



LAW ANSWERED

SAMPLE CHAPTER FROM OUR PRIVATE CLIENT ELECTIVE GUIDE

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LASTING POWERS OF ATTORNEY

It is possible to create two different types of LPA (s. 9(1) MCA), the two types are independent, and it is possible for one donor to have different attorneys for each type. The LPA gives power over either:

- 1) Health and welfare; or
- 2) Property and financial affairs.

	PROPERTY AND FINANCIAL AFFAIRS	HEALTH AND WELFARE
What is it used for?	<p>Giving power to manage the donor's property and finances, e.g.:</p> <ul style="list-style-type: none"> • Sale of the donor's house; or • <u>Reasonable gifts</u> can be made on '<u>customary occasions</u>' (ss. 12(2) and (3) MCA) to those related or connected to the donor, or to any charity to which the donor made/might have been expected to make gifts. There is no power to provide <u>maintenance</u>. 	<p>Giving power to make decisions regarding the donor's personal welfare, e.g.:</p> <ul style="list-style-type: none"> • Where the donor should live; or • Consent to medical treatment. <p>Note: for decisions relating to <u>life-sustaining treatment</u> there needs to be a separate statement, unless this issue is expressly dealt with in the original deed (s. 11(8) MCA).</p>
Choice of attorney(s) (s. 10 MCA)	<ul style="list-style-type: none"> ✓ An individual over 18 ✓ A trust corporation ✗ A bankrupt individual 	<ul style="list-style-type: none"> ✓ An individual over 18 ✗ A trust corporation ✓ A bankrupt individual
	<p>Often the donor chooses either:</p> <ol style="list-style-type: none"> 1) Someone they know and trust – e.g. close friends/relatives; or 2) A professional – e.g. a solicitor <p>More than one attorney may be appointed by the donor. The donor chooses whether they are to act <u>jointly</u>, <u>jointly and severally</u> or <u>jointly for some matters and severally for others</u> (s. 10(4) MCA). If the donor makes no election, the attorneys are deemed appointed jointly (s. 10(5) MCA) (<i>contrast with EPAs</i>).</p> <p>If acting <u>jointly</u> and one attorney becomes unable to act (e.g. dies, lacks capacity etc.) and is not replaced, the LPA becomes invalid (ss. 13(5)-(7) MCA). However, many donors still appoint attorneys jointly to avoid any potential abuse of power.</p> <p>If acting <u>jointly and severally</u>, and one attorney becomes unable to act, the other can act unilaterally and the LPA remains valid (s. 13(7)(b) MCA).</p> <p>Substitute attorney(s) can be appointed in the event that one or more of the original attorneys are unable to act. If the original attorneys had been appointed jointly, the replacement attorney will take over and act alone.</p>	

When can it be used?	Before <u>and</u> after donor has lost capacity	Only after donor has lost capacity
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SUGGESTED STRUCTURE FOR QUESTION ON EXECUTING AN LPA

STEP 1:	Check that the donor has capacity
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The donor must have **capacity** to grant the LPA **at the time it is created**. A certificate provider (see *below*) must certify this. If a donor lacks capacity then the LPA is void **Public Guardian v RI**.

REMEMBER: capacity is presumed to exist unless the contrary is proven (**s. 1 MCA**).

STEP 2:	Creation – ensure that the correct form is used and choose a certificate provider
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- 1) The LPA must be in the prescribed form (**Sch. 1 and s. 10 MCA**). Otherwise it will be invalid and cannot be registered without authorisation by the CoP, unless the difference is immaterial (**Sch. 1 para 3 MCA**).
- 2) The donor must choose a certificate provider (**Reg. 8(1) 2007 Regs**) who is either:
 - a) **Over 18 whom they have known for at least 2 years** – e.g. a neighbour / friend / relative (**Reg. 8(1)(a) 2007 Regs**); or
 - b) **Over 18 with the required expertise** – e.g. registered healthcare professional/professional lawyer/social worker/independent mental capacity advocate (**Reg. 8(1)(b) 2007 Regs**).

NOTE: while a **knowledge-based certificate provider** (i.e. under **Reg.(1)(a)** above) is unlikely to charge, their opinion regarding capacity could be open to challenge (which could invalidate the LPA). Conversely, a **skills-based certificate provider** (i.e. under **Reg.(1)(b)** above) may charge but their opinion is less likely to be subject to a successful challenge.

The following cannot act as certificate providers (**Reg. 8(3) 2007 Regs**):

- 1: Attorneys of this or any other LPA by the donor.
- 2: Family members of the donor/attorney (incl. their spouse/civil partner, half-blood and step relatives).
- 3: Business partners or employees of donor/attorney/replacement attorney.
- 4: Owners, managers or employees of any care home where the donor lives, or family members of such owners, managers or employees.

- 5:** Directors or employees of trust corporations acting as attorneys/replacement attorneys for this LPA.

NOTE: the certificate is invalidated if the attorney is present when the certificate provider discusses the LPA with the donor.

STEP 3: Execution in the prescribed manner (Reg. 9 2007 Regs)

Part A

Donor must read (or have read to them) the prescribed information, sign and date in the presence of a witness and name people to be notified on registration of the LPA (if none, 2 certificate providers are required).

Part B

Certificate provider(s) must complete and sign the certificate confirming that the donor understands the nature of the LPA and that there is no fraud/undue pressure.

Part C

Attorney(s) must read the prescribed information, sign and date in the presence of a witness.

NOTE: the certificate provider can be a witness, one attorney can be a witness to another attorney but not to the donor, and the donor cannot witness any signature (*see the table below*).

NOTE: there were no provisions for the signature and witness process to be managed remotely during the Covid 19 pandemic, digital signatures were not allowed.

Person signing	Who can witness the signature?		
	Donor	Certificate Provider	Attorney
Donor	n/a	✓	X
Attorney	X	✓	may witness another attorney

STEP 4: Revocation and termination

The LPA can be revoked by:

- 1) The **donor** at any time when they have capacity (**s. 13(2) MCA**).

2) The CoP:

- if the LPA has been registered: when fraud or undue pressure was used, or if any attorney has behaved/proposes to behave in a way that contravenes their authority or is not in the donor's best interests (**s. 22(3) MCA**).
- if not yet registered: the CoP can direct that the LPA should not be registered (**s. 22(4) MCA**).

3) Automatic revocation. If one or more attorney(s) become unable to act and are not replaced, and (where the attorneys are acting jointly and severally) there are no remaining attorneys (**s. 13(6) MCA**).**STEP 5: Registration**

Each LPA must be registered with the Public Guardian ("PG") **before it can be used**. There are advantages in registering the LPA as soon as it is completed; it will then be ready for use as soon as it is needed. Early registration obviates the need to ensure that the LPA is kept up to date in terms of addresses and contact details. Changes cannot be made to the LPA between execution by all parties and registration.

NOTE: the attorney has **no powers** until registration has been completed. Registration requires the following steps to be completed:

- 1:** Before an application for registration is made, anyone named by the donor should be notified. Form **LPA001** must be sent to them; they have 3 weeks to "raise concerns".
- 2:** The application for registration can be made by the donor or attorney(s) to the Office of the Public Guardian ("OPG") on form **LPA002**. **Note:** if the power is joint, all attorneys must apply, otherwise any attorney can do so. Separate applications must be made for each type of LPA.
- 3:** Upon receipt of an application, the **OPG** must notify anyone not party to the application (i.e. donor / other attorneys).
- 4:** The PG will register the LPA 4 weeks after service of the notices of application provided it is in the prescribed form and there are no objections. It will then notify the donor and attorneys of successful registration.

NOTE: in reality, registration will take much longer than this, in January 2022 the website of the **OPG** carried information indicating that the delay in registration was 20 weeks.

OBJECTIONS TO REGISTRATION OF LPA

These can only be made by the **donor, attorney(s) or those notified of an application to register** within 3 weeks of receiving notice of the application.

Factual objection by the attorney or “*person to be told*” include:

- The donor or an attorney is dead.
- The donor and an attorney were married or in a civil partnership and the marriage or partnership has come to an end.
- The attorney does not have the mental capacity to act.
- An attorney has disclaimed their appointment.
- The donor or an attorney are bankrupt or subject to a Debt Relief Order (applies to property and financial affairs LPAs only).

Prescribed objections include:

- LPA is not legally correct.
- Lack of belief that donor had capacity to make the LPA.
- Cancellation of the LPA.
- Fraud or undue pressure when the LPA was created.
- Attorney acting against the donor’s best interests.