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LASTING POWERS OF ATTORNEY

Introduction

Many people have had the experience of seeing a friend or relative become incapable of dealing with his or her own affairs as a result of mental incapacity. When this happens, it is often difficult for the family to pay outstanding bills or deal with the person's finances generally. If this situation arises, then an application has to be made to the Court of Protection and the procedure can be both slow and costly.

This can be avoided by making a Lasting Power of Attorney or "LPA" now. An LPA is a document by which you choose someone to take certain decisions on your behalf. That person is called your "attorney".

This leaflet will outline what is involved in creating an LPA. It can only act as a brief introduction and if you are considering making an LPA you should take professional advice tailored to your own circumstances.

Types of LPA

There are two types of LPA – the Property and Financial Affairs LPA and the Health and Welfare LPA. You can make just one type of LPA, if you wish, or both of them.

Property and Financial Affairs LPA

This LPA gives your attorney power to look after your property and finances on your behalf. This would include the ability to deal with the following matters:

- Managing bank accounts and investments
- Selling your property
- Handling state benefits and pensions
- Completing your income tax return
- Making certain gifts

You can also include restrictions in the document which limit what the attorney can do. Such restrictions need to be carefully phrased so that they don't cause confusion in the future.

Health & Welfare LPA

This LPA allows your attorney to make decisions about your health and personal welfare. This would include the following types of decision:

- Where you are to live
- Arrangements for your day to day care
- Decisions relating to medical treatment
- Access to your personal information
- Making complaints about your care or treatment

Once again, you can limit the scope of the LPA if you don't want your attorney to have such wide powers.

You can, should you wish, give your attorney the power to refuse consent to life-sustaining medical treatment on your behalf.

Neither type of LPA can be used until it has been registered with the Court (see below). The Health & Welfare LPA cannot be used unless you lose your mental capacity. The Property and Financial Affairs LPA can be used straight away, even if you still have capacity. This can be useful if, for example, a physical disability makes it difficult for you to deal with financial matters or if you would simply like your family to be able to look after matters for you.

Choosing your attorney

You can choose anyone you like to be your attorney, so long as they are over 18, not a bankrupt and not mentally incapacitated. It's sensible to choose someone who's good at handling money to act under a Property and Financial Affairs LPA. It's also important to choose someone you get on with who can be relied upon to act in your best interests. Most people choose close relatives or friends to act as their attorney. If you wish, you can appoint a solicitor or accountant to act as your attorney

although they would generally charge a fee for fulfilling this role.

It is possible to appoint more than one attorney, in which case you'll need to specify whether they are to act "jointly" or "jointly and severally". Attorneys who are appointed jointly must always act together and cannot act separately. This means that if one of the attorneys dies, the LPA will be invalid. Attorneys who are appointed jointly and severally may act together but can also act separately if they wish, which provides more flexibility.

Certificates

Every LPA has to contain a statement from at least one "certificate provider". The certificate provider will discuss the LPA with you and then sign a certificate to say that in his or her opinion you understand the LPA and have not been pressurised into making it. We can act as your certificate provider for no extra charge.

Registering the LPA at the Court

Either you or your attorney can apply to the Court of Protection for registration of the LPA. Until the LPA is registered, your attorney cannot act on your behalf. The registration process takes at least six weeks, so we generally suggest it's better to register the LPA sooner rather than later, just in case it's needed in a hurry.

Before you apply to register the LPA you must give notice to up to five people of your choosing. The reason for this notice procedure is to protect you from fraud or undue influence.

If you don't want to notify anybody, you can say so in the LPA but you would need to have two certificates from two separate certificate providers instead. We can arrange this for you.

After Registration

Once a Property and Financial Affairs LPA has been registered, your attorney has full power to administer your affairs (subject to any restrictions contained in the LPA).

Once a Health and Welfare LPA has been registered, your attorney only has power to take health and welfare decisions on your behalf if you are not able to make those decisions yourself.

In both cases, your attorney must follow the Mental Capacity Act 2005 Code of Practice whenever acting on your behalf. This Code gives guidance as to how decisions should be made by and for people with impaired capacity and is essential reading for all attorneys. In particular, the Code states that your attorney should support you to make your own decisions if you are able to do so, rather than simply taking the decision for you. Any decisions that your attorney takes on your behalf must be in your best interests.

The Court of Protection has wide powers to supervise the actions of attorneys. That said, it will not usually exercise these powers unless problems are brought to its attention. **It is therefore extremely important that you only choose as your attorney somebody in whom you have the utmost confidence that they will act in your best interests.**

Changing your mind

If you wish to cancel your LPA prior to registration this can be done by means of a simple deed. If you wanted to cancel the LPA after it is registered, you would need to make an application to the Court of Protection.

Planning ahead

Everyone should think about making LPAs as part of sensible planning for the future. Once correctly set up, the LPAs can be put away for an eventuality which, hopefully, will never arise. You, though, will have the peace of mind that comes from knowing that, if the worst does happen, someone you trust will be able to make decisions on your behalf.

Please contact Wake Smith Solicitors Limited of No 1 Velocity, 2 Tenter Street, Sheffield, S1 4BY or on 0114 2666660 for further information or to arrange an appointment

Information for Attorneys acting under Property and Financial Affairs Lasting Power of Attorney

Introduction

This Lasting Power of Attorney (LPA) made by the donor gives you power to deal with their property and financial affairs. As the attorney, you must only do such things as the power allows you to do and must not delegate the role to another person. It does not give you power to make health or welfare decisions on behalf of the donor.

If you have been appointed with another person, it may be that you have to deal with all matters together (a joint appointment); or it could be that you can act together or independently (a joint and several appointment); or some decisions together and some independently (a hybrid appointment). Attorneys are expected to consult with each other and keep one another informed about what they are doing.

This leaflet will outline the important points for acting as an attorney under a financial and property LPA. The role of an attorney is one of responsibility so we advise you to take professional advice tailored to your own circumstances.

Can you use it immediately?

Once the power has been registered with the Office of the Public Guardian and provided there are no conditions or restrictions preventing you from acting at this point, you may use the power immediately. You should only do what the donor wants you to do and always act in their best interest.

If there is a condition in the power which prevents you from using the power until the donor is mentally incapable of manging their financial affairs, you will usually need to produce evidence of the donor's incapability to third parties, such as banks and building societies before they will accept your authority.

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The Mental Capacity Act 2005 Principles of Code and Practice

When acting under the Lasting Power of Attorney you must follow the Principles set out in the Mental Capacity Act 2005 and have regard to its Code of Practice. This means:

- You must assume that the donor can make their own decisions unless it is established that they cannot do so because they lack mental capacity.
- You must help the donor to make as many of their own decisions as possible.
- You must not treat the donor as unable to make the decision in question unless all practicable steps to help them to do so have been made without success.
- You must not treat the donor as unable to make the decision in question simply because the donor wishes to make a decision you consider is unwise.
- You must make decisions and act in the donor's best interests when they are unable to make the decision in question.
- Before you make the decision in questions or act for the donor, you must consider whether you can make the decision or act in a way that is less restrictive of the donor's rights and freedom but still achieves the purpose.

It is important that you consider the Code when making decisions as failure to do so may result in your removal as an attorney.

What is the in donor's best interest?

Decisions as to what is or is not in the donor's best interest are not always easy. You must consider all the relevant circumstances, particularly:

- the likelihood of the donor recovering in the foreseeable future and being able to make the decision;
- the donor's past and present wishes and feelings;
- the donor's beliefs and values that would be likely to influence their decisions if they had capacity; and
- other factors that the donor would be likely to consider if they were able to do so.

You must also involve the donor in decisions as far as practical. If appropriate, you must consult with caregivers, relatives and/or friends or others, such as your co-attorney or a court-appointed deputy who also has an interest in the donor's welfare.

Limits of the powers to make gifts

If the donor hasn't included restrictions or conditions on the power which limit you from making gifts you may **only** make gifts on customary occasions, such as birthday or wedding presents, provided it is for a friend or relative (including yourself).

Gifts can also be made to a charity if the donor has made such gifts in the past or if not, in the circumstances they might be expected to make gifts to the charity.

However, the size of the gift must be reasonable in the circumstances and in relation to the size of the total value of the donor's assets. You should be cautious to avoid interfering in succession rights under the donor's intended will or their intestacy and if the donor might need the asset for their own use in the future.

The power cannot be used to make larger gifts, even if the donor has sufficient mental capacity and asks you to make the gift on their behalf. If the donor lacks mental capacity and you wish to make larger gifts, you should get authority from the Court of Protection.

You are able to use the donor's money to maintain their spouse, civil partner, cohabitee, or the donor's child if under 18. This is subject to any maintenance payment being reasonable in the circumstances and affordable for the donor. There is no set sum you can give or pay for maintenance – it depends on the donor's financial position, their own financial needs and the circumstances.

Managing Finances

Banks and other financial institutions have different ways of dealing with attorneys. Some will allow you to continue to operate the donor's account whilst others will wish a new account to be opened.

If you operate an account for the donor, you should sign your usual signature and then underneath, sign the words 'as attorney'. If you have to open a new account it should be opened in your name 'as attorney for' the donor.

You should not open an account in your name without identifying that the asset belongs to the donor, as this may cause complications with your own financial affairs. If it's not possible to hold the asset in this way, it is appropriate to identify the true ownership in a 'Declaration of Trust'.

Even if the donor may at times struggle to remember information and events, in law it does not mean they cannot make any financial decision. You should try to support the donor to make those decisions they are able, and involve them in the decisions you plan to make on their behalf.

Keeping Accounts and Financial Advice

If the power doesn't include a condition that you prepare and produce accounts or provide financial statements to be checked, you still have a duty to keep accounts. The Office of the Public Guardian could ask you to account for your dealings with the donor's money.

You must not use the donor's money or property for your own benefit; even if it were a loan or you believe the donor would agree to this, if they were mental capable. If the donor lacks mental capacity, such action must be authorised by the Court of Protection.

You must act using reasonable standards of care and skill. You should consider taking independent financial advice on how best to invest and hold funds belonging to the donor.

Other responsibilities

An attorney must act with honesty, integrity and in good faith. You must keep the donor's affairs confidential, unless legally required to disclose information.

You are not allowed to be paid for acting as an attorney, unless the donor has authorised it in the power. You can recover reasonable out of pocket expenses which have been personally incurred. These should be made transparent from the donor's own expenses.

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BUSINESS LASTING POWER OF ATTORNEY

A Business Lasting Power of Attorney (BLPA) allows the donor to appoint an attorney to make decisions concerning their business interests either when they are unavailable or lack mental capacity.

Reasons to put a BLPA in place:

- It ensures the business owner has someone they trust and who understands their particular business in place and who will then be able to carry out the day to day running of the business.
- A business may be at risk if it does not have in place a BLPA as part of its crisis management strategy.
- If in place it may reduce insurance costs and future claims.
- It is far less expensive than having to apply to the Court of Protection for a Deputyship Order.
- It can prevent bank accounts being frozen – even where bank accounts are jointly held in the name of the business partners or directors the bank may choose to freeze the account if a partner or director loses capacity.

Attorneys can:

- Deal with property owned or leased by the business;
- Organise insurance;
- Access bank statements and accounts;
- Invest assets;
- Deal with the tax affairs of the business;
- Pay staff and suppliers; and
- Sign contracts.

Without a BLPA:

- It may not be possible to pay staff or suppliers;
- Complete unfinished transactions; or
- Enter into new contracts.

Who is a business client?

- Sole traders;
- Partners (general partnerships and limited partnerships);
- Partners (Limited Liability Partnerships); and
- Company Directors,

In many instances, it will not be appropriate for the same person to make both personal financial decisions and business decisions on behalf of the donor. Commercial legislation and practices, financial regulatory bodies, conflicts of interest, the partnership agreement or articles of association may prevent such an appointment. Where this is the case, it is important to obtain advice from an expert.

For further enquiries please contact **Suzanne Porter** Director at Wake Smith Solicitors Suzanne.porter@wakesmithsolicitors.com or 01142 24 2178