

LASTING POWERS OF ATTORNEY EXPLAINED

1. WHAT ARE LASTING POWERS OF ATTORNEY?

Lasting powers of attorney (“LPAs”) are a mechanism by which you are able to confer on another person, known as your ‘attorney’, the authority to make decisions about your health and welfare and/or your property and financial affairs in circumstances where you no longer have the mental capacity to make such decisions on your own.

2. WHY MAKE AN LPA?

If you to lose capacity to take health and welfare decisions for yourself, then in the absence of an appropriate LPA, other people would have to take those decisions on your behalf, for example medical staff or Social Services. An LPA gives you control over your affairs by specifying who you would like to make those decisions – ideally this will be someone who knows your wishes and will act accordingly.

LPAs also avoid delays that have financial implications. If you were to lose capacity and not have an LPA in place, your assets will be effectively frozen and no-one would have immediate authority to deal with them. This also applies to many jointly owned assets. Someone, most likely a family member, would have to apply to court to act as your deputy, an application that can take several months. During this time, no-one would be able to manage your assets.

3. SCOPE OF LPAS

One of the key principles of the relevant legislation governing LPAs and mental capacity is that your attorneys must consult you on every decision they make because you may have capacity to make some decisions but not others. An attorney must take all practicable steps to help you make a decision on your own and must always act in your best interests in respect of any decision they do take on your behalf.

As you may be aware, there are two distinct types of LPA, the first dealing with your property and financial affairs (“Finance LPAs”) and the second with your health and welfare (“Health LPAs”):

- (a) Finance LPAs give your attorneys broad powers to do almost anything you could do yourself in relation to your property and finances, including buying and selling investments, accessing your bank accounts and buying and selling property.
- (b) Health LPAs give your attorneys authority to make decisions about your health care and medical treatment, including where you live and the day to day decisions concerning your personal welfare.

4. WHEN LPAS CAN BE USED

With Finance LPAs, you can elect for them to be useable once they are registered with the Office of the Public Guardian (the “OPG”), but before you have lost capacity. This means that the Finance LPAs can be used if you retain mental capacity but, for example, are bed-bound and so unable to care for yourself for physical reasons.

Alternatively, you may elect that the Finance LPAs can only be used once you have lost capacity. However, this means that the attorneys must go through the process of demonstrating lack of capacity, which will likely involve an examination by a medical professional and cause unnecessary delay.

Whether or not you choose to make the Finance LPA effective before you have lost capacity, your attorneys are nevertheless always bound to act in your best interests and to consult with you on every decision as far as is possible.

Health LPAs can only be used once you have lost mental capacity.

5. CONSIDERATIONS AND INFORMATION REQUIRED WHEN MAKING AN LPA

In order to prepare either kind of LPA you will need to consider the following and provide us with the requested information as appropriate:

5.1. Your attorneys

You can appoint up to four attorneys in both kinds of LPA. Your attorneys must be over the age of 18 and not bankrupt.

You can choose whether to appoint your attorneys ‘jointly’, in which case they must all make every decision unanimously, or ‘jointly and severally’, meaning that they can act independently of each other. We strongly advise that you appoint your attorneys jointly and severally as this is by far the most practical option, and is the option the overwhelming majority of our clients choose.

5.2. Replacement attorneys

You have the option to appoint one or more replacement attorneys should all your attorneys be unable or unwilling to act.

5.3. Certificate provider

By way of a safeguard in your LPAs, it is a requirement that someone certifies that you understand the document itself and that so far as they are aware no fraud or undue pressure is being used to induce you to enter into the LPA. This person is known as the “certificate provider”.

As solicitors, we would be well placed to act as your certificate provider. Alternatively, your certificate provider can be another professional such as a doctor, or it can be someone you have known for more than two years as more than just an acquaintance.

5.4. Notifiable persons

When preparing LPAs you have the option to notify an interested party as to the registration of the documents. Practically speaking, this section becomes irrelevant if you decide to register the Finance LPAs as soon as they are fully signed.

Unless you have specific individuals (other than your attorneys and replacement attorneys) whom you would like to notify in advance, we usually recommend that you do not include notifiable persons so as to reduce the time it will take the OPG to register the documents.

5.5. Preferences and instructions

LPAs allow you to include specific instructions (which must be followed by your attorneys) and preferences for your attorneys (which are not mandatory). For example, you may want your attorneys to invest only in ethical investments.

In order to keep your LPAs as flexible as possible, and unless you have any strong feelings to the contrary, we suggest you do not include any instructions or preferences in your LPAs. The one exception to this is a standard clause we recommend all clients insert which permits attorneys to delegate investment management to a third party.

5.6. Life-sustaining treatment

Health LPAs give you the option to authorise your attorneys to give or withhold consent to life-sustaining medical treatment. If you choose not to give this authority to your attorneys then this final decision will be taken by the appropriate medical professional in consultation with your next of kin. It should be stressed that a medical professional should only present the option to your attorneys where there is a genuine question of whether to administer such treatment.

5.7. Signing the LPAs

There is a strict order in which you, your attorneys and your certificate provider must sign the LPAs for them to be valid.

5.8. Registration

For the reasons given above (see section 4), we would usually advise that you register your LPAs with the OPG as soon as they have been signed. There is a registration fee of currently £82 per document and the registration process usually takes approximately 2 months.

With Finance LPAs, you can elect for them to be useable once they are registered with the Office of the Public Guardian (the “OPG”), but before you have lost capacity. This means that the Finance LPAs can be used if you retain mental capacity but, for example, are bed-bound and so unable to care for yourself for physical reasons.

Alternatively, you may elect that the Finance LPAs can only be used once you have lost capacity. However, this means that the attorneys must go through the process of demonstrating lack of capacity, which will likely involve an examination by a medical professional and cause unnecessary delay.

Whether or not you choose to make the Finance LPA effective before you have lost capacity, your attorneys are nevertheless always bound to act in your best interests and to consult with you on every decision as far as is possible.

Health LPAs can only be used once you have lost mental capacity.

6. ADVANCE DECISIONS

For healthcare decisions, you are also able to make what is known as an ‘Advance Decision’. This is a document in which you can stipulate the circumstances in which you do not wish to receive certain treatment. The Advance Decision will take effect in the event that those specified circumstances arise and you are not able to give or refuse consent to that treatment at the relevant time.

Advance Decisions are more limited than Health LPAs as they do not operate where the circumstances that arise are different to those foreseen in the Advance Decision.

However, they remain a useful tool if you have strong feelings about certain treatments, or do not wish to burden your attorney with making such decisions.

7. OUR FEES

Our fees for the preparation and registration of LPAs will be in the region of £500 plus VAT per document. The OPG’s registration fee(s) will be in addition to our fees.

FOR MORE INFORMATION PLEASE LIAISE WITH YOUR CONTACT AT COLLYER BRISTOW, OR ALTERNATIVELY YOU CAN CONTACT US AT

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