



What is a Lasting Power of Attorney

A Lasting Power of Attorney (LPA) is a document under which you can give authority to someone to make decisions on your behalf after you have lost mental capacity. There are two types of Lasting Power of Attorney

1. Property and Financial Affairs
2. Health and Welfare

The Property and Financial Affairs LPA of Attorney allows you to give authority to someone to deal with your financial affairs. This can be used both before you lose mental capacity and afterwards.

The Health and Welfare LPA allows you to give authority to someone to make decisions in respect of your personal welfare and can only be used once you have lost mental capacity.

You can make one or other or both of these types of LPA.

The authority given by an LPA can only be exercised once it has been registered with the Office of the Public Guardian.

1. Property and Financial Affairs

This includes all of your money and property including your houses, bank accounts, investments, pensions, benefits, utility accounts, liabilities, arranging a contract for residential care etc.

This type of LPA can be used to give effect to your decisions if you have mental capacity, although such a power can be excluded and will be used by the Attorney to make decisions when you do not have mental capacity.

2. Health and Welfare

This includes everything to do with how you live – for example where you live, what care you receive, who can visit you, what medical treatment you receive and can specifically include the authority to make decisions relating to life-sustaining treatment.

Life-Sustaining Treatment means any treatment that a doctor considers necessary to sustain your life and it will depend on the circumstances of a particular situation. Examples of life-sustaining treatment might include serious treatments such as:

- a serious surgical operation, e.g. a heart bypass
- receiving chemotherapy, radiotherapy or undergoing surgery to treat cancer or;
- an organ transplant

Life-sustaining treatment can also include more day-to-day procedures or treatments. The important factor would be whether the treatment was required to keep you alive. This could be as simple as a course of antibiotics or as basic as artificial nutrition or hydration.

2. Health and Welfare (continued)

Making a Health and Welfare LPA does not give your Attorneys the authority to make decisions on your behalf on the following matters:

- consent to marriage or civil partnership;
- consenting to a decree of divorce or dissolution of a civil partnership on the basis of two years separation;
- consenting to place a child up for adoption or consenting to the adoption of a child;
- consenting to sexual relations;
- giving you medical treatment for a mental disorder or consenting to you being given medical treatment for a mental disorder if your treatment is regulated by Part 4 of the Mental Health Act 1983;
- deciding to vote.

The authority given by this type of LPA can only be exercised if you do not have mental capacity to make your own decisions.

Who can make a Lasting Power of Attorney?

Anyone over the age of 18 that has the necessary level of mental capacity may make an LPA. It would normally be necessary to obtain a medical opinion where it is not immediately obvious whether someone has the requisite level of capacity.

Who can I appoint as my Attorneys?

Anyone over the age of 18 can act as an Attorney so long as they are mentally capable and not bankrupt. You can appoint family, friends or even professionals such as a solicitor or accountant. Alternatively you can appoint a trust corporation to act as attorney – such a corporation can only act under a Property and Financial Affairs LPA.

The right person or people to choose will depend on the type of LPA you are making. For Property and Financial Affairs it would be sensible to appoint someone who will not only act in your best interest but also has a good head for money and administrative skills.

For Health and Welfare it is sensible to appoint someone who has a good understanding of how you would want to be cared for and what sort of medical treatment you would want to receive.

It is also a good idea to appoint more than one Attorney so that there is a greater chance that there is someone able to act on your behalf. Although you can appoint anyone as your Attorney it is recommended that you appoint people the same generation or younger than you as they are more likely to be available and able to act on your behalf.

Please note that if you appoint your spouse or Civil Partner as your Attorney and the marriage or Civil Partnership is dissolved or annulled in the future that appointment will then fail unless you have expressly provided that they are still to act in that circumstance.

How do my Attorneys act?

There are three ways that your Attorneys can act:

- Jointly
- Jointly and severally
- Jointly on some issues and jointly and severally on others.

If you have chosen to appoint your Attorneys to act jointly then they must do everything together. This may sound a good way to make sure that nobody takes advantage of the powers you have given them but it is quite impractical. If, for example, one of the Attorneys was away on holiday or business and was unavailable for a period of time no actions can be taken by your other Attorney(s) during that time. It will also cause the power to become useless if one of your Attorneys dies, becomes mentally incapable or becomes bankrupt and there is no replacement Attorney that can take their place.

If you have chosen to appoint your attorneys to act jointly and severally then they can act together but they can also act separately. This means that one Attorney can carry out an act without the other Attorney(s) being involved or even aware of the same. However it does allow for more flexibility when acting on your behalf and avoids problems if one or more of the Attorney(s) are unavailable or becomes unable to act.

The LPA does allow you to “mix and match” between these two types of appointments. You can choose to appoint your Attorneys to act jointly for some matters but jointly and severally for others. For example, in a Property and Financial Affairs LPA you could appoint your Attorneys to act jointly for the sale of your home but jointly and severally for all other aspects of your property and financial affairs. In a Health and Welfare LPA a similar example would be to appoint your Attorneys to act jointly for any decisions relating to life-sustaining treatment but jointly and severally for all other aspects of your welfare. If you do not specify how your Attorneys are to act they will be assumed to be acting jointly.

What is a Replacement Attorney and when do they act?

The LPA allows you to appoint Replacement Attorneys who will act if the Attorneys you have initially appointed become unable to act. You can direct when those Replacement Attorneys act. For example, you have appointed three Attorneys initially, your spouse and two of your children and you appoint your brother as a Replacement Attorney to act if, for some reason, your spouse is unable to act. If you don't specify when a Replacement Attorney is to come into play then it is assumed that they all take the place of the first of your Attorneys to become unable to act. You cannot appoint a Replacement Attorney to take over from another Replacement Attorney.

What are Instructions and Preferences?

Instructions

These are limits that you can put on the powers you are granting your Attorneys. You can set down that your Attorneys can only deal with certain assets or that they can only do certain acts in respect of your assets – for example you could include a restriction preventing the sale of your property. A commonly used restriction relates to when your Attorneys can act on your behalf.

What are Instructions and Preferences? (Continued)

You should bear in mind the fact that it is difficult now to anticipate what circumstances will arise in the future and what actions your Attorney may need to carry out on your behalf. The more restrictions you include the more you will be tying the hands of your Attorneys.

You can also specify actions that you require your Attorneys to take in the course of managing your property and affairs or making decisions relating to your personal welfare.

Examples of instructions that could be included in the Property and Financial Affairs LPA would be the requirement that annual accounts are lodged with your solicitor or that your Attorneys only sell your home if you move into residential accommodation permanently. An example of an instruction that could be included in the Health and Welfare LPA would be the requirement that your Attorneys consult certain people when deciding where you live.

Please note that if a restriction or condition is too complicated too restrictive or impractical the Office of the Public Guardian may refer your lasting Power of Attorney to the Court of Protection for them to consider cancelling that restriction or condition. This may give rise to additional fees both of the Court and your legal advisor.

Preferences

These are not binding on your Attorneys, rather they are suggestions that you would like your Attorneys to bear in mind, an indication of what you feel would be in your best interest. An example would be to say that if you needed to go into residential accommodation that you stayed in a particular area or that you were moved closer to your daughter etc.

Can the Lasting Power of Attorney be used as soon as it is signed?

No – an LPA must be registered at the Office of the Public Guardian before it can be used.

When can registration of the Lasting Power of Attorney be done?

The LPA can be registered at any time after it has been signed. In fact it is wise for the registration to occur before the document needs to be used. Registration will probably take three to four months and the Attorneys have no authority to act while they are awaiting the registration. You can revoke the appointment of an Attorney following registration but otherwise you cannot change an LPA once it has been signed and registered.

Who can register a Lasting Power of Attorney?

If you are mentally capable, an application to register the LPA can be made either by you, or by your Attorneys. If you have lost mental capacity then the application to register will be made by your Attorneys.

Can the Lasting Power of Attorney be cancelled or revoked?

While you retain mental capacity you can cancel the LPA at any time. You will however need to notify the Attorneys that this has occurred. If the LPA has been registered with the Office of the Public Guardian, you will also need to notify them so that they can remove it from the Register.

In addition, the Office of the Public Guardian can cancel the registration on factual grounds, such as if your Attorney has gone bankrupt. The Court may also terminate an LPA for a variety of reasons, for example where your Attorneys are not carrying out their duties correctly.

Can I object to any decisions that my Attorney makes?

Your Attorney is only allowed to make decisions on your behalf if you are not mentally capable of making them yourself. If you are still able to make decisions on your own behalf your Attorney has no authority to make those decisions. They can carry out actions relating to your property and finances as your agent while you are mentally capable but they cannot take the ability to make decisions away from you. This remains the case even after the Lasting Power of Attorney has been registered. If, however, your Attorney does make a decision that you were capable of making and you are unhappy you may object to the Office of the Public Guardian, and you may wish to consider revoking the LPA. If you suffer a loss as a result of that decision your Attorney may be ordered to compensate you.

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