

Lasting Powers of Attorney - summary

The donor and the attorney

A lasting power of attorney (LPA) is used by one person (the donor) to give authority to another person (the attorney) to make certain decisions on behalf of the donor. An LPA can be used when the donor is no longer able, or lacks mental capacity, to make decisions.

There are two types of LPA:

- 1 A property and financial affairs LPA, which allows the attorney to deal with the donor's property and finances. This can include selling property, closing bank accounts, access to the donor's financial information and dealing with the donor's tax affairs. This type of LPA can be used once it has been registered, even if the donor still has capacity to make decisions themselves.
- 2 A health and welfare LPA allows the attorney to make welfare and health care decisions on the donor's behalf, but only when the donor lacks the mental capacity to do so themselves. These decisions can include where the donor should live, decisions regarding medical treatment and the donor's day-to-day care.

Who can be an attorney

Any person over eighteen may be appointed as an attorney under an LPA. (An attorney who is a bankrupt cannot be appointed as attorney in relation to the donor's property and affairs, but can be in relation to the personal welfare of the donor.)

The role of an attorney is an important one and carries a great deal of responsibility. It

is therefore important that attorneys are chosen carefully and understand their responsibilities in law as to how and when they make decisions.

Limiting the types of decision an attorney can make

Certain decisions are beyond the scope of what can be done by an attorney. For example, a health and welfare LPA cannot be used if the donor has capacity to make the decision in question; a property and financial affairs LPA cannot be used to make gifts except to the limited extent permitted by the Mental Capacity Act.

It is possible to set out further limits on the decisions an attorney can make by specifying this in the LPA itself. A property and financial affairs LPA can specify that an attorney cannot act until the donor lacks capacity to make decisions. Otherwise an attorney will be able to act as soon as the LPA is registered, although if the donor still has capacity, the attorney must consult with the donor before making any decisions. A health and welfare LPA may prevent the attorney from giving or refusing consent to life sustaining treatment.

Attorneys must act in the best interests of the donor at all times

The attorney must always act in the best interests of the donor. This requires consideration of the donor's past and present wishes and feelings, beliefs and values. For example a donor may wish to specify that certain relatives are consulted over an important decision such as the sale of the family home. These may be recorded in the LPA itself. Attorneys are accountable to the Court and may be called upon to

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

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justify their decisions if there is evidence that they have failed to take account of the donor's wishes.

There can be more than one attorney

If there is more than one attorney the donor must decide whether the attorneys are to act jointly, meaning every decision must be made together, or jointly and severally, allowing a single attorney to make a decision if the others are not available.

The donor can specify replacement attorneys

The donor can specify replacement attorneys in the LPA. For example, a donor may appoint his or her spouse as attorney and a son or daughter as a replacement attorney if the spouse should die or become unable to act.

Procedure for making an LPA

As the LPA gives the attorney control over the donor's property, there are a number of safeguards to protect the donor.

Certain people may be notified before the LPA is registered.

The donor may name up to five people to be notified when an application is made to register the LPA. This enables the named people to raise objections if they have any concerns regarding the LPA.

Although this safeguard is optional, it is always advisable for a donor to inform close relatives and professional advisers of the LPA.

The donor must choose an independent person to provide a certificate of capacity

The certificate provider is chosen by the donor and must be either:

- 1 Someone the donor has known personally over the last 2 years. This must be more than just a passing acquaintance.
- 2 Someone who has relevant professional skills. This includes registered healthcare professionals including a GP, a registered social worker, an Independent Mental Capacity Advocate, a barrister, solicitor, advocate or any other person who certifies that they possess the relevant professional skills and expertise to provide a certificate.

The following cannot be a certificate provider:

- an attorney of the LPA or any other power of attorney made by the donor
- a family member of the donor
- a family member of the attorney
- a director or employee of a trust corporation acting as an attorney
- a business partner or employee of the donor, or of the attorney
- an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed or a family member of such a person.

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A certificate provider confirms the donor:

- understands what an LPA is and understands the contents of the LPA;
- understands what powers the donor is giving to the attorney in the LPA;
- is not being pressured, tricked or placed under duress by someone else to make the LPA; and
- that there is nothing else that would prevent the LPA in question being created.

The certificate provider certifies this when signing the LPA. The certificate provider can be called to justify an assessment at a later date if there are concerns that any of these requirements have not been satisfied.

The signatures of the donor and attorney must be witnessed.

The certificate provider can also act as a witness to the LPA. The donor and attorney cannot act as witnesses for each other but the attorneys can witness each other's signatures.

The LPA must be registered with the Office of the Public Guardian (OPG) before it can be used

The LPA can be registered any time after it is signed and cannot be used until it has been registered. The benefit of registering the LPA shortly after it is made is that it will be ready to be used whenever it is needed. The registration process can take up to two months and the attorneys cannot use the power while awaiting registration to be completed.

If an application to register the LPA is made a long time before it is needed the donor should review it from time to time to make sure it is still relevant to his or her circumstances. However, the donor cannot make changes to an LPA once registered. To make changes (e.g. change the scope of its powers or appoint new attorneys) a new LPA would need to be completed.

The OPG charges a fee of £82 for each application to register an LPA. However, the donor may be eligible for a fee exemption if in receipt of the following means-tested benefits and has capital of less than £16,000 (and has not been awarded damages of more than £16,000):

- 1 Income Support;
- 2 Income-based Job-Seeker's Allowance;
- 3 Income-based Employment and Support Allowance;
- 4 State Pension Guarantee Credit;
- 5 A combination of Working Tax Credit and either Child Tax Credit, Disability Element or Severe Disability Element; or
- 6 Housing Benefit or Council Tax Benefit.

The OPG may investigate attorneys and involve the Court of Protection

In the majority of cases, attorneys act lawfully and with no outside supervision. Occasionally however, attorneys act improperly or concerns are raised by relatives, social workers or other professionals. They can report their concerns to the OPG who have authority to

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investigate attorneys and obtain accounts and records from them. If they have acted improperly, an application may be made to the Court of Protection for their removal.

The Court of Protection has ultimate jurisdiction to make decisions for persons who lack capacity, and which are in their best interests. Thus where there is conflict or uncertainty over whether a certain decision should be made, or a decision is needed which is beyond the scope of an attorney's authority, then an application should be made to the Court of Protection.

Conclusion

An LPA enables a person to plan ahead and choose the right persons to make decisions that may need to be taken at a time when he or she cannot make them. This may be a time when decisions cannot be made in person and need to be entrusted to someone else, or at a time of stress and vulnerability. In the absence of a properly appointed attorney, bank accounts (including joint accounts where one account holder has lost mental capacity) and other savings will be frozen. Access to funds will only be possible on the appointment of a deputy by the Court of Protection. That involves a lengthy and often costly procedure, which is avoided by the appointment of attorneys.

Having an LPA registered and ready for use can allow decisions to be made quickly if the donor loses capacity and can help avoid disputes as to who should make decisions and what the donor's preferences would have been had the donor not lost capacity.

Why Thomson Snell & Passmore

We have a great deal of experience in this area of practice. We have looked after the affairs of our clients for generations and frequently act as attorneys and deputies for clients who lack capacity. We have one of a handful of dedicated teams of lawyers in the country specialising in Court of Protection work, acting for deputies, attorneys and relatives in all aspects of Court of Protection proceedings, including contested applications for the replacement of attorneys or deputies, the making of settlements, gifts and Wills.

Disclaimer

This information sheet is written as a general guide. As any course of action must depend on your individual circumstances, you are strongly recommended to obtain specific professional advice before you proceed. We do not accept any responsibility for action which may be taken as a result of having read this information sheet.

The law is stated as at 30 June 2020.

If you require further information, please discuss with your usual contact in the firm or email Una Angus at una.angus@ts-p.co.uk

Alternatively, please speak with Una or another member of the Private Client team on 01892 510000.

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