

## Lasting Powers of Attorney and Deputyship Orders

A lasting power of attorney (LPA) and a deputyship order are legal instruments which enable persons to make decisions on another's behalf, if and when they no longer have, or never have had the legal capacity to manage their own affairs.

A second form of attorneyship still exists although it is no longer possible for these to be created. These are called Enduring Powers of Attorney (EPA).

There are two sorts of attorneyship or deputyship:

Firstly, to manage and make decisions in respect of property and financial affairs.

Secondly, to make decisions in respect of health and welfare.

The point of making an LPA is to make provision in the future for another to be able to help and/or manage a person's affairs. It is not always possible to predict what might happen in the future. Typically an example of when an LPA might be made is for a person who is becoming less able to manage themselves. Often this is someone who may have a family history of dementia, or someone for example with Parkinson's disease, but not exclusively so.

If a person is no longer able to make an LPA because they lack capacity, then it would be necessary to make an application to the Court of Protection for an order to ensure someone is made a deputy on their behalf. This person or persons could then make decisions for that person. This would be more expensive, would take longer and would usually require the services of a solicitor. So it is worth giving some thought to the making of provision for future needs at an appropriate time.

Some people have never had capacity, that could include, e.g. persons who suffered medical negligence affecting their cognitive ability at birth or for example someone with learning difficulties. Some people lose their capacity, for example as a result of, for example, a head injury sustained in a serious road traffic accident. In that instance they would need to have a deputy appointed to help them manage their affairs. (1)

## Applying for a power of attorney

This can be done on line to the **Office of the Public Guardian**, via the forms to be found on the government website. "**Make, register or end a lasting power of attorney**"

<https://www.gov.uk/power-of-attorney>.

It is also possible to apply on the paper forms to be found on the government website.

The person giving someone a power of attorney is called the **donor**. The person receiving the POA is called the **donee**.

The donor must be over 18 and have the legal capacity to make an LPA.

In practice, capacity to make an LPA means the donor should be able to understand:

- What an LPA is
- What are his/her reasons for making the LPA
- Who has he/she chosen as attorneys
- Why have those people been chosen
- The LPA must be registered with the Office of the Public Guardian for it to be effective.
- The donor should understand that he/she can revoke it at any time as long as he/she has the mental capacity to do so.

The donor is required to sign the LPA to show they have understood it.

The attorneys need to sign the LPA to say they understand their duties.

## Independent Certificate Provider

The LPA needs to be witnessed by an independent certificate provider whose duty it is to confirm, as far as they are aware, the donor understands the LPA's purpose and the scope of the authority under it. Also, that no one has used fraud or undue pressure to make or trick the donor into making the LPA and there is not any reason why it should not be made.

The certificate provider plays an important role in safeguarding against abuse. He or she should be an independent third party. This can either be a person known to the donor for at least two years or a professional such as :

A registered health care professional ;  
A barrister, solicitor or advocate ;  
A registered social worker;  
Or an independent mental capacity advocate.

Family members of the donor or the donees may not give such a certificate, they are disqualified from doing so.

OPG guidance suggests the certificate provider ask the following :

- What is your understanding of what an LPA is ?
- What are your reasons for making an LPA?
- Why have you chosen me to be your certificate provider?
- Who have you chosen to be your attorneys?
- Why them?

There was a very recent case handed down in December of last year (TA v The Public Guardian [2023] EWCOP 63 ) In this, the judge found the certificate provider did not make a proper effort to talk to the donor about questions set out above and form an opinion about the LPA. Therefore the judge set aside the LPA and it was no longer valid.

### Attorneys

The donor may appoint a single attorney or joint attorneys. Joint attorneys who act jointly so must always act together. Joint attorneys appointed jointly and severally can act together and/or independently.

It is worth giving some thought to who the attorneys should be. If family members , would they be able to collaborate effectively together to make appropriate decisions? Sometimes it may be appropriate to have a family member or friend, and a professional such as a solicitor.

The act governing LPAs and deputyships, is the Mental Capacity Act 2005. (MCA)

The starting point is that any actions or decisions taken must be in the **best interest** of the donor. The donor must also be consulted about decisions made on their behalf unless they are no longer able to communicate their view.

Donees and deputies are obliged to familiarise themselves with their duties and responsibilities under the MCA. There is a Code of Practice to the MCA published by the government and available on line.

<https://assets.publishing.service.gov.uk/media/5f6cc6138fa8f541f6763295/Mental-capacity-act-code-of-practice.pdf>

Hard copies of the code may be purchased from the government stationary office : [www.tsoshop.co.uk](http://www.tsoshop.co.uk) telephone orders: 0870 6005522.

Chapter 7, pages 114 to 136 set out information about being an attorney including enduring powers of attorney.

Chapter 8 sets out the role of the Court of Protection and deputies. Pages 137 to 157.

One of the areas which attorneys often struggle with is what gifts can be made to people or charities from the donor's money by attorneys . This is an important area to be aware of. Pages 126 and 127 of the code of practice deals with this.

*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 and anniversaries*
- *any other occasions when families friends or associates usually give presents."*

If the donor regularly gave to charities that is permitted but the value of any gift or donation must be reasonable and take into account the size of the donor's estate.

**The Alzheimer's Society** website ( [alzheimers.org.uk](http://alzheimers.org.uk) ) has some helpful information sheets about Powers of Attorney and deputyships.

**The** [mencaptrust.org.uk](http://mencaptrust.org.uk) website also has useful information and although it is written from the perspective of health and welfare LPAs the general principles are the same.

I have included the judgement in a court case called Re: GM 2013 which makes interesting reading and which is really a lesson in what not to do when acting for another as an attorney (although this was in fact a deputyship.) Read the judge's comments!

<http://www.bailii.org/ew/cases/EWCOP/2013/2966.html>

( see separate document)

#### Sources

Assessment of Mental Capacity - A Practical Guide for Doctors and Lawyers : Alex Ruck Keene -published by The British Medical Association and the Law Society. 5th Edition 2022.

The Mental Capacity Act 2005

The Mental Capacity Act 2005 Code of Practice : published by The Stationary Office on behalf of the Department for Constitutional Affairs. First Edition 2007.