

LASTING POWERS OF ATTORNEY

As people live longer, more and more are likely to suffer from illnesses and conditions that affect their mental capacity. Generally, there is a gradual mental deterioration though sometimes, things are more dramatic. From a financial point of view, the crunch often comes when funds have to be provided to pay for care in a residential care home. This may involve sale of the person's home but if they have lost mental capacity this may be difficult. The person may be unable to give a valid consent and sign the necessary papers to give effect to a sale of their property. Funds cannot be withdrawn from a bank or building society on the person's behalf to pay care home fees if they are unable to give their agreement.

It is also possible for someone to lose mental capacity suddenly, perhaps as a result of an accident, and in these situations decisions will need to be taken about their treatment and welfare.

Introduction

From the 1st October 2007, it is possible to make a new type of power of attorney, called a Lasting Power of Attorney (LPA). The advantage in making a LPA is that an individual (the donor) can choose who he would like to look after his financial affairs or make decisions about healthcare or welfare issues and that appointment will survive any subsequent loss of mental capacity, when he is no longer able to run his own affairs.

An LPA must be in a prescribed form and it is essential that the donor has mental capacity at the time he gives the LPA and understands what he is doing. The LPA contains explanatory notes that must be read and understood by the donor and attorney/s before the LPA is signed.

In order for the LPA to be validly created the correct procedure for executing the LPA must be followed.

Types of LPAs

There are two types of LPAs:

- A Property and Financial Affairs LPA, which allows your attorney authority to deal with your property and finances, as you specify.
- A Health and Welfare LPA, which allows your attorney to make health care and welfare decisions on your behalf, but only when you lack mental capacity to do so yourself. This could also extend, if you wish, to giving or refusing consent to the continuation of life sustaining treatment.

You can choose to have either a Property and Financial Affairs LPA or a Health and Welfare LPA or both and this note is designed to raise some of the issues you should consider if you are interested in having either or both types of LPA drawn up. We have a specific note on Health and Welfare LPAs as there are certain points that are only applicable to that type of LPA and please let us know if you would like a copy.

We would always advise taking specific advice and Taylor Walton will not prepare any LPAs, of either type, without meeting you to take your specific instructions.

Choice of Attorney

As with any power of attorney, an LPA is an important document and you should take care whom you appoint as your attorney, as they should be trustworthy and have the appropriate skills to make the proposed decisions.

The appointment of a sole attorney may provide greater opportunity for abuse and exploitation than appointing more than one attorney. You may wish to consider appointing family members or independent people from outside your family or a combination of both. Whoever you choose should have the required skills to manage your affairs or make decisions about your welfare. It may be appropriate to appoint different people as attorneys under a Property and Financial Affairs LPA than under a Health and Welfare LPA.

If you choose to appoint a professional attorney, such as a partner of Taylor Walton, then they will charge for the time they spend dealing with your affairs and a specific clause will be added to your LPA authorising them to charge their normal professional fees.

Please note, the partners of Taylor Walton will not normally act as attorneys under a Health and Welfare LPA.

If you appoint more than one attorney, you can appoint them to always act jointly or jointly and severally. If no distinction is made, the law provides that they will act together. You may even appoint them to act jointly for some things and jointly and severally for others, although this should only be done after taking proper advice, as it may cause practical problems when the attorneys come to use the power.

You may also choose to appoint replacement attorneys, in case the first appointed attorney dies or is otherwise unable to act.

An LPA may contain restrictions and/or conditions imposed by the donor on the powers of the attorney and they would be legally binding. The donor may also include guidance to his attorney which is not legally binding.

If you are interested in imposing restrictions, conditions and/or guidance please complete the questionnaire sent to you fully and we can discuss the implications with you in due course, as certain restrictions and conditions may turn out to be unworkable in practice.

When can the Attorney act?

An attorney under either type of LPA will only be able to act when the LPA has been signed by you and your attorney and certified by a person, referred to as the

certificate provider, that you understand the nature and scope of the LPA and have not been unduly pressured into making the power. The certificate provider will also need to confirm there has not been any fraud or any other reason why you cannot make the power. The LPA must then be registered with the Office of the Public Guardian before it can be used.

You can nominate up to five people, who must be told in the prescribed manner when the LPA is registered and they can object to the registration. If you do not nominate anyone to be told, then you will need to provide 2 certificate providers when the LPA is created.

The Property and Financial Affairs LPA can be used both when you still have capacity to act, as well as if you lack mental capacity to make a financial decision provided it has been registered first. The Health and Welfare LPA can only be used if you lack mental capacity to make a welfare or medical decision.

Relationship between a Property and Financial Affairs LPA and a Health and Welfare LPA

An attorney has a duty to act within the extent of his powers and so, for example, an attorney appointed under a Property and Financial Affairs LPA cannot make health or welfare decisions on behalf of the donor.

However, an attorney must consult with attorneys under any other LPAs made by the donor, and so the attorney must be told about them, whenever the donor's best interests are being considered. It would also be sensible, and a matter of best practice, to consult attorneys appointed under any valid Enduring Powers of Attorney (EPAs).

It is also important to note that a decision is not always purely a financial one, nor is it necessarily purely a welfare one. An example of this would be if the donor had to go into a nursing home, which has both financial and welfare implications.

If attorneys under different LPAs cannot agree then an application will need to be made to the Court, but this will be costly and take time and so it is important to consider that you may need both a Property and Financial Affairs LPA and a Health and Welfare LPA and that the different sets of attorneys must be able to work together in your best interests.

Existing Enduring Powers of Attorney

Any EPAs validly made before 1st October 2007, will continue to be able to be used but only in respect of your property and affairs. An EPA can never give an attorney authority to make decisions regarding healthcare and welfare decisions.

If you wish to give someone authority over your health or welfare you will need to make a Health and Welfare LPA.

Gifts

Attorneys appointed under a LPA only have limited powers under the Mental Capacity Act 2005 to make gifts of the donor's money or property and this power cannot be extended in the LPA, although it can be restricted or even excluded.

This limited power is very important to note as attorneys or the donor may assume that the attorneys have discretion to make gifts, including for inheritance tax planning purposes, when they do not.

Under the Mental Capacity Act 2005, any gifts:-

- Must be made to a recipient who is related to or connected with the donor, or a charity to which the donor has made gifts in the past or might be expected to if he had the capacity to do so.
- The gift must be made within prescribed parameters. Gifts to charity can be made at any time but a gift to an individual must be of a seasonal nature or made on the occasion of a birthday or wedding or similar event.
- The value of the gift must be reasonable having regard to all the circumstances and in particular to the value of the donor's estate.

An attorney has no power to sign a will on the donor's behalf and indeed, the attorney's authority to act ceases on the donor's death.

If you do not have a will in place, please contact us straight away and we would be happy to discuss matters with you.

What happens if you have not made an LPA or EPA?

If you lack capacity to make a financial decision, then it may be necessary for an application to be made to the Court of Protection for an appropriate order, such as appointing someone as your deputy so that they can make decisions on your behalf. This can be both costly and time consuming.

Most care and treatment decisions can be made on your behalf without the need for a court application. However, if you wish to avoid potential disputes, you should consider giving someone you trust authority to make those decisions on your behalf by making a Health and Welfare LPA.

We often find that clients, particularly the elderly, have peace of mind from knowing that they have an LPA to protect their family, and them, during their lifetime in case of an accident or illness arises in the future.

That does not mean though that an LPA is appropriate for everyone. An application to the Court of Protection for deputyship, which brings with it the oversight of the Office of the Public Guardian, may be preferable in some circumstances such as:

- Where there are indications of persistent family conflicts which suggest an LPA would be contested
- Where substantial assets are involved and your affairs are more complex than family members are accustomed to handle
- In cases where litigation may lead to a substantial award of damages for personal injury

The LPA Register and Disclosure of Information

The Office of the Public Guardian is responsible for maintaining a register of all LPAs, and also has details of registered EPAs and court appointed deputies.

You should note that once your LPA has been registered certain basic information will be available to anyone who applies to search the register and pays the prescribed fee.

The information available includes

- Your name and date of birth and the type of LPA
- The date the LPA was created and registered
- The attorneys' names and nature of appointment, i.e. jointly or jointly and severally
- Whether the LPA contains any restrictions, conditions or guidance, but not the details of these restrictions, conditions or guidance.
- Whether any note has been attached to the LPA, but not details of its contents.

It is also possible to make a further, advanced search but any applicant will need to explain why they are doing so and why it is in the donor's best interests.

Therefore if you have an LPA prepared, you must be aware that details of your LPA are available for public inspection.

For more information, tailored to your particular circumstances, please contact a member of Taylor Walton's Private Client department, on:

- 01582 731161 (Luton office)
- 01582 765111 (Harpenden office)
- 01727 845245 (St Albans office)

This note reflects the law as at **1 October 2009**. It is intended to cover only the basic principles and should not be relied upon as exhaustive. Everyone will have their own particular circumstances and will have questions to ask which no doubt you will be able to discuss fully with us before deciding how best to proceed.

December 2009