

POWER OF ATTORNEY

collect, and receive
requests,

FACTSHEET

Decision making for other people

Nobody has an automatic right to make decisions on someone else's behalf, even if they are married or in a civil partnership with them. This factsheet explains how a person can give someone authority to provide that support.

Lasting Powers of Attorney (LPA)

If you are unable, or no longer want to make decisions, either as a result of mental incapacity or health issues then a Lasting Power of Attorney, gives someone you trust the legal authority to act for you.

A Lasting Power of Attorney can be created if the individual (donor) and the attorney are both aged over 18 and have mental capacity to create it.

You can appoint more than one attorney, and it is often helpful to do so. You can also choose how attorneys support you. Our recommendation is jointly and severally, which means that each attorney may act on their own discretion. This is why it is important to choose attorneys carefully. Attorneys can also be appointed to act jointly for all decisions or jointly for some decisions and individually for others. But, where there is any requirement for joint decision making, this can cause issues if there is a death, bankruptcy or falling out within the family.

Lasting Powers of Attorney to manage your finances and your welfare

There are two types of LPA and both must be registered with the Office of the Public Guardian (OPG) before they can be used, which may take four to five months.

1. Property and finance LPA

This LPA deals with managing financial matters including, but not limited to financial assets, accounts, investments, pensions, tax, buying or selling property, benefits and payment of bills. It can be used whether or not the donor has mental capacity, but if the donor has capacity then the attorney is only able to act on their wishes.

2. Health and welfare LPA

This LPA is used for managing, but not limited to: the type of care you receive, where you live, life sustaining treatment, who visits you. It can only be used if the donor no longer has capacity to deal with the issue themselves. Each decision is made at the time it is needed, so one day someone may be able to decide and the next not.

Sometimes someone may also have a living will or advanced directive which details treatment or end of life care. However, a simpler and more flexible option is a health and welfare LPA plus a letter of wishes, which can be altered at any stage.

Alternative ways to manage someone's affairs

The following provide authority to act on someone's behalf in certain circumstances.

Enduring Powers of Attorney (EPA)

The predecessor to the property and financial affairs LPA. Valid EPAs will have been made before the 1st October 2007, and are still valid now.

An EPA doesn't have to be registered before use if the donor is physically incapable or unable to sign their name. But, they must be registered with the OPG if the donor becomes, or is becoming, mentally incapable of dealing with their finances.

General Power of Attorney (GPA)

A document which does not need to be registered with the OPG and can be used as soon as signed. It is suitable for someone who is incapable of leaving home due to a short term illness or accident but who still has mental capacity of dealing with matters themselves.

However, it is only practical for 12 months. After this the attorney needs to prove the donor is still mentally capable each time it is used, and that the GPA is still valid. If the donor becomes mentally incapable of dealing with their financial affairs, even if that is within the first 12 months, the GPA cannot be used.

Deputyship, for someone who has lost capacity

If someone has lost or never had capacity to create a Lasting Power of Attorney then an application to the Court of Protection is needed to appoint an individual or individuals to manage their affairs. This typically takes 5 to 6 months. There are two types of deputyship; a property and finance deputyship and a health and welfare deputyship and they cover the same areas as the LPAs.

The court considers who should be a deputy, including family, the local authority and professional deputies. As with attorneys, the best appointment is jointly and severally and, if a professional deputy is not appointed, a solicitor can nonetheless assist.

Department of Work and Pensions (DWP) appointeeship

The DWP can provide authority for an appointee to specifically look after someone else's benefits if they are unable to do so themselves. They can be difficult to use due to issues with managing banks accounts and transfer of appointees if necessary.

Third party authorities

An authority allowing a third party to deal with an account in addition to the individual themselves. This authority cannot be used if the account owner becomes mentally incapable of dealing with their finances. Often, banks will recommend a joint account instead, but there can be consequences with this, for example tax, inheritance or issues with a divorce. These authorities are limited and do not allow a third party to deal with anyone else on the donor's behalf, i.e. utility companies, pension providers, or estate agents.

Other considerations

Deputies/attorneys can't make or change a will and shouldn't gift assets

While a deputy/attorney can administer day-to-day affairs there are things they can't do without a court order, including making or changing a will or giving away assets.

If a donor has no will or it's out of date then the court of protection may allow a will to be made or altered if it believes it is in the best interests of the individual. However, this may not be what the donor may have wished, and anyone who would benefit under intestacy or under a previous will must be notified and can make representations to the court.

Similarly, gifts from the estate should not be made without legal advice and/or a court order. Unauthorised gifts are not valid regardless of whether this was recommended by an IFA and will not be valid for IHT purposes.

Worried about giving away power

Understandably people worry about giving away power, but the law provides comprehensive protection. All attorneys, under a registered power, of whatever kind, can be investigated at any time by the OPG and anyone can raise an issue including solicitors, family, friends, social workers etc. Deputies have to work under a strict regime and produce accounts each year for the OPG.

How we can help

Managing the finances of someone who may be in failing health is complex and is best addressed long before it occurs. We can guide you through the process.



Mea North

Associate Solicitor | Community Care Lead

Community care

E mea.north@moorebarlow.com

T 023 8071 8108

Contact us today

E info@moorebarlow.com

T 023 8071 8000

moorebarlow.com

Private wealth | Family | Employment | Property | Corporate | Commercial | Serious injury

The information in this leaflet is correct as of May 2020. Moore Barlow LLP is authorised and regulated by the Solicitors Regulation Authority. Please note that the information contained in this leaflet is provided for guidance only and should not be relied upon as a replacement for legal advice. Please talk to a qualified solicitor about your specific circumstances. Authorised and regulated by the Solicitors Regulation Authority. SRA ID: 487618.