The Newcastle upon Tyne Hospitals NHS Foundation Trust

Lasting Powers of Attorney and Court of Protection

<table>
<thead>
<tr>
<th>Version No.:</th>
<th>2.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective From:</td>
<td>19 May 2017</td>
</tr>
<tr>
<td>Expiry Date:</td>
<td>19 May 2020</td>
</tr>
<tr>
<td>Date Ratified:</td>
<td>23 December 2016</td>
</tr>
<tr>
<td>Ratified By:</td>
<td>Clinical Risk Group</td>
</tr>
</tbody>
</table>

1 Introduction

1.1 Patients have a fundamental legal and ethical right to determine what happens to their own bodies. Consent is a patient's agreement for a health professional to provide valid consent to treatment and is absolutely central in all forms of healthcare, from providing personal care to undertaking major surgery. For patients with capacity, consent must be obtained as outlined in the Trust's Consent Policy.

1.2 It is recognised that adults have the right to say in advance that they want to refuse treatment if they lose capacity in the future. Some patients may anticipate a time in their future when they will not have capacity to consider treatment. There are various options for these patients to identify their wishes at a time when they still have capacity. One of these options is to nominate a person or persons by making a Lasting Power of Attorney (LPA). Further details regarding LPAs and other options for patients with capacity who anticipate that they may lose capacity or be too unwell to make their wishes clear to healthcare professionals, are outlined under Deciding Right Lasting Powers of Attorney (LPA) were introduced with effect from October 2007 and replace Enduring Powers of Attorney (EPA) as well as introducing new safeguards against abuse and exploitation.

1.3 An EPA allowed an Attorney to make decisions solely about property and financial affairs both before and after loss of capacity (or during periods of fluctuation) according to the person’s wishes. Enduring Powers of Attorney signed and dated on, or prior to, 30 September 2007 will remain valid although new EPAs cannot be drawn up.

1.4 Enduring Powers of Attorney did not give the attorney any power or right to decide upon the medical or welfare care of the donor. The new form of LPA (Welfare) now gives the attorney who is appointed the legal right to decide on the care the patient receives based on the wishes expressed by the patient in the LPA.

1.5 The powers given by a Lasting Power of Attorney only come into force in the event that the donor (person requiring the LPA) lacks capacity to make the required decision.
2 Scope

This policy explains the role and remit of a Lasting Power of Attorney (LPA).

3 Aims

This policy provides guidance for staff in supporting patients who have a Lasting Power of Attorney (LPA).

4 Duties (Roles and Responsibilities)

4.1 Director of Quality & Effectiveness
The Director of Quality & Effectiveness has overall responsibility for ensuring that this policy is reviewed and that there are appropriate quality assurance mechanisms in place in relation to the guidance in this policy.

4.2 Admitting Nurse
The admitting nurse has the responsibility for ascertaining during the completion of the admission documentation whether the patient has a Lasting Power of Attorney.

4.3 Any member of staff made aware of a Lasting Power of Attorney
Any member of staff who is made aware of the existence of a Lasting Power of Attorney (LPA) should ask to see the LPA. The LPA must be checked for authenticity and validity as outlined in section 6 of this policy. The patient’s consultant should be informed of the existence of an LPA as soon as possible and a photocopy of the LPA should be taken immediately and placed in the medical record. When discussing LPA if communication support is required it must be provided. Relying on family members may result in misunderstandings and in the worst case litigation because incorrect information was provided by a family member.

4.4 Responsible Health Care Professionals
Clinical staff must consult with the attorney appointed under a valid LPA when the decision is appropriate to the LPA. All decisions made by an attorney must be made in the best interests of the person lacking capacity. If a healthcare professional either has concerns about the decisions being made or the motivation of an attorney and feels that by fulfilling those decisions s/he would not be acting in the best interests of the patient, this should initially be raised with the attorney. If agreement cannot be reached advice can be sought by the Legal Services Department. Ultimately an application may have to be made to the Court of Protection. Until such times as the decision of the Court is made, clinicians must act in what they believe to be the patient’s best interests, in accordance with the Mental Capacity Act.

5 Definitions

A LPA is a legal document by which one person (the donor) aged 18 or over gives another person(s) the authority to act on their behalf. There are two types of LPA;
• **A personal welfare LPA** is for decisions about both health and personal welfare
• **A property and affairs LPA** is for decisions about financial matters. In effect this has superseded the Enduring Power of Attorney.

The LPA may contain restrictions and/or conditions that place limits on the decisions an attorney can take. These restrictions must be adhered to.

6 **When is an LPA applicable?**

Even when an LPA includes healthcare decisions, attorneys do not have the right to consent to or refuse treatment in situations where:
- the donor has the capacity to make their own treatment decisions
- the donor has made an advance decision to refuse the proposed treatment, unless the donor made the LPA after the advance decision and gave the attorney the right to consent or refuse the treatment, the attorney can choose not to follow the advance decision
- a decision relates to life sustaining treatment, unless the LPA document expressly authorises this
- the donor is detained under the Mental Health Act
- the LPA must comply with the requirements outlined below.

6.1 **Documentation**

6.1.1 The LPA must be executed in a prescribed form and it must be registered with the Office of the Public Guardian before it can be used. See sample document attached as Appendix I.

6.1.2 The LPA must be completed by the Donor whilst they have capacity and a ‘Certificate Provider’ will be required to complete documentation to the effect that the Donor had capacity and did not complete the LPA under duress.

6.1.3 The LPA is not activated until it has been registered with the Office of the Public Guardian (OPG). It is the role of the OPG to scrutinize the legality of the document; it is not their role to comment on the content of the document. Whilst the OPG, in its guidance notes, recommends that the Donor makes his or her wishes clear and easily understood e.g. “when I reach X stage in my life I do not want artificial hydration or nutrition” it is not their role to ask the donor to clarify their wishes. If the LPA is unclear, the Trust will approach the Court of Protection for clarification. Until such time as the decision of the Court is made, clinicians must act in what they believe to be the patient’s best interests, in accordance with the Mental Capacity Act. The application to the Court of Protection will be made through the Legal Services Department.

6.1.4 An LPA can only be made if the donor has capacity to do so. If staff feel that there is any suspicion that there is anything amiss, the OPG should be contacted through the Legal Services Department.
6.1.5 When perusing the LPA for authenticity, staff must ensure that all pages are numbered sequentially and that every page has the OPG’s Holographic Registration sticker applied. If pages are missing or the Holographic sticker is missing, the form may be classed as void until such times as confirmation can be obtained from the OPG.

6.1.6 Checking the Registration of an LPA will be carried out through the Legal Services Department. The OPG can be contacted during normal working hours.

6.1.7 An LPA in relation to property, affairs and finance can be used both before and after the donor loses capacity, according to the donor’s wishes. However a LPA (Welfare) in relation to personal welfare, healthcare and medical treatment can only be used when the donor lacks capacity to make a decision in this respect.

6.1.8 When a patient or his or her representative makes known the existence of an LPA, staff must check the LPA for validity and appropriateness and maintain a copy in the patient’s records. Clinical staff must consult with the Attorney appointed under a valid LPA (where known) when the decision required is appropriate to the LPA.

6.1.9 Patients subject to the Mental Health Act 1983 are able to make an LPA, if they have the capacity to do so. An Attorney cannot consent to or refuse treatment for a mental disorder for a service user detained under Section 28 of the Mental Health Act.

6.1.10 An Attorney is the personal choice of the patient. Trust employees should not act as an Attorney during the course of their work.

6.1.11 More than one attorney may be appointed by the donor. If more than one attorney has been appointed you must clarify the remit of each attorney and establish whether they are authorized to act;

- Together – all attorneys must agree on a decision
- Together and independently – each attorney can act on their own to make a decision and they can also act together
- Together in respect of some matters and together and independently in respect to other matters – all attorneys are required to agree on specified decisions but can act on their own when making other decisions.

If the donor has appointed more than one attorney and not specified within the LPA how they have appointed them, they will automatically be appointed to act together. Further advice is available from Legal Services.
6.2 Court of Protection and the appointment of deputies

6.2.1 The Mental Capacity Act 2005 establishes a new specialist court, known as the Court of Protection, with a new jurisdiction to deal with decision-making for adults who lack capacity. The new Court makes decisions about property and affairs and personal welfare (welfare and healthcare) matters. The Court of Protection has the power to:

- decide whether the person has capacity to make a particular decision for themselves
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decision
- appoint deputies to make decisions for people lacking capacity to make those decisions
- decide whether a Lasting Power of Attorney or Enduring Power of Attorney is valid
- remove deputies or attorneys who fail to carry out their duties.

6.2.2 If a patient has not appointed or is unable to appoint an Attorney (LPA) and they need certain decisions made on their behalf, which cannot be taken other than by bringing the matter to Court, then an application will be made to the Court of Protection. In most cases, the application will be made by the patient’s family or carers, but occasionally by the Trust, where no other appropriate person can be identified.

6.2.3 Trust employees must follow the procedures of the Court of Protection made under the authority of the Lord Chief Justice with the agreement of the Lord Chancellor and published by the OPG. Employees will use the guidance and procedures as defined within the Court of Protection Rules and Practice Directions issued by the Court.

6.2.4 All applications to the Court of Protection will be made through Legal Services Department and the Trust’s Legal Advisor. Employees should not make an application directly to the Court of Protection without the prior agreement of the Legal Services Department.

6.2.5 The OPG is responsible for the supervision and support of Deputies and if it is felt that possible abuse or exploitation has or is taking place by any Deputy appointed by the Court of Protection, the Trust has a duty to inform the OPG immediately.

6.3 Court of Protection and cases involving young people aged 16/17 years

Either a court dealing with family proceedings or the Court of Protection can hear cases involving young people aged 16 or 17 who lack capacity. In some cases, the Court of Protection can hear cases involving people younger than 16. Under section 21 of the Mental Capacity Act, the Court of Protection can transfer cases concerning children to a court which has powers under the Children Act 1989. Such a court can also transfer cases to the Court of Protection.
6.4 Court of Protection – Serious Healthcare and Medical Treatment

6.4.1 Decision makers have a duty to make an application to the Court of Protection for a declaration that a proposed action is lawful before that action is taken in the following situations:

- Decisions about the proposed withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state.
- Cases involving organ or bone marrow donation by a person who lacks capacity to consent.
- Cases involving the proposed non-therapeutic sterilisation of a person who lacks capacity to consent to this.
- All other cases where there is a doubt or dispute about whether a particular treatment will be in a person’s best interests.

All applications will be made through the Trust's Legal Services Department and Legal Representative.

The Trust will use the guidance provided by the Court of Protection and OPG and will produce appropriate internal processes and procedures to support the making of an application.

6.4.2 Section 20 of the Mental Capacity Act 2005 sets out specific restrictions on a Deputy’s powers. A Court Appointed Deputy or Receiver has no authority to make decisions or take actions in the following respects:

- where the action is intended to restrain the person who lacks capacity
- if they think that the person concerned has capacity to make a particular decision for themselves
- if their decision goes against a decision made by an attorney acting under a Lasting Power of Attorney granted by the person before they lost capacity, or
- to refuse the provision or continuation of life sustaining treatment for a person who lacks capacity to consent.

6.4.3 Deputies appointed by the Court of Protection are not able to give consent on a patient's behalf for treatment under Part 4 of the Mental Health Act 1983, where the patient is liable to be detained under the Mental Health Act.

6.4.4 Deputies will also not be able to take decisions about where a person subject to guardianship should live, or take decisions that conflict with decisions that a guardian has a legal right to make.
7  Training

The Trust includes Lasting Power of Attorney training as part of the breeze training package “Mental Capacity Act 2005”.

Bespoke training is available via the Safeguarding Department, on request

8  Equality and diversity

The Trust is committed to ensuring that, as far as is reasonably practicable, the way we provide services to the public and the way we treat our staff reflects their individual needs and does not discriminate against individuals or groups on any grounds. This policy has been properly assessed.

9  Monitoring compliance

<table>
<thead>
<tr>
<th>Standard/process/issue</th>
<th>Monitoring and audit</th>
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</thead>
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<tr>
<td></td>
<td>Method</td>
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<tr>
<td>Patients have the right to appoint and be represented by a Lasting Power of Attorney.</td>
<td>Review of applications to the Court</td>
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<td></td>
<td>By</td>
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<td></td>
<td>Legal team</td>
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<td></td>
<td>Committee</td>
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<td></td>
<td>Clinical Risk Group</td>
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<td></td>
<td>Frequency</td>
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<tr>
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<td>Annually</td>
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<td>MCA audit reviews evidence of LPA and its validation.</td>
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<td></td>
<td>By</td>
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<td></td>
<td>Safeguarding Team</td>
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<td>Committee</td>
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<tr>
<td></td>
<td>MCA Steering Group</td>
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<tr>
<td></td>
<td>Frequency</td>
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10 Consultation and review

This policy has been reviewed with reference to the documents listed in section 12.

11 Implementation

Online training regarding Lasting Power of Attorney is available to clinical staff.

12 References

Mental Capacity Act (2005) London. HMSO

13 Associated documents

Advanced Decision Policy
Deciding right
Mental Capacity Act 2005
To access the form below and associated documents use the link below and double click to open the document LPA for health and care decisions: make and register (complete pack)  Lasting Power of attorney forms

Appendix 1

Lasting power of attorney

Health and care decisions

Use this for:
• the type of health care and medical treatment you receive, including life-sustaining treatment
• where you live
• day-to-day matters such as your diet and daily routine

How to complete this form

PLEASE WRITE IN CAPITAL LETTERS USING A BLACK PEN

☒ Mark your choice with an X
☐ If you make a mistake, fill in the box and then mark the correct choice with an X

Don’t use correction fluid. Cross out mistakes and rewrite nearby. Everyone involved in each section must initial each change.

Making an LPA online is simpler, cleaner and faster
Our smart online form gives you just the right amount of help exactly when you need it. www.gov.uk/power-of-attorney

This form is also available in Welsh. Call the helpline on 0303 456 0330.

This page is not part of the form
Appendix 2

Checking the validity and applicability of an Advance Decision to Refuse Treatment (ADRT) or Lasting Power of Attorney (LPA) in healthcare decisions when mental capacity has been lost

Patient name:  
dob:  
NHS no:  
Tick ✓ statements that apply

Does the patient have capacity for this decision now or could have it in the future?  
Yes  
The decision of the patient with capacity takes precedence over any other decision  
No  

Is the ADRT or LPA order missing or lost?  
Yes  
Validity and applicability cannot be confirmed.  
No  

Has there been a later ADRT or LPA order applicable to this decision?  
Yes  
Check the latest ADRT or LPA and start again at the beginning  
No  

Is this an LPA order?  
Yes  
To be valid and applicable this LPA must  
- Have been completed when they had capacity for this decision  
- Apply to the current circumstances  
- Be a personal welfare (health and welfare) LPA  
- Be registered with the Office of the Public Guardian  
- Be the latest decision the patient made  
- Involve consultation with any jointly appointed Attorney with responsibility for the relevant decision  
- Specifically authorise decisions around life-sustaining treatment if that is the decision that is needed  
No  

Is this an Advance Decision to Refuse Treatment (ADRT)?  
Yes  
To be valid and applicable this ADRT must  
- Have been completed when they had capacity for this decision  
- Apply to the current circumstances  
- Be the latest decision the patient made  
- For refusal of life sustaining treatment be written, signed, witnessed and state that the decision is to apply even if the patient’s life is at risk  
No  

If an emergency treat if this could be of benefit  
Otherwise set up a Mental Capacity Act best interests meeting

Health care professional name:  
Date:  
Signature:  

w.smyth@stawelliniusk.org and Deciding right  
http://www.nscn.nhs.uk/decide-right

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**Equal Analysis Form A**

This form must be completed and attached to any procedural document when submitted to the appropriate committee for consideration and approval.

## PART 1

1. **Assessment Date:** 07/12/16

2. **Name of policy / strategy / service:**
   - Lasting Power of Attorney Policy

3. **Name and designation of Author:**
   - Karen Collingwood, Nurse Specialist – Patient Safety

4. **Names & designations of those involved in the impact analysis screening process:**
   - Clinical Risk Group

5. **Is this a:**
   - Policy [X]
   - Strategy [ ]
   - Service [ ]

   **Is this:**
   - New [ ]
   - Revised [ ]

   **Who is affected:**
   - Employees [ ]
   - Service Users [ ]
   - Wider Community [ ]

6. **What are the main aims, objectives of the policy, strategy, or service and the intended outcomes?** *(These can be cut and pasted from your policy)*
   - This policy aims to provide guidance to staff in supporting patients who have Lasting Power of Attorney

7. **Does this policy, strategy, or service have any equality implications?**
   - Yes [ ]
   - No [X]

   If No, state reasons and the information used to make this decision, please refer to paragraph 2.3 of the Equality Analysis Guidance before providing reasons:
   - This policy is applicable to all individuals and does not discriminate against any persons individually or any collective groups of individuals.
8. **Summary of evidence related to protected characteristics**

<table>
<thead>
<tr>
<th>Protected Characteristic</th>
<th>Evidence, i.e. What evidence do you have that the Trust is meeting the needs of people in various protected Groups</th>
<th>Does evidence/engagement highlight areas of direct or indirect discrimination? If yes describe steps to be taken to address (by whom, completion date and review date)</th>
<th>Does the evidence highlight any areas to advance opportunities or foster good relations. If yes what steps will be taken? (by whom, completion date and review date)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race / Ethnic origin (including gypsies and travellers)</td>
<td>Interpreter Policy and Service Mandatory EDHR Training</td>
<td>Communication support where required will be particularly important within discussions relating to LPA. This to prevent any misunderstandings and in the worst case litigation because incorrect information was provided by a family member.</td>
<td>Add clear guidance to the policy that when required communication support must be provided when discussing LAP. Relying on family members would be an unacceptable risk.</td>
</tr>
<tr>
<td>Sex (male/ female)</td>
<td>Mandatory EDHR Training</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Religion and Belief</td>
<td>Mandatory EDHR Training</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Sexual orientation including lesbian, gay and bisexual people</td>
<td>Mandatory EDHR Training</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Age</td>
<td>Needs of all patients with an LPA Mandatory EDHR Training</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Disability – learning difficulties, physical disability, sensory impairment and mental health. Consider the needs of carers in this section</td>
<td>Needs of people with who lack capacity considered within the policy. Communication needs considered in the policy Mandatory EDHR Training Safeguarding Team and Dementia Team nurse specialists and Learning Disability Liaison Nurse available for advice and support</td>
<td>Communication support where required will be particularly important within discussions relating to LPA. This to prevent any misunderstandings and in the worst case litigation because incorrect information was provided by a family member.</td>
<td>Add clear guidance to the policy that when required communication support must be provided when discussing LAP. Relying on family members would be an unacceptable risk.</td>
</tr>
<tr>
<td>Gender Re-assignment</td>
<td>Mandatory EDHR Training</td>
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<tr>
<td>Marriage and Civil Partnership</td>
<td>Mandatory EDHR Training</td>
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</tr>
<tr>
<td>Maternity / Pregnancy</td>
<td>Mandatory EDHR Training</td>
<td>No</td>
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9. Are there any gaps in the evidence outlined above? If ‘yes’ how will these be rectified?

No

10. Engagement has taken place with people who have protected characteristics and will continue through the Equality Delivery System and the Equality Diversity and Human Rights Group. Please note you may require further engagement in respect of any significant changes to policies, new developments and or changes to service delivery. In such circumstances please contact the Equality and Diversity Lead or the Involvement and Equalities Officer.

Do you require further engagement? Yes ☐ No ☒

11. Could the policy, strategy or service have a negative impact on human rights? (E.g. the right to respect for private and family life, the right to a fair hearing and the right to education?)

This policy supports the right to life

PART 2

Name: Karen Collingwood

Date of completion: 7/12/16

(If any reader of this procedural document identifies a potential discriminatory impact that has not been identified, please refer to the Policy Author identified above, together with any suggestions for action required to avoid/reduce the impact.)