

Guide to Powers of Attorney



Important Note

This guide is intended to be an introduction to this extraordinarily complex area and should not be relied upon without personalised advice.

Introduction

I am a Registered Trust & Estate Practitioner and have been advising on Wills, Trusts, Probate, and Estate Planning since 1971. As a qualified member of the Society of Trust & Estate Practitioners (STEP), I comply with their Code of Professional Conduct. I am a former Chair of STEP Yorkshire.

Powers of Attorney are not a new concept – for centuries people appointed an Attorney to manage their affairs whilst they were abroad for extended periods of time.

General Powers of Attorney were first codified in the UK by the General Power of Attorney Act 1944, which was then updated by the Powers of Attorney Act 1971. The 1971 Act is still the current legislation for General Powers of Attorney.

The key limitation of a *General* Power of Attorney is that it only continues to be valid whilst the Donor, the person granting the power of attorney, has capacity to make their own decisions. Consequently, Enduring Powers of Attorney (EPAs) were introduced by a 1985 Act. EPAs can be used as a General Power of Attorney whilst the Donor has capacity and crucially continue to be valid should the Donor lose capacity.

EPAs only deal with property and financial affairs. Consequently, the Mental Capacity Act 2005 (“the 2005 Act”) introduced Lasting Powers of Attorney (LPAs) for Health & Welfare and replaced EPAs with LPAs for Property & Financial Affairs.

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Important note

This guide is only for people living in England & Wales and is based upon the author’s understanding of the current legal framework and the Office of the Public Guardian custom and practice. There is similar legislation in Scotland for Continuing Powers of Attorney whilst in Northern Ireland it is still Enduring Powers of Attorney, with no Health and Welfare alternative.

What is the definition of capacity?

Under the 2005 Act, a four-way test is needed to establish capacity:

- ✓ Does the individual understand what they are being asked about?
- ✓ Can they mull it over?
- ✓ Can they make a decision?
- ✓ Can they communicate that decision?

If the answer to all four is yes, the individual has capacity.

That decision may not be popular with others but that alone isn't an indicator of a lack of capacity.

Prior to the 2005 Act, there tended to be a train of thought that losing capacity was permanent and universal. In other words, once diagnosed, the individual no longer had capacity to make any decisions. Overturning that misconception is a part of the Act, so it is a decision-by-decision process.

The individual, with as much support as they need, must be given the opportunity to decide for themselves before an Attorney or Deputy decides for them.

Who can assess capacity?

Informally, anyone; family, friends, carers, can.

For important decisions, including making a Will or an LPA, a more formal assessment may be needed. The obvious choice would be healthcare professionals, but social workers, and other professionals can make an assessment. I regularly make assessments prior to taking Will or LPA instructions but call on the acknowledged experts if there is any doubt.

Do I need an LPA?

The quick answer is "Yes". LPAs are often thought to be the preserve of the elderly. However, illness or injury causing cognitive impairment can strike at any age. Derek Draper, Kate Garraway's husband, was just 52 when he contracted Covid-19 and lost capacity.

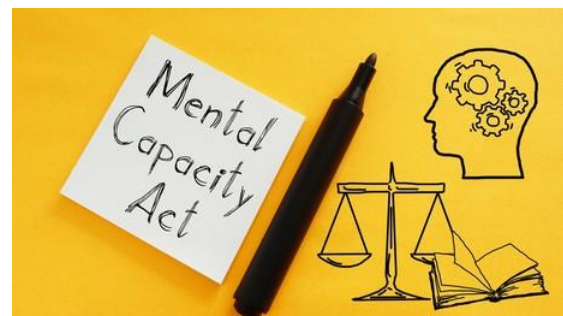
The absence of an LPA for Property & Financial Affairs meant three businesses collapsed, leaving Kate with enormous financial difficulties.

Do I need both types of LPA?

The quick answer is, "Yes".

The need for an LPA for Property & Financial Affairs is perhaps intuitive. Access to savings and investments, including to those in joint names, is denied in the absence of a valid EPA or LPA when an account holder has lost capacity. Meaning that normal expenditure can't be met, let alone exceptional items.

The need for a Health & Welfare LPAs is less obvious, at least until end-of-life. However, recently, it was reported that Dentists had been instructed by their Insurers not to even perform routine examinations on patients lacking capacity in the absence of an LPA for Health & Welfare.



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What if I don't have an LPA?

Property & Financial Affairs

The Court of Protection will appoint a Deputy for someone who has lost capacity.



What is the cost of a Deputyship Order?

The costs are in two parts, initial and annual.

The initial cost comprises potentially three elements:

- Application Fee £421
- Hearing Fee (if needed) £259
- Security Bond £50 - £500

The annual costs are:

- Assessment Fee £100
- Supervision (minimal) £35
- Supervision (general) £320
- Security Bond £50 - £500

I was recently involved in an application for a Deputyship Order where the Security Bond cost £2,625 initially and annually thereafter. This doesn't include professional fees.

None of the Court costs are incurred with an LPA. Although the OPG charges £92 (£46 for those entitled to a concession) for registration. My fee is £250 (no VAT) for each LPA.

For a couple needing both LPAs, so four in total, that's a total cost of £1,368, which is significantly less than the Deputyship route. If you need all four, and ask me nicely, I may offer you a small discount on my fee. Hopefully, they will never be needed but it is much better to have an LPA and not need it than it is to need one and not have it!

A registered LPA is virtually instantaneous when needed, whereas the application for a Deputyship Order can take anything between 4 and 6-months.

Also, the Court might appoint a Panel Solicitor, or even the Local Authority, if felt more suitable than family or friends.

Health & Welfare

It is possible to also apply for a Health & Welfare Deputyship order, with similar costs, apart from the security bond, but these are rare.

In the absence of a Health & Welfare LPA or Deputyship Order, Health professionals will tend to make decisions about your health treatment without consulting your family. Welfare decisions, including the type of care needed will be made by Social Workers employed by the Local Authority, with their decision being final. I liken it to a card game with trumps; the NHS and Local Authority hold all the trump cards in the absence of an LPA for Health & Welfare.



Can't I make my own LPA?

Yes, it is perfectly possible to draw up your own LPA via the OPG website.

However, my service includes:

- Giving advice and taking your detailed instructions.
- Preparing draft documents, including any necessary "Letters of Wishes" to communicate your intentions to your Attorneys.
- Preparing engrossments.
- Overseeing the signing process to ensure compliance with the relevant legislation, including acting as "Certificate Provider".
- Advising upon an Advance Directive to complement your LPA for Health & Welfare.
- Dealing with the Office of the Public Guardian (OPG).

Having an experienced set of eyes looking at all aspects of your LPA will help stop it being one of the 50,000 rejected by the OPG in 2023/24 because of mistakes.

Can I have more than one LPA?

Yes, you can have as many as you want. The key is clearly defining who is doing what. For example, it may be appropriate for a businessperson to appoint their Accountant for their business affairs and their spouse/family for their personal finances. It should be noted that a director cannot delegate their role in that capacity – voting on decisions at a Board Meeting, for example – but their day-to-day business activities can be picked up by an Attorney

In this context, it's worth noting that whilst the duties of an Executor can be picked up by an Attorney, the role of a Trustee cannot.

Whilst the OPG maintains a roll of all registered EPAs and LPAs they do not assume that one replaces another because there can be more than one in operation at any one time.

Consequently, it's essential, if a registered LPA is to be mothballed, it is formally cancelled by Deed which is sent to the OPG.

Who is the Certificate Provider?

The Certificate Provider is either a professional or some who knows you well and can sign a declaration confirming the following:

- That you understand what you are doing by granting an LPA.
- That you are not being coerced into granting an LPA.

Whilst the declaration doesn't specifically mention capacity, it is implied by the reference to understanding. Consequently, the Certificate Provider needs to assess the Donor's capacity and may be called upon to justify that later, if there's any doubt.

Should I add preferences and instructions?

I don't with Health & Welfare LPAs, preferring an Advance Directive which can go into more detail and deal with issues that might otherwise invalidate the LPA. If, for an extreme example, you want to be flown to Switzerland to go to Dignitas, that's currently illegal and would invalidate the entire LPA.

With a Property & Financial Affairs LPA, particularly if my client has complex financial affairs, a Letter of Wishes referenced in the LPA is less cumbersome and more flexible than a raft of preferences and/or instructions.

Who should act as Attorney?

The simple answer is anyone with capacity (over 18) who you trust to make important decisions for you.

Whilst the individuals you chose don't need any previous experience – they can buy-in any professional expertise they need - there are some desirable key skills. Being computer literate, happy to deal with paperwork, and good at form filling, for example.

It's best to have more than one Attorney, and at least one Attorney from a younger generation. Selecting someone exclusively from your generation runs the risk of that individual lacking capacity themselves, or being dead, when the time comes. Bankruptcy also disqualifies an Attorney from acting.

Whilst there's no limit to the number of Attorneys you can appoint, too many create logistical problems. Think also of whether your Attorneys can work together harmoniously. You can always have a "subs bench" with some as Attorneys and some as replacements.

When appointing two or more Attorneys and/or Replacement Attorneys, specify how they are to act – jointly, or jointly and severally. Jointly means they must act together, whilst jointly and severally means that they can act either individually or together. My advice is always to go down the jointly and severally route. With a joint appointment, if one Attorney becomes bankrupt, has lost capacity, or died, the other(s) can't act, so you don't have an LPA.

If you own your home as Tenants in Common (divided shares passing under your Will) as opposed to Beneficial Joint Tenants (both owning the whole and passing by survivorship), your co-owner can't act on their own behalf and as a sole Attorney for you in the event of a sale. Consequently, it is essential to appoint at least two Attorneys.

Unless unavoidable, it is best not to appoint Attorneys living abroad. Apart from the obvious geographical issues, when the time comes, financial institutions will be obliged to make ID and address checks for Anti Money Laundering purposes, which is harder for someone without a UK address. US residents should be avoided at all costs. Uncle Sam has a long reach, which means many UK financial institutions won't even deal with US residents.

Professionals can be appointed Attorneys under a Property & Financial Affairs LPA, but not under a Health & Welfare LPA. My advice is not to do it unless you have no other option. It increases the cost exponentially and is likely to cause delays.

You can have different Attorneys on Property & Financial Affairs and Health & Welfare LPAs but, it is unusual. If we think about long-term-care, the decision about which care home is a Health & Welfare issue, whilst paying for it is a Property & Financial Affairs issue. If you do have separate Attorneys, they need to work together.



When does an LPA come into effect?

In the case of a Health & Welfare LPA, it comes into effect after the Donor has lost capacity. It makes sense that if the Donor can make their own decisions and communicate those to a health professional or social worker, the involvement of the Attorney is unnecessary.

At the point of drafting an LPA for Property & Financial Affairs, there's an option for when the LPA comes into effect – immediately after signing, or only after capacity has been lost. I recommend the former so the LPA can be used as a quasi-General Power of Attorney.

Whilst my father never lost capacity, he lost interest in routine financial matters and needed administrative support following an illness, aged 85. He still made the decisions, but they were implemented under the LPA.

With new LPAs, my recommendation is to get these registered by the OPG immediately after signing. It subjects the LPA to that decisive test and avoids any delays once the Donor has lost capacity.

My advice is to replace an EPA with an LPA in any event, because getting an EPA registered after the Donor has lost capacity is going to incur a delay of several weeks, assuming the OPG agrees it has been validly completed.

What are the signing conventions?

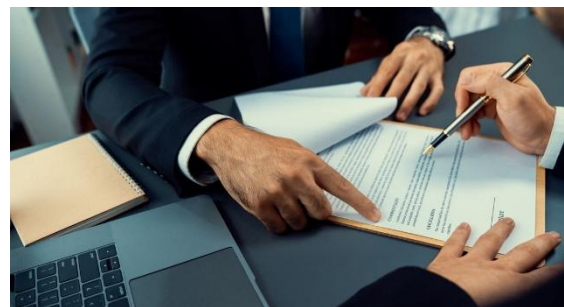
The Certificate Provider needs to be present when the Donor signs the LPA, so can act as witness to their signature. Ideally, there'll be a "roundtable" meeting with all the Attorneys present, so all the signatures can be captured and witnessed.

It's not just a question of signing the LPA(s), it's an opportunity to coach the Attorneys and encourage dialogue between the Donor and the Attorney(s) on sensitive issues, particularly with Health & Welfare.

If an Attorney can't be present, then it's perfectly acceptable to send them just the page they need to sign and have independently witnessed, but they must see the whole LPA as well. An emailed PDF copy of the LPA will suffice.

It's important to remember that there is a strict order of signing, with the Donor first, then the Certificate Provider, followed by the Attorneys and/or Replacement Attorneys. The Donor also needs to sign the last page of the LPA, which deals with the registration formalities; this must be dated after all the other signatures.

As mentioned, with 50,000 LPAs rejected by the OPG in 2023/24, the OPG is meticulous about names, dates, signatures, etc., so great care is needed.



What are the practicalities of implementing an LPA/EPA?

If you are lucky, the LPA for Property & Financial Affairs was registered by the OPG on or after 17 July 2020, as this opens the “Start using a lasting power of attorney” facility.

Via the OPG website, a code can be created for each financial institution, which is then sent to that institution. In turn the institution receives a summary of the LPA sufficient for them to start the process of authorising the Attorney(s) to act.

For EPAs and LPAs registered prior to July 2020, it’s the laborious process of obtaining certified copies of the EPA/LPA and taking/sending one to each institution.

What are the dos and don’ts for Attorneys?

Fundamentally, the Act makes it clear that everything done by an Attorney in the name of the Donor must be for the exclusive benefit of the Donor.

The following notes relate to an EPA/LPA for Property & Financial Affairs.

Can an Attorney make gifts?

This is the most common question, and the simple answer is an unhelpful yes and no! The yes is in relation to any existing pattern of gifting, which can be continued at the previous level. So, if it was commonplace for each of the grandkids to get £100 for Christmas and birthday, for example, that can continue. The amount and frequency can’t increase.

The same applies with charities; regular Gift Aid donations can continue but new donations can’t be made.

Gifting is synonymous with Inheritance Tax (IHT) planning, and it is understandable, particularly when the Attorneys are also the potential beneficiaries under the Will, to want to mitigate any potential IHT liability.

However, by definition, IHT mitigation is exclusively for the benefit of the beneficiaries, not for the Donor.

Consequently, an application to the Court of Protection, via the OPG, needs to be made before any IHT mitigation planning can be undertaken. The following factors will be taken into consideration so robust planning, preparation and presentation is essential

- Will the Donor be able to maintain their standard of living, no matter what happens after the proposed planning?
- Is there evidence of IHT planning prior to the loss of capacity?

A cashflow analysis prepared by a financial planner will aid with the affordability question.

The Letter of Wishes I draft alongside an LPA for Property & Financial Affairs, together with evidence of previous planning, also bolsters the case.

What are the recordkeeping requirements?

The simple answer is, thorough. The legal adage is, “If it isn’t written down, it never happened”!

A Deputy must produce an annual statement of account and whilst an Attorney doesn’t, the OPG can call for a statement of account at any time. Consequently, thorough records are essential.

All accounts must be maintained in the name of the Donor. An Attorney must never open an account in their name to hold money belonging to the Donor.



What should I do with the money I'm looking after?

This is the \$64,000 question! Fundamentally, the Attorney needs to protect and preserve the Donor's savings and investments.

An Attorney is in a fiduciary capacity; just like a Trustee of a Trust, the Attorney has been entrusted with the Donor's life savings. Consequently, the OPG expects Attorneys to adopt the fundamental principles of the Trustee Act 2000, which can be summarised as follows:

- Take proper advice
- Ensure suitability
- Maintain diversification
- Review

In terms of taking proper advice, this is from a regulated financial adviser. My advice is always to seek independent (as opposed to restricted) advice.

Conclusion

There are, perhaps, more questions than answers in this guide, making it clear that both Donors and Attorneys would be well served by taking professional advice at every stage.

I can provide that advice.

Can the author help with other matters?

Personally, and in conjunction with other trusted partners, there are several legal and other matters I can help with, including:

- Lifetime Trusts for gifts and loans
- Trust Administration
- Trust Investment
- HMRC Trust Registration
- Wills
- Deeds of Variation
- Applications for Probate
- Mitigating Inheritance Tax

The above list isn't exhaustive, so if you have a question on any matter raised in this guide, or any other financial matter, please just ask. Remember, the only dumb questions are the ones you don't ask when you have the chance!

Contact me for help and advice on any of these and other related services. Any initial consultation is without obligation, at my expense and your convenience.

