

Why make a Lasting Power of Attorney?

What happens if for any reason you cannot manage your own affairs?

The benefits of drawing up a will are widely recognised. In doing so, you make provision for the winding up of your affairs after death. This not only has advantages for those who will find themselves administering your estate, but also gives you peace of mind, knowing that you have selected as executors the individuals best suited for the role and have given them the necessary instructions (for further details see the leaflet 'Why make a will?').

There are also opportunities available to make provision in advance for the possibility of you becoming incapable of managing your own financial and welfare affairs during your lifetime. This becomes increasingly important as the risk of supervening mental incapacity grows through longevity, illness or accident.



An ordinary power of attorney is not an effective provision because it is automatically revoked by mental incapacity – just at the time when it is most needed. The Court of Protection has power to appoint people to manage your affairs, but the procedure can be costly and time-consuming. More importantly, you will have lost the right to choose who will have the responsibility for looking after your

affairs at a time when it is vital that they are dealt with efficiently and sympathetically.

Until 1 October 2007, it was possible to appoint someone to safeguard your interests and to act on your behalf in respect of your financial affairs by an Enduring Power of Attorney (EPA), which remains valid even after the individual granting the power (the donor) becomes mentally incapable. A simple procedure enables the attorney to register the EPA with the court and then to proceed as before with little further court involvement. EPAs made prior to 1 October 2007 will remain valid and be capable of registration for as long as the donor is alive. So, EPAs will be around for many years to come.

However, an EPA enabled attorney to deal with financial affairs only. In addition, it was felt that the relatively simple procedures could result in the system being abused. Therefore, a more complex and robust system was introduced to enable attorneys to be appointed not only to look after a person's financial affairs, but also to make decisions on their behalf relating to health and welfare issues. These types of document are known as Lasting Powers of Attorney (LPAs).

Lasting Powers of Attorney

LPAs were created by the Mental Capacity Act 2005 (MCA 2005), which covers England and Wales only. MCA 2005 provides a statutory framework to deal with situations where adults lack capacity to make decisions for themselves or who have capacity, but want to make preparations for a time when they may lack capacity in the future.

A Code of Practice supports the MCA 2005 and provides guidance and information to all those working under the legislation. Certain categories of people are obliged to have regard to the Code of Practice, including attorneys and those acting in a professional capacity, such as STEP members.

At the time the power is given, the donor must be capable of understanding its nature and effect for it to be valid. It will be necessary to make separate LPAs, one dealing with 'property and affairs' and the other to cover 'personal welfare' decisions.



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Property and affairs LPA

These are designed for you to appoint attorneys to make a range of decisions including the buying and selling of your house and other assets, dealing with your tax affairs, operating bank and building society accounts and claiming benefits on your behalf. These can be used at your direction while mentally capable and also by the Attorneys if you lack capacity to make these decisions.

Personal welfare LPA

Attorneys appointed under this document can make decisions relating to your living accommodation and care, consenting to or refusing medical treatment on your behalf, and on day-to-day matters such as diet and dress. This can only be used however, if you have lost the capacity to make decisions for yourself.

Provisions common to both forms

Although there are two separate prescribed forms, both contain certain common provisions including statements to be completed by you setting out your details, the attorneys to be appointed and how they are to act, and details of any persons to be notified on the application for registration.

The attorneys must state that they understand their duties and obligations.

In addition, the legislation has introduced a person known as 'the certificate provider', either some one who knows you well or a professional person. The certificate provider must sign the form to confirm that they have discussed the contents of the LPA(s) with you

on your own (if possible) and that they can state that you understand the purpose and scope of the LPA, no undue pressure or fraud is involved in the decision to make an LPA and there are no other factors preventing the creation of the LPA. Often this person is your solicitor.

Registration

Both types of LPA must be registered before they can be used by your attorneys and both can be registered while you still have mental capacity (unless it specifies to the contrary). Registration can be by you or your attorney. As stated previously, a personal welfare LPA can only be used when you no longer have the mental capacity to make particular decisions affecting your health and personal welfare.



Appointment of attorneys

Although LPAs are detailed, they need to maintain flexibility so that:

- you may appoint more than one attorney to act together (jointly), together and independently (jointly and severally), or jointly in respect of some matters and jointly and severally in respect of others. If no selection is made then they must act jointly. If attorneys have to act jointly then the LPA fails if any of the attorneys die or lose capacity (and also in some other circumstances) unless

a substitute attorney is appointed. If they can act jointly and severally then the LPA will continue even if an attorney should die, etc.

- a replacement attorney may be nominated.
- you may grant general or limited authority. If general power is granted then the attorneys may manage all your property and affairs or make all personal welfare decisions. If any restrictions or conditions are to apply then they must be clearly stated.
- where a STEP member or other professional is appointed as an attorney it is recommended that their current terms and conditions of business (including fees to be charged) are discussed with and approved by you.

The attorney's powers and duties

- The attorney's powers may be restricted and the LPA can specify that it can only come into force once you no longer have mental capacity (this applies in any case to personal welfare LPAs).
- The attorneys only have limited powers to make gifts of your money or property, although the court may authorise additional giving.
- When making investment decisions, the attorney will need to take appropriate professional advice.
- An attorney may refuse their appointment by completing a specified form, which will need to be sent to you and copied to the other attorneys and the court.
- Attorneys must observe the Code of Practice and STEP members and other professionals who are being paid for their services are required to display a higher standard of care and skill than a non-professional attorney.

The Court's role

Both the Court of Protection and the Office of the Public Guardian (OPG) have roles to play – the Court of Protection can determine issues such as the validity of LPAs, mental capacity (or the lack of it) and the registration and revocation of LPAs.

However the Court will expect attorneys to seek advice from STEP members or other professionals before involving the Court. The Court would need to be involved if it is necessary to appoint a deputy (formerly known as a receiver) where it is not possible to create an LPA, or a previous EPA or LPA or has been revoked.

The registration of LPAs is dealt with by the OPG, which will maintain a register of all LPAs. Basic information about an LPA can be made available to anyone who makes a search of the register.

The OPG should also be contacted if it is suspected that abuse is taking place or the attorneys are not acting in the donor's best interests.



Your legal advisor's role

As can be seen, your legal advisor will be involved in the initial process of advising you about LPAs and they may also act as your certificate provider. Your legal advisor will also be able to advise on the registration process. It may also be appropriate in some cases for your legal advisor to be appointed as an attorney, often with a family member or a close friend.

The above summary applies to English and Welsh Lasting Powers of Attorney made on or after 1 October 2007. Different rules apply in Scotland and Northern Ireland.