

## **LASTING POWERS OF ATTORNEY (LPA)**

### **The Legal Position**

Since 1<sup>st</sup> October 2007, the Mental Capacity Act 2005 repeals the Enduring Powers of Attorney Act 1985 and Lasting Powers of Attorney (LPAs) have replaced Enduring Powers of Attorney (EPAs) and extends the areas in which donors can authorise others to make decisions on their behalf. Whilst existing EPAs (regardless of whether they have been registered) continue to remain valid, new ones cannot be created.

### **What is an LPA?**

An LPA is a legal document which enables you to choose someone (the “Attorney”) you trust to make decisions on your behalf about, for example, your finances and property at a time in the future when you no longer have capacity to do this yourself.

Unlike EPAs, an LPA can only be used when it is registered with the Office of the Public Guardian.

### **LPAs and their Advantages**

In addition to property and financial affairs, donors can now appoint attorneys to make decisions concerning their personal welfare, by a Health & Welfare LPA, including health, care and consent to medical treatment, when they may lack capacity to make such decisions themselves.

Whilst the main provisions of the Mental Capacity Act are concerned with people who lack decision-making capacity, the statutory principles emphasise the promotion and empowerment to enable people, wherever possible, to make their own decisions. The Act therefore includes provisions to enable people, whilst still capable to plan ahead for the possibility that they may in future lose the capacity to make decisions for themselves. Such provisions allow people to retain a measure of control over future decisions taken on their behalf and also help to ensure that such decisions reflect what they themselves would have decided, had they been capable of doing so.

The main advantages of LPAs may be summarised as follows:

1. They afford greater protection to vulnerable clients and discourage abuse – up to 40% of existing EPAs are used by dishonest relatives and carers to take advantage of confused or elderly people.
2. They must be registered with the Office of the Public Guardian before being

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used. This will make them more expensive than EPAs but it will also make them more secure and so possibly more attractive to many people. When similar changes to powers of attorney were introduced in Scotland in 2001, the take-up rose from 5,000 a year to more than 22,000.

3. They can authorise attorneys to make decisions about the health and welfare of donors who have lost capacity to do this for themselves, even to the point of whether or not they should be given life-saving treatment.
4. Different attorneys can be appointed to make different types of decisions, thus increasing flexibility.
5. An LPA affords greater flexibility as it can appoint a replacement attorney if the attorney originally appointed is unable to act for specified reasons.
6. The Donor can name up to five people who are to be notified when the LPA is sent to the OPG for registration. This is a crucial safeguard as it allows these named people to object to the LPA being registered if, for example, they suspect that the Donor was unduly pressured into making the LPA.
7. The Code of Practice places emphasis on risk management and claims avoidance. This adds to the firm's administrative workload but may also have the beneficial knock-on effect of reducing professional negligence claims.

### The Two Different Types of LPA

1. A **Property and Affairs LPA**, which allows your Attorney to make decisions on your behalf concerning your property and financial affairs. This could include paying your bills, collecting your income and benefits or selling your house (subject to any restrictions or conditions which you can impose).

You can appoint an Attorney to manage your finances and property whilst you still have capacity as well as when you lack capacity. For example, it may be easier for you to give someone the power to carry out tasks such as paying your bills or collecting your benefits.

2. A **Health & Welfare LPA**, which allows your Attorney to make decisions on your behalf about your personal welfare. Unless you add restrictions or conditions, your Attorney will have authority to make all personal welfare, including health and care decisions, *except* for:

**A.** Decisions relating to **life sustaining treatment**, unless you have

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expressly authorised this in section 5 of the Form. Life sustaining treatment is defined as “treatment which in the view of a person providing healthcare for the person concerned is necessary to sustain life.”

- B.** Where you subsequently make a valid **advance decision** to refuse the proposed treatment (also known as a “**living will**”). An advance decision allows a person with capacity to refuse specified medical treatment at a point in the future when they lack capacity to consent to that treatment. If an advance decision is both valid and applicable in the particular circumstances, it has the same effect as a contemporaneous refusal of treatment by a person with capacity. This means that the treatment specified in the decision cannot lawfully be given. .

The two main differences between an advance decision and a Health & Welfare LPA is firstly that the latter allows you to give general authority for your Attorney to consent or refuse life sustaining treatment where Option A in section 5 of the Form is completed. Unlike an advance decision, it is not necessary to specify a particular treatment. This therefore requires a high degree of trust by you towards your Attorney but has scope for much more flexibility to take account of medical breakthroughs.

Secondly, under a Health & Welfare LPA, the Attorney must make decisions in your best interests. Where an advance decision is being followed, however, the best interests principle does not apply and it must be carried out even if the healthcare professionals think it goes against the person’s best interests.

Although “personal welfare” is not defined, it is likely to include decisions about where you should live (and with whom), your day-to-day care and the provision of community care services.

It is important to note that personal welfare decisions can only be made on your behalf when you lose the capacity to make them yourself, caused by, for example, illness.

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## **Who can make an LPA?**

Anyone aged 18 or over, with the capacity to do so, can make an LPA. You cannot make an LPA jointly with another person – each person must make their own.

## **What are the Safeguards?**

An LPA is an extremely powerful legal document and it is important to remember that (unless you have included restrictions in your LPA) the person you appoint as your Attorney, will have the same control as you have over your money, savings, any investments and property.

When choosing your Attorney, it is therefore important that you are confident they know what you want. They should therefore be someone you know well and trust. In addition, they must be at least 18 or a trust corporation. You may choose more than one Attorney and if this is the case, you will need to decide whether your Attorneys should act jointly (so they all need to sign any document to make it effective) or jointly and severally, meaning that they can all act together but also separately if they wish

There are, however, safeguards which include the following:

1. The requirement to identify someone to provide a “Part B Certificate” confirming, amongst other things, that you understand the purpose of an LPA and the scope of powers you are giving to your Attorney(s).
2. The provision for certain people chosen by you (up to five) to be notified before registration of the LPA. An Attorney of the LPA cannot be specified as a person to be notified. If you decide not to include anyone to be notified, a second person will be needed to provide an additional certificate. Including a named person is an important safeguard as, if you lose capacity at the time of registration, you will be relying on these people to raise concerns.
3. The requirement for your signature, together with that of your Attorney(s) to be witnessed.
4. The right of specific people (such as you, your Attorney(s) and named people) to object to the registration of the LPA.

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There are also optional safeguards such as:

1. Including restrictions or conditions in the LPA which your Attorney(s) must follow. For example, you may include a condition that your Attorney(s) need to keep accounts to be submitted to someone of your choice, such as a family member or professional.
2. Giving guidance in your LPA which your Attorney(s) should take into account when making decisions on your behalf.

### **Choosing a replacement Attorney**

You can decide to name one or more replacement Attorneys in case your existing Attorney is unable or no longer wishes to act for you.

### **Paying Attorneys**

An attorney is entitled to be reimbursed for out-of-pocket expenses incurred whilst carrying out their duties. Professional Attorneys, such as solicitors and accountants will charge for their services.

### **Registration of an LPA**

As previously emphasised, an LPA cannot be used until it has been registered with the Office of the Public Guardian. The LPA can be registered anytime after it has been completed and signed by all those who are required to sign.

It is generally best practice to register an LPA sooner rather than later as there are implications of not registering it shortly after having been made. For example, if the Donor of an unregistered Personal Welfare LPA faced a medical emergency, their Attorney would not be authorised to act on their behalf until the power is registered, which at the very least would take between six and eight weeks.

As previously indicated, a Property and Affairs LPA can be used whilst the Donor still has capacity, unless it specifies that it cannot. A Health & Welfare LPA, however, can only be used when the Donor no longer has capacity to make the particular decision affecting their health, care or personal welfare.

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