

Lasting Powers of Attorney

A guide for Certificate Providers and Witnesses

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Introduction

This guidance is for anyone who has been asked to take on the role of Certificate Provider or Witness for a Lasting Power of Attorney (LPA).

This guidance has two sections:

Part A Certificate Providers includes:

- the role of a Certificate Provider;
- who can be a Certificate Provider;
- who cannot be a Certificate Provider;
- responsibilities of a Certificate Provider; and
- determining mental capacity.

Part B Being Witness includes:

- what a Witness is;
- who can be a Witness; and
- the responsibilities of a Witness.

Part A - Certificate Providers

Your role

This is a very important role and something that you must fully understand before agreeing to undertake it. A Certificate Provider is a person the **Donor** (the person making the Lasting Power of Attorney) **chooses** to complete a Part B Certificate of the Lasting Power of Attorney (LPA) to confirm that in his or her opinion the Donor:

- understands what an LPA is and understands the contents of their LPA;
- understands what powers they are giving to the Attorney(s) in their LPA;
- is not being pressured, tricked or placed under duress by someone else to make the LPA; and
- that there is nothing else that would prevent the LPA in question being created.

The Certificate

The Certificate is a vital part of the LPA form. Without it, the LPA is not valid and cannot be registered. For this reason, the Certificate must not be detached from the LPA.

If you have been asked to complete a Certificate you must read the prescribed information in the form carefully. You must also read the LPA you are being asked to sign and ensure that you understand the provisions contained in it.

If someone challenges the Donor's capacity to make the LPA you may be required to explain to the Court of Protection your decision to sign the Certificate.

However, you are only asked to give **your** opinion on the Donor's capacity to make an LPA at the time you were asked to certify the LPA. You will not be responsible if the Donor's capacity subsequently changes or concerns are raised, for example, at the time of registering.

Who can act as a Certificate Provider?

There are two types of Certificate Provider:

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Category A

Knowledge certification – a knowledge-based Certificate Provider is someone who knows the Donor personally and has done so **for at least two years**.

Category B

Skills certification – a skills-based Certificate Provider is someone chosen by the Donor and who considers that they have the **relevant professional skills and expertise** to certify the LPA.

The following are some suitable skills-based Certificate Providers listed on the form:

- a registered healthcare professional, including a GP;
- a barrister, solicitor or advocate;
- a registered social worker; or
- an Independent Mental Capacity Advocate (IMCA).

The form also specifies that someone can be a Certificate Provider if they consider that they have the relevant professional skills and expertise to provide a Certificate but are not one of the professionals listed on the form.

It is important that if you are asked to be a skills-based Certificate Provider and are not from one of the listed professions that you think carefully about whether you have the professional skills and expertise necessary to undertake the certification process.

If you are a skills-based Certificate Provider and you are not from one of the four professions listed, you will need to specify on the Certificate what your relevant professional skills and expertise are.

Is there anyone who cannot be a Certificate Provider?

Yes. A Certificate Provider must be able to act independently of the Donor and his or her Attorney(s). This means that you need to make up your own mind about whether or not to provide a Certificate. In particular, you cannot be a Certificate Provider if you are:

- a member of the Donor's or Attorney's family;
- a business partner or paid employee of the Donor or an Attorney(s);
- an Attorney appointed in this form or another LPA or any Enduring Power of Attorney (EPA) made by the Donor;
- an owner, director, manager, or an employee of a care home in which the Donor lives or their family member; or

- a director or employee of a trust corporation appointed as Attorney in this LPA – **this only applies to someone certifying a Property and Affairs LPA.**

What are my responsibilities as Certificate Provider?

You will need to talk to the Donor about LPAs generally, and about the contents of his or her LPA in a place where they feel able to speak or communicate with you freely.

You will need to talk to the Donor in private and away from his or her Attorney(s) and you will need to confirm in the Certificate that you have done so. **The Certificate is not valid if the Attorney is present when you discuss the LPA with the Donor.**

There may be circumstances where someone else needs to be present with the Donor when you discuss the LPA with him or her. For example, if the Donor is deaf and you need someone to translate sign language for you. You should state on the Certificate if someone else was present and why. This person must never be the Attorney(s).

You will need to assess the Donor's capacity to understand what an LPA is, the importance of the LPA and the effect of the powers he or she is giving in the LPA.

If you are content, you should sign the Certificate straight after discussing the LPA with the Donor. This is because you are certifying that, at the time when you sign the Certificate, you are of the opinion that the Donor has the capacity to make the LPA.

Taking on the role of Certificate Provider is very important as it provides one of the main safeguards in the LPA process.

It is important to remember that, if anyone decides to object to the LPA at the point when it is being registered, you as Certificate Provider may be required to explain the reasons why in your opinion the Donor had the capacity to create the power and was not acting under pressure. You may be required to explain this to the Court of Protection.

Understanding mental capacity

A formal test of mental capacity is not necessary in order to provide a Certificate. However, it is important that you are satisfied that, in your opinion, the Donor understands the LPA they are making, has the mental capacity to make it and that they are not being forced into making it.

It is important that you think about the questions you will need to ask the Donor to establish their capacity and understanding. You may want to consider asking the Donor the following open questions to help you establish if they:

1. Understand the LPA and the powers they are giving:

- What is an LPA?
- Why do you want to make an LPA?
- Who are you appointing as your Attorney?
- Why have you chosen to appoint x as your Attorney?
- What powers are you giving your Attorney(s)?

2. Have been put under pressure to make the LPA:

- Has the Attorney given you the answers to certain questions (like those listed above)?
- Do you have any reason to believe that the Attorney is not trustworthy?

3. Are aware of any other reasons why the LPA should not be created.

You will also need to ask questions that are specific to the person and the LPA in front of you. You may want to prepare a checklist to help you with this.

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This list **is not a formal test of capacity** and is only provided as a guide to the types of questions you may want to ask to help you when forming your opinion as to whether or not the Donor understands the LPA and if he or she has been pressured into making it.

You may want to keep a record of the questions you asked and the responses the Donor gave, on a separate sheet for your own records.

Who do I approach if, following the interview with the Donor, I have concerns about the Donor's capacity or the circumstances in which this LPA is being made?

You should raise your concerns with the Office of the Public Guardian and we will investigate them and decide what, if any, action to take. Contact details are at the end of this document.

Can I refuse to be a Certificate Provider?

Yes, you can refuse to be a Certificate Provider and should do so if you do not feel able to certify any of the matters you are asked to on the form.

Part B – Being a Witness

What is a Witness?

This is someone who signs the Lasting Power of Attorney (LPA) form to confirm that they Witnessed:

- the Donor (the person making the LPA) signing and dating the LPA form; or
- the Attorney (the person appointed by the Donor) signing and dating the LPA form.

The Witness is an important role and is one of the safeguards when making an LPA.

Can I be a Witness?

This will depend on the signature you have been asked to Witness.

Donor's signature

If you have been asked to Witness the **Donor's** signature:

- You can be a Witness if you are aged 18 or over and **are not** an Attorney appointed in the LPA you are signing.
- If you have already been asked to be the Certificate Provider, you can also be a Witness if the Donor asks you to. This could be useful in circumstances where the Donor is not able to find separate Witnesses and Certificate Providers.

Please note: You cannot Witness **the Donor's signature** if you are an Attorney appointed in the LPA you are signing.

Attorney's signature

If you have been asked to Witness the **Attorney's** signature, you are permitted to be a Witness if you are aged 18 or over and also if you are a Certificate Provider or **another Attorney** appointed in the LPA.

What are my responsibilities as a Witness?

You are required to Witness the Donor or Attorney(s) (or both) signing and dating the LPA form. A different Witness could be used for each person who is signing and dating the form. You must ensure that you see the relevant person sign and date the form and you should not sign it as a Witness unless you have seen this.

Contact us

You can obtain further information on being a Certificate Provider or a Witness from the Mental Capacity Act Code of Practice chapter 7, or by contacting the OPG.

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