

“Lasting Powers of Attorney”

v1.0 - 09.2012



AW Financial Management LLP

Financial Planning
Independent Financial Advice
Investment & Wealth Management

River House, 1 Maidstone Road, Sidcup, Kent, DA14 5RH
Tel: 01322 669 059 www.awfm.co.uk

In October 2007, changes to legislation brought in a fundamental variance in the way powers of attorney are created. A “Lasting Power of Attorney” (LPA) has now replaced its predecessor, the “Enduring Power of Attorney” (EPA). The main difference between the two documents is that, unlike an EPA, the new LPA document can extend to personal welfare matters as well as property and affairs.

What is a Power of Attorney...

A power of attorney is a legal document whereby one person gives another person or persons (the “attorney”) the power to act on his/her behalf with regard to that person’s property and financial affairs. The potential benefit of having a Power of Attorney in place is that you can then be satisfied that your finances and personal life will be dealt with in a satisfactory manner if you yourself are unable to look after your affairs by making the necessary day to day arrangements.

Ordinary Power of Attorney

This is generally created for a specific period of time, for example if the Donor is going abroad or is unable to act for some reason and wishes someone else to have the authority to act on his/her behalf. This will usually end at the expiry of the specified period or upon the formal request of the Donor. It is automatically revoked in the event the Donor loses mental capacity. This form of document does not need to be registered.

Enduring Power of Attorney

If an EPA is already in place, then it remains valid whether or not it has been registered at the Court of Protection, provided that both the donor of the Power and the attorney/s signed the document prior to 1 October 2007.

An EPA can be used while you still have mental capacity, provided you consent to its use. If you start to lose the mental capacity to manage your finances, your attorney/s are under a duty to register your EPA with the Office of the Public Guardian (OPG). While the registration is being processed, your attorney/s can use your finances for essentials on your behalf such as paying for food or payment of regular bills. However, they will not be able to deal with larger transactions such as the sale of your house until the EPA has been registered.

Lasting Power of Attorney

This is a very different type of document and is designed to permit a person (the “attorney”) to make and take decisions on their behalf if the subsequently lose mental capacity. This is often used to give a family member permission to make decisions on an elderly relative’s behalf.

Cont.....





There are 2 types of Lasting Power of Attorney that are available:

■ **Property & Affairs Lasting Power of Attorney**

This document will permit the chosen person (attorney) to make decisions about how to spend your money and the way your property and affairs are managed, so this might mean decisions about paying bills or selling your home etc. Once the document has been registered (unless you have put a restriction on it) then this type of LPA can be used by the attorney immediately.

■ **Personal Welfare Lasting Power of Attorney**

This document will permit the chosen person to make decisions on your behalf, relating to care of your personal health and welfare. This includes decisions to give/refuse consent to medical treatment on your behalf or about where you live. These decisions can only be actioned when the LPA has been registered and where you lack the capacity to make the necessary decision for yourself.

There are key principles which lay behind a LPA for people protection and these are detailed in the Mental Capacity Act 2005. Click here to access the [Code of Practice](#)

Implications of not having a Lasting Power of Attorney in place...

If you have not already drawn up a LPA and you lose your mental capacity, then an application has to be made to the Court of Protection. This process can be time consuming and is likely to involve some expense. It also means that you will have no say in deciding who will look after your affairs as the Court will decide.

Granting a Power of Attorney...

Anyone over the age of 18 with mental capacity can grant a Power of Attorney. You can only grant a Power of Attorney to do things that you already have the right and capacity to do yourself.

You can make a Lasting Power of Attorney if you already have a diagnosis of dementia but you must be able to show that you comprehend/understand the effect of what you are signing. If there is any doubt about your capacity to sign, then we suggest that it would be prudent to get a doctors certificate prior to proceeding.

If you wish, you can appoint joint attorneys. Sometimes in families this might involve the spouse of the Donor together with a son/daughter. Joint attorneys must always act together.

An alternative solution could be appointing joint and several attorneys and this will permit them to act jointly or individually. In this way, if anything happens to one of the attorney's (say death or incapacity) then the other can continue and the Power of Attorney will remain in place.

You can also revoke an LPA at any time whilst you still have mental capacity.

What sort of activities might an attorney action for you...

- Settling bills by signing cheques
- Setting up Standing Order and Direct Debit payments
- Withdrawing funds from Bank/Building Society deposits
- Buying or selling investments
- Using assets to finance your residential or nursing care

The attorney may also have limited powers to use your assets to assist anyone for whom you may have made provision - perhaps small gifts for birthdays or special occasions, or donations to charities or perhaps a tithe to your church etc.





What an attorney mustn't do...

When an individual takes on responsibility as an attorney, then they are subject to the duties of an attorney. The role carries with it much responsibility and so should not be entered into lightly by any of the parties concerned.

An attorney must not take advantage of your position to gain any benefit for themselves. They are required to keep your finances and transactions separate from their own. They should also keep account of all dealings they effect on your behalf.

When might you consider setting up a Power of Attorney...

We would recommend you consider setting up a Lasting Power of Attorney while you are mentally capable. A good time to consider this issue is also whenever you review your Will documents.

An LPA is a great 'safety measure' in case of sudden ill health or an accident or is particularly useful to consider as you near a time when you might need greater care.

How to make an LPA

There are separate forms for making a "Property and Affairs" LPA and a "Personal Welfare" LPA. Copies of the blank forms and explanatory leaflets can be obtained from the Office of the Public Guardian (OPG).

Before the LPA is valid, you must have a certificate of capacity drawn up by an independent third party called a Certificate Provider. The Certificate Provider could be your solicitor, your doctor or another independent person that you have known personally for at least two years. A family member, attorney or relative of your attorney cannot be a Certificate Provider. The prescribed form must be completed and signed in the presence of a witness and each attorney must sign to confirm they have read the explanatory information and understand the duties imposed upon them.

In addition, you should list one or more named persons who you wish to be notified of any application to register the LPA. If none are listed then an additional certificate of capacity must be provided.

The form must be registered at the OPG before it can be used. There is a fee for registering each LPA, so if you are registering a property and affairs LPA and a personal welfare LPA, you will have to pay twice. You may be exempt from having to pay the fee if you cannot afford it. The Office of the Public Guardian can advise you.

Do I need a solicitor?

You do not have to seek legal advice. However, an LPA is a powerful and important legal document and you may wish to seek advice from a legal adviser with experience of preparing them.

Discussing the options and making the right choice for your specific circumstances can be difficult. We would therefore recommend that you instruct a solicitor to draw up the appropriate document(s) for you. In this way you can ensure that all the necessary elements have been covered for your situation. There are likely to be costs involved.

At AWFM, we work with a number of solicitors and if you wish, we can effect an appropriate introduction for you - simply telephone us in the first instance.





Other useful information...

■ **What is the Office of the Public Guardian?**

The Office of the Public Guardian (OPG) is headed by the Public Guardian who is responsible for the registration of LPAs, including dealing with objections and maintaining the register of LPAs.

In addition, the OPG will deal with any issues (including complaints) about the way in which an attorney is exercising their powers.

The Court of Protection has wide powers, the same as the High Court with jurisdiction in England and Wales. It can:

- decide whether a person has capacity to make particular decisions for themselves
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions;
- decide whether an LPA or EPA is valid
- remove attorneys who fail to carry out their duties
- hear cases concerning objections to register LPA.

■ **Additional Resources...**

■ There is more information on LPAs on the [direct.gov.uk](https://www.direct.gov.uk) website.

■ There are a range of forms and guidance which are available from the [Office of the Public Guardian](https://www.opg.gov.uk) website.

The contents of this article are intended for general information purposes only and shall not be deemed to be, or constitute legal advice. We recommend you take professional legal advice in connection with Powers of Attorney and cannot accept responsibility for any loss as a result of acts or omissions taken in respect of this article.

