

# Guidance on Lasting Powers of Attorney

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## Types of Lasting Power of Attorney

A Lasting Power of Attorney ("**LPA**") is a legal document that allows you to give another person or persons (known as 'attorneys') authority to make decisions on your behalf.

There are two types of LPA:

- 1 **Lasting Power of Attorney: Financial Decisions:** this allows attorneys to make decisions on your behalf about your property and financial affairs, for example paying bills, selling your property, and administering your bank account. NB. an LPA only covers such assets in England and Wales. If you have assets elsewhere, similar powers of attorney for that country may be available; and
- 2 **Lasting Power of Attorney: Health and Care Decisions:** this allows for decisions to be made in your behalf in relation to medical treatment, care, medication, where you live, and even life sustaining treatment.

Once prepared, signed and registered, an LPA provides the best way to ensure that somebody you trust is authorised to make decisions for you should you require assistance or lack mental capacity.

## Scope of an LPA

Your attorneys can **only** use either type of LPA once it is registered with the Office of the Public Guardian ("**OPG**"), see more details below.

- **Under a Financial LPA**, once it is registered with the Public Guardian, you may authorise your attorneys to act for you if you require their assistance (even if you have mental capacity). Alternatively, you can select on the LPA that your attorneys can only administer your financial affairs if you have lost mental capacity.
- **Under a Health and Care LPA**, once it is registered with the Public Guardian, your attorneys may only make decisions for you once you have **lost mental capacity** and can no longer make health and care decisions yourself.

## What happens if you do not make an LPA?

If you lose mental capacity and you do not have a valid LPA in place (or Enduring Power of Attorney) then it may be necessary for an application to be made to the Court of Protection for the appointment of a Deputy for you. A Deputy is a Court appointed person who would be given authority by the Court to make certain financial decisions for you. Other decisions may have to be made by the Court.

It is possible for a Health and Care Deputy to be appointed by the Court, but this happens in far fewer cases.

The process of a Deputy being appointed can be time consuming and costly. We therefore recommend to all of our clients that they consider putting in place LPAs to avoid this.

## Who signs the LPA?

The LPA is signed by the donor (the person making the LPA) and the attorneys. Both types of LPA must also be signed by an **independent certificate provider**, see below.

## Choosing your Attorneys

You can have one or more attorneys. An attorney should be somebody trust who is at least 18 years old and has full mental capacity, or a trust corporation. An attorney on a financial LPA cannot be a bankrupt or subject to a debt relief order.

If an attorney under a financial LPA *becomes* bankrupt or subject to a debt relief order, after the LPA is set up, their appointment as your attorney must cease and the OPG must be notified. This does not affect their appointment under a health LPA.

If you chose your spouse as your attorney, and you later divorced, the dissolution of marriage will revoke the appointment of the spouse as attorney unless the terms of the LPA specifically provide otherwise.

If you choose more than one attorney, you must decide whether:

- your attorneys should act together in all circumstances, known as **jointly**; or
- your attorneys should act together and independently, known as **jointly and severally**.

The latter is the most common. It can provide more flexibility as it means that attorneys have the option of acting together but can also act alone, if one were on holidays or otherwise unavailable.

## Replacement Attorneys

Both types of LPA also allow the ability to name one or more replacement attorneys in case an original attorney is unable or unwilling to continue acting for you. It is not compulsory to have a replacement attorney but it is advisable if you are only appointing one attorney in the first instance.

## Certificate Provider

An independent person must complete and sign a certificate in both forms of LPA to confirm that, in their opinion, you are making the LPA of your own free will, that you understand its purpose and the powers you are giving your attorneys. This is an important safeguard and your LPA cannot be registered unless the certificate is completed.

Typically, we as your solicitor would act as your certificate provider. Alternatively, someone who has known you for over 2 years can act as certificate provider in certain circumstances.

## Paying your Attorneys

An attorney is entitled to be reimbursed for out-of-pocket expenses incurred in carrying out their duties. Attorneys are not usually entitled to be paid for their time, unless they are professional attorneys such as solicitors.

## Registration of the LPA

Remember, an LPA cannot be used in any circumstances unless it is registered with the OPG. Most clients will therefore register the LPA(s) straight away so that it is available to be used in an emergency.

The disadvantage of registering later, is that the registration process can take a number of months with the OPG and therefore, if there was an emergency, your LPA would not be able to be used.

## Cancelling your LPA

You can cancel your LPA even after it is registered as long as you have the mental capacity to do so. You need to take formal steps to revoke the LPA including notifying your attorneys and the OPG.

## Decisions your financial attorney(s) can make for you

An attorney for financial affairs may make any decision that you could make about your property and affairs e.g. buy or sell property, manage investments or carry on a business and may access personal information. This is subject to any restrictions you place in the LPA and any decisions which are not permitted by the Mental Capacity Act 2005.

Importantly some “out of the ordinary” decisions will require the approval of the Court of Protection before the attorney can carry them out. For example an attorney **must** make an application to Court if they wish to:

- make gifts from the donor’s funds which exceed the limited scope permitted in the Mental Capacity Act 2005;
- make loans to members of the donors family;
- make investments in the donors own business;
- make a sale or purchase of the attorneys property at an undervalue; or
- any other transaction where there is a potential conflict between the interest of the donor and the interests of the attorney.

The above list is not exhaustive and the attorneys should seek independent legal advice when they are considering making any decision which could potentially be seen as causing a conflict of interest.

*Please see our **separate guidance notes** specifically about your attorneys’ duties.*

## DIY LPAs

The OPG has provided an online tool to allow people to make LPAs themselves, without the assistance of a solicitor. This can be found here: [www.gov.uk/power-of-attorney/make-lasting-power](http://www.gov.uk/power-of-attorney/make-lasting-power). If you do attempt to prepare them yourself, we strongly recommend you read the full guidance provided on the OPG website prior to submitting the LPAs for registration.

### Our fees

Clarion’s professional fees are set out below and include preparing and registering the LPAs with the OPG so that they are activated ready to be used. The OPG also charges **£82 per LPA** for registration which is in addition to our fees below. Other disbursements may also apply.

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| • One LPA (finance or health)                        | <b>£500 plus VAT</b>  |
| • Two LPAs   | <b>£900 plus VAT</b>  |
| • Four LPAs (i.e. a couple having both types of LPA) | <b>£1600 plus VAT</b> |

The information set out in this document is intended as guidance only and does not constitute legal advice. If you require legal advice, please contact a member of the Private Wealth team.