

LASTING POWER OF ATTORNEY INFORMATION SHEET

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What is a Lasting Power of Attorney (LPA)?

A Lasting Power of Attorney (LPA) allows the Donor (who may in the future lose mental capacity to make decisions) to instruct a Donee or Attorney (person granted authority) to make decisions on their behalf. An Attorney acting under an LPA may be granted the power to make both financial and welfare decisions. An LPA can only be used once it has been registered at the Office of the Public Guardian, and, in the case of Health and Welfare, when the Donor no longer has mental capacity to make decisions for themselves.

Why make an LPA?

A person's mental capacity may deteriorate with age, and may in the future not be sufficient to make vital or even every day decisions regarding their health, welfare, finances and property. If a person lacks mental capacity in the future and they have not made an LPA, these decisions could be taken by a Deputy appointed by the Court of Protection.

What if you have already made an Enduring Power of Attorney (EPA)?

Before October 2007, people could grant an Enduring Power of Attorney so that a third person could act for them if they could no longer manage their finances. Any EPA remains valid whether or not it has been registered at the Court of Protection, provided that both the Donor and the Attorney(s) signed the EPA prior to 1st October 2007.

An EPA can be used while the Donor still has mental capacity, provided the Donor consents to its use. If the Donor starts to lose mental capacity to manage their finances, the Attorney(s) is/are under a duty to register the EPA with the Office of the Public Guardian.

While the registration of the EPA is being processed, the Attorney(s) can use the Donor's finances for essentials such as paying for food or regular bills; however, they cannot deal with larger transactions such as the sale of the Donor's home until the EPA has been registered.

An EPA gives no authority in respect of health and care decisions and is effective **only** in relation to financial decisions. If you have an EPA you may wish to consider making an LPA for health and care.

The two types of LPA:

1. Financial Decisions LPA

This type of LPA allows the Attorney(s) to deal with the Donor's property and finances. This can include running the Donor's Bank and savings accounts, making or selling investments, paying the Donor's bills, buying and selling the Donor's house, and dealing with the Donor's tax affairs. Once this type of LPA has been registered with the Office of the Public Guardian, it can be used immediately, even where the Donor retains sufficient capacity, unless this has been restricted by the Donor. On the LPA, the Donor may give preferences or instructions as to the use of the Attorney's financial powers. A preference is what you would like your Attorney(s) to think about when they make decisions for you but they do not have to be followed, whereas an instruction tells your Attorney(s) what they **must** do. A preference might be "I would like to donate £100.00 each year to Age UK", and an instruction might be "My Attorneys must not sell my home unless, in my Doctor's opinion, I can no longer live independently".

2. Health and Care LPA

This type of LPA allows the Attorney to make health and care decisions on the Donor's behalf but only once the LPA has been registered with the Office of the Public Guardian **and** it has been established that the Donor lacks mental capacity to make such decisions for themselves. The decisions an Attorney can make on behalf of the Donor include where the Donor should live, the Donor's day to day care, such as diet, dress or daily routine, and decisions regarding what medical treatment the Donor should receive. Most importantly, the Donor can choose whether an Attorney or a Doctor should make decisions about accepting or refusing medical treatment to keep the Donor alive at a time when the Donor can no longer make that decision themselves. "Life sustaining treatment" means care, surgery, medicine, procedures or treatment from a Doctor which is needed to keep the Donor alive. On the LPA the Donor can give preferences or instructions as to the use of the Attorney(s) health and care powers as mentioned before. A preference could be "I would like to have regular haircuts" or "If I were in the last days of a terminal illness I would only want treatment to make me comfortable, not to prolong my life". Whereas an instruction might be "My Attorney(s) must not decide I am to move into a Residential Care Home unless, in my Doctor's opinion, I can no longer live independently" or "My Attorney(s) must not agree to life sustaining treatment if I am in a persistent vegetative state".

Who may be a Donor?

A Donor can be any person aged 18 years and over and at the time of making the LPA has the mental capacity to execute it.

Who may be an Attorney?

An Attorney can be any person aged 18 years and over and must have sufficient mental capacity to act. An Attorney who is a bankrupt cannot be appointed as an Attorney in relation to the Donor's financial decisions but can be appointed in relation to the health and care of the Donor.

Multiple Attorneys

In respect of both types of LPA, more than one Attorney can be appointed. The Donor must decide whether the Attorneys are to act together (i.e. every decision must be a joint one) or together and severally (i.e. allowing an Attorney to make a decision on their own and also together with the other Attorney). Most people choose “joint and severally” as it is the most flexible and practical way for Attorney(s) to make decisions.

Replacement Attorneys

The LPA allows the Donor to appoint a replacement Attorney to step in if one of your original Attorneys can no longer make decisions on the Donor’s behalf. For example, a Donor may appoint their spouse as an Attorney and one of their children as a replacement Attorney if the spouse should die or become unable to act.

Act in the Best Interests of the Donor

An Attorney of a LPA must always act in the best interests of the Donor at all times. This would therefore require consideration of the Donor’s past and present wishes and feelings, beliefs and values.

Creating an LPA

The creation process of a LPA is similar to that of an Enduring Power of Attorney (EPA) in that it must be in the prescribed form and signed in the presence of a witness, but there are some distinct differences. These are noted below:

People to Notify

A Donor can specify up to 5 people they would like to be notified when an application is made to register the LPA. This enables the “notified people” to raise any objections they have regarding the registration of the LPA if they thought a Donor were under pressure to make the LPA or if they thought fraud was involved. A Donor **does not** need to notify anyone; this is entirely optional.

Certificate Provider

The Certificate Provider is an impartial individual who signs a statement that there are no reasons why the Donor should not create the LPA at the time of creating it. The Certificate Provider will need to confirm that the Donor understands what he/she is doing, and that no-one is forcing him/her to make the LPA. The Certificate Provider is somebody who is chosen by the Donor and must be one of the following:

1. Someone over 18 years of age.
2. Someone the Donor has known for at least the past two years.
3. A professional who has the skills and expertise to certify the LPA. This will include registered health care professionals including GPs, Registered Social Workers, independent Mental Capacity Advocates, Barrister, Solicitor, Advocate or any other person who certifies that they possess the relevant profession, skill and expertise to provide a certificate.

The Donor must understand the LPA and not be unduly influenced to enter into it

The Certificate Provider must confirm that the Donor

1. Can understand what the LPA is and understand the contents of the LPA
2. Can understand what powers they are giving to the Attorney in the LPA
3. Is not being pressured, tricked or placed under duress by someone else to make the LPA and
4. That there is nothing else that would prevent the LPA in question being created.

Registering the LPA

There is no correct time to register the LPA as it depends upon the Donor and the types of decisions to be made, but it must be registered before the LPA can be used. However, the benefit of registering the LPA shortly after it is made, is that it will be ready to be used whenever it is needed, thus preventing any delays from being effective when it is needed the most.

Even after registration, it does not automatically mean that the Attorney will start making all decisions on behalf of the Donor. Only those decisions that the Donor is unable to make themselves owing to lost capacity may be taken by the Attorney.

Personal Care LPA powers can only be exercised after the Donor has lost sufficient mental capacity to make the decision themselves, whereas a Financial Decisions LPA may be used once registered even before the Donor has lost capacity (unless restricted to only once capacity is lost).

There is a separate registration fee charged by the Office of the Public Guardian which is payable for the Financial Decision LPA and the Health and Care LPA when each application for registration is made, which is currently £82.00 per Power.

What if I do not have an LPA?

If somebody has not made an LPA and later loses the capacity to make their own decisions, then it may be necessary for an application to be made to the Court of Protection for an Order appointing another person as a Deputy to make decisions on that person's behalf. This can be extremely costly and time consuming.

If you require any further information, please contact the Private Client Department by way of telephone or e-mail as per the details given on the front page of this Information Sheet.