

Guidance Note: Lasting Power of Attorney

1. The following is a breakdown highlighting the aspects that are required to be considered when assessing the mental capacity to donate a power of attorney and what instances that an LPA may be required and used.

Overview of a Property and Financial Affairs LPA

2. A lasting power of attorney (LPA) is a legal document that lets a Person ("P" – the 'donor') appoint one or more people (known as 'attorneys') to help them make decisions or to make decisions on their behalf. P must be 18 or over and have mental capacity (the ability to make their own decisions) when they make their LPA.
3. It is for the assessor to fully comprehend that having mental capacity to appoint a power of attorney is different to having mental capacity to manage financial affairs. Capacity around these areas is decision specific and 'lacking capacity' cannot be used as a blanket term relating to someone's capacity.
4. There are 2 types of LPA – health and welfare and property and financial affairs. All assessments will relate to property and financial affairs for Client Affairs Team referrals.

Uses of a Property and Financial Affairs LPA

5. A Property and Financial Affairs LPA is used for P to give an attorney the power to make decisions about their money and property for them, for example: managing a bank or building society account, paying bills, collecting benefits or a pension, signing or terminating a tenancy, spending money on their house or flat and selling their home.

Making a Property and Financial Affairs LPA

6. A key part of the assessment is to ascertain exactly what constitutes the 'relevant information' when it comes to appointing an attorney. A good starting point is to ensure that P has read and understood section 8 of the LPA – '**your legal rights and responsibilities**'. In addition to this, at the very least, the assessor should ensure that P understands:
 - **the nature and purpose of the LPA**
 - **the role of the attorney**
 - **the options available for the appointment of an attorney(s)**
 - **the theoretical concepts of trust and 'substituted decision-making'**
 - **how multiple attorneys can work together and when replacement attorneys may become involved**
 - **the practical implications and risks associated with appointing or not appointing an attorney(s)**
7. In considering a person's capacity to appoint an attorney, the assessor must follow the two-stage test under the Mental Capacity Act 2005 (MCA 2005) by considering whether the individual is suffering any

impairment or disturbance in the functioning of the mind or brain (the diagnostic test) and if so, whether this affects the individual's functional ability to:

- understand the relevant information;
- retain that information;
- weigh up and use the relevant information; and
- communicate their decision.

8. Following the two-stage test under the Mental Capacity Act 2005 as listed above, the causative nexus has to be identified for P. This is where the assessor needs to make a link between the person's inability to make the decision (stage one) and the mental impairment (stage two). The Court has made clear that the person must be unable to make the decision because of their mental impairment to be deemed as lacking capacity under the terms of the Mental Capacity Act 2005.
9. P can make an LPA online or using paper forms. It takes up to 20 weeks to make an LPA if there are no mistakes in the application. It's usually quicker if it is made and paid for online.
10. P needs to sign the forms before they send them off. They also need to be signed by the attorneys, witnesses & a 'certificate provider (the assessor)', who confirms P is making the LPA by choice and that P understands what they're doing. Everyone must sign the same original document. They cannot sign copies or use digital signatures.
11. It costs £82 to register an LPA unless P gets a reduction or exemption. If a mistake is made on the form, the OPG may let it be corrected and apply again within 3 months for £41. A reduction in the application fee can be applied for if P earns less than £12,000. P might also be able to apply for an exemption if they're on certain benefits, such as Income Support.

Options Available for the Appointment of an Attorney

12. P's attorney needs to be 18 or over and could be a relative, a friend, a professional – for example a solicitor – or P's husband, wife or partner.
13. P must appoint someone who has the mental capacity to make their own decisions. P's attorney does not need to live in the UK or be a British citizen.
14. The appointed attorney(s) to administer the LPA is/are legally obligated to adhere to the MCA 2005 and its Code of Practice, this means P's attorney(s) must assume that P can make their own decisions unless it is established that P cannot do so.

Theoretical Concepts of Trust and 'substituted decision-making'

15. Substituted decision-making enables an attorney to make decisions on behalf of P who is incapable, therefore, the concerned individual has no right to make a decision for themselves. There are a number of practical implications as to who qualifies to be a substitute decision-maker.
16. Firstly, the substitute decision-maker should be a person with the best knowledge of P's specific wishes, or of their values and beliefs as they pertain at the time of the decision.
17. Generally, close relatives are preferred as substitute decision-makers in the belief that they will know P well enough to replicate the decision that P would make if they were capable. Clearly P could be

estranged from their spouse, parents, siblings or children, and in these cases, a friend will know P's best wishes.

18. When P is considering the appointment of an attorney to be a substitute decision-maker, certain elements of trust between P and the proposed attorney must be considered. While P may be in potentially close contact with certain family members or friends, if an underlying element of trust to carry out the correct tasks is not present, this can result in the trusted individual, network of individuals or entity to be disregarded.
19. Secondly, the substitute decision-maker's task is to decide not how they would want to be treated were they in the P's situation, or what they want to happen, but rather how P wanted to be treated.
20. Finally, where there is disagreement who is to make a decision, focus must be made on questions of what P would want to be done or what is in P's 'best interest'.

Multiple and Replacement Attorneys

21. If P is appointing more than one person, they must decide if they'll make decisions:
 - separately or together - sometimes called 'jointly and severally' - which means attorneys can make decisions on their own or with other attorneys; or
 - together - sometimes called 'jointly' - which means all the attorneys have to agree on the decision.
22. P can also choose to let them make some decisions 'jointly', and others 'jointly and severally'. Attorneys who are appointed jointly must all agree, or they cannot make the decision.
23. When P makes their LPA, they can nominate other people to replace their attorney or attorneys if at some point they cannot act on P's behalf anymore.
24. The OPG must be informed when a replacement attorney starts to act. The OPG will also need to be sent:
 - the original LPA
 - all certified copies of the LPA
 - a return address for OPG to send the documents back to
25. The replacement attorney will be able to start helping P make decisions as soon as the attorney they're replacing stops acting.
26. The LPA must be checked to see if there are any other attorneys that the replacement attorney needs to make decisions with (clarity given in [section 21](#)). This should be done after the replacement attorney starts acting as an attorney.

Practical implications and risks associated with LPAs

27. There are many benefits for P to both consider and appoint an attorney while they have the capacity to do so. Some of the prominent benefits can include:
 - It's a legal document – so it can't be ignored by anyone.
 - It's ethically managed – when P makes an LPA, a 'certificate provider' (the assessor) decides if they're capable of making that choice.

- It belongs to P – P can appoint one or more attorneys to act for them, and P can determine how they must work together to make decisions on their behalf.
- Security – protects P from potential problems caused by making financial decisions when they're not in a fit state to make them. By setting up an LPA, P is ensuring that their finances are managed by a person or people they trust, if P loses capacity.
- Peace of mind – P's LPA provides peace of mind for them. P can be safe in the knowledge that they've avoided any potential problems with access to funds for things like bills in the future.
- Protecting P – only P can set up an LPA when they have mental capacity. Once P has lost capacity, this isn't possible, so they needn't worry about anyone doing this for them when they're vulnerable and unable to stop them.

28. There can also be some disadvantages of getting an LPA. These points must be considered at the stage of assessment to ensure this is in the best interest of P:

- Fraud – with access to information about P's finances and bank account(s), P's attorney could use their authority to commit fraud against them.
- No direct oversight – P's attorney might make mistakes while acting on their behalf. However, it might be possible to get money back if the court decides the attorney(s) have been dishonest or spent P's money unwisely.
- After death – LPAs do not continue after P dies. P would need to designate a person to handle their estate when they pass away. P would need to create a will.
- Healthcare and personal matters – an attorney under a finance and property LPA can't make decisions about P's future healthcare or personal matters.

29. It is worth noting that most of the above potential disadvantages can be avoided by P choosing the right people to act on their behalf.

30. If an LPA is not put in place when P has capacity to do so, it will result in an application needing to be made to the Court of Protection. This will be done when P has been assessed to lack capacity to manage certain aspects of their property and financial affairs.

31. The application to the Court of Protection can take considerably more time for an order to be granted, it is also more expensive on both an individual basis as well as a continuous one.

32. The application incurs a one-off application fee along with an annual supervision fee. Additionally, there will be annual charges applied by the Deputy as well as other work carried out through the year, for example, the annual report for the OPG, property visits, tax returns, outsourcing of work and travel costs.

Using the Property and Financial Affairs LPA

33. Firstly, P needs to ensure that the LPA has been certified. The LPA cannot be used if this has not happened. Each page of the LPA needs to be signed and a certain phrase written. For the sake of this brief guidance, it will not be quoted. Alternatively, the LPA can be certified by a solicitor, a person authorised to carry out notarial activities or someone who has known P for more than two years.

34. Once the LPA has been certified, it can be used to contact the relevant companies/agencies in the same instance(s) as P would have. This will most likely consist of some of the examples that were highlighted in [section 5](#) of this guidance.

Amending a Property and Financial Affairs LPA

35. P (if they still have mental capacity) or one of P's attorneys must tell the Office of the Public Guardian (OPG) if P or an attorney change name or address or an attorney dies.
36. P can ask the OPG to remove an attorney if P's LPA is registered and P still has mental capacity to make decisions. P will need to send OPG a written statement called a 'partial deed of revocation'. If P wants to add another attorney, they need to end their LPA and make a new one.
37. P can end their LPA themselves - if P has mental capacity to make that decision. P needs to send the OPG both the original LPA and a written statement called a 'deed of revocation'. P must be able to make their own decisions when they end their LPA. P can also complain if they have concerns about their attorney, for example if they're not carrying out their responsibilities properly.
38. P's LPA may also end if their attorney:
- loses the ability to make decisions - 'loses mental capacity';
 - divorces P or ends their civil partnership if they're P's husband, wife or partner;
 - becomes bankrupt or they're subject to a Debt Relief Order (DRO) - if they're a property and financial affairs attorney;
 - is removed by the Court of Protection; or
 - dies
39. P's LPA will end automatically when they die. P's affairs will be looked after by their executors or personal representatives from that point, not P's attorney.

Contacting the OPG:

40. Guidance can always be obtained from the OPG in greater detail using the below contact methods:

Email: customerservices@publicguardian.gov.uk

Telephone: 0300 456 0300

Textphone: 0115 934 2778

Address: Office of the Public Guardian, PO Box 16185, Birmingham, B2 2WH