



Enduring Powers of Attorney and Lasting Powers of Attorney

People who lack mental capacity need someone else to manage their legal, financial and health affairs

The Mental Capacity Act 2005 made provision for people to choose someone to manage not only their finances and property should they become incapable but also to make health and welfare decisions on their behalf. They are able to do this through a Lasting Power of Attorney (LPA).

LPAs replaced Enduring Powers of Attorney (EPAs) in 2007, when the Mental Capacity Act came into force, although existing EPAs remain valid.

Enduring power of attorney

Before October 2007, people could grant an EPA so a trusted person could manage their finances for them if they could no longer do this. Any existing EPA prepared before this date remains valid whether or not it has been registered at the Court of Protection, provided that both the donor of the Power and the attorney(s) signed the document prior to 1 October 2007.

An EPA can be used while you still have mental capacity, provided you consent to its use.

If you start to lose the mental capacity to manage your finances, your attorney(s) are under a duty to register your EPA with the Office of the Public Guardian (OPG). While the registration is being processed, your attorney(s) can use your finances for essentials on your behalf such as paying for food or payment of regular bills. However, they will not be able to deal with larger transactions such as the sale of your house until the EPA has been registered.

Lasting power of attorney

Property and affairs LPA

You can make a property and affairs LPA to enable someone you trust (the attorney) to make decisions on your behalf about your property and affairs at a time when you are no longer able or lack the mental capacity to take those decisions yourself. This can include paying your bills, collecting your income and benefits or selling your house, subject to any restrictions or conditions you might have included. It can only be used once it has been registered at the Office of the Public Guardian (OPG).

Health and welfare LPA

In addition, a health and welfare LPA allows the person/s you have chosen as your attorney to make decisions on your behalf about your personal welfare, e.g. where you live. It can include the power for the attorney to give or refuse consent to medical treatment. You have to fill in the form appropriately if this is the option that you require. If you do not wish to consent to specified life-sustaining treatment to be given to you at a future time, the LPA giving the attorney the decision-making power will invalidate a previous advanced decision refusing treatment, thus giving the attorney power to make the decision. A subsequent advanced decision, if applicable in the circumstances, would be binding on the attorney.

A health and welfare LPA can only be used once the form is registered at the OPG and you have become mentally incapable of making decisions about your own welfare.

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This information is for general use only and is not case specific. You are recommended to seek legal advice regarding your particular case.



Who can make an LPA?

Anyone aged 18 or over with the capacity to do so can make an LPA appointing one or more attorneys to make decisions on their behalf.

Who can act as my attorney?

You can choose anyone you trust to act as your attorney provided they are over 18 and not bankrupt when they sign the form. You can appoint more than one person to act. You can also appoint replacement attorneys. If you appoint more than one person, you can choose whether they can act together or together and independently. You can state that your attorneys must act together for some decisions but for others they can act independently.

A new feature is that your attorneys must follow the principles set out in the Mental Capacity Act when they are making decisions or acting on your behalf, which essentially require 'minimum intervention' and 'maximum retained autonomy', for example, wherever possible, you should be assisted in taking your own decisions.

Attorneys must always act in your best interests, and consider your needs and wishes as far as possible. When possible, attorneys should take all practical and appropriate steps to help the donor make the particular decision. An attorney must consider the donor's past and present wishes.

The attorneys must not take advantage of the donor's position to gain any benefit for themselves. They must keep any entrusted money and property separate from their own and from that of other people and they must keep accounts of any dealings on the donor's behalf.

Attorneys must keep affairs relating to the LPA private unless otherwise stipulated on the LPA form or if it can be demonstrated that it is in the donor's best interest to pass on information to somebody else.

A person can refuse to act as attorney but if they agree to take on the responsibility, they immediately become subject to the duties of an attorney. Failure to comply could mean the LPA is cancelled and in some cases the attorney may be taken to court on charges of fraud or negligence. The role carries with it power and responsibility and should not be entered into lightly.

How to make an LPA

There are separate forms for making a property and affairs LPA and a health and welfare LPA. Copies of the blank forms and explanatory leaflets can be obtained from the OPG, over the internet, or via us. Before the LPA is valid, you must have a certificate of capacity drawn up by an independent third party called a Certificate Provider. The Certificate Provider can be your solicitor (this is part of the service we offer) as well as your doctor or another independent person that you have known personally for at least two years. A family member, attorney or relative of your attorney cannot be a Certificate Provider.

The prescribed form must be completed and signed in the presence of a witness and the certificate provider as well as each attorney must also sign to confirm they have read the explanatory information and understand the duties imposed upon them.

In addition, you should list one or more named persons whom you wish to be notified of any application to register the LPA. If none are listed then an additional certificate of capacity must be provided. We are happy to act as the person upon whom notice must be served if this assists.

The form must be registered at the OPG before it can be used. There is a fee of £110 for registering each LPA, so if you are registering a property and affairs LPA and a health and welfare LPA, you will have to pay twice. You may be exempt from having to pay the fee if you cannot afford it.

Do I need a solicitor?

You do not have to seek legal advice but an LPA is a powerful and important legal document, and you may wish to seek advice from us as we have experience of preparing them and limiting their scope for inappropriate use. Our involvement usually requires 2 or 3 hours of our time, with a fee of around £400 + VAT.

What is the Office of the Public Guardian?

The Office of the Public Guardian (OPG) is headed by the Public Guardian who is responsible for the registration of LPAs, including dealing with objections and maintaining the register of LPAs.

In addition, the OPG will deal with any issues (including complaints) about the way in which an attorney is exercising their powers.

The Court of Protection has wide powers, the same as the High Court with jurisdiction in England and Wales. It can:

- ✦ decide whether a person has capacity to make particular decisions for themselves
- ✦ make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- ✦ decide whether an LPA or EPA is valid
- ✦ remove attorneys who fail to carry out their duties
- ✦ hear cases concerning objections to register LPA

Deputies

If a person has no EPA or LPA in place, the Court of Protection may appoint a deputy to make ongoing decisions on behalf of a person lacking capacity. The Mental Capacity Act 2005 introduced deputies in place of the previous system of receivers.

The Deputy Order will set out the extent of the powers granted to the deputy which might relate to finances or personal welfare. This order can have a time limit on it so it is important to check how long it lasts.

The deputy must be someone who is trustworthy and with the skills to carry out their duties. The deputy has a duty to follow the key principles set out in the Mental Capacity Act and only to make those decisions authorised by the order of the Court. The deputy must always act in the best interests of the person. An application to be appointed as deputy must be made to the Court of Protection in the first instance on the prescribed application form. The Office of the Public Guardian can provide more information about making an application (see 'Useful organisations').

There is an application fee of £400 and an annual supervision fee. The Office of the Public Guardian will assess each case and place it in a band where it will receive a low, medium or high level of supervision. The fees charged will be determined by the allocated band (contact the Office of the Public Guardian for band rates).

Responsibility for the supervision of deputies lies with the Office of the Public Guardian

Deputyships are costly to set up: it is far better to appoint an attorney while mentally capable, than to have a deputy appointed after capacity has been lost.