

Factsheet 22

Arranging for someone to make decisions on your behalf

June 2017

About this factsheet

This factsheet looks at how you can arrange for other people to make decisions about your health, care and finances if you think you may lose the mental capacity to do this in future. This is usually family members or friends, but it could be a professional such as a solicitor.

You create this power by setting up a Lasting Power of Attorney (LPA). It can be arranged when needed via a Deputyship where no LPA has been arranged. A person can become an Appointee to deal with your social security benefits. There is information about when other people have to make decisions if you lack mental capacity in a hospital or other setting and your related advocacy rights.

The role of the Court of Protection and Office of the Public Guardian are explained. These bodies oversee the system under the *Mental Capacity Act 2005*.

The factsheet deals with arrangements for others to help with your finances while you are able to supervise them and make your own decisions.

The information in this factsheet is applicable in England and Wales. If you are in Scotland or Northern Ireland, please contact Age Scotland or Age NI for their version of this factsheet. Contact details can be found at the back of this factsheet.

Contact details for any organisation mentioned in this factsheet can be found in the Useful Organisations section.

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1 Recent developments

In April 2017, the individual LPA registration fee was reduced to £82 from £110 and the repeat submission fee reduced to £41 from £55.

There is a scheme to give a partial refund to anyone who paid to register an LPA or EPA between 1 April 2013 and 31 March 2017. You must claim your refund by 31 January 2021 and can submit a claim online. If the donor has died, only the executor of the will or administrator of the estate can claim a refund and they must submit specified documents first.

For information go to Gov.uk or call the refunds helpline 0300 456 0300.

2 Information sources

This factsheet is based on the *Mental Capacity Act 2005* ('the Act') and the *Mental Capacity Act 2005 Code of Practice* ('the Code'). The Act must be adhered to and the Code taken into account as guidance when decisions are made on behalf of someone who lacks mental capacity.

You can find the Act at www.legislation.gov.uk/ukpga/2005/9/contents and the Code at www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

This factsheet is also based on information and guidance provided by the Office of the Public Guardian and the Court of Protection.

3 What is mental capacity?

Mental capacity means you are able to understand and retain information and make a choice based on that information.

The Act aims to protect people who lack mental capacity and who may not be able to make certain decisions for themselves. This could, for example, relate to conditions such as dementia, acquired brain injury or learning disabilities.

3.1 Mental capacity is decision specific

One way to approach this is to understand that mental capacity is decision specific. For example, you may not be able to decide on a major or complex issue but can decide smaller or more straightforward ones.

Your capacity may vary depending on the type of illness or condition you have or it might change from day to day, so no general presumption of a lack of capacity should be made.

Taking time to understand something or communicate can be mistaken for a lack of mental capacity. If you have difficulty communicating a decision, attempts should always be made to overcome those difficulties before concluding you do not have capacity.

3.2 The legal test for capacity

The Act sets a legal test to decide whether you lack the mental capacity to make a particular decision or express your views. You must have an impairment or disturbance in the functioning of your mind or brain.

The test includes your inability to:

- understand information given to you
- retain that information long enough to make a decision
- weigh up information to make a decision
- communicate the decision – via all possible means.

You must be appropriately supported in any capacity assessment.

3.3 Who decides whether I have mental capacity?

There is no specific person required to assess mental capacity in all of the situations where the question could arise. Anyone can potentially do this, for example a medical professional, lawyer, relative or carer.

However, they must be the appropriate person for the type of required decision or action. There must be a reasonably held belief that you lack the mental capacity to make the decision for yourself and that it is in your best interests.

For most day-to-day decisions, there is no formal process. For important decisions such as medical treatment, the medical professional delivering treatment must decide whether you have the capacity to consent or not. If in doubt, they should get a second opinion from a doctor or other appropriate professional, perhaps someone who knows you well.

For legal matters such as a will, a solicitor must judge whether you have the mental capacity to understand the meaning of the will. A solicitor is often involved in setting up a Lasting Power of Attorney and needs to decide whether you understand what it is and that no undue influence is being placed on you to set one up.

The Court of Protection has powers to decide if you have the mental capacity to make a decision and to resolve disputes (see section 7).

3.4 Links to social care legislation

In **England**, the *Care and Support Statutory Guidance* supports the *Care Act 2014* and states where there is concern about someone's mental capacity, an assessment of their capacity must be made alongside their general needs assessment. This means they may be entitled to extra support about their assessment and any subsequent decisions about meeting their needs, for example from an Independent Mental Capacity Advocate (see section 10).

In **Wales** there are various Code of Practice documents that accompany the *Social Services and Well-being (Wales) Act 2014* in Wales. Regarding mental capacity, the same rules apply as in England.

3.5 Best interest principles and decisions

Anyone supporting someone lacking mental capacity must act in their best interests. There is no single definition of this concept within the Act. The Code sets out principles about mental capacity, sometimes called the '*best interest*' principles:

- **A presumption of capacity** – you have the right to make your own decisions and must be assumed to have capacity to do so unless it is proved otherwise.
- **The right to be supported to make your own decisions** – all practicable steps must be taken to help you make your own decision before anyone concludes you are unable to do so.
- **The right to make eccentric or unwise decisions** – you are not to be treated as being unable to make a decision simply because the decision you make is seen as unwise.
- **Best interests** – any decision made or action taken on your behalf if you lack capacity must be made in your best interests.
- **Least restrictive intervention** – anyone making a decision on your behalf if you lack capacity should consider all effective alternatives and choose the one least restrictive of your basic rights and freedoms.

Anyone involved in supporting someone who lacks mental capacity must adhere to these principles.

Best interest decisions

There may be situations where a group of professionals need to make a decision on your behalf if you lack mental capacity. For example, this may be a multi-disciplinary team on a hospital ward or in a social care context.

A list of considerations that must be taken into account under Section 4 of the Act (and the Code) requires that they must:

- **Encourage participation** - do whatever is possible to permit and encourage you to take part, or to improve your ability to take part, in making the decision.
- **Identify all relevant circumstances** - try to identify all the things you would take into account if making the decision or acting for yourself.
- **Find out your views** - try to find out your views, including past and present wishes and feelings, whether expressed verbally, in writing or through behaviour or habits; any beliefs and values (e.g. religious, cultural, moral or political) likely to influence the decision; and other factors you would consider if making the decision or acting for yourself.
- **Avoid discrimination** - not make assumptions about your best interests simply on the basis of your age, appearance, condition or behaviour.

- **Assess whether you might regain capacity** - consider whether you are likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?
- **If the decision concerns life-sustaining treatment** - not be motivated in any way by a desire to bring about your death. They should not make assumptions about your quality of life.
- **Consult others** - if it is practical and appropriate to do so, consult other people for their views about your best interests and to see if they have information about your wishes, feelings, beliefs and values.

In particular, consulting anyone previously named by you to be consulted on either the decision in question or similar issues. This includes anyone caring for you (relatives, friends, others with an interest in your welfare); an attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney; a deputy appointed by the Court of Protection.

For decisions about major medical treatment or where you should live, if no-one fits the categories above, an Independent Mental Capacity Advocate must be consulted. When consulting, you still have a right to keep your affairs private, so it would not be right to share every piece of information with everyone.

- **Avoid restricting your rights** - see if there are other options that may be less restrictive of your rights.

The Code requires all these factors to be taken into account and weighed up to work out what is in your best interests. Section 5 of the Act provides legal protection for those making best interest decisions if the required standards are met.

The *Mental Capacity Act 2005 in Practice – learning materials for adult social workers* has useful case examples on best interest principles. See www.gov.uk/government/publications/learning-resources-mental-capacity-act-2005-mca-in-social-work

4 Lasting Power of Attorney – planning for the future

If you want someone to act for you if you lose mental capacity in the future, you can create a '*Lasting Power of Attorney*' (LPA). This is a legal document appointing one or more people to act for you if you become incapable of making decisions.

If you do this, you are called '*the donor*' and the person acting for you '*the attorney*'.

LPAs are a legal power introduced by the Act to replace the previous Enduring Powers of Attorney (EPA) system. You cannot set up new EPA's, but EPA's set up before 1 October 2007 are valid and can still be registered (see section 5).

An LPA must be created while you are capable of understanding its nature and effect. There are two types of LPA:

- a '**financial decisions LPA**' giving your attorney authority to make decisions about your financial affairs
- a '**health and care decisions LPA**' giving your attorney authority to make decisions about your health and personal care.

An important distinction between the two is a financial decisions LPA can be used by the attorney whilst you still have mental capacity to make your own decisions, whereas a health and care decisions LPA can only be used once you lose capacity to make relevant decisions.

You can set up a financial decisions LPA that includes a restriction only allowing someone to act for you if you lose mental capacity.

There are separate forms to apply and if you want your attorney to have the power to make both types of decision, you must set up two separate LPAs, even if the same person is appointed as attorney for both.

Your LPA must be registered to be used

An LPA document must be registered at the Office of the Public Guardian before it can be used. This can be done before or after you lose mental capacity. If you want, you can register an LPA while you still have capacity to do so, to avoid delay when it needs to be used.

If you lose capacity before an LPA is registered, your attorney needs to register it. It is important to be aware that you grant your attorney a power to decide when to register an LPA in future if you do not do this immediately. This is when they become aware that you are no longer able to make decisions under the scope of the specific LPA you created and within any requirements, guidance or limitations set out in the LPA.

The fee for registering each LPA is £82.

If you do not register your LPA immediately

If you do not register your LPA immediately, your chosen attorney has to do this in future if you lose the capacity to make decisions. This could be the first of many decisions they take on your behalf. It can mean there are delays before they can start acting on your behalf.

You can set out requirements for others to be notified at this time, who can then object if they have concerns. Or you can have preferences and instructions set down that must be followed e.g. a requirement for supporting expert medical opinion to be obtained.

You can set down future restrictions and guidance e.g. on use of your assets and how your attorney may act.

Your attorney must make decisions in your best interests as defined in the Act and its supporting Code and only act within the authority you have granted to them.

4.1 Choosing attorneys

An attorney must always act in your best interests and within the authority granted to them.

For a **financial decisions LPA**, the attorney:

- must be over 18 years of age
- must not be bankrupt, interim bankrupt or subject to debt relief at the time the LPA is made
- can be an individual or a trust corporation (e.g. part of a bank)
- should not be a paid care worker (e.g. a care home manager) unless there are exceptional circumstances (e.g. they are the only close relative of the donor).

For a **health and care decisions LPA**, the requirements are the same except the bankruptcy rule does not apply and the attorney must be an individual.

Choosing an attorney is a vital decision, and you need to think carefully about who to give the power to.

Useful questions to think about include:

- Are the people you wish to appoint willing to be appointed?
- Can you trust them to act in your best interests?
- Might there be disagreements or problems between friends and/or family?
- Would it be a good idea to talk to family and tell them what you plan and why?
- Do you want to consider more than one attorney?
- Do you want to name a replacement attorney to take over from the original attorney (for example if the original attorney dies)?
- Do you want different attorneys appointed for different things? This can be specified in the LPA.
- Do you wish to limit the attorney's authority?

You can give an attorney a general authority or set up specific limitations within your LPA.

Points to consider for a **financial decisions LPA** include:

- Do you want to ask your attorney(s) to regularly provide you with details of expenditure and income? If you lose capacity, the accounts can be sent to your solicitor or member of your family.
- Do they handle their own money well?
- Do you think they understand your wishes and feelings about how you would spend your money?

Points to consider for a **health and care decisions LPA** include:

- Does your attorney know you well enough to take your views into account when deciding what is in your best interests?
- If you have strong views on a particular type of treatment, are they aware of this?
- Do they understand your beliefs, views or feelings; and would you trust them to take these into account when making decisions?

If the attorney is your spouse or civil partner, the LPA is automatically cancelled if your marriage or civil partnership is dissolved or annulled, unless you expressly state it is to continue in these circumstances, or you have named a replacement attorney, or there is another attorney acting jointly and severally.

4.2 Joint attorneys

Any number of attorneys may be appointed in the same LPA. You need to decide and say in the LPA whether attorneys are to act **jointly** (together on all matters) or **jointly and severally** (can act together or separately, as they choose).

If attorneys are appointed to act jointly, the LPA ends if one of them dies. If attorneys are appointed jointly and severally, the survivor(s) can continue to operate the LPA.

You can specify that attorneys must act jointly for specific decisions (such as selling a house), and jointly and severally for all other decisions. The appointment of a sole attorney may offer less security for your assets than joint attorneys.

4.3 The certificate provider

When setting up an LPA, you must have it signed by someone who confirms that, in their opinion, you understand what it means and the effect of signing it. They must clearly write down their full name. They are called the '*certificate provider*'.

The certificate provider can be someone you have known personally for over two years, or a professional with relevant skills to provide the certificate.

It can be a friend, ex-colleague, GP or other healthcare professional, solicitor or social worker, Independent Mental Capacity Advocate or anyone else with the necessary expertise to provide the certificate.

Most family members are excluded from being your certificate provider, including:

- spouse, partner or civil partner (or people living together as such)
- children, grandchildren

- parents, grandparents
- brothers, sisters
- aunts, uncles
- nieces, nephews.

The following people also cannot be certificate providers:

- an attorney or replacement attorney named in this LPA or any other LPA or enduring power of attorney for the donor
- a family member related to you or any of your attorneys or replacements
- a business partner, paid employee of yours or any of your attorneys or any listed replacement (back-up) attorneys
- the owner, director, manager or employee of a care home in which you live or a member of their family
- a director or employee of a trust corporation appointed as an attorney or replacement attorney in your lasting power of attorney.

The certificate provider should discuss relevant matters with you and make sure you are aware that:

- the attorney will, in general, be able to make decisions about anything you could have done personally, unless you place specific restrictions on their powers
- the attorney has authority to make decisions on your behalf when you lose capacity and cannot supervise their actions
- if you are mentally incapable of making decisions yourself, the LPA cannot be revoked without an order of the Court of Protection.

You should be clear about and able to demonstrate to the certificate provider that you understand:

- what an LPA is
- why you want to make an LPA
- who you are appointing as your attorney(s) and why
- what powers you are giving your attorney(s).

As tests of capacity vary, it is possible you can create an LPA as you understand what it means, but at the same time, be unable to make a decision in relation to a particular matter, so you are deemed not to have mental capacity in relation to that matter. In these circumstances, the validity of the LPA is not affected.

4.4 How to set up an LPA

Do I have to use a solicitor?

You do not have to use a solicitor to create an LPA. You can obtain application forms from the Office of the Public Guardian (OPG) and complete them yourself using the accompanying guidance. You can fill them in on-line and phone the OPG helpline if you have questions.

Alternatively, you can pay a solicitor to complete the form for you. Solicitors' fees for creating an LPA vary and so you may want to contact a few to compare their fees and the service they offer.

See OPG document LP12, *Make and register your lasting power of attorney – a guide*, for a general summary.

4.5 LPA application forms

There are specific forms that must be used to set up an LPA. For a **financial decisions LPA**, the form is LP1F. For a **health and care decisions LPA**, the form is LP1H. Each form has an application to register the LPA form within it. You can register an LPA at any time.

The forms, notes and guidance for registering an LPA are available from the OPG and can be downloaded from their website www.gov.uk/government/publications/make-a-lasting-power-of-attorney

You can request paper copies by phoning 0300 456 0300 (9am–5pm, Monday, Tuesday, Thursday, Friday, 10am-5pm Wednesday).

The registration fee is £82 for each LPA. Make sure all required sections are completed. If there are errors, the OPG reject the form.

There is a repeat fee of £41 every time an LPA is re-submitted to the OPG within 3 months of the registration application being sent back. This process can take up to 10 weeks.

The donor's statement

The forms have sections in which you set out how you are going to appoint people to make decisions for you. This is where you specify who is going to be your attorney(s) and how they are to act for you. You can place specific restrictions on their powers and set out particular guidance they should follow when deciding what is in your best interests.

You can choose specific people to be notified when an application for LPA registration is made. Once named, these people have the right to object to an LPA registration when notified, for example if they think you have been put under undue pressure to create it.

You can choose up to five people and they should be people you know well enough to identify issues that might prevent the LPA registration, for example friends or relatives, or a healthcare worker who knows you relatively well.

The certificate provider

Section 10 of an LPA form is completed by the certificate provider. They confirm that, in their opinion, you understand the purpose and effect of the LPA and you have not been put under undue pressure to create it.

The certificate provider must discuss the LPA with you, not in the presence of the prospective attorney, to make sure you fully understand the effects of signing it.

The OPG provides guidance for certificate providers to read before signing the form. This includes suggested questions for the certificate provider to ask you, to make sure you understand the LPA and have not been put under pressure to sign.

If the certificate provider has concerns you are being put under pressure or do not fully understand the effects of the LPA, they should not sign the LPA but should raise their concerns with the OPG.

If an LPA is later challenged by someone who believes you did not have mental capacity to make it, the certificate provider may have to explain to the Court of Protection why they decided you did have capacity.

The attorney's statement

Section 11 of an LPA form is for your attorney(s) to complete confirming they understand and accept their duties under the LPA. Your signature and that of the attorney(s) must be witnessed. The witness can be the same person as the certificate provider. The person named as attorney must not be the witness to your signature. The witness must be over 18 years old.

If you cannot sign or mark the form, for example due to illness or physical disability, you can choose someone else to sign for you. The person signing on your behalf must be independent (not an attorney, certificate provider or witness) and the signing must be witnessed by two independent witnesses (not the attorney(s)).

4.6 Preferences and instructions

The LPA application form has a section titled '*Preferences and instructions*'. '*Preferences*' are what you would like your attorneys to think about when making decisions for you. Your attorneys do not have to follow them but should bear them in mind.

'*Instructions*', on the other hand, must be followed exactly as you have written them.

Form LP12 *Make and register your lasting power of attorney a guide* provides information and examples of preferences and instructions.

Examples of preferences are: '*I'd like my pets to live with me for as long as possible – if I go into a care home, I'd like to take them with me*' and '*I prefer to invest in ethical funds.*'

An instruction can include requiring expert medical opinion to allow your LPA registration by your attorneys. This can be an important safeguard to prevent an attorney seeking to take advantage of you, by claiming you have lost your capacity to make decisions when you may not have.

For a Health and Care LPA, the following is suggested: *'My attorneys must not decide I am to move into residential care unless, in my doctor's opinion, I can no longer live independently.'* Example instructions for other health and care issues including medical treatment are provided.

Suggested instructions for financial decisions include: *'My attorneys must not sell my home unless, in my doctor's opinion, I can no longer live independently'* and *'My attorneys must send annual accounts to my brother and sisters.'*

Some people leave this section blank when applying for an LPA. You can just talk to your attorneys and explain how you would like them to act for you. They are then free to make decisions they think are right and will know how you want them made.

However, it is important to fully understand the significance of the powers you grant to your attorneys and setting down preferences and instructions can maximise your peace of mind.

4.7 Registration of the LPA

You can register the LPA immediately after creating it or you can wait until it is needed when you lose, or are losing, the capacity to make decisions. In this case, the attorney registers the LPA.

You do not have to pay the application fee if you do not register an LPA immediately. It takes time for the registration procedure to be completed and during this delay, your attorney has no power to act under the LPA.

This can cause problems if immediate actions are needed, such as paying care home fees. It may be necessary to apply for a Court of Protection order so your affairs can be dealt with until an LPA is registered.

Another reason for immediate registration is if errors are discovered, you still have mental capacity to rectify them and create a valid LPA. The forms for registering your LPA are in the LPA application forms. Registration can be carried out at any time after the application has been processed.

Form LP3 *'Form to notify people'* must be completed and sent to all the people you named as people to be notified on registration of the LPA. They have three weeks to raise concerns with OPG.

They may do this, for example, if they believe your LPA has been made as a result of undue pressure or fraud, or they believe the attorney is planning to act in a way not in your best interests. The Court of Protection has the power to prevent an LPA being registered.

If an LPA is registered by the donor, the OPG write to the attorney(s) to inform them of the application. If registered by the attorney, the OPG write to the donor. A fee of £82 is payable on registration of the LPA. If you register a health and care decisions LPA and a financial decisions LPA you pay a registration fee for each (i.e. £164).

After registration

The LPA form is returned, having been stamped on each page as being registered by the OPG. Once received, it is a valid LPA.

A financial decisions LPA can be used immediately, whereas a health and care decisions LPA can only be used if you lack the capacity to make decisions yourself.

The OPG website has information about making and registering LPAs: www.gov.uk/government/publications/make-a-lasting-power-of-attorney.

4.8 Fees and the fee remission scheme

You may be exempt from paying the registration fee(s), or you may be able to apply for remission or postponement of the fee. You are exempt if you receive any of the following benefits and have not received a damages award in excess of £16,000 which was disregarded for the purposes of eligibility for the benefit:

- Income Support
- Income-based Employment and Support Allowance
- Income-related Jobseeker's Allowance
- Guarantee Credit element of State Pension Credit
- Housing Benefit
- Council Tax Reduction/Support
- A combination of Working Tax Credit and at least one of: Child Tax Credit, Disability Element of Working Tax Credit, or Severe Disability Element of Working Tax Credit.

If you do not meet these requirements, you may qualify for a fee remission if you are on a low income. If your gross annual income is less than £12,000, you may be eligible for a 50 per cent fee reduction.

You need to provide appropriate evidence to qualify for a fee reduction.

OPG Discretion

If you do not meet fee remission requirements, the Office of the Public Guardian has discretion to waive or postpone payment of all or part of the fee if payment would cause you hardship. To apply for exemption or remission, use form LPA120A. You must provide appropriate supporting evidence.

4.9 Cancelling the power

You can cancel (revoke) an LPA at any time provided you have mental capacity. However, if it is registered, an LPA cannot be cancelled without an order of the Court of Protection once you lose mental capacity to cancel it yourself. If you want to cancel an LPA, you should:

- write to the attorney(s) advising them the document has been revoked
- write to the OPG asking it be removed from the LPA register, if it has been registered.

For financial decisions LPA, inform banks, building societies and institutions where you have invested money the LPA has been revoked.

4.10 The role and responsibilities of an attorney

Once you (the attorney) start using your powers under an LPA, you may have to answer to the OPG or the Court of Protection if anyone expresses concerns you might not be acting in the donor's best interests. You have no authority to act under the LPA until it has been registered with the OPG.

If you are an attorney you must:

- follow the statutory principles of the Act
- make decisions in the best interests of the donor (see section 3.5)
- have regard to the guidance in the Code
- only make decisions you have authority to make under the LPA, including any preferences, instructions, limitations or conditions.

If you are only a financial decisions attorney, you cannot make decisions about the donor's health and care although you might be consulted.

You should take all practicable steps to help the donor to make their own decisions. Steps to help them make a decision include:

- make sure they have all the information needed to make a decision
- make sure information is communicated in the most appropriate way; for example, use simple language, an interpreter, non-verbal communication, or a family member
- make them feel at ease by considering the best time of day and location to communicate and considering who they want present.

When deciding what is in a donor's best interests, take into account their religious and moral beliefs, how they behaved in the past and any views expressed about the issue. Consult family and carers where practical and appropriate. Remember the donor appointed you to assess what is in their best interests and to make the decision on their behalf. You cannot delegate that authority to anyone else.

You must not take any advantage to gain benefit for yourself or allow personal interests to conflict with your duties as an attorney.

The criminal offence of ill treatment or wilful neglect

It is an offence to cause or allow ill-treatment or wilful neglect of someone who is a donor if you are their attorney.

This applies to attorneys, Court-appointed deputies and anyone who has the care of a person who they believe lacks mental capacity. The penalty for conviction for the offence is a fine or imprisonment of up to five years.

Attorneys under a financial decisions LPA

You do not have authority to act on health and care decisions unless you are also appointed under that LPA.

- **Accounts** – you should keep full, accurate and up-to-date accounts of all the donor's assets and income, including bank and building society accounts, investments and property. Tax returns must be completed. The OPG and Court of Protection may ask to see these at any time, including after the death of the donor. Keep all the donor's assets in their name and keep their accounts separately. You need to keep all estimates, invoices, receipts and vouchers. An attorney may be held liable if the donor's money is not handled responsibly.
- **Gifts** – you can make gifts to people when the donor would usually have done so, for example birthday present to a relative or a wedding or civil partnership present to a friend. You can make charitable donations in accordance with the donor's expected wishes, for example if they regularly gave to charity in the past. Any gifts or donations must be reasonable in proportion to their estate. If you want to make larger gifts of money or property, for example for Inheritance Tax planning purposes you must apply to the Court of Protection.
- **Expenses** – professional attorneys (for example, solicitors or accountants) may charge for time spent on their duties. The LPA form includes a section to record the fees agreed between the donor and the attorney. You can choose to pay non-professional attorneys for their services, but you must specify the terms of an agreement made on the form or they can only claim back reasonable out-of-pocket expenses.
- **Property** – if you are thinking of selling or letting the donor's property because it is in their best interests, you must be sure they would not be likely ever to return to live there. Contact the OPG if the sale is below the market value or you want to buy the property yourself, or give it to someone else. The OPG can advise you whether you need to apply to the Court of Protection about this.
- **Wills** – you cannot make a will on behalf of the donor. If the donor still has mental capacity, they can make their own will or make an amendment to the existing will (a codicil). Contact the OPG if you are in any doubt about the donor's capacity to do this.

If a will is needed for someone lacking capacity to do it themselves, a ‘*statutory will*’ can be made by the Court of Protection. This can be if they made a will that needs amending due to a change in circumstances (e.g. the death of the main beneficiary). Contact the OPG if this is necessary.

If the donor has a will already, you do not have an automatic right to see it. If the donor has not left specific permission to allow you access to the will, you can apply to the Court if you believe it may help you carry out your duties and whoever holds the will refuses to show it to you. This might be appropriate if you need to know whether a property was intended to be left to someone and you are considering selling it.

- **Making a grant of representation** – this is a court document confirming a person can deal with someone else’s estate as executor when the other person dies. HM Courts and Tribunals services have confirmed that, if you have capacity, your attorney can obtain this on your behalf if you do not wish to make the application. Your attorney can do this if you have lost capacity and your LPA is registered.

If you do not comply with your duties as an attorney, you may be ordered to pay compensation to the donor for any losses.

Attorneys under a health and care decisions LPA

You do not have authority to act on financial decisions unless you are also appointed under that LPA.

- **Where the donor lives** – you can make decisions on where it is in the best interests of the donor to live, for example in a care home. You cannot make decisions about selling the donor’s house unless authorised under a financial decisions LPA.
- **Medical treatment** – as long as there is no restriction on your powers under the LPA, you can consent to, or refuse, medical treatment on behalf of the donor.
- **Life-sustaining medical treatment** – you cannot refuse life-sustaining treatment on behalf of the donor unless they specifically authorised you to do so. The donor must have signed section 5 of the LPA form (LP1H) giving their consent for you to make such decisions.

If you make a decision on life-sustaining treatment, you must not be motivated by a desire to bring about the donor’s death. The decision must always be made in their best interests.

- **Advance decisions** – if the donor has made an advance decision to refuse treatment, you cannot make a decision relating to the provision of that treatment, unless the LPA was made by the donor after they made the advance decision and they have given you specific authority to refuse, or consent to, that treatment. This issue is very significant as it may relate to life sustaining treatment. For more, see factsheet 72, *Advance decisions, advance statements and living wills*.
- **Wills** – You cannot make a will on behalf of the donor (see above).

- **Mental Health Act 1983** – if the donor is treated for a mental disorder and is detained under the *Mental Health Act 1983*, you cannot make decisions refusing, or consenting to, this treatment.
- **Marriage and civil partnerships** – you cannot consent to marriage or civil partnership on behalf of the donor or to divorce or dissolution of a civil partnership. You cannot consent to sexual relations on their behalf.

4.11 Duration of an LPA

The LPA remains valid until one of the following occurs:

- death of the donor or the sole attorney
- bankruptcy of the donor or the sole attorney (this applies to financial decisions LPAs)
- revocation (cancellation) by the donor (where they have mental capacity to do so) or the OPG
- disclaimer by the attorney
- mental incapacity of the attorney.

If the donor dies, an LPA comes to an end. You must notify the OPG and send them the LPA document and a copy of the death certificate.

5 Existing Enduring Powers of Attorney

If you have an Existing Power of Attorney (EPA) set up before 1 October 2007, it is still valid. The EPA must be registered at the OPG once the donor loses capacity to make decisions about their finances (not health and care as with LPA's). An EPA cannot be used if the donor does not have mental capacity until it has been registered. The fee to register an EPA is £82

An EPA can be registered as long as it was validly created before 1 October 2007.

To register an EPA, the attorney must complete form EP1PG and EP2PG. EP1PG is sent to you (the donor) and your three nearest relatives to notify you of the attorney's intention to register the EPA. EP2PG must be returned to the OPG.

The forms can be downloaded from the OPG website, www.gov.uk/government/publications/register-an-enduring-power-of-attorney or by phoning 0300 456 0300.

If the attorney believes you may be distressed by receiving the notice, the Court of Protection may agree to dispense with the notice to you. They need evidence from your doctor that you will be caused harm or distress by learning of the application to register an EPA. This fee is £400.

Notifying your relatives

The three nearest relatives who must be notified are taken in order of priority, class by class. The order of priority is:

- 1 spouse
- 2 children
- 3 parents
- 4 brothers and sisters whether whole or half
- 5 widow or widower of your child
- 6 grandchildren
- 7 children of your whole brothers and sisters
- 8 children of your half brothers and sisters
- 9 uncles and aunts
- 10 children of your uncles and aunts

If there is more than one person in a particular class of relatives entitled to receive notice, they must all be given notice, even if this means more than three people are notified.

Notice need not be given to people otherwise entitled to receive notice if their names and addresses are not known to the attorney(s) and cannot be reasonably ascertained or the attorney(s) have reason to believe they have not reached the age of 18 years or are mentally incapable. If you do not have three living relatives, the attorney(s) should say so on the form when applying for registration.

Revoking an EPA

To revoke an EPA, you must apply to the Court of Protection, who must be satisfied you have the required mental capacity. Input from a professional such as a solicitor may be necessary to confirm this. The Court of Protection revocation fee is £400.

An existing EPA can be revoked and a financial decisions LPA set up instead, as long as the donor still has mental capacity at the point the LPA is created. Alternatively, you can keep your financial decisions EPA and create a separate health and care decisions LPA to run alongside it.

If you want to revoke an unregistered EPA, notify the attorney(s) and anyone else aware of it that it is revoked. For example, write to your bank if the EPA was previously used there.

Although not strictly required, you can create a legal document called a Deed of Revocation to state the EPA has been revoked. It can help avoid disputes or future uncertainty. You and a witness sign this document and a copy must be given to each attorney. You can ask a solicitor for advice about creating a Deed and they may charge a fee. An example Deed is at www.gov.uk/use-or-cancel-an-enduring-power-of-attorney

6 The Office of the Public Guardian (OPG)

The OPG has a regulatory role covering England and Wales. It provides help and support services to attorneys looking after the finances, health and care of people who lack mental capacity. It has a register of LPAs and EPAs and supervises and keeps a register of deputies (see section 8). It investigates complaints about attorneys or deputies.

In some cases, it may not be necessary to instruct solicitors to deal with the Court of Protection or the OPG, except where complex legal work such as selling a house needs to be done, as it adds to the cost.

Legal Aid under the Legal Help and Legal Representation scheme is available for limited types of proceedings in the Court of Protection, mainly serious health and welfare cases. Seek legal advice about whether you are entitled to Legal Aid funding for your case.

The OPG publishes guidance booklets for people making an LPA, people taking on the role of attorney, certificate providers and witnesses. These are available at www.justice.gov.uk/about/opg or phone 0300 456 0300 to request copies.

6.1 Search the OPG register

You can apply to the OPG for a search of their register. There are two levels of search.

The first tier search can find out limited information such as the names of donors and attorneys, the date of registration, whether it is a financial decision or health and care decision LPA and whether the LPA has been cancelled. No information about the contents of the LPA is available through the first tier search.

A second tier search can be used to request further information about the LPA. The applicant must satisfy the OPG that it is in the best interests of the donor for the information to be provided.

7 The Court of Protection

If you lack mental capacity to make a significant decision and have not set up an LPA, an application to the Court of Protection may be necessary. Its role is to protect the financial affairs of people lacking mental capacity and to make decisions relating to their health and care needs. The Court's jurisdiction extends to England and Wales.

It is not normally necessary to attend a court hearing as business is usually conducted by post. If a hearing is necessary, the Court keeps its procedures as informal as possible. The general rule is proceedings in the Court are conducted in private to protect the privacy of those concerned, but the Court has power to order a hearing to be held in public or information about the case to be published.

7.1 When will the Court of Protection become involved?

The Court of Protection may become involved if something needs to be done to protect your assets or to enable them to be used for your benefit. For example, if you own your home but are in hospital and unlikely to return home because you need residential care, it may be necessary to sell the property so the proceeds can fund this.

The Court should be involved in decisions relating to serious medical treatment such as proposed withholding or withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state or cases involving organ donation by a person lacking capacity to consent.

You can apply to the Court if there is major disagreement about a serious decision which cannot be agreed any other way. The Court of Protection can be involved if there is an issue over the validity or use of an LPA.

7.2 The powers of the Court

The Court has powers to:

- make declarations about your mental capacity to make a decision, if this cannot be resolved in another way
- make decisions about your financial affairs if you lack the mental capacity to make decisions yourself
- decide urgent or emergency applications where a decision must be made on your behalf due to risk, for example serious medical treatment
- appoint deputies to make ongoing decisions for you if you lack mental capacity
- give people permission to make one-off decisions on your behalf if lack mental capacity
- consider applications to make statutory wills or gifts
- make decisions when you can be deprived of your liberty under the Act
- make decisions about an LPA or EPA, including whether they are valid, objections to registration, scope of Attorney powers and removal of Attorney powers.

It can end an attorney appointment and/or cancel the LPA if the attorney's duties are not being carried out in the best interests of the donor.

7.3 Applying to the Court

You may need to get permission from the Court of Protection before an application can be made. The Court considers your connection to the person, your reasons for application, the benefits and alternatives when deciding whether to grant permission.

Permission is not needed in most cases about financial decisions. The exceptions are cases involving the appointment or removal of trustees and cases relating to wills and gifts. Permission is needed in most cases about health and care decisions. In either case, permission is not needed if the person making the application is:

- the person who is alleged to lack capacity to make a particular decision, for example they wish to challenge a decision they lack capacity
- the donor or attorney of an LPA where the application relates to that LPA
- a Court-appointed deputy
- a person named in an existing Court order in connection with the same matter.

If unsure about whether you need permission to apply, ask the OPG. The application form is COP1 and has a section on asking permission and the reasons for this. The Court should deal with your application for permission within 14 days of receiving it. They consider your connection to the person, reasons for the application, the benefits of granting permission and whether there are alternatives to involving the Court.

You must submit other forms, depending on what you apply for. You always need to submit form COP1A or COP1B to provide supporting information and usually need to submit form COP3. Form COP3 includes a section to be completed by a medical practitioner who has assessed the person to whom the application relates. This confirms that, in their opinion, the person lacks mental capacity to make the relevant decisions.

The notes to COP1 explain the other forms you must submit to support your application. Check with the OPG you have completed the correct forms before submitting your application. There is a fee of £400 payable when making an application to the Court. A similar exemption and remission scheme applies for Court of Protection fees as for OPG fees (See section 4.8). You use form OPG120 to apply.

Notifying the person to whom an application relates

When you make an application, you must notify the person to whom the application relates. This notification can be carried out in the most appropriate to make sure they understand it. For example, it could be given verbally rather than in writing, using simple language. You must provide them with two specific forms, COP5 and COP14.

If no one objects to your application, the Court may make a decision without holding a hearing. If you or anyone else affected by the Court's decision is unhappy about it, the Court can be asked to reconsider its decision.

This should be done using form COP9 within 21 days of the date you were served the Court Order. If the order was made at a hearing, use form COP35 to appeal against the decision.

Urgent cases

In case of extreme urgency, the Court can make an interim order, for example before necessary medical evidence is available. It is advisable to telephone the OPG first for advice to check whether an emergency application is appropriate. Another example is where access a person's money is needed urgently to pay care home fees.

For queries about applications to the Court of Protection or to request Court of Protection forms, call 0300 456 4600, or download them from the website.

7.4 Access to a bank account

A financial decisions LPA donor can decide to give an attorney authority immediately or only when they lose the ability to make decisions, requiring registration at that time. They can place restrictions on how an attorney can manage an account and put guidance and conditions in the LPA.

The attorney can only use the authority once the LPA has been registered. The British Banking Association advises banks and building societies must always check specific documents before they can let an attorney manage a donor's account. They need:

- proof of the attorney's name and address
- evidence of the attorney's authority to act for the accountholder e.g. the filled-in and signed original LPA form, registered with the OPG; and
- proof of the account holder's (attorney's) name and address if the bank or building society does not already have this.

A bank freezes the account of a sole account holder if it becomes aware a customer has lost mental capacity. It only restores access with a Court of Protection order (Deputyship/Court Order) or a registered financial decisions LPA

A bank should not take this type of action without an appropriate level of proof, for example a medical report and discussion with all those concerned. It may be unlawful to act in this way without appropriate evidence as it can amount to unjustifiable discrimination in the provision of goods and services.

The best interest principles of the Act have force in this situation. The Code provides guidance on accessing bank accounts.

Examples are:

6.64 Access to a person's assets

Scenario: Being granted access to a person's assets

A storm blew some tiles off the roof of a house owned by Gordon, a man with Alzheimer's disease. He lacks capacity to arrange for repairs and claim on his insurance. The repairs are likely to be costly.

Gordon's son decides to organise the repairs, and he agrees to pay because his father doesn't have enough cash available. The son could then apply to the Court of Protection for authority to claim insurance on his father's behalf and for him to be reimbursed from his father's bank account to cover the cost of the repairs once the insurance payment had been received.

5.27 Scenario: Taking a short-term decision for someone who may regain capacity

Mr Fowler has suffered a stroke leaving him severely disabled and unable to speak. Within days, he has shown signs of improvement, so with intensive treatment there is hope he will recover over time. But at present both his wife and the hospital staff find it difficult to communicate with him and have been unable to find out his wishes.

He has always looked after the family finances, so Mrs Fowler suddenly discovers she has no access to his personal bank account to provide the family with money to live on or pay the bills. Because the decision can't be put off while efforts are made to find effective means of communicating with Mr Fowler, an application is made to the Court of Protection for an order that allows Mrs Fowler to access Mr Fowler's money.

The decision about longer-term arrangements, on the other hand, can be delayed until alternative methods of communication have been tried and the extent of Mr Fowler's recovery is known.

7.36 What decisions can an LPA attorney make?

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.*

8 Deputies

The Court of Protection has the power to appoint a deputy if there is no registered LPA or EPA in place. The Court can make a court order giving the deputy authority to act and make decisions on your behalf if you do not have mental capacity. The powers given to the deputy should be as limited in scope and duration as possible.

The deputy must be someone trustworthy, who has the necessary skills to carry out their duties. It is usually a family member or friend, if they are willing to take on the role. The Court can appoint an independent professional deputy such as a solicitor or an officer from the social services department if this is in your best interests.

Two or more deputies can be appointed, to work jointly (they act together on all decisions) or jointly and severally (they can act separately or jointly on any particular decision). The court order explains what decisions the deputy is legally allowed to make. It may require regular reports to the OPG to ensure the deputy is acting in your best interests.

To support this, the deputy should keep a record of any decisions they make, for example:

- making a major investment
- changing the care you receive
- deciding where you should live.

And keep copies of documents about decisions they make, for example:

- receipts
- bank statements
- letters and reports from health agencies or social services.

A deputy usually has to complete a report once a year, using the deputy declaration form OPG102 for financial decisions. Deputies can be appointed to deal with health and care decisions, but this is uncommon.

Usually a deputy is not needed as health and social care professionals working with you and your family make those decisions, or, if there is serious conflict, the Court of Protection decides.

The OPG publish professional deputy standards, see:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf.

8.1 Security bonds for financial decisions deputies

A deputy must pay a bond to a security bond provider to protect your finances to cover any loss as a result of their behaviour. They get a letter from the Court telling them how to do this. The Court determines the level of security required, which should be proportionate to the amount of funds they handle.

8.2 Role and responsibilities of a Court-appointed deputy

A deputy has a duty to follow the principles of the Act. They must:

- always make decisions in your best interests
- take all practicable steps to help you make the decision yourself
- allow you to make the decision if you have the capacity to do so
- only make decisions they are authorised by the Court to make.

Deputies should consult the Code for guidance on fulfilling their duties.

The powers granted by the Court of Protection to a deputy cease on the death of the client. A deputy does not have authority to deal with the estate.

8.3 Applying to be appointed as a deputy

An application to be appointed as a deputy must be made to the Court of Protection using the application form COP1 and the deputy's Declaration form COP4. The Court uses information provided on the declaration form to assess your suitability to be a deputy. This includes information about your personal circumstances and your financial circumstances.

You must submit forms COP3 and COP1A or COP1B. See section 7 for more information on applying to the Court of Protection.

8.4 Fees and fee remission for deputies

Fees are normally paid from your funds but can be paid by the prospective deputy applying and then refunded from your funds later. There is a fee of £400 payable to the Court of Protection when a deputyship application is made. You need to pay the application fee twice if you are applying to become both types of deputy

A one-off Deputy Assessment fee of £100 must be paid to the OPG when it receives the order appointing someone as deputy. It is used to assess the level of supervision they need – General or Minimum. The fees are:

- £320 for the General Supervision fee or
- £35 for the Minimum Supervision fee.

Fees are due annually on 31 March. They are billed in arrears and will be calculated on a pro-rata basis if there are any supervision changes within the year.

Exemption or remission of deputyship fees

You may be entitled to a remission or exemption of fees based on your financial circumstances. If it is a financial decisions deputyship or one combined with a health and care decisions deputyship, it is your assets that are looked at, but if it is only a health and care one, it is the deputy's that are relevant.

No remission is available for the minimal supervision fee. Any application for remission or exemption of fees should be made within six months of the fee being raised, using form OPG120 and must be supported by relevant evidence.

Exemption

See section 4.8 about rights to fee exemption, which relates to for both LPAs and deputyships.

Remission

If your gross annual income is less than £12,000, you are eligible for a 50 per cent reduction of the fee. If this information is not immediately available at the time of application, it may be possible to obtain a retrospective remission.

Extended remission/exemption period

The OPG has discretion to grant remissions/exemptions for a 3 year period where it is unlikely there will be any changes in financial conditions. Any changes must be immediately reported by the deputy.

Hardship

If there is no eligibility for remission/exemption but other circumstances are likely to result in financial hardship, an application can be made to have fees waived. This requires appropriate evidence such as proving there are high and unavoidable on-going household expenses.

Review

If there is an unsuccessful remission/exemption application, a review can be requested if made within 4 weeks.

9 Monitoring of attorneys and deputies

Court of Protection Visitors

Where an LPA is in place or a deputy has been appointed by the Court of Protection, the OPG can appoint a person to report to them on the actions of the attorney or the deputy.

The person appointed is called a Court of Protection Visitor. They can visit the donor, attorney or deputy to gather evidence for their report to the Court.

10 Independent Mental Capacity Advocates

An Independent Mental Capacity Advocate (IMCA) can support and represent you if you lack capacity to make important health and welfare decisions and have no family or friends willing and able to be consulted about the decision.

An IMCA is an independent person who must have relevant experience and training for the role. They must:

- support and represent you when it is being decided what is in your best interests
- find information to help assess what is in your best interests. This can be information about your feelings, values and beliefs, or finding out if there is a way to help you make or communicate your own decision
- challenge decisions which may not be in your best interests.

An IMCA must be instructed if a decision has to be made about:

- serious medical treatment or
- a long-term stay in hospital or a care home (long term means more than 28 days in hospital or eight weeks in a care home) or
- a move to a different hospital or care home.

An IMCA may be consulted in relation to decisions about care reviews or in adult protection cases.

If an urgent decision is needed, it may not be possible or appropriate to instruct an IMCA. If the urgent decision relates to moving accommodation, an IMCA must be instructed as soon as possible after the move.

The local authority or NHS organisation providing your care or treatment are responsible for instructing the IMCA. They must take into account the representations and information provided by the IMCA when deciding what is in your best interests.

The IMCA service is only generally appropriate if you have no one else to support or represent you (other than paid staff). If you have family or friends willing to be consulted, or have a health and welfare LPA or a Court-appointed deputy, it is not necessary for an IMCA to be instructed.

However, an IMCA's could possibly be involved in decisions concerning adult protection even where you have friends or family to consult.

11 Appointees for benefits

If your income includes social security benefits and you have not created an LPA or EPA, you could have a deputy appointed who would be responsible for managing your benefits. Instead of having a deputy appointed, you can have an 'appointee' to deal with benefit claims and payments. An appointee is responsible for making and maintaining your benefit claims.

Note

If you have already created a financial decisions LPA you can allow your attorney to start managing your finances while you still have mental capacity, including managing your benefits. It is important to be aware that during this time you would ultimately be responsible for any issues that may arise, for example notification of overpayments. However, if you lose mental capacity your attorney would, at that time, become fully responsible for your benefits management.

An appointee is responsible for making and maintaining your benefit claims. The appointee must be over 18 years old.

They must:

- sign your benefit claim forms
- report any changes affecting how much you receive
- spend the benefit in your best interests
- tell the benefit office if they need to stop being the appointee

If a benefit is overpaid, the appointee can be held responsible.

This method of assistance is normally used if you are unable to act for yourself due to mental incapacity. Sometimes it is appropriate if you are physically disabled, for example you had a severe stroke. You should not be assumed to be incapable of managing your financial affairs just because you have lost the ability to communicate.

If you are capable of managing your financial affairs but need someone to collect your benefit payments for you, an appointee is unlikely to be suitable and you should consider the options in section 12.

Usually, it is a close relative who lives with, or frequently visits, you who is the most suitable person to act. Sometimes an organisation or representative of an organisation can be a corporate appointee, for example the local authority or NHS trust. They nominate a person to carry out appointee duties on their behalf but the organisation remains responsible for the management of your affairs.

If you want to continue to collect your own benefits and provided you are able to understand the implications of claiming and receiving social security benefits, the Department for Work and Pensions (DWP) should not give approval for an appointee or for bulk payments to an organisation acting as an appointee for a large number of people.

Applying to become an appointee

An application to become an appointee needs to be made to the DWP. They visit you to assess if an appointee is needed. They interview the prospective appointee to make sure they are a suitable person. During the interview, an appointee application form BF56 is completed.

If the DWP agree with the application, the appointee is sent form BF57 confirming they have been formally appointed to act. Once an appointee is authorised, the DWP should monitor the situation to make sure it is still suitable for both of you.

The appointment can be stopped if the appointee does not act properly under the terms of the appointment, you regain your ability to manage your own benefits, or the appointee becomes incapable of fulfilling the role – they must let the DWP know immediately.

For more on becoming an appointee, see www.gov.uk/become-appointee-for-someone-claiming-benefits.

11.1 People in care homes

In most cases, an appointee is someone you know. Sometimes, as a last resort, the person appointed is your care home owner or manager. If the home is part of an organisation, it must be established that the organisation is willing to act as appointee.

If an organisation becomes an appointee, the proprietor or manager can collect benefit payments provided they are authorised to do so by the organisation. The money can be put into a corporate account, but not the care home's business account, unless all benefit is used to pay the home fees.

If the care home collects benefits on behalf of a local authority funded resident, their Personal Expenses Allowance (PEA) should not be used to meet the cost of personal care (in Wales, the PEA is now known as the Minimum Income Amount).

Guidance states that if you live in a care home, it should not be assumed you are incapable of managing your affairs. A manager should not be appointed merely for the convenience of the home. The appointee should not be a member of staff (unless they are your relative or friend) but only the owner or manager.

11.2 The role and responsibilities of an appointee

Appointees '*stand in the shoes*' of the claimant and can sign forms, make appeals and generally deal with the benefits claim as if it was their own. Even though the claimant may not be able to deal with the claims process, it is important they are involved as much as possible with decisions about how to spend their money.

All money collected by the appointee must be used for the sole benefit of the claimant for whom they act. The appointee is responsible for:

- finding out about entitlements and social security benefits
- letting people know about any change in your circumstances
- arranging for overpayments to be paid back.

The money is paid to the appointee but they cannot spend it on themselves.

Dealing with your capital

Your appointee only has the power to deal with your benefits income. An appointee cannot deal with any other assets, savings, or income from other sources.

Unspent pension and benefits can be treated as capital, for example for means-tested local authority services. The appointee may not have full legal authority to deal with such issues and other options may have to be considered, for example one-off court order application to the Court of Protection, which avoids the need for a deputyship application.

Complaints and concerns about appointees

If you are concerned an appointee is abusing their position or is not acting in your best interests, contact the relevant DWP agency. This is Jobcentre Plus or the Pension Service, depending on the benefits received.

12 Arrangements while you can still make decisions

Nobody can make decisions about your healthcare or personal welfare on your behalf while you have capacity to make these decisions yourself. However, you can choose to let other people manage and access your finances even if you could manage them yourself.

12.1 Arrangements for access to your bank account

Direct debits and standing orders

The most common way to allow other people to access your money is through direct debits or standing orders. Many banks and building societies offer an easy-to-use basic bank account. Your pension or benefits can be paid directly into these accounts. Most basic bank accounts let you set up direct debits and standing orders.

A standing order is an instruction to your bank or building society to transfer a fixed amount to someone else's account on a regular basis. You control your finances and they cannot access any funds except the transfer amount. They must have an account to transfer into and it can take up to four working days to access the money, so may not be suitable if access is needed urgently.

A direct debit is an instruction to your bank or building society to allow someone to collect money from your account. They can collect any amount, as long as they inform you beforehand of the amount and the date it will be collected.

Joint accounts

This gives you and the joint account holder the authority to withdraw all money. An advantage is you do not need to set up any specific instructions.

You need to be sure you can trust the other account holder, as there is no restriction on their access to the funds and you may be liable for their debts. You both have a card and a personal identification number (PIN) to allow easy access to the account.

If one joint account holder loses mental capacity to operate their account, banks and building societies should use their discretion to determine whether to temporarily restrict the operation of the account to essential transactions only (for example, living expenses and medical/residential care bills) until a deputy is appointed or an LPA registered.

If the other joint account holder holds an unregistered LPA for the holder who has lost mental capacity, they can register it and run the joint account. If the person who has lost mental capacity has chosen someone else to be their attorney, that person (once registered) has to agree with the other joint account holder, and the bank or building society, how the joint account should be run in future, possibly requiring new bank instructions and mandates in relation to the account.

The British Bank Association leaflet *You and your joint account*, provides guidance on how banks and building societies should act if one joint account holders loses mental capacity. They also provide a related guide *Guidance for people wanting to manage a bank account for someone else*.

The Mental Health Foundation produce a useful booklet *Banking on good decisions – how can the Mental Capacity Act help you with your bank, building society or post office account?*

Third party mandate

This is an instruction to your bank or building society to provide access to your account for another person. The mandate gives details of exactly what authority you are giving the person, so you can specify how much access to give. They are not usually given a card and PIN so do not have access to cash machines. This option may suit if it is a long-term arrangement and you trust the person who has the mandate. Mental incapacity terminates the mandate.

Emergencies (letters of authority)

If you are temporarily unable to withdraw money from your account, for example you are temporarily housebound after an operation, banks and building societies may accept a letter of authority, which requests a third party to withdraw money on your behalf on a one-off basis. There is a high risk of fraud, so some banks and building societies do not offer this.

Post Office card account for benefit payments

If you have a Post Office card account, you can apply for another person to have permanent access to your account. They are called the Permanent Agent. They are issued with their own card and PIN number. You must be able to trust the person in this role, as they can withdraw up to £600 a day.

Payment of benefits

The Department for Work and Pensions (DWP) no longer makes payments by giro cheque when you cannot get to the post office to access your account. There is now a Simple Payment scheme.

Under the scheme, you receive a Simple Payment card that you can use to collect your payment from a PayPoint outlet displaying the Simple Payment sign. There are PayPoint outlets across the UK, including some newsagents, convenience stores and supermarkets.

If you cannot get to a PayPoint and ask someone to do this for you, when they show your card to the person serving them, they need to confirm a memorable date (this is your date of birth to begin with, but you can change this to another memorable date) and show an original (not a copy) document that proves their and your identity.

Acceptable documents include your passport or utility bill that is less than three months old. If you do not have one of these, contact the office paying your benefit or pension and they can give you a letter to use instead.

12.2 Ordinary power of attorney

An Ordinary Power of Attorney (OPA) is only valid while you still have mental capacity to make your own decisions and is likely to be the most appropriate in the following circumstances:

- if you need someone to act for you for a temporary period, for example while you are on holiday
- if you wish someone to act for you only while you are able to supervise their actions.

If you want someone to be able to act for you when you lose capacity to make your own decisions and when you can no longer supervise their actions, you should consider a LPA rather than an OPA.

A power of attorney provides the attorney – the person appointed – with a legal document that proves their powers.

You can buy an OPA document from a law stationer (some high street stationers stock them) or arrange for a solicitor to prepare one.

It is for you, as the donor, to decide what the power of attorney covers and whether it is a general power, without restrictions, or whether it gives limited powers only to do a specific act, for example to sell a house. In either case, you can still also act for yourself.

How long does an OPA last?

Whether the OPA is a general one or is limited, it is only valid while you are capable of giving instructions. It ends if:

- you lose mental capacity to make your own decisions about your finances and are no longer able personally to supervise or direct the attorney
- you revoke the power
- the power is limited to a specific task which has been completed
- the attorney(s) themselves die or lose mental capacity.

12.3 Lasting Power of Attorney for use while you still have capacity

LPA's can be used to give authority to someone to make decisions on your financial affairs (not health and care), even when you have mental capacity to do so yourself. It can only be used if it is registered with the OPG. The difference between an OPA and an LPA is that an LPA continues to be valid if you lose mental capacity to make your own decisions about your finances.

13 Complaints, standards and safeguarding

How to make a complaint about a deputy or an attorney

Responsibility for supervising deputies and monitoring attorneys lies with the OPG. If you think a deputy or attorney is misusing their powers, for example not acting in the person's best interests, or are acting outside their authority, contact the OPG. If it is a serious case of fraud or if someone is at risk of abuse, contact the police or the social services adult protection team.

Complaints about service provision or the local authority

If you or the person you represent as an advocate is not satisfied with a local authority service and the issues cannot be informally resolved, you can complain to the local authority. The local authority must publish details of its complaints procedure, provide appropriate support and assistance to you and respond to the complaint promptly.

Local authorities are responsible for receiving and coordinating responses to safeguarding and abuse allegations. They must uphold human rights and equalities law and guidance.

In England

If you are self-funding, for example you live in a care home, you can complain to the Local Government Ombudsman. The sector standards regulator, the Care Quality Commission, can be contacted about any registered health and social care service provider.

See factsheet 59, *How to resolve problems and complain about social care* and factsheet 78, *Safeguarding older people from abuse*.

In Wales

If you are self-funding, for example you live in a care home, you can complain to the Public Services Ombudsman for Wales. The Ombudsman can be contacted about complaints to the local authority, if you have pursued the issue with the authority and are not satisfied with the way it was handled.

There are two standards regulators in Wales – the Care and Social Services Inspectorate Wales (CSSIW) and the Healthcare Inspectorate Wales (HIW).

CSSIW regulates social services and social care providers (for example, care homes or domiciliary care agencies), whilst HIW regulates healthcare services (NHS and independent healthcare organisations).

CSSIW and HIW have a wide powers and a duty to respond to new information in an appropriate and timely manner. They do not generally deal with individual complaints in the way required by a local authority or NHS service provider.

For further information see Age Cymru factsheet 41w, Social care assessments for older people with care needs in Wales, which contains information on making a complaint to a local authority. If you want to complain about an NHS service, see Age Cymru factsheet 66w, Resolving problems and making a complaint about NHS care in Wales. Age Cymru factsheet 78w, Safeguarding older people in Wales from abuse and neglect, has information on the role of local authorities in coordinating responses to safeguarding and abuse allegations.

The criminal offence of ill treatment or wilful neglect

Section 44 of the Act makes it a criminal offence to cause or allow ill-treatment or wilful neglect of someone who lacks mental capacity. For example this could be in relation to their finances.

This applies to attorneys, Court-appointed deputies and anyone who has the care of a person who they believe lacks mental capacity. The penalty for conviction for the offence is a fine or imprisonment of up to five years.

Useful organisations

Action on Elder Abuse (AEA)

www.elderabuse.org.uk

Telephone helpline 080 8808 8141 (free phone)

Works to protect and prevent the abuse of vulnerable older adults. AEA offer a UK wide helpline, open every weekday from 9am to 5pm. The helpline is confidential and provides information and emotional support in English and Welsh.

Alzheimer's Society

www.alzheimers.org.uk

Telephone helpline 0300 222 11 22

Campaigns for and provides support to people affected by all types of dementia and their relatives and carers. There are local branches across the UK.

British Banking Association

www.bba.org.uk

Telephone 020 7216 8800

Provides guidance for bank staff on banking for mentally incapacitated and learning disabled customers.

Care and Social Services Inspectorate Wales (CSSIW)

www.cssiw.org.uk

Telephone 0300 7900 126

The CSSIW oversees the inspection and regulation of care and social services in Wales.

Care Quality Commission

www.cqc.org.uk

Telephone 03000 616 161 (free call)

Independent regulator of adult health and social care services in England, covering NHS, local authorities, private companies or voluntary organisations and people detained under the *Mental Health Act*.

The Court of Protection

www.gov.uk/courts-tribunals/court-of-protection

Telephone 0300 456 4600

The Court of Protection (COP) makes decisions and appoints other people to make decisions, for people who lack the capacity to do this for themselves. These decisions relate to the property and affairs, and healthcare and personal care needs of adults (and occasionally children) who lack capacity.

Department of Health

www.gov.uk/government/organisations/department-of-health

Telephone 020 7210 4850

Publishes guidance for healthcare and social care staff in England and is the government department with responsibility for the IMCA service.

Healthcare Inspectorate Wales (HIW)

www.hiw.org.uk

Telephone 0300 062 8163

The HIW is the independent inspector and regulator of NHS healthcare and independent healthcare organisations in Wales. Also protects the rights of people detained under the *Mental Health Act*.

Mind

www.mind.org.uk

Telephone 0300 123 3393

Provides information and advice for people with mental health problems.

Ministry of Justice

www.justice.gov.uk/

This government department has responsibility for the *Mental Capacity Act 2005*.

Office of the Public Guardian

www.gov.uk/government/organisations/office-of-the-public-guardian

Telephone 0300 456 0300

Official Solicitor and Public Trustee Office

www.gov.uk/government/organisations/official-solicitor-and-public-trustee

Represents minors and adults under legal disability in County Court, High Court or Court of Protection in England and Wales.

Solicitors for the Elderly

www.solicitorsfortheelderly.com

Tel: 0844 567 6173

An independent organisation of lawyers who provide specialist legal advice for older people, their families and carers.

Welsh Government

www.wales.gov.uk

Telephone 0300 060 3300 (English) or 0300 060 4400 (Welsh)

The devolved government for Wales. Has overall responsibility for publishing guidance for healthcare and social care staff in Wales and for the IMCA service.

Age UK

Age UK provides advice and information for people in later life through our Age UK Advice line, publications and online. Call Age UK Advice to find out whether there is a local Age UK near you, and to order free copies of our information guides and factsheets.

Age UK Advice

www.ageuk.org.uk

0800 169 65 65

Lines are open seven days a week from 8.00am to 7.00pm

In Wales contact

Age Cymru

www.agecymru.org.uk

0800 022 3444

In Northern Ireland contact

Age NI

www.ageni.org

0808 808 7575

In Scotland contact

Age Scotland

www.agescotland.org.uk

0800 214 4222

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Next update June 2018

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