



Making a Lasting Power of Attorney (LPA) for Health and Welfare

LPAs are very useful, if not essential, legal documents that everyone should consider making. They are, however, rather detailed and there are many variables to consider before completing one.

Who can make an LPA?

Anyone who is over 18 and capable of understanding the document (known as the Donor).

What are the benefits of making an LPA?

- It allows you to plan in advance the decisions that you want to be made on your behalf if you were to lose mental capacity.
- You choose the person or people (the Attorney) that you want to make those decisions.
- You set down how you want the Attorney to make those decisions and the factors that they must consider at the time.
- Choosing who you want to make decisions for you puts you in control of decisions eventually made on your behalf.

What sort of decisions can the Attorney make on my behalf?

- Giving or refusing consent to certain types of health care, including medical treatment.
- Whether you should stay in your home, perhaps with support from social services or other agencies.
- Whether you should move to residential or other care outside your home, and choosing the right kind of accommodation.
- Day-to-day issues, like your dress, diet and daily routine.
- The Attorney must only make decisions that are in your best interests (see below).
- It is important to remember that the Attorney can only act if the LPA is registered at the Office of the Public Guardian (OPG) and you lack mental capacity. Whilst you remain mentally capable the decisions regarding health and welfare remain with you regardless of whether the LPA is registered.

What decisions is the Attorney not able to make on my behalf?

Decisions regarding your finances etc – that must be dealt with in a different form of LPA.

Is there any official guidance for the Attorney?

Yes, the Attorney should be aware of the Code of Practice and Principles which set out the factors that should be considered when making decisions, including the overriding principle that they must act in your best interests.

These documents are very comprehensive, and we can help guide your Attorney through them.

What is meant by 'Best Interests'?

The Code of Practice states that the Attorney must at all times act in your best interests when making decisions. When looking at this the Attorney must take into account all relevant factors that it would be reasonable to consider, not just those that they think are important, and they must not act or make a decision based on what they would want to do if they were the person who lacked capacity.

Who can be appointed as Attorney?

- Anyone over the age of eighteen can be appointed although usually it would be a close family member. As the Attorney will have very important powers over your health and welfare it is important to get the appointment right, and given the personal nature of the decisions that will have to be made it is not usual practice to appoint a professional.
- From a more practical point of view it is usually sensible to appoint someone younger than you. For example, an elderly couple may wish to appoint one another, but it may well make sense for one or more of their children to be appointed, or for children to be appointed as replacements should the spouse be unable to act (see overleaf).

How many people can I appoint as Attorney?

There is no actual limit on the number of people that can be appointed, but we suggest no more than four.

What are the options if I appoint more than one Attorney?

There are three options:

- **Joint:** this means that all must be involved in all decisions. This can be a cumbersome arrangement, and problems can arise on the death or incapacity of one joint Attorney;
- **Jointly and Separately:** this means that one attorney can act without the others, so for example one could make decisions without involving the other Attorney;
- **Joint for some matters and Jointly and Separately for others:** there is some flexibility as to how this can be defined. For example, you could state that for major decisions such as deciding whether to consent to medical treatment all of them must act, whereas for day-to-day matters such as diet or dress only one of them need act. Great care must be taken when drawing up such an appointment as precise wording must be used to avoid confusion. We can make sure that such wording is correct.

Replacement Attorney

You can if you wish appoint a replacement to act if the Attorney (or one of them) dies or becomes incapable of acting.

Life sustaining treatment

- This is a very important part of the LPA.
- You can decide whether the Attorney should have the power to make decisions about life sustaining medical treatment. Unless you specifically authorise them, they will not have this power.
- Examples of life sustaining treatment include:
 - A serious surgical operation, such as a heart bypass;
 - Receiving chemotherapy, radiotherapy or other cancer treatment or surgery;
 - An organ transplant;
 - The meaning of life sustaining treatment can change depending on circumstances; so for example, if you had breathing problems and developed pneumonia the giving of a simple course of antibiotics could be a life sustaining treatment.

Limiting the powers of the Attorney

- You can define the limits of the authority of the Attorney as follows:
 - Impose Conditions or Restrictions. These are matters that are binding on the Attorney and which he/she/they must follow, for example not consenting to certain treatments on religious grounds.
 - Provide Guidance. This does not bind the Attorney, but may be useful when making decisions, for example, you may wish to set out your views on certain medical treatments, or who you would like your Attorney to consult when making decisions.
- If you wish to impose limitations, again the wording used is very important to avoid confusion and/or conflict and we can assist you in making sure the wording is correct.

Registration

- Your Attorney can only use the LPA when it has been registered with the Office of the Public Guardian (OPG). This can be done as soon as the LPA is signed, or left until it is actually needed. It should be remembered that the registration process takes several months, and if registration is left there will be some delay in the Attorney being able to make decisions.
- A registration fee of £120 is payable to the OPG for each LPA registered, unless your income is below certain limits or you are in receipt of certain benefits.
- When the LPA is signed, you can decide whether anyone should be notified when registration takes place. This is intended to prevent fraud by ensuring that at least one other person is aware that the Attorney is in the process of registering the LPA.

Notification

- Anyone can be notified apart from the Attorney. The spouse of the Attorney can be notified, but we suggest that you name someone entirely independent if possible.
- If you do not wish anyone to be notified, you will need two certificate providers when the LPA is signed. Again, the intention behind this rule is to prevent fraud.

Certificate Provider

- When the LPA is signed, someone must act as Certificate Provider. That person is confirming that you understood the document and were under no undue influence when it was signed.
- A friend can act as Certificate Provider if they have known you personally for at least two years.
- A solicitor, doctor or other professional can act even if they have not known you for two years, provided they are experienced in this field.
- If no-one is to be notified of the registration, there must be two Certificate Providers.
- The role of Certificate Provider is very important and not to be taken lightly. The Certificate Provider must take you through the document and through certain information prescribed by law. Ideally, this should be done without the Attorney being present.

Payment of Attorney

- The Attorney can recover out of pocket expenses incurred whilst acting as Attorney.
- Unless you specifically authorise it, the Attorney will not be entitled to charge a fee for acting.
- It is very unusual for a Health and Welfare Attorney to be paid.

Advance directives

Another option that you might like to consider is an Advance Directive, also commonly known as a living will. If you complete one you are giving instructions to your medical advisors of what you want to happen should certain situations arise in the future. This can be contrasted with an LPA where you are appointing someone else to make those decisions in the future, albeit with guidance from you.

We can assist with the preparation of an Advance Directive if you prefer that alternative.

Conclusion

Sitting down to consider all the options available to you regarding an LPA can seem a daunting task, but at mfg we have a huge amount of experience of completing such documents and can guide you through the process.

The forms may appear complex and can be made so, but they can also be relatively simple and straightforward.

Other information

The OPG has a number of forms and booklets to assist anyone interested in an LPA, but many of these are longer than the forms themselves. This helpsheet is intended to serve a similar purpose, but in a more concise manner. If you wish to consult the more detailed information available from the OPG we suggest that you look at their website www.publicguardian.gov.uk.

For more information please call our private client division on:

0845 55 55 321

(Local rate charges apply)