

Turning the Spotlight on Lasting Powers of Attorney

Recent comments by retired Court of Protection Senior Judge, Denzil Lush, have thrown a spotlight onto Lasting Powers of Attorney. His comments have included concerns over the potential for financial abuse by attorneys.



Whilst this in itself may cause some individuals to hesitate over whether or not to make a Lasting Power of Attorney, it has brought an opportunity to examine how Lasting Powers of Attorney operate, their advantages and the consequences of not making one.

A Lasting Power of Attorney (LPA) is a legal document that allows you (the Donor) to appoint one or more people to help you make decisions, or make decisions on your behalf, once you have lost the mental capacity to do so. LPAs were introduced in October 2007, replacing the previous system of Enduring Powers of Attorney (EPA); however, an EPA is still valid if it was made prior to October 2007.

The crucial point is to set up an LPA while you still have the capacity to do so. This enables you to appoint someone you trust and you can also choose which decisions they are allowed to make for you. Donors often appoint their spouse/partner or other trusted family members but, in some cases, it may be appropriate to appoint a professional attorney. Attorneys must comply with the relevant guidelines and obligations. These include but are not limited to duties of care and good faith, as well as obligations not to take advantage of their position as attorney. Attorneys must also keep accounts, ensuring that the Donor's assets are kept separate to those of their own (in regards to property and financial LPAs).

There are two different types of LPAs. One type covers your finances and any property you may have, the other covers your health and welfare. You can decide whether to make either types of LPA, or just one; you can also choose whether to appoint the same attorneys for each LPA, or different attorneys. It is also recommended to consider the appointment of replacement attorney(s) to act, if more than one replacement attorney is appointed it is important to state clearly how and when they should commence acting.

A property and financial affairs LPA allows your attorneys to make a range of decisions on your behalf if there comes a time that you are unable to manage your finances on your own. These decisions include, but are not limited to, the buying and selling of a property, managing your bank accounts and paying your bills, dealing with tax affairs and claiming benefits to which you are entitled. If you are not completely happy with an attorney making all of these decisions, you can place limits or conditions on what your attorneys can do.

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The health and welfare LPA allows your attorney to make decisions on your behalf about your health and welfare if there comes a time when you are not able to do so. Attorneys are able to make decisions on a number of matters, for example, about where you live, as well as your day to day care, including your diet and what you wear. You can also give your attorney the power to refuse or consent to life-sustaining medical treatment.

Both LPAs must be registered with the Office of the Public Guardian who is responsible for maintaining a register of all registered LPAs. An LPA can be registered at any time after it has been signed by all relevant parties. The registration process can take around three months. The key difference between the two LPAs is that a property and financial affairs LPA can be used whilst you still have capacity whereas a health and welfare LPA can only be used once you no longer have capacity to make decisions.

If an individual loses capacity and has not made a valid Lasting Power of Attorney, an application must be made to the Court of Protection to appoint a 'deputy' to administer that individual's finances. This can be a very difficult and stressful period for the individual and loved ones. The application to the Court of Protection can be complex and can take in the region of three to six months before an order is made, making it substantially more expensive than making an LPA. During the intervening period, it is not possible to administer an individual's personal affairs, which often presents significant difficulties

with regards to cash flow for both the individual and their family. A person who has lost capacity without having an LPA in place, is not able to make an expression of wishes as to how their affairs, or health and welfare, should be managed. LPAs therefore play a vital role in giving peace of mind to the donor (and of course their family) in having regard to the Donor's wishes, during what will be a difficult period.

For anyone thinking about making an LPA, it is important to seek independent legal or professional advice to ensure that the nature and extent of the power afforded to the persons whom they choose to appoint, is fully understood.

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