

# A Guide to Lasting Powers of Attorney

There are two types of power of attorney: general and lasting. Both are designed to put in place a process for a nominated 'attorney' to make decisions on a person's behalf.

Lasting Powers of Attorney' (LPA), are put in place to plan for the future in case a person loses mental capacity and covers decisions related to finances and property or health and welfare. Lasting powers of attorney are registered with the [Office of the Public Guardian](#).

On the other hand, a 'general power of attorney' is an agreement to allow an attorney to make decisions regarding another person's finances on their behalf while that person still has mental capacity.

Here at Butcher & Barlow LLP, we have an excellent private client team that provides tailored and personal advice on powers of attorney. That is why we have created this guide, to provide an overview of lasting powers of attorney in England and Wales below.

## The Basics

When one decides to set up a Lasting Power of Attorney (LPA), 'the donor' gives someone they trust – their 'attorney' – (or multiple people) the legal authority to make decisions on their behalf. This can be for a number of reasons, but the most common is because the donor no longer wants, or is able, to make them for themselves.

The **donor** creates the LPA and chooses people to act on their behalf in the future.

An **attorney** is the person that becomes responsible for the decisions to be made on behalf of the donor. They are usually a friend, family member, or professional (such as a solicitor).

While an LPA can be set up as soon as the donor turns 18, they tend to be put in place later in life as a precautionary measure in case a person loses their mental capacity. It

can, however, be a good idea to set up an LPA earlier in life, or as soon as possible; losing mental capacity can occur as a result of (often) age-related matters such as a stroke or dementia, but it can also happen as a result of an accident or illness.

If an LPA is not set up and a person loses their mental capacity, the process for a nominated individual to make decisions on that person's behalf becomes much more difficult and more expensive. They will need to go through the Court of Protection to become a 'deputy', which is a costly and convoluted process often taking around 9 months to complete.

Usually a family member or friend, a **deputy** is a person appointed by the Court of Protection to manage the affairs and make decisions for someone who no longer has the mental capacity to do so for themselves. A deputy may be for financial purposes or healthcare purposes separately.

An LPA allows a donor to retain control as the donor gets to choose who will act in the future. Deputyship doesn't give a deputy the same control as anybody could volunteer to be involved.

Nobody has the automatic right to make decisions about another person's finances, property, health, or welfare if they no longer can make the decisions themselves, which is why an LPA is set up to allow an attorney to do so. Once you have set up an LPA, the attorney is still required to consult the donor for their input and do all they can to allow them to make the decision for themselves.

## Types of Lasting Power of Attorney

Lasting Powers of Attorney can be set up to manage decisions related to finances and property or health and welfare. Both of these can be set up, but they are separate documents and need to be treated as such. The same attorney or attorneys can be used in both instances.

### *Financial and Property*

With a Financial and Property LPA, the donor can decide whether their attorney begins to make decisions on their behalf before or after losing their mental capacity, as long as this is detailed in the LPA document.

An attorney of finances and property can make a number of decisions including but not limited to:

- Selling your home,
- Paying your mortgage,
- Paying bills,
- Arranging repairs to your property, and
- Managing investments

The donor can also decide, when preparing the LPA document, what kind of decisions the attorney can make. For example, the donor could stipulate pre-prepared guidelines (advanced decisions or advanced statements) for certain situations while allowing their attorney more control for others – the latter may be referred to as “working to your best wishes and interests”.

Under a financial LPA, attorneys are also required to keep the donor’s accounts and money separate from their own, and provide regular updates on spending and how much money the donor has if requested.

The attorney may also decide to pass on some financial details to family members, doctors, or social workers where necessary.

### *Health and Welfare*

Once a donor has lost their mental capacity, their attorney can begin to make decisions about their health and welfare, for example:

- Where the donor should live,
- What medical care the donor receives,
- Who the donor should be in contact with,
- What kind of social activities the donor can do, and
- Potentially choices regarding life-saving treatment.

Once the health and welfare attorney begins making decisions, they must tell the family, friends, and relevant healthcare professionals of the donor.

### *The First Steps*

#### *Registering*

In order to set up a valid LPA, the document must be registered with The Office of the Public Guardian. The LPA cannot be used during the registration process, which can take up to 10 weeks.

If the donor loses their mental capacity during the process but had mental capacity when they signed the LPA, the attorney may be able to register it for them.

### **Mental Capacity**

In essence, mental capacity is the ability to make a decision at the time it is needed. To assess whether a person/someone has their mental capacity, you must consider:

- Whether they have a general understanding of the decision they are making and the consequences this will have,
- If they can weigh up all of the relevant and available information to help them make their decision, and
- Any other information or support you can provide to help them come to the decision themselves.

Mental capacity is also not an absolute, which means it might change in certain situations, or at certain times. For example, just because a donor has dementia or can no longer speak, that does not mean they no longer have mental capacity; as many accommodations as possible should be made to help them make the decision themselves, such as using simpler vocabulary, sign language, or pictures to communicate more easily.

### **Best Interests**

In order to ensure the best decision is made for the donor, the attorney must keep their best interests in mind by understanding and following certain principles, which are detailed in the [code of practice for attorneys](#) from the [Mental Capacity Act 2005](#).

### **To Act in Someone's Best Interests**

In order to act in the donor's best interests, the attorney must:

- Encourage them to be involved,
- Consider their past and present feelings, wishes, and advanced decisions and advanced statements,
- Keep in mind the beliefs and values they have,
- Discuss decisions with family, friends, carers, etc. who may be able to make suggestions regarding feelings, beliefs, and values,
- Respect their privacy – it may not always be appropriate to share every detail with everyone, and
- Know of any exceptions, such as an advanced decision to refuse life-sustaining medical treatment.

### *Assume Mental Capacity is Intact*

Before making any decisions on the donor's behalf, the attorney must first assume that they have the mental capacity to make the decision themselves.

### *Help the Donor Make the Decision Themselves*

The attorney must offer as much practical help as possible to help the donor make the decision themselves. This includes allowing the donor reasonable time to make a decision when it best suits them, or using different means of communication.

### *Allow the Donor to Make 'Unwise Decisions'*

The donor should be allowed to make their own decisions if they have mental capacity to do so, regardless of whether the attorney agrees or disagrees.

### *Least Restriction*

All of the possible alternatives and outcomes of each decision should be assessed by the attorney, ensuring they choose what is least restrictive of the rights and freedoms of the donor.

### *Make Wishes Known*

While the donor still has mental capacity, they can plan and explain their wishes and any decisions they want to make ahead of time, in case they lose mental capacity. This might be to refuse certain kinds of medical treatment, for example.

### *Does Not Need to Be in Writing*

Not all of the wishes of the donor need to be made in writing while they have mental capacity, although it can be a good idea to do so. They should still be added to the donor's medical notes, however.

Decisions regarding life-sustaining treatment do, however, need to be in writing as well as signed and dated by the donor.

### *Advanced Decisions*

Advanced decisions are specific decisions that the donor wishes to make regarding their finances or healthcare. Whichever decision was made most recently must be followed and, in England and Wales, they are legally binding.

It is very important to frequently review advanced decisions to ensure they still reflect the donor's wishes.

If any advanced decisions were made before the lasting power of attorney was registered, they need to be sent along with the LPA application to ensure there are no conflicts in the two documents.

### **Advanced Statements**

Advanced statements cover preferences and beliefs regarding future care, which could pertain to religion, your interests, your diet, and almost anything else.

While not legally binding, advanced statements help to record the wishes of the donor for the future reference of anyone that is involved in your care.

### **Lasting Powers of Attorney Provide Assurances**

Lasting Powers of Attorney are used to ensure the best interests of the donor are kept in mind throughout, meaning there is someone to make the important decisions for them when they can no longer do so themselves. They act as a safety net – like an insurance policy does.

LPAs are important documents in the lives of many people because they ensure their finances and healthcare are overseen by someone they trust. The law recognises that their attorney can make decisions on the donor's behalf, which also provides reassurance.

You should make a Lasting Power of Attorney whilst you are capable, for a time in the future when you may not be capable.

If you are a business owner, you may be interested in this article: [Business Owners: What happens to your business if you fall ill?](#)

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