

The Certificate Provider's Guidance: Health and Welfare Lasting Power of Attorney



Introduction

The Mental Capacity Act 2005 and underpinning Regulations set out the framework to enable adults with mental capacity to make Lasting Powers of Attorney (LPAs). LPAs give another person the right to make a decision on their behalf, if and when they are unable to make their own decision or decisions.

There are 2 types of LPA:

- Property and financial affairs
- Health and Welfare

This guidance for the Certificate Provider is specific for Health and Welfare LPAs, and has been written by Caroline Bielanska, a solicitor who specialises in LPAs and the Mental Capacity Act 2005.

The role of the Certificate Provider

As an important safeguard to prevent a person (known as the ‘donor’) giving a power when they lack mental capacity or through fraud or pressure, the LPA must be signed by an independent person (‘the Certificate Provider’).

The Certificate Provider must confirm in their opinion, at the time the donor signs the power that:

- The donor understands the purpose of the LPA and the scope of the authority conferred under it;
- No fraud or undue pressure is being used to induce the person to create the LPA; and
- There is nothing else that would prevent the LPA from being created.

Can you be a Certificate Provider?

The donor must choose who should be their Certificate Provider. You can be the Certificate Provider if you are an adult and either:

- have **known the donor personally for a period of at least 2 years** (known as more than an acquaintance); or
- have **relevant professional skills and expertise** to certify such matters, such as being a solicitor, doctor, social worker, or advocate.

You cannot be a Certificate Provider if you are:

- A member of the either the donor or the 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)
- An attorney appointed in the proposed or another lasting power of attorney or any enduring power of attorney made by the donor (whether or not it has been revoked)
- The owner, director, manager, or an employee of a care home in which the donor lives or their family member or partner

Forming your opinion

You must read the donor's LPA to form your opinion, and in particular **Section 8** of the form.

The donor must also have read or have had read to him or her, Sections 1-9 of the LPA. To assist the donor understand what they are reading or what is being read to them, the following aids should be used:

1. The Easy Read Guide and Record of making a Health and Welfare LPA; and
2. An Easy Read Guide to Sections 8 and 9 of the Health and Welfare LPA form.

The donor must have mental capacity to make the Health and Welfare LPA at the time they sign. The donor may lack capacity to make other decisions, for example they may lack capacity to manage their own money, but have capacity to make the LPA.

To follow the Mental Capacity Act 2005:

1. You must assume that the donor can make this LPA, unless on the balance of probabilities you form the opinion that they cannot do so because they lack mental capacity.

2. You must not assume the donor lacks mental capacity because of their condition, diagnosis or behaviour.
3. You must support the donor to make this LPA.
4. You must not treat the donor as unable to make this LPA unless all practicable steps to help him or her to do so have been made without success.
5. You must not treat the donor as unable to make this LPA simply because the donor wishes to make a decision you consider is unwise, for example appointing an attorney you do not consider a good choice.

Chapter 3 of the Mental Capacity Act 2005 Code of Practice, provides useful guidance and information to help you support the donor and form your opinion from:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf

What the donor needs to understand

When the donor signs Section 5 and Section 9 of the LPA, the donor must be able to understand, retain, use and weigh relevant information, to decide they want to make the LPA, and be able to communicate that decision (by any means). To be able to sign as Certificate Provider, you must conclude that on the balance of probabilities the donor has capacity to make the LPA.

You must also form the opinion that there is no fraud or undue pressure being used to get the donor to sign this LPA.

This means the donor must understand, retain, use and weigh the following:

1. Why they want to make this LPA and it is their choice to make it.
2. Why they have chosen their particular attorney(s) and it is their choice to appoint them.
3. By signing the LPA, their attorney(s) would be able to make any health decisions (like medical treatment) and welfare decisions (like where they live) which they could make - but only if the donor cannot decide because they lack capacity.
4. If Option A in Section 5 has been chosen - this means the attorney(s) can give or refuse consent ('say yes or no') to the donor receiving life-saving treatment.

5. Any decisions the attorney(s) cannot make or any limits on decision making. For example, if Option B has been chosen, they need to understand the attorney(s) cannot give or refuse consent ('say yes or no') to life-saving treatment.
6. The attorney(s) must follow special rules (the Mental Capacity Act 2005 Principles) when making decisions.
7. The LPA cannot be used until it has been registered and stamped by the Office of the Public Guardian.
8. If they are able, the donor can change their mind and cancel the LPA.
9. Without making the Health and Welfare LPA, if the donor did not have mental capacity, their attorney(s) may not be able to make decisions for them.

Signing the LPA as a witness and/or Certificate Provider

The Certificate Provider can also be the witness to the donor's signature on Sections 5 and Sections 9 of the LPA. If you are the witness, you must also include your full name and address.

If the donor is unable to sign the LPA, you can sign at their direction, but the donor will need 2 other witnesses.

Continuation Sheet 3 must be signed instead of Section 9.

Section 5 (page 6 of the LPA form) will need to be photocopied and the second witness should sign and add their full name and address.