

Power of Attorney Explanatory Notes England and Wales

As part of our legacy service, we can refer you to our specialist partner Redstone Wills Limited (Redstone) who can help you find a solution that's right for your individual circumstances, arranging your Will or Lasting Power of Attorney (LPA) with minimum fuss.

Whether you are completing your LPA instructions by post, telephone or Skype, it is useful to have some guidance to help you answer some of the questions and understand some of the terms used in creating an LPA.

Please read these guidance notes before completing your LPA application or attending your telephone or Skype appointment.

1. Choosing which type of LPA you require

There are two types of Power of Attorney: Lasting Power of Attorney (LPA) and General Power of Attorney (GPA).

What is a Lasting Power of Attorney?

An LPA is a legal document that allows someone to choose other people to make decisions on their behalf, including when they lack the mental capacity to make the decision themselves.

An LPA is always 'completed' while the person still has capacity to make decisions.

However, an LPA cannot be used until it has been registered with the Office of the Public Guardian (OPG). There is a fee payable to the OPG (see the Legal Documents and Estate Administration Tariff of Charges for more details).

The Lasting Power of Attorney is generally referred to as an LPA throughout the rest of this guidance.

There are two versions of an LPA to reflect different decision-making capabilities:

Property and Financial Affairs

This allows the Attorney(s) to make decisions about property and financial affairs, such as paying bills, dealing with the bank, collecting benefits, selling your house, etc. You can decide whether your Property and Financial Affairs Attorney(s) can make decisions immediately, or only in the event you lose mental capacity.

Health and Welfare

This allows the Attorney(s) to make decisions about your health and welfare, including treatment, care, medication, where you live, etc. Your Health and Welfare Attorney(s) can only make decisions in the event you lose mental capacity. (Please note, you can't appoint a Professional Attorney for health and welfare POAs).

The benefits of making an LPA

An LPA allows you to plan in advance:

- the decisions you want to be made on your behalf if you lose capacity to make them yourself
- the people you want to make these decisions and
- how you want the people to make these decisions.

Having an LPA is a safe way of maintaining control over decisions made for you because:

- it has to be registered with the OPG before it can be used. By having your LPA document registered, it will guard against someone else taking control of your affairs
- you choose someone to provide a 'certificate' confirming that you understand the significance and purpose of it
- you can choose 'people to be told' about your LPA when it is registered (so that they have an opportunity to raise concerns)
- your signature and the signatures of your chosen Attorney(s) must be witnessed
- from a legal perspective, your Attorney(s) must follow the Code of Practice of the Mental Capacity Act 2005 – if they don't always act in your best interests the OPG can step in, and your Attorney(s) may be held accountable.

Remember, if you lose mental capacity at some point – for whatever reason – if you haven't completed an LPA, other people may need to apply to the Court of Protection to be able to make any decision on your behalf. This can be costly, and can be demanding and stressful for your relatives, friends and carers. By choosing whom you want to make decisions for you, having an LPA puts you in control of decisions eventually being made on your behalf from the beginning.

IT IS GOOD PRACTICE TO REGISTER YOUR LPA EARLY AS IT CAN'T BE USED UNTIL YOU DO.

2. What is a General Power of Attorney (GPA)?

Similar to an LPA, a GPA allows you to nominate one or more people to deal with your finances on your behalf but unlike an LPA the document automatically becomes invalid if you lose mental capacity. Because of this, they tend to be used only over short periods of time or for a specific task. A GPA can be quite general in nature and cover any and every aspect of your affairs, or you can specify which matters your Attorney(s) can deal with. You can end the arrangement at any time.

You may wish to consider a General Power of Attorney if:

- you are going abroad for a period of time
- you are going into hospital or are physically unable to manage your finances due to illness or disability or
- you would like someone else to deal with a particular financial matter, for example, selling your property.

A GPA does not need to be registered with the OPG before it can be used, though it must be completed correctly.

As such, some organisations may place some restrictions or further checks on what they will allow the Attorney(s) to do under a GPA and you should check with your building society or bank beforehand. It might be that the powers you give your Attorney to act under a GPA are very wide and may include the ability to do anything you could do with your finances and property, unless you decide to restrict what they can do within the GPA document itself. For this reason, you should be entirely happy with, and trust your choice of, Attorney(s).

If someone that has a GPA becomes mentally incapable, the Attorney or family should contact a solicitor or financial adviser, as it will be necessary to make an application to the OPG for a Deputy

to be appointed to handle their financial affairs. It is important to note that if your intention in appointing an Attorney(s) is to have someone in place to deal with your financial matters, should you become mentally incapable, then the only way this can be achieved is through an LPA. Without an LPA the only way a person can be legally appointed to manage your affairs would be through a Deputyship Order at the Court of Protection.

The benefits of making a General Power of Attorney

- It is a shorter document than an LPA so requires less time and expense to complete
- A GPA does not need to be registered with the OPG
- Useful for when you know your affairs will need managing for a short period e.g. holidays, extended trips abroad or longer hospital stays
- Allows you to give Attorneys general or specific direction e.g. operate all your accounts or buy/sell a property and
- Can be cancelled at any time using a Deed of Revocation, or if you become mentally incapable.

3. Full names

You will need to provide all names in full including middle names – not just initials – as this information will be used in your POA.

4. Certificate provider

For an English or Welsh POA, a certificate provider needs to be an independent person who is able to confirm that you understand the significance of your POA. They must have known you well for at least two years, or have relevant professional skills to enable them to confirm that you understand the significance of your LPA (for example, your GP or solicitor).

5. You and your spouse/partner details

If you are married or in a civil partnership and you both wish to arrange your POA then Redstone can take your instructions at the same time, though you will both need to be present. If you both have the same or similar requirements e.g. the same attorneys and required powers, Redstone can take these as 'Mirror' instructions. If you have significantly different requirements then you should each submit a single instruction.

6. Choosing your Attorney(s)

Your Attorney(s) should be someone who you are confident will act responsibly in your interests, has the necessary skills and is competent, reliable and willing to act for you. Your Attorney(s) must be aged at least 18, can be a relative, spouse or civil partner, or you can appoint a professional Attorney such as a solicitor. Other requirements are:

- for a Property and Financial Affairs LPA, the Attorney cannot be bankrupt or subject to a debt relief order
- a trust corporation can be Attorney for a Property and Financial Affairs LPA
- the attorney must be an individual for Health and Welfare LPA. You can have more than one Attorney and can also nominate one or more replacements in the event the Attorney(s) selected can no longer act.

If you have chosen more than one Attorney, how do you want them to act?

If you choose more than one Attorney, you must decide whether they are to

- act together (jointly)
- 'independently'
- or together and independently (jointly and severally) which means they can act together but they can also act separately if they wish.

You may appoint your Attorneys together in respect of some matters and together and independently in respect of others. If you appoint more than one Attorney and do not state whether they are appointed together or together and independently, when your LPA is registered they will be treated on the basis that they are appointed together.

Jointly:

Choosing this option means that all your Attorneys must always make all decisions together. If one of your Attorneys does not agree with something, that decision cannot be made on your behalf. You might choose this option, for example, if you want to be sure that your Attorneys agree about every decision.

However, bear in mind that:

- getting agreement from all your Attorneys could take extra time and delay otherwise straightforward decisions that which may need to be taken very quickly (even if there is no disagreement)
- if your Attorneys cannot work together your LPA may be cancelled and
- if one of your Attorneys dies or can no longer act, your LPA will be cancelled unless a replacement Attorney has been appointed.

Jointly and Severally:

Choosing this option means that all your Attorneys can act together or independently for all decisions; so any one of your Attorneys can make any decision on your behalf. You might choose this option if, for example:

- one of your Attorneys is closely involved in your financial affairs, and you trust them to make your decisions on their own
- one of your Attorneys is frequently unavailable (working abroad, for example) and
- you want to ensure that your LPA continues to be workable if one of your Attorneys dies.

Many people find this option works best for them.

Jointly for some decisions, and Jointly and Severally for other decisions.

Choosing this option means that your Attorneys can make some decisions independently. However, for other decisions they must all agree. You might choose this option if, for example, you want your Attorneys to:

- make decisions about whether to consent to medical treatment on their own and
- agree when making significant decisions e.g., where you live.

If you choose this option, you need to list all the decisions that can be made:

- jointly
- jointly and severally

Bear in mind that if one of your Attorneys should die (or can no longer act on your behalf), the other Attorney will not be able to make the decisions you have specified to be taken jointly. In this situation, it is advisable to have a replacement Attorney.

7. Choosing a replacement Attorney

You can name a replacement(s) in case an Attorney is unable to or no longer wishes to continue acting for you.

A Property and Finance Attorney will be unable to act if:

- they are or become bankrupt
- if they are your spouse and you divorce
- or they are your civil partner and you terminate the civil partnership.

Your Attorney(s) can also change their mind and may not want to act for you. If this is the case, they must tell you and the OPG.

If you have appointed more than one original Attorney and more than one replacement Attorney, you should set out the order in which the replacements should act. For example, if you appoint your spouse and child as your original Attorneys and your grandchildren as the replacements, you could say that your grandchildren are to replace the first original Attorney who is unable to act or they are to step in only when both original Attorneys are unable to act. If you have appointed joint Attorneys and one of them can no longer act, they are all replaced by all of your replacement Attorneys.

8. What if an Attorney dies or resigns?

If an Attorney dies, their personal representatives should notify the OPG and remaining or substitute Attorney(s) will continue to act. Remember, where Attorneys can only make decisions jointly and one Attorney dies, the POA ceases unless a substitute Attorney has been appointed.

An Attorney who wishes to resign should inform the donor, the OPG and any other Attorneys named in the LPA.

9. Restricting the powers of your Attorney(s) or adding conditions

You can put legally binding instructions on your Attorney(s) powers and the scope of their authority in the POA. However, these should be considered carefully to ensure it they do not make the POA unworkable.

10. Health and Welfare LPA only: about life-sustaining treatment

Life-sustaining treatment means any treatment that a doctor considers necessary to keep you alive. Whether or not a treatment is life-sustaining will depend on the specific situation. Some treatments will be life-sustaining in some situations but not in others.

For example:

- a serious surgical operation, like a heart bypass
- receiving chemotherapy, radiotherapy, or other cancer treatment or surgery
- an organ transplant.

However, if you have breathing problems and develop pneumonia, a simple course of antibiotics could be regarded as life-sustaining. Artificial Nutrition or Hydration (ANH) can also be life sustaining. ANH is food and water given to someone other than by their mouth.

In a Health and Welfare LPA your Attorney(s) can only make decisions on your behalf – whether about life-sustaining treatment or not – once you lack mental capacity. This is an important safeguard.

Your Attorney(s) cannot make decisions about life-sustaining treatment on your behalf unless you specifically state in your Health and Welfare LPA that you do want them to. This would allow your Attorney(s) to decide to withdraw treatments like ANH in situations where it has become a burden or is not working. However, even if you give your Attorneys authority to make decisions in relation to life-sustaining treatment, doctors can override their decision.

If you don't want your Attorney(s) to make decisions about life-sustaining treatment your doctors will make the decision. They will carry out a best interests assessment – taking into account the views of your Attorney(s) and others involved in your welfare.

The decisions you authorise your Attorney(s) to make for you in your LPA take the place of any advance decision you have already made on the same subject. You must be clear whether or not you want to give your Attorney(s) this authority. This is very important so please be clear about the choice you are making. You might want to discuss this first with your Attorney(s) or doctors and health professionals.

11. 'People to be told': notifying other people before registration

You can name up to five people to be notified when an application to register your LPA is made to the Office of the Public Guardian (OPG). You do not have to name any but it is an important safeguard.

Selecting people to be notified of an application to register is one of the key safeguards of an LPA. Listing people, known as named persons, allows you to decide at the time you make your LPA who you would like to be notified that registration of your LPA is taking place. Once notified, if the people you choose have concerns about the registration of your LPA – for example they feel that you were put under pressure to make it – they can object to the LPA being registered. It is good practice to name up to five people if at all possible.

You can choose family members or friends or, if you prefer, someone else such as a health or social care worker who knows you. Your Attorney(s) or replacements cannot be named as the persons to be notified.

When an application is made to register your LPA, each of your people to be told are contacted by you or your Attorney(s) using a specific form from the OPG. The people to be told are given three weeks (from the day on which the notice is given) to raise any concerns. Your people to be told do not have to do anything when they receive your notice form, but they have the opportunity to raise any concerns.

You can choose anyone who knows you well enough to be able to raise any concerns that they might have about your LPA. Let them know that you would like them to perform this role. So that they understand what they are being asked to do, ask them to read this guidance. If they are not happy to do this for you, choose someone else.

12. When an Attorney can act

Your LPA cannot be used until it has been registered with the OPG. Either you or your chosen Attorney(s) can apply to register the LPA.

Redstone will register your LPA immediately, if you choose for them to register it.

A Property and Financial Affairs LPA can be used straight away unless you have specified that it should only be used when you lack capacity. If you have mental capacity you can continue to act on your own behalf as well.

Remember, a Health and Welfare LPA can only be used once you lack capacity.

13. The Certificate Provider

A Certificate Provider is a person who you must select to complete a Certificate in the LPA form, which confirms that you understand the LPA and that you are not under any pressure to make it.

You will need to choose a suitable person to be your Certificate Provider.

They can either be a trusted friend who you have known for two years or more, or they can be a registered healthcare professional, social worker, barrister, solicitor, advocate or an Independent Mental Capacity Advocate (IMCA).

Please note that some professionals may make a charge for completing this Certificate.

Who can be a Certificate Provider?

Someone who:

- is aged over 18
- has known you for at least two years, or
- has relevant skill or knowledge to be able to form a professional judgement about your understanding.

If you choose a trusted friend to be your Certificate Provider, the OPG may contact you to confirm your instructions.

If you choose someone with relevant professional skills, they must be one of the following:

- a registered healthcare professional (your doctor for example);
- a solicitor, barrister, or advocate
- a registered social worker
- an Independent Mental Capacity Advocate (IMCA)
- someone who considers that they have the relevant professional skills and can specify what they are.

Who cannot be a Certificate Provider?

- an Attorney or replacement Attorney named in this LPA or any other LPA or EPA for the donor
- a family member related to the donor or any of their Attorneys or replacements
- a business partner or paid employee of the donor or any of their Attorneys or replacements
- the owner, director, manager or employee of a care home that the donor lives in, or a member of their family
- a director or employee of a trust corporation appointed as an Attorney or replacement Attorney in this LPA
- employees of Skipton Building Society or the Skipton Building Society Group.

Talk to Redstone today

0808 168 2560

Redstone Wills Limited, Windmill Road, St Leonards-on-Sea, East Sussex TN38 9BY. Company no. 3673190. Please note that the Wills & POA Referral Service is not regulated by the Financial Conduct Authority.

As family members cannot be a Certificate Provider, it is good practice not to use anybody who has a family connection of any kind.

Please note that the Certificate is a vital part of the LPA document. Without it, the LPA is not valid and cannot be registered.

14. Giving guidance to your Attorney

You can also give guidance about your preferences to your Attorney(s) in your LPA. This is not legally binding but the Attorney(s) should take into account your expressed wishes when they are making decisions for you, if it is reasonable to do so.

However, this does give you the opportunity to provide broader information that you would like your Attorney(s) to consider when making decisions on your behalf. For example:

- your views on different medical treatments
- areas you prefer to live in
- your preferences for regular exercise
- preferred helpers or care workers
- who you would like your Attorney(s) to consult.

Guidance is anything that you feel will help your Attorney(s) when making decisions in your best interests.

A requirement that cannot be incorporated as an instruction in the LPA can often be achieved as guidance. For example, if you have three Attorneys acting jointly and severally, you cannot include a 'restriction and condition' that two of them must act jointly in relation to decisions about moving into residential care. It is possible, however, to state in the 'guidance for your Attorneys' that you wish them to work together for decisions of this kind.

You can list as many guidance notes as you like but please bear in mind that making lots of guidance could result in your LPA being impractical.

15. Paying Attorneys

An Attorney is entitled to be reimbursed for out-of-pocket expenses incurred in carrying out their duties. A professional Attorney, such as a solicitor or an accountant, will charge for their services. You should discuss this with your Attorney(s) and record any decision you make about paying your Attorney(s) in the LPA.

16. Changing your mind

You can cancel (revoke) your LPA even after it is registered if you have the mental capacity to do so, by taking formal steps to revoke the LPA. You must tell your Attorney(s) if you do, and if it is registered, you will need to ask the OPG to remove it from the register of LPAs.

17. Storing your LPA

If anything happens to your LPA, or if your Attorney(s) do not know where to find it, you might as well not have written one. You need to decide how to look after your LPA, then let your Attorney(s) know where it is.

Never keep your LPA in a safety deposit box. If you become incapacitated, the deposit box cannot be opened until confirmation has been obtained that your representatives have a right of access.

