

A GUIDE TO LASTING POWERS OF ATTORNEY

What is a Lasting Power of Attorney?

Lasting Power of Attorneys were introduced by the Mental Capacity Act 2005 and replaced Enduring Powers of Attorney (“EPAs”) from 1st October 2007.

EPAs in existence before this date will still be valid.

A Lasting Power of Attorney is a document by which you (the Donor) give someone else (the Attorney) power to make decisions on your behalf.

There are two types of Lasting Power of Attorney – a Property & Financial Lasting Power of Attorney and a Personal Welfare Lasting Power of Attorney.

You can have either one or both types of Lasting Power of Attorney.

A Financial Lasting Power of Attorney gives the Attorney power to make financial decisions on your behalf, e.g. to sell your house or write cheques on your bank accounts.

A Personal Welfare Lasting Power of Attorney gives the Attorney power to make personal welfare decisions on your behalf, e.g. which care home you should go to, healthcare issues and even consent to medical treatment on your behalf.

Who should I appoint as my Attorney?

The Attorney is given a great deal of power over some of the most important decisions you have to make. Your choice of Attorney must therefore be made very carefully. You should appoint someone you can trust to act in your best interests. But that person should also have some understanding as to how the Power of Attorney works and what their duties and responsibilities are under the law.

Executing a Lasting Power of Attorney does not mean that you cannot act in respect of your own affairs while you are still mentally and physically able to do so.

How many Attorneys can I appoint?

You can appoint more than one Attorney, and you can appoint them to act both jointly, or jointly and individually, or jointly in some circumstances, and individually in others. In fact, it does make sense to have two Attorneys, so that if one dies or is unable to act, the other can carry on.

You can also appoint substitute Attorneys so that if say, one dies or is unable to act, the substitute can take over.

When does the Lasting Power of Attorney take effect?

Both types of Lasting Power of Attorney must be registered at the Office of the Public Guardian before they are effective and able to be used.

Once registered, a Personal Welfare Lasting Power of Attorney can only take effect in the event of you losing mental incapacity.

Once registered, a Financial Lasting Power of Attorney can take effect immediately or only in the event of mental incapacity – you have the choice. The Attorneys can then only use the document once a doctor has certified that you are incapable of managing your own affairs.

Do my Attorneys have to follow any guidelines when acting on my behalf?

There are 5 important principles enshrined in the Mental Capacity Act which your Attorneys must adhere to when making a decision on your behalf. These are:-

- 1. Presumption of Capacity** – you are presumed to have capacity unless it is proven otherwise. The test for capacity (or the lack of it) must be both time and decision specific.
- 2. Supported decision making** – you cannot be treated as lacking capacity to make a decision unless you have been given all practical assistance to help you make your own decision.
- 3. Making unwise decisions** – you have the right to make a decision based on your own values, beliefs, preferences and attitudes without being labelled as lacking the capacity to make your own decisions.
- 4. A person's best interests** – any decision made on your behalf must be in your best interests – this is an objective test.

5. Less restrictive options – before doing something on your behalf it will be necessary for your Attorney to consider whether there is a less restrictive way (in relation to your rights and freedoms) of doing so.

Your Attorneys also have a legal duty to have regard to the Mental Capacity Act “Code of Practice”. This provides guidance and information about how the Act works on a day to day basis. If your Attorneys depart from the Code when acting on your behalf they will have to explain their reasons for doing so should they ever be questioned by the court.

Can my Attorney act for me as soon as we have signed the Lasting Power of Attorney?

No – there are a number of formalities which must be complied with before the Lasting Power of Attorney is usable.

You must choose a certificate provider who certifies that in their opinion:-

- You understand what a Lasting Power of Attorney is
- You understand the contents of your Lasting Power of Attorney
- No fraud, pressure or undue influence has been applied to induce you to create the Lasting Power of Attorney
- There is nothing else that would prevent the Lasting Power of Attorney in question being created

There are only certain categories of people who can be certificate providers (solicitors, doctors, social workers etc) and there is usually a fee for this service but we include this in our fixed fee. Alternatively you can appoint someone who has known you for at least two years but this can be an onerous obligation since that person may have to give evidence in court at a later date if there were ever any challenge made to the capacity of the donor when the Lasting Power of Attorney was made.

The Lasting Power of Attorney must be registered with the Office of the Public Guardian (OPG)

There is a £110 court fee but people who receive certain benefits can have their fee reduced or waived completely.

At least one person of your choice must be notified of the registration.

If those notified of the registration do not raise any objections (or their objections are investigated and rejected) the court will register and stamp every page of the Lasting Power of Attorney and return it to you. This process will take approximately 4-6 weeks.

What if someone does not have the mental capacity to make a Lasting Power of Attorney?

In these circumstances a different application is required and this is made to the Court of Protection. The Court has jurisdiction to appoint a Deputy to make decisions on such a person's behalf - subject to the "best interests" provision mentioned above. The Deputyship Order that is made will explain what the Deputy's powers will be and this will depend on the needs of the person as decided by the Court.

This process can take a long time to complete and ultimately means that the Court of Protection is heavily involved in dealing with a person's affairs than if they had been able to make an Lasting Power of Attorney.

Further information regarding Lasting Powers of Attorney can be found on the website of the Office for the Public Guardian – <http://www.justice.gov.uk/about/opg>

If you would like to discuss arranging a Lasting Power of Attorney for you or a relative or you want a quotation for our fees then you are very welcome to telephone or arrange an appointment.

We provide you with a fixed fee which will include :-

- seeing you (at our office or at your home) to take your instructions and give you advice
- preparing the Power/s of Attorney
- Obtaining consent from your Attorney/s to their appointment
- Providing the certificate as your mental capacity
- Seeing you to sign and witness the Power/s of Attorney
- Providing the necessary notification to your nominated person/s
- Applying for registration to the Office of the Public Guardian,

We hope you have found this guide useful.

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