



**September 2008**

**Key Points:**

- Replaces previous version dated September 2007
- *Mental Capacity Act* came into force fully from October 2007

## **Arranging for others to make decisions about your finances or welfare**

This factsheet is aimed at people aged 60 and over and deals with arrangements for others to make decisions about your finances, including arrangements you can make now in case you later lose capacity to make decisions yourself. It also covers legal arrangements for others to make decisions about your healthcare and personal welfare when you no longer have capacity to do so.

Fees levels quoted are correct at the time of writing but may change in the future.

It may be advisable to seek legal advice before signing any of the documents mentioned in this factsheet. (*Age Concern*

*England is unable to give legal or financial advice).*

This factsheet applies to England and Wales only. Readers in Scotland and Northern Ireland should contact their national Age Concern office for information on arrangements in those nations.

**Contact details for other national Age Concern offices are:**

**The Scottish Helpline for Older People – Age Concern  
Scotland, tel: 0845 125 9732  
(local call rates) Monday to  
Friday, 10am – 4pm; website:  
[www.olderpeoplescotland.co.uk](http://www.olderpeoplescotland.co.uk);**

**Age Concern Cymru**, Ty John Pathy, Units 13/14 Neptune Court, Vanguard Way, Cardiff CF24 5PJ, tel: 029 2043 1555 (national call rate), website: [www.accymru.org.uk](http://www.accymru.org.uk);

**Age Concern Northern Ireland**, 3 Lower Crescent, Belfast BT7 1NR, tel: 028 9032 5055 (national call rate), Monday to Friday 10am – 12pm and 2pm - 4pm, website: [www.ageconcernni.org](http://www.ageconcernni.org).

## Contents:

1.	Decision making and mental capacity.....	4
2.	Arrangements whilst you can still make your own decisions ....	6
2.1	Arrangements for access to your bank account .....	6
2.2	Ordinary Power of Attorney .....	8
2.3	Lasting Power of Attorney for use when you still have capacity .....	9
3.	Making arrangements for the future – Lasting Powers of Attorney .....	9
3.1	Choosing an attorney/attorneys .....	11
3.2	Joint Attorneys.....	12
3.3	The test of capacity for executing the LPA.....	13
3.4	How to set up an LPA.....	13
3.5	Registration of the LPA.....	17
3.6	After registration .....	18
3.7	Fees and the fee remission scheme .....	18
3.8	Cancelling (revoking) the power .....	19
3.9	The role and responsibilities of an attorney with LPA.....	20
3.10	Duration of an LPA .....	24
4.	Existing Enduring Powers of Attorney.....	25
5.	The Office of the Public Guardian (OPG).....	27
6.	Arrangements made on your behalf when you no longer have capacity - The Court of Protection.....	28
6.1	The Powers of the Court.....	29
6.2	Making an application to the Court .....	29
7.	Deputies .....	31
7.1	The role and responsibilities of a Court appointed deputy...	32
7.2	Applying to be appointed as a Deputy .....	32
7.3	Fees and fee remission for Deputies .....	33
8.	Monitoring Deputies and Attorneys .....	33
9.	Arrangements made if you no longer have capacity – Appointeeship for benefits .....	34
9.1	People in care homes .....	35
9.2	The role and responsibilities of an appointee.....	36
10.	Independent Mental Capacity Advocates.....	37
11.	Deprivation of Liberty Safeguards.....	38
12.	Further information and assistance.....	39
13.	Further information from Age Concern.....	41

## **Introduction**

The Mental Capacity Act 2005 aims to protect people who may not be able to make certain decisions for themselves and to empower them to make their own decisions when possible. Changes brought in under the Act in October 2007 extended the circumstances in which you can arrange for people to make decisions on your behalf if you are no longer able to do so yourself. Before October 2007 you could only set up a power of attorney to cover your financial affairs; you can now give someone authority to make decisions relating to your health and personal welfare as well, using a new Lasting Power of Attorney.

This factsheet looks at your options if you want someone else to look after your financial affairs whilst you still have mental capacity to act for yourself. This could be, for example, if you cannot get to the post office or bank yourself, or if you are in hospital or going abroad for a few months.

It then looks at the options for planning for a time in the future when you may no longer have capacity to make your own decisions. It also deals with arrangements that can be made by others if it is necessary to make decisions on your behalf.

## **1. Decision making and mental capacity**

The law presumes that every adult has the right to make his or her own decisions and is assumed to have the capacity to do so unless it is proved otherwise. Mental capacity means that a person is able to understand and retain information and make a choice based on that information. A person's capacity may vary depending on the nature of the decision. Or the nature of their illness might mean that their capacity to make decisions may change from day to day.

Taking time to understand or communicate may be mistaken for a lack of mental capacity, and having dementia does not necessarily mean a lack of mental capacity. Where someone may have difficulty in communicating a decision, an attempt should always be made to overcome those difficulties before concluding that the person does not have capacity.

## What is mental capacity?

Incapacity means that someone is either unable to make a decision because of his or her mental state, because s/he cannot communicate that decision or for both reasons. The *Mental Capacity Act* establishes the following principles about mental capacity:

- **a presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- **the right to be supported to make their own decisions** – all practicable steps must be taken to help a person make their own decision before anyone concludes that they are unable to do so;
- **the right to make eccentric or unwise decisions** – a person is not to be treated as being unable to make a decision simply because the decision they make is seen as unwise;
- **best interests** – any decision made or action taken on behalf of people without capacity must be made in their best interests; **and**
- **least restrictive intervention** – anyone making a decision for or on behalf of a person without capacity should consider all effective alternatives and choose the one which is the least restrictive of the person's basic rights and freedoms.

People who are appointed to manage the finances and property of an older person, or make health and welfare decisions for them if they are unable to do so themselves, must apply these principles when making decisions on their behalf.

## Who decides whether I have mental capacity or not?

For most day to day decisions there is no formal process. For more important decisions such as medical treatment the medical professional delivering the treatment must decide whether you have the capacity to consent. For legal matters such as a will, a solicitor needs to make a judgement about whether you are capable of understanding the meaning of the will. If in doubt they would get an opinion from a doctor or other appropriate professional. Solicitors will also often be involved in setting up a Lasting Power of Attorney and so would need to decide whether you understand what it is and that no undue influence is being placed on you to set one up. The Court of Protection has power to decide whether someone has mental capacity or not, if this is in dispute (see Section 6 below).

## **2. Arrangements whilst you can still make your own decisions**

Nobody can make decisions about your healthcare or personal welfare on your behalf whilst you have the capacity to make these decisions yourself. However, you can choose to let other people manage and access your finances even if you could manage them yourself. This section explains how.

### **2.1 Arrangements for access to your bank account**

#### **Direct Debits and Standing Orders**

The most common way to allow other people access to your money is through direct debits or standing orders. Many banks and building societies are now offering an easy to use basic bank account. Your pension or benefits can be paid directly into these accounts. With most basic bank accounts you can set up direct debits (eg, to pay regular bills) and standing orders (to make a regular payment of the same amount to someone). See Age Concern's Information Sheet 16 *Payments of Pensions and Benefits into Bank Accounts* for more information about basic bank accounts.

A standing order is an instruction to your bank or building society to transfer a fixed amount into someone else's account on a regular basis. You still have control of your finances, and the third party cannot access any funds except the transfer amount. The third party must already have an account to transfer into, and it can take up to 4 working days to access the money, so may not be suitable if access to the money is needed urgently.

A Direct Debit is an instruction to your bank or building society to allow someone to collect money from your account. They can collect any amount, as long as they have informed you beforehand of the amount and the date it will be collected.

#### **Joint Accounts**

This will give you and the joint account holder the authority to withdraw all money. An advantage is that you don't need to set up any specific instructions, but you need to be sure you can trust the other account holder, as there is no restriction on their access to the funds, and you may be liable for their debts. You will both have a card and Personal Identification Number (PIN) to allow easy access to the account.

If one joint account holder loses mental capacity, the bank should freeze the account. The other joint account holder does not automatically have the right to access the money, unless they have authority under a Lasting Power of Attorney or an Enduring Power of Attorney, or there has been an order from the Court of Protection.

### **Third party mandate**

This is an instruction to your bank or building society to provide access to your account for another person. The mandate gives details of exactly what authority you are giving the person, so you can specify how much access you give them. Usually this will not mean that they are given a card and PIN to allow access to cash machines. This option may suit you if it is a long-term arrangement and you can trust the person who will have the mandate. Mental incapacity terminates the mandate.

### **Emergencies (Letters of authority)**

If you are temporarily unable to withdraw money from your account, for example if you are temporarily housebound after an operation, banks and building societies may accept a letter of authority, which requests a third party to withdraw money on your behalf on a one-off basis. There is a high risk of fraud, so many banks and building societies do not offer this option.

### **Post Office Card Account for benefit payments**

If you have a Post Office Card Account you can apply for another person to have permanent access to your account – they are then called the Permanent Agent. They will be issued with their own card and PIN number. You must be able to trust the person in this role, as they could withdraw up to £600 a day.

### **Cheque payment of benefits**

The DWP will make payment by cheques in circumstances where you cannot get out to the post office to access your account by your payment card. These can be cashed at a post office or paid into a bank or building society account. You can authorise someone to cash your cheque for you. You will have to sign the back of each cheque, and the person cashing it must also sign to declare they are cashing it on your behalf.

The person you have authorised will need to take proof of their identity, as well as proof of your identity. These can be items like a passport; Council rent book, credit card, full driving licence, birth or marriage certificate. Check with the organisation what they need as proof.

The DWP has said it plans to phase out payment of benefits by cheque, but not until there is a suitable alternative system in place.

## **2.2 Ordinary Power of Attorney**

A power of attorney is a legal document. It authorises one or more people to handle your financial affairs (including property, shares, money etc). There are different types of powers of attorney – ordinary, lasting and enduring. See sections 3 and 4 below for details of lasting and enduring powers of attorney. An Ordinary Power of Attorney is only valid while you still have mental capacity to make your own decisions and is likely to be the most appropriate in the following circumstances:

- if you need someone to act for you for a temporary period, for example while you are on holiday
- if you wish someone to act for you only while you are able to supervise their actions

If you want someone to be able to act for you when you lose capacity to make your own decisions and when you can no longer supervise their actions, you should consider a Lasting Power of Attorney rather than an Ordinary Power of Attorney.

A power of attorney provides the attorney – the person appointed – with a legal document which proves their powers. You can buy an Ordinary Power of Attorney document from a law stationer (some high street stationers also stock them), or arrange for a solicitor to prepare one.

It is for you as the donor to decide what the Power of Attorney covers, and whether it is a general power, without restrictions, or whether it gives limited powers only to do a specific act, for example to sell a house. In either case, you can still also act for yourself.

### **How long does an Ordinary Power of Attorney last?**

Whether the Ordinary Power of Attorney is a general one or is limited, it is only valid while you are capable of giving instructions. It will end if:

- you lose mental capacity to make your own decisions about your finances and are no longer able personally to supervise or direct the attorney;
- you revoke the Power;
- the Power is limited to a specific task which has been completed;
- the attorney(s) themselves die or lose mental capacity.

### **2.3 Lasting Power of Attorney for use when you still have capacity**

Lasting Powers of Attorney can be used to give authority to someone to make decisions on your financial affairs, even when you have the mental capacity to do so yourself. It can only be used if it has been registered with the Office of the Public Guardian. The difference between an Ordinary Power of Attorney and an LPA is that an LPA continues to be valid if you lose mental capacity to make your own decisions about your finances. See below for more on LPAs.

## **3. Making arrangements for the future – Lasting Powers of Attorney**

If you wish someone to act for you if you should become mentally incapable some time in the future, then you should consider a Lasting Power of Attorney (LPA).

LPAs are a new power introduced by the *Mental Capacity Act* and replace Enduring Powers of Attorney. No new Enduring Powers of Attorney can be set up after 1st October 2007, but pre-existing ones are still valid. A pre-existing EPA can still be registered after 1st October 2007 (see Section 4 below).

An LPA is a legal document which appoints one or more people to act for you, if in the future you become incapable of making your own decisions. It must be created while you are capable of understanding the nature and effect of an LPA.

There are two types of LPA:

1. a property and affairs LPA – which gives the attorney authority to make decisions about your financial affairs;
2. a personal welfare LPA – which gives the attorney authority to make decisions about your healthcare and personal welfare.

An important distinction between the two types is that a property and affairs LPA can be used by the attorney even when the donor still has mental capacity to make their own decisions; a personal welfare LPA can only be used once the donor has lost capacity to make the relevant decisions themselves.

You can set up a property and affairs LPA which includes a restriction so that it *only* allows someone to act for you if you lose mental capacity.

The LPA system is wider ranging than the previous system of EPAs as an EPA could only cover financial decisions, not decisions on your health care or personal welfare.

There are separate forms for creating the two different types of LPA; one form for personal welfare LPAs and one for property and affair LPAs. If you want to give your attorney the power to make both types of decision, you will have to set up two separate LPAs, even where the same person is appointed as attorney for both types of decision.

Both types of LPA document must be registered at the Office of the Public Guardian (OPG) before it can be used. This can be done before or after the donor loses mental capacity to make their own decisions. If you want to you can register the LPA while you still have capacity to do so, to avoid any delay when it needs to be used. If you lose capacity before the LPA is registered, your attorney will need to register it. There is a fee for registering the LPA (see Section 3.5 for more on registration).

See Section 4 below for information on existing Enduring Powers of Attorney, created before 1st October 2007.

### 3.1 Choosing an attorney/attorneys

For a property and affairs LPA, the attorney:

- must be over 18;
- must not be bankrupt at the time the LPA is made;
- can be an individual or a trust corporation (eg, part of a bank);
- a paid care worker such as a care home manager should not be an attorney unless there are exceptional circumstances such as they are the only close relative of the donor.

For a health and welfare LPA the requirements are the same except the rule on bankruptcy does not apply and the attorney must be an individual.

Who you appoint as an attorney is a vital decision, and you need to think carefully about who you give the power to. Some questions to ask are:

- are the people you wish to appoint willing to be appointed?
- can you trust them to act in your best interests?
- are there likely to be any disagreements or problems between friends and/or family?
- would it be a good idea to talk it over with your family and tell them what you plan and why?
- do you want to consider more than one attorney? See below for details of how more than one attorney can work together;
- do you want to name a replacement attorney to take over from the original attorney (for example if the original attorney were to die)?
- do you want different attorneys to be appointed for different things? This can be specified in the LPA;
- do you wish to limit the attorney's authority? You can give the attorney a general authority to carry out transactions, or specific authority limiting the power to act as attorney only when you become mentally incapacitated (remember that this only applies to property and affairs LPAs - a personal welfare LPA can *only* be used once you become mentally incapacitated). The document may also set limits on the type of financial transactions or welfare decisions for which authority is given.

Particular points to consider for a property and affairs LPA include:

- do you wish to include in the LPA a request that the attorney(s) should regularly provide you with details of expenditure and income? If you lose mental capacity then the accounts could be sent to your solicitor or another member of your family, which would provide an extra level of security;
- do they handle their own money well?
- do you think they understand your wishes and feelings about how you would spend your money.

Particular points to cover for a personal welfare LPA include:

- do they know you well enough to take your own views into account when deciding what is in your best interests? For example if you have strong views on a particular type of treatment, are they aware of this?
- do they understand your beliefs, views or feelings; and would you trust them to take these into account when making decisions?

If the attorney is your spouse or civil partner, the LPA will automatically be cancelled if your marriage or civil partnership is dissolved or annulled, unless you have expressly stated that it is to continue in these circumstances, you have named a replacement attorney or if there is another attorney acting jointly and severally (see below).

### **3.2 Joint Attorneys**

Any number of attorneys may be appointed in the same LPA. You will need to decide and to say in the LPA whether the attorneys are to act jointly (this is together on all matters) or jointly and severally (where they may act together or separately, as they choose). If attorneys were appointed to act jointly, the LPA ends if one of them dies. If attorneys are appointed jointly and severally the survivor(s) can continue to operate the power.

You can specify in the LPA that the attorneys must act jointly for specific decisions (such as selling a house), and jointly and severally for all other decisions. The appointment of a sole attorney may offer less security for your assets than a joint attorneyship.

### 3.3 The test of capacity for executing the LPA

When setting up an LPA you will need to have the document signed by someone who can confirm that, in their opinion, you understand what it means and the effect of signing it. This person is called the certificate provider. The certificate provider should discuss the following matters with you. Be aware that:

- the attorney will, in general, be able to make decisions about anything you could have done personally, unless you place specific restrictions on their powers;
- the attorney has authority to make decisions on your behalf when you have lost capacity and cannot supervise their actions;
- if you are mentally incapable of making the decisions yourself, the LPA cannot be revoked, without an order of the Court of Protection.

You should be clear about, and be able to demonstrate to the certificate provider that you understand the following:

- what is an LPA?
- why do you want to make an LPA?
- who are you appointing as your attorney(s)?
- why have you chosen to appoint this person as your attorney?
- what powers are you giving your attorney(s)?

Because tests of capacity vary it is possible that you may be able to execute an LPA because you understand what it means, but may, **at the same time**, be unable to make a decision for yourself in relation to a particular matter so that you are deemed not to have mental capacity (in relation to that particular matter). In these circumstances the validity of the LPA is not affected.

### 3.4 How to set up an LPA

#### Using a solicitor

You can complete the form to create an LPA yourself, or you can get help from a solicitor. Solicitors' fees for creating an LPA vary and so you may want to contact a few to compare their fees and the service they will offer.

You may be eligible for legal aid under the Legal Help scheme for advice and assistance from a solicitor to set up an LPA if you are:

- aged 70 or over; **or**
- disabled within the meaning of the *Disability Discrimination Act 1995*.

You must also meet the requirements about your income and capital to be eligible. Solicitors have a duty to advise you whether you are entitled to legal aid.

Not all solicitors can carry out work under legal aid funding and it can be difficult to find a legal aid solicitor who can advise on LPAs. You can call the Solicitors' Regulation Authority on 0870 606 2555 to find solicitors specialising in LPAs and then contact them to find out if they can carry out the work under legal aid.

### **LPA forms**

There are specific forms which must be used to set up an LPA. For a property and affairs LPA the form is LPA PA. For a personal welfare LPA the form is LPA PW. These forms, the notes and guidance which accompany them and all forms necessary for registering an LPA are available from the Office of the Public Guardian (OPG). They can be downloaded from the website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk) or you can request copies by phoning 0845 330 2900 (lo-call rate; 9am – 6pm Monday -Friday).

You must make sure that all required sections have been completed. If there are any errors, even something like not ticking a required box, the OPG will reject the form. You can be required to pay the registration fee again when you resubmit a corrected form. This could mean you end up paying another £300 if you have to resend forms for both types of LPA.

The OPG has provided a list of the most common reasons why they have to reject forms:

- The Certificate Provider has not ticked the boxes to confirm that they are acting independently and that they are over 18.
- The Certificate Provider has not ticked the boxes in the 'I confirm and understand' section.
- Some boxes in the Attorney's statement section have not been completed.

- The donor has not named people to be notified and there is only one Certificate Provider (rather than the two required if no notifiable persons are named).

## **The Donor's Statement**

Part A of the form is for the donor's statement. This is where you specify who is to be your attorney(s) and how they are to act for you. You can place specific restrictions on their powers and set out particular guidance which they should follow when deciding what is in your best interests.

Part A also includes a section for you to name specific people who you wish to be notified when an application for registration of the LPA is made. These people have the right to object to the registration of the LPA, for example if they think you have been put under undue pressure to create it. You can choose up to five people and they should be people who know you well enough to identify any possible issues which should prevent the registration of the LPA; for example friends or relatives, or a healthcare worker who knows you relatively well. See Section 3.5 below for more information on how people can object to the registration of the LPA.

## **The Certificate Provider**

Part B of the form is to be completed by a certificate provider. This is someone who can confirm that, in their opinion, you understand the purpose and effect of the LPA and that you have not been put under undue pressure to create it.

The certificate provider can either be someone who has known you personally for over the last two years, or a professional with the relevant skills to provide the certificate. This could be your GP or another healthcare professional; another professional such as a solicitor or social worker; an Independent Mental Capacity Advocate (see Section 10 below) or anyone else who has the necessary expertise to provide the certificate.

A Certificate Provider must **not** be:

- a member of your family or your attorney's family;
- a business partner or employee of you or your attorney;
- your attorney (even if appointed by a previous EPA or LPA);

- the owner, director, manager or employee of a care home in which you live, or a family member of any of those people;
- if you appoint a trust corporation (rather than an individual) as your attorney, the certificate provider must **not** be a director or employee of that trust corporation.

The Certificate Provider must discuss the LPA with you, not in the presence of the attorney, to make sure that you fully understand the effects of signing it. The OPG provides guidance for the Certificate Provider which they should read before signing the form. The guidance includes suggested questions for the Certificate Provider to ask you, to make sure you understand the LPA and have not been put under any pressure to sign it.

If the Certificate Provider has concerns that you are being put under pressure to create the LPA, or that you do not fully understand its effects, they should not sign the LPA and should raise their concerns with the OPG.

If you do not name anyone who you want to be notified when the LPA is registered, you will need two certificate providers.

If the LPA is challenged at a later date by someone who believes you did not have mental capacity to make it, the certificate provider may have to explain to the Court of Protection their reasons for their opinion that you did have capacity.

You should double check that the Certificate Provider has completed all the required boxes, as this is a common reason for forms being rejected by the OPG.

### **The Attorney's Statement**

Part C is for your attorney or attorneys to complete confirming that they understand and accept their duties under the LPA. Again, make sure that they have ticked all the required boxes.

Your signature and that of the attorney must be witnessed. The witness can be the same person as the certificate provider. The person named as attorney **MUST NOT** be the witness to your signature. The witness must be over 18 years old.

If you cannot sign or mark the form, for example because of illness or physical disability, you can choose someone else to sign for you. The person who signs on your behalf must be independent (not an attorney, certificate provider, or witness) and the signing must be witnessed by two independent witnesses (not the attorney(s)).

### **3.5 Registration of the LPA**

The forms for registration of the LPA are available from the Office of the Public Guardian. Form LPA001 'Notice to Named Persons' must be completed and sent to all the people (if any) the donor has named as people to be notified on registration of the LPA. The person registering the LPA is responsible for sending this notification. Form LPA002 is the application form to register the LPA. You must confirm in Form LPA002 that Form LPA001 has been sent to all the named people. Guidance on how to complete these forms is also available from the OPG.

If the LPA is being registered by the donor, the OPG will write to the attorney to inform them of the application; if it is being registered by the attorney the OPG will write to the donor.

A fee of £150 is payable on registration of the LPA. If you are registering both a personal welfare LPA and a property and affairs LPA you will need to pay a registration fee for both (ie, a total of £300).

If you have named anyone to be notified on registration of the LPA the person applying for registration must inform them when the application for registration is made and they have the right to object to the registration. Any objection must be made within five weeks of receiving notification of the registration.

They may wish to do this if they believe you have made the LPA as a result of undue pressure or fraud; or if they believe the attorney is planning to act in a way which is not in your best interests. The Court of Protection has the power to prevent an LPA being registered. This is a safeguard to help prevent abuse of the LPA system.

#### **When to register the LPA**

You can register the LPA immediately after creating it, or you can wait until it is needed at a time when you have lost, or are losing, capacity to make decisions. In this case, it would be the attorney who registers the document.

If you do not register the LPA immediately, you may never need to register it, if you do not lose your mental capacity at any point. In this case you will not have to pay the registration fee. However, the difficulty is that it takes time for the registration procedure to be completed and during this delay the attorney has no power to act under the LPA. This can cause problems if immediate actions are needed, such as payment of care home fees. It may become necessary to apply for an order of the Court of Protection so that your affairs can be dealt with until the LPA is registered.

Another reason for immediate registration is that if any errors are discovered, you will still have mental capacity to rectify them and create a valid LPA.

### **3.6 After registration**

The LPA form will be returned, having been stamped on each page as being registered by the OPG. Once this is received it is a valid LPA. A property and affairs LPA can be used immediately, a personal welfare LPA can only be used if you lack the capacity to make the decision yourself. The attorney must act within the principles of the *Mental Capacity Act*.

The British Bankers Association has produced guidance for bank staff called 'Banking for mentally incapacitated customers'. There is also a short leaflet for customers available from their website: [www.bba.org.uk](http://www.bba.org.uk).

The Mental Health Foundation has also produced a booklet '*Banking on good decisions – How can the Mental Capacity Act help you with your bank, building society or post office account?*'. This can be downloaded from the website [www.mentalhealth.org.uk](http://www.mentalhealth.org.uk), or call 020 7803 1101 to order a copy.

### **3.7 Fees and the fee remission scheme**

The fee for registering an LPA is £150. If you are registering a property and affairs LPA and a personal welfare LPA you will have to pay a separate fee for each one; a total of £300.

In some circumstances you may be exempt from paying the fee, or you may be able to apply for remission or postponement of the fee.

You will be exempt if you are in receipt of any of the following benefits, *and* you have not received a damages award in excess of £16,000 which was disregarded for the purposes of eligibility for the benefit. The relevant benefits are:

- Income Support;
- Income-based Jobseeker's Allowance;
- Pension Guarantee Credit;
- a combination of Working Tax Credit and either Child Tax Credit or Disability Element or Severe Disability Element;
- Housing Benefit;
- Council Tax Benefit.

If you do not meet these requirements, you may qualify for a remission if you are on a low income. This means you will only have to pay a percentage of the fee, according to the following bands:

<b>Gross annual income</b>	<b>Remission</b>
Up to £11,500	No fee to pay
£11,501 - £13,000	75% remission (i.e. you pay 25% of the fee)
£13,001 - £14,500	50% remission
£14,501 - £16,000	25% remission
Over £16,000	You are not entitled to a remission

Even if you do not meet any of the above requirements, the Office of the Public Guardian has discretion to waive or postpone payment of all or part of the fee if payment would cause you hardship. To apply for exemption or remission, use form OPG506A. If you are applying for the fee to be waived or postponed on grounds that it would cause you hardship, you should write to the OPG explaining your circumstances.

### **3.8 Cancelling (revoking) the power**

You may cancel or revoke an LPA at any time provided you have mental capacity. However, if it is registered, an LPA cannot be cancelled without an order of the Court of Protection once you have lost mental capacity to cancel it yourself. If you wish to cancel an LPA you should:

- write to the attorney(s) advising them that the document has been revoked;

- if the LPA has been registered at the Office of the Public Guardian you must write to the Public Guardian asking for it to be removed from the register of LPAs.

For a property and affairs LPA you should inform all banks, building societies and other institutions where you have invested money that the document has been revoked.

### **3.9 The role and responsibilities of an attorney with LPA**

If you are the attorney under an LPA, this section deals with some of your main duties.

Once you (the attorney) start using your powers under the LPA you may have to answer to the Office of the Public Guardian or the Court of Protection if anyone expresses concerns to them that you might not be acting in the person's best interests. Remember that you have no authority to act under the LPA until it has been registered with the OPG.

If you are an attorney you must:

- follow the statutory principles of the *Mental Capacity Act* (see Section 1 above);
- make decisions in the best interests of the donor;
- have regard to the guidance in the Code of Practice (see Section 12 for details of how to obtain a copy of the Code);
- only make those decisions that you have authority to make under the LPA. So if you are only a property and affairs attorney, you can't make decisions about the donor's welfare although you might be consulted about these decisions.

The Code of Practice gives guidance on how to assess a person's capacity to make decisions and on working out what is in the best interests of the donor. Remember that mental capacity to make a decision can change over time, and that people may have capacity to make certain decisions but not others. When assessing a person's capacity you must consider their ability to make the particular decision at the particular time it needs to be made.

You should take all practicable steps to help the person to make their own decisions. Steps to help someone make a decision could include:

- making sure they have all the information they need to make a decision;
- making sure the information is communicated in the most appropriate way; for example consider using simple language, an interpreter, non-verbal communication, or a family member who may be able to help with communication;
- making the person feel at ease by considering the best time of day and location to communicate with them, and considering who they would want present.

When deciding what is in someone's best interests, you should take into account their religious and moral beliefs, how they have behaved in the past, and any views that they have expressed about the issue in question. You should also consult with their family and carers where this is practical and appropriate. But remember that the donor has appointed *you* to assess what is in their best interests and to make the decision on their behalf. You cannot delegate that authority to anyone else.

You must not take any advantage to gain benefit for yourself, or put yourself in a position where your personal interests conflict with your duties as an attorney.

### **Attorneys under a Property and Affairs LPA**

The following information applies to attorneys under a property and affairs LPA. Remember that you do not have authority to act on personal welfare decisions unless you are also appointed under a personal welfare LPA.

- **Accounts** – you should keep full, accurate and up-to-date accounts of all the donor's assets and income, including bank and building society accounts, investments, and property. Tax returns will need to be completed. The OPG and Court of Protection may ask to see these at any time, including after the death of the donor. You should keep all the donor's assets in the donor's name, and keep their accounts separately. You will need to keep all estimates, invoices, receipts and vouchers. An attorney may be held liable if the donor's money is not handled in a responsible manner.

- **Gifts** – you may make gifts to people at times when the donor would usually have done so themselves, for example birthday presents to relatives of the donor, or a wedding or civil partnership present to a friend of the donor. You can also make charitable donations in accordance with the donor's expected wishes, for example if they regularly gave to charity in the past. Any gifts or donations must be reasonable in proportion to the donor's estate. If you want to make larger gifts of money or property, for example for Inheritance Tax planning purposes you will need to make an application to the Court of Protection (see Section 6 below).
- **Expenses** – professional attorneys (for example solicitors or accountants) may charge for their time spent on their duties. The LPA form includes a section to record what fees have been agreed between the Donor and the Attorney. Other attorneys can be paid out of pocket expenses such as the cost of stationery, postage and phone calls, but not for their time.
- **Property** – if you are thinking of selling or letting the donor's property because it is in their best interests, you need to be sure that they would not be likely to ever return to live there. You should contact the OPG if the sale is below the market value, or you want to buy the property yourself, or give it to someone else. The OPG can advise you on whether you need to apply to the Court of Protection about this.
- **Wills** – you cannot make a will on behalf of the donor. If the donor still has mental capacity to do so they can make their own will or make an amendment to the existing will (a codicil). You should contact the OPG if you are in any doubt about the donor's capacity to do this. If it is necessary for a will to be made on behalf of someone who lacks capacity to do it themselves, a 'statutory will' can be made by the Court of Protection. This could be required for example if they previously made a will which needs to be amended due to a change in circumstances (e.g. the death of the main beneficiary). You should contact the OPG if this is necessary.

If the donor has a will already, you do not have an automatic right to see this. If the donor has not left specific permission for you to have access to the will, you can apply to the Court if you believe it would help you to carry out your duties and the person who holds the will is refusing to show it to you. An example of where this might be appropriate is if you need to know whether the property was intended to be left to someone, and you are considering the sale of the property.

If you do not comply with your duties as an attorney, you may be ordered to pay compensation to the donor for any losses they suffer. There is also a new criminal offence of ill-treatment or wilful neglect which applies to attorneys, court appointed deputies and anyone who has the care of a person who lacks capacity. The penalty for the offence is a fine or imprisonment of up to five years.

The OPG publishes a booklet called *Lasting Powers of Attorney – A Guide for people taking on the role of Property and Affairs Attorney under a Lasting Power of Attorney* (LPA105). This can be downloaded from their website or telephone 0845 330 2900 (lo-call rate) for a copy. There is a separate guide available for personal welfare attorneys.

### **Attorneys under a personal welfare LPA**

The following information applies to attorneys under a personal welfare LPA. Remember that you do not have authority to act on property and affairs decisions unless you are also appointed under a property and affairs LPA.

- **Where the donor lives** – you can make decisions on where it is in the best interests of the donor to live. You cannot make decisions about the sale of the donor's house unless you are authorised under a property and affairs LPA;
- **Medical treatment** – as long as there is no restriction on your powers under the LPA, you can consent to or refuse medical treatment on behalf of the donor;
- **Life-sustaining medical treatment** – you cannot refuse life-sustaining treatment on behalf of the donor *unless* they have specifically authorised you to do so. The donor must have signed Section 6 of the LPA form giving their consent for you to make such decisions.

If you are making a decision on life-sustaining treatment, you must not be motivated by a desire to bring about the donor's death. The decision must always be made in the best interests of the donor;

- **Advance decisions** – if the donor has made an advance decision to refuse treatment you cannot make a decision relating to the provision of that treatment, unless the LPA under which you are appointed was made by the donor *after they* made the advance decision and they have given you authority to refuse or consent to that treatment. (For information on advance decisions see Age Concern's Information Sheet (IS/5), *Advance Statements, Advanced Directives and Living Wills*);
- **Mental Health Act 1983** – if the donor is being treated for a mental disorder and is detained under the *Mental Health Act 1983*, you cannot make decisions refusing or consenting to this treatment;
- **Marriage and civil partnerships** – you cannot consent to marriage or civil partnership on behalf of the donor, or to divorce or dissolution of a civil partnership. You cannot consent to sexual relations on their behalf.
- **Wills** – You cannot make a will on behalf of the donor (see above).

The OPG publishes a booklet called *Lasting Powers of Attorney – A Guide for people taking on the role of a Personal Welfare Attorney under a Lasting Power of Attorney* (LPA104). This can be downloaded from their website or phone 0845 330 2900 (lo-call rate) for a copy. There is a separate guide available for property and affairs attorneys.

There is a new criminal offence of ill-treatment or wilful neglect which applies to Attorneys, Court Appointed Deputies and anyone who has the care of a person who lacks capacity. The penalty for the offence is a fine or imprisonment of up to five years.

### 3.10 Duration of an LPA

The LPA remains valid until one of the following events occur:

- the death of either the donor or the sole attorney;
- the bankruptcy of the donor or the sole attorney (this rule on bankruptcy only applies to property and affairs LPAs, not personal welfare LPAs);

- revocation (cancellation) by the donor (where they have mental capacity to do so) or by the OPG;
- disclaimer by the attorney;
- mental incapacity of the attorney.

If the donor dies the LPA comes to an end. You must notify the Office of the Public Guardian and send them the LPA document and a copy of the death certificate.

#### **4. Existing Enduring Powers of Attorney**

If you already have an EPA set up before 1st October 2007, it is still valid. As under the pre-October 2007 system, the EPA must be registered at the Office of the Public Guardian once the donor loses capacity to make decisions. An EPA cannot be used if the donor does not have capacity to make their own decisions, until it has been registered. There is a fee of £120 to register an EPA. An EPA can still be registered after 1st October 2007, as long as it was validly created before that date.

To register an EPA, the attorney must complete form EP1 'Notice of intention to apply for registration' and EP2 'Application for Registration'. EP1 is sent to you (the donor) and your three nearest relatives to notify you of the attorney's intention to register the EPA. EP2 must be returned to the Office of the Public Guardian. The forms necessary for registration of an EPA can be downloaded from the OPG website, [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk), or requested by phoning 0845 330 2900 (local rate).

If the attorney believes that you may be distressed by the receipt of the notice, the Court of Protection may agree to dispense with the notice to you. They will require evidence from your doctor that you will be caused harm or distress by learning of the application to register the EPA. The Court can also decide that notice to your relatives can be dispensed with. In either case, the attorney would have to apply to the Court for notice to be dispensed with. This will involve payment of the Court fee of £400.

## **Notifying your relatives**

The three nearest relatives who must be notified are taken in order of priority, class by class, in the way set out in the *Enduring Power of Attorney Act 1985*.

The order of priority is:

1. Your spouse;
2. Your children;
3. Your parents;
4. Your brothers and sisters whether of the whole or of half blood (sharing one parent);
5. The widow or widower of a child of yours;
6. Your grandchildren;
7. The children of your brothers and sisters of the whole blood;
8. The children of your brothers and sisters of the half blood;
9. Your uncles and aunts of the whole blood;
10. The children of your uncles and aunts of the whole blood.

If there is more than one person in a particular class of relatives entitled to receive notice then all persons in that class must be given notice, even if this means more than three people are notified.

Notice need not be given to people otherwise entitled to receive notice if their names and addresses are not known to the attorney(s) and cannot be reasonably ascertained by them, or the attorney(s) have reason to believe that they have not attained the age of 18 years or are mentally incapable.

If you do not have three living relatives who come within those listed, the attorney(s) should say so on the form when applying for registration.

## **Revoking an EPA**

An existing EPA can now be revoked and a property and affairs LPA set up instead under the new system as long as the donor still has mental capacity to do so at the point the LPA is created. Alternatively, you can keep your EPA for your financial affairs and create a personal welfare LPA to run alongside it.

If you want to revoke an unregistered EPA you should notify the attorney(s), and anyone else who was aware of it, that you have revoked it. For example you should write to your bank if the EPA had previously been used there. Although it is not strictly required, you could sign a legal document called a Deed of Revocation to make clear that the EPA has been revoked. This could help to avoid any dispute or uncertainty in the future. You should see a solicitor about creating a Deed of Revocation.

If your EPA has already been registered, it will continue to be effective. To revoke a registered EPA you would need to apply to the Court of Protection which would need to be satisfied that you have mental capacity to revoke the EPA.

## **5. The Office of the Public Guardian (OPG)**

This is an executive agency of the Ministry of Justice. As well as having a regulatory role, it provides help and support services to those who look after the finances of people who lack capacity. The OPG keeps a register of LPAs and EPAs, supervises deputies (see Section 6.1 below), and keeps a register of deputies. It will also investigate any complaints about attorneys or deputies.

The OPG publishes a number of guidance booklets for people making an LPA, people taking on the role of attorney, certificate providers and witnesses. These are available to download from the OPG website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk). Or you can request a copies by phoning 0845 330 2900 (lo-call rate).

In some cases it may not be necessary to instruct solicitors to deal with the Court of Protection or the OPG except where legal work such as selling a house needs to be done, as this will add to the cost. Legal aid under the Legal Help and Legal representation scheme is available for limited types of proceedings in the Court of Protection; these will mainly be serious health and welfare cases. You should seek legal advice as to whether you would be entitled to legal aid funding for your particular case.

## **Searching the register**

Anyone can apply to the OPG for a search to be made of the register on payment of a fee of £25. There are two levels of search. The first tier search can be used to find out limited information such as the names of the donor and attorney(s), the date it was registered, whether it is a property and affairs or personal welfare LPA, and whether the LPA has been cancelled. No information about the *contents* of the LPA is available through the first tier search. A second tier search can be used to request further information about the LPA. The applicant must satisfy the OPG that it is in the best interests of the donor for the information to be provided.

## **6. Arrangements made on your behalf when you no longer have capacity - The Court of Protection**

If you can no longer manage your own affairs and have not granted a Lasting Power of Attorney then an application to the Court of Protection may be necessary. The Court of Protection exists to protect the property and financial affairs of people who lack mental capacity, and to make decisions relating to their health and welfare. The Court's jurisdiction extends to England and Wales. Separate arrangements exist for Scotland and Northern Ireland.

It is not normally necessary to attend a court hearing as its business is usually conducted by post. If a hearing is necessary the Court keeps its procedures as informal as possible. The general rule is that proceedings in the Court are conducted in private to protect the privacy of the persons concerned, but the Court does have the power to order that a hearing is held in public or that information about the case is published.

### **When will the Court of become involved?**

The Court of Protection would become involved if something needed to be done either to protect someone's assets or to enable them to be used for their benefit. For example, if the client owns their home but are unlikely to return to it, then it may be necessary to sell the property so that the proceeds may be used for their benefit.

The Court should also be involved in decisions relating to serious medical treatment such as the proposed withholding or withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state, or cases involving organ donation by a person who lacks capacity to consent.

The Court of Protection can also be involved where there is an issue over the validity or use of an LPA.

## **6.1 The Powers of the Court**

The Court of Protection can make a declaration on whether a person has mental capacity to make a particular decision. If the Court decides a person does not have capacity, it can make decisions and orders on financial or welfare matters affecting the person.

If there is an ongoing need for decisions to be made on behalf of a person without capacity, the court may appoint a deputy to make those decisions. The system of court appointed deputies is introduced by the *Mental Capacity Act* to replace the previous system of receivers. If you were a Receiver you should have been contacted by the Office of the Public Guardian to notify you of the change and explain what this means for you. Receivers are called deputies from 1st October 2007 but there will be no change to the powers that they have. For more details see the OPG website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk) or contact the OPG.

The Court can make declarations on the validity of an LPA and can end an attorney's appointment and/or cancel the LPA if the attorney's duties are not being carried out in the best interests of the donor.

## **6.2 Making an application to the Court**

It is sometimes necessary to get permission from the Court of Protection before an application can be made. Permission *is not* needed in most cases which relate to a person's property and affairs (the exceptions are some cases involving the appointment or removal of trustees and some cases relating to wills and gifts). Permission *is* needed in most cases relating to a person's personal welfare. In either case permission *is not* needed if the person making the application is:

- the person who is alleged to lack capacity to make a particular decision, for example if they wish to challenge a decision that they lack capacity;
- the donor or attorney of an LPA where the application relates to that LPA;
- a court appointed deputy;

- a person named in an existing court order in connection with the same matter.

If you are unsure about whether you need permission to apply to the court you should contact the OPG.

To apply for permission submit form COP2, either before or at the same time as you submit your application form (COP1).

The Court should deal with your application for permission within 14 days of receiving it. They will consider your connection to the person, your reasons for making the application, the benefits of granting permission and whether there are any alternatives to involving the Court.

### **Court forms**

COP1 is the application form for the Court of Protection. You will also need to submit various other forms, depending on what you are applying for. You will always need to submit form COP1A or COP1B to provide supporting information to the application, and you will usually need to submit form COP3 'Assessment of capacity'.

Form COP3 includes a section to be completed by a medical practitioner who has assessed the person to whom the application relates. This is to confirm that, in their opinion, the person lacks mental capacity to make the relevant decisions.

The notes to COP1, the application form, explain which other forms you must submit to support your application. You can check with the OPG that you have completed the correct forms before submitting your application.

There is a fee of £400 payable when making an application to the Court. The same exemption and remission scheme applies for Court of Protection fees as for Office of the Public Guardian fees. See Section 3.7 for details of when you may be exempt from paying fees and when the fee could be remitted or waived.

### **Notifying the person to whom the application relates**

When you make an application you must notify the person to whom the application relates (ie, the person who is alleged to lack capacity). This notification can be carried out in whatever way is most appropriate to make sure the person understands it.

For example it could be given verbally, using simple language rather than being given in writing. However, you must also provide the person with two specific forms; COP5 'Acknowledgement of service/notification' and COP14 'Proceedings about you in the Court of Protection'. These are available from the OPG.

If no one objects to your application, the Court may make a decision without holding a hearing.

If you or anyone else affected by the Court's decision is unhappy about it, the Court can be asked to reconsider its decision. This should be done using form COP9, within 21 days of the date you were served with the Court Order. If the order was made at a hearing you should use form COP35 to appeal against the decision, rather than asking for a reconsideration.

### **Urgent cases**

In case of extreme urgency, the Court can make an interim order before the necessary medical evidence is available. It is advisable to telephone the OPG first for advice to check whether an emergency application is appropriate. An example of where this may be necessary is where access to a person's money is needed urgently, for example to pay care home fees.

## **7. Deputies**

The Court of Protection has the power to appoint a deputy if there is no LPA or EPA in place. The Court will make an order giving the deputy authority to act and make decisions on behalf of the person without capacity. The powers given to the deputy should be as limited in scope and duration as possible.

The deputy must be someone who is trustworthy and who has the necessary skills to carry out their duties. It would usually be a family member or friend of the person, if they are willing to take on the role, but the Court can appoint an independent professional deputy (such as a solicitor, or an officer from the Social Services department of the local authority) if this is considered to be in the person's best interests.

Two or more deputies can be appointed, either to work jointly (in which case they would have to act together on all decisions) or jointly and severally (when they could act separately or jointly on any particular decision).

## **7.1 The role and responsibilities of a Court appointed deputy**

A deputy has a duty to follow the principles of the *Mental Capacity Act* (see Section 1 above). They must:

- always make decisions in the person's best interests;
- take all practicable steps to help the person make the decision themselves;
- allow the person to make the decision themselves if they have the capacity to do so;
- only make decisions that they are authorised by the Court to make.

Deputies should consult the Code of Practice to the *Mental Capacity Act 2005* for guidance on how to fulfil their duties (see Section 12 for details of how to obtain this).

The powers granted by the Court of Protection to a deputy cease on the death of the client. A deputy does not have authority to deal with the estate.

## **7.2 Applying to be appointed as a Deputy**

An application to be appointed as a deputy must be made to the Court of Protection using the main application form (COP1) and the deputy's Declaration form (COP4). The Court uses information provided on the declaration form to assess your suitability to be a deputy. This includes information about your personal circumstances and your financial circumstances. You will also have to submit the Assessment of Capacity (COP3) and Supporting Information (COP1A or COP1B) forms. See Section 6.2 above for further information on applying to the Court of Protection.

### **7.3 Fees and fee remission for Deputies**

In addition to the court fee of £400 payable when you make your application to be appointed as a deputy (see Section 6.2) there is a deputy set up fee of £125 payable on appointment.

There is also an annual supervision fee payable to the OPG. There are three levels of supervision fees;

- £800 for Type I cases requiring the highest level of supervision by the OPG;
- £175 for Type II cases requiring less supervision. Most cases are expected to fall into this category;
- Type III cases where there will be no annual fee. These are cases where there are limited assets and limited involvement of the OPG is required.

In certain cases these fees can be waived, if it would cause financial hardship or in other exceptional circumstances. Contact the OPG to find out if this would apply in your case.

## **8. Monitoring Deputies and Attorneys**

### **Court of Protection Visitors**

Where an LPA is in place or a deputy has been appointed by the Court of Protection, the Office of the Public Guardian can appoint a person to report to them on the actions of the attorney or the deputy. The person appointed is called a Court of Protection Visitor. They can visit the donor, attorney or deputy in order to gather evidence for their report to the Court.

### **How to make a complaint about a deputy or an attorney**

Responsibility for supervising deputies and monitoring attorneys lies with the Office of the Public Guardian. If you think a deputy or attorney is misusing their powers, for example if they are not acting in the person's best interests, or are acting outside of their authority you should contact the OPG. If it is a serious case of fraud or if someone is at risk of abuse you should contact the police and/or the social services adult protection team.

## **9. Arrangements made if you no longer have capacity – Appointeeship for benefits**

If your income is purely made up of benefit income (social security benefits or state pension) and you have not created an LPA or EPA, then rather than needing a deputy to be appointed you can have an 'appointee' to deal with your benefit claims and the payments made. This method should normally only be used if you are unable to act for yourself due to mental incapacity. Only in very rare circumstances is it appropriate if you are physically disabled, for example if you have suffered a severe stroke. Officials are told in guidance not to assume a person is incapable of managing their financial affairs just because they have lost the ability to communicate. If you are still capable of managing your financial affairs but need someone to collect your benefit money for you, an appointee is unlikely to be suitable and you should consider the options in Section 2 above.

If you are entitled to a benefit or allowance but are unable to act for yourself, for example because of dementia or because of a temporary mental incapacity following an illness or accident, a representative of the Department for Work and Pensions may, on receiving an application, appoint someone else to exercise your right to make claims for and to receive benefits, and to spend them on your behalf.

It is accepted policy that a close relative who lives with or frequently visits the claimant is the most suitable person to act. Sometimes an organisation or representative of an organisation can be a corporate appointee, for example the local authority or healthcare trust. The appointee must be over 18 years old.

If you wish to continue to collect your own benefits, and providing that you are able to understand the implications of claiming and receiving social security benefits, then the DWP should not give approval for an appointee, or for bulk payments to an organisation which acts as an appointee for a large number of people.

The DWP must satisfy itself that you are unable to manage your affairs, for example by visiting you and if necessary getting medical evidence. It must also check on the suitability of the person who has applied to act. If a deputy is appointed by the Court of Protection or there is an attorney under an EPA or LPA, that person will automatically take over from the appointee in dealing with any benefits.

## 9.1 People in care homes

In most cases the appointee will be someone who you know, either family or friends. But in some case as a 'last resort' the person appointed is the care home owner or manager.

If the home is part of an organisation it must first be established that the organisation is willing to act as appointee. Where the organisation becomes the appointee, the proprietor or managers may still collect the benefit provided they are authorised to do so by the organisation. The benefit can be put into a corporate account, but not into the care home's business account, unless all the benefit is being used to pay the home's fees. If the care home is collecting the benefit on behalf of a local authority funded resident, the resident's personal expenses allowance should not be used to meet the cost of personal care.

Before an appointee is authorised to act, a visiting officer from the DWP must make sure that an appointee is required and that the prospective appointee is suitable and willing to act. The prospective appointee is interviewed. Guidance states that where someone lives in a care home, it should not be assumed that they are incapable of managing their affairs. Neither should a manager be appointed merely for the convenience of the home.

The appointee should not be a member of staff (unless they are a relative or friend of the customer), but only the owner or manager.

There are standards that should be followed (Standard 35 of Care Homes for older people; National Minimum Standards):

- the registered manager may be appointed as an agent for a service user only where no other individual is available.

In this case, the manager ensures that:

- the registration authority is notified on inspection;
- records are kept of all incoming and outgoing payments for each individual.

The Commission for Social Care Inspection (CSCI) inspects homes and should make sure that these standards are being met.

## 9.2 The role and responsibilities of an appointee

Appointees 'stand in the shoes' of the claimant under the benefit regulations and can sign forms, make appeals and generally deal with the benefits claim as if it was their own. Even though the claimant may not be able to deal with the claims process it is important that they are involved as much as possible with decisions about how to spend their money.

All money collected by the appointee must be used for the sole benefit of the claimant for whom they are acting. Unless instances of misuse are brought to its notice the Jobcentre Plus or Pension Service is unable to monitor that the arrangement is working to the claimant's benefit, or ensure that the claimant is receiving the full allowance.

The appointee is responsible for:

- finding out about your entitlements and benefits;
- letting people know about any change in your circumstances;
- arranging for any overpayments to be paid back.

Being an appointee lasts until the person is well enough to take back control of their finances. Any party (you, the appointee, or the office dealing with the payments) can end the arrangement.

### Dealing with capital

An appointee does not have the authority to deal with the capital or other income belonging to the incapacitated person. Unspent pension and benefits **may** constitute capital, even if held in the name of the appointee. The appointee may not have full legal authority to deal with it and other options may have to be considered.

It is unlikely that an appointee would need to apply to the Court of Protection if they held a 'reasonable sum' of accrued savings. The Court has indicated that it would regard a reasonable sum as being equivalent to one month's accommodation costs, and around £500 cash float to meet unforeseen emergencies.

## Complaints and concerns about Appointees

If you are concerned that an appointee is abusing their position or is not acting in the person's best interests, you should contact the relevant DWP agency. This will either be the Jobcentre Plus or the Pension Service, depending on the type of benefits received.

## 10. Independent Mental Capacity Advocates

The *Mental Capacity Act* creates a new service called the Independent Mental Capacity Advocate (IMCA) service. This is a service to support and represent people who lack capacity to make important health and welfare decisions themselves and who have **no family or friends who are willing and able to be consulted** about the decision.

An IMCA is an independent person who must have the relevant experience and training for the role.

The role of the IMCA is to:

- support and represent the person who lacks capacity when it is being decided what is in their best interests;
- find information to help assess what is in the person's best interests. This could be information about their feelings, values and beliefs; or it could mean finding out if there is any way of helping the person to make or communicate their own decision;
- challenge decisions which may not be in the best interests of the person.

An IMCA *must* be instructed if a decision has to be made about:

- serious medical treatment; **or**
- a long-term stay in hospital or a care home (long term means longer than 28 days in hospital or eight weeks in a care home); **or**
- a move to a different hospital or care home.

An IMCA *may* be consulted in relation to decisions concerning care reviews or in adult protection cases.

If a decision is needed urgently, it may not be possible or appropriate to instruct an IMCA. If the urgent decision relates to a move of accommodation, an IMCA must be instructed as soon as possible after the move.

It is the local authority or NHS organisation providing the person's care or treatment which is responsible for instructing the IMCA. They must take into account the representations and information provided by the IMCA when deciding what is in the person's best interests.

The IMCA service is only appropriate for people who have no-one else to support or represent them (other than paid staff). If someone has family or friends who are willing to be consulted, or has set up a health and welfare LPA, or has a court appointed deputy, it would not be necessary for an IMCA to be instructed.

## **11. Deprivation of Liberty Safeguards**

New measures are due to come into force in April 2009 relating to people who lack mental capacity to make decisions on, or give consent to, the arrangements for their care and treatment and who are deprived of their liberty in a care home or hospital.

The new legislation aims to provide safeguards to ensure people are only deprived of their liberty where this is necessary for their own safety, and to provide the care and treatment they need, and where a lawful procedure has been followed to authorise this. It also provides people with access to a court to challenge their detention.

There is no definition of what amounts to a deprivation of liberty, but the following factors would be relevant:

- If someone is not allowed to leave the care home or hospital,
- If they have no, or very limited, choice about their life within the care home or hospital,
- If they are prevented from maintaining contact with the world outside the care home or hospital.

Any of these factors on their own may or may not amount to a deprivation of liberty; it will always depend on the individual facts of each case.

The legislation introduces a procedure for care homes or hospitals to obtain authorisation for someone to be deprived of their liberty.

If someone is at risk of, or is already being deprived of their liberty, the managing authority of the care home or hospital must apply for authorisation of the deprivation of liberty. The application must be made to the relevant supervisory body – this will either be the local authority or PCT – which is responsible for arranging an assessment of the deprivation of liberty.

The assessment involves various stages to ascertain whether the deprivation of liberty should be authorised. This includes assessment of whether the person lacks capacity to make their own decisions about their care, whether the arrangements actually amount to a deprivation of liberty, and assessment of whether this is in their best interests. The law sets out rules as to who is qualified to carry out the assessments; these include suitably qualified mental health professionals and social workers.

If you are concerned that someone is being deprived of their liberty, for example a friend or family member, you will be able to apply to the supervisory body for an assessment to be carried out.

We will provide more information on the Deprivation of Liberty Safeguards nearer the time they come into force in April 2009.

## **12. Further information and assistance**

**Action on Elder Abuse**, Astral House, 1268 London Road, London SW16 4ER, tel: 020 8765 7000, helpline tel: 0808 808 8141 (free call), website: [www.elderabuse.org.uk](http://www.elderabuse.org.uk). The helpline is confidential and provides information and emotional support in English and Welsh. It is available to people who are being abused, those who are concerned about possible abuse, carers and workers who may have similar concerns, and those who are interested in finding out more about elder abuse.

**Alzheimer's Society**, Devon House, 58 St Katharine's Way, London E1W 1JX. Helpline: 0845 300 0336 (lo-call rate), website: [www.alzheimers.org.uk](http://www.alzheimers.org.uk). Provides information about all types of dementia and supports people, their families and carers. The Society also produces a range of factsheets.

**British Banking Association**, tel: 020 7216 8800, website: [www.bba.org.uk](http://www.bba.org.uk). Provides guidance for bank staff on 'Banking for mentally incapacitated and learning disabled customers'.

**Commission for Social Care Inspection (CSCI)**, 33 Greycoat Street, London, SW1P 2QF, tel: 0845 015 0120 (lo-call rate), website: [www.csci.org.uk](http://www.csci.org.uk). The body responsible for inspecting and reporting on care services, including care homes

**Department of Health**, website: [www.dh.gov.uk](http://www.dh.gov.uk). Publishes guidance for healthcare and social care staff and is the government department with responsibility for the IMCA service.

**Mental Health Foundation**, Sea Containers House, 20 Upper Ground, London, SE1 9QB, [www.mentalhealth.org.uk](http://www.mentalhealth.org.uk), tel. 020 7803 1101. Provides information for anyone affected by mental health problems, including guidance on the Mental Capacity Act.

**MIND**, Granta House, 15-19 Broadway, London E15 4BQ, Infoline tel: 0845 766 0163 (lo-call rate), website: [www.mind.org.uk](http://www.mind.org.uk). Information Unit offers support for people in mental distress and their families. Referral to local associations which provide services such as counselling projects, self-help support groups, drop in centres and other services. Legal advice is also available.

**Ministry of Justice**, Selborne House, 54 Victoria Street, London SW1E 6QW, website: [www.justice.gov.uk](http://www.justice.gov.uk). This government department has responsibility for the *Mental Capacity Act 2005*.

A series of booklets produced by the Ministry of Justice is available to download from the Office of the Public Guardian website at: <http://www.publicguardian.gov.uk/forms/additional-publications-and-newsletters.htm>; You may be able to order copies by phoning 0845 330 2900 but there are limited numbers available:

Booklet 1: For people who may be unable to make some decision for themselves/who wish to plan ahead for the future;

Booklet 2: For family friends and unpaid carers;

Booklet 3: For people who work in health and social care;

Booklet 4: For advice workers;

Booklet 5: The Independent Mental Capacity Advocate (IMCA) service.

**Official Solicitor and Public Trustee Office**, 81 Chancery Lane, London WC2A 1DD, tel: 020 7911 7127, website: [www.officialsolicitor.gov.uk](http://www.officialsolicitor.gov.uk). Represents minors and adults under legal disability in County Court, High Court or Court of Protection in England and Wales.

**Office of the Public Guardian**, Archway Tower, 2 Junction Road, London N19 5SZ, tel: 0845 330 2900 to order forms and guidance, website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk). The OPG publishes a range of Guidance for people wanting to make an LPA, attorneys, certificate providers and witnesses.

The OPG publishes the **Code of Practice** to the *Mental Capacity Act 2005*. This can be downloaded from the website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk). Or you can order a copy from The Stationery Office for £15, from the TSO online shop at: [www.tsoshop.co.uk](http://www.tsoshop.co.uk), or by phoning the order line on 0870 600 5522 (national call rate).

**Solicitors for the Elderly**, Room 17, Conbar House, Mead Lane, Hertford, Herts, SG13 7AP. Produces a booklet for solicitors which gives details about financial abuse and actions solicitors can take if they have concerns. Called 'A Strategy for recognising, preventing and dealing with the abuse of older and vulnerable people', it is available on their website: [www.solicitorsfortheelderly.com](http://www.solicitorsfortheelderly.com).

### **13. Further information from Age Concern**

The following factsheet/information sheets may be of interest:

Factsheet 7	<i>Making your will</i>
Info Sheet IS/5	<i>Advance Decisions, Advance Statements and Living Wills</i>
Info Sheet IS/16	<i>Payment of Pension and Benefits into Bank Accounts</i>

If you would like:

- to find your nearest Age Concern
- any additional factsheets mentioned (up to a maximum of 5 will be sent free of charge)
- a full list of factsheets and/or a book catalogue
- to receive this information in large print

phone 0800 00 99 66 (free call) or write to Age Concern FREEPOST (SWB 30375), Ashburton, Devon TQ13 7ZZ. For people with hearing loss who have access to a textphone, calls can be made by Typetalk, which relays conversations between text and voice via an operator.

Age Concern factsheets and other information materials can be downloaded free from our website at: [www.ageconcern.org.uk](http://www.ageconcern.org.uk). To receive a free e-mail notification when new and updated factsheets are published, please either contact the Factsheet Subscription Service on tel: 020 8765 7200 by email: [factsheet.subscriptions@ace.org.uk](mailto:factsheet.subscriptions@ace.org.uk), or sign up on-line.

Age Concern provides factsheets free to older people, their families and people who work with them. If you would like to make a donation to our work, you can send a cheque or postal order (made payable to Age Concern England) to the Personal Fundraising Department, ACE, Freepost CN1794, London SW16 4BR.

Find out more about Age Concern England online at: [www.ageconcern.org.uk](http://www.ageconcern.org.uk).

Please note that the inclusion of named agencies, companies, products, services or publications in this factsheet does not constitute a recommendation or endorsement by Age Concern. Whilst every effort is made to ensure accuracy, Age Concern cannot be held responsible for error or omissions.

No factsheet can ever be a complete guide to the law, which also changes from time to time. Therefore please ensure that you have an up to date factsheet and that it clearly applies to your situation. Legal advice should always be taken if you are in doubt. (*Age Concern England is unable to give financial or legal advice*).

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