

Lasting Power of Attorney



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Many people plan for what should happen to their property and finances after they die. However, fewer people plan for someone else to manage their finances for them during their lifetime, for example if they lose mental capacity, or are temporarily incapacitated e.g. Covid. According to the Office of the Public Guardian, although an estimated 40% of the adult UK population have a Will, less than 1% have put a Lasting Power of Attorney (LPA) in place. Many people assume that there is an automatic right for the next of kin (or a spouse) to deal with an individual's finances once they lose capacity or if they cannot manage their own finances for some other reason, but without a Power of Attorney in place, this is not the case. These are also restrictions on matters of health and welfare decisions. An LPA is strongly advised in order to overcome unexpected issues.



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When can they be put in place?

Financial LPAs can be put in place so that they are effective either immediately, or when an individual has lost capacity. Therefore, while often it is older clients who consider putting LPAs in place, there is great value in putting a financial LPA in place as soon as possible so that it can be used in an emergency, such as an individual suffering an injury causing them to be housebound or hospitalised for a period.

The authority afforded by an LPA can also be useful in more simple everyday circumstances, for example, where a spouse wants to access a bank account on their partner's behalf, though it is important to note that if the Donor has not lost capacity, their Attorney is under a duty to act only with their consent.

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Principles of the Mental Capacity Act (2005) that your Attorneys must follow

1. Your Attorneys must assume that you can make your own decisions unless they establish that you cannot do so.
2. Your Attorneys must help you to make as many of your own decisions as you can. They cannot treat you as unable to make the decision in question unless all practicable steps to help you to do so have been made without success.
3. Your Attorneys must not treat you as unable to make the decision in question simply because you make an unwise decision.
4. Your Attorneys must make decisions and act in your best interests when you are unable to make the decision in question.
5. Before your Attorneys make the decision in question or act for you, they must consider whether they can make the decision or act in a way that is less restrictive of your rights and freedom but still achieves the purpose.



Purpose of a Lasting Power of Attorney

A Property and Affairs LPA gives your Attorneys authority to make decisions about your property and financial affairs when you cannot make your own decisions. This can include running your bank accounts and savings accounts, decisions about making or selling investments and selling property, and spending your money. The health and welfare LPA can assist in making decisions such as care at home preferences and care home guidance.



When your Attorneys can act for you

Your Attorneys can use a Lasting Power of Attorney only after it has been registered and stamped on every page by the Office of the Public Guardian. Your Attorneys can make decisions for you as soon as a Lasting Power of Attorney is registered – both when you have mental capacity and when you lack mental capacity, unless you put a restriction in your Lasting Power of Attorney.



The Mental Capacity Act

Your Attorneys cannot do whatever they like. They must follow the principles of the Mental Capacity Act 2005. Guidance about these principles is in the Mental Capacity Act Code of Practice. Your Attorneys must have regard to the Code of Practice. They can read it online at www.publicguardian.gov.uk



Your best interests

Your Attorneys must act in your best interests in making decisions for you when you are unable to make the decision yourself. They must take into account all the relevant circumstances. This includes, if appropriate, consulting you and others who are interested in your welfare. Any guidance you add may assist your Attorneys in identifying your views.



Cancelling a Lasting Power of Attorney

You can cancel a Lasting Power of Attorney at any time before or after it is registered as long as you have mental capacity to cancel it. Please read the guidance available at www.publicguardian.gov.uk.

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Case study 1

John and May travelled to Florida for a Caribbean cruise.

John ran his own business, and most day-to-day payments were made from his accounts, but they also shared a small joint account.

John had a heart attack and was hospitalised. The couple had no travel insurance. John's hospital admission was complicated over payment issues and May was unable to authorise payments from John's accounts. Over a period of months, financial issues were experienced because John was unable to instruct the financial institutions directly.

Issues were also created with invoice payments being authorised from John's business account.

This could have been avoided if John had an LPA giving May the power to make property and affairs decisions on his behalf when he was incapacitated for a temporary period. Many people experienced similar issues when they were hospitalised with Covid-19.

Case study 2

Zofia was widowed after 40 years of marriage at the age of 75. She was supported by her daughter, but her health was deteriorating.

She had relied upon her husband for transport and could not make journeys by herself. She was not technically competent and was afraid of using online banking. She also relied on her daughter for day-to-day guidance now that her husband was deceased.

She was also concerned that her mental capacity was reducing. Zofia was advised to make an LPA appointing her daughter as her Attorney, this would permit her daughter to talk with the bank and Zofia's financial adviser on her behalf.

The LPA was signed within a month, and it took eight weeks for the office of the Public Guardian to approve and register the LPA. As soon as it was in place, the difficulties that had been experienced were overcome and Zofia had greater peace of mind.

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Case study 3

Shyla was widowed. She had a son, Niall, and a daughter, Taylor. Her son and his wife moved in with her shortly after her husband passed away as he had left the house to their son in his Will.

Taylor had a falling out with her brother, so her access to her mother was restricted. Over time, Shyla's health deteriorated.

Niall decided that she would be best taken care of in a care home, he subsequently sold the property and moved away.

If the family had engaged in better estate planning with a Beneficiary Protection Plan, as well as LPAs, the outcome could have been better for Shyla. She could have been better supported and her Health and Welfare LPA could have expressed the wish to have suitable home care prior to residential care. If Taylor was listed as the Attorney, she could have looked after Shyla.

Frequently Asked Questions

Do I need to create both types of LPA? The Property and Affairs LPA seems to be the most commonly used document, however, the majority of people that we provide planning for typically choose both.

I have an EPA; do I need an LPA? EPAs are still effective, so you do not need to change it, but bear in mind that they do not cover Health and Welfare.

Can I do my own LPA? Yes, people do choose to do their own LPAs but professionally drafted LPAs will generally have additional Powers which may be essential for future investment decisions.

Should I register my LPA? Our advice is generally yes, do it now. It takes several weeks to register an LPA so will restrict the ability to use it otherwise.

Can I change my LPA? Yes, you can, but you will need to use a document called a 'partial deed of revocation'.

Contact your estate planner in order to progress your Lasting Power of Attorney application

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