

Wills, Trusts and Probate Briefings

Making a lasting power of attorney

The basics

A power of attorney gives someone (your "attorney") the power to make decisions on your behalf.

If you want someone to be able to look after your affairs if you become incapable (for example, if you start suffering from dementia), you need to use a special kind of power of attorney. Prior to 1 October 2007, you could draw up an Enduring Power of Attorney. Since that date, it has no longer been possible to create a new Enduring Power of Attorney (though existing ones remain in effect). Instead, you need to make a Lasting Power of Attorney (LPA).

There are two separate kinds of LPA: a Property and Affairs LPA for property and finances, and a separate Personal Welfare LPA for decisions about your healthcare and personal welfare. (An Enduring Power of Attorney can only apply to property and finances.) If you want someone to be able to make both kinds of decisions, you will need to prepare two separate LPAs.

You can prepare an LPA whenever you like, provided you have the mental capacity to understand what you are doing. However, the LPA does not take effect until it has been registered with the Office of the Public Guardian. You might want to consider drawing up an LPA at the same time as dealing with other pieces of planning - for example, when you draw up or update your will.

Finances and property

You use a Property and Affairs LPA to give an attorney the power to make decisions such as:

- Dealing with your bank accounts and handling day-to-day finances.
- Claiming any benefits you are entitled to.
- Dealing with taxes.
- Making gifts that you used to make (eg birthday presents to relatives) on your behalf.

A Property and Affairs LPA cannot give your attorney the power to draw up or amend your will - you should do this yourself while you are capable.

Unless the LPA says otherwise, the attorney can use the powers granted by it as soon as the LPA has been registered - even if you are still capable of doing so yourself. For example, your attorney could act for you temporarily (eg if you go on holiday) or if you find it difficult (eg because of physical infirmity).

Healthcare and welfare

A Personal Welfare LPA appoints an attorney to make decisions about your healthcare and welfare. For example:

- Giving or refusing consent to particular medical treatments and other forms of healthcare. If you want your attorney to be able to take decisions about "life-sustaining" treatments, the LPA must explicitly say so.
- Deciding whether you should continue living at home or move into a residential care home. Note that a decision like this also involves a decision on financial issues - which must be taken by an attorney appointed under a Property and Affairs LPA.
- Making choices on routine aspects of personal welfare, such as diet and clothing.
- Arranging day-to-day activities.

The attorney can only make decisions for you if you lack the mental capacity to do so yourself. Depending on the circumstances, you may lack the capacity to make some complex decisions (such as whether to go into a nursing home) but still be able to make other day-to-day decisions (such as what clothes to wear).

Choosing your attorney

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Almost anyone over the age of 18, including your spouse, can be appointed as an attorney (though someone who is bankrupt cannot act as an attorney under a Property and Affairs LPA). Although many people appoint their spouse or an adult child, this may not be the best choice. Key factors in choosing the right attorney include:

- **Trustworthiness.** Although your attorney will be legally bound to act in your best interests, problems are not unknown. (Restricting the attorney's powers under the LPA can also be an important protection for you - see below.)
- **Competence.** For example, the attorney might have to make complicated judgements on what kind of care would be best for you or the best way to manage your finances.
- **Willingness.** Being an attorney can involve making difficult and time-consuming decisions. It is also unpaid (though reasonable expenses can be reclaimed) unless the attorney is a professional and the LPA allows for payment to be made.
- **Age.** An older individual is less likely to be able to act as your attorney in the future (for example, if the individual dies or becomes infirm).

An LPA can appoint more than one attorney. If so, the LPA can require the attorneys to act together (ie agreeing decisions unanimously), "together and independently" (ie any one of the attorneys can make a decision), or a mixture of the two (for example, requiring specified major decisions to be agreed unanimously). Requiring several attorneys to act together helps protect you against the risk that a single attorney will make a bad decision, but can also make it more difficult for your attorneys to make any decisions at all - even when they are in your best interests.

You can also have more than one LPA, with either the same or different attorneys under each LPA. For example, you could have one attorney who makes financial decisions (under a Property and Affairs LPA) and another responsible for healthcare issues (under a Personal Welfare LPA). You should bear in mind that your attorneys may need to cooperate on some decisions - for example, moving into residential care (a welfare decision) also involves paying for the care (a financial decision).

If you choose to have an LPA with a single attorney, or attorneys who must act together, the LPA could cease to be effective if one attorney can no longer act (eg if an attorney dies). This can also happen if your spouse is an attorney and you get divorced, as he or she will automatically cease being an attorney (unless the LPA specifies otherwise). However, the LPA can name one (or more) replacement attorneys to cover these possibilities.

Drawing up the LPA

The first step is to decide what decisions you want your attorney(s) to be able to take. You can choose to limit their powers - for example, by specifying that they cannot sell your house, or that they must refuse certain kinds of life-saving treatment. However, limiting your attorney's powers could cause problems in the future if your circumstances change, or if a decision needs to be made that is outside their powers. A more flexible alternative can be to include guidance in your LPA: this helps your attorney make decisions but is not binding if a different choice would be in your best interests.

You need to decide who you would like to act as your attorney, and check that they are willing to be appointed.

The LPA itself must be prepared on the appropriate form from the Office of the Public Guardian. An experienced adviser can help you ensure that you do not overlook any important issues and that you draft the LPA so that it has the desired effect. The form has three main sections:

- **The Donor's statement** - where you say who you want to be your attorneys and what powers you want them to have. You should also give the names of up to five "named persons" to be notified when the LPA is registered. These named people can help protect your interests (see below).
- **The Attorney's statement** - where the attorney confirms that they understand their legal responsibilities.
- **The Certificate Provider's statement** - where someone independent who has known you for two years, or an appropriate professional (eg a doctor or solicitor) confirms that you know what you are doing and are not acting under pressure. If you have not named anyone to be notified of registration, two certificates are needed.

Registering the LPA

Your attorneys cannot make decisions for you under the LPA until it has been registered with the Office of the Public Guardian (OPG). Either you or an attorney can apply to register the LPA whenever you like. A fee (currently £150) is payable. When the application is made, the OPG will notify the donor (if an attorney applies) or the attorneys (if the donor applies) and all the named persons. Any of you can object within six weeks, after which the LPA takes effect.

This system helps to protect you - for example, you (and your named persons) will know if an attorney applies to register your LPA and can object if you think something underhand is happening. However, the six week delay could cause problems if you suddenly lose capacity (eg in an accident). You may want to discuss the best options with your adviser: for example, you might prefer to register the LPA straight away, but specify in the LPA that your attorneys can only act for you once you lack capacity (this is automatically the case for a Personal Welfare LPA).