

LASTING POWERS OF ATTORNEY

Overview

4.1 The Law introduces Lasting Powers of Attorney. A Lasting Power of Attorney (LPA) is a legal document which allows a person (sometimes called the Grantor but referred to as 'P' in this code of practice) who is aged 16 or over, to give another person (the attorney) authority to make decisions on their behalf. Such decisions are as valid as those made by the person. A Lasting Power of Attorney can only be made when P has capacity to make this.

4.2 There are two types of Lasting Power of Attorney: for Health and Welfare decisions and for Property and Financial decisions. P can nominate more than one person to act as the Attorney who can act jointly or severally. The Attorney must be aged 18 or over or, for property and financial affairs, is a body which holds or is deemed to hold a primary or secondary fiduciary licence¹. The Lasting Power of Attorney for Health and Welfare decisions can only be activated and used when P has lost capacity to make relevant decisions. P can give the Attorney, under a Lasting Power of Attorney for Property and Financial Affairs, permission to use this whilst they still have capacity.

4.3 The Lasting Power of Attorney can exclude specific decisions, such as whether the Attorney can make decisions related to life sustaining treatment. The Lasting Power of Attorney cannot be used to authorise a significant restriction of a person's personal rights or freedoms. This can only be authorised by a Protective Authorisation or by the Mental Health and Capacity Review Tribunal.

What is a Lasting Power of Attorney?

4.4 A Lasting Power of Attorney is a legal document which allows the Attorney(s) to make decisions on behalf of the P. The Attorney can only make the same decisions that the Grantor would have been able to make when they had capacity to do so. The Attorney must act in P's best interests (see chapter on Best Interests in Code of Practice) and should take account of any past wishes, including those detailed in any Advanced Care Plan. This means consideration of what P would have decided, when P had capacity to do so.

Decision	Attorney's power (valid LPA Health & Welfare)	What Attorney cannot do
Consent to/refusal of specific medical treatment	The Attorney can consent to, or refuse treatment, when P has lost capacity to make their own	The Attorney can only make the same decisions as P could make when they had capacity. If

¹ For the purposes of the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2020.

	decision. This should be in line with P's views and previously expressed wishes.	there is a valid and applicable Advanced Decision to Refuse Treatment (ADRT), the Attorney cannot override this (unless the LPA was made after the ADRT).
Make a decision about a package of care, including move to a care home.	Attorney can make this decision.	Where the placement is made and funded by the Committee, the Attorney cannot insist upon a more expensive placement.
Making financial decisions	Attorney can manage P's financial affairs and ensure that bills are paid.	The Attorney cannot dispose of P's real property. This needs to be referred to the Royal Court for permission.

Case example – making a decision about moving to a care home

Mr Sinclair lives with his wife. He has made Lasting Powers of Attorney for health and welfare and also for property and financial affairs, naming his son John as Attorney. Mr Sinclair suffered a stroke, which has affected his cognition, and is in hospital pending a decision about whether he can safely return home. John Sinclair contacts his father's consultant who advises that Mr Sinclair has lost capacity to make decisions about his medical treatment and also about how to manage his care needs. John Sinclair applies to activate the Lasting Powers of Attorney. Mr Sinclair's speech has been affected by his stroke and he is no longer able to express his views about where he lives, however he has always said that he would not want to live in a care home.

Mr Sinclair's wife is elderly and does not feel able to have her husband come home to live with her without 24 hour care provided so John investigates care homes and other options, such as carers in his own home. He is advised by the social worker that, as Mr Sinclair does not have a lot of money, he may be eligible for a placement funded by the Committee. The social worker suggests a care home that may be suitable however John says that he would prefer his father to return home with 24 hour care. The cost of 24 hour care is a great deal more expensive than a care home placement. John tells the social worker that this is what he wants for his father however the social worker explains that the LPA does not give him the authority to make the Committee spend more money. If he wants his father to have care at home he will have to find a way to fund this himself.

4.5 Who can act as an Attorney (A)?

A person is eligible to act as an attorney if A is –

- (a) aged 18 or over for LPA
- (b) not bankrupt (for property and financial affairs matters).

For the purposes of appointment as an attorney in relation to an LPAs, a person is bankrupt if:

- (a) one of the following events took place in the Bailiwick not less than 10 years before the person is appointed as an attorney:
 - a declaration of insolvency has been made in respect of a person by the Royal Court under the Loi ayant rapport aux Débiteurs et à la Renonciation, 1929,
 - a Commissioner or Committee of Creditors has been appointed by the Royal Court under that Law to supervise or secure a person's estate,
 - a person's affairs have been declared to be in a state of "*désastre*" at a meeting of that person's arresting creditors held before a Commissioner of the Royal Court,
 - an interim vesting order has been made against a person in respect of any of that person's real property in the Bailiwick, or
 - a composition, compromise or arrangement with creditors has been entered into in respect of a person whereby that person's creditors will receive less than 100 pence in the pound, or
- (b) an event or declaration who is the equivalent to any of the above events has taken place outside the Bailiwick and the person has not been discharged from it for the purposes of the legislation of any other jurisdiction.

For property and financial affairs LPAs, a person holding or deemed to hold a primary or secondary fiduciary licence can also act as an attorney.

4.6 The Law allows for the appointment of one or more attorneys. If there is more than one attorney, P should specify whether they are to act jointly, jointly and severally, or jointly in some matters and jointly and severally in others. If P does not specify this in the document, the attorneys will act jointly.

4.7 An individual who is bankrupt is not eligible to be appointed as an attorney for a Lasting Power of Attorney for property and financial affairs, although they can act as attorney for health and welfare matters.

What happens if an attorney (for a LPA for property and financial affairs) is made bankrupt?

4.8 If an attorney is made bankrupt

- (a) If the attorneys are to act jointly, the Lasting Power of Attorney cannot be created or activated.
- (b) If the attorneys are to act jointly or severally, the LPA can be created but only in respect of the other attorney(s).

If the LPA has already been registered but not activated, P should apply for an amendment (see creating a LPA) to reflect the change in Attorneys.

What happens if an attorney loses capacity?

4.9 If an attorney loses capacity to make the relevant decisions after the LPA has been registered but before it is activated, P should amend the LPA by selecting another A, unless more than one A has been appointed. P should advise HM Greffier in order that the register can be updated. If A loses capacity after the LPA has been activated, the LPA will be revoked unless more than one A has been appointed and who is eligible to act. In either case, if two or more attorneys are named and can only act jointly, the LPA will be revoked. If an attorney has concerns about another attorney's capacity to act under the LPA, they should inform HM Greffier who will update the register.

What decisions can an attorney under a LPA for property and financial affairs make?

4.10 A Lasting Power of Attorney for property and financial affairs can be used whilst P still has capacity, if P gives permission for this. The Attorney can manage P's financial affairs for a short period (such as when P is away on holiday) or for the longer term (perhaps P may need assistance to manage their affairs due to increased health needs). The Lasting Power of Attorney can specify any excluded decisions but it should be noted that the Attorney cannot dispose of P's real property. Such decisions can only be taken by the Royal Court.

What decisions can an Attorney under a LPA for health and welfare matters make?

4.11 There are a wide range of health and welfare decisions that may need to be made and therefore it is important for P to be clear, when creating the LPA, whether any decisions should be excluded (for example life sustaining treatment decisions). The Attorney should act in P's best interests and therefore it is advisable for P to discuss their wishes with A, when making the LPA. The Attorney can consent to, or refuse, medical treatment, in the same way that the person would have been able to make their own decision, when they had capacity to do so.

Examples of decisions the Attorney(s) can make	Decisions the Attorney(s) cannot make
Consent to, or refuse, specific treatment, in line with P's previously expressed wishes.	Insist upon treatment options that would not be available if P had capacity.
Consent to admission for P to a care home	Consent to P being subject to a significant restriction in a care home

	approved by the Committee to provide a protective authorisation.
Consent to admission to hospital	Consent to P being subject to a significant restriction in the hospital approved by the Committee to provide a protective authorisation.
Agreement to/ or refusal of the granting of a Protective Authorisation	The Attorney cannot refuse to allow the assessments to be completed.
Selecting the Representative for the Protective Authorisation	Changing P's will.

Treatment decisions

4.12 P can permit the attorney under a LPA for health and welfare decisions to make treatment decisions on their behalf when they no longer have capacity to make their own decision. P may exclude certain decisions (such as Life Sustaining Treatment). If treatment is proposed for P the Attorney can consent to, or refuse the treatment. Such decisions should be made in P's best interests, taking account of any previously expressed wishes or views. The healthcare professional must take account of the Attorney's decision, in the same way that they would seek consent or refusal from P, when P had capacity. If the Attorney refuses the treatment, this cannot go ahead. This is the same as if a person, who has capacity, refuses a specific treatment. This does not apply to treatment under the Mental Health Law 2010.

What happens if there is a difference of opinion?

4.13 It is important to remember that the role of the Attorney(s) is to act in the Grantor's best interests, taking account of P's wishes and views. If the difference of opinion is between two attorneys and this cannot be resolved, it may be necessary to refer the matter to the Royal Court to consider the differing opinions and to make the relevant decision.

What happens if the healthcare professional believes that an Attorney is not acting in the best interests of P?

4.14 There may be exceptional circumstances when the treating professional believes that the Attorney is not acting in P's best interests. In the first instance the professional should try to resolve the issues but, should if this cannot be done, it may be appropriate to refer the matter to the Royal Court (s30 (3) (b) Capacity Law). The Court has the power to suspend the Lasting Power of Attorney, if the concerns about the Attorney are upheld. In such circumstances the healthcare professional proposing the treatment, will be the decision maker and should follow the best interests process.

Case example

Mr Albert Spencer is 92 years old. He suffered a stroke 6 months ago, since when he is no longer able to walk and he has a lot of difficulty swallowing. He has a cognitive impairment and struggles to communicate. Mr Spencer's son, Jim, holds Lasting Power of Attorney for Health and Welfare. Jim lives with his father and acts as his main carer. Mr Spencer had carers coming twice daily to support him to get up and to put him to bed, however Jim has been very critical of the care provided and the care agency has withdrawn the carers.

One morning Jim notices that his father is listless and unable to eat. An ambulance is called and Mr Spencer is admitted to hospital and he is diagnosed with aspiration pneumonia. He is prescribed antibiotics. As Mr Spencer is very unwell and has difficulty swallowing, the doctor wishes to keep him in hospital and to administer the medication intravenously. The doctor is also very concerned that Jim has been feeding his father a normal diet, rather than pureed foods as advised by the dietician after his stroke. Jim tells the doctor that he wishes to discharge his father home and that he can take oral medication. He gets very angry with the doctor when they are discussing this and threatens to take his father home. He is particularly annoyed that the hospital has granted a Protective Authorisation for Mr Spencer. Jim is later observed trying to feed his father with a burger. The doctor is concerned for Mr Spencer's safety if he is discharged home to Jim's care.

The doctor refers this matter to the Committee who can make an application to the Royal Court to revoke the Lasting Power of Attorney. If the LPA is revoked the doctor can make the decision regarding treatment, via the best interests process.

Admission to a care home

4.15 The Attorney(s) can make the decision for P to be admitted to a care home, when P no longer has capacity to make this decision. The Attorney should take account of P's wishes and views and act in P's best interests. If the arrangements in the home will include restrictions imposed on P, such that a Protective Authorisation would be required, the Attorney cannot consent to these restrictions. The Protective Authorisation process must go ahead, however, if the Attorney objects to the proposed placement in the care home, alternative arrangements will need to be made. The Attorney must act in P's best interests.

What happens if there is a difference of opinion?

4.16 It is important to remember that the role of the Attorney(s) is to act in P's best interests, taking account of P's wishes and views. If the difference of opinion is

between two attorneys and this cannot be resolved, it may be necessary to refer the matter to the Royal Court to consider the differing opinions and to make the relevant decision.

What happens if a social care professional believes that an Attorney is not acting in the best interests of P?

4.17 There may be exceptional circumstances when the social care professional believes that the Attorney is not acting in P's best interests. In the first instance the professional should try to resolve the issues but, if this cannot be done, it may be appropriate to refer the matter to the Royal Court (s30 (3) (b) Capacity Law). The Court has the power to suspend the Lasting Power of Attorney, if the concerns about the Attorney are upheld. In such circumstances the social care professional proposing the placement, will be the decision maker and should follow the best interests process (see Best Interests section of Code of Practice).

Process to create a Lasting Power of Attorney

4.18 The process to create a Lasting Power of Attorney has been designed to provide safeguards for both P and the attorney. Any person making a Lasting Power of Attorney must be 18 years of age or over and have capacity to make this.

- 1) The grantor should complete the relevant Lasting Power of Attorney form(s) including completing a statement to confirm that P has read and understood the information regarding the purpose of the LPA. A separate form is required for each type of LPA (Health and Welfare decisions or Property and Finance decisions).
- 2) The Attorney(s) should complete a statement to confirm that A has read and understood the information regarding the duties imposed by the LPA. This includes understanding the principles of the Capacity Law (S3 The Capacity Law) and best interests (s6 The Capacity Law).
- 3) The Lasting Power of Attorney must be registered by P at Her Majesty's Greffier.
- 4) The Lasting Power of Attorney must be activated before it can be used.

Registration

4.19 The Lasting Power of Attorney must be registered Her Majesty's Greffier by P who must attend in person and pay the relevant fee. Her Majesty's Greffier will confirm that P is eligible to make the Lasting Power of Attorney, including that P has capacity to do so. The Lasting Power of Attorney will be registered if all the requirements are met.

4.20 HM Greffier can refuse to register a Lasting Power of Attorney if there is evidence that P does not have capacity to make the Lasting Power of Attorney or that P has been placed under undue pressure to do so. A referral must be made to the Safeguarding Team to investigate. P and/or A can appeal this decision to the Royal Court.

Persons unable to attend the Royal Court House.

4.21 There may be reasons why a person is unable to attend the Royal Court House or other place, for example due to ill health. In such cases, a request should be made to HM Greffier for a home visit. There will be a charge for this service.

Using a Lasting Power of Attorney

4.22 A Lasting Power of Attorney for Property and Financial affairs can be used by the attorney once the document is registered, provided that P has agreed that A can do so. This can be agreed at the time of registration or at a later date, using the prescribed form. HM Greffier should be notified if this agreement is granted after the LPA is registered. P can also decide that the LPA can only be used when P loses capacity to manage their affairs. A Lasting Power of Attorney for Health and Welfare can not be used until P has lost capacity to make the relevant decision and the document has been activated.

Activating a Lasting Power of Attorney

4.23 A LPA can be activated when P has lost capacity to make the relevant decision, so that the attorney is able to make decisions for P. The attorney must request a prescribed person² to complete a capacity assessment to establish whether P has capacity to make the relevant decision. The prescribed person, completing the capacity assessment will complete the certificate to state that P does not have capacity to make the relevant decision. The attorney will present this to HM Greffier, with the request for activation of the LPA. If HM Greffier is satisfied that the prescribed person has assessed P to lack capacity, the Certificate of Activation will be issued to the attorney and the Register will be updated to show that the LPA has been activated. The attorney will be able to make relevant decisions in accordance with the LPA.

4.24 If HM Greffier believes that P still has capacity, the LPA will not be activated and the attorney cannot make decisions for P. P or A may challenge the decision of HM Greffier in the Royal Court (see section on Court).

Case scenario

Mr Paul Cox has lived alone since the death of his wife, two years ago. He had been diagnosed with dementia but has always been independent and had managed well, with only minimal support from a carer who helps with the housework. However, recently his son has been getting calls from the neighbour to say that Mr Cox has been found outside in the middle of the night, appearing confused and distressed. When he visits his father, he notes that the house is neglected and his father does not appear to be washing often. The fridge is nearly empty and large quantities of medication are found in the kitchen, suggesting that

² For details of prescribed persons see Regulation (no)

he has neither been eating well or taking his medication. The carer, when contacted, tells Mr Cox's son that he had dispensed with her services some months previously.

Mr Cox (junior) talks with his father about needing to have help in the house and with his personal care, but he does not appear to understand how bad things have got and tells his son that he is making a fuss unnecessarily. Mr Cox (junior), noting how his father has changed, thinks that he may no longer be able to make informed decisions for himself about his needs for care and support. As his father had previously made a Lasting Power of Attorney for Health and Welfare, he contacts the GP and requests a capacity assessment. If Mr Cox is assessed to lack capacity, the GP will complete the relevant certificate that can be provided to HM Greffier to activate the LPA.

What is the relevant decision for activating a LPA for property and financial affairs?

4.25 The prescribed person should assess whether P has capacity to make decisions regarding their property or financial affairs, such that the Lasting Power of Attorney should be activated. The prescribed person should consider the relevant information that P needs to understand to have capacity to make their own decision about their financial affairs or their property. The relevant information could include (but is not limited to)

- Understanding what money is and the value of money (including fair pricing for items)
- Understanding that P needs to pay bills, rent/mortgage, for food/meals
- Managing a bank account and how to withdraw or transfer money
- The risks of being financially exploited by others
- Knowledge of any financial investments, pensions etc.

What is the relevant information for activating a LPA for health and welfare decisions?

4.26 The prescribed person should assess whether P has capacity to make decisions regarding their health and welfare, such that the Lasting Power of Attorney should be activated. The prescribed person should consider the relevant information that P needs to understand to have capacity to make their own decision about their health and welfare. The relevant information could include (but is not limited to)

- Can P understand about any current health condition and the treatment for this? Does P understand the risks of refusing treatment?
- Does P know what medication they have been prescribed and what this is for?
- Does P understand any risks they face due to their health or care needs?
- Does P understand that they may need assistance from others to meet their needs or to maintain their safety?

Amending a Lasting Power of Attorney

4.27 P can make changes to the LPA after this has been registered, for example changing, or adding to, the named attorneys or the permitted decisions. P will need to complete the prescribed form and pay any required fee. As with creating a LPA, P will need to attend in person at HM Greffier to make the changes. Any changes can only be made whilst P has capacity to do so. The Register will be updated to reflect the amendment.

4.28 If HM Greffier has evidence to indicate that P lacks capacity to make the amendments or that P has been put under undue pressure to do so the LPA, the changes will not be made. P or A may challenge the decision of HM Greffier in the Royal Court.

What happens if P regains capacity?

4.29 In certain circumstances P may lose capacity temporarily, for example due to an infection or injury. The Attorney can activate the LPA in order to manage P's affairs or to make treatment decisions. If P subsequently appears to have regained capacity, the attorney must request a capacity assessment. If P is assessed to have capacity the attorney must notify HM Greffier that the LPA is suspended and the Register will be updated. The attorney can no longer make decisions for P. If the capacity assessment concludes that P lacks capacity, the LPA will not be suspended.

Revoking a Lasting Power of Attorney

4.30 P can make revoke the LPA after this has been registered. P will need to complete the prescribed form. As with creating a LPA, P will need to attend in person at HM Greffier to make the changes. Any changes can only be made whilst P has capacity to do so. The Register will be updated.

Register of Lasting Powers of Attorney

4.31 Her Majesty's Greffier will hold a register of Lasting Powers of Attorney. This register will include the following information:

- a) Name and address of grantor
- b) Type of Lasting Power of Attorney – health and welfare decisions or property and finance decisions
- c) Name and address of each Attorney
- d) Date of registration
- e) Date of activation
- f) Date of suspension (as appropriate)
- g) Whether the attorneys (where there is more than one) should act jointly or jointly and severally.

4.32 A professional who needs to check whether a Lasting Power of Attorney has been registered, activated or suspended, can apply to HM Greffier for this information. The attorney should provide a copy to a health or social care professional to confirm that they have authority to make decisions for P.

Fees

4.33 The fee to register, amend or revoke a lasting power of attorney must be paid before the document can be registered, amended or revoked. HM Greffier will advise of the fee.

Gifts

4.34 A lasting power of attorney for property and financial affairs can make gifts similar to how P would have made gifts when P had capacity to do so. This would include birthday presents to relatives or friends, or on the occasion of a marriage or civil partnership or for charitable donations. Such gifts should be in keeping with the size of P's estate and not of an unreasonable value. This should be in keeping with the presents that P has previously given. The purpose of any gifts should not be to dispose of P's property.

Real property

4.35 A lasting power of attorney does not permit the attorney to dispose of P's real property where the person lacks capacity to make this decision. The attorney will need to take specific steps to dispose of the property depending on where the property is located and where P is ordinarily resident. Where the real property is located in the Bailiwick, the attorney must give notice of the intention to dispose of the real property to all other attorneys and other persons set out in the Ordinance, before making an application to the relevant court in which the real property is located (the Court of Alderney, the Court of Seneschal or the Royal Court). Where the real property is not located in the Bailiwick but P is ordinarily resident in the Bailiwick, the attorney must give notice of the intention to dispose of the real property to all other attorneys and other persons set out in the Ordinance. If the attorney disposes of P's real property without complying with the relevant requirements, A is guilty of an offence. Disposing of P's property includes selling or otherwise conveying the property, creating a charge over the property, granting a long lease or granting anyone a life interest in the property. Specific legal advice should therefore be sought where attorneys consider disposing of P's real property.

Powers of court

4.36 The Law allows for the Court to make decisions regarding the validity of a lasting power of attorney. The Court can consider whether the requirements to create a lasting power of attorney have been met, as well as whether the LPA has been revoked. The Court can rule that a lasting power of attorney should not be registered, for example if it is satisfied that fraud or undue pressure was used to force P to create the LPA or if the person lacks capacity to make this.

4.37 The Court has the power to give direction regarding decisions that the attorney has the power to make. This may apply where there are two or more attorneys and there is a conflict of opinion as to what is in P's best interests. The Court can order the attorney to produce reports or accounts, or other documents. The Court may also authorise gifts which are not agreed under S26(2) of the Capacity Law.

4.38 The Court can order that an attorney may not use the lasting power of attorney or can only make specific decisions, for a limited period to allow time for the Committee to investigate any concerns raised. This includes investigating whether fraud or pressure was used to persuade P to make a LPA or if it is believed that the attorney has acted fraudulently or applied undue pressure to P.

Bankruptcy

4.39 If P is made bankrupt, this revokes any lasting power of attorney for property and financial affairs, although this does not have any effect if the LPA is for health and welfare decisions. If the attorney is made bankrupt A can no longer act under a LPA for property and financial affairs and A's appointment will be terminated (see 8.8).

Divorce, annulment or dissolution of marriage or civil partnership.

4.40 If P names P's spouse or civil partner as attorney and later they divorce, this will end the spouse or civil partner's appointment unless specifically stated otherwise in the LPA. If P names their spouse or civil partner as one of only two attorneys and they are to act jointly, divorce will revoke the Lasting Power of Attorney.

What happens if A loses capacity?

4.41 If the attorney loses capacity to make decisions for P, the LPA will be revoked unless more than one attorney has been appointed and the document allows for the A to act jointly and severally. HM Greffier should be notified that the relevant A is no longer eligible to act.

Replacement attorneys

4.42 If the LPA includes a replacement attorney this person can replace an attorney who is no longer able to act. The replacement attorney must advise HM Greffier of this change.

4.43 The Law provides powers for the Committee to investigate whether fraud or undue pressure was used, either to persuade a person to create or register a lasting power of attorney, or to activate this. If the investigation concludes that an attorney behaved, or intends behaving in a way that is not in P's best interests or that is not within A's authority, an application can be made to the Royal Court to revoke the attorney's appointment.

4.44 The Committee can require an attorney to provide information or documents as required, in order to carry out an investigation. Such documents must be provided within any period specified by the Committee.

4.45 If a person makes a false, misleading or deceptive statement or produces false, misleading or deceptive information in connection with an investigation, this is an offence under the Law. This carries a sentence of up to 2 years imprisonment or a fine. It is an offence for an attorney to fail to disclose any relevant information. Such failure may also lead to the revocation of the LPA.

Expenses

4.46 An Attorney under a LPA for property and financial affairs can reimburse any reasonable expenses incurred in the course of managing P's affairs.

Keeping Accounts

4.47 Attorneys should keep accounts of all financial transactions made on behalf of P, under a Lasting Power of Attorney for Property and Financial Affairs. This will allow any attorney whose conduct may be investigated to provide evidence how they have handled P's affairs.

Death of P

4.48 The Lasting Power of Attorney expires upon P's death. The attorney should advise HM Greffier of P's death so that the Register can be updated.

15th March 2022