

Powers of Attorney and Advance Decisions: The Legal Consequences of Mental Incapacity

Mental incapacity may arise at any age. Commonly it occurs in the elderly, for example, with the onset of dementia or Alzheimer's disease but it may happen at any time, perhaps as a result of a serious accident, a head wound or drug abuse.

A Power of Attorney is a document made by a "donor" delegating authority to a person or persons (the "attorney" or "attorneys") to make decisions on behalf of the donor. There are five main types of Power of Attorney which are:-

- A general Power of Attorney made under the Powers of Attorney Act 1971
- An Enduring Power of Attorney made under the Enduring Powers of Attorney Act 1985
- A Lasting Power of Attorney in relation to property and affairs made under the Mental Capacity Act 2005
- A Lasting Power of Attorney in relation to health and welfare made under the Mental Capacity Act 2005
- A Trust Power of Attorney made under the Trustee Act 1925 (section 25) as amended by the Trustee Delegation Act 1999

Slightly overlapping with Health and Welfare Lasting Powers of Attorney, an "Advance Decision" can also be made.

An Advance Decision (sometimes called a Living Will) allows a person to prescribe a certain course of action to be taken in a particular situation, such as a person's refusal to accept medical treatment at a time when he does not have capacity to refuse such treatment himself.

General Power of Attorney and Mental Incapacity

A Power of Attorney gives an attorney power to act on behalf of the donor according to the terms of a document which may define or limit the authority given to the attorney. If the donor of this type of power becomes mentally incapable, the power ceases to have effect immediately and any purported action by the attorney under the power given to him would be in breach of the authority previously bestowed.

Enduring Power of Attorney ("EPA")

Since 1 October 2007 it has not been possible to create an EPA. EPAs created before that date will be effective indefinitely and attorneys may act under the powers given to them.

If the donor of the power becomes mentally incapable it will be necessary to register the power with the Court of Protection which is usually a relatively simple procedure. After registration the attorney may continue to act on behalf of the donor.

Lasting Power of Attorney (“LPA”)

LPAs were introduced under the provisions of the Mental Capacity Act 2005 and replace EPAs.

There are two types of LPA, each requiring completion of a separate form. They are:

- A Property and Financial Affairs Lasting Power of Attorney; and
- A Health and Welfare Lasting Power of Attorney.

When an LPA has been registered with the Office of the Public Guardian (“OPG”), certain pieces of information in relation to the LPA will be available to anyone who searches the OPG register. An LPA cannot be used prior to registration with the OPG.

The forms recently underwent an overhaul in their design and requirements. This came into effect on 1 July 2015. The old forms may still be used (until 31 January 2016) but this note will refer solely to the new forms.

The format of the new LPA is, on the whole, simpler – although the forms are lengthier. Most of the guidance included on the old notes has been included in a separate Guide, which is 48 pages long and can be downloaded from the OPG website. When drafting LPAs, the Guide must be consulted. Furthermore, relevant sections of the Guide should be read by the donor, attorney(s) and replacement attorney(s) before registration of an LPA takes place so everyone is clear of their role going forward.

a) Property and Financial Affairs Lasting Power of Attorney

This type of power gives an attorney authority to deal with property and financial affairs, which is similar to the authority given to the attorney of an EPA, and may be used after the loss of mental capacity.

The formalities to complete the new form are much more cumbersome. Briefly, the main stages of the procedure are as follows:-

Donor’s decisions

The donor will need to decide:-

- Who to appoint as his attorney or attorneys (there is no limit to the number but 2 or perhaps 3 are usually sufficient; the attorneys must be over 18 years of age and they must not be an undischarged or interim bankrupt).
- If more than one attorney is appointed, whether they can act independently of each other or whether they should act jointly (it is possible to state they can act independently in respect of some actions and must act jointly in respect of others).
- If he wishes to appoint a replacement attorney or attorneys in case any of the “first appointed” attorneys are permanently unable to act owing to bankruptcy, disclaiming their appointment, loss of mental capacity, divorce or death. Appointing replacement attorneys mitigates this risk and allows your registered LPA to continue as intended.
- Who should be the “certificate provider” under the legislation. We can do this if required, provided that a partner of Winckworth Sherwood is not appointed as an attorney.
- If they want to notify anyone of their intention to register the LPA. Between one and five persons may be nominated as persons to be notified of your decision to apply to register an LPA and they should know you well enough to be able to raise any concerns that they might have about your LPA. Although not a requirement, the advantage of listing people to be notified when an application is made to register an LPA, is to safeguard the donor as the listed people will be able to raise any concerns about the attorneys acting for the donor at the time of registration of the LPA.
- Whether or not the attorney(s) can act before he becomes mentally incapable; we would advise that no restrictions are applied.
- Whether he wishes to limit the decisions that his attorney can make for him. We do not advise limitations on the power as it is not possible to anticipate all circumstances which could arise when the attorney may need to

make decisions in the best interests of the donor, but would be fettered by restrictions and thus unable to do so.

- Whether he wishes to authorise attorneys to delegate investment decisions to a discretionary investment manager, such as a bank. The OPG have updated their guidance to confirm that, in the absence of express permission from the donor in the LPA, the attorney(s) would have to apply to the Court of Protection for authority to appoint a professional fund manager to manage the donor's investment. Where possible, the wording of the donor's authorisation will need to be checked carefully by the financial institution concerned before registration of the LPA.
- Whether he wishes to give any (not legally binding) guidance to his attorney.
- Whether he wishes his attorney to be remunerated for acting as attorney – this is only appropriate for professional attorneys.

Objections to an attorney being appointed at the time of registration can only be made by the donor, other attorneys and the named persons listed in the LPA.

Certificate provider

As stated above one certificate provider is required. The certificate provider ensures that the donor understands his LPA, has not been pressurised into completing the LPA and that the LPA was not completed fraudulently.

There are 2 types of certification:-

- Knowledge certification: That is from a certificate provider who knows the donor personally and has done so for at least 2 years; and
- Skills-based certification: That is from a certificate provider who has the relevant professional skills and expertise to sign such as a GP or solicitor. We can provide a person to act as a certificate provider, provided that a partner of Winckworth Sherwood is not an attorney.

Certain people cannot act as certificate providers and they include: a member of the donor's or attorney's family; a business partner or paid employee of the donor or an attorney; most people associated with or working for a care home in which the donor lives.

The certificate provider will need to talk to the donor about the LPA in private.

The certificate provider will need to assess the donor's mental capacity before signing the form. When he signs it he should be satisfied that the donor understands what an LPA is, the powers the donor is giving to the attorney, its importance and its effect. Should anyone object to the LPA when it is registered the certificate provider may be required to explain to the Court of Protection why he thought the donor had the capacity to create the power. There are certain questions, it is suggested, that a certificate provider should ask of the donor. These include:-

- What is an LPA?
- Why do you want to make an LPA?
- Who are you appointing as your attorney(s)?

Equally important, the certificate provider should be satisfied that the donor is not being placed under pressure to make the LPA.

Attorney(s) and mental capacity

The donor must appoint an attorney(s) who will make decisions on their behalf.

Attorneys are under a duty to follow the principles of the Mental Capacity Act 2005 which include:-

- To act in the donor's best interests
- To assume capacity unless it is established that the person lacks capacity
- That merely because a person's decision is unwise, he is not to be treated as unable to make a decision and
- To act in accordance with the Mental Capacity Act 2005 Code of Practice, a document of almost 300 pages

Mental capacity means an ability to make a decision and there is a presumption of capacity. Anyone claiming that a person does not have capacity should be able to provide proof of this. A person is unable to make a decision if they cannot:-

- Understand information about the decision to be made; and
- Retain that information; and
- Use or weigh up that information in the decision making process; and
- Communicate their decision (this provision only applies if the person cannot communicate their decision in any way).

There is no one point at which a person is deemed to lose capacity - he may lack capacity on a temporary or permanent basis and may be able to make some decisions but not others. For example, a person may be unable to make complex investment decisions but be able to manage day-to-day finances. An attorney will need to assess, with the help of doctors and others when appropriate, a donor's capacity to make each decision in question.

A person has the right to be supported to make his own decisions and given all appropriate help before it is concluded he cannot do so.

The OPG will supervise attorneys if necessary. Failure to comply with the provisions set out in the Mental Capacity Act 2005 and the Code of Practice could lead to an application to the Court of Protection to remove the attorney. In some circumstances an attorney may be personally liable to criminal charges of fraud or negligence.

An attorney must keep accounts and produce them to the Court of Protection on request.

Registration

The donor or the attorney can register the LPA with the OPG for a fee of £82. This can be done at any time after it has been signed and the registration process takes about 8 – 10 weeks, but could be longer if objections are raised. It is possible to wait until such time as the donor loses capacity. An attorney should inform the OPG when he begins to act under an LPA if the LPA, having been registered, has not been used for some time.

If the donor registers the LPA, the attorney will be notified. If the attorney registers the LPA, the donor will be notified and may object.

The LPA for property and financial affairs expressly asks the donor as to when the LPA should be deemed to be in operation: if it is to be on registration or solely on incapacity. We usually recommend the former.

Once the LPA has been registered the attorney(s) will be able to make decisions in relation to the donor's property and affairs, with the donor's consent or in relation to a decision that the donor lacks the capacity to make.

Unlike the position with EPAs, once an LPA is registered, there is no presumption for or against the donor's capacity. It is of note that this can cause difficulties for banks and third parties when considering if they are able to accept instructions from the donor or attorney. Where such issues arise each transaction may need to be dealt with on a case by case basis.

b) Health and Welfare Lasting Power of Attorney

Nearly all of what has been stated in connection with a Property and Affairs LPA applies to a health and welfare LPA. The form is very similar; there are separate guidance notes issued by the OPG that apply to both donors and the attorneys of Health and Welfare LPA's.

An LPA for health and welfare can only be used when the donor lacks capacity to make the particular health and welfare decision in question. There is no one point in time when a person is treated as having lost capacity and the donor may be able to make some decisions but not others.

An attorney with unlimited authority for health and welfare can make all the decisions a donor would make about his welfare, including decisions about where he lives and what medical treatment he receives. The attorney can access the donor's personal information, such as medical records. The attorney cannot, however, make decisions about life-sustaining treatment unless express provision is made for this in the LPA. Section 5 of the form asks the donor to decide if they want their attorney to have the authority to give or refuse consent to life-sustaining treatment on their behalf. Life-sustaining treatment includes surgery, cancer

treatment, medicine, care or artificial nutrition or hydration.

A health and welfare attorney may need to work with a donor's attorney for property and affairs, his family, his carers and possibly the Court to agree what is in the donor's best interests. A donor can restrict the attorney's powers, for example, to social care only, and can give guidance which the attorney will have to take into account when making decisions, for example, about a particular type of treatment.

A donor who already has an EPA dealing with financial affairs can make an LPA for health and welfare. However, care will be needed in the choice of certificate provider as it cannot be the attorney of the EPA.

If a person lacks capacity and has no Health and Welfare LPA, doctors and carers must act in the person's best interests. If there is disagreement it is possible to apply to the Court of Protection for a decision. Following implementation of the Mental Capacity Act 2005, the Court may appoint a deputy to take decisions for the person on an ongoing basis.

Advance Decisions

Under the Mental Capacity Act 2005 a person may make an Advance Decision to refuse specified medical treatment in the future should they lack capacity at that time. This could be important if an individual has beliefs which conflict with certain medical treatments such as blood transfusions. It might be useful for the individual to discuss this option with their doctor. If a donor makes an Advance Decision as well as an LPA for health and welfare, great care will be necessary to avoid conflict. In some cases, Advance Decisions can be included as part of a donor's guidance in the LPA but the donor should always seek advice first.

There is no prescribed form for Advance Decisions although if the decision refuses life-sustaining treatment then certain formalities must be complied with:

The statement must be signed in writing with verification that it is "to apply to the treatment even if life is at risk."

- It must be signed.

- The signature must be made in the presence of a witness.
- The witness must sign it in the presence of the decision maker.

Trustee Power of Attorney

A trustee or personal representative (i.e. an executor of an estate) may, by power of attorney, delegate trust powers that have been vested in him as a trustee for a period of up to 12 months. (The delegation may also be made by a lasting power of attorney.) It is possible to extend the permitted delegation period by granting an unlimited number of successive powers of attorney, each lasting for 12 months.

It is necessary for the donor of a trust power of attorney to give written notice of delegation to his co-trustees and any person or persons who have power to appoint a new trustee. The donor of the power is liable for the acts of the attorney in the same way as if they were his own acts.

For further information, please contact:



HUGH MACDOUGALD

Partner, Private Client
T: 020 7593 5149
E: hmacdougald@wslaw.co.uk



TIM SNAITH

Partner, Private Client
T: 020 7593 5147
E: tsnaith@wslaw.co.uk