











### 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*'. 

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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: 

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**Let you take part in the decision** - do whatever 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.

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### 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 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 you 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). 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, including property.

'**health and care decisions LPA**' gives your attorney authority to make decisions about your health, care and welfare (such as where you live).

When creating a financial decisions LPA, you can choose to allow your attorney to make decisions while you still have mental capacity. If you later lose capacity, they can continue to act for you. Alternatively, you can choose to only allow your attorney to act once you have lost capacity.

The health and care decisions LPA can only be used once you lose capacity to make the relevant decisions.

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 or people are appointed for both.

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





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

does your attorney know you well enough to take your views about health and care into account when deciding what is in your best interests? For example, 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 about your health and care?

### **Separation from spouse or civil partner**

If the attorney is your spouse or civil partner, the LPA automatically ends if your marriage or civil partnership is dissolved or annulled, unless you expressly state in the LPA 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 Appointing more than one attorney**

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) or

**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 or no longer wants to make decisions on your behalf.

Think carefully about choosing for your attorneys to act jointly for some or all decisions. As all attorneys must be in agreement for joint decisions, they will not be able to act for you if they cannot agree.

If attorneys are appointed to act jointly on all decisions, the LPA ends if one of them dies or is unable or no longer wants to act, unless you have appointed at least one replacement attorney. If attorneys are appointed jointly and severally, the LPA can continue if this happens.

## **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. You may need to pay a professional certificate provider.

A professional certificate provider can be a GP or other healthcare professional, solicitor, 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, grandchildren, parents and grandparents

brothers and sisters

aunts and uncles

nieces and nephews

in-laws and step relatives.

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 of 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

## **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 also

## Preferences and instructions

The LPA application form has a section titled '*Preferences and instructions*'. '*Preferences*' are what you would like your attorney(s) 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.



## After registration

The LPA form is returned, having been stamped on each page as being registered by the OLS. Once received, it is sent to the LPA Office.

A financial decisions LPA can be used immediately, with your permission, 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.

See section 3 for information about how it is decided whether you have mental capacity for a particular decision.

## 4.6 Help with LPA fees

You may be exempt from paying the registration fees, or you may be able to apply for a '*remission*' (reduction) 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 these benefits:

Income Support

Income-based Employment and Support Allowance

Income-related Jobseeker's Allowance

Pension Credit Guarantee Credit

Housing Benefit

Council Tax Reduction/Support

A combination of Working Tax Credit and at least one of:

## 4.7 The role and responsibilities of an attorney

Once you as an 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

## **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



**Making a grant of representation** – this is a court document confirming a person can deal with someone else’s estate as an 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.

If the donor is subject to the *Mental Health Act 1983* (MHA), restrictions may apply to decisions about where the donor lives. If the donor is treated for a mental disorder and is detained under the MHA, you cannot make decisions refusing, or consenting to, treatment. If the donor is subject to a MHA *guardianship*, you cannot make decisions about where the donor lives, or any decision that conflicts with decisions the guardian has a legal right to make. For advice about the MHA, contact MIND.

**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 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 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.

**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.





They must keep copies of documents about decisions they make:

receipts

bank statements

letters and reports from health agencies or social services.

A deputy must usually 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.

All deputies must comply with certain standards, published by the OPG at [www.gov.uk/government/publications/office-of-the-public-guardian-deputy-standards](http://www.gov.uk/government/publications/office-of-the-public-guardian-deputy-standards)

## **6.1 Security bonds for financial affairs deputies**

Most deputies must pay a bond to a security bond provider to protect your finances to cover any loss due to their behaviour. If the deputy pays the bond from their own funds, they can reclaim the money from you once they have authority to act. They get a letter from the Court telling them how to do this. The Court determines the level of security required.

## **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 person lacking mental capacity. 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 forms provided by the Court. The Court decides whether it is in the person's best interests to appoint a deputy to act for them. The Court will also decide whether the applicant is a suitable person to act as deputy.

As the application process is complex, it is advisable to seek advice from the OPG or use the guidance available cation process is complex

## 6.4 Fees and fee remission for deputies

Where a prospective deputy for property and financial affairs pays fees from their own funds, the fees can later be refunded from the finances of the person lacking mental capacity. This may also be possible when the deputy is for personal welfare. Seek advice from the OPG.

There is a fee of £371 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. There is an additional fee of £494 if the Court of Protection decides your case needs a hearing. Contact the Court of Protection for information about help with the application fee.

A one-off deputy assessment fee of £100

## 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](http://www.gov.uk/emergency-court-of-protection)

## 7 Appointees for benefits

If you lack mental capacity to manage income from social security benefits, the Department for Work and Pensions (DWP) can make someone your '*appointee*' to do this for you. There is no fee involved in becoming 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 local authority ('*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 are physically disabled and cannot manage your benefits income, the DWP may allow you to have an appointee, but this is rare. Generally, if you are capable of managing your financial affairs but need someone to collect your benefit payments for you, see 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 aged 18 years or over. Someone from the DWP visits 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,

## 7.1 The role and responsibilities of an appointee

The appointee must:

- sign your benefit claim forms

- use income solely for your benefit, in your best interests

- manage your benefits appropriately, including telling the DWP of any change of circumstances and dealing with any overpayments

- tell the DWP if they need to stop being the appointee. For example, because you regain mental capacity.

### Dealing with your income and





## 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 financial decisions and are no longer able personally to supervise or direct the attorney

you revoke the power

## 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.

You must also show an original document (not a copy) to prove your identity. Acceptable documents include a driving license, a passport or recent utility bill. If you do not have these, contact the office that pays the benefit or pension.

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 document proving

## 9.4 Your attorney or deputy accessing your account

The OPG and British banking bodies say 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 is a government organisation for 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. They supervise and keep a register of deputies. They investigate complaints about attorneys or deputies.

Call the OPG helpline if you need help with making or registering an LPA, making a deputy application, or with carrying out your duties as an attorney or deputy.

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

The OPG publishes guidance for people making an LPA, applying to be appointed as deputy and for people taking on the role of attorney or deputy.

The guidance is available at [www.justice.gov.uk/about/opg](http://www.justice.gov.uk/about/opg). Alternatively, phone the OPG on 0300 456 0300 to ask if copies can be provided.

### 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.

## 11 The Court of Protection

The Court of Protection protects the rights of people 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 cancel an EPA or LPA if the attorney's duties are not being carried out in the best interests of the donor

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## 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 £371 payable when making an application to the Court. The form and a guide about help with the fee is available from [www.gov.uk/government/publications/apply-for-help-with-court-protection-fees-form-cop44a](http://www.gov.uk/government/publications/apply-for-help-with-court-protection-fees-form-cop44a)

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 funds for your case.

More information about applying to the Court is available at

[www.gov.uk/oneoff-decision-personal-welfare-by-deputy-the-opg](http://www.gov.uk/oneoff-decision-personal-welfare-by-deputy-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.





## **Hourglass**

[www.wearehourglass.org](http://www.wearehourglass.org)

Telephone helpline 0808 808 8141 (free phone, open 24 hours a day, seven days a week)

Works to protect and prevent the abuse of vulnerable older adults.

Hourglass offer a UK wide helpline. The helpline is confidential and





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