

Mencap's guide to Lasting Powers of Attorney and the Court of Protection

Notes about this guide

This guide is intended as an outline guide only. It is not intended to be exhaustive and reliance should not be placed on it without seeking more detailed advice from a professional advisor or solicitor in light of your own circumstances. This guide is based on English law and practice in force at the date it was prepared.

The wills and trusts team can provide you with the following guides:

- **Leaving money in trust** - a guide to leaving money to someone with a learning disability. This is a starting point for parents, families and carers to think about their options
- **Mencap's guide to making wills** - a factsheet about making your will, answering common questions and giving tips
- **Mencap's guide to being a trustee** - information about the duties and responsibilities of being a trustee
- **Mencap's guide to guardianship** - information about appointing a guardian for your child who is under 18 years old
- **Mencap's guide to writing your letter of wishes** - information about writing a letter of wishes as guidance for your trustees
- **Mencap's guide to the Mental Capacity Act** - an introductory guide to the Mental Capacity Act 2005
- **Mencap Trust Company** - information about the Mencap Trust Company (a trust company which administers discretionary trust funds for people with a learning disability)
- **A list of specialist legal professionals in your area** - an essential part of drawing up a will or trust is finding a legal professional who has the knowledge and experience to help you provide for a person with a learning disability. We can give you a list of legal professionals in your area who are specialists in preparing wills and trusts
- **Giving times magazine** - the latest edition of the wills and trusts team's annual magazine, with tips, advice and stories
- **An easy-to-read guide to wills** - information for people with a learning disability about writing their will
- **A gift for the future** - information about leaving a gift in your will to Mencap

To order any of the booklets or guides, please contact the wills and trusts team:

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Telephone: 020 7696 6925

Email: willsandtrusts@mencap.org.uk

Visit: www.mencap.org.uk/willsandtrusts

Guide to Lasting Powers of Attorney and the Court of Protection*

The Mental Capacity Act 2005, which came into force on 1 October 2007, introduces the new lasting powers of attorney (LPA). By signing an LPA you will be giving power to attorneys to take decisions concerning your affairs while you are still alive, but unable to make decisions (due to ill health or being incapable of making your own decisions).

* Not applicable in Northern Ireland

Lasting Powers of Attorney

There are two different types of LPAs:

- Property and Financial Affairs LPAs for decisions about finances, for example, in relation to a individual's bank accounts, investments and property; and
- Health and Welfare LPAs for decisions about an individual's welfare and health, for example, where you should live and what care or medical treatment you should receive. You can also authorise the attorney to give or refuse consent to life sustaining medical treatment. The attorney can only use the welfare power if you have lost the capacity to make the relevant decisions.

An LPA will enable you to give detailed instructions to your attorneys to outline precisely your wishes. It is therefore very important for you to consider the scope of the authority given carefully and to discuss this with both the prospective attorneys and any relevant health professional, if appropriate.

LPAs are powerful documents and in particular, you will have the opportunity to:

- Direct how your attorneys will make decisions on your behalf;
- State whether your attorneys must act together in taking some decisions, but separately for others;
- Appoint replacement or substitute attorneys; and
- Choose who, if anyone, should be notified on registration (this is important as it gives these people the right to object to the registration of the LPA).

Your attorneys must also sign the LPA when you are making it. There is a certificate of capacity which must be completed by an independent third party at the time of signing the LPA. The certificate provider must confirm that they are of the opinion that you understand the purpose and scope of the power, and that there is no reason why the document should not be valid.

Once signed by all parties, the LPA must be registered with the Office of the Public Guardian (OPG) before it can be used, and this is regardless to whether or not you have capacity at the time.

You can either make an LPA through your solicitor, or you can obtain the forms direct from the Office of the Public Guardian. There are fees associated with making an LPA and registering it with the OPG. Please check with the OPG directly for current fees. (For more information, go to their website www.justice.gov.uk/about/opg.htm and click on Guidance and then Forms).

If, however, you no longer have the capacity to make your own decisions, or you have never had capacity to manage your own affairs and make your own decisions, then an application to the Court of Protection for a deputy to be appointed on your behalf may have to be considered.

Court of Protection and Deputyship

What is the Court of Protection?

The Mental Capacity Act 2005 established a new Court of Protection. The Court has the same powers, rights, privileges and authority as the High Court. The Court can decide if a person lacks mental capacity and, if they do, can decide an appropriate course of action to deal with that person's property, affairs, and personal welfare.

What is a deputy?

A deputy is a person appointed by the Court of Protection to make financial or welfare decisions on an ongoing basis for a person who does not have capacity to make those decisions him/herself. (Before the implementation of the Mental Capacity Act 2005 on 1st October 2007, these appointments were called 'receiverships'.)

Why would a deputy need to be appointed?

Where a person lacks capacity to make their own decisions, and has not made a Lasting Power of Attorney, and has assets which need to be used or dealt with for their benefit, then a deputy needs to be appointed by the Court for that person. A deputy may be appointed to make either financial or welfare decisions.

Who can be appointed as a financial deputy?

Anyone can be appointed as deputy if they can demonstrate their suitability to the Court of Protection. A financial deputy does not necessarily have to be experienced in financial affairs, but he/she should be someone who can keep orderly records and who is used to operating bank accounts and dealing with financial institutions.

More importantly, a deputy should be willing and able to devote time to looking after the financial affairs of another person on a regular basis. The person appointed by the Court of Protection is often a relative of the client, but there may be no suitable family member willing to be a deputy, or the family may decide to ask a professional such as a solicitor or accountant to become the deputy. The Court of Protection has to approve the person and make the formal appointment.

How is a deputy appointed?

An application is made in writing to the Office of the Public Guardian, either by the person's family or a professional. Medical evidence must be provided confirming the person's inability to manage their own affairs. If the Court is satisfied with all the evidence submitted, it will make the order appointing the deputy.

For more information, go to their website www.justice.gov.uk/about/opg.htm and click on Guidance and then Court Appointed Deputies).

What can the deputy do?

The Court of Protection makes a formal 'order' detailing what the deputy may do in each case. For a deputy for property and affairs, this may include dealing with income from benefit payments and retirement pension and to receive capital from banks/building societies and to spend the money on the person concerned. For a deputy for personal welfare, this may include authorising decisions about care or medical treatment that the person receives. The Order will give the deputy as much flexibility as possible so that he/she does not have to make repeated applications to the Court. However, he/she may have to apply to the Court for specific authority to, for example, sell their property or to make a will for the person concerned.

There are restrictions on what a deputy can do under the terms of the Mental Capacity Act 2005. He/she can only make a decision on behalf of the client where he/she reasonably believes the client lacks capacity to make that decision for himself. Any decision made on someone else's behalf must be made in their best interests. There is a code of practice issued by the Lord Chancellor which deputies are obliged to observe when taking decisions on behalf of someone else.

The deputy must submit an annual report to the Court showing what decisions have been made on behalf of the person who lacks capacity, including a record of money received and payments made during the year on behalf of the person concerned.

How long will the deputyship order last?

Until the Court is satisfied that the person has recovered and can manage their own financial affairs, or until his/her death. If the deputy wants to retire at any time (or dies), the Office of the Public Guardian can make a new order appointing a new deputy.

You can either make an application for a deputyship order through your solicitor, or you can obtain the forms direct from the Office of the Public Guardian. There are fees associated with making a deputyship order and ongoing annual charges, please check with the OPG directly for current fees.

For information about the fees attached to the deputyship order, go to their website www.justice.gov.uk/about/opg.htm and click on Guidance and then Court Appointed Deputies).