

Taylor Vinters for Individuals



Lasting Powers of Attorney

ERBIF

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LASTING POWERS OF ATTORNEY

Mental Capacity Act 2005 (MCA 2005)

Revokes the Enduring Powers of Attorney Act 1985. No new Enduring Power of Attorney (EPA) can be created after 30 September 2007.

Existing Enduring Powers of Attorney, provided they comply with the formalities under the 1985 Act, remain valid whether registered with the Court of Protection or not, unless revoked by the Donor or by the Court of Protection.

Trustee Act 1925 (Sections 23 and 25), Powers of Attorney Act 1971, Trusts of Land and Appointment of Trustees Act 1996, and Trustee Delegation Act 1999 (except sections 4 and 6 dealing with EPAs) not affected. Ordinary/General powers of attorney and Trustee powers of attorney can still be used to delegate authority where capacity to make decisions is unlikely to be an issue.

Power to delegate decision-making if the Donor lacks capacity now dealt with by Lasting Powers of Attorney.

Note MCA 2005 also provides legislative recognition of Advance Decisions to Refuse Treatment (Living Will/Refusal directive) and therefore confirms the right of an adult having capacity to refuse a specified treatment or treatments if he lacks capacity to consent at a later stage. This is not delegation, as the decision-making has been carried out by the Donor.

Prescribed Format

As with EPAs, LPAs are very prescribed as to format and the formalities for execution.

LPAs are a much longer document in part because much more space is given to certain elements and partly because it includes some completely new elements.

The changes are intended, amongst other things, to address two concerns: human rights and financial abuse.

LPAs reflect the tenor of the legislation, which is to allow adults to make decisions for themselves as long as they have capacity and provide support to allow them to do so.

Two different prescribed forms: Property and Affairs LPA and Welfare LPA

What are they used for?

Allows an individual (the Donor) to choose for themselves the person/persons/trust corporation (the attorneys) whom they want to make decisions on their behalf if at some time in the future they lack capacity to make that decision for themselves.

The Donor can choose any number of attorneys, and even provide for substitutes, either to replace a particular attorney or to replace any attorney. The Donor must, if they choose more than one attorney, stipulate whether the attorneys act together or together and independently, and can have a mixture provided it is clear which decisions fall into which stipulation.

There are a limited number of acts that it is not possible to delegate authority for, under any type of power of attorney – for example making a Will or the position of

office holder. Under a Property and Affairs LPA, the authority of the attorney to decide to make gifts from the donor's estate is also restricted under the MCA 2005. With LPAs it is now possible to delegate decision on non-financial matters – “welfare” issues.

The Donor can include restrictions on the attorneys' authority and can within the documents provide guidance, although this is not binding.

LPAs therefore give the Donor control over who can make decisions on their behalf if they lose capacity, and the extent of the decisions that can be made by the chosen attorneys. In the absence of an LPA, in relation to property and finance, the Court of Protection appoints the person (deputy) who can make such decisions as the Court authorises them.

Useful both as a safety net and to address more specific concerns about capacity to make decision.

Protection of the Donor's rights

The authority of an attorney under a Welfare LPA only operates if the donor lacks capacity to make the particular decision.

The authority of an attorney under a Property and Affairs LPA is not automatically restricted in this way, but the donor can choose to make it so.

The test of capacity is time and task specific, and no assumptions can be made based on age/appearance. Aspects of behaviour, conditions that the donor may be suffering from cannot give rise to unjustified assumptions. The question of whether someone lacks capacity or not is decided on the balance of probabilities.

The elements of the capacity test:

- Ability to understand relevant information
- Ability to retain that information
- Ability to use or weigh that information as part of process
- Ability to communicate the decision.

The attorney should consider whether he needs expert assessment – which may depend for example on the gravity of the decision in question.

If the attorney feels the donor lacks capacity at the time, he must still permit and encourage the donor to participate or improve his ability to participate as fully as possible in decisions affecting him. He must also consider whether the donor might regain capacity in the future and when that might be. Also, the attorney should ascertain donor's past and present wishes and feelings, values and beliefs and other relevant factors and consult other engaged in caring for the donor or anyone named for consultation.

The LPA form allows the donor to nominate up to 5 people who are notified when the LPA is registered. The LPA form requires that an acceptable “Certificate Provider” sees the donor on his own as soon as possible after he has completed and signed the donor's section to certify that the donor understands the purpose of the LPA and the scope of the authority granted, and that no fraud or undue pressure has been applied to the donor.

If no-one is nominated to be notified of the registration there have to be two separate Certificate Providers.

Choice of Certificate Provider lies with the donor, but it cannot be a family member, business partner, paid employee, attorney under this or any previous EPA or LPA or someone connected with a care home in which the donor lives.

The Certificate Provider may either be an appropriate professional (healthcare professional, solicitor, registered social worker etc), or someone who has known the donor for at least two years.

If donor has difficulty with communication, it is possible to have someone to facilitate present, but otherwise the certificate provider must see the donor on his own.

Donor can include a requirement for annual accounts to be prepared by the attorneys and audited, and can stipulate that lack of capacity must be certified by a doctor.

Position of the attorney and third parties.

Unless the LPA requires that the decision that the donor lacks capacity must be verified by a written assessment from a doctor, there is a very significant burden on the attorney. The attorney should protect himself by keeping records, and if the decision in question is significant be more cautious.

The position of a third party dealing with the attorney is dealt with to a very limited extent in MCA 2005. The third party should assure himself when dealing with an attorney under an LPA: that the power is still in force and that the attorney is acting within the scope of his authority.

Any transaction between and attorney and a third party is, in favour of the third party as valid as if the power had been in existence unless at the time of the transaction the third party had knowledge that an LPA was not created or of circumstance which would terminate the attorney's authority had an LPA been created. In favour of a purchaser in a transaction between an attorney and a third party, the transaction is conclusively presumed to be valid if completed in 12 months of the date on which the LPA was registered or the third party makes a statutory declaration before or within 3 months of the completion date that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose.

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