

A Guide to

Lasting Powers of Attorney

leonard
gray



- Understand what is a Financial Decisions LPA.
- Understand what is a Health and Care Decisions LPA.
- Understand who should act as your Attorney and the need to register the LPA.

This Guide has been designed to assist you with some of the general issues and to answer questions that you may have. This Guide is only intended to be a general overview of the law in relation to Lasting Powers of Attorney. Legal advice should always be obtained from Leonard Gray in application to a particular case.

Section

1

What is a Lasting Power of Attorney?

In this Section of the Guide we look at what a Lasting Power of Attorney ('LPA') is and the two different types that are available.

A LPA allows a person (the 'Donor') to choose one or more people they trust (the 'Attorney(s)') to make decisions about things such as healthcare or finances on your behalf at a time in the future when you may lack the physical or mental capacity to make those decisions yourself. There are two types of LPA that can be made which are as follows:

1. A Health and Care Decisions LPA

This allows your Attorney to make decisions on your behalf about your health and personal welfare, such as:

- deciding where your permanent place of residence should be;
- deciding what care and accommodation may be appropriate for you;
- consenting to any medical treatment or procedure or therapy of whatever nature for your benefit and providing access for that, or refusing such consent;
- deciding, alone or with others, on the level of care which you may require;
- making decisions about your dress, diet and personal appearance as appropriate;
- choosing your social and cultural activities;
- arranging for you to undertake work, education or training; and

- taking you on holiday or authorising someone else to do so.

A Health and Care Decisions LPA does not allow your Attorney to make decisions about your financial matters. Health and Care decisions can only be taken on your behalf when you lack the capacity to make them yourself, for example if you are ill, unconscious or because of the onset of a condition such as dementia.

It is also important to remember that treatment is ultimately a clinical decision and your Attorney cannot demand treatment which doctors do not believe is necessary or clinically worthwhile.

If you want your Attorney to have the power to make decisions about 'life-sustaining treatment' you have to expressly give your Attorney the power to make such decisions. Life-sustaining treatment means any treatment that a doctor considers necessary to sustain your life and it will depend on the circumstances of a particular situation. If you do not give your Attorney the ability to make decisions about life-sustaining treatment, these decisions will be made by a health professional instead.

Examples of life-sustaining treatment might include a serious surgical operation, receiving chemotherapy or an organ transplant. It can also include more day-to-day procedures or treatments such as a course of antibiotics if you have breathing problems and develop pneumonia. Whether treatment is life sustaining or not will depend on the situation. The important factor is if the treatment is needed to keep you alive.

2. A Financial Decisions LPA

This allows your Attorney to make decisions on your behalf about your property and financial affairs, such as:

- buying or selling any property you own;
- opening, closing or operating any bank, building society or other account containing your funds;

- claiming, receiving and using all benefits, pensions, and allowances, on your behalf;
- making all tax returns and adjusting and settling any claim for tax;
- paying your household expenses, private medical care or residential care costs;
- making gifts on your behalf, including any limits on the size of such gifts or the people that receive them, subject to any restrictions; and
- implementing tax planning or similar arrangements (this may need an application to the Court of Protection).

A Financial Decisions LPA does not allow your Attorney to make decisions about your Health and Care decisions. Your Attorney can manage your finances and property while you still have capacity as well as when you lack capacity. For example, it may be easier for you to give someone the power to carry out tasks such as paying your bills or collecting your benefits or other income. This might be easier for lots of reasons: you might find it difficult to get about or to talk on the telephone, or you might be out of the country for long periods of time.

Your Attorney will be able to make exactly the same kind of decisions you can make now about your money and property, unless you include any restrictions or guidance in the LPA. They can even make limited gifts from your money as long as you have not said they cannot by including any restrictions in your LPA. You can exclude the power to make gifts from your LPA.

However, your Attorney can only make gifts to people who are related to or connected with you on occasions such as birthdays, wedding or civil partnership anniversaries, or any other occasion when you would usually give gifts to your family, friends or associates. The value of any gift given by your Attorney must be reasonable compared to everything you own.



The next Section of this Guide details the considerations the Donor should have when entering into an LPA.

Section 2

The Attorney

This Section of the Guide considers the various issues concerning the creation of an LPA including the selecting of an Attorney or more than one Attorney and restrictions that can be placed on Attorneys.

1. Choosing Your Attorney(s)

When choosing an Attorney, it is important that you are confident that they know what you want and that you are comfortable that they will be making decisions on your behalf. It is important to choose someone you know well, someone you trust to make decisions in your best interests and someone who is happy to take on the role.

You can choose and appoint a family member, friend or anyone willing to act for you, providing they are aged over 18. You can also appoint your spouse, partner or civil partner as your Attorney if you wish.

If you choose your spouse or civil partner, it is important to remember that should your marriage or civil partnership be dissolved or annulled in the future then the LPA will cease, unless:

- you have included a condition within the LPA that your spouse or civil partner can continue to act as your Attorney; or
- you have appointed a replacement Attorney able to replace them (see below); or
- you have appointed Attorneys to act together and independently (see below).

You can appoint as many Attorneys as you wish, but it is important that you consider how you are appointing them. You will need to specify whether you want to appoint your Attorneys to act:

- Jointly

Attorneys appointed together must always act together. They must all agree before doing anything on your behalf. If one Attorney does not agree with a proposed action, that decision cannot be made. Donors often use this as a safeguard to ensure that all those they trust to make decisions for them are in agreement. However, you must remember that this could delay decisions that may need to be taken at short notice.

- Jointly and Severally

Attorneys appointed jointly and severally can act on their own and they can act together. This means that any one of your Attorneys appointed together and independently can decide on a particular issue. This can be useful if one of your chosen Attorneys is not available all of the time to help make decisions on your behalf, for example, if they work abroad for long periods of time. Also, if one of the Attorneys becomes ill, dies or loses the capacity to act, the LPA will still continue and the remaining Attorneys can continue to act.

- Jointly for Some Decisions, Jointly and Severally for Other Decisions

You can also appoint your Attorneys to act jointly in respect of some matters and jointly and severally in respect of others. For example, you could appoint your Attorneys to act together when deciding where you live but appoint them to act together and independently when deciding on whether to consent to medical treatment.

You will need to set out clearly what these matters are in your LPA when you appoint your Attorneys.

2. Choosing Your Replacement Attorney(s)

Replacement Attorneys are people you can appoint to act in place of an Attorney who is no longer able to or does not wish to make decisions as your Attorney. For example, you may choose your spouse as your Attorney, then choose your son/daughter as a replacement if your spouse should die or can no longer act on your behalf. As before, it is important to choose someone you know well and trust to make decisions in your best interests in the same way that you selected your first choice Attorney.

You can choose as many replacements as you want. They can act in place of any of your Attorneys but you must set out how they are to be appointed (i.e. together or together and independently).

If you want to appoint a replacement Attorney, you do so at the time you make your LPA and your replacement Attorney has to sign up to taking on this role like any other Attorney. Your replacement Attorney can replace any of your chosen Attorneys and will play no part in making decisions for you unless they are needed to replace your original Attorney.

However, if you have more than one Attorney you can specify who you wish your replacement Attorney(s) to replace or who they cannot replace. You can include a condition when appointing a replacement Attorney, stating that the replacement is to replace:

- any Attorney not wishing to or able to carry out their duties;
- a specific Attorney (of your choice), should that Attorney no longer wish to or is not able to act on your behalf; or
- any Attorney not wishing to or able to carry out their duties except a specified Attorney (of your choice).

3. Attorneys: Out-Of-Pocket Expenses and Charging For Services

Your Attorney will be able to claim out-of-pocket expenses for things such as telephone calls, postage charges and transport costs that are incurred whilst specifically undertaking their duties as your Attorney. The expenses must be in direct proportion to the size of your estate and the duties they undertake.

However, it is entirely up to you whether you want your Attorney to receive payments/fees specifically for taking on the role of Attorney and acting on your behalf. If you do decide that your Attorney should receive payment for acting on your behalf, or you appoint a professional, for example a solicitor or an accountant, it would be wise to make a note of the agreed fees within LPA form.

4. Attorneys: Preferences and Instructions

If you make a LPA that does not contain any preferences and instructions, once the LPA is registered your Attorney will be able to do anything that you can do now in relation to your Health and Care decisions and/or your Financial decisions, depending on which LPA you have made.

You may wish therefore wish to include guidance regarding what things to take into consideration when making decisions on your behalf or you may include restrictions preventing your Attorney from specifically making some of the decisions listed above.

Note: You should think very carefully about how you word any preferences or instructions that you include in your LPA. For example:

- Financial Decisions LPA

In order to ensure that anybody dealing with your Financial decisions, such as banks, building societies and solicitors, can follow your instructions effectively in the future, the instruction should be straightforward, easy to understand and capable of being put into practice.

- Health and Care Decisions LPA

If you are intending to include any restrictions or guidance on a Health and Care Decisions LPA then we strongly advise you to discuss the types of instructions you want to include in your LPA with a health or social care professional.

The next Section of this Guide reviews the requirements for a Certificate Provider and their responsibilities on your behalf regarding the LPA.

Section 3

The Donor's Mental Capacity and a Certificate Provider

This Section of the Guide details how a LPA will not be valid without someone certifying that you have sufficient mental capacity to make the document.

1. Mental Capacity of the Donor

It is necessary for the Donor to have sufficient mental capacity to be able to execute a Lasting Power of Attorney. The Mental Capacity Act 2005 sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a 'decision-specific' test. The reason for the inability to make a decision must be because of an impairment of, or disturbance in the functioning of, the mind or brain, whether this be permanent or temporary.

Nobody should be considered 'incapable' as a result of a particular medical condition or diagnosis. A lack of capacity cannot be established merely by reference to a person's appearance, or age, or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity.

The Mental Capacity Act 2005 sets out four criteria for deciding whether a person lacks capacity. Taken together these constitute a capacity test. To fail it he or she must be unable:

- to understand the information relevant to the decision; or
- to retain that information; or
- to use or weigh that information as part of the process of making the decision; or
- to communicate the decision (whether by talking, using sign language or any other means).

For some people with impaired cognitive functions, their ability to meet some or all of these criteria will fluctuate over time. Some people, for example those in the early stages of dementia, are able to retain information for a limited period only. The fact that a person is able to retain the information relevant to a decision for a short period only may not prevent him or her from being regarded as able to make the decision. In some cases it may be necessary to seek a view from a medical professional.

2. What is a Certificate Provider?

A Certificate Provider is a person that you must select to complete part of the LPA form confirming that you understand the LPA and that you are not under any pressure to make it. The certificate is a vital part of the LPA document. Without it, the LPA is not valid and cannot be registered.

If your Certificate Provider has any concerns about your understanding of the LPA through lack of the appropriate mental capacity or other reason or feels that you have been influenced or pressured into making it, they can contact the Office of the Public Guardian to make them aware of their concerns.

There can be two types of Certificate Provider as follows:

- **Category A: Knowledge Certification**

A knowledge-based Certificate Provider is someone that you know personally and has done so for at least two years.

- **Category B: Skills Certification**

A skills-based Certificate Provider is someone who considers that they have the relevant professional skills and expertise to certify your LPA. They can be one of the following:

- a registered healthcare professional (including a GP);
- a solicitor, barrister or advocate;
- a registered social worker; or
- an Independent Mental Capacity Advocate.

You can also pick someone not listed on the form. However, they must consider that they have the relevant professional skills and expertise to provide a certificate and be able to specify on the certificate what their relevant professional skills and expertise are. Skills-based certificate providers are entitled to charge a fee for providing the certificate.

However, you cannot select anyone from the following list to be a Certificate Provider:

- a member of your or your Attorney's family;
- a business partner or paid employee of yours or your Attorney(s);
- an Attorney appointed in the LPA;
- an unmarried partner, boyfriend or girlfriend of either you or your Attorneys; or
- the owner, director, manager, or an employee of a care home in which you currently live or their family member

The next Section sets out the requirements to register a LPA with the Office of the Public Guardian.

Section

4

Registration of the LPA

This Section of the Guide highlights the necessity to register the LPA before it can be used by an Attorney.

The LPA cannot be used until it has been registered with the Office of the Public Guardian.

Your Attorney can only use your LPA when it has been correctly completed, signed, witnessed and has been registered with the Office of the Public Guardian.

1. When to Register the LPA

Your LPA can be registered any time after you have made it and cannot be used until it has been registered. The benefit of registering the LPA at the time of creation is that it will be ready to be used by your Attorney whenever it may be needed.

2. Who Can Register the LPA?

The Attorney(s) or the Donor, can apply to register an LPA, providing the correct forms are completed and the named persons listed on your LPA are notified (see below). You can appoint someone else such as a legal professional to make the application on your behalf if you wish.

3. Can I Still Make Decisions if the LPA is registered?

Yes. Registration of an LPA does not mean that you lack capacity. You are assumed to have capacity to act unless it is shown that you do not. Your Attorney is always obliged to help you to make as many of your own decisions as you possibly can. If you do lack

the capacity to make a decision, your Attorney can act for you in your best interests according to the contents of your LPA.

4. Optional Notification an Individual of Your LPA – The Right to Object

A named person is someone you specify in your LPA who you might want to be notified when an application is made to register your LPA. Selecting people to notify of an application to register is one of the key safeguards of an LPA.

Listing people, known as named persons, allows you to decide at the time you make your LPA who you would like to be notified that registration of your LPA is taking place. Once notified, if the people you choose have concerns about the registration of your LPA, for example if they feel that you were put under pressure to make it, they can object to the LPA being registered.

There is no requirement to notify anybody of the registration of the LPA but you can select up to five people and it is up to you to select the people you want to be notified. However, it is important to remember that the person/people you choose should know you well enough to be able to raise any concerns they may have about an application to register your LPA. You can choose family members or friends or, if you prefer, someone else such as a health or social care worker that knows you.

Only the Donor, the named person(s) or Attorney(s) are able to object to the registration of an LPA.

Objections by a named person(s) or an Attorney(s) will have to be either:

a) On Factual Grounds.

The Office of the Public Guardian can be asked to stop the registration if:

- the Donor is bankrupt or interim bankrupt (for Financial Decisions LPAs only);
- the Attorney is bankrupt or interim bankrupt (for Financial Decisions LPAs only);
- the Attorney is a trust corporation and is wound up or dissolved (for Financial Decisions 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.

The Office of the Public Guardian will require appropriate evidence to support any factual objection raised.

b) 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 purported to be created by the instrument 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 created by the instrument 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.

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

The next Section of this Guide will look at how to make an appointment.

Section 5

Making an Appointment

If you would like to discuss the issues raised in this Guide further then please contact a member of our team: **Chris Kelly**, **Jenna James** or **Sigourney Rutkowski** who will be happy to do so.

T: 01245 504 904

E: ckelly@leonardgray.co.uk / jjames@leonardgray.co.uk
srutkowski@leonardgray.co.uk

A: Leonard Gray LLP 72 -74 Duke Street Chelmsford Essex CM1 1JY

We are based in Chelmsford town centre, a two minute walk from Chelmsford Rail Station with car parking and disabled access at the rear of our office for the use of clients.

Open Monday to Friday, 9am to 5pm. Alternative times by arrangement.

Other available Guides from Leonard Gray:

- **A Guide to Administering an Estate**
- **A Guide to Agricultural Property Relief and Business Property Relief**
- **A Guide to Care Home Funding and Home Protection Schemes**
- **A Guide to Deputyship on the Loss of Mental Capacity**
- **A Guide to Inheritance Tax Planning and Solutions**
- **A Guide to Making a Will**
- **A Guide to Registration and Use of an Existing Enduring Power of Attorney**
- **A Guide to Trustees Powers and Duties**

