

LAWPACK



Do-it-yourself Kit

Power of Attorney

Guidance Manual

The contents of this Manual have been approved by Richard Dew, barrister of Ten Old Square, Lincoln's Inn, under English law, and by Neill Clerk & Murray, solicitors, under Scottish law.



This is an excerpt from Lawpack's *Power of Attorney Kit*.

To find out how to prepare a Power of Attorney Form and allow somebody to act on your behalf when you're unable to, [click here](#).

Important Facts about this Lawpack Kit

This Lawpack Kit provides the information, instructions and access to forms necessary to prepare your own Lasting Power of Attorney (LPA) or General Power of Attorney (GPA) in England and Wales, and your own Continuing Power of Attorney (CPA), Welfare Power of Attorney (WPA) or General Power of Attorney (GPA) in Scotland. It also includes guidance on drawing up a Living Will (Advance Decision) in England and Wales and a Living Will (Advance Medical Directive) in Scotland. This Kit is not suitable for use in Northern Ireland. It is important that you read and follow the instructions in 'How to use this Kit' on page 6.

The information this Kit contains has been carefully compiled from reliable sources but its accuracy is not guaranteed, as laws and regulations may change or be subject to differing interpretations. This is particularly true for any figures given which are liable to change. The law is stated as at 1 September 2012.

Neither this nor any other publication can take the place of a solicitor on important legal matters. This Lawpack Kit is sold with the understanding that the publisher, author and retailer are not engaged in rendering legal services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

As with any legal matter, common sense should determine whether you need the assistance of a solicitor, rather than relying solely on the information and forms in this Lawpack Kit.

We strongly urge you to consult a solicitor if:

- substantial sums of money are involved;
- you do not understand the instructions or are uncertain how to complete and use the form correctly, or
- what you want to do is not precisely covered by the forms provided.

Note: throughout this Lawpack Kit, for 'he', 'his' and 'him' read 'he or she', 'his or her' and 'him or her'!

EXCLUSION OF LIABILITY AND DISCLAIMER

Whilst every effort has been made to ensure that this Lawpack Kit provides accurate and expert guidance, it is impossible to predict all the circumstances in which it may be used. Accordingly, neither the publisher, author, retailer, approving barrister and solicitors nor any other supplier shall be liable to any person or entity with respect to any loss or damage caused or alleged to be caused by the information contained in or omitted from this Lawpack Kit.

IMPORTANT NOTICE – LASTING POWER OF ATTORNEY CHANGES

Lasting Power of Attorney Forms may be changing in **April 2013** and this Kit may not be suitable for creating Lasting Powers of Attorney after that date. For up-to-date information, use the 'Updates and Forms to download' service.

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Included as loose leaf

- General Power of Attorney for England & Wales
- General Power of Attorney for Scotland
- Living Will (Advance Decision) for England & Wales
- Living Will (Advance Medical Directive) for Scotland

Updates and forms to download

For England & Wales

- Lasting Power of Attorney
Property and Financial Affairs
- Lasting Power of Attorney Health
and Welfare
- Notice of Intention to apply for
registration of a Lasting Power of
Attorney
- Application to register Lasting
Power of Attorney
- Other useful Office of the Public
Guardian forms and guidance
notes

For Scotland

- Continuing Power of Attorney
- Welfare Power of Attorney
- Certificate under Section 15(3)(C)
of the Adults with Incapacity
(Scotland) Act 2000 for CPA
- Certificate under Section 16(3)(C)
of the Adults with Incapacity
(Scotland) Act 2000 for WPA
- Application for Registration of a
Continuing Power of Attorney or
Welfare Power of Attorney
- Other useful Office of the Public
Guardian forms and guidance
notes

Powers of Attorney in England & Wales

What is a Power of Attorney?

A Power of Attorney is a formal, written authority granted by one person (the 'Donor') to another person (the 'Attorney') enabling the Attorney to act on the Donor's behalf and manage his interests.

This Kit deals with the two kinds of Power of Attorney in England & Wales - 'General' and 'Lasting'.

A General Power of Attorney (GPA) is a relatively straightforward authorisation for wide-ranging use or for specific periods or events. The need to create a General Power might arise, for example, if you go abroad and need to entrust the management of business interests to your spouse. It can only be used to manage or deal with your financial affairs.

Lasting Powers of Attorney (LPAs) are more complicated to create and administer than General Powers because they permit the Attorney to make decisions that the Donor is incapable of making. They require particular procedures and formalities to be followed. A General Power is automatically revoked if the Donor becomes mentally incapable.

There are two types of Lasting Power of Attorney. A Lasting Power of Attorney Property and Financial Affairs authorises the Attorney to make decisions concerning the Donor's property and affairs or specified matters concerning the Donor's property and financial affairs (see page 13 for explanation). A Lasting Power of Attorney for Health and Welfare permits the Attorney to make decisions about matters concerning the Donor's health and welfare (see page 18 for explanation).

Using a Power of Attorney

The ability of the Attorney to act on behalf of the Donor will depend on the terms of the LPA or GPA as well as the automatic restrictions and limitations described below.

In practical terms most people will wish to use a Power of Attorney either to carry out one specific transaction (such as a house sale) or to manage the Donor's affairs generally. This will require dealing with various organisations (e.g. solicitors, banks, local authorities) all of whom will have to be satisfied that the Power exists and is valid. Different organisations will have different requirements and procedures and these will need to be followed. Some will be satisfied with a copy of the Power of Attorney. Others will want to see the original or a certified copy (if you are using the

post we recommend recorded or special delivery). A certified copy is a copy that has a form of words written on it certifying that the copy is a true copy of the original and signed by a solicitor. The solicitor will have to see the original and the copy in order to sign this.

Once the organisation is satisfied that the Power exists and is valid it will be possible to deal with the Donor's affairs to the extent permitted by the Power. Again, how this is done in practice depends upon the organisation concerned and it will be necessary to discuss the matter with them. Template letters for dealing with these organisations are available to download (see page 5 for further details). Banks may permit an Attorney to sign cheques on behalf of the Donor, others will require the Attorney to be added as a signatory to the account. In some cases, particularly in the case of an LPA where the Donor has lost 'capacity' (see page 9 for definition), it may be more practical to set up a separate account in the Attorney's name.



Enduring Powers of Attorney

An Enduring Power of Attorney (EPA) can no longer be created. However, existing EPAs continue to be valid and can be used.

This Kit explains what an EPA is and how it differs from an LPA, as well as the procedures necessary to register the Power (page 32).

Lasting Powers of Attorney

Important Note: The forms for creating a Lasting Power of Attorney changed on 1st October 2009. Forms created before that date are not valid and should not be used.

A Lasting Power of Attorney (LPA) authorises the Attorney to make decisions on behalf of the Donor even when the Donor does not have the capacity to do so himself. As already mentioned, Lasting Powers of Attorney come in two forms: Lasting Powers of Attorney Property and Financial Affairs (LPA PFA) and a Lasting Powers of Attorney for Health and Welfare (LPA HW).

To create an LPA you will need:

- to complete the prescribed Form;
- to sign it in the presence of a witness who also signs in the Donor's presence;
- have the Form certified – this involves a professional or an acquaintance who has known the Donor for at least two years certifying that they have discussed the LPA with them when the Attorney was not present, that he understands the purposes of the LPA and its scope, that no fraud or undue pressure is being used to make him create the LPA and there is nothing else that would prevent the LPA being created;
- to identify persons who must be informed (notified) of its registration;
- to register it (see below).

Before an LPA can be used (even when the Donor has no problems with capacity) it must be registered with the Office of the Public Guardian (OPG), a government

organisation that is responsible for the management of the affairs of adults who are incapable. Once registered an LPA PFA can be used by the Attorney unless it is expressed not to apply until the Donor lacks capacity in respect of the specific decision. An LPA HW can only be used by the Attorney if the Donor lacks capacity in respect of the particular decision.

Important concepts

LPAs were introduced by the Mental Capacity Act 2005 which also introduced a number of concepts that are important to understanding how LPAs operate. These concepts are further explained in the Code of Practice which all Donors are under a duty to have regard to (see page 13). The Code of Practice is available to download (see page 5 for further details).



Capacity

An LPA can only be created by a person who has the capacity to create it. An LPA HW can only be used by the Attorney when the Donor lacks capacity in respect of the particular decision. An LPA PFA may also be limited to apply only if the Donor lacks capacity in respect of the particular decision.

The Mental Capacity Act states that ‘a person lacks capacity in relation to a matter if at the time he is unable to make a decision for himself in relation to that matter because of an impairment of, or a disturbance in the functioning of, the mind or brain’.

The question of whether a person lacks capacity is particular to the decision in question. For that reason a person may not have capacity to make some decisions but be able to make others.

Example

Mr Jones suffers from dementia. He is able to deal with day-to-day matters and regularly purchases newspapers and groceries from the shops but is unable to understand financial matters.

Mr Jones may lack capacity to decide issues related to the sale of his house (for example) but does not lack capacity in respect of simple day-to-day matters.

It should always be assumed that a person has the capacity to make a decision unless it can be shown that he does not. So, in the above example the starting point is that Mr Jones does have capacity to make the particular decision unless it can be shown that he does not.

Making a decision involves a process of understanding, retaining and evaluating information and then communicating the decision. A person who is unable to carry out this process in respect of any particular decision is considered to lack capacity (and so be ‘incapable’). Thus, a person is unable to make a decision for himself if he is unable:

1. to understand the information relevant to the decision;
2. to retain that information;

3. to use or weigh that information as part of the process of making the decision;
or
4. to communicate his decision (whether by talking, using sign language or any other means).

Examples

Although suffering from no mental defects, Julie has been rendered unconscious by a car accident. She will recover, but for the period of time when she is unconscious she lacks capacity to make any decision.

Tony suffers from a severe disease that leaves him able to hear and understand information and to evaluate it but unable (by any means) to communicate. Again, whilst not (as commonly understood) suffering from any mental defect, Tony lacks capacity.

In this respect:

- A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (such as using simple language, visual aids or any other means). So it is important to take steps to assist a person to make a decision and wrong to simply assume that they lack capacity.

Example

John is profoundly deaf but otherwise has no mental difficulties. He is capable of understanding information provided that it is presented to him in writing or using visual aids. It is wrong to assume he cannot make complex decisions.

- The fact that a person is able to retain the information relevant to a decision for a short period only, does not prevent him from being regarded as able to make the decision.

Example

Mr Smith understands what is said to him, can hold a normal conversation about it and make decisions, but is prone (due to illness) to forget these conversations shortly afterwards. Provided that he can remember information for long enough to make a decision about it Mr Smith has capacity.

- The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision.

Example

When considering whether to sell a house, it is relevant to consider what will happen if it is sold or not sold (for example, if it is not sold then nursing home fees will not be paid and the person may lose his care). It is also necessary to consider what will happen if no decision is made - in this example the property will not be sold.

Further reading

Further guidance on capacity and how to assess it is contained in Chapter 4 of the Code of Practice.

'Best interests'

Whenever using an LPA, whether an LPA PFA or an LPA HW the Attorney must act in the Donor's best interests.

In most cases it is clear what a person's best interests are and the term is not defined by legislation. However, the Mental Capacity Act 2005 does set out a number of requirements that must be considered when deciding what is in a person's best interests:

- The Mental Capacity Act states that 'the person making the determination must not make it merely on the basis of the person's age or appearance, or a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests'. So you must not (for example) merely assume that just because someone is old they would prefer to die than receive treatment or because they are disabled that they would not wish to live on their own.
- The person making the determination must consider all the relevant circumstances and in particular must take the following steps:
 1. He must consider whether it is likely that the person will at some time have capacity in relation to the matter in question, and if it appears likely that he will, when that is likely to be.
 2. He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
 3. Where the determination relates to 'life-sustaining treatment' (see below) he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
 4. He must consider, so far as is reasonably ascertainable, the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity), the beliefs and values that would be likely to influence his decision if he had capacity, and the other factors that he would be likely to consider if he were able to do so.
 5. He must take into account, if it is practicable and appropriate to consult them, the views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; anyone engaged in caring for the person or interested in his welfare; any Attorney under a Lasting Power of Attorney granted by the person; and any deputy appointed for the person by the court as to what would be in the person's best interests and in particular, as to the matters mentioned in 4. above.

Further reading

Further guidance on 'Best Interests' is contained in Chapter 5 of the Code of Practice.

Life-sustaining treatment

Life-sustaining treatment is treatment which in the view of the person providing health care is necessary to keep someone alive.

In many cases it is obvious what such treatment might be; for example, heart massage for a person who has suffered a heart attack would normally be described as life-sustaining. However, some treatments that would not normally be considered life-sustaining may be so in the circumstances of a particular case. Therefore, the treatment of a minor infection may be life-sustaining if a person's health means that without this treatment the infection would otherwise kill them.

The LPA HW is used to give the Attorney power to make decisions about a person's welfare, include decisions regarding health care. This can include decisions about life-sustaining treatment. However, it is necessary to specifically state within the LPA HW that the Power is to extend to such decisions.

Similarly, a Living Will (Advance Decision) (page 39) will only extend to life-sustaining treatment if:

- it contains a statement by the Donor to the effect that the decision is to apply to the specified treatment even if his life is at risk; and
- it is in writing, signed by the Donor or by another in his presence and at his direction; his signature is made or acknowledged by him in the presence of a witness and the witness signs it, or acknowledges the Donor's signature in his presence. Acknowledgment means that the signature is identified as being his by the person who made it.

Whenever a person, including an Attorney, has to make a decision that relates to life-sustaining treatment he must consider the Donor's best interests and must not, when considering whether the treatment is in the best interests of the Donor, be motivated by a desire to bring about the Donor's death.

Further reading

Further guidance on life-sustaining treatment is contained in the Code of Practice.

'The five principles'

The Mental Capacity Act 2005 establishes and defines five principles which must be considered in all matters, including whenever using a Lasting Power of Attorney. They are:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.

2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Further reading

Further guidance on these principles in the Mental Capacity Act 2005 is contained in Chapter 2 of the Code of Practice.

The Code of Practice

Lasting Powers of Attorney and Living Wills (Advance Decisions) were created by the Mental Capacity Act 2005. That Act required the preparation of a Code of Practice for various purposes including for the guidance of Attorneys acting under Lasting Powers of Attorney. It is the duty of an Attorney to have regard to the Code of Practice. In practice, that means that the Attorney must have read through the Code and must keep a copy to hand to refer to when making decisions.

The Code of Practice is an extensive document and is available to download (see page 5 for further details).



Lasting Powers of Attorney Property and Financial Affairs

A Lasting Power of Attorney Property and Financial Affairs (LPA PFA) authorises the Attorney to make decisions on behalf of the Donor in respect of his property and financial affairs or in respect of specified matters concerning the Donor's property and financial affairs.

An LPA PFA must be created on the prescribed form, and registered, before it can be used.

An LPA PFA can be used when the Donor lacks capacity in respect of the particular decision. It can also be used when the Donor does not lack capacity, although it may be restricted so as to apply only where the Donor lacks capacity.

The Code of Practice

LPAs, their creation, registration and use, are further explained in Chapter 7 of the Code of Practice. It is the duty of an Attorney to have reference to this.

What LPA PFAs apply to

The powers under a LPA PFA extend to all matters concerning the Donor's property and financial affairs; this may include selling a Donor's home, buying property for the Donor in the Donor's name, decisions about how a Donor's care (including health care) should be paid for, and carrying on (or winding up) the Donor's business.

What LPA PFAs do not apply to

The Attorney's powers are expressly subject to the restrictions and conditions contained within the Power of Attorney.

An LPA PFA does not apply to any decisions about the Donor's personal welfare. These decisions must be made under a LPA HW or, if not possible, by the Court of Protection or someone appointed by the Court.

An LPA PFA does not authorise the Attorney to make gifts to any persons except in the circumstances described below (page 17).

An LPA PFA does not permit the Attorney to make a new Will for the Donor. The Court has the power to do this and so if it is felt necessary the Attorney (or some other person) should apply to the Court.

An LPA PFA does not authorise the Attorney to restrain the Donor (that is to prevent the Donor from doing something) unless three conditions are satisfied. These are:

1. that the Attorney reasonably believes that the Donor lacks capacity in relation to the matter in question;
2. the Attorney reasonably believes that it is necessary to do the act in order to protect the Donor from harm; and
3. that the act is a proportionate response to the likelihood of the Donor suffering harm and the seriousness of that harm.

An LPA PFA cannot give an Attorney the authority to make any of the following decisions on behalf of the Donor:

- consenting to marriage or a civil partnership;
- consenting to have sexual relations;
- consenting to a decree of divorce being granted on the basis of two years' separation;
- consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation;
- consenting to a child being placed for adoption by an adoption agency;
- consenting to the making of an adoption order;
- discharging parental responsibilities in matters not relating to a child's property;
- giving a consent under the Human Fertilisation and Embryology Act 1990.