

Lasting Powers Of Attorney

What is a Lasting Power of Attorney?

Lasting Power of Attorneys have been introduced by the Mental Capacity Act 2005 ("the Act") and replaced Enduring Powers of Attorney ("EPAs") from 1st October 2007. EPAs in existence before this date will still be valid.

An Lasting Power of Attorney is a document by which you (the donor) give someone else (the attorney) power to make decisions on your behalf. There are two types of Lasting Power of Attorney - a financial Lasting Power of Attorney and a personal welfare Lasting Power of Attorney. You can prepare either one or both types of Lasting Power of Attorney.

The Financial Lasting Power of Attorney gives the attorney power to make financial decisions on your behalf, e.g. to sell your house or write cheques on your bank accounts.

The personal welfare Lasting Power of Attorney gives the attorney power to make personal welfare decisions on your behalf, e.g. which care home you should go to, healthcare issues and even consent to medical treatment on your behalf.

Who should I appoint as my attorney?

The attorney is given a great deal of power over some of the most important decisions you have to make. Your choice of attorney must therefore be made very carefully. You should appoint someone you can trust to act in your best interests. But that person should also have some understanding as to how the mechanics of it work.

If you do not have anyone that you can appoint, you may like to appoint a professional who understands the legalities and duties behind the document. The partners at Berry Smith are more than happy to act on your behalf and would be happy to meet and discuss matters with you.

Alternatively, you may like to appoint a family member together with a professional. We recommend that you appoint at least one professional in respect of a financial Lasting Power of Attorney, but that you appoint a family member in respect of a personal welfare Lasting Power of Attorney.

Executing an Lasting Power of Attorney does not mean that you cannot act in respect of your own affairs, while you are still mentally and physically able to do so.

How many attorneys can I appoint?

You can appoint more than one attorney, and you can appoint them to act both jointly, or jointly and individually, or jointly in some circumstances, and individually in others. In fact, it does make sense to have two attorneys, so that if one dies or is unable to act, the other can step into their shoes.

You can also appoint substitute attorneys so that if say one dies or is unable to act the substitute can take over.

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When does the Lasting Power of Attorney take effect?

A personal welfare Lasting Power of Attorney can only take effect in the event of your mental incapacity.

You can specify when you want your financial Lasting Power of Attorney to take effect – either immediately or only in the event of mental incapacity. If it takes effect immediately, then it can be used even if you are frail, abroad or simply unable to sign the appropriate documentation needed. If it only takes effect in the event of mental incapacity, then the attorneys can only use the document once a doctor has certified that you are incapable of managing your own affairs.

Do my Attorneys have to follow any guidelines when acting on my behalf?

There are 5 important principles enshrined in the Act which your attorneys must adhere to when making a decision on your behalf. These are:-

- 1. Presumption of Capacity** – you are presumed to have capacity unless it is proven otherwise. The test for capacity (or the lack of it) must be both time and decision specific.
- 2. Supported decision making** – you cannot be treated as lacking capacity to make a decision unless you have been given all practical assistance to help you make your own decision.
- 3. Making unwise decisions** – you have the right to make a decision based on your own values, beliefs, preferences and attitudes without automatically being labeled as lacking the capacity to make your own decisions
- 4. A person's best interests** – any decision made on your behalf must be in your best interest – this is an objective test
- 5. Less restrictive options** – before doing something on your behalf it will be necessary for your attorney to consider whether there is a less restrictive way (in relation to your rights and freedoms) of doing so.

Your attorneys also have a legal duty to have regard to the Mental Capacity Act Code of Practice. This provides guidance and information about how the Act works on a day to day basis. If your attorneys depart from the Code when acting on your behalf they will have to explain their reasons for doing so should they ever be questioned by the court.

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Can my Attorney act for me as soon as we have signed the Lasting Power of Attorney?

No – there are a number of formalities which must be complied with before the Lasting Power of Attorney is usable.

You must choose a certificate provider who certifies that in their opinion you:-

- * Understand what a Lasting Power of Attorney is
- * Understand the contents of your Lasting Power of Attorney
- * No fraud, pressure or undue influence has been applied to induce you to create the Lasting Power of Attorney
- * That there is nothing else that would prevent the Lasting Power of Attorney in question being created

There are certain categories of people who can be certificate providers (solicitors/social workers etc) and there is a fee for this service. Alternatively you can appoint someone who has known you for at least two years but this can be an onerous obligation since that person may have to give evidence in court at a later date if there were ever any challenge made to the capacity of the donor when the Lasting Power of Attorney was made.

The Lasting Power of Attorney must be registered with the Office of the Public Guardian

There is a £120 court fee and certain people (of your choice) must be notified of the registration.

If those notified of the registration do not raise any objections (or their objections are investigated and rejected) the court will stamp every page of the Lasting Power of Attorney and return it to you. This process will take approximately 6 weeks – there is no fast track procedure for the registration.

What if someone does not have the mental capacity to make a Lasting Power of Attorney?

In these circumstances a different application is required and made to the Court of Protection. The Court has jurisdiction to appoint a Deputy to make decisions on such a person's behalf - subject to the "best interests" provision mentioned above. The Deputyship Order that is made will explain what the Deputy's powers will be and this will depend on the needs of the person as decided by the Court. This process can take a long time to complete and ultimately means that the Court of Protection is heavily involved in dealing with a person's affairs than if they had been able to make an Lasting Power of Attorney. If somebody has lost capacity and this is the only route available we can assist in making the application to the Court.