

The Supporter's Guide to the Health and Welfare Lasting Power of Attorney



Introduction

This guide is aimed at supporters of adults with a learning disability and/or who are autistic to help them make a Health and Welfare Lasting Power of Attorney (LPA) and should be read before providing assistance.

One of the aims of the Mental Capacity Act 2005 is to empower people to make their own decisions (if needed with support), and to plan ahead for a time, if and when they have not sufficient mental capacity to make some or all decisions for themselves.

The exact format of an LPA is set in Regulations, and currently extends to 20 pages. The LPA form also includes information about how to complete the power and apply for registration of the LPA with the Office of the Public Guardian. In addition there are Continuation sheets which may need to be used.

The extent and detail contained within each form can create an obstacle for making an LPA. However, with support it may be possible for the person to comply with the legal requirements to make an LPA.

This guide forms part of a suite of information and support:

- An Easy Read Guide and Record for Making a Health and Welfare LPA
- An Easy Read Guide to Sections 8 and 9 of the Health and Welfare LPA form
- The Certificate Provider's Guidance: Health and Welfare LPA
- Guidance for attorneys acting under a Health and Welfare LPA

All these publications have been written by Caroline Bielanska, a solicitor who specialises in Lasting Powers of Attorney and the Mental Capacity Act 2005.

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This symbol appears in this guide to help the supporter collect important information, as it will be needed to complete the LPA form.



This symbol appears in this guide to highlight complexities where legal advice is recommended.



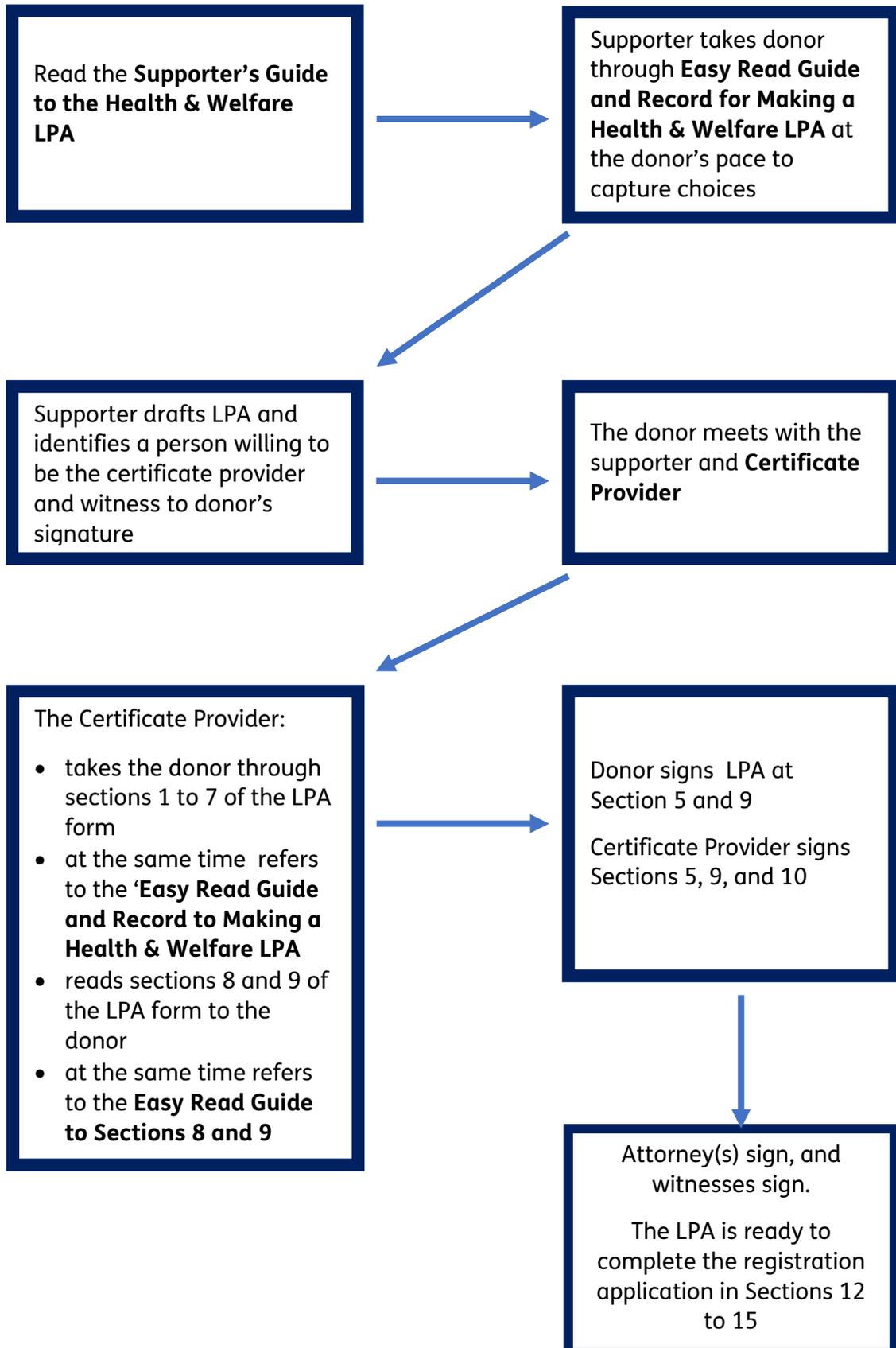
This symbol appears in this guide to show a choice needs to be made. Choices should be captured in the **Easy Read Guide and Record for Making a Health and Welfare LPA**.

Terminology

The LPA contains terms which will be unfamiliar to most people. The Easy Read guides contain simple explanations.

Donor	The adult making the power
Attorney	The adult being appointed
Replacement attorney	An adult who replaces an original attorney if they can no longer act
Life-sustaining treatment	Treatment which in the view of the health care professional is necessary to keep the person alive
Option A	The attorney(s) can give or refuse consent to life sustaining treatment
Option B	The attorney(s) have no power to give or refuse consent to life sustaining treatment
People to notify	Named people who will be told the LPA is being registered and can raise a concern
Certificate Provider	An independent person who confirms the donor understands the scope and purpose of the LPA, and there is no fraud or undue pressure being used to get the donor to make the power
Joint	The attorneys must always make decisions together
Joint and several	The attorneys can make decisions together but can also make decisions on their own
Registration	Before the LPA can be used, it must be registered with the Office of the Public Guardian, which will stamp the LPA as 'validated'.

The overview of making the LPA



What are Lasting Powers of Attorney?

The Mental Capacity Act 2005 and underpinning Regulations set out the framework to enable adults with mental capacity to make LPAs giving another person the right to make a decision on their behalf, if and when they are unable to make their own decision or decisions in the future.

There are 2 types of LPA:

- Property and financial affairs
- Health and Welfare

This guide is specific for Health and Welfare LPAs.

What is mental capacity?

Mental capacity is the ability to make a particular decision at the time the decision is made. Chapter 2 of the Mental Capacity Act 2005 statutory Code of Practice sets out what is meant by mental capacity in more detail and can be found here:

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

An adult is presumed to have mental capacity to make an LPA, unless it is established that they do not. Just because a person has a particular diagnosis or they want to make a decision which others consider is unwise, it does not mean they lack mental capacity.

An adult may have capacity to make certain types of decisions, but not others. For example they may have capacity to make decisions about where they live and their care, but not have capacity to manage their finances to pay for the arrangements.

If needed, a person should be provided with help and support to make their own decisions, including deciding to make an LPA. Chapter 3 of the Mental Capacity Act 2005 statutory Code of Practice suggests ways in which the person may be supported to make their own decisions.

Key features of a Health and Welfare LPA

- The donor **must have** sufficient mental capacity to make the LPA
- The donor **must choose** an independent person (Certificate Provider) to sign the LPA and confirm they understand what they are doing and are not being pressured to make the LPA
- The donor **may choose** up to 5 people to be told they have made the LPA
- The donor **must choose** whether or not to give their attorney the right to give or refuse consent to life sustaining treatment
- The donor **must read or have read to them** Section 8 of the LPA form
- The donor **must confirm** the choices they have made in Section 9 of the form
- The LPA **must be correctly signed** to be valid

- The LPA **must be registered** with the Office of the Public Guardian for it to be used
- The attorney can **only make** those Health and Welfare decisions which the donor **cannot make** because they lack mental capacity

The donor must choose their attorney(s)



- The attorney must be over 18 years of age
- There can be more than one attorney
- They can be a family member
- They must be trustworthy and be able to make good decisions on the donor's behalf
- The attorney(s) must be willing to be appointed as an attorney
- The attorney(s) will need to sign the LPA form (Section 11)

The donor must choose how they want their attorneys to make decisions



If the donor wants to have more than one attorney, the donor will need to decide whether the attorneys make decisions:

- 1 **Jointly**, i.e. always together; or
- 2 **Jointly and severally**, i.e. together and independently so that they can make decisions together but also separately; or
- 3 **A combination of 1 and 2**, so some decisions can be made jointly and other decisions jointly and severally. Legal advice should be sought if making this choice, as it is easy to make mistakes which might hold up registration.



Joint appointments can provide reassurance that everyone is in agreement when they make decisions, although this may delay decisions being made. If one attorney dies, resigns their appointment (referred legally as 'disclaim'), is no longer legally married to their spouse or civil partner who they appointed as an attorney, or loses mental capacity, then the LPA can no longer be used, unless a replacement is appointed.

Joint and several appointments are more flexible, and allows for decisions to be made quickly, although it may cause arguments if one attorney does not agree with another. The LPA can still be used if one attorney dies, resigns their appointment, is no longer legally married to their spouse or civil partner who they appointed as an attorney, or loses mental capacity. Replacements can be appointed if all or any joint and several attorneys are unable to act.

Does the donor want to appoint replacement attorneys?



If any or all of the original attorneys can no longer make decisions, the donor can appoint a replacement to step in.



You will need to have the full name, address, and date of birth of each original and replacement attorney(s).



The donor may wish to say the replacement can only act when all original attorneys cannot act. Legal advice should be sought if making this choice, as it can be complex to draft.

Does the donor want the attorney(s) to give or refuse consent to life saving treatment decisions?



The donor must choose either:

1. **to give** their attorney(s) power to give or refuse **consent** to life sustaining treatment (known as 'Option A'); or
2. **not to give** their attorney(s) power to give or refuse **consent** to life sustaining treatment (known as 'Option B')

Separate guidance is available for the attorney(s), so they understand the scope of their authority.

Does the donor want to give their attorney(s) guidance?



It can be helpful for the attorney(s) to have guidance about the donor's wishes, feelings, values and beliefs, and any person they would like the attorney to speak to before making a decision.

This will give the attorney(s) confidence they are making decisions the donor would want to be made, if they were able.

Does the donor want others to be told they have made the LPA?



The donor can choose up to five people to be told that the donor has made an LPA. The people chosen are informed before the LPA is

registered with the Office of the Public Guardian. This is so interested people can raise any concerns they may have about the LPA being made.

The donor can choose anyone, but not their attorney(s) or replacement attorney(s).



You will need to have the name and address of each person (if any) who is to be told that the donor has made the LPA.

The donor must choose a person to be their Certificate Provider



The donor must choose an independent person who will confirm the donor understands the LPA they are signing, and they are not being pressured to make it. The supporter can help the donor decide who can be their Certificate Provider.

See The Certificate Provider's Guidance for more detail.

Who can act as Certificate Provider?

The Certificate Provider must be:

- over 18 years of age;
- Someone the donor has **known for at least two years**; or
- Someone who, on account of their **professional skills and expertise**, considers themselves competent to make the judgments necessary to give the certificate, such as a lawyer, social worker, or doctor. A professional certificate provider is likely to charge a fee for signing the LPA.

The Certificate Provider cannot be:

- A member of the donor's family, any of the attorney(s) or replacement attorney(s) family such as, spouse, civil partner, an unmarried partner (whether or not they are living at the same address as the donor or attorney), parents, grandparents, child, grandchild, brother, sister, uncle, nephew or niece, including those of full blood, half blood, step and illegitimate relationships and any relationship by marriage.
- A business partner or paid employee of the donor or attorney(s) or replacement attorney(s)
- Any attorney or replacement attorney appointed under this LPA or another LPA, or enduring power of attorney (whether or not it has been revoked)
- The owner, director, manager, or employee of a care home in which the donor is living, or their family member or partner

Putting this guide into practice

It is common for other people to suggest to the donor that they make an LPA. If too much pressure is placed on the donor, the LPA cannot be made, as the Certificate Provider must confirm in their opinion that no undue pressure is being used on the donor to make the LPA.

Having a learning disability or autism does not mean a person lacks capacity to make an LPA. The donor must have sufficient understanding of key information, be able to retain that information, use and weigh that information to decide to make an LPA and be able to communicate that decision. The person does not have to have capacity to make all decisions that the attorney may need to make, to have capacity to make the LPA.

The Certificate Provider Guidance on page 4 sets out what is needed to be understood in more detail.

Conversations about making an LPA should occur over time. The donor has to make lots of choices before the LPA can be drafted. **The Easy Read Guide and Record for Making a Health and Welfare LPA** is an aid to these conversations, and includes a record of what the donor would like in their LPA.

Once all choices are made, the LPA can be completed by downloading the form from <https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney>



You will need the full personal details of each attorney, replacement attorney, people to be told the donor has made the LPA, and name and address of the proposed Certificate Provider.

How the donor signs the LPA

It is a legal requirement that the donor read or have read to them, Section 8 of the LPA. This contains important information, which forms part of what the Certificate Provider needs to be sure the donor understands.

The LPA form also requires the donor to confirm their choices. This is set out in Section 9 of the LPA.

The donor can make an LPA, even if they cannot read and write, but will need more support. The donor can sign by making a 'mark'.



If the donor cannot sign or make a mark, the LPA can be signed on their behalf (but the donor must direct that they want this). If the donor cannot sign or make a mark, Continuation Sheet 3 must be used, and an additional witness will be needed to sign Section 5 of the LPA (Option A or B choice). This means that you will need to photocopy Section 5 and the 2nd witness should sign that page.

Legal advice is recommended as it is complex and failure to sign the LPA properly will result in the LPA not being valid.

Section 8 and 9 of the LPA must be read to the donor. To help the donor understand what is being read, the donor should read the **Easy Read Guide to Section 8 and Section 9**.

The supporter will need to ensure that the LPA is signed in the following order:

1. Donor signs and dates the LPA at Sections 5 and 9, and any continuation sheet(s)
2. Their witness signs and must include their FULL NAME and address
3. The Certificate Provider signs section 10 of the form
4. Each attorney and replacement attorney signs and dates on separate Section 11 pages of the LPA
5. Each attorney and replacement attorney's witness must sign and includes their FULL NAME and address

Witnesses

Any adult can be a witness, but the donor and attorney cannot witness each other's signature. The Certificate Provider can witness the donor's signature.



If the LPA is not signed correctly by all those involved, it will not be valid, and the process will have to be started again.

Registration of the LPA

Sections 12 to 15 of the LPA form contain the application to register the LPA. The attorney(s) can apply. If the attorneys are appointed jointly and severally, then any one of them can sign the application. If the attorneys are appointed jointly, they will all need to sign. Section 15 must be dated after everyone has signed. It can take several months for the LPA to be registered, so immediate registration is recommended.

Exemption or remission of fees

The donor may not need to pay a fee (exemption). This depends on what benefits they receive; or if the donor has a low income (£12,000), then they may be eligible for a reduced fee (remission).

To apply for an exemption or remission, form LPA120 will need to be completed and sent with the application and evidence in support. See <https://www.gov.uk/government/publications/power-of-attorney-fees>

Notice to a person to be notified

Where the donor has chosen a person or persons to be notified of the registration of the LPA, they must be informed of the intention to register the LPA on prescribed form LP3. It can be obtained here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/519167/LP3-Form-to-notify-people.pdf