

Factsheet 22

Arranging for someone to make decisions on your behalf

June 2024

About this factsheet

This factsheet looks at how you can arrange for other people to make decisions about your finances and health and care 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.

It explains how you can create a Lasting Power of Attorney (LPA) whilst you still have mental capacity. A deputyship grants similar powers and 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 how people must act in your *'best interests'* for decisions about care or treatment if you lack mental capacity and related duties to appoint you an advocate if you have no one to support and represent you.

The roles of the Court of Protection and Office of the Public Guardian are explained. These bodies oversee the system of attorneys and deputies 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. 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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3.1 Mental capacity principles

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.

Support 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 be a way to explain 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.

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 unwise or eccentric.

Decisions must be made in your best interests See section 3.3 for more information *best interests*.

Least restrictive option Anyone making a decision on your behalf should consider all 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 or deputy must decide whether you have mental capacity to make a decision or whether they must make the decision for you.

when making a will or ~~sett~~

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

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, 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 unusual 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 if needed (for example if the original attorney dies)?

if you are making both kinds of LPA, do you want to appoint different attorneys for financial decisions and health and care decisions?

do

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 fill them in online, but you need to print out the forms to sign them. Contact the OPG helpline if you have questions.

For a detailed guide, see OPG documents LP12, *Make and register your lasting power of attorney – a guide*, and *Avoiding errors when completing a lasting power of attorney form*. If an incorrect application is made, you may incur fees, see below.

Alternatively, you can pay a solicitor to complete the form for you.

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(s) or other people, 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 should raise this with the local authority safeguarding team. If the validity of the LPA is later challenged, the certificate provider may need explain to the Court of Protection why they believed there was no cause for concern when the LPA was made.

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 aged 18 or over 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 later on. 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 is likely to 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 because if errors are discovered, you can correct them and create a valid LPA.

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 and OPG can prevent an LPA being registered. The person registering the LPA must use form LP3 to notify anyone named in section six.

Section 13 of the application form allows you to choose who the LPA is sent to once it is registered. The person you choose is also the person the OPG contacts if there are any questions about your 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, 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:

:

Making a grant of representation this is a court document confirming 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 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

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 or loss of mental capacity of a sole attorney

in a financial decisions LPA, bankruptcy of the donor or the sole attorney, or the donor or sole attorney becomes subject to a debt relief order

a sole attorney is married or in a civil partnership with the donor and the relationship legally ends, unless the donor makes an instruction that the attorney can continue acting in these circumstances

a sole attorney no longer wants to act (known as '*disclaiming*')

there is more than one attorney, and one attorney dies, or is unable to act, or no longer wants to act, when all decisions under the LPA must be made jointly

revocation by the donor or the Court of Protection.

If you have appointed one or more replacement attorneys, the LPA may be able to continue if an original attorney is unable or no longer wants to act. If the donor dies, an LPA ends. If the donor or an attorney dies, the OPG must be notified and sent the LPA documents. You do not need to send a copy of the death certificate unless the OPG request this.

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. An unregistered EPA can be used with your permission, if you have mental capacity. The EPA must be registered with the OPG if you lose capacity to make decisions about your finances. The registration fee is £82. Forms and guidance can be obtained from the OPG.

If the attorney believes you may be distressed by receiving the notice to register the EPA, the Court of Protection may agree to dispense with the notice to you. Seek advice from the OPG as there may be fees involved in dispensing with the notice.

Revoking an EPA

A registered EPA can only be revoked by the Court of Protection. The Court of Protection revocation fee is £408. A fee exemption or reduction may be available.

If you have registered an EPA, you cannot register an LPA of either type unless the EPA is revoked. If you want to register an LPA and you have already made an EPA, seek advice from the OPG about what to do.

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. For more on creating a Deed of Revocation, see www.gov.uk/use-or-cancel-an-enduring-power-of-attorney

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,

A deputy must keep copies of documents about decisions they make, including:

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 the Deputy Standards, published by the OPG at 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's website provides more information.

6.2 Role and responsibilities of a Court-appointed deputy

A deputy should consult the Code and must follow the principles of the Act and comply with the Deputy Standards. 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 power of the Court to appoint a deputy is set out in the Act.

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 £408 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 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

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 income from social security benefits, the Department for Work and Pensions (DWP) can make an *appointee*. Your benefits are paid to the appointee. There is

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 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 financially assessed local authority care 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 best interests, contact the relevant DWP agency.

8 Independent Mental Capacity Advocates

An Independent Mental Capacity Advocate (IMCA) supports and represents you if you lack capacity to make certain health and welfare decisions.

You must be appointed with an IMCA where a decision must be made about:

- serious medical treatment, or
 - a long-term stay in a hospital or a care home (long-term means more than 28 days in hospital or more than eight weeks in a care home), or
 - a move to a different hospital or care home for a long-term stay, and
- there is no one appropriate to consult about the decision, 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.

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

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 to do so

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

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.

If you have made an LPA, your attorney may also be able to evidence their authority to act for you through the *'Use a Lasting Power of Attorney* service. For information, see www.gov.uk/use-lasting-power-of-attorney.

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, with carrying out your duties as an attorney or deputy, or to raise concerns about 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

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.

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 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

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 £408 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-of-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 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

authority, contact the OPG, who are responsible for investigating concerns. For further information about raising concerns with the OPG, see: www.gov.uk/report-concern-about-attorney-deputy-guardian

Contact the DWP if you think an appointee for benefits is misusing their authority.

Abuse and neglect and safeguarding

If you are experiencing, or at risk of, abuse or neglect, or someone you know is, contact the local authority

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 or imprisonment of up to five years, or

Useful organisations

www.alzheimers.org.uk

Telephone helpline 0333 150 3456

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.

Association of Lifetime Lawyers

www.solicitorsfortheelderly.com

Telephone 020 8234 6186

An independent organisation of lawyers, with a particular specialism in advising older people.

Care Inspectorate Wales (CIW)

<https://careinspectorate.wales/>

Telephone 0300 7900 126

The CIW is responsible for the inspection and regulation of care and social services in Wales.

Care Quality Commission

www.cqc.org.uk

Telephone 03000 616 161

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*. They assess how local authorities meet their duties under the Care Act 2014.

Court of Protection, The

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

Telephone 0300 456 4600

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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*.

Hourglass

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 provides information and emotional support in English and Welsh. The helpline number will not appear on your phone bill.

Mind

www.mind.org.uk

Telephone 0300 123 3393

Provides information and advice for people with mental health problems.

MoneyHelper

www.moneyhelper.org.uk

Telephone 0800 138 7777 (free call) Mon-Fri 8am-6pm

Independent service offering money advice and guidance.

Office of the Public Guardian

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

Telephone 0300 456 0300 (general enquiries)

To raise concerns about an attorney or deputy, call 0115 934 2777 or email opg.safeguardingunit@publicguardian.gov.uk

Official Solicitor and Public Trustee

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

Represents adults lacking mental capacity in court.

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

0300 303 4498

In Northern Ireland contact

Age NI

www.ageni.org

0808 808 7575

Our publications are available in large print and audio formats

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The evidence sources used to create this factsheet are available on request. Contact resources@ageuk.org.uk

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