

Mental Capacity

Decision making and Lasting Power of Attorney

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Decision Making and Lasting Power of Attorney (LPA)

At the Down's Syndrome Association (DSA), we often receive calls to our confidential helpline from families about decision making, the law post 16, and the rights of families to make decisions on the part of their loved one.

At age 16, the Mental Capacity Act (MCA) 2005 comes into force and the situation around children's decision-making changes from the parental perspective. We do not address this change here as this article is specifically about Lasting Power of Attorneys (LPAs). However, the DSA has a resource about making decisions post 16 that can be downloaded free of charge: [Making-Decisions-post16.pdf \(downs-syndrome.org.uk\)](https://www.downs-syndrome.org.uk/resources/making-decisions-post-16.pdf)

In certain circumstances, it is possible to have formal legal authority to make decisions on behalf of someone else; an LPA confers this authority. We are often asked whether or not applying for an LPA might be an appropriate course of action. So, we thought it would be useful to cover some of the basic questions we are asked about LPAs in this article.

Although the law changes at 16, it is only possible for a person with capacity, who is aged 18 years or over, to grant an LPA.

Background

The law that covers what happens should a person be unable to make a decision for themselves is the MCA. It applies to anyone over the age of 16 in England and Wales and its purpose is:

- To support individuals to make their own decisions wherever possible.
- To protect those who cannot.

The Act is supported by a Code of Practice with specific guidance for professionals (e.g. social care, health, paid carers) who work with people who lack capacity.

We feel it is really important for family carers to be aware of what the Code of Practice says, so please do read up here:

[Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67222/Mental_Capacity_Act_Code_of_Practice.pdf)

There is different legislation in Scotland and Northern Ireland.

What is an LPA?

An LPA is a legal document that allows a person or persons to make decisions for you or to act on your behalf.

If you choose to grant an LPA, you are known as the '**donor**'.

The person who receives the power to make decisions on your behalf is known as the '**attorney**'.

There are two types of LPA:

Property and Financial Affairs – this is where the donor gives the power to an attorney to make decisions about their property, and the way their finances and affairs are managed. For example, this might include how money is spent, paying bills, and renting property.

A donor can decide whether this LPA takes effect immediately or whether it only comes into effect where they do not have capacity.

They can restrict the LPA to certain decisions, or they can decide to grant the attorney the power to make all decisions relating to finance/property.

As an attorney, you need to keep accounts in case you are asked to justify certain decisions/actions. You should make sure the donor's money is kept separately.

Health and Welfare - this is where the donor grants the attorney the power to make specific decisions in the event they lack the capacity to make these themselves. This might cover things like where to live, how the person spends their time, and/or healthcare interventions. If you are called upon as an attorney to make a best interests decision, you should keep a record of the information you have gathered and the process you have followed in case you are challenged about that decision.

Can someone who has Down's syndrome grant an LPA?

With the right information and support, some people who have Down's syndrome will be able to grant an LPA. However, it does depend on individual capacity, and this will differ from person to person.

We know some parents who have worked over a period of time with their sons/daughters to ascertain their wishes and capacity. They have told us how they produced their own accessible information about LPAs and how they spent time talking to their family member about the issues. As part of this work they used visual prompts, checked their loved one's understanding of LPAs, their retention of information and the consistency of their responses.

It is always helpful to keep a record of any processes of this kind you have undertaken in case you are called upon at any time to justify certain actions or decisions.

What do we mean by capacity?

Mental capacity is the ability to make decisions and it is always assessed on a decision-by-decision basis. For the purposes of this article, it means a person needs to understand the nature of what they are doing (i.e. granting an LPA), as well as the implications.

The donor does not have to have an in-depth knowledge about the legal process. So, in the case of an LPA regarding financial affairs, the donor would need to understand they are giving the power to another person to manage their money and what this might entail.

Similarly, in order to grant an LPA for health and welfare, the donor would need to understand that they are giving the power to another person to make decisions about their health and welfare in the event they are, in future, unable to make these decisions for themselves.

To have capacity to decide about granting an LPA, a person would have to be able to do the following:

- Show some understanding of the information given to them to make the decision.
- Retain that information long enough to be able to make the decision.
- Weigh up the information and use it to make the decision.
- Communicate their decision – this could be by talking, using sign language or movements such as blinking an eye or squeezing a hand.

Under the terms of the MCA, a person would be assessed as being unable to make their own decision (lacked capacity) if they could not do one or more of the above.

If you were in doubt about your loved one's capacity to grant an LPA, you could arrange for a formal capacity assessment.

You will find further information about capacity in chapter 4 of the MCA Code of Practice.

Who can be an Attorney?

Attorneys must be over 18 years old; they could be a family member, friend, work colleague or a professional for example. An attorney must have mental capacity to make their own decisions.

It is obviously the donor's decision as to who they appoint as their attorney. For practical reasons, it is worth thinking about whether an attorney can be appointed who is younger than the person who has Down's syndrome and therefore likely to outlive them. Although the attorney does not need to live in the UK or be a British citizen, it may be more practical for an attorney to be appointed who lives relatively locally.

The donor of the LPA can choose to appoint more than one person as an attorney. If more than one person is appointed, the donor must decide whether they will make decisions separately or together.

Someone who is bankrupt or subject to a debt relief order cannot fulfil the role of attorney for property and financial affairs.

When an LPA is made, the donor can nominate other individuals to replace an attorney if at some point, they are no longer able to fulfil the role.

There is information about acting as an attorney at the Gov.uk website: [Lasting power of attorney: acting as an attorney - GOV.UK \(www.gov.uk\)](https://www.gov.uk/lasting-power-of-attorney-acting-as-an-attorney)

Best interests

Any decisions made by an attorney on behalf of the donor must always be made in their best interests and not those of any other person. Attorneys need to be mindful that any decision made in the donor's best interests must also be the least restrictive option in relation to their general rights and freedoms. An attorney making a best interests decision would, as a matter of course, be expected to ascertain the wishes/beliefs of the donor and to consult with other

relevant persons including professionals, friends and family members. The best interests process is described more fully in chapter 5 of the Code of Practice.

What happens if an LPA is not held by a family member

If, for example, a health or social care related decision needs to be made, and your loved one is unable to make that specific decision (lacks capacity), then a best interests decision will need to be made on their behalf. If there is no LPA in place (or Deputyship), the best interests process will be led by the professional in the situation (e.g. the GP or social worker). Family members who have an interest in the welfare of the person who has Down's syndrome should be consulted by professionals as a matter of course in this situation to ascertain what they believe the best interests of the person might be in relation to the decision under consideration. However, it is important to note they do not have to follow your views if they believe they are not in the person's best interests.

A best interests decision does not mean cutting out the person who has Down's syndrome. Everything should be done to include the person in the best interests process and to establish what their wishes/feelings (past and present) might be. Their welfare should be looked at in the widest sense and relevant medical/social circumstances considered before a decision is made. The decision must be in their best interests and not in the interests of any other person or the state.

If you feel that best interests decisions are going to be made without your input, you should raise your concerns in writing with the relevant professional(s), explain your right to be consulted, and ask to be included in the decision making process. An easy pre-emptive step you can take when your son/daughter turns 16 is to write to the relevant professionals in their lives and ask for it to be noted that you are to be consulted if a best interests decision needs to be made on their behalf.

There are informal and formal ways to challenge a best interests decision if you do not believe the proper process has been followed (see chapter 5 of the Code of Practice) and/or you do not believe the decision is in the person's best interests.

Do we need to go down this route?

The Office of the Public Guardian (OPG) can help you to decide whether applying for an LPA is a relevant course of action.

customerservices@publicguardian.gov.uk

Tel: 0300 456 0300

For more in-depth information about LPAs, please take a look at chapter 7 of the MCA Code of Practice.

As a final note, it is advisable for parents to consider whether they need to draw up and register their own property and financial affairs LPA. This should help to ensure that any financial support the parent provides, or wishes to provide, to their relative who has Down's syndrome, continues if they themselves lose capacity in the future.

How do you go about applying for an LPA?

You can apply to the OPG for an LPA. The necessary forms and guidance can be found online at the Gov.uk website: [Make, register or end a lasting power of attorney - GOV.UK \(www.gov.uk\)](https://www.gov.uk/make-register-end-last-power-attorney)

The LPA donor will need to choose a '**certificate provider**' who is able to confirm they are making the LPA by choice and that they have the capacity to do so.

An LPA must be registered with the OPG before it is legally recognised.

There is a one-off cost for each LPA that is registered, and as of November 2021 this stands at £82. Fee reductions and exemptions are available, there is further information about this at the above link.

An LPA can be cancelled if it is no longer needed or if a new one needs to be made.

You don't have to use a solicitor to create an LPA. You can fill out the forms yourself or you can do so with the help of a local advice agency such as the Citizens Advice Bureau. It is your choice whether or not you seek professional advice, but it can prevent difficulties arising later on.

If you decide to ask a solicitor to complete the forms for you, they will charge a fee. This will vary so you may like to shop around to compare fees and services offered.

The OPG has a helpline (as above) if you have any questions or concerns about the process.

You can call the DSA's Helpline 0333 1212 300 (not premium rate) with any questions and our Information Officers will do their best to assist. However, please be aware that we do not provide legal advice. We provide rights-based information and advice based on a general knowledge of particular areas of law.

Contact us

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