

Lasting powers of attorney

Introduction

The benefits of drawing up a Will are widely recognised as, in so doing, you make provision for the winding up of your affairs after death. This not only has advantages for those who will find themselves administering your estate but also gives you peace of mind, knowing that you have selected, as Executors, those individuals best suited for the role and have given them the necessary instructions.

Less well known are the opportunities available to make provision in advance for the possibility of your becoming mentally incapable of managing your own affairs during your lifetime. This becomes increasingly important as the risk of incapacity grows through longevity, illness or accident. An ordinary power of attorney is not an effective solution because it is automatically revoked by this kind of incapacity; just at the time when it is most needed. The Court of Protection has power to appoint someone to manage your finances but the procedure can be time-consuming and inflexible. More importantly, you will have lost the right to choose who will have the responsibility for looking after your affairs at a time when it is vital that they are dealt with both efficiently and sympathetically.

The better solution is, while you are mentally capable, to appoint someone to safeguard your interests and to act on your behalf if necessary. You can do this using a Lasting Power of Attorney, also called an 'LPA'.

Lasting Powers of Attorney

From 1 October 2007, two types of powers can be made

- A Property and Financial Affairs LPA, which allows your attorney to deal with your property and finances.
- A Health and Personal Welfare LPA, which allows your attorney to make welfare and healthcare decisions on your behalf, but only when you lack the 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 make one or both of these types of LPA.

LPAs differ from ordinary powers of attorney in that they remain valid even after the individual who has granted the power becomes mentally incapable. At the time the power is given, however, you must be capable of understanding its nature and effect for it to be valid.

LPAs are very flexible

- You may appoint more than one attorney to act together, separately or together in relation to some decisions and separately in relation to others. You may appoint a successor to your attorney in case they die or otherwise cannot act for you.
- You may limit the scope of the attorney's authority by, for example, requiring them to obtain the consent of another person before entering into certain transactions.
- Under a Property and Financial Affairs LPA you may provide either that your attorney's authority to act on your behalf only commences when you lose your mental capacity or that it has immediate effect. Attorneys under a Health and Welfare LPA can only act once you have lost mental capacity.
- You may revoke either LPA at any time whilst you are mentally capable.

Attorney's Duties

The attorney will only be able to act under an LPA when three things have happened;

- You and your attorney have both signed the document.
- The LPA has been certified by an independent person that, in their opinion, you understand the nature and scope of the LPA, have not been unduly pressured into making it, there has not been any fraud and there is no other reason why you cannot make the LPA.
- The LPA has been registered with the Office of the Public Guardian. Part of the registration process requires that persons you have specified are notified that you are making an LPA. If you choose not to specify anyone to be notified, two certificates of capacity will be needed.
- Once you have lost your mental capacity, your attorney has a duty to notify the Office of the Public Guardian that this has happened. The attorney will then be able either to carry on acting under your LPA or to start acting if your Property and Financial Affairs LPA has been restricted in this way or is a Health and Welfare LPA. You will no longer be able to make most financial or healthcare and welfare decisions for yourself.

The Court's Role

Your attorney is always subject to the jurisdiction of the Court of Protection. Any attorney who exceeds their powers will be in contempt of Court. For example, your attorney may only use your assets to make gifts on your behalf in very limited circumstances and if the attorney goes further than this the Court may make an order for a refund or compensation. The Court may authorise transactions that go beyond the attorney's usual powers, but will not do so without making full enquiries.

Existing Enduring Powers of Attorney

Any enduring power validly made before 1 October 2007 will continue to be able to be used, but only in respect of your property and affairs. If you wish to give authority over your healthcare or welfare you will need to make a Health and Welfare LPA.

Our Role

The LPA itself is a printed form and relatively straightforward to complete. Our primary role is to ensure that you understand what is involved, advise you about the powers that you can give to your attorney and, if the time comes (and we very much hope it will not!) to advise your attorney about notifying the Court of your incapacity and what their future role will be. If you wish, you may appoint a partner here to be your attorney under a Property and Financial Affairs LPA, although we recommend that you also appoint a friend or relation to deal with your affairs on a day-to-day basis. Attorneys under a Health and Welfare LPA are most appropriately friends or relations. We have considerable experience in giving advice to attorneys on the legal and practical aspects of their role and, where necessary, making applications to the Court on their behalf.

For further information or advice please contact:

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