

Lasting Power Of Attorney

&

Court Of Protection

Guidance Notes

ProTrust 
Estate Planning

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Introduction

Lasting Power of Attorney and Court of Protection

Everyone knows how important it is to have a Will prepared. However, a Will takes effect only on death.

What if a person loses mental capacity or is physically incapacitated during his or her lifetime? How would financial and property transactions take place? Who would make health decisions for the incapacitated person such as where to live or treatment received?

A Power of Attorney is equally as important to put in place as a Will, if not more so, as it is actually for the benefit of the individual for their lifetime, rather than a Will which simply decides what is to happen with money, property and assets on death.

Without a Power of Attorney in place, if a person loses mental capacity*, the only other legal method of being able to assist in the management of their affairs is the more formal and costly route of applying for Deputyship at the Court of Protection*

A Lasting Power of Attorney is a legal document that must be correctly prepared and registered at the Office of the Public Guardian*.

Lasting Power of Attorney – a Summary

There are two types of Lasting Powers of Attorney (LPA):

- (a) Lasting Power of Attorney for Financial Decisions; and
- (b) Lasting Power of Attorney for Health & Care.

The Lasting Power of Attorney for Financial Decisions can be used by your Attorney(s) to take decisions on bank accounts, investments and holdings and regarding selling or transferring property. Importantly, the Attorney can act even if the Donor still remains mentally capable of taking decisions. It is useful therefore not only just for mental incapacity situations but also if someone is mentally capable but physically frail or unable to travel to their local bank and other financial institutions for whatever reason.

The Lasting Power of Attorney for Health & Care can be used by your Attorney(s) only if you have lost mental capacity. It covers all decisions relating to treatment, residence and life support issues.

Both types of LPA must be registered at the Office of Public Guardian (OPG) before they can be used. Therefore, it is usual for us to prepare the Lasting Power of Attorney documents and also to complete the registration process at the same time so that they are ready for use at the right time, without delay.

Choosing your Attorneys

Attorneys are usually your most trusted people, being one or more of your next of kin or closest relative or friend, but can also be a professional.

You can appoint a single sole Attorney or two or more Attorneys. It is also possible to appoint substitutes in the event that any of your primary Attorneys are unable to act. You will have the choice of deciding whether joint attorneys can act jointly and independently of each other (with just one signature for example) or whether they have to act jointly together (with both having to sign).

We will advise and guide you through those choices so you make an appropriate choice that suits you best.

Lasting Power of Attorney Process

There is a two-staged process for Lasting Power of Attorney preparation and registration:

- Stage (1): Advising, taking instructions and preparation of the Lasting Power of Attorney documents. Completing the required certificate to confirm capacity.
- Stage (2): Preparing and submitting all registration documents to the Office of the Public Guardian (OPG) and providing certified copies of the registered documents once received.

LPA Costs & Registration Fees

Document Preparation

We charge £240 + VAT to prepare a Lasting Power of Attorney document, which includes the following:

- (i) Advice and guidance at a meeting; and taking instructions;
- (ii) Drafting of the document;
- (iii) Attending with you to explain all provisions;
- (iv) Witnessing your signing; and
- (v) Completing the Certification

Where both LPAs are being prepared, we charge 50% (ie £120+vat) to prepare the 2nd LPA so a total of £360+vat for our preparation work for both LPAs combined.

Registration Work

We charge £120 + VAT to complete the registration process of an LPA at the Office of the Public Guardian, which includes the following:

- (i) Completing the application for registration, copying and scanning all signed documents; preparing accompanying correspondence;
- (ii) Receiving initial notices from the OPG and communicating the progress of the registration; and
- (iii) Upon receipt of the original registered document, preparing copies for your use and scanning originals.

Where both LPAs are being registered, we charge 50% (ie £60+vat) to register the 2nd LPA so a total of £180+vat for our registration work for both LPAs combined.

General Powers of Attorney and Enduring Powers of Attorney

What is a General Power of Attorney?

This document allows you to appoint an attorney for urgent decision-making usually as an interim measure where you are waiting on the 2–3-month registration process for a Lasting Power of Attorney. It does not cover you when you have lost mental capacity and it does not cover health and care decision making.

It is therefore limited in its scope when compared to the LPA but it can be useful for some urgent or pressing decisions or matters and will be discussed as part of taking your LPA instructions.

The demand for Lasting Powers of Attorney has never been greater

More and more people are looking to set up Lasting Powers of Attorney (LPA) with the recent and ongoing threat of Covid-19. Setting up an LPA can assist in routine matters for instance a business owner can have conduct of their business whilst away from work temporarily. In particular, those who form part of the most at risk groups and are having to self-isolate, may need to rely on friends and family members to act on their behalf in regards to their finances.

Unfortunately, the current timing of eight to ten weeks to get a Lasting Power of Attorney registered is not helping matters for our clients and the likelihood that this timeline will increase because of the pandemic is pretty much a certainty.

So, what can we do to help?

The best way we can help you would be to offer a “BELT & BRACES” strategy by drafting a second GENERAL (or Ordinary) Power of Attorney for you, at the same time as taking your instruction for your Lasting Powers of Attorney, which provides you with this protection whilst waiting for the LPA to be registered and returned by the OPG. This means you can benefit from being able to provide your Attorneys with the authority to act on your behalf immediately.

What does a General Power of Attorney do for you?

A General (Ordinary) Power of Attorney allows one or more person, known as the attorney(s), to make financial decisions on your behalf. It's only valid while you still have the mental capacity to make your own decisions.

It is useful when:

- Your need someone to act for you for a temporary period, such as when on holiday or in hospital or currently having to self-isolate.
- You are unable to get out and about to the bank or post office and want someone to be able to access your account(s) for you.
- You want someone to act for you while still able to supervise your actions.

Witnessing

A General Power of Attorney will need to be signed by the donor in the presence of an independent witness (NOT an attorney) such as a friend, neighbour or relative.

This poses certain difficulties in the current environment but whilst we wait for the law to change there are many suggestions being made to work around this and remain compliant such as having documents witnessed by a friend or neighbour:

- over the garden fence
- through a window

The point is, however this is achieved as long as everyone can see everyone else, then the document is valid.

Are Enduring Powers of Attorney (EPAs) still valid?

Since 2007, it has no longer been possible to draw up a new EPA. However, any previous EPA is likely to be still valid.

The EPA is more limited in its scope compared to the LPA. There are no powers within the EPA to appoint substitute attorneys if the first choice is unable to act. Also, the powers are limited to financial and property decision-making and do not extend to health and care. Due to the passage of time, some banks and institutions (or their clerks/assistants) may not now recognise it and there may be delay in acting on it. Our advice is to update an existing EPA by creating a new set of LPA documents.

The role of the Court of Protection

The Court of Protection will usually only become involved if there is no Lasting Power of Attorney in existence and the person has lost mental capacity.

A next of kin can apply for appointment as the “Deputy” for the patient and there is a requirement to file Annual Deputyship accounts and an Annual Report.

The process of application takes a long time and is costly although the costs are regulated and fixed by the Court.

Footnotes

***mental capacity** – for example, stroke, car accident, coma

* **Deputyship at the Court of Protection** - A deputy is a person appointed by the Court of Protection to be legally responsible for someone who lacks capacity to make decisions for themselves where there is no power of attorney.

* **Office of the Public Guardian** - (OPG) protects people in England and Wales who may not have the mental capacity to make certain decisions for themselves, such as about their health and finance. OPG is an executive agency, sponsored by the Ministry of Justice.

Contact Us

Please contact us to discuss drawing up LPAs and the reasons why they are important to be undertaken. Without them, the only likely recourse for someone to assist in decision-making on your behalf is the Court of Protection.

Our advice is to undertake LPAs as soon as possible, either when undertaking your Will review, or simply following reading this guidance. Believe us when we say that it is ideal to create them when you are in good health and young in life and when it is not a sensitive issue for you, rather than having to do so when there is an impending likelihood of lack of capacity.

Whatever your circumstances, we will be sensitive to your requirements and help you achieve your desired outcome.

For more information and for an initial discussion for advice please contact us on:

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