

Dickinson
Manser LLP
S o l i c i t o r s

LASTING POWERS OF ATTORNEY

This Fact Sheet covers appointing someone to manage your finances, health and personal welfare should you be unable to do so at some stage in the future.

Lasting Powers of Attorney replaced Enduring Powers of Attorney in October 2007 and are governed by the Mental Capacity Act 2005. An EPA can no longer be made but if you have an existing EPA it can continue to operate (whether registered or not).

At any stage in your life you may suffer an accident, physical ill-health or the onset of mental illness and for whatever reason, you may find that you become unable to manage your own affairs, whether they be financial or relating to your health and welfare.

A LPA is a legal document or documents appointing a person or persons of your choice to be your attorney(s). It is an extension of the former EPA. There are two different types of LPA you can use to make provision for the future. You can set up one or both types:-

1. **Property and Financial Affairs LPA**

This is similar to an EPA. This allows you to choose someone you trust to manage or make decisions about your finances and property on your behalf should you be unable. Your attorney can operate a bank account, make investment decisions, sign tax returns, purchase or sell a property, make gifts or donations on your behalf. This power can operate solely from the onset of mental incapacity or your attorney can manage some or all of your property and financial affairs on your instruction while you still have capacity. If there are powers you do not wish your attorney to have, you may place conditions and/or restrictions in the LPA documents.

2. **Personal Health and Welfare LPA**

This is new and allows you to choose someone you trust to make decisions on your behalf relating to your personal health and welfare. These decisions may include giving or refusing consent to medical care and treatment on your behalf, deciding where you live and who you will have contact with. Any decisions can only be taken on your behalf if your attorney believes that you lack the capacity to make the decision yourself. You can place conditions and/or restrictions on your attorney in regard to what decisions they make on your future health and welfare. Any conditions and/or restrictions must be written in the LPA document.

- (a) Advance decisions you can make within an LPA about your future health and welfare.

Within the health and welfare LPA document you are able to make advance decisions concerning the carrying out or continuing of medical treatment that may be needed in the future. However, unless strict formalities have been complied with, any advance decision you make will not affect any treatment that a doctor considers necessary to sustain your life. That is, the decision must be made in writing, signed and witnessed, and there must be an express statement that the decision stands "even if life is at risk".

- (b) How does an attorney assess the donor's capacity to make health and welfare decisions?

The Mental Capacity Act 2005 sets out a test for the attorney to assess whether a person lacks capacity to take a particular decision at a particular time. It is a "decision specific test". This means with each decision in relation to your health and welfare, your attorney will have to re-assess whether you have the capacity to decide for yourself. Whenever an attorney makes a decision under an LPA, by law they must act in your "best interests". When establishing your "best interests", your attorney must consider your age, your past wishes and your beliefs and values. For some people, mental incapacity may fluctuate with periods when their decision-making ability is unimpaired, so your attorney must assess whether or it is likely that you will, at some point in the future, have the capacity to make the decision yourself. Your attorney must allow you to participate as fully as possible in these matters. An attorney may only authorise restriction of your liberty or physical restraint to prevent harm to yourself and any restriction or restraint must be proportionate to the harm you might do to yourself.

- (c) Who can you appoint to be your attorney under both types of LPA?

Any individual aged eighteen years or over, who is of sound mind can be appointed to act as your attorney for both your financial affairs and your personal health and welfare. Under your financial affairs LPA you may also appoint a Trust Corporation. Under your health and welfare affairs LPA, only an individual or individuals can act as an attorney. You can choose the same or different individuals to act on your behalf under the financial affairs LPA and personal health and welfare LPA. You can choose to have just a financial affairs LPA or just a personal health and welfare LPA or both. For each type of LPA you can appoint more than one attorney and stipulate whether you wish your attorneys are to act together, or together and independently (meaning one attorney can act independently of any other). For a property and financial affairs LPA, it makes sense to appoint an attorney who is accustomed to handling their own or others' financial affairs on a regular basis and who knows you well enough that you trust them to make financial decisions that would reflect your wishes. For a personal health and welfare affairs LPA, you should appoint an attorney who you are confident will act in your "best interests". They should know you well enough that you trust them to make decisions on your behalf about every aspect of your home, your day-today personal care and any medical treatment.

(d) How do you make an LPA?

You must be eighteen years or over to make an LPA. The LPA must be made on the prescribed form. It must stipulate whether the LPA covers personal health and welfare or financial affairs or both. It must lay out clearly any conditions or restrictions you might have, as well as stating whether the attorney has the authority to act should you no longer have mental capacity. Once the form is completed it must be signed by you (the donor) and the attorney. The LPA must also be accompanied by a certificate from an authorised person which confirms that the donor understood the purpose and scope of the LPA and that there was no fraud or undue pressure or anything else that would prevent an accurate LPA from being created according to the donor's wishes. The powers given in a LPA cannot be exercised until the document has been registered with the Office of Public Guardian. Either party may apply for registration of the document. This is a change from the EPA which does not require registration until the onset of mental incapacity.

(e) Can you revoke an LPA?

You can revoke your LPA at any time provided you still have mental capacity. The attorney's powers is automatically revoked should the attorney lack mental capacity or if the attorney and donor have been married and get divorced, or have been in a civil partnership which is dissolved. The attorney's power is also revoked under a property and affairs LPA if they become bankrupt. An attorney can also decide at any time that they no longer want to act as your attorney. If you have lost mental capacity and your attorney no longer wants to act on your behalf, your attorney must inform the Office of the Public Guardian.

This fact sheet is one in a series of publications designed to provide practical guidance on matter of interest to clients. Copies of all our fact sheets may be obtained free of charge on request from any of our Partners or Staff.

We believe the information contained herein to be correct as at January 2008. Whilst all possible care is taken in the compilation and presentation of this fact sheet, no responsibility for loss, occasioned by any person acting or refraining from acting as a result of the material in this fact sheet, can be accepted by the firm or the author.

The information in this fact sheet is not designed to be a definitive text on this issue. On the contrary, it is designed to merely serve as a guide to supplement what we can advise you on directly. If you have any particular queries, especially where the circumstances of a matter make it unusual, you should seek further advice.

