



# **Guide to Making a Lasting Power of Attorney**

## What is a Lasting Power of Attorney?

A Lasting Power of Attorney (**LPA**) is a powerful legal document which allows an individual, **or Donor**, to appoint a person(s) or Trust Corporation of their own choice (**an Attorney**) to look after their affairs should they at a later stage, no longer wish to make decisions for themselves or, lack the mental capacity to manage their own affairs.

## Who can make a Lasting Power of Attorney?

Anyone aged 18 or over can make an LPA. You must make it as an individual – two or more people cannot make a joint LPA. You can have help in writing it, but another person cannot make an LPA for you. Anyone making an LPA needs to have mental capacity when they make it.

## What are the benefits of making a Lasting Power of Attorney?

### ❖ An LPA allows you to plan in advance:-

- ✓ the decisions you want to be made on your behalf if/when you lose capacity or you are unable to make them yourself;
- ✓ the people you want to make these decisions; and
- ✓ how you want the people to make these decisions.

### ❖ Having an LPA is a safe way of maintaining control over decisions made for you because:-

- ✓ you choose someone to provide a 'Certificate' confirming that you understand the significance and purpose of it;
- ✓ you can choose 'people to be told' about your LPA when it is registered (so that they have an opportunity to raise any concerns);
- ✓ your signature, and the signatures of your chosen Attorneys must be witnessed;
- ✓ from a legal perspective, your Attorney(s) must follow the Code of Practice of the Mental Capacity Act 2005 – if they do not always act in your best interests the Office of the Public Guardian (OPG) can step in, and your Attorney(s) may be held accountable; and
- ✓ it has to be registered with the OPG before it can be used (if someone else tries to register it you and your Attorney(s) will be able to make an objection).

## The role of the Office of the Public Guardian

The Office of the Public Guardian (OPG) is part of the Ministry of Justice. The OPG manages the registration process of LPAs and maintains a register of all LPAs. It also deals with any complaints and concerns raised, if, for example, someone feels a person has been pressurised into making an LPA.

## There are two types of LPA:-

### 1. Property and Financial Affairs

A registered Property and Financial Affairs LPA lets the people you choose make decisions about, for example:-

- ✓ buying and selling your property;
- ✓ opening, closing, and operating bank/building society accounts in your name; and
- ✓ claiming, receiving and using your benefits, pensions, and allowances.

Once a Property and Financial Affairs LPA has been registered, your Attorney(s) can start to make decisions for you – **both when you have mental capacity and when you lack mental capacity**. If you do not want your Attorney(s) to act until you lack capacity, you can add a restriction to your LPA

**N.B.** If you have already made an Enduring Power of Attorney (EPA) before October 2007, this is still valid. However, it does not allow your Attorney(s) to make decisions about your health and welfare.

### 2. Health and Welfare

A registered Health and Welfare LPA lets the people you choose make decisions about, for example:-

- ✓ giving or refusing consent to particular types of health care, including medical treatment decisions;
- ✓ you staying in your own home, perhaps with help and support from social services;
- ✓ you moving into residential housing and choosing the right care home for you; and
- ✓ day-to-day issues, like your diet, dress, or daily routine.

By choosing who you want to make decisions for you, having an LPA puts you in control of decisions eventually being made on your behalf.

Once a Health and Welfare LPA has been registered, **your Attorney(s) can only make decisions for you when you lack mental capacity** and are unable to make the decisions yourself.

If you have already made an Advance Decision to refuse treatment and then later make a Health and Welfare LPA which gives someone authority to give or refuse consent to the same kinds of treatment, your Advance Decision will become invalid.

If you have made an Advance Decision, and are considering making an LPA, you may wish to seek advice from:-

- ✓ a health professional
- ✓ a social care professional
- ✓ patient support groups
- ✓ or other experienced relevant organisations

in respect of what powers to give your Attorney(s).

Many people take the decision to make both an LPA for Property and Financial Affairs and for Health and Welfare.

## Registering your LPA

We would recommend that you register your LPA immediately. Your Attorney(s) can act on your behalf as soon as it is registered if you so wish to enable them to make decisions even whilst you have mental capacity.

## What happens if you keep your LPA and delay registration?

If you keep your LPA until you lose capacity, it may, by that time, contain errors that could prevent it being registered, or the information in it may have become out of date. If your LPA is rejected, you **will not** be able to make another one.

Registration takes at least 6 weeks with the OPG and you may need to pay a fee when you register, the fee is set by the OPG. This fee can be waived or reduced depending on the Donor's annual gross income. Please refer to the OPG Registration Fees document for full details. You do not need to inform the OPG every time there is a change of address (or name) of any of the people in your LPA.

**N.B.** If you need your LPA to be used urgently, it cannot be used during the 6 week registration period. If your Attorney(s) needs to make decisions urgently, they will have to apply for a Court Order.

# The Process

## Choosing your Attorney(s)

Being your Attorney is an important role. You need to be sure that the person you choose knows you well enough to make decisions on your behalf and that those decisions are in your best interests. You must be able to trust them.

You also need to make sure that the person is happy to take on the role – guidance for your Attorney(s) can be found in Chapter 5 of this Guide. Attorney(s) are required to sign Part C of your LPA form to confirm that they understand their role and responsibilities.

Once your LPA has been registered, the person will be able to make all decisions about your property and financial affairs on your behalf – unless you specify otherwise in your LPA form (see how to make restrictions and conditions).

Your Attorney(s) can be anyone aged 18 or over, for example:-

- ✓ a family member;
- ✓ a friend;
- ✓ a professional (e.g. a solicitor);
- ✓ your spouse, partner, or civil partner; and/or
- ✓ a Trust Corporation

A Trust Corporation is an organisation that manages your funds (savings, pensions, investments, etc.) based on a set of objectives and criteria you approve with. You do not have to appoint a Trust Corporation as an Attorney. However, if you do, you can only have one Trust Corporation, and you can appoint them as either your Attorney or replacement Attorney (not both). If you are appointing a Trust Corporation make sure you ask them for the exact name that they operate under.

If you choose your spouse or civil partner, bear in mind that if the relationship is legally ended, your LPA will become unusable unless you:-

- ✓ include a condition in your LPA that they can continue to act as your Attorney
- ✓ appoint a replacement Attorney
- ✓ have appointed more than one Attorney, and have indicated in that you would like them to act jointly and severally.

## Who you cannot choose to be your Attorney

You **cannot** choose anyone who:-

- ✗ is under the age of 18
- ✗ lacks mental capacity
- ✗ is an undischarged bankrupt

If an Attorney becomes bankrupt after your LPA has been registered, they will not be able to act and your LPA may be cancelled.

## Choosing your replacement Attorney(s)

At some point, your Attorney(s) might not be able to make decisions for you. There are a lot of reasons why this could happen, for example, they could die, they could lack mental capacity themselves, or could just decide that they do not want to act for you anymore.

Having at least one Replacement Attorney means that when this happens, your LPA will continue to be usable, because you have a replacement person who can make decisions for you.

For example, if you choose your spouse to be your Attorney, you might choose a son or daughter as your Replacement Attorney if your spouse dies.

When choosing Replacement Attorney(s), the same issues apply as for choosing your Attorneys. You can choose anyone who is 18 or over and not bankrupt, and you need to be sure they understand their role and responsibilities and that they agree to being appointed.

If you decide to appoint a Replacement Attorney, they will not make any decisions for you until they are needed to replace your Attorney(s).

You **cannot** appoint a Replacement Attorney to make decisions for you:-

- ✗ when your Attorney is still able to act (for example, when your Attorney is on holiday or unavailable for some other reason); or
- ✗ to take over from another replacement attorney.

Once you have signed and dated your LPA you cannot make any amendments – this includes adding or changing Replacement Attorney(s). Once your LPA has been registered, someone will need to inform the OPG if a replacement is to act on your behalf. They will ask you to return the LPA, attach a note, update the LPA register, and send it back to you.

If you have appointed more than one original Attorney and more than one Replacement Attorney, you should set out the order in which the replacements should act. For example, if you appoint your spouse and child as your original Attorneys and your grandchildren as the replacements, you could say that your grandchildren are to replace the first original Attorney who is unable to act or they are to step in only when both original Attorneys are unable to act.

You can have as many Replacement Attorneys as you like, but this may impact on the effective operation of your LPA.

If you have appointed a sole Attorney and more than one Replacement Attorney, you should state whether you want them to act:-

- jointly;
- jointly and severally; or
- jointly for some decisions, and jointly and severally for others.

If you don't, they will act jointly in the event of the sole Attorney's appointment ending.

### **How do you want your Attorney(s) to make decisions on your behalf?**

This will depend on how many Attorneys and Replacement Attorneys you are appointing, how happy you are for individuals to make decisions, the individuals themselves, and how quickly you might need them to make decisions, for example.

### **Jointly**

Choosing this option means that all your Attorneys must always make all decisions together. If one of your Attorneys does not agree with something, that decision cannot be made on your behalf. You might choose this option, for example, if you want to be sure that your Attorneys are in agreement about every decision. However, bear in mind that:-

- Obtaining the agreement of all your attorneys could take extra time, and delay otherwise straightforward decisions that could (or may need to) be taken very quickly even if there is no disagreement
- if your attorneys cannot work together, your LPA may be cancelled
- if one of your attorneys dies or can no longer act, your LPA will be cancelled unless a replacement attorney has been appointed.

### **Jointly and Severally**

*(Many people find this option works best for them)*

Choosing this option means that all your Attorneys can act together, or independently for all decisions. So, any one of your Attorneys can make any decision on your behalf. You might choose this option if, for example:-

- one of your Attorneys is closely involved in your financial affairs, and you trust them to make your decisions on their own;
- one of your Attorneys is frequently unavailable (working abroad, for example); or
- you want to ensure that your LPA continues to be workable if one of your Attorneys dies.

### **Jointly for some decisions, and Jointly and Severally for other decisions**

Choosing this option means that your Attorneys can make some decisions independently, but for other decisions they **must all** be in agreement.

You might choose this option if, for example, you want your Attorneys to:-

- ✓ make day-to-day decisions like paying regular nursing home fees on their own;
- ✓ make decisions about whether to consent to medical treatment on their own;
- ✓ be in agreement when making more significant decisions, like where you live; or.
- ✓ be in agreement when making more significant decisions, like selling your house.

If you choose this option, you need to list all the decisions that can be made:-

- jointly; and
- jointly and severally

Bear in mind that if one of your Attorneys dies (or can no longer act on your behalf), the other Attorney will not be able to make the decisions you have specified to be taken jointly. In this situation it is advisable to have a Replacement Attorney.

## Restrictions and Conditions

If you leave this box blank, or cross through it, once your LPA has been registered, your Attorney(s) will be able to make **all** decisions about your property and financial affairs on your behalf.

Filling in this box gives you the opportunity to specify: the procedures they **must** follow, like:-

- ✓ keeping and submitting annual accounts to an accountant or friend, or continuing to make charitable donations on your behalf, for example; and/or
- ✓ advice they must seek, i.e. obtaining professional financial advice before making any investments, for example.

An example of a typical, useful Restriction, would be one which states that your LPA cannot be used after being registered until you lack mental capacity.

Bear in mind that any Restrictions and Conditions which you fill in are binding – your Attorney(s) must follow them.

Make sure that you explain Restrictions and Conditions clearly and in such a way that banks and building societies, for example, can easily follow them without confusion.

If your LPA contains a Restriction that will not work in practice, it may not be registered – and may result in a delay in the time taken for your LPA to be usable (this can also lead to additional costs). Restrictions and Conditions that will not work in practice, include, making gifts that are wider than the gifts allowed under the statutory gift making power.

### LPA Health & Welfare - Life-sustaining Treatment

Life-sustaining treatment means any treatment that a doctor considers necessary to keep you alive, for example:-

- a serious surgical operation, like a heart bypass;
- receiving chemotherapy, radiotherapy, or other cancer treatment or surgery; or
- an organ transplant.

However, if you have breathing problems and develop pneumonia, a simple course of antibiotics could be regarded as life-sustaining.

Artificial nutrition or hydration (ANH) can also be life-sustaining. ANH is food and water given to someone other than by their mouth.

In a Health and Welfare LPA your Attorney(s) can only make decisions on your behalf, whether about life-sustaining treatment or not, once you lack mental capacity. This is an important safeguard.

Your Attorney(s) cannot make decisions about life-sustaining treatment on your behalf unless you specifically state in your LPA that you do want them to do so. This would allow your Attorney(s) to decide to withdraw treatments like ANH in situations where it has become a burden or is not working.

If you don't want your Attorney(s) to make decisions about life-sustaining treatment, your doctors will make the decision. They will carry out a best interests assessment - taking into account the views of your attorney(s) and others involved in your welfare.

## Guidance

Giving guidance about how you want your Attorney(s) to act **is not binding**. Filling in this box gives you the opportunity to provide broader information that you would like your Attorney(s) to consider when making decisions on your behalf. For example:-

- ✓ your views on ethical investment;
- ✓ your views on different medical treatments;
- ✓ minimum amounts you like to maintain in certain bank accounts;
- ✓ areas you prefer to live in;
- ✓ your preferences for tax returns and tax claims;
- ✓ your preferences for regular exercise;
- ✓ how to deal with interest accrued;
- ✓ preferred helpers or care workers;
- ✓ who you would like your Attorney(s) to consult

### Guidance is anything that you feel will help your Attorney(s) when making decisions in your best interests

A requirement that cannot be incorporated as a restriction can often be achieved as guidance. For example, if you have 3 Attorneys acting jointly and severally, you cannot include a 'Restriction and Condition' that two of them must act jointly in relation to decisions about selling your house. It is possible, however, to state in the 'Guidance for your Attorneys' that you wish them to work together for transactions of this kind.

You can list as many restrictions, guidance notes, and payment notes as you like (if you run out of space use continuation sheet A2). However, bear in mind that making lots of restrictions and guidance could result in your LPA being impractical.

You should discuss and agree with your Attorney(s) before completing your LPA, whether they are to be paid for acting on your behalf. Your Attorney(s) do not have to be paid and you can, for example, decide to pay each of your Attorneys differently. All Attorneys can claim reasonable out-of-pocket expenses that they incur whilst acting on your behalf.

## Choosing your people to be told

To make sure that someone has not put you under pressure to make your LPA, you can choose up to 5 people to be told when an application is made to register your LPA. This is an important safety aspect of your LPA.

When an application is made to register your LPA each of your people to be told are contacted by you or your Attorney(s) using form LPA001. They are given 5 weeks (from the day on which the notice is given) to raise any concerns.

Your people to be told do not have to do anything when they receive your LPA001 notice form, but they have the opportunity to raise any concerns.

You can choose anyone who knows you well enough to be able to raise any concerns that they might have about your LPA. Let them know that you would like them to perform this role, so that they understand what they are being asked to do. If they are not happy to do this for you, choose someone else.

### ❖ Your people to be told could (and will often) be:-

- ✓ Family members, and/or
- ✓ Friends.

### ❖ You cannot choose

- ✗ your chosen Attorney(s)
- ✗ your chosen Replacement Attorney(s)

If you do not want any people to be told when your LPA is registered, you **must have two Certificate Providers**.

It is a good idea to mention who you have appointed as Attorney(s) when you discuss your LPA with your people to be told, so that they may raise any concerns. Make sure that you provide details of named individuals (i.e. not a title, like 'Director of Social Services', or the name of a firm of solicitors).

If you have only one person to be told, make sure you cross through the second one.

You can choose up to five people to be told. Supply their details on a continuation sheet if you are appointing more than two.

## ***Remember!***

***Your people to be told could die, or move away – this is another good reason to register your LPA straightaway.***

## Certificate Providers

A Certificate Provider is someone who you choose, who can confirm that you:-

- ✓ understand your LPA; and
- ✓ have not been put under pressure to make it and that it has not been completed fraudulently.

This is an important safety aspect of your LPA.

### Who can be a Certificate Provider

Either someone who:-

- ✓ has known you for at least 2 years; or
- ✓ has relevant skill or knowledge to be able to form a professional judgement about your understanding.

If you choose someone with relevant professional skills, they must be one of the following:-

- ✓ a registered healthcare professional (e.g. your Doctor);
- ✓ a Solicitor, Barrister, or Advocate;
- ✓ a registered Social Worker;
- ✓ an Independent Mental Capacity Advocate (IMCA); or
- ✓ someone who considers that they have the relevant professional skills and can specify what they are.

Family members, who **cannot** be a Certificate Provider, for example, include:-

- ✗ spouse, partner or civil partners (or people living together as such);
- ✗ children, grandchildren;
- ✗ parents, grandparents;
- ✗ brothers, sisters;
- ✗ aunts, uncles; and
- ✗ nieces, nephews

## Guidance for Certificate Providers

Being a Certificate Provider is an important role. In carrying out the role in a professional capacity, you should have no doubt about the person's identity.

You need to fully understand what the role involves before agreeing to take it on – and you can refuse to do so if you do not feel able to confirm everything that you are being asked to certify.

### You are confirming that in your opinion the Donor understands:-

- ✓ what an LPA is;
- ✓ the contents of their LPA; and
- ✓ the powers they are giving to their Attorney(s);

### and that

- ✓ the Donor is not being put under pressure, being tricked, or being forced by someone else to make the LPA; or
- ✓ nothing else exists that would prevent the Donor's LPA being created.

## Assessing Capacity

To establish the Donor's capacity and understanding, here are some suggested topics to discuss:-

- What is your understanding of what is an LPA is?
- What are your reasons for making an LPA?
- Why have you chosen me to be your Certificate Provider?
- Who have you chosen to be your Attorney(s)?
- Why them?
- What powers are you giving them?
- In what circumstances should the power be used by your Attorney(s)?
- What types of decision would you like them to make and what (if any) should they **not** take?
- If there are any Restrictions in the LPA, what do you believe they achieve?
- What is the difference between any Restrictions and any guidance made in the LPA?
- Have the chosen Attorney(s) provided you with answers to any of these questions?
- Do you have any reason to think they could be untrustworthy?
- Do you know when you could cancel the LPA?
- Are there any other reasons why the LPA should **not** be created?

It is advisable to keep a record of the questions and answers in case someone challenges the Donor's capacity to make an LPA. You could be asked to explain to the Court of Protection how you formed your opinion. If you have any concerns about the Donor's understanding, or feel that they may be being put under pressure, do not sign. You can discuss your concerns with Countrywide Tax & trust Corporation Limited, your Advisor, or the OPG.

If you are forming your opinion as someone who has known the Donor personally, personal knowledge of the Donor could include:-

- ✓ "I have been a neighbour for 5 years, and I have frequently talked at length with the Donor."
- ✓ "We attend the same congregation at Church every week."
- ✓ "I am a close friend who meets the Donor in the pub every fortnight. I've known him since 1932."

If you are forming your opinion as someone with relevant professional skills, you should **carefully consider whether you have the relevant professional skills** to carry out the role. You are asked to form your opinion at the point in time that the Donor signs. You will **not** subsequently be responsible if the Donor loses their capacity.

## Guidance for Attorney(s)

Being an Attorney is an important role. You need to fully understand what it involves before agreeing to take on the role – and you can refuse to do it if you feel uncomfortable about it. The Donor should discuss their LPA with you.

Attorneys cannot use the LPA and start making decisions until it has been registered. The Donor or an Attorney can apply to register the LPA any time after it has been made.

Even if the Donor has the capacity to make decisions themselves, the LPA, once registered, allows you to make decisions on their behalf – unless the Donor has included a condition stating that you can only act when they lack capacity (see Restrictions and Conditions, also see advice on assessing capacity)

In agreeing to be an Attorney you are declaring that you understand the role and the responsibilities associated with it.

**The Mental Capacity Act 2005 and its Code of Practice** set out other responsibilities of Attorneys, including:-

- ✓ a duty of care when making decisions on behalf of the Donor;
- ✓ to carry out instructions that the Donor has made in their LPA;
- ✓ a duty **not** to delegate the powers you have under the LPA, unless the LPA says you can;
- ✓ **not** to benefit yourself, but to benefit the Donor – meaning that you should avoid any potential conflicts of interest and **not** to profit or benefit personally from the position other than where specified within the LPA;
- ✓ a duty of good faith – meaning that you should act with honesty and integrity;
- ✓ keeping the Donor's affairs confidential, unless the Donor has specified otherwise;
- ✓ to comply with directions of the Court of Protection;
- ✓ **not** to give up your role without discussing it with the Donor if possible;
- ✓ to keep the Donor's money and property separate from your own; and
- ✓ to keep accurate accounts in all of your dealings as an Attorney.

You should read/refer to the Mental Capacity Act Code of Practice (particularly when assessing the Donor's capacity). It can be found at:-

[www.publicguardian.gov.uk/mca/code-of-practice.htm](http://www.publicguardian.gov.uk/mca/code-of-practice.htm)

You may be accountable if you fail to carry out your duties properly.

Having a good understanding of the Donor's past and recent wishes and decision-making will help you make decisions that are in their best interests. And any guidance the Donor has to help you do this is included in. You should bear the Donor's guidance in mind when making any decisions on their behalf.

## Additional guidance for Attorneys

In making decisions with other Attorneys, if you feel another Attorney is not acting in accordance with their role and responsibilities you should firstly, raise your concern with the Attorney, then if you are **not** satisfied with the outcome, contact the OPG.

The same applies if your decision-making is disputed. Keep notes or records of discussions so that you can demonstrate why you made the decision, and firstly, raise your concern with the person(s) making the dispute, then if you are **not** satisfied with the outcome, contact the OPG. Always bear in mind that the key objective at all times is the best interests of the Donor.

Even after registering the LPA, you should assume that the Donor has capacity to make decisions themselves. A person should **not** be treated as unable to make a decision just because they make a decision which, in your opinion, is unwise.

You should only be making decisions for the Donor when they:-

- ✓ are incapable of making them themselves; or
- ✓ may be capable, but have asked you to make them on their behalf.

The Donor may have a gradually degenerating condition, or may have capacity on one day, but not on another. You should devise a strategy for dealing with this that allows you to:-

- ✓ assess their capacity from time to time; and
- ✓ support them in making as many decisions as possible for themselves, whilst allowing you to make everyday decisions like paying bills.

You might consider, for example:-

- ✓ whether the Donor has all the relevant information they need to make a decision?
- ✓ could the information be presented or explained in such a way that would make it easier for them to understand (e.g. by using pictures, photographs, sign language)?
- ✓ are there times of the day when the Donor is more lucid?
- ✓ could the support of a third party (e.g. a relative or friend) help the Donor decide?

If the Donor disagrees with your decision, and they have capacity, you must go with the Donor's view. If they lack capacity you can make the decision, but bear in mind that Donors can inform the OPG if they are unhappy about your decision-making and the OPG can ask you to explain your decisions.

In deciding what is in the Donor's best interests, bear in mind:-

- ✓ their past and recent wishes;
- ✓ any views the Donor has expressed in the past;
- ✓ their beliefs and values;
- ✓ the views of family members, parents, carers, etc.;
- ✓ the possibility that the Donor could regain capacity;
- ✓ any other factors that may be specific to a Donor's circumstances; and
- ✓ any guidance in the LPA or other written statement.

There may be occasions when you need to obtain personal or confidential information about the Donor from a doctor, bank, or solicitor, for example. Provided you are acting within the powers of the LPA this is appropriate, but you must only ask for information that is strictly relevant and maintain confidentiality where at all possible.

**Under a Property and Financial Affairs LPA**, provided the Donor has not placed Restrictions, you can make decisions about:-

- ✓ selling a Donor's house - but, since this is likely to impact where the Donor lives, you should discuss the decision with the Donor's Health and Welfare Attorney(s), if they have a Health and Welfare LPA as well. If the sale is below the property's market value, or if you want to buy the property yourself or sell it to a family member, you should contact the OPG;
- ✓ selling the Donor's stocks and shares; and
- ✓ making gifts on the Donor's behalf.

**but you cannot make decisions about:-**

- ✗ making a Will on the Donor's behalf;
- ✗ voting on the Donor's behalf;
- ✗ access the Donor's Will unless the Donor has included a condition that you can – however you can apply to the Court if you believe the Will is essential in helping you carry out your role, or if the person who holds the Will refuses to show it to you.

**Under a Health and Welfare LPA**, provided the Donor has not placed Restrictions, you can make decisions about:-

- ✓ where the Donor lives – but, since this may impact on selling the house, you should discuss the decision with the Donor's Property and Financial Affairs Attorney(s) if applicable;
- ✓ refusing to consent to medical treatment; and .
- ✓ deciding what sort of care would be most suitable.

**but you cannot make decisions about:-**

- ✗ consenting to marriage or civil partnership;
- ✗ consenting to a Decree of Divorce (or Civil Partnership Dissolution) based on 2 years' separation;
- ✗ consenting to sex;
- ✗ medical treatment for a medical disorder if the treatment is regulated by Part 4 of the Mental Health Act 1983.

## Being a Witness

Your Witness is someone who signs your LPA to confirm that they witnessed you signing and dating it. This is an important safety aspect of your LPA.

The same person could witness both your signature and your Attorney(s) signature(s). If you have two separate Witnesses, each Witness must see the relevant person sign and date that part of the form.

Make sure your Witness(es) write their name(s) and address(es) clearly and legibly. Your chosen Attorney(s) or Replacement Attorney(s) cannot act as a Witness.

The Witness is someone who signs the LPA to confirm that they witnessed your Attorney(s) signing and dating it. This is an important safety aspect of your LPA.

## Frequently Asked Questions

### What if my Attorney dies?

**Before registration:** if you have capacity you can make a new LPA and choose a new Attorney.

**After registration:** if you have one Attorney and no Replacement Attorneys your LPA becomes unusable. If you have a Replacement Attorney, they take over.

### Can my Attorney give gifts on my behalf?

Unless you make a Restriction stating otherwise, your Attorney(s) will be able to give (limited) gifts on your behalf:-

- ✓ to charitable organisations;
- ✓ to relatives, very close friends and any Attorney named in your LPA who is a relative or very close friend;
- ✓ on birthdays, weddings, anniversaries, etc., when you would usually give gifts;
- ✓ of a value that is appropriate to your assets.

### Can my Attorney(s) charge for acting for me?

You should discuss and agree with your Attorney(s) before completing your LPA, whether they are to be paid for acting on your behalf.

Your Attorney(s) do not have to be paid and you can, for example, decide to pay each of your Attorneys differently. Payment is not usual for a Health and Welfare Attorney.

All Attorneys can claim reasonable out-of-pocket expenses that they incur whilst acting on your behalf

### Can a Property and Financial Affairs Attorney make decisions about where I live?

No.

### Can I make decisions about the Donor's personal welfare?

Decisions about the Donor's personal welfare can only be made by an Attorney acting under a Health and Welfare LPA or by someone given the authority to do so by the Court of Protection.

However, if you are also appointed to perform any of these roles for the Donor then you will be able to take those decisions within the limits of the powers given to you.

### Can I stop being a Property and Financial Affairs Attorney?

Yes, you can stop acting as the Attorney at any time. If the LPA is registered you will need to complete form LPA005 Disclaiming Your Appointment and send this to the OPG. Contact the OPG immediately if you need to discuss this.

You should also inform any other Attorney(s) appointed on the LPA and the Donor if they still have the capacity to understand your decision.

### Will anyone replace me and if so, who?

Possibly – if you decide to stop or **cannot** continue as an Attorney, a Replacement Attorney could act as a replacement if the Donor has made arrangements for this in the LPA document.

**Please note:** The Donor can appoint a Replacement attorney either to act as a replacement for a specific Attorney only or alternatively can specifically exclude you from being replaced.

### What if I am one of the Attorneys appointed to act together?

If there is no Replacement Attorney named or you are unable to be replaced due to a condition included in the LPA, the remaining Attorney(s) **cannot** carry on and the LPA will end.

### What if I am an Attorney appointed to act jointly and severally?

If you are appointed to act jointly and severally and the Donor has **not** appointed a Replacement Attorney the LPA will continue providing there is at least one remaining Attorney acting on behalf of the Donor.

### Can another Attorney be added after the LPA has been registered?

No. If the Donor has capacity to cancel the existing LPA he/she can do so and make a new one appointing a new Attorney.

### I am acting as a Replacement Attorney, should I let the OPG know?

Yes. If you are a Replacement Attorney you are required to advise the OPG that you are now acting as Attorney. You must ensure that the LPA is returned to the OPG to note the change on the LPA and to update the LPA register.

**Please note:** If the LPA does not have a note of the change the Replacement Attorney may not be able to act.

### If the LPA is no longer valid can the donor make another?

Yes, but only if the donor still has the capacity to do so.

### What happens when the Donor dies?

The LPA will automatically come to an end. You should send the original LPA and a Death Certificate to the OPG as soon as possible. The OPG cannot give advice on how to deal with the Donor's Estate. You should contact your legal advisor at Countrywide Tax & Trust Corporation Ltd

### What if someone objects to me being appointed as an Attorney?

The Donor, the people to be told or other Attorneys are able to object to the registration of an LPA.

Other persons (apart from people to be told and Attorneys) can object to registration, but they have to pay a Court fee.

Objections by a person to be told or an Attorney will have to be either:-

#### ❖ **On factual grounds** – the OPG can be asked to stop the registration if:-

- ✓ the Donor is bankrupt or interim bankrupt (for Property and Financial Affairs LPAs only);
- ✓ the Attorney is bankrupt or interim bankrupt (for Property and Financial Affairs LPAs only);
- ✓ the Attorney is a Trust Corporation and is wound-up or dissolved (for Property and Financial Affairs LPAs only);
- ✓ the Donor is dead;
- ✓ the Attorney is dead;
- ✓ there has been dissolution or annulment of a marriage or civil partnership between the Donor and Attorney (except if the LPA provided that such an event should **not** affect the instrument);
- ✓ the Attorney(s) lack the capacity to be an Attorney under the LPA; or
- ✓ the Attorney(s) have disclaimed their appointment.

#### ❖ **On prescribed grounds** – objections to the Court of Protection against registration of the LPA can only be made on the following grounds:-

- ✓ that the power is not valid as an LPA for example, the person objecting does **not** believe the Donor had capacity to make an LPA;
- ✓ that the power no longer exists – for example the Donor revoked it at a time when he/she had capacity to do so;
- ✓ that fraud or undue pressure was used to induce the Donor to make the power; or
- ✓ the Attorney proposes to behave in a way that would contravene his/her authority or would not be in the Donor's best interests.

The OPG will require appropriate evidence to support any factual objection raised.

Objections by the Donor do **not** need to be on any specific grounds.

If the OPG or the Court receive an objection to your application to register an LPA, they will contact you to advise what steps you need to take next.

### What if I want to register my Property and Financial Affairs LPA, but do not want my Attorney to act until I lack capacity?

You can include a Restriction stating how the Attorney must demonstrate this – e.g. "my Attorney(s) must **not** use my LPA until they have obtained medical evidence stating that I have lost mental capacity". However this may cause problems in practice.

### If the Donor requested that the LPA is only to be registered upon loss of capacity, does medical evidence need to be supplied to the OPG on loss of capacity?

No. The OPG will not need medical evidence, but as with all applications to register, they will notify the Donor upon receipt to give them an opportunity to object to the registration.

### Once I have served notices, what do I do next?

Once you have served the last notice you will need to send us the original LPA form, the completed registration form **LPA002** and the appropriate fee.

### Are two separate fees payable if I am registering both types of LPA at the same time?

Yes. A separate registration fee must be paid for each separate LPA registered.

### What if the Donor or Attorney cannot afford the application fee(s)?

The fee is normally paid from the Donor's assets. However, if you cannot afford the fee you can ask to postpone or waive payment.

### Where do I get extra copies of the registered LPA?

The OPG can supply office copies of the original LPA document and may charge a fee. Solicitors can also certify copies as being true copies of the original and they may also charge.

**Please note:** To ensure that a copy is acceptable, check first with the organisation/institution who needs to see the LPA.

### **What if the original LPA is missing?**

The OPG will not usually accept an application to register without the original LPA form. However, they may consider registering a 'certified copy'. This means a copy that is signed on every page to show that it is a 'true copy' and has not been tampered with in any way. Usually solicitors sign certified copies. Unless you have gone to the trouble of certifying a copy (which would be unusual), it would normally be possible for the company who prepared the LPA to certify a copy. For this reason, every effort should be made to locate the original LPA. You will also need to send a written statement explaining how the original was lost.

### **As a certificate provider can I discuss the LPA with the donor with the attorney present?**

You should discuss the contents of the LPA with the Donor – not in the presence of the chosen Attorney(s) if at all possible – in order to form your opinion. Make sure the Donor is able to communicate with you freely. However, there may be exceptional circumstances when this just may not be possible – a husband and wife meeting with their GP in the consulting room for example.

### **What happens if the LPA cannot be registered?**

If the Donor does not have the capacity to make another LPA, someone such as the Attorney or other relevant person should consider applying to the Court for an Order covering the decisions that need to be made on the Donor's behalf.

### **Can the registered LPA be cancelled or revoked?**

Yes. The OPG can cancel registration on factual grounds (such as bankruptcy of the Attorney) and the Court of Protection can terminate an LPA for other reasons, such as where the Attorney is not carrying out his/her duties correctly. Alternatively, if the Donor still has the capacity, they can revoke the LPA. They will be required to advise their Attorney(s) and the OPG of the revocation so that the LPA can be removed from the register.

### **What is the LPA register?**

The LPA register is a searchable database containing the details of all registered LPAs. It is important to remember that once an LPA is registered, certain pieces of personal information will be available to **anyone who applies to search the register**.



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