

The Attorney Guide

For Lasting Powers of Attorney



About this guide

This guide will give you an overall view of what you are required to do as an Attorney. At the time that you receive it, this guide covers the relevant guidance relating to Attorneys and Lasting Powers of Attorney. By its very nature it will become out of date over time. Therefore, please come back to us at any time in the future if you have questions or queries regarding your role as Attorney.

Your role as an Attorney

Your role as Attorney is a vital one, as it will put you in control of making decisions about the property, Financial affairs, and wellbeing of the person who has named you as their Attorney.

The Lasting Power of Attorney (LPA) has five sections:

- **The Donor** is the person creating the LPA, setting out the appointment of their chosen Attorney(s) and how they are to act on their behalf.
- **An Attorney** is a person appointed to act for the Donor in relation to their property and affairs, in the manner instructed within the LPA document by the Donor.
- **A replacement Attorney** is appointed to replace an Attorney who is unable or unwilling to act for the Donor.
- **A person to be told** is notified when the LPA is being registered (this is optional). This enables any concerns or objections to be raised before the LPA can be used.
- **A certificate provider** certifies the document to confirm the Donor's understanding of the LPA and the authority they are giving their Attorney, and that no fraud or undue pressure is used in creating the LPA.

Purpose of the Lasting Power of Attorney

The Lasting Power of Attorney (Property & Affairs) gives the Attorney(s) authority to make decisions about the Donor's property and Financial affairs when they cannot make their own decisions. This can include running bank accounts and savings accounts, decisions about making or selling investments and selling property, and spending money.

The Lasting Power of Attorney (Health & Welfare) gives Attorney(s) authority to make decisions about the Donor's well-being, including where they may live if going into care, and will either grant or refuse Attorney(s) the authority to make decisions about life-sustaining treatment.

When attorneys can act

Attorneys can use the LPA only after it has been registered and stamped on every page by the Office of the Public Guardian. Attorneys can make decisions as soon as the LPA (Property & Affairs) is registered – both when the Donor has mental capacity and when they lack mental capacity, unless there is a restriction in the LPA. Attorneys can only make decisions under the Lasting Power of Attorney (Health & Welfare) once the Donor lacks mental capacity.

The Mental Capacity Act

Attorneys cannot do whatever they like. They must follow the principles of the Mental Capacity Act 2005. Guidance about these principles is noted below. Attorneys must have regard to the Code of Practice.

You can see the full version of the Mental Capacity Act Code of Practice at:

<http://www.justice.gov.uk/downloads/protecting-thevulnerable/mca/mca-code-practice-0509.pdf>.

(Note: paragraph numbers and chapter numbers given in this guide refer to Code of Practice chapters.)

Principles of the Mental Capacity Act 2005 that Attorneys must follow

1. Attorneys must assume that the Donor can make their own decisions unless it is established that they cannot do so.
2. Attorneys must help the Donor to make as many of their own decisions as they can. Attorneys cannot treat the Donor as unable to make the decision in question unless all practicable steps to help them to do so have been made without success.
3. Attorneys must not treat the Donor as unable to make the decision in question simply because they make an unwise decision.
4. Attorneys must make decisions and act in the Donor's best interests when the Donor is unable to make the decision in question.
5. Before Attorneys make the decision in question or act, they must consider whether they can make the decision or act in a way that is less restrictive of the Donor's rights and freedom but still achieves the purpose.

Best interests

Attorneys must act in the best interests of the Donor in making decisions when they are unable to make the decision for themselves. Attorneys must take into account all the relevant circumstances. This includes, if appropriate, consulting the Donor and others who are interested in their welfare. Any guidance added in the LPA may assist Attorneys in identifying views.

When acting under a LPA

- Make sure that the Act's aforementioned statutory principles are followed
- Check whether the person has the capacity to make a particular decision for themselves. If they do:
 - a Health & Welfare LPA cannot be used – the person must make the decision
 - a Property & Affairs LPA can be used even if the person has capacity to make the decision, unless they have stated in the LPA that they should make decisions for themselves when they have capacity to do so.

At all times, remember...

- Anything done under the authority of the LPA must be in the person's best interests.
- Anyone acting as an Attorney must have regard to guidance in the Code of Practice that is relevant to the decision that is to be made.
- Attorneys must fulfil their responsibilities and duties to the person who lacks capacity

What decisions can an Attorney make using an LPA (Property & Affairs)?

If a Donor does not restrict decisions the Attorney can make, the Attorney will be able to decide on any or all of the person's property and Financial affairs. This might include:

- Buying or selling property
- Opening, closing or operating any bank, building society or other account
- Giving access to the Donor's Financial information

- Claiming, receiving and using (on the Donor's behalf) all benefits, Pensions, allowances and rebates (unless the Department for Work and Pensions has already appointed someone, and everyone is happy for this to continue)
- Dealing with the Donor's tax affairs
- Paying the Donor's mortgage, rent and household expenses
- Paying for private medical care and residential care or nursing home Fees
- Applying for any entitlement to funding for NHS care, social care or adaptations using the Donor's money to buy a vehicle or any equipment or other help they need
- Repaying interest and capital on any loan taken out by the Donor

What decisions can an Attorney make using an LPA (Health & Welfare)?

The Attorney will be able to decide on matters relating to personal welfare, which can include healthcare and medical treatment decisions. Health & Welfare LPAs might include decisions about:

- Where the Donor should live and who they should live with
- The Donor's day-to-day care, including diet and dress
- Who the Donor may have contact with
- Consenting to or refusing medical examination and treatment on the Donor's behalf
- Arrangements needed for the Donor to be given medical, dental or optical treatment
- Assessments for and provision of community care services
- Whether the Donor should take part in social activities, leisure activities, education or training
- The Donor's personal correspondence and papers
- Rights of access to personal information about the Donor
- Complaints about the Donor's care or treatment

What gifts can an Attorney make under an LPA (Property & Affairs)?

7.40 An Attorney can only make gifts of the Donor's money or belongings to people who are related to or connected with the Donor (including the Attorney) on specific occasions, including:

- Births or birthdays
- Weddings or wedding anniversaries
- Civil partnership ceremonies or anniversaries,
- or Any other occasion when families, friends or associates usually give presents (section 12(3)(b)).

7.41 If the Donor previously made donations to any charity regularly or from time to time, the Attorney can make donations from the person's funds. This also applies if the Donor could have been expected to make such payments (section 12(2)(b)). But the value of any gift or

donation must be reasonable and take into account the size of the Donor's Estate. For example, it would not be reasonable to buy expensive gifts at Christmas if the Donor was living on modest means and had to do without essential items in order to pay for them.

7.42 The Donor cannot use the LPA to make more extensive gifts than those allowed under section 12 of the Act. But they can impose stricter conditions or restrictions on the Attorney's powers to make gifts. They should state these restrictions clearly in the LPA document when they are creating it. When deciding on appropriate gifts, the Attorney should consider the Donor's wishes and feelings to work out what would be in the Donor's best interests. The Attorney can apply to the Court of Protection for permission to make gifts that are not included in the LPA (for example, for tax planning purposes).

What are an Attorney's other duties?

7.58 An Attorney appointed under an LPA is acting as the chosen agent of the Donor and therefore, under the law of agency, the Attorney has certain duties towards the Donor. An Attorney takes on a role which carries a great deal of power, which they must use carefully and responsibly.

They have a duty to:

- Apply certain standards of care and skill (duty of care) when making decisions
- Carry out the Donor's instructions
- Not take advantage of their position and not benefit themselves, but benefit the Donor (fiduciary duty)
- Not delegate decisions, unless authorised to do so

- Act in good faith
- Respect confidentiality
- Comply with the directions of the Court of Protection
- Not give up the role without telling the Donor and the court

In relation to Property & Affairs LPAs, they have a duty to:

- Keep accounts
- Keep the Donor's money and property separate from their own

What to do and when

Before it can be used, the LPA documents must be registered with the Office of the Public Guardian (OPG). There are a number of forms that must be completed which can be found on www.gov.uk (search for 'registering LPA'). The OPG will stamp each page of the document during registration. When the LPA has been registered, it can be used at any time unless the document states that it can only be used when the Donor cannot make their own decisions (the Health & Welfare LPA can only be used once the Donor lacks capacity). At the time the document is needed, the Attorney(s) will need to register the Property & Affairs LPA with the Donor's various Financial houses, such as banks, building societies and Investment providers. These providers may ask you to complete some paperwork and provide photographic identification and address confirmation for yourselves, so it would be prudent to have these to hand when making the Financial houses aware of the LPA. Once registered, you will be able to administer accounts and investments on behalf of the Donor if they are unable to do so.

Duty of care

7.59 'Duty of care' means applying a certain standard of care and skill – depending on whether the Attorney is paid for their services or holds relevant professional qualifications.

- Attorneys who are not being paid must apply the same care, skill and diligence they would use to make decisions about their own life. An Attorney who claims to have particular skills or qualifications must show greater skill in those particular areas than someone who does not make such claims.
- If Attorneys are being paid for their services, they should demonstrate a higher degree of care and skill.
- Attorneys who undertake their duties in the course of their professional work (such as solicitors or corporate Trustees) must display professional competence and follow their profession's rules and standards.

Fiduciary duty

7.60 A fiduciary duty means Attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They also must not allow any other influences to affect the way in which they act as an Attorney. Decisions should always benefit the Donor, and not the Attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the Donor's expense.

Duty not to delegate

7.61 Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. The Attorney may seek professional or expert advice (for example, Investment advice from a Financial Adviser or advice on medical treatment from a doctor). But they cannot, as a general rule, allow someone else to make a decision that they have been appointed to make, unless this has been specifically authorised by the Donor in the LPA.

7.62 In certain circumstances, Attorneys may have limited powers to delegate (for example, through necessity or unforeseen circumstances, or for specific tasks which the Donor would not have expected the Attorney to attend to personally). But Attorneys cannot usually delegate any decisions that rely on their discretion.

Duty of good faith

7.63 Acting in good faith means acting with honesty and integrity. For example, an Attorney must try to make sure that their decisions do not go against a decision the Donor made while they still had capacity (unless it would be in the Donor's best interests to do so).

Duty of confidentiality

7.64 Attorneys have a duty to keep the Donor's affairs confidential, unless:

- Before they lost capacity to do so, the Donor agreed that some personal or Financial information may be revealed for a particular purpose (for example, they have named someone they want to check their Financial accounts), or
- There is some other good reason to release it (for example, it is in the public interest or the best interests of the person who lacks capacity, or there is a risk of harm to the Donor or others).

In the latter circumstances, it may be advisable for the Attorney to get legal advice. Chapter 16 gives more information about confidentiality.

Duty to comply with the directions of the Court of Protection

7.65 Under sections 22 and 23 of the Act, the Court of Protection has wide-ranging powers to decide on issues relating to the operation or validity of an LPA. It can also:

- Give extra authority to Attorneys
- Order them to produce records (for example, Financial accounts), or
- Order them to provide specific information or documentation to the court
- Attorneys must comply with any decision or order that the court makes.

Duty not to disclaim without notifying the Donor and the OPG

7.66 Once someone becomes an Attorney, they cannot give up that role without notifying the Donor and the OPG. If they decide to give up their role, they must follow the relevant guidance available from the OPG.

Duty to keep accounts

7.67 Property & Affairs Attorneys must keep accounts of transactions carried out on the Donor's behalf. Sometimes the Court of Protection will ask to see accounts. If the Attorney is not a Financial expert and the Donor's affairs are relatively straightforward, a record of the Donor's income and expenditure (for example, through bank statements) may be enough. The more complicated the Donor's affairs, the more detailed the accounts may need to be.

Duty to keep the Donor's money and property separate

7.68 Property & Affairs Attorneys should usually keep the Donor's money and property separate from their own or anyone else's.

There may be occasions where Donors and Attorneys have agreed in the past to keep their money in a joint bank account (for example, if a husband is acting as his wife's Attorney). It might be possible to continue this under the LPA. But in most circumstances, Attorneys must keep finances separate to avoid any possibility of mistakes or confusion.

Mental Capacity Act 2005 Section 4 – Best Interests

1. In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of:
 - (a) the person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
2. The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
3. He must consider:
 - (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
 - (b) if it appears likely that he will, when that is likely to be.
4. He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
5. Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
6. He must consider, so far as is reasonably ascertainable:
 - (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)
 - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c) the other factors that he would be likely to consider if he were able to do so.
7. He must take into account, if it is practicable and appropriate to consult them, the views of:
 - (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind
 - (b) anyone engaged in caring for the person or interested in his welfare

- (c) any donee of a Lasting Power of Attorney granted by the person, and
 - (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
8. The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which:
- (a) are exercisable under a Lasting Power of Attorney, or
 - (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
9. In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
10. 'Life-sustaining treatment' means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
11. 'Relevant circumstances' are those:
- (a) of which the person making the determination is aware, and
 - (b) which it would be reasonable to regard as relevant.

Useful Numbers

Penguin Wealth Planners Ltd

Penguin House, Raleigh Walk

Brigantine Place, Cardiff

CF10 4LN

Email: Info@penguinwealth.com

Web: www.penguinwealth.com

Tel: 02920 450 143

Office of the Public Guardian

PO Box 16185

Birmingham B2 2WH

Tel: 0300 456 0300

Email: customerservices@publicguardian.gsi.gov.uk

The Office of the Public Guardian keeps a register of LPAs and is the body that will register the LPA and provide support to Attorneys in their role.

Court of Protection

The Royal Courts of Justice

Thomas More Building

Strand, London

WC2A 2LL

Tel: 0300 456 4600

For FAQs email: copfaq@hmcts.gsi.gov.uk

Code of Practice

<http://www.justice.gov.uk/downloads/guidance/protectingthe-vulnerable/mca/mca-code-practice-0509.pdf>

The Court of Protection supports the OPG in the registration of LPAs and will appoint a Deputy for the Donor if all Attorneys are unable or unwilling to act and the Donor no longer has capacity to appoint their own replacement Attorneys.



Plan - Perform - Protect

Penguin Wealth Planners Ltd.
Penguin House, Brigantine Place, Cardiff, CF10 4LN
Tel: 02920 450 143
Web: www.penguinwealth.com
Email: info@penguinwealth.com

Penguin Wealth Planners Ltd. are authorised and regulated by the Financial Conduct Authority
(FCA no. 830057).