

Factsheet 22

Arranging for someone to make decisions on your behalf

December 2019

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 the future. This is usually family members or friends, but it can be a professional such as a solicitor.

You create this power by setting up a Lasting Power of Attorney (LPA). A Deputyship granting similar powers can be applied for on your behalf if you lose mental capacity and cannot make an LPA. 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 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 Lasting Power of Attorney (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 Enduring Power of Attorney (EPA) between 1 April 2013 and 31 March 2017.

You must claim a refund by 1 February 2021 and you 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. For information, go to www.gov.uk/power-of-attorney-refund or call the refunds helpline 0300 456 0300 (choose option 6).

A refund scheme also applies to deputy assessment and annual supervision fees for the period 1st April 2008 to 31st March 2015. Refunds must be claimed by 4 October 2022. For information, go to www.gov.uk/deputyship-refund or call the refund helpline above.

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
You can find the Code at www.gov.uk/government/publications/mental-capacity-act-code-of-practice.

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 is about your ability to make a particular decision at the time the decision needs to be made, rather than your ability to make decisions in general. This is because you might have mental capacity for some decisions, but not others, or capacity to make a decision at one time, but not another.

In deciding whether you lack mental capacity for a particular decision at the time it needs to be made, the Act sets out a test. You must have an impairment or disturbance in the functioning of your mind or brain and be unable to do at least one of the following:

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

3.1 The right to make your own decisions

The Act contains five fundamental principles that must be followed when someone else intends to make a decision on your behalf.

- **Right to make your own decisions and presumption of capacity** – Having mental capacity means you have the right to make your own decisions. You are assumed to have mental capacity, unless there is proof you do not, using the test above
- **Right to be supported to make your own decisions** – Every effort should be made to help you make the decision before it is concluded you cannot do so. There might a way of explaining information that is easier for you to understand or a place where you feel more at ease. You might want someone you know and trust to be present when the decision needs to be made. You should be given as much information as you need to make the decision.
- **Right to make unwise or eccentric decisions** – People who know you, or professionals like your doctor or social worker might express a view about a particular decision, but you have the right to decide what is best for you. You should not be treated as lacking mental capacity because people think your decision is wrong.
- **Decisions must be made in your best interests** – See section 3.3 for more information.
- **Least restrictive option** – Anyone making a decision on your behalf should consider all of the options and choose the one least restrictive of your basic rights and freedoms.

3.2 Who decides whether I have mental capacity?

This depends on the sort of decision that needs to be made and the situation. The Code says it is usually the person who is directly involved with you at the time of the decision.

Common examples include:

- If you require social care and support, the local authority social services team may assess whether you have mental capacity to agree to care arrangements being made for you.
- If you are in hospital, the doctor or another health care professional must assess your mental capacity to consent to treatment.
- Your attorney may decide whether you have mental capacity to make a decision or whether they must make the decision for you.
- When making a will or setting up a Lasting Power of Attorney, your solicitor must assess whether you have mental capacity to instruct them.

Whoever decides must follow the Act's principles. No one can conclude you lack mental capacity, unless they can prove you are unable to make the particular decision at the time the decision needs to be made.

3.3 Protections and best interests

If you lack mental capacity, any decision made or action taken on your behalf **must** be in your '*best interests*'.

There is no set meaning of best interests, because everyone is different. The person deciding for you must recognise that your best interests might not be the same as someone else's. Anyone deciding what is in your best interests must:

- **Let you take part in the decision** - do whatever is possible to permit and encourage you to take part, or to improve your ability to take part, in making the decision.
- **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.
- **Speak to family, friends or others who know you** - for their views about your best interests and what is important to you, unless there is a good reason not to. This includes anyone appointed as your Enduring or Lasting Power of Attorney or anyone appointed as your deputy. When people are consulted about the decision, you have a right to keep your affairs private, so it is not right to share every piece of information with everyone.
- **Identify all relevant circumstances** - try to identify all the things you would take into account if making the decision or acting for yourself.
- **Avoid restricting your rights** - see if there are other options that may be less restrictive of your rights.
- **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.

For decisions about major medical treatment or a long-term stay in a care home or hospital, an Independent Mental Capacity Advocate must be instructed if there is no one appropriate to consult other than those caring for you in a paid or professional capacity. See section 8 for more information.

3.4 Who decides in my best interests?

The person making the decision in your best interests depends on the situation and the decision that needs to be made. The Code says many different people might be required to make a decision if you lack capacity. Whoever makes the decision for you must be able to show that they are acting in your best interests. Common examples include:

- an attorney or deputy making a financial or care decision they have been appointed to make
- a carer making a day to day decision about your care and support
- your doctor or the local authority social services if a decision needs to be made about health treatment or care arrangements, unless you have an attorney or deputy appointed to make these decisions or have made an advance decision to refuse treatment.

4 Lasting Power of Attorney

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

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

An LPA cannot be created unless you have mental capacity to understand its nature and effect. There are two types of LPA:

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

A financial decisions LPA can be used by the attorney whilst you still have mental capacity, 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. If you want your attorney to have the power to make both types of decision, you need two separate LPAs, even if the same person is appointed for both.

The LPA must be registered with the Office of the Public Guardian before it can be used. See section 4.5 for more information.

4.1 Choosing attorneys

An attorney must always act in your best interests and within the authority granted to them. You can pick more than one person to be your attorney. They must be aged 18 or over.

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

- must not be bankrupt, interim bankrupt or subject to a debt relief order 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, unless there are exceptional circumstances e.g. they are your only close relative
- must not be on the Disclosure and Barring Service list, unless they are a member of your family and will not be paid to be your attorney.

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

Things to think about

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 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?
- 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 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?

Separation from spouse or civil partner

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. Appointing a sole attorney may offer less security for your assets than joint attorneys. 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.

You can also appoint replacement attorneys, who can act if an original attorney is permanently unable to make decisions on your behalf.

4.3 The certificate provider

When setting up an LPA, it must be signed by someone who confirms that, in their opinion, you understand what you are doing and no one is forcing you to make an LPA. They are called the '*certificate provider*'.

The certificate provider must be someone you have known personally for at least two years, or a professional with relevant skills to provide the certificate. If the certificate provider is a professional, it does not matter how long they have known you.

A professional certificate provider can be a GP or other healthcare professional, solicitor or social worker, Independent Mental Capacity Advocate or anyone else with the necessary expertise.

Your partner and family members are excluded from being a certificate provider, including:

- children and grandchildren
- parents and grandparents
- brothers and sisters
- aunts and uncles
- nieces and nephews.

The following people also cannot be certificate providers:

- an attorney or replacement attorney named in this LPA or any other LPA or EPA for the donor
- a member your attorney or replacement attorney's family
- a partner of your attorney or replacement attorney
- a business partner, paid employee of yours or any of your attorneys or replacement 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 a financial decisions lasting power of attorney.

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

- the attorney can 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 capacity is decision specific, it is possible that you have capacity to create an LPA, but lack capacity to make the decisions you want your attorney(s) to make on your behalf.

If so, the validity of the LPA is not affected.

4.4 How to set up an LPA

4.4.1 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 online 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 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 detailed guide.

4.4.2 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 found at www.gov.uk/government/publications/make-a-lasting-power-of-attorney.

Paper copies can be requested via the OPG helpline.

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.

Attorneys, restrictions and people to be notified

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.

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, but do not need to be followed. '*Instructions*' must be followed exactly as you have written them.

LP12 *Make and register your lasting power of attorney a guide* has information and examples, including how to avoid instructions and preferences that make an LPA unworkable. Examples of preferences include '*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*'.

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, an example includes: '*My attorneys must not decide I am to move into residential care unless, in my doctor's opinion, I can no longer live independently*.' An example instruction for financial decisions includes: '*My attorneys must not sell my home unless, in my doctor's opinion, I can no longer live independently*'.

You must make an instruction if applying for a financial decisions LPA and have investments managed by a bank and want that to continue, or you want your attorney(s) to let a bank manage your investments.

Otherwise you can 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. 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.

4.4.3 Signing the LPA form

Once the LPA form is complete, it must be signed in the correct order. As the donor, you must sign first, followed by the certificate provider. Your attorney(s) must sign last.

The donor's signature

Section nine of the form is signed by you, as the donor. If you are making a health and care decisions LPA, you must sign section five of the form first. Also sign continuation sheets one and two, if used, before signing section nine. Once section nine is signed, you are forming a legal agreement with your attorney(s).

Your signature must be witnessed. The witness cannot be an attorney or a replacement attorney and must be aged 18 or over. If you cannot sign or mark the form, you can choose someone else to sign for you. The person signing on your behalf must have their signature witnessed by two independent witnesses (not the attorney(s)).

The certificate provider

Section 10 is signed by the certificate provider. They confirm that, in their opinion, you understand the purpose and effect of the LPA, you have not been put under undue pressure to create it and there is no fraud involved or other reason for concern.

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.

If the certificate provider has concerns, for example they believe you are being pressured into making an LPA, they should not sign the LPA and raise this 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 is signed by your attorney(s), confirming they understand and accept their duties under the LPA. Their signature must be witnessed. The witness must be at least 18 years old and cannot be the donor.

4.5 Registration of the LPA

You can register the LPA while you still have mental capacity for decisions. You can do this immediately after making it, or at a later time.

If you lose mental capacity before the LPA is registered, the attorney registers it for you. Waiting until you lose mental capacity can cause delays. Attorneys cannot act until the registration is completed, which can take several weeks. 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 registration while you have mental capacity is if errors are discovered, you can correct them and create a valid LPA.

You can use section six of the LPA form to name anyone you want to be notified of the LPA being registered, so they can raise concerns if needed. 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 will not act in your best interests. The Court of Protection has the power to prevent an LPA being registered. The person registering the LPA must use form LP3 to notify anyone named in section six.

If you register the LPA, the OPG will write to your attorney(s) to inform them of the application. If registered by your attorney(s), the OPG will write to you to inform you of the application.

A fee of £82 is payable to register each LPA. If you register a health and care decisions LPA and a financial decisions LPA, you pay £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, unless you have specified it can be used only if you lose mental capacity. A health and care decisions LPA can only be used if you lack the capacity to make decisions yourself.

4.6 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 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 may also qualify if you claim Universal Credit.

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

OPG discretion

If you do not meet fee remission requirements, the OPG 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 LPA120. You must provide appropriate supporting evidence.

4.7 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 that 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 and have regard to the guidance in the Code
- make decisions in the best interests of the donor (see section 3.3)
- only make decisions you have authority to make under the LPA, taking into account any preferences, instructions, limitations or conditions
- not take any advantage to gain benefit for yourself or allow personal interests to conflict with your duties as an attorney
- not delegate your authority to make decisions for the donor to anyone else.

You **must** 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 may 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, friends 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

Under section 44 of the Act, it is an offence to ill-treat or wilfully neglect a person lacking capacity. This applies to attorneys, Court-appointed deputies and anyone who has the care of a person who lacks mental capacity. The penalty for conviction for the offence is a fine and/or imprisonment of up to five years.

Duties of an attorney 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, although you may be consulted.

- **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. You should usually 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 a 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 of the property or another valuable item is below market value, or you want to buy it yourself, or give it to someone else. The OPG can advise you whether you need to apply to the Court of Protection to do 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.

Duties of an attorney 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 five 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 information, see factsheet 72, *Advance decisions, advance statements and living wills*.

- **Wills** – You cannot make a will on behalf of the donor.
- **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.

4.8 Cancelling the power

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

- sign a witnessed '*deed of revocation*' and send it to the OPG. The OPG website and helpline provides information about how to do this.
- write to the attorney(s) advising them the document has been revoked

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

4.9 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, or the donor or sole attorney becomes subject to a debt relief order (financial decisions LPAs)
- revocation by the donor or the Court of Protection.
- the attorney no longer wants to act (known as '*disclaiming*') or loses mental capacity.

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

5 Existing Enduring Powers of Attorney

If you have an Enduring Power of Attorney (EPA) set up before 1 October 2007, it is still valid and can be registered. The EPA must be registered at the OPG once the donor loses capacity to make decisions about their finances. The fee to register an EPA is £82.

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

Forms and guidance 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. Seek advice from the OPG as there may be fees involved in dispensing with the notice.

Revoking an EPA

To revoke a registered 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 £365. You may be entitled a fee exemption or reduction.

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.

You should also 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. Go to www.gov.uk/use-or-cancel-an-enduring-power-of-attorney for information about creating a Deed of Revocation.

6 Deputies

The Court of Protection can appoint a deputy to act for you if you lack mental capacity and have not made an LPA or EPA. There are two types of deputy: **property and financial affairs** and **personal welfare**.

Personal welfare deputies are uncommon. Usually a deputy of this kind 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 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.

They must keep copies of documents about decisions they make:

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

A deputy usually has to complete a report once a year, using a deputy report form.

Anyone thinking of applying to be your deputy should check whether an appointee for benefits could be used to manage your money instead. This applies if your income is solely made up of benefits including the State Retirement Pension. See section 7 for more information.

The OPG publish professional deputy standards, see:
www.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf.

6.1 Security bonds for financial affairs 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. If the deputy pays the bond from their own funds, they can reclaim the money from you once they have authority to act.

6.2 Role and responsibilities of a Court-appointed deputy

A deputy should consult the Code and must follow the principles of the Act. They have a legal duty to:

- 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.

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

6.3 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 also submit forms COP3 and COP1A or COP1B. As the application process is complex, it is advisable to seek advice from the OPG or use the guidance available at www.gov.uk/become-deputy.

6.4 Fees and fee remission for deputies

Fees are normally paid from your funds but can be paid by the prospective deputy and then refunded from your funds later.

There is a fee of £365 payable to the Court of Protection when a deputyship application is made. If both types of deputy are applied for, the application fee must be paid twice. Contact the OPG for information about who can claim help with the application fee.

A one-off Deputy assessment fee of £100 must be paid to the OPG when it receives an order appointing a 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 are calculated on a pro-rata basis if there are part year supervision changes.

Exemption or remission for assessment and supervision fees

Once a deputy has been appointed, the assessment fee must be paid. The supervision fee is paid at the end of the financial year. Entitlement to help with the fees is based on the circumstances of the person the deputy has been appointed for.

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

Exemption

See section 4.6 for fee exemptions that also apply for deputyship.

Remission

If your gross annual income is less than £12,000, you are eligible for a 50 per cent fee reduction.

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.

6.5 Interim order while waiting for deputy to be appointed

It may take some time before the application of a deputy is approved. In the meantime, financial decisions cannot be made for the person lacking mental capacity.

If an urgent, one off decision needs to be made, such as paying outstanding care home fees, an urgent interim order can be applied for. There is no fee for this. Forms can be downloaded from www.gov.uk/emergency-court-of-protection.

7 Appointees for benefits

If you lack mental capacity to manage benefits income, the Department for Work and Pensions (DWP) can make someone your '*appointee*' to do this for you. There is no fee involved in applying to be your appointee. The appointee is usually someone you know, like a close relative or friend. In some cases, the appointee is an organisation, like the NHS or local authority, and is called a '*corporate appointee*'.

An appointee is not needed if you have a financial LPA, an EPA, or deputy, as the person acting for you is authorised to manage your benefits. If you live in a care home, the appointee can be the owner or manager, but only as a last resort.

If you have mental capacity but physical disability means you cannot manage your benefits income, the DWP may allow you to have an appointee, but rarely. Generally, if you are capable of managing your financial affairs but need someone to collect your benefit payments for you, consider the options in section 9 instead.

Applying to become an appointee

An application to become an appointee needs to be made to the DWP via the helpline for a particular benefit. The person applying must be 18 or over. DWP 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 information see www.gov.uk/become-appointee-for-someone-claiming-benefits.

7.1 The role and responsibilities of an appointee

The appointee must:

- sign your benefit claim forms.
- use your benefits income solely for your benefit, in your best interests
- manage your benefits appropriately, including telling the DWP of any change of circumstances and arranging for any overpayments to be paid back.
- tell the DWP if they need to stop being the appointee. For example because you have regained mental capacity.

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 the person's best interests, contact the relevant DWP agency.

8 Independent Mental Capacity Advocates

An Independent Mental Capacity Advocate (IMCA) can support and represent you if you lack capacity to make certain health and welfare decisions and there is no one appropriate to consult 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 with decisions about 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 for a long-term stay.

The duty to instruct an IMCA only applies if there is no one appropriate to consult about your best interests other than those providing care or treatment to you in a professional or paid capacity.

An IMCA may be consulted in relation to decisions about care reviews or in safeguarding cases. If the decision relates to safeguarding, an IMCA may be appointed even if people who know you are available to be consulted. If an urgent decision is needed, it may not be possible or appropriate to instruct an IMCA. If an urgent decision is about 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.

9 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.

9.1 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 instead. An ordinary power of attorney provides 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, or
- the attorney(s) themselves die or lose mental capacity.

9.2 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 instructs your bank or building society to regularly transfer a fixed amount to another account. You control your finances and they cannot access any funds except the transfer amount. They must have an account to transfer into. It can take up to four working days to access the money, so may be unsuitable if access is needed urgently.

A direct debit instructs your bank or building society to allow someone to collect money from your account. They can collect any amount, as long as they tell you beforehand of the amount and 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. The Building Societies Association leaflet *You and your joint account* has more information.

Third party mandate

This is an instruction to your bank or building society to provide access to your account by 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, 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. There is a *Payment Exception Service*, where DWP sends you a card, a voucher over email or a text message with a reference number that you can use to collect money from PayPoint outlets. 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, they must show your card, voucher or text to the person serving them and show an original (not a copy) document proving their and your identity. Acceptable documents include a passport or recent utility bill. If you do not have these, contact the DWP and they can give you a letter to use.

9.3 Access to a bank account if you lose mental capacity

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), a registered financial decisions LPA, or a registered EPA.

If one holder of a joint bank account loses mental capacity, 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 or EPA is registered.

Once an attorney or deputy can act for the account holder lacking mental capacity, it is usually appropriate to close a joint account because the person's money should generally be kept separate from anyone else's.

However, there may be good reasons to keep a joint account open, for example where the donor and attorney are a couple and the joint account is long standing.

The British Bankers Association leaflet *Guidance for people wanting to manage a bank account for someone else* has guidance on how banks and building societies should act if one joint account holder loses mental capacity. 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?*

9.4 Your attorney or deputy accessing your account

The British Bankers Association says your bank or building society should expect the following information from your attorney or deputy before they allow access to your account:

- Evidence of your attorney or deputy's authority to act for you. For example, the original or copy of the LPA or EPA document, stamped on every page by the OPG. For a deputy, a copy or original court order document.
- Proof of the name and address of your attorney or deputy and your name and address if the bank or building society do not already have it.

10 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. It investigates complaints about attorneys or deputies.

If there are any aspects of making or registering an LPA or of your duties as an attorney you are unsure about, call the OPG helpline for help.

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.

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.

10.1 Search the OPG register

You can apply to the OPG to find out if someone has an LPA, EPA or deputy acting for them. The OPG provides information including the name of the attorney or deputy, the decisions they have been appointed to make and any restrictions applying to their authority.

You can also request additional information, not held on the OPG register. The OPG decides if it is in the best interests of the donor for additional information to be provided, meaning your request may be refused.

11 The Court of Protection

The Court of Protection protects the rights of adults lacking mental capacity. In most kinds of situation, the Court does not need to be involved. The most common example is when the Court needs to appoint a deputy because a person lacking mental capacity has not made an EPA or LPA.

Other situations involving the Court include:

- where there is serious disagreement about mental capacity or best interests that cannot be resolved in any other way
- there is an issue over the use or validity of an LPA or EPA
- there is doubt or disagreement about an advance decision to refuse treatment
- a decision needs to be made about 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.

11.1 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
- end an attorney appointment and/or cancel an EPA or LPA if the attorney's duties are not being carried out in the best interests of the donor.

- 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 you 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.

11.2 Applying to the Court

If you want the Court to become involved, you must make an application. You may need permission from the Court before you apply and it is best to check this with the OPG before you start.

There is a fee of £385 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 4.6). You use form COP44A to apply.

It may be advisable to seek the advice of a solicitor in certain cases involving the Court. 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.

More information about applying to the Court is available at www.gov.uk/oneoff-decision-personal-welfare or by contacting the OPG.

12 Monitoring of attorneys and deputies

Court of Protection Visitors

Where an LPA or EPA 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.

13 Concerns about an attorney, deputy or appointee

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, who are responsible for investigating concerns. Contact the DWP if you think an appointee for benefits is misusing their authority.

Abuse and neglect and safeguarding

If you are concerned that a donor is at risk of abuse or neglect, contact the local authority social services for the area where the donor lives. The local authority has a duty under the Care Act 2014 to safeguard adults experiencing, or at risk of, abuse or neglect if criteria are met. For more information, see Age UK factsheet 78, *Safeguarding older people from abuse and neglect*. In Wales, see Age Cymru factsheet 78w, *Safeguarding older people in Wales from abuse and neglect*.

Contact the police if you think a crime has been committed.

The criminal offence of ill treatment or wilful neglect

Section 44 of the Act makes it a criminal offence to ill-treat or wilfully neglect a person 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 lacks mental capacity. The penalty for conviction for the offence is a fine and/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. The helpline provides information, advice and support.

British Bankers Association

<https://www.bba.org.uk/>

Telephone 020 7216 8800

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

Care Inspectorate Wales (CIW)

<https://careinspectorate.wales/>

Telephone 0300 7900 126

The CIW 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

Makes decisions and appoints other people to make decisions for people lacking mental capacity.

Healthcare Inspectorate Wales (HIW)

<http://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.

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 adults lacking mental capacity in court.

Solicitors for the Elderly

www.solicitorsfortheelderly.com

Telephone 0844 567 6173

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

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 Advice

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 124 4222

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Next update December 2020

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