

Lasting Powers of Attorney

What is a Lasting Power of Attorney?

A power of attorney is a legal document by which a person gives another person or persons (the attorney) authority to make certain decisions on his or her behalf.

Types of Lasting Powers of Attorney (LPAs)

There are two types of LPAs:

- A property and financial affairs LPA, which allows your attorney authority to deal with your property and finances as you specify.
- A health and welfare LPA, which allows your attorney to make health and welfare care decisions on your behalf but only when you lack mental capacity to do so yourself. This could also extend, if you wish, to giving or refusing consent to the continuation of life sustaining treatment.

Your Attorney

As with any power of attorney, it is an important document and you should take care whom you appoint as they should be trustworthy and have appropriate skills to make the proposed decisions. If you appoint more than one attorney, you can appoint them to always act together (jointly) or together or separately (jointly and severally). You may even appoint them to act jointly for some things and jointly and severally for others, although this should only be done with advice, as it may cause problems when using the power. You may also choose to appoint a successor to your attorney, in case they die or otherwise cannot act for you.

When can the Attorney act?

The attorney will only be able to act when the LPA has been signed by you and your attorney, then certified by a person that you understand the nature and scope of the LPA and have not been unduly pressured into making the power. The certificate will also need to confirm there has not been any fraud or another reason why you cannot make the power. It must then be registered with the Office of Public Guardian before it can be used. The property and financial affairs LPA can be used both when you have capacity to act, as well as if you lack mental capacity to make a financial decision. The health and welfare power can only be used if you lack mental capacity to make a welfare or medical decision.

Existing Enduring Powers of Attorney (EPA)

Any enduring power, validly made before 1st October 2007, can still be used but only in respect of your property and financial affairs. If you wish to give authority over your health or welfare you will need to make a health and welfare LPA.

What happens if you have not made an LPA or EPA?

If you lack capacity to make a financial decision, then it may be necessary for an application to be made to the Court of Protection for an appropriate order, such as appointing another person to make decisions on your behalf. This is both costly and time consuming. Most care and treatment decisions can be made on your behalf without the need for a court application. However, medical professionals are increasingly unwilling to accept the views of even close family members in relation to an individual's care without formal confirmation that such family members are entitled to make a decision. Therefore if no Lasting Power of Attorney exists the decisions taken may be those adjudged correct by the clinicians in charge but may not accord with an individual's wishes.

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When should the LPA be registered?

Before the LPA can be used it must be registered with the Office of the Public Guardian (OPG). Their fee covers registration and should it occur, their costs of investigating allegations of mismanagement.

Delay Registration	Register Immediately
<ul style="list-style-type: none"> You don't pay the registration fee until the power needs to be used. The registration process delays the use of the power by at least 6 weeks (and depending on the number of applications before the OPG then often longer), at a time when it needs to be used. There is no scope to use the power during this process and if the attorney needs to make decisions urgently, they will need to apply for a Court order. You can change your mind and cancel the power without any problem. No need to keep the OPG informed of any change of address/names. You control a property and financial affairs power of attorney, so it cannot be used until you choose for it to be registered or it needs to be registered for use. 	<ul style="list-style-type: none"> You pay the fee even if you do not need the power to be used immediately. As soon as the power needs to be used it can be activated immediately, without any delay. If you change your mind and cancel the power and make another power, then further fees will need to be paid to the OPG. There is a need to keep the OPG informed of any change of address/names of attorneys. The attorney can use a property and financial affairs power immediately it has been registered, unless you state otherwise.

How much will it cost?

To be effective an LPA will have to be registered with the Office of the Public Guardian before it can be used irrespective of the donor's mental capacity and inevitably there is an O.P.G. fee for such registration, which is currently £82.00 unless any exemptions or remissions apply. However, if the Donor of the LPA subsequently loses their mental faculties, there is no requirement for the LPA to be registered again. Likewise the LPA form is longer but more comprehensive than the old EPA form and because of the formalities is more expensive initially to set up. The likely cost is in the region of £250.00 - 500.00 plus V.A.T for the main document depending on requirements and including the registration formalities, but more if a secondary Health and Welfare LPA is required although there will be an economy of scale as to much of the information in the second LPA. Likewise if more than one LPA is produced at the same time e.g. for husband and wife then again there is little extra cost involved. Nevertheless, an LPA is still a more cost effective and flexible alternative to having to make a full-scale application to the Court of Protection in London for a Deputy (formerly a Receiver) to be appointed, which is the only option if no LPA has been put in place. Such a procedure can cost several thousands of pounds and take a number of months to process.

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What are the alternatives?

Do nothing!

In relation to an LPA in respect of property and financial affairs should no action be taken then one can continue to look after one's own affairs unless and until one's faculties fail. They may never do so and if one's decline is gradual then it will still be possible to put in place an LPA at that stage provided sufficient capacity has been retained. However if the decline in mental capacity is sudden there will be no opportunity to put an LPA in place and therefore an application for the appointment of a Deputy as outlined above will be the only option. There may be merit however in making a statement in advance as to who should make an application to be appointed as Deputy should the need arise. Essentially therefore it is a calculated risk that it might be possible to correct matters in the future or perhaps be faced with the more expensive appointment of a Deputy, but in so doing the initial costs of an LPA are avoided.

As with property and financial affairs, an individual can continue to make their own decisions in relation to health and welfare until their capacity fails. However, one may then be in a position whereby a decision required by medical professionals either cannot be made, for example due to mental incapacity, or cannot be communicated effectively. In these circumstances such professionals will be bound to make a decision in one's clinical best interest, even if this does not accord with an individual's wishes and there will be little that those close to that individual, be it family members or otherwise, can do to override that decision. By this stage it is then too late to put in place an LPA and whilst an application to appoint a Deputy as outlined above can be made in respect of an individual's health and welfare, in practice such orders are rarely granted.

Consider a General Power of Attorney

It is still perfectly possible to put in place a General power of Attorney under the Powers of Attorney Act 1971. This will be effective to enable the appointed attorneys to undertake matters in relation to an individual's property and affairs and will still be effective to cover situations such as the onset of physical incapacity. It will not, however, survive the onset of mental incapacity, as at that stage the Donor will be deemed to have insufficient capacity to instruct the Attorney or to ratify his or her actions. In these circumstances the only option will be to apply for a Deputy to be appointed as outlined above. Nevertheless by the use of a General Power it is possible to appoint a third party to act whilst the Donor has capacity and at a cost in the region of £25.00 plus V.A.T. when prepared with a will or £50.00 plus V.A.T. when prepared in isolation it is significantly cheaper than an LPA which, if any decline in mental capacity were gradual it would still be possible to put in place. Accordingly there is a calculated risk that mental capacity will not fail suddenly but nevertheless the arrangement retains the benefits of a Power of Attorney without the initial costs of putting in place an LPA.

To conclude

Each of the above courses of action has pros and cons and the eventual cost against benefit decision that needs to be taken is very much a personal one but it remains the case that the only machinery that exists whereby one can appoint another to administer one's affairs if capacity fails is an LPA. We hope that we have clarified the LPA and its alternatives and we will of course be happy to advise in more detail as required.

Produced with information supplied by 

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