to make a decision your attorney(s) think is unwise.
- If you lack mental capacity, your attorney(s) must undertake any act for you or make a decision for you in your best interests.

Before the act is done, or the decision is made, your attorney(s) must consider if they could achieve the same outcome in a way that is less restrictive on your rights and freedom of action.

- Your attorney(s) must follow any instructions which are set out in your LPA
- Your attorney(s) must follow any restrictions on their authority set out in the Mental Capacity Act 2005, so for example can only make very limited gifts from your money.
- Your attorney(s) must act in good faith and owe a duty of care to you when making decisions, respecting your confidentiality and not take advantage or benefit from their position as attorney(s).
- Your attorney(s) must keep financial records and keep their own money separate from yours.

10. What does having “mental capacity” mean?

Mental capacity is the ability to make a decision. This could be as simple as deciding what to eat for breakfast or more complex such as whether to have medical treatment or sell an investment or property.

Whether someone has or has not mental capacity is based on the thinking the person has to go through to make that decision. It is not based on the outcome of the decision.

There may be a time when it becomes harder to make decisions, for example due to ill health or disability. Everyone should be supported (by providing or explaining relevant information, assisting with communication, choosing a suitable time of day or location) to make those decisions they are able.

11. What is the loss of mental capacity?

Under the Mental Capacity Act 2005 a person is considered to lack mental capacity if they are unable to understand, retain, use, or weight information about the decision, at the time the decision needs to be made because they have an impairment or disturbance in their mind or brain. Also, if a person has no way of communicating by any means, for example they are in a coma, they will be treated as lacking mental capacity.

Mental incapacity can be permanent or temporary and can fluctuate.

12. Who decides if someone has mental capacity?

The person who decided whether someone has mental capacity, depends on the decision to be made, at the time it is to be made. For example, a family member who is providing care may decide whether their loved one has capacity to make decisions about who they see or what they eat or drink. A doctor may decide whether a patient has capacity to consent to medical treatment and care. A solicitor may decide whether a person has mental capacity to enter into a legal transaction. Your attorney(s) may decide whether you have capacity to make financial or health and welfare decisions.

There is not usually a formal process for assessing capacity, except where the assessor is acting professionally. However, an individual who has a reasonable belief that the person lacks

capacity must have objective reasons for this belief and if there is a query, may be required to explain the steps they took to establish it.

13. How is an LPA made?

Forms and guidance notes for completing LPAs are freely available on the Government website:

<https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney>

There is a standard fee payable to register each LPA, although this can be reduced if you have a low income.

However, we would recommend getting appropriate legal advice from a suitably qualified solicitor to support you through the process. Whilst we recognise engaging legal advice involves additional costs and is not the cheapest option, professional advice can help you make important choices about who you want to be your attorney(s), how they make decisions and including guidance and administrative powers to minimise the likelihood of difficulties later when the LPA is needed.

Once the forms have been completed, signed, and witnessed they must be sent off to the OPG to be registered. This must be done by the donor, the attorney(s) or the legal adviser preparing the LPAs.

The OPG will notify you and the attorneys when it has been registered.

It is possible to delay registering your LPA with the OPG until it is required to be used. This choice has risks as it can take up to 20 weeks to register the LPA, which may create difficulties where an urgent decision needs to be taken.

Even when the LPA is registered you remain in control of your own decisions. You can tell your attorney(s) when you want them to make decisions, and they should involve you in decisions they plan to make on your behalf. If they do not do this, you can cancel your LPA.

It is recommended that the LPA is registered as soon as it has been written in case there are any errors. Any mistakes can only be rectified whilst you have the mental capacity to do so.

14. Are there any decisions that cannot be made by an attorney?

Certain decisions on family matters such as marriage, divorce, adoption, or parental responsibilities cannot be made on someone else's behalf.

15. What sort of things should be considered whilst drafting LPAs?

Choice of attorney(s)

- How many attorney(s)/replacement attorney(s) should be named?
- Should there be different attorney(s) for property and financial affairs and health and welfare?
- Should the attorney(s) agree unanimously on each decision (jointly) or be able to make some decisions independently (jointly and severally)? Should this differ according to the decision to be made?
- Who should be the certificate provider and who should be notified that you have made an LPA?

16. What are preferences?

A preference is guidance setting out how you want decisions to be made, for example who are the people you would like your attorney(s) to talk to before they make decisions, or your views and wishes about the decisions to be made. Your attorney(s) are not obliged to follow your preferences.

17. Examples of preferences for a health and welfare LPA

"I would like to continue to have my hair/nails done every fortnight"

"I would like my pets to live with me for as long as possible"

"I would prefer to continue to live in the local area should I need to live in a care home"

Examples of preferences for a Property and finance LPA

"I would like to continue to receive an annual income from my savings account"

"I would like to invest in ethical funds"

"I would like to make an annual gift of £500 to The Dogs Trust"

“I prefer to receive private health care wherever this is possible. Money in my savings account can be used to pay for this”

18. What are instructions?

These are statements that tell the attorney(s) what to do and how to act. Instructions are certainties that must be followed.

- Your instructions must not be contradictory with the way you require your attorney(s) to act.
- You cannot require your attorney(s) to break the law, for example purporting to give them power to euthanise you.

You cannot instruct your attorney(s) to act in someone else’s best interests - they must only be required to act on your behalf.

19. Examples of instructions for a health and welfare LPA

- “My attorney(s) should not consent to any medical treatment involving blood products as this is against my religion”
- “I must be allowed to continue to eat a vegan diet”
- “I must only be moved into residential care upon the specific advice of my GP”

Examples of instructions for a Property and finance LPA

- “My attorney(s) must not sell my home unless I have moved permanently into residential care”
- “Independent financial advice must be sought if any of my investments are to be changed”
- “No gifts should be made by my attorney(s)”
- “My attorney(s) only have the authority to access my personal bank account. They should not be permitted to access my business accounts or make any decisions relating to my business”

Mistakes made in writing preferences and instructions can make a poorly drafted LPA unworkable.

20. What happens once an LPA is registered?

Once an LPA has been registered it becomes legally binding and should be kept in a safe place. It is a good idea to get certified copies of the LPA made so each attorney has at least one copy

of the LPA, although it is possible to register for the OPG's 'Use my LPA' scheme, which allows easier use when notifying financial organisations or health and social care organisations.

A certified copy of an LPA may be created either by the donor (assuming they have mental capacity) a solicitor or Notary. The following text must be written on the bottom of every page of the copy: "I certify this is a true and complete copy of the corresponding page of the original lasting power of attorney."

On the final page of the copy, you must also write: "I certify this is a true and complete copy of the lasting power of attorney."

The person certifying the LPA will need to sign and date every page.

Your attorney(s) can then use this copy to prove they have permission to act on your behalf before they make decisions in your best interests.

21. What happens if you lose mental capacity?

Once the LPA has been registered, the attorney(s) can start making decisions as soon as you are unable to make decisions.

22. What happens if an attorney does not act in your best interests?

Any person can contact the OPG if they have concerns about how an LPA is being used. The OPG will consider if it can investigate the concern and decide how best to do this. The OPG may report the concern to the local authority's adult social services department and suspicions of crimes or concerns that someone is in immediate danger may be reported to the Police.

The OPG may apply for an order from the Court of Protection to remove the attorney and if need be, revoke the LPA.

23. Is it possible to cancel an LPA?

You can cancel your LPA at any time, provided you have the mental capacity. You can cancel the whole LPA or cancel the appointment of one attorney appointed to act jointly and severally. You need to complete a deed of revocation and send it to the OPG with the original

LPA (see the link below).

<https://www.gov.uk/power-of-attorney/end>

24. Are there other times when my attorney(s) cannot act?

Your attorney(s) are not able to act if any of the following apply:

- You and your attorney were married and get divorced.
- Your attorney dies or loses mental capacity
- You or your attorney become bankrupt (only property and financial affairs LPAs)
- Your attorney resigns by disclaiming their appointment
- Your attorney is removed by the Court of Protection

25. Further Guidance and Information:

Mental Capacity Act 2005

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.legislation.gov.uk%2Fukpga%2F2005%2F9%2Fpdfs%2Fukpga_20050009_en.pdf&clen=400333&chunk=true

Mental Capacity Act (2005) Code of Practice

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachmen_t_data%2Ffile%2F921428%2FMental-capacity-act-code-of-practice.pdf&clen=1420522&chunk=true

An “easy read” accessible guide to the Mental Capacity Act (2005) can be found here:

chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.thh.nhs.uk%2Fdocuments%2F_Patients%2FPatientLeaflets%2Fgeneral%2FMCA_Act-EasyRead-DoH.pdf&clen=287193&chunk=true

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Lasting Powers of Attorney guidance and forms

<https://www.gov.uk/power-of-attorney>

LP12 Make and register your lasting power of attorney: a guide (web version)

<https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney/lp12-make-and-register-your-lasting-power-of-attorney-a-guide-web-version>