

# WHY MAKE A LASTING POWER OF ATTORNEY?



England & Wales

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

**STEP**   
ADVISING FAMILIES ACROSS GENERATIONS

**The benefits of drawing up a will are widely recognised. In doing so, you make provision for the winding up of your affairs after death.**

This not only has advantages for those who will find themselves administering your estate, but also gives you peace of mind, knowing that you have selected as executors the individuals best suited for the role and have given them the necessary instructions (for further details see the STEP leaflet 'Why make a will?').

There are also opportunities available to make provision in advance for the possibility of you becoming incapable of managing your own financial and welfare affairs during your lifetime. This becomes increasingly important as the risk of mental incapacity grows through longevity, illness or accident.



## MAKING PROVISION FOR MENTAL INCAPACITY

An ordinary power of attorney is not an effective provision because it is automatically revoked by mental incapacity – just at the time when it is most needed. The Court of Protection has power to appoint people to manage your affairs, but the procedure can be costly and time-consuming. More importantly, you will have lost the right to choose who will have the responsibility for looking after your affairs at a time when it is vital that they are dealt with efficiently and sympathetically.

Until 1 October 2007, it was possible to appoint someone to safeguard your interests and to act on your behalf in respect of your financial affairs by an Enduring Power of Attorney (EPA), which remains valid even after the individual granting the power (the donor) becomes mentally incapable. A simple procedure enables the attorney to register the EPA with the court and then to proceed as before with little further court involvement.

EPAs made prior to 1 October 2007 will remain valid and be capable of registration for as long as the donor is alive, so EPAs will be around for many years to come.

However, an EPA enabled an attorney to deal only with financial affairs. In addition, it was felt that the relatively simple procedures could result in the system being abused. Therefore, a more complex and robust system was introduced to enable attorneys to be appointed not only to look after a person's financial affairs, but also to make decisions on their behalf relating to health and welfare issues. These types of document are known as Lasting Powers of Attorney (LPAs).



## LASTING POWERS OF ATTORNEY

At the time the power is given, the donor must be capable of understanding its nature and effect for it to be valid. It will be necessary to make separate LPAs, one dealing with 'property and affairs' and the other to cover 'personal welfare' decisions.

LPAs were created by the Mental Capacity Act 2005 (MCA 2005), which covers England and Wales only. MCA 2005 provides a statutory framework to deal with situations where adults lack capacity to make decisions for themselves or who have capacity, but want to make preparations for a time when they may lack capacity in the future.

A Code of Practice supports the MCA 2005 and provides guidance and information to all those working under the legislation. Certain categories of people are obliged to have regard to the Code of Practice, including attorneys and those acting in a professional capacity, such as STEP members.

### **Property and financial affairs LPA**

These are designed for you to appoint attorneys to make a range of decisions including the buying and selling of your house and other assets, dealing with your tax affairs, operating bank and building society accounts and claiming benefits on your behalf. These can be used at your direction while mentally capable, for example if you become immobile, and also by the attorneys if you lack capacity to make these decisions or no longer wish to deal with your finances.

### **Health and welfare LPA**

Attorneys appointed under this document can make decisions relating to your living accommodation and care, consenting to or refusing medical treatment on your behalf, and on day-to-day matters such as diet and dress. This can only be used, however, if you have lost the capacity to make decisions for yourself.

### **Provisions common to both forms**

Although there are two separate prescribed forms, both contain certain common provisions including statements to be completed by you, setting out your details, the attorneys to be appointed and how they are to act, and details of any persons to be notified on the application for registration.

The attorneys must state that they understand their duties and obligations.

In addition, the legislation has introduced a person known as ‘the certificate provider’, either some one who knows you well or a professional person. The certificate provider must sign the form to confirm that they have discussed the contents of the LPA(s) with you on your own (if possible) and that they can state that you understand the purpose and scope of the LPA, no undue pressure or fraud is involved in the decision to make an LPA, and there are no other factors preventing the creation of the LPA.

### **Registration**

Both types of LPA must be registered before they can be used by your attorneys and both can be registered while you still have mental capacity (unless it specifies to the contrary).

You can make a LPA using the paper forms or online, but you will need to print the forms off to be signed by the donor, attorneys and witnesses. You can appoint someone else to use the online service or fill in the paper forms for you, for example a family member, friend or solicitor. The signed forms will need to be sent to the Office of the Public Guardian (OPG) with payment of the registration fee.

Registration can be by you or your attorney. If your attorney registers your LPA, you will receive a notice from the OPG so that you can object if you do not want it to be registered. It will take about eight to ten weeks to register if there are no mistakes or objections.

As stated previously, a personal welfare LPA can only be used when you no longer have the mental capacity to make particular decisions affecting your health and personal welfare.

Further details on LPA registration, including current costs and timescales, are available at [www.gov.uk/power-of-attorney/register](http://www.gov.uk/power-of-attorney/register)

## **Appointment of attorneys**

The appointment of your attorneys should be considered very carefully, since they will be entrusted with important responsibilities. You must have at least one attorney, who should be at least 18 years old and can be a family member, spouse/partner or friend. Alternatively (or additionally) you can engage a qualified professional such as a solicitor to act as your attorney. Where a STEP member or other professional is appointed as an attorney, it is recommended that their current terms and conditions of business (including fees to be charged) are discussed with and approved by you.

You need to trust your attorney to understand your wishes, respect your values and make decisions that will be in your best interests. They must be able to make potentially difficult decisions on your behalf, so it's important that you discuss your wishes with anyone who you'd like to act as your attorney. You should also discuss the various responsibilities with them to make sure they understand what you are asking of them and that they are happy to be appointed.

### **How should the attorneys be appointed?**

When appointing attorneys, you will need to consider the following:

- If you appoint more than one attorney, you can choose if they should act together (jointly), together and independently (jointly and severally), or jointly in respect of some matters and jointly and severally in respect of others. If no selection is made, then they must act jointly. If attorneys have to act jointly, then the LPA fails if any of the attorneys die or lose capacity (and also in some other circumstances), unless a successor attorney is appointed. If they can act jointly and severally then the LPA will continue even if an attorney should die, etc.
- It is prudent to nominate a replacement or successor attorney, in case the attorney you have chosen is unable to assume the role, for whatever reason.
- You may grant general or limited authority. If general power is granted, then the attorneys may manage all your property and affairs or make all personal welfare decisions. If any restrictions or conditions are to apply then these must be clearly stated.

### **The attorney's powers and duties**

The attorney's powers may be restricted and the LPA can specify that it can only come into force once you no longer have mental capacity (this applies in any case to personal welfare LPAs).

The attorneys only have limited powers to make gifts of your money or property, although the court may authorise additional giving.

When making investment decisions, the attorney will need to take appropriate professional advice.

An attorney may refuse their appointment by completing a specified form, which will need to be sent to you and copied to the other attorneys and the court.

Attorneys must observe the Code of Practice and STEP members and other professionals who are being paid for their services are required to display a higher standard of care and skill than a non-professional attorney.

### **The Court's role**

Both the Court of Protection and the OPG have roles to play – the Court of Protection can determine issues such as the validity of LPAs, mental capacity (or the lack of it) and the registration and revocation of LPAs.

However the Court will expect attorneys to seek advice from STEP members or other professionals before involving the Court. The Court would need to be involved if it is necessary to appoint a deputy (formerly known as a receiver), where it is not possible to create an LPA, or a previous EPA or LPA has been revoked.

The registration of LPAs is dealt with by the OPG, which maintains a register of all LPAs. The OPG provides a free online facility for members of the public to search its register to find out if a person in England or Wales has an attorney or court-appointed deputy acting for them. The OPG should also be contacted if it is suspected that abuse is taking place or the attorneys are not acting in the donor's best interests.

### **Your legal advisor's role**

As can be seen, your legal advisor can be involved in the initial process of advising you about LPAs and they may also act as your certificate provider. Your legal advisor will also be able to advise on the registration process.

It may also be appropriate in some cases for your legal advisor to be appointed as an attorney, often with a family member or a close friend.

Please note that the above summary applies to English and Welsh Lasting Powers of Attorney made on or after 1 October 2007. Different rules apply in Scotland and Northern Ireland.

## WHAT IS STEP?

STEP is the global professional association for practitioners who specialise in family inheritance and succession planning. We work to improve public understanding of the issues families face in this area and promote education and high professional standards among our members.

STEP members help families plan for their futures, from drafting a will to advising on issues concerning international families, protection of the vulnerable, family businesses and philanthropic giving. Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

This leaflet and the companion leaflets 'Why make a trust?', 'What to do when someone dies' and 'Why make a will?'; as well as other informational leaflets produced by STEP, are available to view and order at [www.step.org/leaflets](http://www.step.org/leaflets)

You can find more information on related topics at [www.advisingfamilies.org](http://www.advisingfamilies.org)

This leaflet was updated in August 2019 and applies to England and Wales only. Different laws apply in other countries, including in Scotland and Northern Ireland.

For further details of our members practising  
in your area, contact the STEP office or visit  
[www.step.org/member-directory](http://www.step.org/member-directory)

*Disclaimer:* This leaflet is for general information only. Readers should seek the guidance of a suitably qualified professional before taking any action or entering into any agreement in reliance upon the information contained in this leaflet. While STEP has taken every care in compiling this leaflet to ensure accuracy at the time of publication, we do not accept liability or responsibility for errors or omissions therein, however caused.

STEP  
Artillery House,  
11-19 Artillery Row,  
London, SW1P 1RT,  
United Kingdom

T: +44 (0) 203 752 3700  
E: [step@step.org](mailto:step@step.org)  
W: [www.step.org](http://www.step.org)

© STEP 2019

**STEP**   
ADVISING FAMILIES ACROSS GENERATIONS