

# CHILD & CHILD

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Health and Care Decisions  
Lasting Powers of Attorney

## WHAT IS A HEALTH AND CARE DECISIONS LASTING POWER OF ATTORNEY?

Since 1 October 2007, it has been possible to make a new type of power of Attorney, called a Lasting Power of Attorney (“LPA”). A power of attorney is a legal document where a person gives another person or persons (the Attorney) authority to make certain decisions on his or her behalf.

A Health and Care Decisions LPA allows your Attorney to make welfare and healthcare decisions on your behalf only when you lack the mental capacity to do so yourself. The lack of capacity can also include instances where you are ill, unconscious or a medical condition renders you incapable of making such decisions. This could also extend if you wish, to giving or refusing consent to the continuation of life sustaining treatment.

## WHAT TYPES OF DECISIONS CAN BE MADE THROUGH A HEALTH AND CARE DECISIONS LPA?

Although the Mental Capacity Act 2005 does not contain a cast-iron definition of what “personal welfare” means, the Code of Practice that accompanies the legislation takes personal welfare to mean such decisions made by your Attorney(s) in relation to the following aspects of your life:

- where you will live, who you should live with and who you should have contact with;
- your day-to-day care, including diet, dress and wellbeing;
- consent to refusal of medical examinations and treatment on your behalf;
- the assessment of and provision for any community care service provided to you;
- whether you should take part in any social activities, educational activities or leisure activities;
- your personal paperwork and any correspondence received by you;
- any rights of access to your personal details and data; and
- any complaints about your general or specific care and treatment.

It is important to note that this is not an exhaustive list of decisions that can be made by your Attorney(s), it merely highlights some of the aspects that you should think about in relation to the scope of the power given to your Attorney(s) before entering into a LPA.

There are two types of Certificate Provider: a knowledge-based Certificate Provider and a skills-based Certificate Provider. A knowledge-based Certificate Provider is someone who has known you for the past two years and a skills-based Certificate Provider is someone who has relevant skills and expertise, such as a General Practitioner, solicitor, barrister or a registered social worker.

It is particularly important to note that if you appoint a solicitor or a solicitors’ firm to act as your Attorney, the same solicitor or firm cannot be your Certificate Provider and vice versa.

## REGISTERING THE HEALTH AND CARE DECISIONS LPA

There is a requirement that an LPA must be registered with the Office of the Public Guardian before use. You may choose to have up to five “named persons” listed on your LPA who you would want to be notified when an application is made to register your LPA. Upon being notified of such registration, any of the named persons can raise an objection with the Office of the Public Guardian.

## POWERS AND LIMITATIONS OF AN ATTORNEY UNDER A HEALTH AND CARE DECISIONS LPA

The Health and Care Decisions LPA cannot be used as a tool with which to physically restrain you (in terms of threatened or actual use of force or to restrict your liberty of movement) within your personal life. Physical restraint can only be used in order to prevent harm to you and if your Attorney(s) believe that restraint is necessary in order to prevent such harm. The restraint must be proportionate to the likelihood of suffering harm and the seriousness of the harm that is contemplated.

As the Health and Care Decisions LPA is assessed by way of mental capacity, an Attorney cannot use their powers to make a decision about your welfare where you either still have capacity or you have already made a decision in advance as to your medical wellbeing.

## THE “BEST INTERESTS” TEST

When a person lacks mental capacity, the Attorney(s) must take into account your best interests before making any decisions on your behalf. The Mental Capacity Act 2005 looks at the test of best interests and identifies a number of factors that must be taken into account in relation to any decision. Such factors include:

- considering all relevant circumstances;
- considering whether mental capacity is likely to be regained in the future;
- making any decision on the basis of equal consideration with no discrimination involved;
- permitting and encouraging your participation in the decision; and
- considering past, present and future wishes and beliefs/values.

## THE CERTIFICATE PROVIDER

Section 10 of the LPA form provides that an independent person (“Certificate Provider”) must confirm that when making the power of attorney:

- you understand its purpose and the scope of the authority it gives to the Attorney(s);
- no fraud or undue pressure is being used to induce the person to make the power; and
- there is nothing else that would prevent the LPA from being created.

## WE CAN HELP

Because of the far-reaching nature of a Health and Care Decisions Lasting Power of Attorney, it is not something that should be done without first obtaining proper legal advice. If you wish to receive further advice on the creation or registration of Lasting Powers of Attorney, or dealing with someone's property and affairs under a Lasting Power of Attorney, please get in touch with the Private Client team direct, or speak to your usual contact in the firm.



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