

LASTING POWER OF ATTORNEY



What are they?

Many of us worry that as we grow older, we may become ill and unable to deal with our own affairs or lack the mental capacity to make decisions for ourselves.

To provide you with peace of mind, we recommend that you create a Lasting Power of Attorney (LPA), a legal document which, when active, allows someone you trust (the appointed Attorney) to act in the place of the person for whose benefit it has been created (the Donor). If desired, more than one Attorney may be appointed to act either jointly (can only act together) or jointly and severally (can act together or separately).

There are two kinds of LPA introduced by the Mental Capacity Act 2005: a 'Health & Welfare LPA' and a 'Property & Financial Affairs LPA'

Property and Financial Affairs LPA

A Property & Financial Affairs LPA relates, as the name suggests, to the property and financial interests of the person who makes it. Once active, the Attorney is responsible for the management of all assets, income and expenses of the Donor.

Health and Welfare LPA

A Health & Welfare LPA gives authority to the Attorney to make decisions regarding the physical wellbeing of the Donor should they themselves be unable to do so. This can range from deciding to move the Donor into a care home, to making life-and-death decisions about the withdrawal of life-sustaining treatment. A Health & Welfare LPA can be tailored to the wishes of the Donor so as to limit what the Attorney can do.

When does an LPA become 'active'?

Either type of LPA can be made at any time. They become 'active' if the Donor loses mental capacity, as defined in s.2 of the Mental Capacity Act 2005. At that point, the Attorney assumes responsibility for their relevant affairs, provided that the LPA has already been registered with the Office of the Public Guardian. In addition, a Property & Financial Affairs LPA may be exercised by the Attorney with the consent of the Donor before they have lost mental capacity.

What is meant by 'loss of mental capacity'?

Loss of mental capacity is defined as being "unable to make a decision for himself in relation to the matter" due to an "impairment" or "disturbance" of the "mind or brain".

What happens if mental capacity is lost and there is no LPA?

If an individual loses mental capacity before they have made an LPA with the Office of the Public Guardian, it would be necessary for a Deputy to be appointed by the Court of Protection, which is considerably more expensive and time-consuming than putting an LPA in place.

It is advisable, therefore, for an individual to make an LPA as early in life as possible, so that it is always there to fall back on. In the case of a Property & Financial Affairs LPA, this has the added advantage of allowing the individual to shift the burden of managing their finances to their Attorney at their discretion even if they still have mental capacity.

What are the duties of an Attorney?

An Attorney has a legal duty to always act in the “best interests” (s.4, Mental Capacity Act 2005) of the Donor, including taking account of their wishes and feelings as well as those of parties who the Donor would wish to be consulted.

What next?

If you are unsure as to what you would want from your LPA, the following points are worth considering:

- Which kind of LPA would you make?
- Who would be appointed as your Attorney(s)?
- Would your Attorneys be appointed jointly or severally?
- Would there be a replacement Attorney? This person would only act if one of the original Attorneys were unable or unwilling to act.
- Who would act as your Certificate Provider? Before signing the LPA it is necessary to obtain a Certificate of Capacity which we provide. The Certificate establishes that the scope and effects of the LPA are understood and that the person is making the decision of their own free will. Our solicitors are able to act as Certificate Providers.

How do I go about making an LPA?

Woodfines Solicitors has extensive expertise in creating and advising on Powers of Attorney, as well as related issues.

Should you wish to instruct us, we would need to meet with you to determine the content of your LPA. You would need to bring the full names, addresses, telephone numbers, email addresses and dates of birth of all the people you would like to appoint. We would then prepare a draft which would be sent to you for approval. If required, we would then discuss any further amendments.

When you are satisfied that the LPA meets your requirements, we would make an appointment for you to sign the final draft at your convenience.

Contacts

To discuss your LPA with one of our expert solicitors or to set up an appointment, please contact us:

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