

BURNETTS
S O L I C I T O R S

Guide to Lasting Powers of Attorney



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The Lasting Power of Attorney (LPA) was introduced by the Mental Capacity Act 2005 ('the Act') and came into effect on the 1st October 2007. It replaces the Enduring Power of Attorney (EPA) although EPAs made prior to 1st October 2007 will continue to be valid.

You may make two types of LPA – the Property and Affairs LPA and the Welfare LPA. As the names suggest, the Property and Affairs LPA deals with financial matters whereas the Welfare LPA covers personal and healthcare decisions.

Choice of Attorney

The Donor (the person making the LPA) should appoint an Attorney they trust and in whom they have complete confidence. The Attorney must be over 18 and must not be an undischarged or interim bankrupt person. The Donor can appoint more than one Attorney to act either together, independently or together in respect of some matters and independently in respect of others. If the LPA is silent on how two or more attorneys are to act, they must act together. Under LPAs it is possible for the Donor to appoint a replacement Attorney.

Role of Attorney

An Attorney's role is to make all the decisions (subject to any restrictions or conditions contained in the LPA) that the Donor would have made himself and in reaching these decisions, the Attorney must comply with the Mental Capacity Act 2005 and the Code of Practice.

Under a Property and Affairs LPA, the Attorney will commonly be able to pay bills and expenses, collect income and benefits, manage bank and building society accounts, buy and sell property, complete and submit tax returns and make gifts within the statutory limits.

Under a Welfare LPA, the Attorney is likely to be given power to consent or refuse particular types of healthcare, including medical treatment and may even be able to consent to or refuse life-sustaining treatment on behalf of the Donor. The Attorney may also be able to decide whether the Donor remains in his own home or moves into residential or nursing care and also more day-to-day decisions such as the Donor's diet, dress or daily routine. LPAs can be restricted or contain conditions limiting the Attorney's authority. The Donor can also, if he wishes, include guidance for the Attorney in the LPA. This guidance is not legally binding but could be invaluable to the Attorney.

The Certificate Provider

Not only must LPAs be signed by the Donor and Attorney(s) and witnessed, a certificate must also be given by a third party, the 'Certificate Provider'.

A Certificate Provider is an independent person chosen by the Donor to complete a certificate contained in the LPA to confirm that in his or her opinion the Donor:

- understands the purpose and content of the LPA;
- understands the extent of the powers he is giving to the Attorney;
- is not being pressurised, tricked or placed under duress by a third party to make the LPA; and
- that there is nothing else that would prevent the LPA being created.

The Certificate is a vital part of the form and without it the LPA is invalid and cannot be registered.

The Certificate Provider can either be someone who knows the Donor personally and has done so for at least 2 years or a person with the relevant professional skills and expertise to certify the LPA, for example a solicitor, barrister, doctor or social worker.

Registering the LPA

An LPA, whether it is a Property and Affairs LPA or a Welfare LPA, must be registered with the Office of the Public Guardian (OPG) before it can be used. The registration fee is £150.00 and the registration process is likely to take between 6 and 8 weeks.

Once registered, a Property and Affairs LPA can be used immediately but a Welfare LPA can only be used once it is registered *and* the Donor has lost his mental capacity to make decisions.

When making the LPA, the Donor can nominate up to 5 people to be notified of the application to register. Those notified will have an opportunity to object to registration if they have concerns, for example, regarding the integrity of the Attorney. It is not a requirement that persons are nominated but it is advisable.

A registered LPA will be added to the OPG database and searches can be made by third parties to see whether an LPA is in existence.

Revoking an LPA

An LPA can be revoked by the Donor at any time provided he has mental capacity. The Attorney can also disclaim the appointment. There are also circumstances when an LPA *will* be revoked. These are:-

- When the sole Attorney dies or is made bankrupt. If two or more Attorneys are appointed, the appointment of the surviving or non-bankrupt Attorney will continue;
- When the Donor dies;
- When the Donor is made bankrupt (NOTE: this rule does not apply to a Welfare LPA);

- When the Attorney is a spouse or civil partner and the marriage ends in divorce or the civil partnership is dissolved. The LPA may, however, specify that the appointment continues notwithstanding such divorce or dissolution.

If you would like further information about Lasting Powers of Attorney, please contact Martyn Wrightson who is the Head of the Probate Department at Burnetts

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This guide is intended solely as a summary of the subject for general guidance only. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be sought to take into account the application of the law to your particular circumstances. For further information please contact a member of our Probate Team