

Disability Law Service

advice and legal representation for disabled people

Lasting Powers of Attorney

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Introduction

This is a brief guide to Lasting Powers of Attorney (LPAs). In the event you require further information, you may wish to contact the organisations listed at the end of this information sheet. Please note this information applies to the law in England and Wales only.

The Mental Capacity Act 2005

The Mental Capacity Act 2005 ('the Act') came into force on 1 October 2007. The overriding principle of the Act is to protect the right of an individual to make their own decisions whenever it is possible to do so. Should you wish to obtain further information on the Act you may wish to consult our factsheet entitled '**Mental Capacity**'.

The Act presumes that all individuals have the mental capacity to make decisions. A person is said to have mental capacity if they are able to make decisions for themselves. The Act makes

it clear that every attempt should be made to try and assist a person to make a decision for themselves. This may include providing information in a different format such as through the use of visual aids or asking an advocate to help communicate a person's decision. Therefore a person will only be deemed to lack mental capacity if all reasonable attempts have been made to assist that person to make a decision and those attempts have failed.

The Act also recognises that there may be times when an individual no longer has the mental capacity to make their own decisions and therefore trusted individuals should be able to make decisions on their behalf, especially on important issues such as their welfare and finances. As a result the Act created Lasting Powers of Attorney (LPAs).

What is a Lasting Power of Attorney?

An LPA is a legal document which allows a person who has mental capacity (known as a 'donor') to appoint one or more persons (known as an 'attorney') to make certain decisions on the donors behalf. There are two types of LPAs:

1. A **Property and Affairs LPA**. This allows an attorney to make decisions about the donor's financial affairs such as what investments should be made or whether a house should be sold or bought for the donor. It also gives the attorney the ability to manage and control the donor's bank account.
2. A **Health and Welfare LPA**. This allows an attorney to make decisions about a donor's health and social care needs such as deciding where a donor should live, the care the donor requires or the medical treatment a donor requires.

An individual can create one or both types of LPAs. The LPAs can be created at the same time or at different times.

Who can be appointed as an attorney?

Any individual over the age of 18 years old who has not been made bankrupt can be appointed as an attorney. The attorney must also have mental capacity. Therefore, an attorney can be a family member, friend, spouse, health care professional, social care professional etc. It is important that the

attorneys are chosen carefully as they will have a great deal of influence over the donor's future.

In the event the donor decides to create both a Property and Affairs LPA and a Personal Welfare LPA the same attorney can be appointed on both LPAs. Alternatively the donor may wish to choose to have different attorney appointed for each type of LPA.

How many attorneys can be appointed?

Up to nine attorneys can be appointed on each LPA. If more than one attorney is appointed, the donor must decide whether the attorney's power should be 'joint' or 'joint and several'. If the attorney's power is 'joint' the attorneys will have to agree and act on all decisions together. If the attorney's power is joint and several then the attorneys can act together or independently of one another other. If the attorney's power is 'joint' it may delay the decision making process as all of the attorneys will have to be consulted when a decision has to be made. However, an individual may not be happy to allow an attorney to have 'joint and several' power as it would mean one individual could make all of the decisions on their behalf without having to consult anyone else.

Who decides an LPA is necessary?

The donor is the only person who can decide to draw up an LPA. Whilst a partner or family member may be the one to suggest it as they are concerned about the future, ultimately it is for the donor to decide if he or she wants to draw up an LPA.

How is an LPA created?

An LPA will only be valid if it is drawn up using the forms published by the Office of the Public Guardian ('the OPG'). Copies of the forms can be downloaded from the OPG website at the following address:

www.publicguardian.gov.uk/forms/Making-an-LPA.htm.

When can an LPA be used?

An LPA cannot be used until the forms have been completed and registered with the OPG. Either the donor or the attorney can register an LPA. It is possible to indicate on the LPA if someone specific should be notified when the LPA is registered. The LPA does not have to be registered as soon as

it is signed, a donor may decide the LPA should only be registered if he or she loses mental capacity.

A donor, attorney or persons notified of the LPA can object to its registration if they consider it to be unnecessary. If no objection is made, the OPG will register the LPA and will notify the donors and attorney that it has been registered. The LPA will then be added to the register kept by the OPG.

An LPA can be revoked at any time whilst the donor still has mental capacity. This has to be done using a Deed of Revocation. Legal advice should be sought in order to ensure the Deed of Revocation is correctly drawn up.

What decisions can attorneys make?

Once an LPA is registered, the decisions an attorney can make will depend on the type of LPA and the powers that have been granted to the Attorney in the LPA.

Property and Financial Affairs LPA

A donor does not need to lack mental capacity before an attorney can act under a Property and Financial Affairs LPA. Therefore, attorneys can start making decisions using a

Property and Financial Affairs LPA as soon as it is registered. Decisions that can be made include collecting the donor's benefits, paying bills on the donor's behalf or selling or buying a house for the donor.

Health and Welfare LPA

Unlike a Property and Financial Affairs LPA, a donor **must** have lost mental capacity before an attorney can act under a Health and Welfare LPA. The LPA allows an attorney to make decisions about a donor's social and health care. This will include, unless expressly excluded, whether consent should be given for the donor to receive medical treatment. However, it should be noted that if the donor has also drawn up an advance medical directive this may take precedence over an LPA.

What happens if a person cannot create an LPA?

An individual must have mental capacity in order to create an LPA. Therefore if an individual has lost mental capacity it is not possible for an LPA to be created. However, the Act does allow people to make some decisions on behalf of individuals who do not have mental capacity and who do not have an LPA. It must

be demonstrated that the decisions being made are being done in the individual's best interests. The power is very limited as it only applies to decisions concerning day to day living such as helping an individual to wash, dress, eat, make doctor's appointments etc.

Where a LPA has not been registered for a person who lacks mental capacity, an application can be made to the Court of Protection for someone to be appointed to make decisions on issues concerning property, finance or welfare. The person appointed is known as a deputy. The Court of Protection can appoint a deputy to make decisions on another person's behalf on either a specific issue or on an ongoing basis. The Court can also resolve disagreements between carers and social workers on how a person should be best cared for. Further information on making an application to the Court of Protection can be obtained from the OPG.

Useful Contacts

The Office of the Public Guardian

Web: www.publicguardian.gov.uk

Telephone: **0300 456 0300**

Email: **customerservices@publicguardian.gsi.gov.uk**

Textphone: **020 7664 7755**

Community Legal Advice

Web: **www.communitylegaladvice.org.uk/**

Telephone: **0845 345 4 345**

The Law Society

Web: **www.lawsociety.org.uk**

Telephone: **020 7242 1222**

Legal Disclaimer

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education / informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

For further advice on these matters please contact:

Disability Law Service

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Fax: **020 7791 9802**

Email: **advice@dls.org.uk**

Website: **www.dls.org.uk**

Or write to us at: 39 – 45 Cavell Street, London E1 2BP

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