

Why we should all consider making a Lasting Power of Attorney

The UK is using its 2013 presidency of the G8 to host the first [G8 Dementia Summit](#), which aims to lead an international effort in tackling the condition.

Health ministers from G8 countries have been invited to the Summit in London on 11 December to discuss how efforts to combat dementia can be coordinated effectively. The aim of the summit is to identify and agree a new approach to dementia research, so that greater progress can be made through international cooperation.

It is estimated that in the UK alone, there are likely to be almost one million people with dementia by the end of 2020. The Alzheimer's Society has said that "dementia is fast becoming the biggest health and social care challenge of this generation."

Lasting Powers of Attorney

The increase in the number of people suffering from dementia means that more and more people are managing the property and financial affairs of those who are losing, or have lost, the necessary capacity to manage their own affairs. No family remains untouched by dementia; we all know, and many care for, relatives or friends with the condition.

In England and Wales, solicitors are instructed daily by donors wishing to make a Lasting Power of Attorney (LPA), so that the appropriate arrangements are in place should they go on to lose capacity to manage their own financial affairs.

LPAs must be registered with the Office of the Public Guardian (OPG) before they can be used by an attorney. There are two types of LPA you can make; one for Property and Financial Affairs and another for Health and Welfare. LPAs for Property and Financial Affairs can be used following registration, unless you have entered a restriction on the form which says it cannot be used until you have lost the required capacity. However, LPAs for Health and Welfare can only be used when you have lost capacity to make those decisions.

LPAs replaced Enduring Powers of Attorney (EPAs), which could be made before 2007. EPAs can still be used following their creation, though must be registered when the donor of the power is becoming, or has become, mentally incapable of handling his or her own affairs.

With LPAs now having been available for over 6 years, the number of registered LPAs is continuing to increase, with the [Office of the Public Guardian](#) (OPG) estimating they will deal with the registration of approximately 300,000 LPAs in the financial year 2013/14, which is over 50,000 more than in 2012/13¹.

¹ Presentation by Allan Eccles, the Public Guardian, to the Four Jurisdictions Conference on 24 October 2013

Creating a Lasting Powers of Attorney

Making an LPA is fairly straightforward, though it involves completing several forms, one to:

- create the LPA
- inform certain parties of your intention to register it
- apply for registration

Many people prefer a [solicitor](#) to assist them with the forms, but it is possible to obtain these directly from the OPG and make the application yourself. The OPG launched an online tool in July 2013, which is designed to take users through the application and ensure that it has been completed correctly, or applications can be made on paper.

You have to decide who you would like to appoint as your attorney or attorneys, how you would like them to be appointed (jointly, or jointly and severally), and what powers or guidance you would like to give them. You also have to choose a certificate provider (such as your GP, or a solicitor), who must confirm that you have the necessary capacity to create the LPA. Furthermore, you must nominate someone to be informed of the registration of the LPA. If you do not have anyone you wish to nominate, then two certificate providers are required.

Although some people may find all the paperwork a little bewildering, advice can be obtained. Making an LPA now gives you the opportunity to choose your attorneys and discuss your wishes with them. If you wish to appoint 1 or 2 children and not appoint others, it gives you the opportunity to discuss this with them and explain your reasons. This may help prevent any future dispute, which can lead to significant expense being incurred.

The Duties of an Attorney

If you choose to appoint an attorney under a LPA, they must have regard to the [Code of Practice](#) published for their guidance. Attorneys have a duty of care in relation to their role, cannot delegate their role, must act in good faith, must keep your affairs confidential, must keep an account of their dealings with your finances, and should keep your money and property separate from their own.

Anyone appointing an attorney should ensure that the attorney has read the guidance available to them from the OPG and more importantly, understood it. Acting as an attorney is an important role, which should be treated accordingly. The Senior Judge of the Court of Protection recently said that ignorance of the law was no excuse for an attorney who has acted outside their powers.

Some people express concerns about giving powers to others in relation to their finances. However, your attorneys cannot simply do what they like with your money or property. They must comply with their duties and act in your best interests.

For example, attorneys have a limited authority to make gifts on your behalf, but are restricted in terms of the size of these and must have regard to your previous gift-giving. Gifts can be made to charities (to which you might have been expected to make such gifts) and to persons related or connected to you on customary occasions (such as birthdays, marriages etc).

The Implications of not Appointing an Attorney

Many people lose the capacity to manage their property and financial affairs without having appointed an attorney to assist them. This may mean that an application has to be made to the Court of Protection, for a [Deputy](#) to be appointed by the Court. A Deputy has similar powers and duties as an attorney.

The Deputy may be a relative or friend, or the Court may appoint a professional Deputy, such as a solicitor. However, it does rely on there being someone willing to take on the responsibility. In the absence of a Deputyship, isolated, vulnerable adults could be missed out and left open to abuse.

An application for Deputyship requires the completion of a number of forms, along with an assessment of mental capacity from an appropriate expert. The application can take several months to be approved, even if no-one contests the application. In the interim, no-one has the authority to manage the affairs of the individual lacking capacity, which can mean bills are unpaid, benefits unclaimed and transfers of property are put on hold.

The fee for a Deputyship application is £400, which is much more than the registration fee for an LPA, of £110 (though the fees can be waived if you are on low income). The current registration time for LPAs with the OPG is 9 weeks, which makes it a much quicker, as well as less expensive process.

Although disputes can arise at the time of registration of an LPA, for example, whether the attorney is an appropriate person to be appointed, these disputes are generally easier to resolve than Deputyship disputes. If the registration of the LPA is made when you still have capacity, then you will be able to explain your reasoning for appointing your chosen attorneys.

However, with a Deputyship application you may no longer be capable of expressing your wishes of who should act as your Deputy (though if they are able to, the Court will take such wishes into account). You could end up with your affairs being managed by a relative you do not like, or do not trust, or by a professional Deputy who charges for their services. Such charges will be deducted from your funds.

Disputes

If a [dispute](#) arises in relation to a Deputy appointment, the dispute can go on for several months, if not longer, and substantial legal costs can be incurred. These costs may ultimately be paid from the assets of the individual lacking capacity.

Furthermore, if two relatives cannot agree on who can be appointed as a Deputy, the Court will often order the appointment of an independent Deputy, from the Court's panel of Deputies. Again, the independent Deputy will charge for their services in managing the individual's financial affairs.

As many disputes in the Court of Protection involve family members (often siblings), sadly, time and expense can be wasted on the parties using the dispute to settle other scores. This can divert valuable Court time away from determining what would be in the best interests of the individual lacking capacity, which is the aim of the process.

Changes in society and the increase in more complex family structures may also be creating a growth in family disputes. Disputes between second (or third) spouses and children from

former marriages are common, and can involve a power struggle between the parties, who are each concerned about the actions of the other.

It is often said that, more generally, society is becoming more litigious, and this may also increase the likelihood of disputes in the Court of Protection.

It is important to remember that it is not only the elderly that may need an LPA. We are all vulnerable to becoming ill or experiencing an accident which may prevent us from managing our own financial affairs, even if temporarily. Those of us with dependents reliant on us to provide for them do not want to be left in a position where the mortgage, rent or bills cannot be paid, as no-one has the necessary authority to manage our finances. Making an LPA now can prevent unnecessary problems, stress and expense later on.

For further information please contact [Rita Bhargava](#) or visit our website pages on:

- [powers of attorney](#)
- [deputies](#)
- [applications to the court of protection](#)
- [capacity and court of protection disputes](#)

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