

Lasting Power of Attorney

From 1st October 2007, the Mental Capacity Act 2005 comes into force and the Enduring Power of Attorney (EPA) will be replaced by the Lasting Power of Attorney (LPA). No new EPAs can be made after that date, but all existing EPA documents will remain valid, whether registered or unregistered.

Under the new Lasting Power of Attorney, attorneys can be given powers relating to the donor's personal welfare as well as their property and financial affairs.

Creation of a Lasting Power of Attorney

Anyone aged 18 or over and has the capacity to understand what it means to create the document will be able to make a LPA. The power must:

- Meet the prescribed form
- Stipulate whether the power covers personal welfare or financial affairs or both
- Set out any restrictions or conditions that the donor wishes
- Must state that the attorney is given the authority to act when the donor no longer has capacity to make those decisions themselves

The powers under the LPA will become effective from the onset of mental incapacity. These powers can be extended to powers relating to property and financial affairs, but not personal welfare which are effective whilst the donor still has capacity.

The donor can appoint one or more attorneys. If more than one attorney is appointed, the donor must stipulate whether they are to act 'jointly' or 'jointly and severally'. If attorneys are appointed 'jointly', they must act together whilst attorneys appointed as 'jointly and severally' can act together and separately.

Once signed, the LPA must be sent to the Office of the Public Guardian for registration. It must be sent with a certificate from an authorized person, which confirms that the donor understood the purpose and scope of the LPA and that there was no fraud or pressure. If the requirements are met, the power will be formally registered.

Once registered, the attorney(s) have the authority to act within the terms of the LPA.

A donor can revoke the LPA at any time provided they have the capacity to do so.

Lack of Capacity and Inability to Make Decisions

The Act states that:

- A person's capacity may be only partial or temporary
- A person may lack capacity in respect of one matter but not others
- The inability to make a decision must be caused by an impairment or disturbance in the functioning of the brain
- When determining capacity, a decision should not be made according to a person's age, appearance or any unjustified assumptions on their condition or behaviour.

A person is unable to make their own decisions if they are unable to:

- Understand the information relevant to a decision
- Retain that information

- Use that information as part of the process of making the decision
- Or Communicate the decision

Attorneys

Attorneys must be aged 18 or over and not be bankrupt.

The LPA document can appoint alternative attorneys to replace an attorney who resigns, dies, becomes bankrupt or lacks capacity. An attorney is not allowed to appoint a substitute or successor.

An attorney cannot act on the dissolution or a marriage or civil partnership between the donor and donee (attorney).

Different attorneys can be appointed for property and affairs decisions and personal welfare decisions.

Property and Affairs Decisions

The powers are similar to those under an enduring power of attorney. They can cover property, bank account, savings and investments.

Personal Welfare Decisions

This can cover matters such as where the donor resides, provision of care and medical treatment for the donor. The authority is subject to 'advance conditions' concerning the carrying out or continuation of treatment and does not extend to refusing life-sustaining treatment unless stated in the LPA.

Differences between an EPA and LPA

- The EPA does not need to be registered until it is to be used but is valid from the initial date. The new LPA needs to be registered and paid for at outset even if it is never used.
- Unlike an EPA, the LPA can extend to personal welfare matters as well as property and financial affairs.
- An LPA dealing with property and financial matters can be used both before and after the Donor loses capacity. An EPA can only be used after the Donor loses capacity.
- However, a personal welfare LPA, which relates to health care decisions, can only be used once the Donor has lost capacity.

Summary

A Lasting Power of Attorney can cover financial and/or personal welfare matters. The power has to be registered whilst the donor is mentally capable of understanding their actions. An attorney can act when the donor is mentally incapable of making decisions relating to the matters covered by the power.

An attorney must always act in the best interests of the donor and any action must be the least restrictive of their basic rights and freedoms.

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