



LASTING POWERS OF ATTORNEY

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LASTING POWERS OF ATTORNEY

A power of attorney is a legal document enabling you to give people you trust (your attorneys) authority to make certain decisions on your behalf. Unlike ordinary powers of attorney, a Lasting Power of Attorney (LPA) continues to operate if you lose the capacity to manage your own affairs. This is a powerful and valuable document and should be entered into with care.

Why make an LPA?

The potential for loss of mental capacity is not limited to later life and as such this is something that everyone should put in place. The key benefit of an LPA is enabling people you trust to take action on your behalf when you are unable to (whether that's because you're out of the country or worse).

If LPAs are prepared much earlier in life they will give the same protection in the event of incapacity as the result of illness or accident. Making an LPA now does not mean that you give up any of your own rights, just that you have an arrangement in place enabling your chosen Attorney to take responsibility for some or all of your affairs if you need them to.

Types of LPAs

- 🔗 **A property and affairs LPA** - enabling your attorney to deal with your property and finances; and
- 🔗 **A welfare LPA** - authorises your attorney to make welfare and healthcare decisions on your behalf, but only when you lack mental capacity to do so yourself. This also extends, if you wish, to giving or refusing consent for the continuation of life sustaining treatment

Your Attorney

You should take care over who you appoint. They should be trustworthy and have appropriate skills to make the proposed decisions. If you appoint more than one attorney, you can require them to always act together (jointly), or together or separately (jointly and severally). You may even appoint them to act jointly for some things, and jointly and severally for others. This should only be considered after taking advice, as it may cause problems when using the power.

You may also choose to appoint a successor to your attorneys, in case they die or otherwise cannot act for you.

When can the Attorney act?

Your attorney can only act when:

- 🔗 your LPA has been signed by you and your attorney(s); and
- 🔗 it has been certified by an independent person (the certificate provider) that you: understand the nature and scope of the LPA; have not been unduly pressured into making the power; and that there has not been any fraud or another reason why you cannot make the power; and
- 🔗 it has been registered with the Office of Public Guardian.

The financial LPA can be used both when you have capacity to act and if you lack capacity to make a financial decision. The welfare power can only be used if you lack mental capacity to make a welfare or medical decision. Following the Mental Capacity Act 2005, capacity is assessed on a decision by decision basis.

What happens if you have not signed a power of attorney?

If you lack capacity to make a financial decision, and do not have an LPA in place, an application may be needed to the Court of Protection to appoint someone to make decisions on your behalf. This is both costly and time consuming and is best avoided. Most care and treatment decisions can be made on your behalf without the need for a court application. However, preparing a welfare LPA can avoid potential disputes.

Preparing an LPA

It is worth planning ahead. When someone becomes incapable of managing their affairs it can be a very difficult time for all concerned. At least with an LPA in place, some of the day to day issues can be dealt with more easily.

WHAT TO CONSIDER

Choice of Attorney

Consider the following when choosing an attorney:

- ✔ They must be over 18
- ✔ They must not be an undischarged or interim bankrupt if you are making a Property & Financial Affairs LPA
- ✔ They must be absolutely trustworthy and possess appropriate skills to make decisions on your behalf
- ✔ They should be people with whom you have a settled and easy relationship and if more than one, who get on with each other well or are likely to do so
- ✔ You can appoint one attorney but we recommend you appoint more than one to lessen the chance of abuse of the power and ensure continuity in case one attorney cannot act
- ✔ They can be family members (it is common to appoint partners and children), friends or professional advisers such as ourselves
- ✔ They must agree to be your attorney and should understand the role they will be fulfilling
- ✔ If they know the people who will be notified on registration – they should have a good relationship with them
- ✔ They must always act in your best interests and according to the principles of the Mental Capacity Act 2005 and follow the guidance contained in the Code of Practice
- ✔ They will need to sign the LPA to accept their role and responsibilities
- ✔ You need to supply their full names and address, date of birth, telephone number (landline or mobile) and email address

How do you want them to act?

- ✔ If you have more than one attorney, consider how you want them to act: jointly (i.e. always together) or jointly and severally (i.e. together and independently so that they can sometimes sign together and sometimes separately). The latter option works well when the attorneys do not live near each other. Further, if one were to retire or be unable to act then the other could still continue
- ✔ You can direct that some tasks (e.g. selling your home) must be dealt with together and some tasks together and independently – this can cause complications so please seek advice beforehand
- ✔ If your attorneys are appointed together they MUST be able to sign together which can be difficult in practice and if one dies, loses their own capacity or is declared bankrupt the financial power can no longer be used
- ✔ If you appoint your spouse or civil partner the dissolution of the marriage or civil partnership terminates the appointment unless you have indicated otherwise

Do you want to appoint replacement attorneys and if so when?

- ✔ It is especially useful to have a replacement attorney if your original attorneys have been appointed jointly but it is also sensible as a way of “hoping for the best and preparing for the worst”
- ✔ Your choice of replacement should be considered in the same way as your original attorney – so read the section above for them also
- ✔ You need to decide which attorney they will replace – in the absence of a choice they will replace the first attorney who needs replacing

Do you wish to place restrictions and / or conditions?

- ✔ You can restrict the occasions when your attorneys should act for you
- ✔ You do not have to restrict your attorneys and you should note that the restrictions will be legally binding and may cause difficulties
- ✔ If you do, you must be careful that the document can still work. You should seek advice on this

Do you want to give your attorneys guidance?

- ✔ For example:
 - it may be helpful to give your attorneys an idea of the way in which you would like your finances looked after;
 - you may want to indicate where you would want to live and what treatments you prefer not to have
- ✔ Consider carefully the types of decisions you would like your attorneys to make on your behalf and take appropriate advice

Do you want your attorneys to be paid?

- ✔ Generally, family and friends would not expect to be paid though you may wish for it be made clear that their out of pocket expenses should be covered
- ✔ Professional attorneys must be paid for their work and this should be covered

Notifying people of registration

You can choose up to five people to be notified when the LPA is registered with the Office of the Public Guardian. This is an important safeguard as they can raise concerns on your behalf. Think carefully as to the people you choose. Ideally:

- ✔ They should be a person with whom you are likely to have contact throughout your life
- ✔ They should be a person who is interested in your well being
- ✔ You should tell them that you are naming them and make sure they will take their role seriously
- ✔ You need to supply their full personal details
- ✔ If you decide that no one is to be notified you will need two Certificate Providers
- ✔ Please share this document with those to be notified so they can have access to more information

Who will be the Certificate Provider?

You must choose someone to act as your Certificate Provider on the LPA forms. Without this the powers cannot be registered or used.

This is a VITAL role as the person concerned is confirming facts about the form and you – namely:

- ✔ That they have read the prescribed information on the LPAs and the part of the forms that you have completed and the part that they will complete
- ✔ That you understand the purpose of the LPA and the scope of authority it conveys **(They can only do this if they themselves understand what it is, so they can ask you appropriate questions)**
- ✔ That no fraud or undue pressure is being used to induce you to create the LPA (they will need to ask various questions to establish this);
- ✔ That there is nothing else which would prevent your LPA from being created (e.g. perhaps a defect in the way in which it has been completed)

Who can act as Certificate Provider?

- ✔ They must be someone of your choice and over 18 years old
- ✔ Someone whom you have known for at least two years as more than an acquaintance or
- ✔ Someone who, on account of their professional skills and expertise, considers themselves competent to make the judgement necessary to give the certificate, such as a lawyer or a doctor

They cannot be:

- ✔ A member of your family
- ✔ A family member of any of your attorneys
- ✔ Your business partner or a paid employee
- ✔ Any attorney appointed by you under the document or another LPA or Enduring Power
- ✔ The owner, manager or employee of a care home in which you are living, or their family member or partner
- ✔ A director or employee of a trust corporation appointed as your attorney

If we are not appointed as attorneys we can act as Certificate Provider but in order to fulfil the requirements of the document itself we will need to see you alone even though you are with your spouse / civil partner / partner. If we agree to act as attorney we cannot also act as Certificate Provider.

YOUR ROLE AS AN ATTORNEY: PROPERTY & FINANCIAL AFFAIRS LPA

You have agreed to be an Attorney of a Property & Financial Affairs LPA

This information sheet is for Attorneys appointed to act under Health & Welfare LPAs. It provides a brief overview of what is entailed in the role.

When do I need to Act?

Once the Lasting Power of Attorney (LPA) has been registered with the Office of the Public Guardian and provided it is unrestricted, you will be able to act for the donor (the person who created the power) for the rest of their life (as long as the power is not revoked), either because he or she asks you to or because he or she has lost the capacity to deal with his or her property and affairs in whole or in part.

Until the LPA has been registered with the Office of the Public Guardian you have no legal powers. The donor can register the LPA while he or she is mentally capable or you can apply to register the LPA at any time.

There is no power to make any decision for the donor under the LPA during the registration process. If the LPA has been registered but not used for some time, you should tell the Office of the Public Guardian when you begin to act under it, so that you can be sent relevant, up-to-date information about the working of LPAs.

What Actions Can I Take As An Attorney?

You will be able to do anything the donor could have done in relation to their finance and property, provided there are no restrictions in the document. For example:

- ✔ Buying or selling property.
- ✔ Opening, closing or operating any bank, building society or other account.
- ✔ Giving access to the donor's financial information.
- ✔ Claiming, receiving and using (on the donor's behalf) all benefits, pensions, allowances and rebates (unless the Department for Work and Pensions has already appointed someone and everyone is happy for this to continue).
- ✔ Receiving any income, inheritance or other entitlement on behalf of the donor.
- ✔ Dealing with the donor's tax affairs.
- ✔ Paying the donor's mortgage, rent and household expenses.
- ✔ Insuring, maintaining and repairing the donor's property.
- ✔ Investing the donor's savings.
- ✔ Making limited gifts on the donor's behalf.
- ✔ Paying for private medical care and residential care or nursing home fees.
- ✔ Applying for any entitlement to funding for NHS care, social care, or adaptations.
- ✔ Using the donor's money to buy a vehicle or any equipment or other help they need.
- ✔ Repaying interest and capital on any loan taken out by the donor.

What Power Do I Have to Make Gifts?

You have very limited powers to make gifts from the donor's property, only:

- ✔ To people who are related to, or connected with, the donor (including attorneys) on specific occasions:
 - births or birthday
 - weddings or wedding anniversaries
 - civil partnership ceremonies or anniversaries, or
 - any other occasions when family, friends or associates usually give presents.
- ✔ Gifts can continue to be made to charities if the donor was making regular payments, or even from time to time.
- ✔ You must remember that gifts must be reasonable in relation to the donor's own assets.

What Do I Need To Consider?

Attorneys have important duties and responsibilities, set out in the Mental Capacity Act 2005 and explained in the Code of Practice, with which you should be familiar.

The Act and Code can be accessed from www.gov.uk/government/publications/mental-capacity-act-code-of-practice or a hard copy obtained by calling 0870 600 5522 or order from customerservices@tso.co.uk

In particular you must follow the principles set out in Section 1 of the Act

- 🔍 **Principle 1** It should be assumed that everyone has capacity to make his or her own decisions, unless it is proved otherwise
- 🔍 **Principle 2** A person should have all the help and support possible to make and communicate their own decision, before anyone concludes that they lack capacity to make their own decision.
- 🔍 **Principle 3** A person should not be treated as lacking capacity just because they make an unwise decision.
- 🔍 **Principle 4** Actions or decisions carried out on behalf of someone who lacks capacity must be in that person's best interests.
- 🔍 **Principle 5** Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

You must always act in the donor's best interests

There is guidance in Chapter 5 of the Code of Practice to help you. In general terms, you need to:

- 🔍 Consider the donor's past and present wishes and feelings, beliefs and values.
- 🔍 Where practical and appropriate consult with: anyone caring for the donor; close relatives and anyone with an interest in their welfare; and other attorneys appointed by the donor.
- 🔍 Always check whether the donor has the capacity to make a particular decision himself or herself. You can only act if the donor does not, on a balance of probabilities, have capacity to make the required decision at the time.
- 🔍 Only make those decisions the LPA gives you authority to make. For example: if you are acting only under a Health and Welfare LPA, you cannot make decisions about the donor's property and affairs; if the LPA is restricted in any way, your authority is limited. If you need further powers in the future, you will be able to apply to the Court of Protection.

Other duties include having a duty to:

- 🔍 Apply certain standards of care and skill (duty of care) when making decisions.
- 🔍 Carry out the donor's instructions.
- 🔍 Not take advantage of your position and not benefit yourself, but benefit the donor (fiduciary duty)
- 🔍 Not delegate decisions, unless authorised to do so.
- 🔍 Act in good faith.
- 🔍 Respect confidentiality.
- 🔍 Comply with the directions of the Court of Protection
- 🔍 Not give up the role without telling the donor and the Court.
- 🔍 Keep accounts and keep the donor's money and property separate from your own.

How Do I Decide Whether or Not the Donor Has Capacity?

You use the test laid down in the Mental Capacity Act 2005, which comprises two stages:

- Stage 1** Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain? Examples may include conditions associated with some form of dementia, or the long-term effects of brain damage
- Stage 2** Does the impairment or disturbance mean that the person is unable to make a specific decision? This stage can only be applied if you have taken all practical steps to support the donor in making the decision and this has failed.

A person is considered to be unable to make a decision if they cannot on a balance of probabilities:

1. Understand information about the decision to be made (the Act calls this 'relevant information')
2. Retain that information in their mind
3. Weigh that information as part of the decision making process, or
4. Communicate their decision (by talking, by using sign language or by any other means)

The Code of Practice offers practical examples which will be very helpful to you, but essentially you need to give the donor as much opportunity as possible to make his or her own decisions before you decide to act and also, to follow the steps laid down in Chapter 4 of the Code of Practice; suggested steps for establishing 'that the donor lacks capacity to make a particular decision'.

YOUR ROLE AS AN ATTORNEY: HEALTH & WELFARE LPA

You have agreed to be an Attorney of a Health & Welfare LPA

This information sheet is for Attorneys appointed to act under Health & Welfare LPAs. It provides a brief overview of what is entailed in the role.

When do I need to Act?

You can only act if:

- ✔ The LPA has been registered with the Office of the Public Guardian.
- ✔ You reasonably believe that the donor (the person who created the power) has lost the mental capacity to make the decision in question, **at the time** it needs to be made.
- ✔ In relation to life sustaining treatment: where there is no valid Advance Decision or Living Will in place **and** the LPA specifically allows you to make this decision. NB: there is no power to demand specific forms of treatment.

Please note: if the donor has been detained under Part 4 of the Mental Health Act 1983, no decision can be made regarding treatment for their mental disorder.

What Actions Can I Take As An Attorney?

Unless the LPA document restricts you, you will be able to make decisions about the donor's health and welfare – for example:

- ✔ Where the donor should live and who they should live with.
- ✔ The donor's day-to-day care, including diet and dress.
- ✔ Who the donor may have contact with.
- ✔ Consenting to or refusing medical examination and treatment on the donor's behalf.
- ✔ Arrangements needed for the donor to give medical, dental or optical treatments.
- ✔ Assessments for and provision of community care services.
- ✔ Whether the donor should take part in social activities, leisure activities, education or training.
- ✔ The donor's personal correspondence and papers.
- ✔ Rights of access to personal information about the donor, or
- ✔ Complaints about the donor's care or treatment.

What Do I Need To Consider?

Attorneys have important duties and responsibilities, set out in the Mental Capacity Act 2005 and explained in the Code of Practice, with which you should be familiar. The Act and the Code can be accessed from the website of the Ministry of Justice here www.gov.uk/government/publications/mental-capacity-act-code-of-practice or a hard copy obtained by calling 0870 600 5522 or order from customerservices@tso.co.uk

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- ✔ **Principle 3** A person should not be treated as lacking capacity just because they make an unwise decision.
- ✔ **Principle 4** Actions or decisions carried out on behalf of someone who lacks capacity must be in that person's best interests.
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You must always act in the donor's best interests

There is guidance in Chapter 5 of the Code of Practice to help you. In general terms, you need to:

- ✔ Consider the donor's past and present wishes and feelings, beliefs and values.
- ✔ Where practical and appropriate consult with
 - Anyone caring for the donor.
 - Close relatives and anyone else with an interest in their welfare.
 - Other attorneys appointed by the donor.
- ✔ Always check whether the donor has the capacity to make a particular decision himself or herself. You can only act if the donor does not, on a balance of probabilities, have capacity to make the required decision at the time.
- ✔ Only make those decisions the LPA gives you authority to make – for example:
 - If you are acting only under a Health and Welfare LPA, you cannot make decisions about the donor's property and affairs.
 - If the LPA is restricted in any way, your authority is limited. If you need further powers in the future, you will be able to apply to the Court of Protection.

Other duties include having a duty to:

- ✔ Apply certain standards of care and skill (duty of care) when making decisions.
- ✔ Carry out the donor's instructions.
- ✔ Not take advantage of your position and not benefit yourself, but benefit the donor (fiduciary duty)
- ✔ Not delegate decisions, unless authorised to do so.
- ✔ Act in good faith.
- ✔ Respect confidentiality.
- ✔ Comply with the directions of the Court of Protection
- ✔ Not give up the role without telling the donor and the Court.
- ✔ In relation to end of life decisions, not be motivated by the desire to bring about the donor's death. You may be wishing to save the donor suffering and to comply with his or her wishes.

How Do I Decide Whether or Not the Donor Has Capacity?

You use the test laid down in the Mental Capacity Act 2005, which comprises two stages:

- | | |
|----------------|---|
| Stage 1 | Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?
Examples may include conditions associated with some form of dementia, or the long-term effects of brain damage |
| Stage 2 | Does the impairment or disturbance mean that the person is unable to make a specific decision?
This stage can only be applied if you have taken all practical steps to support the donor in making the decision and this has failed. |

A person is considered to be unable to make a decision if they cannot on a balance of probabilities:

5. Understand information about the decision to be made (the Act calls this 'relevant information')
6. Retain that information in their mind
7. Weigh that information as part of the decision making process, or
8. Communicate their decision (by talking, by using sign language or by any other means)

The Code of Practice offers practical examples which will be very helpful to you, but essentially you need to give the donor as much opportunity as possible to make his or her own decisions before you decide to act and also, to follow the steps laid down in Chapter 4 of the Code of Practice; suggested steps for establishing 'that the donor lacks capacity to make a particular decision'.

WHAT IS A CERTIFICATE PROVIDER?

The Certificate Provider

As an important safeguard against abuse, one of the requirements to validly make a Lasting Power of Attorney is for the document to be signed by an independent person who can confirm that the person ('the donor') making the power:

- ✔ Understands its purpose and the scope of the authority it gives to the attorney (s);
- ✔ No fraud or undue pressure is being used to induce the person to make the power; and
- ✔ There is nothing else that would prevent the Lasting Power of Attorney from being created.

The choice of a suitable certificate provider is a personal and important decision.

Types of Certificate Provider

There are two types of certificate provider:

- ✔ A knowledge-based certificate provider who is someone who has known the person making the power personally (as opposed to an acquaintance) for at least the previous two years or
- ✔ A skill-based certificate provider who has relevant professional skills and expertise

Skill-Based Certificate Provider

A skill-based certificate provider must be one of the following:

- ✔ A registered health care professional, such as a General Practitioner
- ✔ A registered Social Worker
- ✔ A Barrister, Solicitor or Advocate
- ✔ An Independent Mental Capacity Advocate
- ✔ Someone who considers they have the relevant professional skills and expertise to be a certificate provider

Knowledge-Based or Skills-Based?

The advantage of a knowledge based certificate provider is that they are unlikely to charge you. However, if challenged, they could be called to the Court of Protection to justify their opinion. They would need to show the Court that they know how to assess capacity under the Mental Capacity Act 2005. If the challenge were successful the LPA would not be valid. A skills-based certificate provider will usually charge but would be expected to have higher skills and expertise.

A certificate provider cannot be:

- ✔ Under 18 years of age
- ✔ A member of either the donor or one of the attorney's family
- ✔ A business partner or paid employee of the donor or attorney(s)
- ✔ An attorney appointed in the proposed or another Lasting Power of Attorney or any Enduring Power of Attorney made by the donor
- ✔ The owner, director, manager or an employee of a care home in which the donor lives (including care homes with nursing homes) or their family members or partner

Whoever the donor chooses they should be sure that the person would be able to demonstrate the following:

- ✔ Understand what is involved in making a Lasting Power and its effect;
- ✔ Has the skills to assess the donors understanding of the power and its consequences;
- ✔ They can verify that the donor is not acting under undue pressure from another person and that there is not any other reason why the power should not be created
- ✔ Have detailed knowledge of the donors financial and personal situation – to be satisfied that there is no fraud involved in the making of the power

For more information, advice or support call 01227 700 702 or email info@argolifeandlegacy.co.uk

The information contained in this document has been provided by Argo Life & Legacy Ltd for use at the Hot Potato Conference on 4 July 2016. Other providers of information and advice can be consulted. It provides background information only and should not be relied upon as an exhaustive list of the legal issues involved.

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