

# Lasting Power of Attorney

## Summary

### The donor and the attorney

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

### 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 a 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.)

### Limiting the types of decision an attorney can make

It is possible to limit the types of decision an attorney can make by specifying this in the LPA document. A property and financial affairs LPA can specify that an attorney should not act until the donor lacks capacity to make their own decisions; otherwise an attorney will be able to act as soon as the LPA is registered. However if the donor still has capacity to make decisions, the attorney must consult with the donor before making any decisions.

### Attorneys must act in the 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. Attorneys are accountable to the Court and may be called upon to justify their decisions if there is evidence that an attorney is not acting accordingly.

### 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 a joint one, or jointly and severally, allowing an attorney to make a decision alone 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 their spouse as attorney and one of their children as a replacement

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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 to be told' must be notified before the LPA is registered.

The donor can specify up to five people they wish to be notified when an application is made to register the LPA. This enables the people to be told to raise objections if they have any concerns regarding the registration of the LPA. If no people to be told are named, then two rather than one certificate providers must sign the LPA (see below).

### The donor must choose a certificate provider

The certificate provider is chosen by the Donor and must be one of the following:

- 1 Someone the donor has known personally over the last 2 years. This must be more than just a passing acquaintance.
- 2 A professional who has the skills and expertise to certify the LPA. 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:

- a A member of the donor or attorney's family
- b A business partner or paid employee of the donor or attorney
- c An attorney appointed in the LPA or any other LPA or Enduring Power of Attorney made by the donor
- d The owner, director, manager or an employee of a care home in which the donor lives or their family member.

### The certificate provider must confirm that the donor understands the LPA and is not being unduly influenced to enter into it

A certificate provider must confirm that the donor:

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

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The certificate provider certifies this when signing the LPA. The certificate provider can be called to justify their assessment to the court at a later date, if there is evidence that one of the above points may not have 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 before it takes effect**

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 is expected to take a number of weeks and the attorney 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 may need review it from time to time to make sure that the contents are still relevant to their circumstances. However, the donor cannot make changes to an LPA once it is completed. To make changes (e.g. change the scope of powers being given, appoint different attorneys) a new LPA would need to be completed.

A separate registration fee of £130 is payable for the Property and Financial Affairs LPA and the Health and Welfare

LPAs when each application for registration is made.

However, you may be eligible for a fee exemption if you receive any of the following means-tested benefits and you have not been awarded damages of more than £16,000, which were disregarded when determining your eligibility for the benefit:

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

#### **Conclusion**

An LPA enables someone to plan in advance the decisions and actions they might want taken on their behalf at a time when they do not have capacity. Using an LPA, people can choose someone they trust to make decisions about their property and affairs, on their behalf, at a time in the future when they might not have the capacity to make them for themselves, for example due to the onset of dementia in later life.

If someone has not made an LPA and loses the capacity to make decisions, then it may be necessary for an application to be made to the Court of Protection for an order appointing another person to make decisions on that person's behalf. This can be both costly and time consuming.

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

#### 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.

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