

LASTING POWERS OF ATTORNEY

Introduction

A Lasting Power of Attorney (in this note called 'LPA') is a legal document to enable you (the 'donor') to appoint one or more individuals you trust (although you may appoint only one person we use the expression 'attorneys' in the plural in this note) to make decisions on your behalf.

The main purpose of an LPA is for the appointed persons to make decisions if you do not have the mental capacity to make decisions yourself.

'Mental capacity' means the ability to make a decision.

A person with mental capacity has at least a general understanding of the decision they need to make, why they need to make it and the likely consequences. Although sometimes people are able to make some kinds of decisions they do not have the mental capacity to make others.

An LPA enables you to control the decisions that affect you, even when they are made by someone else on your behalf.

An LPA allows you to plan and decide what decisions you want to be made on your behalf and who will make those decisions. You can set boundaries for those decisions.

Property and Financial Affairs

This type of LPA is suitable to use for matters relating to your money and property. This will cover your bank accounts, other savings, assets and liabilities. You do not have to own property or have a lot of money for this type of LPA to be useful or necessary.

It can be used on your behalf, with your consent, as soon as it is registered. However, you can state that it can only be used if you do not have mental capacity.

Health and Welfare

This LPA covers your personal and health care. This type of LPA can only be used if you do not have the mental capacity to make decisions yourself.

You can use it to let your attorneys decide about your daily routine, such as what you wear and eat, moving into a care home or getting help from social services.

You can also give your attorneys the power to refuse or agree to any medical treatment you may need if ever you are unable to make that decision. If your attorneys do not have that power, doctors would decide.

Health and Welfare LPA Life-sustaining treatment-

You can state in your Health and Welfare LPA what you would want to happen if you needed life-sustaining treatment and you no longer had mental capacity.

You have options:

- Option A. Yes. I want to give my attorneys authority to give or refuse consent to life-sustaining treatment on my behalf. If you choose this option, your attorneys can speak to doctors as if they were you.
- Option B. No. I do not give my attorneys authority to give or refuse consent to life-sustaining treatment on my behalf. If you choose this option, it means doctors will make the decisions about life-sustaining treatment instead of your attorneys.

'Life-sustaining treatment' means care, surgery, medicine or other help from doctors that's needed to keep someone alive. Life-sustaining treatment can include:

- a serious operation, such as heart bypass surgery
- chemotherapy, radiotherapy or another cancer treatment
- an organ transplant
- artificial nutrition or hydration (food or water given other than by mouth)

Your attorneys can only make decisions that you have given authority for in your LPA. For example, if your LPA is for your Property and Financial Affairs, your attorneys cannot make decisions about your care or where you live. If your LPA is for your Health and Welfare, they cannot make decisions about your money.

Protecting your interests

Your attorneys must always act in your best interests and follow any instructions you give concerning decisions that may need to be made.

Attorneys must follow the [Mental Capacity Act Code of Practice](https://www.gov.uk/power-of-attorney/overview). This can be found on <https://www.gov.uk/power-of-attorney/overview> together with further information about making a LPA.

The principles are that your attorneys MUST:

1. assume that you can make your own decisions unless they establish that you cannot.
2. help you to make as many of your own decisions as you can. They must take all practical steps to help you to make a decision. They can only treat you as unable to make a decision if they have taken those steps without success.
3. not treat you as unable to make a decision simply because you make an unwise decision.
4. act and make decisions in your best interests when you are unable to make a decision.
5. consider whether they can achieve the same result without restricting your rights and freedom before making a decision or act for you.

Before you begin

Here are some questions to ask yourself:

- Who will be my attorneys?
- How many attorneys do I need?
- Should I have replacement attorneys?
- How should my attorneys make decisions on my behalf? Should they act together or individually, or a mixture of the two?
- Do I want to give my attorneys any instructions about how to make decisions?
- Do I want to state any preferences about my beliefs and values to guide my attorneys' decision-making?
- Who is the independent person – the certificate provider – who can sign my LPA to confirm that you understand it and no one is forcing me to make it?
- Are there any 'people to notify' about my LPA when it is about to be registered? These people are an optional safeguard who can raise concerns about your LPA before it can be used.

The Form:

Section 1- Type of LPA

Which type of LPA you are making?

Section 2 - Details of the Donor

An LPA is for one person only. You can make an LPA if you are at least 18 years old and you have the mental capacity to do so

Bankruptcy does not affect a Health and Welfare LPA. But for a Property and Financial Affairs LPA there are rules for bankruptcy and debt relief orders.

So if you are bankrupt or subject to a debt relief order, you can make, sign and register a Property and Financial Affairs LPA. However, your attorneys will not have power over all of your property. If you are in this situation you should consider obtaining legal advice before you make your LPA.

If you become bankrupt or subject to a debt relief order after your Property and Financial Affairs LPA is made or registered, it will be cancelled.

If an attorney becomes bankrupt or subject to a debt relief order, they can no longer be your attorney under your Property and Financial Affairs LPA.

Names

If you use more than one name or used to be known by a different name, you should make a list of these. This will help your attorneys deal with banks and other organisations on your behalf if your LPA is used.

Section 3- When can a LPA be used

Health and welfare - this takes effect if you do not have the mental capacity to make decisions and the LPA is registered.

Property and financial affairs – you decide whether you want this to take effect when it is registered or when you do not have mental capacity.

Section 4- Who are your attorneys (and Replacement attorneys)?

- You can have one or more attorneys
- Attorneys must be 18 or over
- Attorneys must have mental capacity – the ability to make decisions
- An attorney must not be bankrupt or subject to a debt relief order

Many people choose family members, friends and other people they trust with no legal background. Attorneys do not need to be solicitors.

You can ask anyone to be your attorney, including:

- your wife, husband, civil partner or partner
- a family member
- a close friend
- a professional, such as a solicitor

Make sure that each person agrees to be your attorney before you name them in your LPA.

An attorney can no longer act on your behalf if they:

- lose mental capacity
- decide they no longer want to act as your attorney (known as 'disclaiming their appointment')
- were your wife, husband or civil partner but your relationship has legally ended and you have not stated in your LPA restrictions that they can continue
- become bankrupt or subject to a debt relief order and were an attorney for a property and financial affairs LPA

If you have said that your attorneys must act together for some or all decisions, they will not be able to make those decisions if one dies or can no longer act for you for another reason. If you cancel your LPA, your attorneys can no longer act on your behalf.

Questions to ask yourself

- How many attorneys do you want to appoint?
- Are these people willing to act? Have you discussed your LPA fully with them?
- Do they understand the role and responsibilities of an attorney?
- Do you trust them to act in your best interests?
- Do they know you, your beliefs and your preferences well enough to make decisions for you?
- Do they have the skills to act under your LPA and do they manage their own affairs well? For example, are they good with money?

How attorneys make decisions

If you have more than one attorney, you must decide whether you want them to make some or all decisions on their own or whether they should agree some or all decisions unanimously. The legal terms are 'severally' and 'jointly'.

Your options are:

1 Jointly and severally - Any action taken by any attorney alone is as valid as if they were the only attorney. It is possible for one attorney to make decisions for you without asking your other attorneys.

2 Jointly - Your attorneys must always make all decisions together. They must agree unanimously and they must all sign any relevant documents.

Choose this option if you want your attorneys to agree on every decision, regardless of how large or small it is.

With this option:

- if your attorneys cannot all agree on a decision, it cannot be made
- if your attorneys cannot work together, your LPA will not work
- if one attorney can no longer act or dies, your LPA will stop working, unless you have appointed replacements

3 Jointly for some decisions, and jointly and severally for other decisions

Your attorneys must make certain decisions together and agree them unanimously – but they can make other decisions individually.

If you choose this option you must clearly state which decisions your attorneys should make together and agree unanimously: that is, when they should act jointly.

With this option:

- if your attorneys cannot agree on a joint decision, it cannot be made
- if one attorney can no longer act or dies, your remaining attorneys will not be able to make any of the joint decisions, unless you have appointed replacements

Questions to ask yourself

- Do you trust each of your attorneys to make decisions in your best interests?
- Do your attorneys know what you would decide if you could?
- What might stop your attorneys working together? Do they get on? What would happen if they fell out?
- Even if your attorneys can make most decisions on their own, are there some big decisions that you want them to agree on?
- Do you want your attorneys or replacement attorneys to make all their decisions together and agree everything unanimously?
- Are you happy for your attorneys to choose whether they make decisions together or individually?

Section 5- Replacement Attorneys

A replacement attorney will step in if one of your attorneys dies or cannot longer act.

A replacement attorney:

- cannot temporarily stand in for an attorney who is still able to act (for example, while the first attorney is on holiday)
- cannot replace a replacement attorney

A replacement attorney cannot replace another replacement attorney.

Protecting your LPA

Having replacement attorneys means that your LPA should still work if an original attorney can no longer act on your behalf. Without replacements:

- if you have only one attorney and that attorney can no longer act for you, your LPA will no longer work
- if you have attorneys who must make all or some decisions together ('jointly') and one attorney can no longer act, the rest will not be able to make those joint decisions

If your attorneys have to make all or some decisions jointly and one can no longer act, your replacement attorneys make those joint decisions instead. Both your remaining original attorneys and your replacements can make any decisions that do not have to be made jointly.

Questions to ask yourself

- Do you want replacement attorneys? How many?
- Would it be better to choose several attorneys to act jointly and severally instead of just one attorney?
- Do the people you are considering as replacement attorneys understand that it may be years before they'll need to act for you, if at all?
- Would you want new attorneys to replace original ones in a particular order? (This is only possible if you have said that attorneys should make decisions jointly and

Section 6- Who is the certificate provider?

A certificate provider is a person who confirms that you understand your LPA and are making it of your own free will.

They must be 18 or over, and should be **someone who would speak out if anything was wrong**. You can choose either:

- a person who has known you well personally for at least two years, or
- a person with relevant professional skills and expertise

There are some **people who cannot be your certificate provider**:

- any of your attorneys or replacement attorneys for this or any other LPA or enduring power of attorney
- a member of your family or of any of your attorneys' families – including spouses, civil partners, in-laws and step-relations
- an unmarried partner, boyfriend or girlfriend of you or any of your attorneys

- your business partner or any attorney's business partner
- your employee or any attorney's employee
- anyone running or working for a care home in which you live, or a member of their family
- anyone running or working for a trust corporation appointed as an attorney in your LPA

Section 7- Who should be notified about your LPA?

It is a good idea to let people know when you apply to register your LPA. You can notify up to 5 people of your choice.

These people have a chance to raise any concerns before your LPA is registered, as a safeguard for you.

However, you do not have to include any 'people to notify' for your LPA to be valid.

How people are notified:

Just before we apply to register your LPA, we will send each of the people to notify a form to let them know about it.

Where there are reasons to object to the LPA

There are rules about the sorts of concerns people can raise. They cannot object to your LPA simply because they do not like it. People can only object to an LPA being registered on 'factual grounds' or 'prescribed grounds' and they have 3 weeks to object to the OPG from the date they were notified.

Factual grounds

A person to notify can object to an LPA's registration if:

- you or an attorney has died
- you and an attorney were married or had a civil partnership and your relationship has legally ended
- an attorney does not have the mental capacity to be an attorney

- an attorney has decided to stop acting (known as 'disclaiming their appointment')
- you or an attorney is bankrupt, interim bankrupt or subject to a debt relief order (this only applies to property and financial affairs LPAs)

Prescribed grounds

A person to notify can object to an LPA's registration if:

- the power meant to be created by the LPA is not valid – for example, if they do not believe you had the capacity to make an LPA
- the power created by the LPA no longer exists – if you, the donor, revoked it at a time when you had mental capacity
- there was fraud or undue pressure on you to make the LPA
- an attorney proposes to behave in a way that would go beyond their power under your LPA or would not be in your best interests

Additional information that can be added

If you do not add any additional information your attorneys will be free to make decisions they think are right.

Instructions

These are things your attorneys must or must not do when making decisions for you.

Use words such as 'must', 'shall' and 'have to' when writing instructions for your attorneys.

Preferences

This means things you would like your attorneys to think about when acting under your LPA: your wishes, beliefs and values. Your attorneys do not have to follow this guidance but they should keep it in mind when making decisions for you.

Using words such as 'prefer' and 'would like', makes it clear that you are giving your attorneys advice rather than instructions.

Gifts

Instructions about gifts often cause problems. There are strict limits on the kinds of gifts that attorneys can give on your behalf. They can give presents on 'customary occasions', including weddings, birthdays and religious holidays. They can donate to charities you have previously given to.

Any gifts should be 'reasonable' and take into account how much money you have.

You cannot authorise attorneys to go beyond these limits.

Here are types of gifts you cannot authorise:

- gifts intended to reduce inheritance tax liability
- trust funds for grandchildren
- payment of school fees for grandchildren
- interest-free loans to family
- maintenance for any family member other than your wife, husband, civil partner or child under 18

Your attorneys must apply to the Court of Protection if they want to make gifts like this on your

Why you should register your LPA

Your attorneys can only use your LPA to make decisions on your behalf after the OPG has registered it and sent it back to you officially stamped.

LASTING POWERS OF ATTORNEY

What is a Lasting Power of Attorney?

This is a legal document that lets you appoint one or more persons to make decisions about your welfare, money or property. It can be used at any time when you are not able to make your own decisions. The person you appoint should be someone you trust, who is called an 'Attorney' – that person will make decisions on your behalf. The decisions will be made when you no longer wish to make those decisions or without the mental capacity to do so.

Someone can lack mental capacity if they have had an injury, or suffer from a disorder or condition that affects the way their mind works. This could mean they have difficulty in making decisions all of the time, or that it might take them a long time to make the decision. There is guidance as to how mental capacity is assessed.

The assessment should be made at the time a particular decision needs to be made and **starts with the assumption that the person has the capacity to make the decision in question.**

An assessment should never be simply based on:

- Their age
- Their appearance
- Assumptions about their condition
- Any aspect of their behaviour.

There are several things to be considered when assessing if a person can make a decision:

- If the person understands what decision they need to make and why they need to make it
- If the person understands what might happen if they do or do not make the decision
- If the person can understand and weigh up the information relevant to making the decision
- If the person can communicate their decision (by talking, using sign language or any other means)
- If the person can communicate with help for a professional (such as a speech and language therapist)
- If there is a need for a more thorough assessment (perhaps by involving a doctor or other professional expert)

One must not treat the person as unable to make a decision just because they make a decision that one does not agree with. The Mental Capacity Act 2005 Code of Practice gives more detailed guidance on how to assess someone's ability to make decisions. You can download a copy from www.gov.co.uk

If you need to make decisions for someone else

Any decision you make for someone who lacks capacity must be made in that person's **best interest**.

When working out what is in someone's best interest, all relevant circumstances must always be considered and:

- Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision
- Whether there is a chance that the person will regain capacity to make a particular decision in the future
- The person's past and present wishes and feelings, beliefs and values
- The views of other people who are close to the person who lacks capacity as well as the views of an Attorney or Deputy

There are two main ways that one can make a decision for someone else:

- As someone's Attorney under an Enduring or Lasting Power of Attorney document
- Being a Deputy appointed by the Court of Protection

These are legal arrangements and the person cannot fulfil these roles without agreement from the Court of Protection or the Office of the Public Guardian. Each of these roles has responsibilities and duties for the Attorney or Deputy on behalf of someone else.

More information for Donors and Attornies

The LPA is a legal document that someone (the Donor) makes using a special form. It allows that person to choose someone now (the Attorney) that they trust to make decisions on their behalf at a time in the future when they either lack the mental capacity or no longer wish to make those decisions themselves.

The decisions could be about the Donor's Property and Financial Affairs or about their Health and Personal Welfare.

Making an LPA is the only way to make plans for a time in the future when you may lack the capacity to make decisions for yourself. An LPA can only be used after it is registered with the Office of the Public Guardian.

There are two types of LPA:

The Property and Financial Affairs Lasting Power of Attorney

A Property and Financial Affairs LPA allows the Donor to appoint an Attorney to manage their finances and property whilst they still have capacity to make decisions for themselves. For example, it may be easier for them to give someone the power to carry out tasks such as paying their bills or collecting their benefits or other income.

This might be easier for lots of reasons: the Donor might find it difficult to get about or to talk on the telephone, or might be out of the country for long periods of time.

Alternatively, the Donor may include a restriction that the LPA can only be used at a time in the future when they lack the capacity to make decisions for themselves for example, due to the onset of dementia in later life or as a result of a brain injury.

An Attorney will not be able to make decisions about a Donor's personal welfare unless they have also been appointed as a Personal Welfare Attorney using a separate LPA.

The Health and Personal Welfare Lasting Power of Attorney

A Personal Welfare LPA allows the Donor to appoint an Attorney to make decisions on their behalf about their health and personal welfare.

A Personal Welfare LPA can **only** be used when the Donor lacks the capacity to make these decisions for themselves.

An Attorney will not be able to make decisions about a Donor's property and financial affairs unless they have also been appointed as a Property and Affairs Attorney using a separate LPA.

A Lasting Power of Attorney is different to a short form Power of Attorney and an Enduring Power of Attorney. We can advise you on the differences between these documents.

Restrictions and/or conditions

An LPA may contain restrictions and/or conditions that place limits on the decisions the Attorney can take, for example, he or she may only be allowed to make decisions about where the Donor lives or the attorney may not be able to sell the Donor's house. The Attorney must adhere to these restrictions and conditions.

The Donor may also talk to the attorney about their wishes and feelings and may also include guidance in their LPA to assist the attorney when making decisions in their best interests. The Attorney should take account of this guidance when making decisions for them.

Who can make an LPA?

Anyone aged 18 or over, with the capacity to do so, can make an LPA. You cannot make an LPA jointly with another person; each person must make his or her own LPA.

Who can be an Attorney?

This depends on the type of LPA that the donor is making. If the donor is making:

- A Personal Welfare LPA - then anybody over the age of 18 can be an Attorney as long as their details are correctly written on the LPA form;
- A Property and Financial Affairs LPA - then anybody over the age of 18 can be an attorney. However, the proposed attorney cannot be a bankrupt when the donor signs the LPA form. You should also note that if the attorney becomes bankrupt in the future, this could result in the LPA being cancelled if it has been registered with the Office of the Public Guardian

If you are unsure whether someone you wish to appoint can be an Attorney under an LPA please ask us for advice.

What it means if you have been asked to act with another attorney

The Donor may wish to appoint you to act with one or more other Attorneys and can appoint you to act in different ways. You can be appointed to act:

Together

This means that all attorneys appointed in the LPA must agree on a decision or all attorneys must sign a relevant document. For example, all attorneys appointed together would have to agree where the donor was to live.

Appointing attorneys to act together is sometimes used as a safeguard by the donor.

However, appointing several attorneys can mean:

- it is difficult for them to act/make decisions; or
- the LPA could be cancelled if attorneys appointed together cannot work together or one of them dies or loses the capacity to act.

Together and independently

This means that each attorney appointed can act on their own when making decisions on behalf of the donor and that the attorneys can also act together. This means that any one of attorneys appointed together and independently can decide on a particular issue.

Even if you are appointed with other attorneys to act together and independently it is important to discuss any decisions you are making with the other attorneys, where relevant, before you make them, to avoid any conflicts whilst the LPA is being operated.

Together in some matters and together and independently in other matters

This means that all attorneys are required to agree on certain specified decisions but can act on their own when making other decisions. For example, the donor may state that all attorneys must agree on any decision relating to medical treatment, but can act on their own in deciding in which nursing home they live.

The donor will need to clearly set out what these matters are in their LPA.