



# Lasting Power of Attorney

Your simple guide to help ensure peace of mind for you and your relatives



# Getting the right advice

**As you get older, you naturally want to make life easier for yourself and your relatives. We can assist in a variety of ways to ensure your peace of mind:**

By setting up a lasting power of attorney, you can appoint someone to assist you with your financial affairs, your health and welfare, or to sign documents on your behalf if you are going to be out of the country.

If you lose mental capacity and there is no lasting power of attorney or valid enduring power of attorney in place we offer sympathetic advice and assistance with the legal steps you need to take to appoint someone to act as deputy to deal with these matters.



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This leaflet is not intended to be comprehensive nor to provide any specific legal advice and should not be acted upon or relied upon as doing so. For detailed advice about your own legal position before entering into a Lasting Power of Attorney, please contact your usual Private Client adviser at Thackray Williams LLP.

# Lasting Power of Attorney

A Lasting Power of Attorney (“LPA”) is a legal document that allows you to choose someone to make decisions about your property and financial affairs or to make decisions about your health and welfare. There are two types of LPA: a Property and Financial Affairs LPA and a Health and Welfare LPA.

No-one automatically has the right to deal with your property and financial affairs or to make decisions about your health and welfare (for example because they are your spouse or child) Making an LPA is the main way which you can decide who should deal with these matters if at any time you become unable to manage them yourself.

The person you choose in this way is known as your “Attorney”. You can appoint more than one person to act. Your Attorney (or Attorneys) can use an LPA to manage your property and financial affairs straight away if that is what you want. Alternatively, you can state that the LPA must only be used if you become unable to manage your affairs due to the onset of mental incapacity. Health and Welfare LPAs are different: they can only be used if you have lost mental capacity.

LPAs are different from ordinary Powers of Attorney. Ordinary powers are not valid once you become mentally incapable of managing your affairs. Nor can they be used for health and welfare matters. LPAs can however be used in these situations.

An LPA is not just a document for the elderly: younger people can sometimes lose the ability to manage their affairs through illness or accident. Once the LPA has been signed you cannot change the contents of it. If you want to amend it you will need to cancel it and start again. You can cancel an LPA at any time or make a new one if you wish, as long as you have the mental capacity to do so.

## **Certificate of Capacity**

Your LPA will only be valid if you have a Certificate of Capacity drawn up by an independent third party. This person is called a Certificate Provider. The Certificate Provider can be your solicitor, your doctor or another suitably qualified person. It can also be an independent person whom you have known personally for at least two years. You must get the Certificate Provider to sign the LPA before your Attorneys sign the document. A family member, business partner or employee of yours or any of your Attorneys cannot be a Certificate Provider. If your Certificate Provider has any concerns about your understanding of the LPA or feels you have been pressurised into making it, they can

# Lasting Power of Attorney

## Registration with the OPG

Before your Attorneys can use either type of LPA, it must be registered with the OPG. The registration can be carried out by you or by your Attorneys.

Whenever the OPG receives a request for registration, it will inform you and your Attorneys of that fact. You may have chosen to notify certain people when your LPA is registered, although this is not a requirement. This is a safeguard for you so that these people can object to the registration if they feel that it is not necessary. For example if they feel that you have been put under pressure to make the LPA, or because an Attorney is unsuitable.

Once the LPA has been registered with the OPG it will be entered onto their LPA Register. Anyone can search the register on payment of a fee and obtain outline details of your LPA. People with an interest in your affairs (such as healthcare professionals) can search the register to find out about your LPA in greater detail. They must explain to the OPG why it is necessary and show that there is good reason for the disclosure and that it is in your best interests.

## Commencement of the LPA

A Property and Financial Affairs LPA can be used even though you still have the capacity to manage your own affairs. Alternatively you may wish to restrict it so that it can only be used if you lose that capacity. A Health and Welfare LPA can only be used if you have become mentally incapable of making decisions about your own health and welfare.

Once the LPA has been signed you cannot change the contents of it. If you want to amend it you will need to cancel it and start again. You can cancel an LPA at any time, or make a new one if you wish, as long as you have the mental capacity to do so.

# Property and Financial Affairs LPA

A Property and Financial Affairs LPA can be used even though you still have the capacity to manage your own affairs. Alternatively you may wish to restrict it so that it can only be used if you lose that capacity. A Health and Welfare LPA can only be used if you have become mentally incapable of making decisions about your own health and welfare.

The most common form of appointment gives an Attorney “general authority”. That means that they can do anything in relation to your property and financial affairs that you can. For example:

- Selling your home or other property
- Managing your savings and investments#
- Selling stocks and shares
- Writing cheques to pay bills
- Operating your bank account(s)
- Claiming and receiving any benefits
- Dealing with your Tax Returns
- Making small gifts such as Christmas or birthday gifts.

You can restrict your Attorneys’ powers so that he or she can only act in certain circumstances, or in relation to some of your assets. We can advise if any of these restrictions would be appropriate for you.

You can also provide your Attorney with guidance on your wishes and feelings on particular matters. This will not be legally binding on your Attorney but your attorneys would be required to take note of this guidance as part of acting in your best interests. There are certain things that your Attorney cannot do for you unless your Attorney has the agreement of the Court:

- An Attorney cannot sign a Will or an Advance Decision (Living Will) on your behalf.
- An Attorney cannot make large gifts, for example for tax planning reasons
- An Attorney cannot make decisions about your health and welfare unless they have been appointed under a Health and Welfare LPA.

By signing a Property and Financial Affairs LPA, you are giving your Attorney full power over your home, your money and any other property. If you want your Attorney to handle these things for you if you become mentally incapable, you are not likely to be in a position to check what they are doing. You should therefore choose your Attorney carefully. You should consider how skilled they are at handling money and investment matters, and whether you think they are trustworthy enough to look after your own affairs if you are not able to do so. This may include deciding how your money should be used to look after you and provide for your needs. You can appoint the same Attorney or Attorneys to act under both types of LPA or you can choose different Attorneys.

# Health and Welfare LPA

Your Attorneys will only be able to make decisions about your health and care if you are mentally incapable of making the decisions for yourself.

If you give your Attorneys “general authority” this means that they can do anything that you can do in relation to your health and welfare. For example:

- Deciding where you should live
- Deciding what sort of care is appropriate for you
- Giving and refusing consent to medical treatment
- Deciding who you should live with
- Making decisions about your diet and dress
- Choosing any social and cultural activities for you

You can restrict your Attorneys’ powers or place conditions on them so that they must act in a certain manner or in certain circumstances. We can advise if any of these restrictions would be appropriate for you.

You can also provide your Attorneys with guidance on your wishes and feelings on particular matters. This will not be legally binding on your Attorneys but your Attorneys would be required to take note of this guidance as part of acting in your best interests.

There are certain things that your Attorneys cannot do for you:

- An Attorney cannot consent to a marriage or civil partnership
- An Attorney cannot consent to a divorce/dissolution of civil partnership on the grounds of two years’ separation
- An Attorney cannot vote on your behalf.
- Attorneys cannot make decisions about your property and finances unless they have been appointed under a Property and Financial Affairs LPA.

If you set up a Health and Welfare LPA, your Attorney will only be able to act for you if you become mentally incapacitated. In such circumstances your Attorney will be able to make decisions about all aspects of your social welfare, including where you live or with whom you have contact, your healthcare and medical treatment. It is therefore important that you choose someone you know well and someone you trust to make these decisions on your behalf. You can appoint the same Attorney or Attorneys to act under both types of LPA or you can choose different Attorneys..

# Health and Welfare LPA

## Life-Sustaining Treatment

Life-sustaining treatment is treatment that a doctor considers necessary to keep you alive. The treatment will depend on the situation but could include:

- Life-saving drugs
- Resuscitation procedures
- Artificial Nutrition and Hydration
- An operation
- An organ transplant

The Health and Welfare LPA allows you to give your Attorneys authority to consent to or refuse life-sustaining treatment on your behalf. If you allow your Attorneys to make decisions about this, this means they can take decisions about whether to refuse or withdraw such treatment from you. Clearly an Attorney who is given this power must be someone whom you trust completely.

An Advance Decision (or Living Will, as they were often known) allows you to refuse certain medical treatment at a point in the future when you lack the capacity to communicate your wishes yourself. Advance Decisions will usually contain information about different degrees of illness and particular types of treatment. An LPA does not set out all these details. You simply leave decisions on these matters to your Attorney.

An Attorney acting under an LPA must make any decision about your healthcare in your best interests and should consult with those close to you when making that decision. If doctors are following an Advance Decision neither they nor your Attorney are required to act in your best interests. The doctors must simply follow your wishes regarding refusal of treatment.

## Health and Welfare LPAs and Advance Decisions (Living Wills)

If you have made an Advance Decision, and at a later date you make a Health and Welfare LPA which gives your Attorney power to decide about refusing medical treatment, the Health and Welfare LPA will take priority. If on the other hand you make a Health and Welfare LPA, and later you make an Advance Decision, the contents of that Advance Decision will take priority and be binding on your Attorney.

# The role of an Attorney

By signing LPAs for your “Property and Financial Affairs” and “Health and Welfare” you are giving your Attorney full power over your home, your money and decisions about your healthcare and medical treatment.

## Who can be an attorney?

As long as you are satisfied that your chosen Attorney has the necessary personal qualities to fulfil their appointment on your behalf, the only criteria the law provides for are that an Attorney must be at least 18

## What are the duties of my attorney?

Your Attorney has a number of duties which are set down in law. These include the following:

- to act in your best interests,
- to make only those decisions the LPA gives the Attorney authority to make;
- to make decisions personally and not to delegate them;
- not to take advantage of their position or to benefit themselves unlawfully
- to respect your confidentiality.

Your Attorney must consult you about decisions when appropriate to do so. Your Attorney should help you make decisions for yourself and support you. Where there are a number of choices they must discuss all the options with you and help you to make the decision. If you are unable to make the decision your Attorney can make the decision on your behalf.

It is advisable for your Attorney to keep accounts and they must keep your money separate from their own.

Your Attorney can recover their out-of-pocket expenses. You may agree to pay them a fee for acting but you do not have to. If you appoint a professional to act as an Attorney they will normally charge for their time and you will need to agree this in the LPA.

## Appointing one or more than one Attorney

Some people appoint just one person as their Attorney, but you can choose more than one person. If you appoint more than one person then you can choose whether they should act;

- jointly,
- jointly or severally or
- together in respect of some matters and jointly and severally in respect of other matters.

If you appoint your Attorneys to act jointly they must always act together. If one dies or is unable to act, the LPA fails. If you appoint your spouse and you later divorce then the LPA will terminate. This



# The role of an Attorney

is a less flexible form of appointment. If you appoint your attorneys to act jointly and severally, your Attorneys will choose whether they act together or separately.

This kind of appointment means that if one of the Attorneys dies or is unable to act, the other can continue to act under same LPA. So the LPA is likely to have a longer “life” and you will not have to go to the trouble of making another one. You can also state that your Attorneys must act jointly for some decisions but for others they can act alone. It is also possible to nominate replacement Attorneys. This means that if an Attorney cannot act for any reason, the replacement can step in. If you do want to nominate a replacement, you need to think about who the substitute is going to replace and whether you want the new Attorney to act together or together and independently with the remaining Attorney(s)

## **The power of a Property and Financial Affairs LPA**

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If you set up a Health and Welfare LPA, your attorney will only be able to act for you if you become mentally incapacitated. In such circumstances your attorney will be able to make decisions about all aspects of your social welfare, including where you live or with whom you have contact, your healthcare and medical treatment. It is therefore important that you choose someone you know well and someone you trust to make these decisions on your behalf.

You can appoint the same attorney or attorneys to act under both types of LPA or you can choose different attorneys.

# How we can help you:

**Whilst it is possible for you to make your LPAs yourself, you should consider taking specialist legal advice to avoid the many pitfalls which could cause significant problems when your LPA comes to be used - perhaps in many years to come.**

We have a team of experts able to assist you. Many of our solicitors are members of Solicitors for the Elderly and have specialist knowledge and experience in creating LPAs.

It is not always an easy decision deciding who to appoint as your attorneys. Not everyone has a family member or close friend that they would like to appoint. In some circumstances we can act as your Attorneys. We have many years of experience and will ensure that your property and finances are managed properly and in accordance with your wishes.

Your assets may not be straightforward. You might have investments, a business or assets abroad. Careful consideration needs to be given to these and certain conditions may need to be included to ensure that these assets are managed effectively. If you have investments which are managed within a discretionary management scheme it is vital that specific instructions are added to your Property and Financial Affairs LPA. If you run your own business you would be advised to consider putting a separate Business LPA in place.

Complicated or poorly worded instructions can make your LPAs unworkable and the OPG may insist upon their removal. We can make sure that your instructions are worded in such a way to ensure that they work and are acceptable by the OPG.

LPA's are not always straightforward but we can prepare documents that are tailored to you and your own personal circumstances.