

Lasting Powers of Attorney

A Lasting Power of Attorney (LPA) is a legal document which someone (the Donor) makes, giving someone they trust (the Attorney) the power to make decisions on behalf of the Donor at sometime in the future if he/she lacks the mental capacity *or* no longer wish to make those decisions him/herself.

The Donor must be aged 18 or over with the capacity to make an LPA. Any named individual with mental capacity aged 18 or over can be an Attorney as long as the relevant details are correctly written on the LPA Form.

There are two types of LPA:

The Property and Affairs LPA

This type of LPA allows the Attorney to manage the Donor's finances and property whilst the Donor still has the capacity to make decisions for themselves. Donors may include a restriction that the LPA may only be used at some time in the future when they lack the capacity to make decisions for themselves, for example, as a result of a brain injury or the onset of dementia.

The Attorney for this type of LPA must not be bankrupt when the LPA is signed. A subsequent bankruptcy could result in the LPA being automatically revoked if it has been registered with the Office of the Public Guardian (OPG).

The Personal Welfare LPA

This type of LPA authorises the Attorney to make decisions about the Donor's personal welfare and can be used *only* when the Donor lacks the capacity to make decisions.

Other restrictions or conditions

An LPA may have limits on the decisions the Attorney can make, for example with regard to where the Donor lives or the ability to sell the Donor's house. The LPA may include guidance about the Donor's wishes and feelings. The Attorney should take account of guidance.

The Donor may appoint more than one Attorney, either to act together (all must agree), or together and independently (can act together or any one can decide). It is very important for Attorneys to discuss decisions, where relevant, before making them to avoid conflicts during the operation of the LPA

How to make an LPA

There is a special LPA form which is readily available from legal stationers or by downloading from the internet. An LPA can be made at any time, but cannot be used until it has been registered with the OPG. It is recommended that it is registered as soon as possible after being made, so that there will be no delay in being able to use it should the need arise.

An LPA is a powerful document and it may be sensible to seek advice from somebody with relevant experience, such as a solicitor.

The LPA Form

The LPA form (instrument) is in three parts:

Part A – The Donor’s Statement. This sets out the Donor’s details, details of who is to be appointed Attorney and how he/she is to act. This part of the form can be used to place restrictions or conditions on the decisions the Attorney can make or give relevant guidance. The part can also be used to give the names of anyone to be notified (named persons) when the LPA is registered with the OPG.

Part B – The Certificate Provider’s Statement. A certificate provider is a person the Donor must select to complete a Part B Certificate in the LPA form. Only certain people can be certificate providers (details are listed on the form). The certificate provider must speak with the Donor privately so as to be satisfied that the Donor understands the powers that are being given to the Attorney. The certificate provider must also be satisfied that there has been no fraud or undue pressure on the Donor to make the LPA.

Part C – The Attorney’s Statement. This section provides the Attorney’s personal details and understanding of the legal duties involved in the appointment.

The Mental Capacity Act 2005

This Act provides a statutory framework to empower and protect people who may not be able to make some decisions for themselves. Such people include those with dementia, learning disabilities, mental health problems, stroke or head injuries.

It makes clear who can take decisions in which situations and how they should go about this. It enables people to plan ahead for a time when they may lose capacity. The Act covers major decisions about someone’s property and affairs, healthcare treatment or where the person lives, as well as everyday decisions about personal care or what someone eats, where the person lacks capacity to make those decisions.

Attorneys and other people who have a duty of care to someone lacking capacity must:

- act in accordance with the principle of the Act
- make decisions in the Donor’s best interests
- have regard to the guidance in the Code of Practice
- act only within the scope of the Attorney’s authority.

The Code of Practice

The Code of Practice supports the Act and provides guidance for people working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with, or on behalf of, individuals who lack the capacity to do so themselves.

Duties and obligations of an Attorney under an LPA include:

- a duty of due care when making decisions on behalf of the Donor;
- to carry out instructions as required by the LPA;
- a duty not to delegate the Attorney's powers under the LPA unless authorised to do so
- not to benefit themselves but to benefit the Donor – this means avoiding conflicts of interest and in particular not to profit or acquire personal benefit from their position
- a duty of good faith, which means acting with honesty and integrity
- a duty of confidentiality; to keep the Donor's affairs confidential unless the Donor has consented otherwise

and specifically in relation to property and affairs LPAs:

- to keep the Donor's money and property separate from their own
- to keep accurate accounts on all of their dealings as Attorney.