

LASTING POWER OF ATTORNEYS

Making decisions about your health welfare and finances

In April 2007 the first part of the Mental Capacity Act 2005 finally was published and brought with it a whole new set of rules through a Code of Practice for the professional dealing with clients who are elderly, vulnerable and those at risk and in danger of abuse and for individuals who lack mental capacity.

The second part dealing mainly with the introduction of the Lasting Power of Attorney became effective from October 1 2007 replacing immediately any Enduring Power of Attorney's (EPA) that had not been correctly completed, this has no effect on any EPA that had already been registered with the Court of Protection or any existing unregistered EPA providing it was fully completed with the signatures of the donor and his or her attorney's and all signatures correctly witnessed.

The Act set certain basic principles:

The principles

- 1) The following principles apply for the purposes of this Act.
- 2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- 3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- 4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- 5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- 6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The Act

Part 1: Persons who lack capacity

Part 1 contains provisions defining "persons who lack capacity". It contains a set of key principles and sets out a checklist to be used in ascertaining a person's best interests. It deals with liability for actions in connection with the care or treatment of a person who lacks capacity to consent to what is done. Part 1 also establishes a new statutory scheme for "lasting" powers of attorney which may extend to personal welfare (including health care) matters. It sets out the jurisdiction of the new Court of Protection to make declarations and orders and to appoint substitute decision-makers ("deputies"), where a person lacks capacity.

This Part also sets out rules about advance decisions to refuse medical treatment and creates new safeguards controlling many types of research involving people who lack capacity. It establishes a system for providing independent mental capacity advocates for particularly vulnerable people. It also provides for codes of practice to give guidance about the legislation and creates a new offence of neglect or ill-treatment.

Part 2: The Court of Protection and the Public Guardian

Part 2 establishes a new superior court of record, to be known as the Court of Protection, and provides for its judges and procedures. It also establishes a new statutory official, the Public Guardian, to support the work of the court. Provision is also made for Court of Protection Visitors.

Part 3: Miscellaneous and General

9. Part 3 deals with private international law and transitional and other technical provisions and includes a declaratory provision that nothing in the Act is to be taken to affect the law relating to unlawful killing or assisting suicide. ECHR issues arise in relation to a number of provisions.

The Lasting Power of Attorney – Property and Affairs

A Property and Affairs Lasting Power of Attorney (LPA) allows you to plan ahead by choosing one or more persons you trust or a professional such as a Trust Corporation (your Attorney's) to make decisions and take appropriate actions on your behalf regarding your property and financial affairs.

Your Attorney or Attorney's can manage your finances and property whilst you still have capacity as well as when you lack capacity. For example, it may be easier for you to give someone the power to carry out tasks such as paying your bills or collecting your benefits or other income.

This might be for lots of reasons: you might find it difficult to get about or be housebound or may find talking on the telephone difficult, or you might be working or living abroad for long periods of time.

You can decide what power and the extent of the power to give your Attorney(s) when making decisions about any or all of your property and affairs matters. This could include paying your bills, collecting your benefits or selling your house.

This type of LPA does not allow the person(s) you have chosen (your Attorney) to make decisions about your personal welfare. If you want someone to be able to make personal welfare decisions on your behalf you will need to make a personal welfare LPA.

The Lasting Power of Attorney – Personal Welfare

A Personal Welfare Lasting Power of Attorney (LPA) allows you to plan ahead

with regard to your personal healthcare and welfare by choosing one or more people to make decisions on your behalf.

These personal welfare decisions can only be taken by somebody else (a close friend or family member) when you lack the ability to make decisions regarding your treatment or other personal matters for yourself; for example if you are unconscious or because of the onset of a condition such as dementia.

The Attorney(s) you appoint to make personal welfare decisions will only be able to use this power once the LPA has been registered and provided that you cannot make the required decision for yourself.

You can decide to give your Attorney the power to make decisions about any or all of your personal welfare matters, including healthcare matters. This could involve some significant decisions, such as:

- giving or refusing consent to particular types of health care, including medical treatment decisions; or
- whether you continue to live in your own home, perhaps with help and support from social services, or whether residential care would be more appropriate for you.

You may wish your Attorney(s) to have the power to make decisions about 'life-sustaining treatment', if you do then you have to expressly give your chosen Attorney(s) the power to make such decisions by completing sections 6 and 12 of the LPA form.

You can also give your Attorney(s) the power to make decisions about day-to-day aspects of your personal welfare, such as your diet, your dress, or your daily routine. It is up to you which of these decisions you want to allow your Attorney to make.

How to make an LPA

To make an LPA, you must use a special form.

The LPA Form

The LPA form is made up of three parts:

Part A - The Donor's Statement

This section is about you, the Donor, you will also list who you want to appoint to make decisions for you in the future, (your Attorney(s)) and how you want them to act on your behalf. When appointing your Attorney(s) you can place restrictions or conditions on the decisions your Attorney(s) can make and you can give them guidance as to how you expect them to act. The LPA cannot be used until it has been registered, you should name up to four people, family members or close friends (named persons) that you wish to be notified that the LPA is being registered with the OPG. You are required to sign this document in

the presence of a witness.

Part B - The Certificate Provider's Statement

Only certain people can be certificate providers and details of who can and cannot do so are listed on the form.

Your certificate provider will speak with you privately to satisfy themselves that you understand the powers you are giving your Attorney(s) and that there has been no fraud or undue pressure on you to make the LPA. If you have chosen not to notify any person (your named persons) of the fact that the LPA is being registered you will need to have two certificate providers, this is to safeguard you against a fraudulent act.

Part C - The Attorney's Statement

Everyone you choose as an Attorney will need to provide their personal details and confirm that they understand their legal duties should they need to act as your Attorney. This part of the form will need to be signed by each of your Attorneys and their signatures will need to be witnessed. If you are using a professional to prepare your LPA then your adviser will ensure that the Attorney(s) are advised of their duties and that they receive the necessary information.

If you require help making a Lasting Power of Attorney, please contact us now.