



A GUIDE FOR MAKING LASTING POWERS OF ATTORNEY

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INTRODUCTION

A Lasting Power of Attorney (LPA) gives another person or persons (known as your “attorney(s)”) the authority to act for you if you are unable to do so yourself. That authority continues even if you lose the mental capacity to make decisions for yourself. If you do not have an LPA in place and you lose mental capacity, it will be necessary for someone to make an expensive and time consuming application to the court in order to act on your behalf. This can take several months.

There are two types of LPA:

- Property and financial affairs.
- Health and welfare.

You can have either or both types of LPA.

In this note you will find guidance on:

1. What happens if I lose capacity without making an LPA?
2. The advantages of putting an LPA in place.
3. How to make an LPA, including information on the decisions that you will need to make.
4. How the LPA can be used and how you can control what your attorney(s) are allowed to do.
5. The registration of LPAs.

1. WHAT HAPPENS IF I LOSE CAPACITY WITHOUT MAKING AN LPA?

If you were to lose capacity to manage your affairs without having put in place an LPA, your loved ones would need to make an application to the Court of Protection for an individual known as a deputy to manage your affairs.

A deputy can be appointed to make property and financial affairs decisions or health and welfare decisions, in a similar way to an LPA attorney. However, there are several key differences, which mean many people choose to put in place one or both types of LPA instead of falling back on the deputyship system.

2. ADVANTAGES OF PUTTING IN PLACE AN LPA

Lack of delay

Once an LPA has been registered with the Office of the Public Guardian (OPG), it is available for use immediately so, in the event of a sudden or unexpected loss of capacity, your attorney(s) would be able to step in immediately to take over the management of your affairs and take decisions on your behalf.

In contrast, it takes several months for a deputyship application to be processed by the Court of Protection, during which time there may well be nobody able to access your bank accounts or take decisions on your behalf.

Control over choice of attorney

When you make an LPA, you can choose whom you would like to deal with your affairs when you are no longer able to do so yourself. You can choose whether to appoint one or more attorney(s) and specify how joint attorneys are to take decisions (ie jointly or separately or jointly for certain key decisions and separately for other decisions). You can even appoint one or more replacement attorney(s) to act in the event that your first choice is not able to act for any reason. You are free to appoint a family member, friend, a professional such as a solicitor, or a combination of these.

In the case of a deputyship application, you would no longer have capacity to decide whom should be appointed as your deputy and the court would have the final say in this decision. If no family members or friends put themselves forwards to act as deputy or if there were to be a disagreement as to whom should be appointed, the court might decide to appoint a neutral professional deputy.

Control over extent of attorney's powers

When you make an LPA, you can include preferences or instructions within the LPA form to guide your attorneys as to how you would like them to exercise their powers. For example, in a property and financial affairs LPA, you could specify that your attorney is not to sell your home unless, in your doctor's opinion, you can no longer live independently. You could also include instructions about investments, for example, specifying that your attorney is not to make any investments without seeking professional advice, or that your attorney can only invest in a limited class of safe investments or in ethical investments. In a health and welfare LPA, you could specify, for example, that you wish to live close to a particular relative or include instructions about dietary requirements or personal care requirements.

However, it is important to note that some instructions and preferences might prevent the document from operating as a valid LPA and could be struck out by the OPG when the LPA is registered. It is therefore recommended that you consult a solicitor on the details of any instructions or preferences you wish to include in your LPA form.

In contrast, the powers granted to the deputy would be determined by the Court of Protection. In most cases, deputies are granted broad powers to take decisions on the patient's behalf and in their best interests. In the case of a property and financial affairs deputyship, this would allow the deputy to take possession or control of the patient's property and affairs and to exercise the same powers of management and investment as they would have as beneficial owner.

Less expensive than deputyship

It currently costs £82 to register an LPA with the OPG compared with £371 for an application to the Court of Protection to appoint a deputy. In addition, a solicitor's fee for dealing with a deputyship application would typically be much more than to create and register an LPA.

Peace of mind

Putting in place one or both types of LPA whilst you have capacity can give you peace of mind that your affairs will be taken over by trusted individuals in the event that you are no longer able to take the relevant decisions yourself. You can also have peace of mind that your loved ones will be spared a lengthy court application in order to take over your affairs at an already difficult time.

3. MAKING AN LPA

Who can make an LPA?

Anybody who is over 18 and understands what they are signing, when making an LPA.

What are the differences between the two different types of LPAs?

- **LPA for Property and Financial Affairs** This type of LPA allows your attorney to deal with your financial affairs, for example to pay your bills, sell your property or investments and operate your bank accounts. Unless you specify otherwise in your LPA, your attorney can use your LPA while you still have capacity to make financial decisions yourself. If you allow your attorney to make decisions before you have lost mental capacity, it does not mean that they automatically take all financial decisions for you, it just means that they can take these decisions if you allow them to at the time. This can be helpful if you are unwell or on holiday for an extended period of time.
- **LPA for Health and Welfare** This type of LPA allows your attorney to make decisions about matters such as your medical treatment, your diet, where you live and how you spend your time. Unlike the LPA for property and financial affairs, your attorney can only use it when you have lost the mental capacity to make decisions yourself.

Your attorney cannot make decisions about life-sustaining treatment unless you specifically allow this in the LPA. Life-sustaining treatment includes ventilation to help with breathing, feeding through a tube and resuscitation.

How do I make an LPA?

An LPA must be made using a specific form. There is a different form for each of the two types of LPA.

The form is simple to complete but before completing it you should make sure that you have thought carefully about the three categories of people who will perform different roles in relation to your LPA:

- Attorneys.
- People that will be notified before your LPA is registered.
- Certificate providers.

You will also need to consider the decisions that you would like the attorney(s) to make on your behalf, including how they will make those decisions and whether there should be any limits on what they can do. More information on each of these is provided below.

If you have not completed the form yourself, you must read everything very carefully before signing the document. It is a legal requirement that everyone signing your LPA must read “your legal rights and responsibilities” section. This provides you with information about how your attorney(s) can use the LPA.

Once the form has been completed, it must be signed in the right order. You must sign first, then the certificate provider and then your attorney(s).

The LPA must be registered before your attorney(s) can use it.

Who Will Act as my Attorney(s)?

You must only appoint people that you can trust to act as your attorney(s). You should consider the following categories of people when deciding who to appoint:

- Family members.
- Friends.
- Professional advisors such as your solicitor or accountant. This category is generally only appropriate for LPAs for financial decisions.

You should also consider practical issues such as whether it would be better to have an attorney who is geographically close to you (this might be less relevant, for example, for an LPA for financial decisions if you deal with all of your finances online). You should also consider the time, skills and expertise that each attorney has in relation to what they may need to do. If you choose to appoint professional attorneys you will need to pay them for acting as attorney but you can also pay other attorneys if you wish.

Can I Have More than One Attorney?

It is possible to appoint more than one person to act as your attorney. You can also appoint replacement attorneys. This is useful as an insurance policy in case one of your attorneys cannot act.

You can appoint more than one attorney in the following ways:

- **Jointly.** If you appoint attorneys to make decisions jointly, then they can only act together. This may prove inconvenient, particularly for day-to-day decisions. Your LPA will be terminated if one of the attorneys can no longer act unless you have appointed a replacement for joint attorneys.
- **Jointly and severally.** If you appoint attorneys to make decisions jointly and severally, they may act either together or independently. This provides more flexibility than appointing attorneys to act jointly and means that the remaining attorney(s) can continue to act even if one of them becomes incapable of doing so. The downside of this flexibility is that one attorney may act in a way that the other attorney(s) would not endorse. Arguably, however, you should not appoint an attorney to act at all if you don't trust that person to act alone.
- **Jointly when making some decisions and jointly and severally when making other decisions.** This option may provide a compromise between allowing sufficient flexibility for attorneys to act independently in relation to day-to-day matters and jointly in relation to more important decisions. You will need to decide which decisions the attorneys have to take jointly.

4. HOW CAN I CONTROL WHAT MY ATTORNEYS CAN AND CANNOT DO?

Restrictions Imposed by Law

The law limits what your attorneys can do and how they must act. The most important rule is that an attorney is only allowed to act in your best interests. Another important rule for an attorney for financial decisions is that they must keep accounts and submit them to the Office of the Public Guardian (OPG) on request.

Other rules include:

- Strict limits on the kinds of gifts that an attorney for financial decisions can make on your behalf. For example they can give birthday, Christmas and wedding presents but they can't make gifts for inheritance tax planning or pay school fees for grandchildren without making an application to court.
- The law against euthanasia and assisted suicide. Your attorney cannot break the law even if you try to allow them to do so in your LPA for health and care decisions.

Instructions from You

You can also place additional restrictions on the authority of your attorney(s) in the LPA by specifying instructions that the attorney(s) must follow in section 7 of the LPA form. Common instructions in an LPA for property and financial affairs include:

- Requiring your attorney(s) to submit annual accounts to a person of your choice.
- Allowing your attorneys to appoint an investment manager to make decisions about your investments.

Common instructions in an LPA for health and welfare include:

- Specifying that you would like your attorney(s) to ensure that you have a particular diet, for example a vegetarian diet.
- Allowing your attorney(s) to agree to residential care only if your doctor confirms that you are unable to live independently.

Preferences from You

You can provide your attorney(s) with advice in your LPA about how you would like them to manage your affairs. This indicates your preferences, rather than something which your attorney(s) must do. For example, you might say that you would like your attorney(s) to consult with each other before making any major decisions or that you would like to live in a particular geographical area.

Who checks that my Attorney(s) are acting properly?

You shouldn't appoint anyone that you don't trust to act as your attorney. The OPG oversees attorneys and deals with any complaints that arise about the way that attorneys are exercising their powers.

People to Notify

When you make your LPA you can, but don't have to, nominate up to five people to be told when your or your attorney(s) apply to the OPG for the LPA to be registered. Any people that you specify should be people who are involved in your life and who know you well. The notification acts as a safeguard because it allows

those people to raise any concerns that they may have at the point of registration.

Certificate Providers

A certificate provider is an impartial person who is qualified to act in one of two ways:

- They are a professional (for example, a GP or your solicitor).
- They have known you for at least two years.

You need one certificate provider.

A certificate provider must be independent. For example, it is not possible for any of your attorneys, a member of your family or a member of an attorney's family to act in this capacity. The LPA form contains a full list of those who cannot act as a certificate provider.

When completing and signing the form, the certificate provider will be certifying that:

- You understand the meaning of the LPA.
- You have not been put under pressure to make the LPA.
- There has been no fraud involved in making the LPA (that is that there is no dishonesty or scam involved).
- There is no other reason for concern.

Again, the certificate is a safeguard for you because it is confirmation from a qualified third party that you understand what you are signing and that you have decided to make it yourself, without pressure from others.

5. REGISTRATION

You or your attorney(s) can register your LPA with the OPG at any time. However, your attorney(s) can only use your LPA to make decisions on your behalf after it has been registered. You will need to decide whether you want your LPA to be registered immediately.

If you wish to register your LPA immediately, you or your attorney(s) will need to complete sections 12 to 15 of the LPA and give notice to any 'people to be notified' using form LP3. You will also need to pay the OPG registration fee of £82. If the LPA will not be registered immediately, these sections of the LPA form should be left blank until you are ready to register.

Advantages of Immediate Registration

The advantages are that:

- The OPG checks the LPA when it is about to register it so any problems will be found immediately. If the LPA is not registered until you have lost capacity, you won't be able to rectify any errors and the LPA may be invalid. That is, your attorney(s) will not be able to use it.
- The LPA is ready to use if it is needed in the future. As the registration process can take eight to ten weeks, delaying registration until you lose mental capacity can cause an inconvenient delay when the LPA is required.

Disadvantages of Immediate Registration

The disadvantages are that:

- The registration fee of £82 per LPA has to be paid straight away.
- Over time, you may decide that you want to revoke your LPA and make a new one. If you have already registered your LPA, you will need to pay a second registration fee to register the new LPA.

How the LPA is used after Registration

Your attorney(s) can use a registered LPA for property and financial decisions either before you lose mental capacity (with your agreement) or afterwards. Your attorney(s) can only use a registered LPA for health and welfare after you have lost mental capacity.

When your attorney(s) start using the LPA, they may need to provide evidence of their authority to act for you to banks, utility companies, the local authority, your doctor, care homes and other third parties. The requirements of each individual or organisation will vary. For example, some may need to see the original registered LPA while others may only want a photocopy. Your attorney(s) should avoid sending the original registered LPA by post to a third party and offer to supply an office or certified copy instead. Your attorneys can get office copies from the OPG at a cost of £35 per document. Alternatively, a solicitor or accountant can certify a copy of the LPA, confirming that it is a true copy of the original registered LPA.

CHECKLIST

This section contains a checklist of the decisions you will need to make before creating a lasting power of attorney.

- Which type of LPA do you want to make?
- Who will act as your attorney(s)?
- If you have more than one attorney, how will they work together to make decisions?
- If you are making an LPA for property and financial affairs, whether you want your attorney to be able to make decisions while you still have mental capacity?
- If you are making an LPA for health and welfare, whether you authorise your attorney(s) to make decisions about life sustaining treatment.
- Do you want to place any extra restrictions on what the attorney(s) can do?
- Do you want to specify any preferences to your attorney(s)?
- Do you want anyone to be notified when your LPA is about to be registered? If so, who?
- Who will act as your certificate provider(s)?
- Do you want to register your LPA immediately?