



## BRIEFING PAPER

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# Powers of attorney and other decision-making powers

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## Summary

This note deals with powers of attorney and other ways of authorising someone to make a decision for another person in England and Wales.

### **Powers of attorney**

A power of attorney is a deed by which a person (the donor) authorises another person (the attorney, sometimes called the donee) to act on behalf of the donor. It is not a document which can be applied for by one individual on behalf of another. There are several different types of power of attorney.

An ordinary power of attorney automatically comes to an end as soon as the donor loses mental capacity.

The Mental Capacity Act 2005 created a new form of power of attorney, the lasting power of attorney (LPA). An LPA enables the donor to appoint one or more attorneys to make decisions on their behalf at a time when they no longer have the mental capacity to make those decisions themselves. There are two types of LPA dealing respectively with property and financial affairs and with health and welfare.

LPAs replaced enduring powers of attorney (EPAs) which could authorise an attorney to act in relation to the donor's property and financial affairs but not to make decisions on health and welfare matters. It is no longer possible to create a new EPA but properly executed EPAs made prior to 1 October 2007 continue to be valid.

### **Other decision-making powers**

If a person does not have the mental capacity to make an LPA, it may be necessary to apply to the Court of Protection. The Court of Protection makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity to make those decisions themselves. There are two types of deputy, one for property and financial affairs and one for health and welfare.

If the only income of the person without mental capacity is social security benefits, it may not be necessary for a deputy to be appointed. Instead, the person's benefits may be managed by an appointee, appointed by the Department for Work and Pensions.

### **"Best interests" decisions**

Anyone making a decision for a person who does not have the mental capacity to make their own decision, must act in the best interests of that person. Attorneys and deputies must have regard to the Mental Capacity Act Code of Practice when making decisions.

# 1. What is a power of attorney?

A power of attorney is a deed by which a person (the donor) authorises another person (the attorney, sometimes called the donee) to act on behalf of the donor. The donor may appoint more than one attorney and specify that they must act together (jointly) in making decisions, or that they can act separately or together (jointly and severally), which means attorneys can make decisions on their own or with other attorneys.

A power of attorney may be created only by someone who has sufficient mental capacity to do so. It is not a document which can be applied for by one individual on behalf of another. It is for the donor to decide whether to make a power of attorney, and if so, who the attorney(s) should be.

There are a number of different types of power of attorney, including ordinary powers of attorney; lasting powers of attorney; and enduring powers of attorney.

## 2. Ordinary powers of attorney

An ordinary power of attorney authorises the attorney to act on behalf of the donor. The power can be general or limited:

- A general power of attorney authorises the attorney to do on behalf of the donor anything which the donor can lawfully do by an attorney.
- A limited power authorises the attorney to deal only with specified matters and/or to act for a specified time.

An ordinary power of attorney automatically comes to an end as soon as the donor loses mental capacity.

## 3. Lasting powers of attorney

The [Mental Capacity Act 2005](#) (the 2005 Act) created a new form of power of attorney, the lasting power of attorney (LPA). It was not possible to make an LPA until 1 October 2007.

Office of the Public Guardian (OPG) guidance on the Gov.UK website, [LP9: What happens when I can no longer make decisions for myself?](#) sets out information about planning ahead by making an LPA.<sup>1</sup>

### 3.1 Two types of lasting power of attorney

There are two different types of LPA:

- Property and Financial Affairs LPA: this enables a donor to authorise the attorney(s) to make decisions on the donor's behalf in relation to property and financial matters. When it has been registered, it may be used at once, unless the donor specifies otherwise.
- Health and Welfare LPA: this enables a donor to authorise the attorney(s) to act in relation to all, or only specified, matters concerning their personal welfare. The type of decisions that health and welfare attorneys could be authorised to take might include, for example, decisions on where the donor should live, and giving or refusing consent to medical examination and/or treatment. These decisions can only be taken by the attorney if the donor lacks the capacity to make the necessary decision him/herself.

Anyone wishing to create an LPA can choose to have one type or both.

### 3.2 Making a lasting power of attorney

The 2005 Act provides that an LPA must be in a prescribed form and must contain prescribed information. There are different forms for the two types of LPA. General information about LPAs, together with forms and guidance, and a number of [help sheets](#)<sup>2</sup> are available on the [Gov.UK website](#).<sup>3</sup>

It is possible to [make an LPA online](#) or by using [paper forms](#). However, if the online option is chosen, it is necessary to print out the forms, when completed, to be signed.

An OPG guide, [Make and register your lasting power of attorney \(LP12\)](#) states, "You don't need a lawyer to make an LPA, unless you have unusual or specific requirements".<sup>4</sup> The guide indicates particular matters on which a donor may wish to seek legal advice. The OPG has stated separately that they would always recommend that someone

<sup>1</sup> 28 February 2017. All links in this briefing paper accessed 24 April 2019 unless otherwise stated

<sup>2</sup> Gov.UK, [A guide to making your lasting power of attorney](#)

<sup>3</sup> [Gov.UK, Make, register or end a lasting power of attorney](#)

<sup>4</sup> Updated 17 June 2018

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seeks legal advice if they have complicated finances or specific wishes as part of their application.<sup>5</sup>

### 3.3 Safeguards

Various safeguards are built into the procedure to make an LPA. These include requirements that:

- the donor's signature is witnessed;
- the LPA is signed by a "certificate provider";
- the LPA is registered with the OPG before it can be used.

#### Certificate providers

A certificate provider is an impartial person who confirms that in their opinion, when the donor executes the document:

- the donor understands the purpose of the LPA and the scope of the authority conferred under it;
- that no fraud or undue pressure is being used to induce the donor to create the LPA; and
- there is nothing else which would prevent the LPA being created.

A certificate provider may be someone who has known the donor for at least two years; or someone who has relevant skill or knowledge to be able to form a professional judgment about the donor's understanding, such as the donor's GP, a healthcare professional or a solicitor. [LPA guidance](#) sets out who may and may not be a certificate provider.<sup>6</sup>

#### Registration

An LPA cannot be used until it is registered with the OPG, even if the donor retains mental capacity. It costs £82 to register each LPA.<sup>7</sup> Some people qualify for a fee exemption or remission (that is, to pay less or nothing at all) – Gov.UK provides information: [Lasting or enduring power of attorney fee: exemption or remission](#).

The donor may specify named persons who should be notified when an application is made to register the LPA. Named persons can object to the LPA being registered in certain circumstances. They cannot object to the LPA only because they do not like it. Another OPG help sheet, [People to notify](#), provides further information:

##### Why notify people?

Letting people know about your LPA when it's about to be registered provides extra security. It gives people who know you well a chance to raise concerns.

This safeguard is especially important if there's a long time between making your LPA and registering it.

However, you don't have to choose any people to notify to make your LPA valid – it's an optional extra precaution.

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<sup>5</sup> Office of the Public Guardian Blog, [Lasting powers of attorney – your voice, your decision](#), reply to a comment posted 10 April 2019

<sup>6</sup> [Gov.UK, Certificate providers](#)

<sup>7</sup> Gov.UK, [Make, register or end a lasting power of attorney, Register a lasting power of attorney](#)

**Choose people to notify**

You can choose up to 5 people to notify but they can't be your attorneys or replacement attorneys. Many donors choose family members or close friends...<sup>8</sup>

### 3.4 Guiding principles

Attorneys must follow the principles set out in the 2005 Act:

- A person must be assumed to have capacity unless it is established that they lack capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.<sup>9</sup>

The OPG has published guidance for LPA attorneys:

- [Getting started as an attorney: property and financial affairs](#)
- [Getting started as an attorney: health and welfare](#).<sup>10</sup>

### 3.5 Concerns about an attorney

The OPG is responsible for investigating complaints, or allegations of abuse, made against attorneys acting under registered powers. Information about how to raise concerns is provided on the Gov.UK website, [Report a concern about an attorney or deputy](#).

The Court of Protection has power, in relevant circumstances, to remove attorneys who fail to carry out their duties.

Other ways of dealing with a disagreement between family members may be more appropriate, depending on the circumstances.

The [Mental Capacity Act 2005 Code of Practice](#)<sup>11</sup> provides further information:

- Chapter 14, "[What means of protection exist for people who lack capacity to make decisions for themselves?](#)"
- Chapter 15, "[What are the best ways to settle disagreements and disputes about issues covered in the Act?](#)"

<sup>8</sup> [Gov.UK, People to notify](#)

<sup>9</sup> [Mental Capacity Act 2005 section 1](#)

<sup>10</sup> Gov.UK Office of the Public Guardian, [Lasting power of attorney: getting started as an attorney](#)

<sup>11</sup> See section 6 of this briefing paper below



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The OPG is piloting a mediation service to see whether, in suitable cases, this might reduce any risks to donors resulting from poor family dynamics.<sup>12</sup> The OPG intends to continue the pilot until the summer:

What we're hoping to find is that some investigations can be safely scaled down because the issue is a dispute rather than abuse or neglect.

If the evidence suggests OPG could meaningfully offer a mediation service, then we'd then look to formally procure a long-term service through the appropriate government frameworks.

We'll continue to work with other agencies to ensure abuse or mismanagement is detected. If you have any concerns about the actions of a deputy or attorney please contact the OPG safeguarding team.

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<sup>12</sup> Office of the Public Guardian blog, [Testing how an OPG mediation service might help protect vulnerable people](#), posted by Ashok Chopra on 18 February 2019

## 4. Enduring powers of attorney

Until 1 October 2007, it was possible to create an enduring power of attorney (EPA) to authorise an attorney either:

- to act with immediate effect and to continue to act after the donor had become mentally incapable; or
- to act as attorney only after the donor had lost mental capacity.

EPAs could authorise an attorney to make decisions only in relation to the donor's property and financial affairs and not on health and welfare matters.

It is no longer possible to create a new EPA or to make changes to an existing EPA. However, properly executed EPAs made prior to 1 October 2007 continue to be valid after that date.

An EPA can be used without registration as long as the donor still has mental capacity. The attorney has a duty to register the EPA with the OPG as soon as the donor has become, or is becoming, mentally incapable of managing their own affairs. The duty arises when the attorney has reason to believe that the donor is becoming mentally incapable and therefore this is a decision for the attorney to make.

Notice of the application to register the EPA must be given to the donor and to specified relatives and there are various grounds for objecting to the registration. The Gov.UK website provides further information about EPAs: [Enduring power of attorney: acting as an attorney.](#)

## 5. Other decision-making powers

### 5.1 Court of Protection and court appointed deputies

If a person does not have the mental capacity to make a lasting power of attorney, it may be necessary to apply to the Court of Protection.

The 2005 Act established a new Court of Protection with jurisdiction to make decisions and appoint deputies to make decisions in the best interests of those who lack capacity to make their own decisions.

There are two types of deputy, one for property and financial affairs and one for health and welfare.

General information about the appointment and supervision of deputies, their responsibilities, the fees payable, and exemptions and remissions, is provided on the Gov.UK website, [Deputies: make decisions for someone who lacks capacity](#).

General information is available online including:

- Gov.UK:
  - [Court of Protection](#);
  - [Apply for a one-off decision from the Court of Protection](#);
  - [Deputy guidance: how to carry out your duties](#);
- Citizens Advice Bureau Advice Guide, [Managing affairs for someone else](#);
- Victoria Butler-Cole, [A basic guide to the Court of Protection](#), February 2013.

### 5.2 Department for Work and Pensions appointees

If the only income of the person without mental capacity is social security benefits, it may not be necessary for a deputy to be appointed. Instead, the person's benefits may be managed by an appointee, appointed by the Department for Work and Pensions.

Information about becoming an appointee is provided on the Gov.UK website: [Become an appointee for someone claiming benefits](#).

## 6. Code of Practice

The underlying philosophy of the [Mental Capacity Act 2005](#) is to ensure that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves, is made in their best interests.

The [Mental Capacity Act Code of Practice](#) provides guidance and information on how the Mental Capacity Act 2005 works in practice. Chapter 7 deals with LPAs and Chapter 8 with the role of the Court of Protection and court-appointed deputies.

LPA attorneys and deputies appointed by the Court of Protection are among the categories of people who are legally required to 'have regard to' relevant guidance in the Code of Practice.

### 6.1 Call for evidence

On 24 January 2019, the Ministry of Justice launched a call for evidence, which ran until 7 March 2019, in respect of the Mental Capacity Act Code of Practice:

Since the Act came into force in 2007, the Code of Practice has provided practical guidance regarding its implementation. The Code offers examples of best practice to both carers and practitioners, who have a formal duty to adhere to the Code. It also serves as a fundamental piece of guidance to the friends and family of the individual, to enable them to better understand the practical insight the Act offers to those who lack capacity.

The Call for Evidence will seek to establish the extent to which the current Code of Practice reflects changes in case law and lessons learned through practical use of the Code of Practice over the last 11 years. It is important that we ensure that the Code remains relevant and places individuals at the very heart of the decision-making process. The questions in the call for evidence are designed to inform the Government's decision-making on which aspects of the Code require revision.<sup>13</sup>

### 6.2 What will happen next?

The Government is now analysing feedback. Junior Justice Minister, Edward Argar has said that the Government intends to consult on any proposed changes to the Code:

The call for evidence will run for 6 weeks and will be available at [www.gov.uk](http://www.gov.uk). Following the conclusion of this process, and in collaboration with DHSC [the Department of Health and Social Care], a formal consultation on the proposed changes to the Mental Capacity Act Code of Practice will be launched. The Government anticipates that the consultation will be take place later this year.<sup>14</sup>

<sup>13</sup> Gov.UK from the Ministry of Justice, [Revising the Mental Capacity Act 2005 Code of Practice: Call for evidence](#), 24 January 2019

<sup>14</sup> [Letter from Edward Argar to the Chair of the Justice Select Committee, Call for evidence, Revision of the Mental Capacity Act Code Of Practice, 23 January 2019](#)

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