

LASTING POWER OF ATTORNEY

WHAT IS A LASTING POWER OF ATTORNEY

From the 1st October 2007, you are able to make a new type of power of attorney, called a 'lasting power of attorney' (LPA). A power of attorney is a legal document where a person gives another person or persons (the attorney) authority to make certain decisions on his or her behalf.

Types of LPAs

There are two types of LPAs:

- A property and affairs LPA, which allows your attorney authority to deal with your property and finances, as you specify
- A welfare LPA, which allows your attorney to make welfare and health care decisions on your behalf, only when you lack mental capacity to do so yourself. This could also extend, if you wish, to giving or refusing consent to the continuation of life sustaining treatment

WHEN CAN THE ATTORNEY ACT

The attorney will only be able to act when the LPA has been signed by you and your attorney, certified by a person that you understand the nature and scope of the LPA and have not been unduly pressured into making the power. The certificate will also need to confirm there has not been any fraud or another reason why you cannot make the power. It must then be registered with the Office of Public Guardian before it can be used. The financial LPA can be used both when you have capacity to act, as well as if you lack mental capacity to make a financial decision. The welfare power can only be used if you lack mental capacity to make a welfare or medical decision.

WHO DO I APPOINT

As with any power of attorney, it is an important document and you should take care whom you appoint as they should be trustworthy and have appropriate skills to make the proposed decisions. If you appoint more than one attorney, you can appoint them to always act together (jointly) or together or separately (jointly and severally). You may even appoint them to act jointly for some things and jointly and severally for others, although this should only be done with advice, as it may cause problems when using the power.

You may also choose to appoint a successor to your attorney, in case they die or otherwise cannot act for you.

THE CERTIFICATE PROVIDER

As an important safeguard against abuse, one of the requirements to validly make a lasting power of attorney is for the document to be signed by an independent person who can confirm that the person ('the donor') making the power:

- Understands its purpose and the scope of the authority it gives to the attorney;
 - No fraud or undue pressure is being used to induce the person to make the power; and
 - There is nothing else that would prevent the lasting power of attorney from being created.
- The choice of a suitable certificate provider is a personal and important decision.

There are two types of certificate provider:

- A *knowledge-based certificate provider* who is someone who knows the person making the power personally for the previous two years
or
- A *skill-based certificate provider* who has relevant professional skills and expertise.

A skills based certificate provider must be one of the following:

- A registered health care professional, such as a General Practitioner
 - A registered social worker
 - A barrister, solicitor or advocate
 - An Independent Mental Capacity Advocate
- Someone who considers they have the relevant professional skills and expertise to be a certificate provider

A certificate provider cannot be:

- Under 18 years of age
- A member of the either the donor or his attorney's family
- A business partner or paid employee of the donor or attorney(s)
- An attorney appointed in the proposed or another lasting power of attorney or any enduring Power of attorney made by the donor.
The owner, director, manager or an employee of a care home in which the donor lives (including care homes with nursing homes) or their family member or partner

The advantage of having a knowledge based certificate provider is that they are unlikely to charge you for this. However, if challenged, they could be called to the Court of Protection to justify their opinion. They would need to show to the Court that they know how to assess capacity under the Mental Capacity Act 2005. If the challenge were successful the LPA would not be valid. A skills based certificate provider would usually charge, but would be expected to have higher skills and expertise than the knowledge based adviser.

If you feel that this area of law is applicable to your situation please ring any of the following who would be happy to assist

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- *Being an Executor*
- *Wills & People with Business Assets*
- *Provision for People Lacking Mental Capacity*
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