



DAVIDSON MAHON  
S O L I C I T O R S  
ESTATE PLANNING ■ FAMILY LAW

*People first, lawyers second*

## LASTING POWERS OF ATTORNEY (LPAs)

How would you and your family cope if you became unwell or were involved in an accident which meant you couldn't make your own decisions anymore?

We all hope this will never be the case, but it can happen to anyone at any age. If our mental faculties are affected, we can be extremely vulnerable. This difficult and stressful situation also impacts on those closest to you if you are not prepared. All of this at a

time when things are likely to be quite difficult enough.

A family member or close companion has no **automatic** right to make decisions for you. For example, banks, pension companies and utility companies can't deal with your 'next of kin' without legal authority. Health care professionals can become your 'default decision maker' if you do not have legally appointed and authorised people to represent you and make these types of decisions on your behalf.

An LPA is the only way to legally authorise people you choose and trust to manage your affairs and make decisions on your behalf if you can't. The person or people you choose are called your 'Attorneys'.

You must understand the authority you are giving under an LPA and be able to make informed decisions on who and how to appoint your attorneys when you make your LPA. As such, it may not be possible to make an LPA if your condition means you can't understand the LPA sufficiently. Therefore, everyone over the age of 18 should have LPA(s).

If you can't make an LPA because of your health, an application must be made to the Court of Protection for someone to be authorised and given the power to make decisions on your behalf. If successful, this applicant would become your 'Deputy'.

Having a Deputy appointed by the Court is time consuming and expensive. Whilst the application is being made you may have debts accruing, property that can't be sold and bills that can't be paid. Perhaps most worrying of all; you do not choose who makes this application, even someone you owe money to could apply.

Whilst Health and Welfare Deputy applications are on the increase, the Court is often reluctant to agree to a Welfare Deputy being appointed and often refuses these applications. The fact they take so much time in any event is likely to impact greatly on your care.

There are two kinds of LPAs:

### **PROPERTY & FINANCIAL AFFAIRS**

This allows your Attorney(s) to deal with your finances and any property you own. It can only be used after it has been registered with the Office of the Public Guardian ('OPG'). Once registered your Attorney can deal with matters on your behalf whether or not you have lost capacity. This means you have the option of asking your

Attorney(s) for help even if you are still able to deal with matters yourself. This can be useful if, for example, there is an aspect of your finances you would like your Attorney's help with or you are physically unable to deal with these matters yourself. If you have lost your capacity, then your chosen Attorney(s) can ensure your finances are dealt with appropriately on your behalf and in your best interests.

## HEALTH AND WELFARE

This enables your Attorney(s) to deal with medical decisions and your general wellbeing. Like the financial LPA it can only be used if it is registered with the OPG. However, it is different from the financial LPA as it can only be used **if you have lost the ability to make these decisions yourself**. All aspects of your personal welfare are covered by this type of LPA and your Attorney must always act in your best interests. For example, a Welfare Attorney could make decisions for you about:

- day to day care such as diet and dress
- where you live
- giving or refusing medical treatment

Even if you have a Welfare LPA your Attorney must always consider if you can make your own decision about each aspect of your care and treatment.

## Commonly Asked Questions

### 1. Can I limit the things I want my Attorney to do?

Yes. You can give your Attorney wide ranging powers or limit them as you wish. For example, you may want to restrict your financial LPA so it can only be used if you become mentally incapable of managing your finances. However, we advise you to consider this very carefully as it can make things more difficult for your attorneys in the future. Under a Welfare LPA, you may want to restrict it so your Attorney could not refuse life sustaining treatment or could only make welfare decisions and not medical decisions (or vice versa).

### 2. If something happens to my Attorney can I appoint a 'back up'?

Yes. LPAs allow you to appoint replacement Attorney(s) who act on your behalf if your first choice cannot act for some reason (for example, the original attorney becomes unwell or dies). We can advise you on how best to appoint replacements as it is very important to correctly and clearly set out when and how the replacement attorneys are to act. Otherwise, there can be problems in the future if the LPA is not drafted correctly.

### 3. What if I fall out with my Attorney?

If your relationship with your Attorney changes, provided you are still able to make your own decisions, you can revoke that appointment or the LPA as a whole. Unfortunately, you can't amend an LPA, for example, by revoking the appointment of one attorney and appointing someone in their place. This would involve making a new LPA. We strongly urge you to seek urgent legal advice if you are no longer happy with your choice of attorney for whatever reason.

#### 4. I already have an Enduring Power of Attorney – do I still need an LPA?

If you have an Enduring Power of Attorney (LPAs replaced Enduring Powers of Attorney on 30th September 2007) you may want to review it. Enduring Powers of Attorney made before 30th September 2007 are still valid, but they only relate to your property and finances. If you want to authorise an Attorney to deal with your health and welfare you will need a Health and Welfare LPA. Furthermore, if you want or need to change your Attorney(s) you would need to have a new LPA.

#### 5. Can I have more than one Attorney?

Yes. You can have as many Attorneys as you wish but you will need to think about how you want to appoint them. You will need to decide whether you want your Attorneys to act:

- Jointly so that *all* must sign on your behalf; or
- Jointly and Severally so that a single attorney can make a decision or effect a transaction without having to involve the other attorneys; or
- Jointly in some matters and Jointly and Severally in others.

Particularly with the last choice, great care should be taken in the drafting of the LPA so it is clear, accepted by the OPG and workable in practise.

#### 6. Why should I have LPA(s) when I may never lose my capacity?

- You are in control and proactively plan for this eventuality
- You decide who will act for you
- You avoid the expense and stress of a lengthy application to Court
- If you never lose capacity your LPA will sit and gather dust but at least you were prepared!

#### 7. Why do I need a Health and Welfare LPA when I have family / next of kin?

- You retain control (post losing your capacity) through your carefully chosen attorneys.
- Your attorneys are likely to know you better than the Health Care Professionals. Your attorneys can therefore influence decisions which are more likely to be in line with what you would have decided for yourself.
- You avoid the Health Care Professionals / the State being your 'default decision maker'. In a time when austerity is a major concern there is a danger of decisions being made on an 'easiest and cheapest' basis. Your attorneys can ensure your care is the primary concern and represent you on a legally authorised basis which can't be excluded or ignored by the various professionals involved in your care.
- It is imperative to have welfare attorneys in place in the event there is a disagreement (between the family and the Health Care professionals) about what is in your best interests. The Court of Protection is increasingly being asked to pass judgement on welfare decisions for mentally incapacitated people who do not have attorneys appointed.
- Increasingly Health Professionals, Care Homes and Local Authorities are asking for Health and Welfare LPA(s) to prove a family member or friend's legal authority to be involved in the decision-making process.

- In certain cases, by having an attorney in place, there is no possibility that decisions (such as being moved without your consent) can be made without involving and consulting your Attorney.
- Whilst health professionals will consult family and relevant individuals, by having a Welfare Attorney in place, you make sure the person you have chosen as your attorney has to be consulted and has the chance to fight your corner.

## 8. Do I need legal advice to prepare LPA(s) or can I do it myself?

Have a look at the OPG website first to see if you feel comfortable preparing and submitting the documents online:

<https://www.lastingpowerofattorney.service.gov.uk/home>.

This is likely to be suitable for you if you want something simple and are confident about the decisions you are making and filling out the forms. However, it is important to remember that an LPA is a serious and powerful document that gives very strong permissions over your life and wellbeing, therefore it is advisable that you seek legal help and advice from a solicitor to reduce the risk of abuse of the power given. In addition, there is a danger you may make errors of judgment in drafting the LPA which can make life unintentionally difficult for your attorneys in the future or cause the OPG to reject it. When we help you with your LPA we advise on a wide range of matters such as:

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- Who should be your Attorneys and how many to have. If more than one (usually advisable) how are they to act, particularly if you are appointing replacement attorneys.
- Acting as your Certificate Provider (a requirement of an LPA) which involves assessing and confirming that you understand the significance and purpose of what you are agreeing to and that nobody is forcing you into it.
- Advising on additional matters not automatically covered in the LPA forms such as Trusteeships, Jointly Owned Properties, Access to Testamentary documents and Investment Powers.
- Suggesting additional safeguards such as providing financial statements to third parties and advising on how best to deal with any issues with families or complex assets.
- Alerting you to any unknown aspect that may cause difficulty or affect the validity of the document in the future. Suppose you want to put restrictions on what the Attorney can do. This can be quite complicated to draft correctly, and the risk is (if drafted incorrectly) the OPG may sever the restriction or in extreme cases render the LPA invalid.
- Undertaking all the Practical Aspects of the Process on your behalf including:
  - Initially advising you in a face to face meeting (often in your own home)
  - Preparing the LPA documents
  - Taking you through them in a further face to face meeting.
  - Witnessing your signature to the documents
  - Acting as your Certificate Provider
  - Obtaining your attorneys signatures
  - Submitting the documents to the OPG for registration
  - Receiving the registered documents and issuing copies to you.
  - Storing the originals in our safe
  - Filing a copy of your Welfare LPA with your GP

- Dealing with any issues raised by the OPG.

As specialists, we tailor our advice and recommendations to your circumstances. We advise how *your particular LPA(s)* should operate in practise and draft it to successfully implement your wishes and expectations. This way, you have the reassurance that the entire process is carried out legally and effectively with no nasty surprises in the future and at a time when you may not be able to change or rectify the problem.

***For information and advice relevant to your circumstances please contact our friendly team on 01926 357555***