



**BIRCH**

WILLS & TRUSTS

*Advice tailored to you*

Guide to Powers of Attorney

*Help with making decisions about your  
health, welfare or finances*

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## What this guide is about

There are several reasons why you might need someone to make decisions for you, or act on your behalf.

It could just be temporary: for example, if you are in hospital and need help with everyday things such as making sure bills are paid. Or you may need to make more long-term plans if, for example, you have been diagnosed with dementia or have been in a serious accident.

This guide is applicable across England and Wales.

Lasting Powers of Attorney are only valid in England and Wales, and replaced the old system of Enduring Powers of Attorney in 2007.

For information about powers of attorney in Northern Ireland and in Scotland, contact please contact your Financial Advisor for further details.

## Getting help to manage your money

Perhaps you're starting to need a little bit of help to organise your finances, or maybe health problems are making it difficult to get out and walk to the bank or post office. You might still be perfectly able to make your own decisions, or supervise someone who is helping you.

Fortunately, there are some simple things you can do to help you manage your money.

- Use a pre-paid card. Giving someone a pre-paid card allows you to control the amount of money they can spend for you. You can buy pre-paid cards online or over the telephone and put money on it using a local Pay Point, at post offices, online, or by cheque or bank transfer.

- Use gift vouchers or gift cards to allow others to shop on your behalf. These can often be purchased over the telephone or online.
- Set up a standing order with your bank to pay someone a set amount. This is useful if someone regularly does your shopping for you or pays your bills.
- Set up direct debits. Direct debits allow you to pay bills directly from your bank account, to utility companies for example. The company collects what you owe them, but they must tell you how much they will take in advance.
- Set up a third-party mandate. This is an instruction to your bank or building society to let someone manage your bank account on your behalf. You may be able to limit what the person can do, for example only allowing them to check your balance or withdraw a restricted amount.
- Change your bank account into a joint account by adding the name of someone you trust. You can restrict the account so that it's only used for cheques, or ask the bank to set up a 'both mandate', which means that any cheques paid out of your account must be signed by both account holders. If you have a Post Office account, you can apply for someone to have permanent access to it. It is important to be aware that if one joint account holder loses mental capacity to operate the account, banks and building societies may temporarily restrict access to the account to essential transactions only, such as living expenses.
- Simple Payment Cards. If you use a Simple Payment card to collect benefits or a State Pension and someone else collects your money for you, you can get them their own Simple Payment card. Contact Simple Payment on 0845 600 0046 (textphone 0800 032 5864) or visit [www.gov.uk/simple-payment](http://www.gov.uk/simple-payment) for more information. \*By clicking on one of these links you are departing from the regulatory site of Birch Financial Solutions Ltd. Neither Birch Financial Solutions Ltd

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- Set up an appointee. In some circumstances, someone you trust can apply to claim and manage your benefits by becoming your appointee. They should apply to the office that deals with your benefits, or to the council if they need to deal with Housing Benefit and Council Tax Support (also known as Council Tax Reduction). Visit [www.gov.uk/become-appointee-for-someone-claiming-benefits](http://www.gov.uk/become-appointee-for-someone-claiming-benefits) for more information. \*By clicking on one of these links you are departing from the regulatory site of Birch Financial Solutions Ltd. Neither Birch Financial Solutions Ltd nor Intrinsic is responsible for the accuracy of the information contained within the linked site

You should remember that these are short-term solutions.

While they will allow someone to help you manage your money, they do not give a person the authority to make financial decisions on your behalf. If you're beginning to find it harder to manage your money, and you would like some more help, you might want to consider a power of attorney

It's up to you to decide what's best for you. Don't feel pressurised into doing something you don't want to do.

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## Powers of attorney

There are two types of power of attorney: Ordinary and Lasting.  
Ordinary Powers of Attorney

If you want to give someone the authority to make decisions and take action about your finances while you still have mental capacity, you can set up an Ordinary Power of Attorney.

This gives someone else, who is then known as your attorney, authority to act on your behalf. You can limit the power you give to your attorney so that they can only deal with certain assets, for example, your bank account but not your home.

An Ordinary Power of Attorney is only valid while you (the ‘donor’) remain mentally capable of making your own decisions about your finances, so you can keep an eye on what your attorney is doing.

Ordinary Powers of Attorney can be useful if, for example, you’re going into hospital or on holiday and you want someone to be able to look after your finances for a period of time. Or perhaps you have a medical condition that makes it hard to get out to your bank or post office.

If you want to set up an Ordinary Power of Attorney we can recommend a specialist in this area.

It is important to remember that an Ordinary Power of Attorney is not valid if you lose mental capacity.

### **Lasting Powers of Attorney**

If you want to give someone the authority to make decisions about your finances or your health and care if you lose mental capacity, you can set up a Lasting Power of Attorney (LPA).

The difference between an Ordinary Power of Attorney and an LPA is that an LPA is valid if you lose mental capacity and are no longer able to make your own decisions.

Although it is difficult to think about a time when you won’t be able to make your own decisions, setting up an LPA can give you peace of mind that someone you trust will be able to make decisions for you if the need arrives.

Discuss the options with someone you trust to see what they think and whether they can help. Ultimately, it's up to you how you handle your affairs. Even if someone thinks you're not doing the right thing, the final decision is yours.

## What is mental capacity?

Mental capacity means the ability to make a specific decision at the time it needs to be made. To have mental capacity you must understand the decision you need to make, why you need to make it, and the likely outcome of your decision.

Some people will be able to make decisions about some things but not others. For example, they may be able to decide what to buy for dinner, but be unable to understand and arrange their home insurance. Or their ability to make decisions may change from day to day.

Taking time to understand or communicate may be mistaken for a lack of mental capacity, but having dementia, for example, doesn't necessarily mean someone can't make any decisions themselves.

If you have mental capacity you should be able to communicate your decision through speech, signs, gestures or in other ways. If someone is having difficulty communicating what they want, an attempt should always be made to overcome those difficulties and help the person decide for themselves.

If you're unable to make your own decisions at some point in the future, such as if you have advanced dementia or are unconscious, someone else will need to do so for you. These could be decisions about your property and finances, such as paying your mortgage, investing your savings or buying items you need, or health and care decisions, such as what you should eat, or what type of medical treatment you should receive.

Before someone can make a decision for you, they must have reasonable belief that you cannot make that particular decision yourself. The words ‘reasonable belief’ are important because your mental capacity can change over time. The person making a decision for you must make sure they are acting in your best interests.

## Lasting Powers of Attorney

An LPA is a way of giving someone you trust the legal authority to make decisions on your behalf, if either you’re unable to do so at some time in the future or you no longer wish to make decisions for yourself. This person is known as your attorney.

There are two types of LPA: an LPA for financial decisions and an LPA for health and care decisions.

### **LPA for financial decisions**

Your attorney can use an LPA for financial decisions while you still have mental capacity. Or you can state in your LPA application that you only want it to come into force if you lose capacity.

If you have an LPA for financial decisions your attorney can generally make decisions on things such as:

- selling your home
- paying the mortgage
- investing money
- paying bills
- arranging repairs to property.

If you’re married or in a civil partnership, you may have assumed that your spouse would automatically be able to deal with your bank accounts and pensions, and make decisions about your healthcare, if you lose the ability to do so. This is not the case. Without a Lasting Power of

Attorney (LPA), they won't have the authority.

You can restrict the types of decisions your attorney can make, or let them make all decisions on your behalf. If you're setting up an LPA for financial decisions, your attorney must keep accounts and make sure their own money is kept separate from yours.

You can ask for regular details of how much is spent and how much money you have. This offers you an extra layer of protection.

You can also request that these details are sent to your solicitor or a family member if you lose mental capacity.

If you lose mental capacity and do not have an LPA for financial decisions in place, your family or friends will not be able to make decisions on your behalf regarding your finances.

In this situation, the Court of Protection would need to get involved.

### **LPA for health and care decisions**

Your attorney can only use this when you no longer have mental capacity. It covers health and care decisions. An attorney can generally make decisions about things such as:

- where you should live
- your medical care
- what you should eat
- who you should have contact with
- what kind of social activities you should take part in.

You can also give special permission for your attorney to make decisions about life-saving treatment.

If you lose mental capacity and you don't have an LPA for health and care decisions in place, any decisions about your healthcare will be made by doctors who will make a decision based on your best

interests. They will consult your family, but the final decision will rest with medical staff.

LPAs were introduced in October 2007, replacing the old system of Enduring Powers of Attorney (EPA). EPAs created before October 2007 may still be valid.

## Choosing someone you trust to make decisions for you

The role of attorney involves a great deal of power and responsibility so it's important that you trust the person or people you choose. You could choose a family member, friend, your spouse, partner or civil partner. Alternatively, you could choose a professional, such as a solicitor. Think carefully about who you believe would be able to carry out the role and make decisions in your best interests. Give the person you ask time to think about the role, so they can make sure they are making the right decision about whether to take it on.

It can be a good idea to appoint more than one attorney, but you must decide whether they are to make decisions together or separately. You could also consider appointing replacement attorneys, in case something happens to one of your attorneys and they can't act on your behalf anymore.

Attorneys must be over 18 and shouldn't be paid care workers, unless there are exceptional circumstances.

Your attorney can claim back any expenses they incur while acting as your attorney – postage, travel or photocopying costs, for example. They can claim these from your money, keeping an account of any expenses and relevant receipts.

However, they can't claim for time spent carrying out their duties unless they are a professional attorney, such as a solicitor, who will charge fees.

## Setting up a Lasting Power of Attorney

To apply for an LPA, you can get the LPA forms and an information pack from the Office of the Public Guardian, however taking professional advice can prevent problems later on.

The LPA must be signed by a certificate provider. This is someone who confirms that you understand it and haven't been put under any pressure to sign it. The certificate provider must be someone you know well or a professional person such as a doctor, social worker or solicitor.

The LPA must be registered with the Office of the Public Guardian before it can be used. There is a fee to register your LPA, which the Office of the Public Guardian can tell you about. If you are on a low income, you may be eligible for a 50 per cent discount, and if you're receiving certain benefits you won't have to pay anything at all.

You must register the LPA while you have the mental capacity to do so.

It can't be used during the registration process, which takes around nine weeks.

Contact the Office of the Public Guardian if you need to find out if your LPA has been registered or your financial advisor for further help.

If you lose mental capacity but you signed the LPA while you still had mental capacity, your attorney can register it for you.

You can certify a copy of your LPA if you still have mental capacity.

This shows that a copy of your LPA is genuine and can be used to prove that you have given your attorney permission to make decisions on your behalf, for example, to manage your bank account.

Alternatively, you can ask a solicitor to help you get a certified copy of your LPA.

### **When is an LPA valid?**

An LPA will only be valid if you have the mental capacity to set it up and haven't been put under any pressure to create it. It must be your decision and you must be able to trust your attorney, as you're giving them extensive power to make decisions about your life.

Remember that while you have mental capacity you can cancel your LPA at any time.

If your attorney has a valid LPA for financial decisions but your bank or building society refuses them access to your finances, you can refer the bank to the British Banking Association booklet called *Guidance for people wanting to manage a bank account for someone else*. It can be downloaded from [www.bba.org.uk](http://www.bba.org.uk)

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If you would prefer to seek help from a solicitor, contact the Law Society

Visit the Legal Ombudsman website at [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)

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## Making decisions on your behalf

When someone is acting as your attorney, they have to follow certain principles to ensure you still make your own decisions as much as possible, and that they make the right decisions on your behalf if you can't. The principles are as follows.

### **A presumption that you have mental capacity**

It must be assumed you're able to make your own decisions, unless it can be established that you can't.

### **The right to be supported to make a decision**

You must be given as much practical help as possible to make your own decision before anyone decides you're unable to. For example, if you're more relaxed or able to understand things at a particular time of day, you should be helped to make a decision then. Or you may be better able to understand or communicate through the use of pictures or sign language.

### **The right to make what appears to be unwise decisions**

You shouldn't be treated as unable to make a decision just because you make an unwise decision.

### **Best interests**

Any decision made or action taken on your behalf must be made in your best interests.

### **Least restrictive intervention**

Anyone making a decision for you should consider all the alternatives and choose the one that is the least restrictive of your rights and freedoms.

## How can someone ensure they make a decision in my best interests?

When someone makes a decision in your best interests they must:

- do everything possible to encourage you to participate.
- consider your past and present feelings, especially any expression of your wishes you made, such as an advance statement.
- consider any of your beliefs and values that could influence the decision.
- talk to other people, such as your family, carers or friends, who know about your feelings, beliefs and values and can suggest what might be in your best interests.
- always remember your right to privacy and that it might not be appropriate to share information about you with everyone.
- know about any exceptions, such as if you have made an advance decision to refuse medical treatment.

It might be helpful for you or your attorney to read the Code of Practice to the Mental Capacity Act. It's lengthy but gives clear and practical guidance on how to carry out the role of attorney or deputy.

You can download it free:

[www.gov.uk/government/publications/mental-capacityact-code-ofpractice](http://www.gov.uk/government/publications/mental-capacityact-code-ofpractice) \*By clicking on one of these links you are departing from the regulatory site of Birch Financial Solutions Ltd. Neither Birch Financial Solutions Ltd nor Intrinsic is responsible for the accuracy of the information contained within the linked site.

## What if I have a ready created an Enduring Power of Attorney?

If you set up an Enduring Power of Attorney (EPA) before 1 October 2007, naming someone as your attorney, it might still be valid. Your attorney might already be using it with your permission, without having registered it, so they can act on your behalf (this is different from an LPA, which must be registered before use).

This is fine, until you become unable to make your own decisions about your finances and property. Once this happens, your attorney must register the EPA with the Office of the Public Guardian before they can take any further action on your behalf.

An EPA only covers decisions about your property and financial decisions; an attorney doesn't have power under an EPA to make decisions about your health and care. You might want to consider setting up an LPA for health and care decisions, which can work alongside the existing EPA.

Contact your Financial Advisor for more information about EPA.

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## What happens if I no longer have capacity to make a Lasting Power of Attorney?

If there does come a time in the future when you can't make a decision, and you haven't created a valid LPA or EPA, the Court of Protection may need to become involved.

The Court of Protection can:

- decide whether someone has the mental capacity to make a decision
- make an order relating to the health and care decisions or property and financial decisions of someone who lacks mental capacity
- appoint a deputy to make decisions on behalf of someone who lacks mental capacity.

Someone who wants to make decisions on your behalf can apply to the court to be appointed as deputy, a role similar to that of attorney.

The court will consider whether you'll need someone to make ongoing decisions for you, and whether the person applying is suitable for the role. The court usually does everything by post, rather than holding a hearing.

If you have an existing EPA, the attorney may apply to act as a deputy in certain circumstances.

You can't choose your deputy personally and the process of appointing one can be lengthy and costly. It's much better to have an LPA in place.

The deputy has similar responsibilities to an attorney.

They must follow certain principles (see page 20), taking all steps possible to allow you to make your own decisions, and ensuring any decisions they do make are in your best interests.

The order of the court will set out the extent of the deputy's authority to act, so they must always make sure they are not exceeding their powers. A deputy also has a duty to act in good faith and not to take advantage of their position for their own benefit.

Becoming a deputy involves a lot of responsibility, so anyone asked to do this should think carefully about whether they want to take on the role, or whether there may be someone else who would be more appropriate.

## Independent Mental Capacity Advocates

If, in the future, you are unable to make certain important decisions and there is no one who is able to speak on your behalf, such as a family member or friend, an Independent Mental Capacity Advocate (IMCA) must be instructed to protect your rights.

In this situation, decisions about serious medical treatment or a change of accommodation must involve an IMCA.

An IMCA may be consulted about decisions involving a care review or adult protection procedures.

It is the responsibility of the staff in the NHS or your local council – for example, doctors, social workers and care home staff – to instruct an IMCA.

For information about the role of an IMCA, contact the Office of the Public Guardian or speak to your Financial Advisor to guide you in the right direction.

## Living wills

A living will lets you indicate what type of treatment you want, or refuse some types of medical treatment in certain situations if you're unable to make or communicate your decisions at the time.

The term 'living will' doesn't have a legal meaning but usually refers to either an advance decision or an advance statement.

- An advance decision covers the types of treatment a person does not want. It must be made by someone who has the mental capacity to make it and communicate it. Although the decision doesn't have to be in writing, it is more likely your wishes will be met if it is in writing. It's legally binding, meaning it must be respected by the person providing your treatment.
- An advance statement covers any decisions about how you would like to be cared for, including non-medical matters such as your food preferences, religious or other beliefs, and even whether you prefer a bath or a shower. Unlike an advance decision, it isn't legally binding but should be considered when deciding what's best for you.

## Deprivation of Liberty Safeguards

Deprivation of Liberty Safeguards (DoLS) protect people who lack mental capacity to make a decision in a care home or hospital. These safeguards exist to protect people with mental disorders such as dementia. They aim to make sure that people are only deprived of their liberty when this is needed to keep them safe and provide the care or treatment they need. This could mean staff making all decisions about a patient, or having control over a patient's care or movements. This has to be properly authorised before being agreed.

## What to do if your attorney is not acting in your best interests

If you, or someone you are close to, are worried that your attorney or deputy is not making decisions in your best interests, there are a number of ways to make a complaint.

In England, if you or someone who is looking out for you is concerned about the healthcare decisions your attorney is making, your local NHS Complaints Advocacy service can offer support. Contact your local Health watch for more information (see page 33).

In Wales, your local community health council (CHC) should run a Complaints Advocacy

If you or someone who is looking out for you is concerned about the social care decisions your attorney is making, contact the local social services adult protection team to discuss your concerns. If you could be in immediate danger, contact your local police force.

Concerns over the way an attorney is acting can also be raised with the Office of the Public Guardian anonymously if you prefer.

The Office of the Public Guardian is responsible for monitoring attorneys and deputies, and can investigate allegations of mistreatment or fraud. It can report concerns to another agency, such as the police or social services, if appropriate.

### **Office of the Public Guardian**

Tel: 0300 456 0300

[www.gov.uk/government/organisations/office-of-the-public-guardian](http://www.gov.uk/government/organisations/office-of-the-public-guardian)

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