

# Lasting Powers of Attorney





## *Services*

*Accident Claims*

*Commercial Law*

*Conveyancing*

*Employment Law*

*Equity Release*

*Family Law*

*Landlord and Tenant Law*

*Powers of Attorney*

*Wills, Trusts and Inheritance*

# INFORMATION ON MAKING A LASTING POWER OF ATTORNEY

## What is a Lasting Power of Attorney?

A Lasting Power of Attorney is a document in which you name people to deal with matters on your behalf. Whereas a Will appoints executors to deal with your property and financial affairs after you have died, a Lasting Power of Attorney appoints people to deal with matters while you are living.

Such persons are called “attorneys”. Despite the sound of that word, they do not have to be legally qualified – indeed people often choose members of their own family or close friends to be attorneys. It is also possible to appoint a professional person, such as your solicitor, if you do not have suitable family members or friends nearby, or as a replacement attorney if your original choice of attorneys have died or become unable to deal with matters on your behalf.

The authority of your attorneys to deal with matters on your behalf continues in the event that you lose the mental ability to manage your own affairs. Indeed, that is the main purpose of these documents and is why they are called “lasting” powers of attorney.

There are two separate Lasting Power of Attorney documents which you can make: one for your property and financial affairs and the other for decisions in respect of your health and welfare.

If you make a Lasting Power of Attorney it does not prevent you from continuing to deal with your own affairs. For example, making a Lasting Power of Attorney does not prevent you from signing your own cheques as soon as it has been registered, but it does enable your attorney(s) to deal with matters if you become unable to do so for yourself.

## **Why make a Lasting Power of Attorney?**

If you were to become mentally unable to deal with your own affairs without having made a Lasting Power of Attorney (for example due to dementia, head injury, a stroke or some other illness), in order for your family or anyone close to you to be able to manage your money and pay your bills on your behalf, it may be necessary for them to apply to the Court of Protection.

The legal and medical fees for applications to the Court of Protection can be very expensive and the process can take a long time. The Court usually requires an insurance policy to be taken out and for yearly accounts to be submitted (and in doing so, an administrative fee is generally payable on submitting each year's accounts).

It is usually much cheaper, simpler and less intrusive to put a Lasting Power of Attorney in place while you are able to make one. After a person has lost mental capacity, he or she is not able to make a Lasting Power of Attorney.

## Property and Financial Affairs

A Lasting Power of Attorney for Property and Financial Affairs would enable people you have chosen to use your bank or building society accounts for your benefit (for example, to pay your bills and to buy things that you need), invest your money, sell or buy your property, insure and repair your property, and claim any benefits, allowances or pensions to which you are entitled. It would also enable them to deal with your tax affairs.

A Lasting Power of Attorney for Property and Financial Affairs can be used to enable people to manage your money whether or not you are mentally capable of doing so yourself. For example, they can be useful if you are capable mentally but have difficulty getting out to your bank.

Please note that a Lasting Power of Attorney for Health and Welfare can only be used in the event that you lose mental capacity. It is, however, possible to insert a clause into a Lasting Power of Attorney for Property and Financial Affairs to prevent it being used while you have the mental capacity to deal with your own affairs, if you so wish; although that would of course deny you the convenience of your attorney(s) being able to deal with matters for you if you become less able to get out and about.

*Can I include instructions as to how my attorney(s) deal with my property and financial affairs?*

Your Lasting Power of Attorney can include instructions which your attorney(s) would be obliged to follow, if you so wish. Here are some examples for you to consider:

- To enable your attorney(s) to permit an investment management company or bank to manage your investments
- Not to sell your home unless your doctor confirms in writing that you are incapable of living independently
- Not to invest your money without seeking professional advice
- Not to make any gifts to anyone or certain people out of your money

*Can I express preferences as to how I would wish my property and financial affairs to be managed?*

Preferences can also be written into your Lasting Power of Attorney, if you so wish. They are things that you would like your attorney(s) to bear in mind when making decisions for you, but they are not obliged to follow them. Here are some examples for you to consider:

- To invest your money in ethical funds
- To reinvest all interest earned on your investments into your next year's ISA allowance

## **Health and Welfare**

A Lasting Power of Attorney for Health and Welfare would enable people of your choice to make decisions for you if you should become mentally unable to make your own decisions.

Health and welfare decisions include whether you stay in your own home or choosing a nursing home if necessary, giving or refusing consent to medical treatment, arranging your appointments (for example with your doctor, dentist, optician, etc) and day-to-day decisions such as what you eat, what clothes you wear, what type of exercise you take, what outings you go on and who you see socially.

Health and welfare attorneys would also have a duty to make complaints on your behalf if you were not receiving adequate care or treatment.

In respect of medical decisions, whereas doctors often consult with a person's next-of-kin, the doctors are not obliged to follow their wishes. However, if you have a Lasting Power of Attorney for Health and Welfare, your attorneys' decisions must be followed.

*I wouldn't put a dog in that nursing home! How can I make sure that my wishes are taken into consideration?*

Many people know someone who, through old age or illness, has become incapable of living independently, and families can be upset when social workers seem to take over in the decision-making process. By having your

Lasting Power of Attorney for health and welfare, people you choose are placed in a position where they have the authority to make your decisions for you.

*Can I include instructions on decisions to be made concerning my health and welfare?*

Your Lasting Power of Attorney can include instructions which your attorney(s) would be obliged to follow, if you so wish. Here are some examples for you to consider:

- Not to place you in a nursing home without obtaining written confirmation from your doctor that you are no longer able to live independently
- To ensure that you are only given a certain type of food (e.g. vegetarian, gluten-free, halal, kosher, etc)
- If you know someone you have chosen to be attorney does not like one of your friends, you could restrict your attorney's powers to choose who you do and do not see socially
- To refuse consent to life-sustaining treatment if you are in a persistent vegetative condition
- Not to consent to medical treatment involving blood products if it would be against your religion

*Can I include preferences as to my wishes in respect of my health and welfare?*

Your Lasting Power of Attorney does not need to stop at choosing the people to make your decisions. You can state your wishes now while you are able to do so, which will apply after you have become unable to make decisions for yourself.

Preferences can also be written into your Lasting Power of Attorney, if you so wish. They are things that you would like your attorney(s) to bear in mind when making decisions for you, but they are not obliged to follow them. Here are some examples for you to consider:

- To live in your own home as long as practically possible
- To live within five miles of your family or certain person(s)
- Particular nursing homes that you would wish to be placed in, or ones you would wish to avoid being placed in
- To take exercise at least three times a week whenever you are physically able to do so
- To spend time outdoors at least once a day
- To go on outings as often as possible and not be left indoors every day
- To have pets living with you
- Types of clothes that you like to wear, or do not like to wear
- Types of food that you like, or dislike
- Certain person(s) with whom you would wish to have social contact, or not to have contact with

Remember, a Lasting Power of Attorney for health and welfare is used if and when you lose the ability to make decisions for yourself. If you regain your mental capacity or have “good days” in between “bad days”, your attorney(s) must step back and allow you to make your own decisions.

## **Do I make one or two Lasting Powers of Attorney?**

It is your decision. The Property and Financial Affairs, and Health and Welfare Lasting Powers of Attorney are two separate documents. Some people only make one Lasting Power of Attorney – often for property and financial affairs to ensure that someone is able to manage their money for them. Equally, you could decide to only make a Lasting Power of Attorney for Health and Welfare.

*“I have already made an Enduring Power of Attorney. Is it still valid and what’s the difference?”*

Enduring Powers of Attorney were made under the previous legislation and only allow attorneys to manage property and financial affairs. It was not possible at that time to make one in respect of health and welfare decisions.

If you have an Enduring Power of Attorney it will still be valid, but since 1<sup>st</sup> October 2007 it has not been possible to make a new Enduring Power of Attorney using the old forms. If your Enduring Power of Attorney needs updating (for example, because the people you chose as attorneys are no longer around or because you wish to choose somebody else), then you have to make a new Lasting Power of Attorney.

If you have an existing Enduring Power of Attorney and the person(s) you chose as attorney(s) are still available and suitable, you may wish to take this opportunity to make a Lasting Power of Attorney for Health and Welfare to work in conjunction with your Enduring Power of Attorney in the event that you lose your mental capacity.

## **Who can be an Attorney?**

Anybody who is 18 years of age or older can become an attorney provided that he or she is not bankrupt or mentally incapacitated.

You can choose as many attorneys (and replacement attorneys) as you like.

Attorneys have a great deal of control over a person's affairs; therefore they should be chosen carefully.

If making a Lasting Power of Attorney, particularly for health and welfare decisions, you must ensure that the person(s) you are considering choosing as attorney(s) would have the time to assist you. Health and welfare decisions might involve seeing you every day to choose your clothes and food, decide who you see, make appointments for you, encourage you to take part in activities and ensure that you are receiving adequate care.

It is important that you discuss your wishes with your attorney(s) to ensure that they understand the sorts of decisions that you would make and what they might be required to do for you.

## **What if an attorney dies or is himself unable to deal with matters when needed?**

It is advisable to appoint more than one attorney, or to appoint replacement attorneys. Married couples often wish to appoint each other as attorney, and also have replacement attorneys such as their children to step in if needed, such as when one spouse has died or become incapable of dealing with the other's affairs, but so that the replacement attorneys do not get involved when one spouse is able to deal with the other's affairs.

**If more than one person is made attorney, do they have to consult each other or can any one of them deal with matters on their own?**

That is a choice for you to make. If you are appointing (say) two people as your attorneys, you can either allow any one of them to deal with your affairs on his or her own, or you can require them both to work together.

You can even allow any one of them to act alone for some decisions (perhaps smaller day-to-day decisions, such as paying regular bills or deciding what clothes you wear and whether you will go on outings), but for both attorneys to have to deal with other (perhaps more major) decisions together. You might decide that you would wish your attorneys to have to work together in making decisions such as choosing a nursing home for you, selling your home and investing large amounts of your money.

In the documentation, where any one of your attorneys can deal with matters alone, this is known as acting “jointly and severally”. Whereas where every attorney is required to make decisions together, this is called acting “jointly”.

If you choose for your attorneys to always have to work together (i.e. “jointly”), this means that every attorney will have to sign each of your cheques – one signature alone will not suffice. It also means that if any attorney is on holiday, dies or becomes unable to deal with your affairs, then the other attorney(s) cannot do anything alone. For these reasons, more people tend to elect for the “joint and several” option when appointing more than one attorney.

Remember, you can name replacement attorneys to step in if and when any of your first choice of attorney is unavailable. However, if your first choice of attorneys are appointed “jointly”, then, if one of them is unavailable, all of your first choice of attorneys are unable to act for you and your replacement attorneys replace all of them (not just the one who is unavailable).

## **Can attorney(s) be paid by me?**

It can be stated in the documents whether you wish to pay your attorney(s). Normally, where attorneys are family members or friends the section is left blank. It is not usual for family members or friends to be paid for making decisions relating to your health and welfare.

Your attorney(s) can claim reimbursement of any expenses incurred in assisting you, even if you do not include a charging clause.

If you did wish to pay family members or friends for their work on your behalf, you could, for example, state that each attorney is to be paid (say) £1,000 per year on a certain date. Alternatively, you might wish to leave them a gift in your Will to be paid after you have died.

If you are appointing a professional person, such as your solicitor, to act as attorney, then there would be a charge for work carried out.

## **What is a “certificate provider”?**

As a safeguard, the legislation requires you to choose someone in addition to your attorney(s) to also sign your Lasting Power of Attorney to confirm that you understand what you are signing and that you are not being pressurised into it.

This person must have either known you for at least two years, or have relevant professional skills – for example a solicitor who specialises in this area of law, or a doctor.

This person cannot be someone who is going to be an attorney, a member of your family, a family member of someone who is going to be an attorney, a business partner or employee of yours, a business partner or an employee of someone who is going to be your attorney.

Your solicitor will be pleased to act as “certificate provider” unless you are appointing the firm of solicitors as attorneys; however if there is any doubt as to your ability to make your own decisions, your solicitor will recommend that your Lasting Power of Attorney be signed by a medical practitioner.

## **What is meant by “people to notify”?**

A person to notify is a person or persons who can be named in your Lasting Power of Attorney whom you would like to be notified when an application is made to register your Lasting Power of Attorney. They are not the attorneys. Once notified, if they have any concerns (for example, if they think you were put under pressure to make a Lasting Power of Attorney or think fraud is involved), they can object to the Lasting Power of Attorney being registered. This is an additional safety aspect for you.

There is no requirement for you to notify anyone, however, unlike the position a few years ago.

You can choose up to five people to be notified.

Guidance on how the person(s) to be told can object is part of the notice sent to them. It is important to remember that the person(s) to be notified should know you well enough to be able to raise any concerns they may have about you making a Lasting Power of Attorney.

A person to be notified may also be the certificate provider and a witness to your signature or to the signature(s) of your attorney(s), but they cannot be an attorney.

## Registration at the Office of the Public Guardian

Before a Lasting Power of Attorney can be used, it will be necessary to register it at the Office of the Public Guardian and pay their fee – currently £82 for each Lasting Power of Attorney. If you are making both types of Lasting Power of Attorney, then there are two registration fees payable. However, you may be exempt from paying the fee(s) if you are claiming any of the following:

- Income Support
- Income-related Employment and Support Allowance
- Income-based Job-Seeker's Allowance
- Pension Guarantee Credit element of State Pension Credit
- A combination of Working Tax Credit and either Child Tax Credit, Disability Element Working Tax Credit or Severe Disability Element (within the Working Tax Credit). This does not include Disability Living Allowance or Invalidity Benefit
- Housing Benefit
- Council Tax Benefit (not the 25% single person's reduction)
- Local Housing Allowance

If you are not eligible for any of the above benefits, if your gross annual income is less than £12,000, then you would be eligible for a reduction in the fees and you would only pay 50% of the fee(s) provided that you can produce documentary evidence of your pension(s) or other earnings, as well as all your bank and/ building society account statements for the last twelve months.

If you believe any of the above applies to you, please ensure that you discuss this with your solicitor, who will prepare an additional form on your behalf to claim your entitlement to either the full exemption or the reduced fee(s) rate.

## **Summary of matters to discuss with your solicitor**

1. Name(s) and address(es) and date(s) of birth of the person(s) you wish to choose as attorney(s)
2. Name(s) and address(es) and date(s) of birth of anyone you wish to choose as replacement attorney(s)
3. If choosing more than one person as attorney, whether you require them to only work together or whether any one of them can act on their own
4. Any instructions you as to what you require your attorneys to do, or refrain from doing
5. Any preferences you wish to express to help your attorney(s) make decisions in accordance with your wishes
6. Name(s) and address(es) of any person(s) to be notified that you are making a Lasting Power of Attorney (remember, this is not a requirement and any person(s) to be notified cannot also be your attorney(s))
7. If your solicitors are being made attorneys (and therefore cannot act as certificate provider), the name and address of either someone who has known you for more than two years (and is not a family member) or your doctor, social worker, another solicitor not being a member of the same firm, or a barrister to certify that you understand the document you are signing and are not being put under pressure to do so
8. Whether you are in receipt of any state benefits which may entitle you to an exemption from the Office of Public Guardian's registration fee(s) and, if so, documentary evidence such as a letter from a government department or council stating the benefit to which you are entitled
9. If you are not in receipt of benefits but earn less than £12,000 per year, please let your solicitor have documentary evidence of your earnings (such as the latest letters from your pension providers) as well as all your bank and/or building account statements for the last twelve months

## **INFORMATION FOR ATTORNEYS**

### **What is an “attorney”?**

An attorney is a decision-maker for someone who has chosen you to make decisions on his or her behalf. There are two types of Lasting Power of Attorney: one to enable you to deal with the person’s property and financial affairs, and the other to enable you to make decisions relating to his or her health and welfare.

### **What does an attorney have to do?**

#### *Lasting Power of Attorney for Property and Financial Affairs*

If you agree to be an attorney in respect of someone’s property and financial affairs, you may be involved in using the person’s bank or building society account(s) to pay his or her bills, buying things that he or she needs using his or her money, his or her tax affairs, claiming any benefits, allowances or pensions, and you could be involved in more major decisions such selling the person’s home and investing the money.

You should keep records of all payments in or out of the person’s accounts – for example, you should keep all his or her bank statements and receipts.

You must keep the person’s money separate from your own – i.e. keep his or her money in his or her own account(s) and not mix it with your own.

#### *Lasting Power of Attorney for Health and Welfare*

If you agree to be someone’s attorney for health and welfare, you may be involved in discussing matters concerning his or her medical and housing issues with medical practitioners, social workers and others, and making choices which affect his or her lifestyle.

There is an option in the paperwork for the person to choose whether or not you as attorney can give or refuse consent to life-sustaining medical treatment. This could involve making the difficult decision to turn off a life-support machine.

Before agreeing to be someone's attorney for health and welfare decisions, you should ensure that, if the person should become mentally incapable of making his or her own decisions, you would have the time to assist the person.

Unlike attorneys for property and financial affairs who may only have to deal with finances occasionally (particularly if Direct Debits or standing orders have been set up to pay regular bills), you may be required to have daily contact with the person because health and welfare decisions can involve choosing the person's clothes, ensuring that the person is encouraged to take part in leisure activities rather than being left sitting in front of a television set all day and deciding with whom the person has contact.

You would have a duty to ensure that the person is receiving adequate care, and to complain on his or her behalf if he or she is not.

You may have to restrain the person to protect him or her from harm. However, before doing so, you should consider whether you can protect the person in such a way as to be less restrictive of his or her freedom. For example, this might involve holding the person's hand while crossing a road.

If choosing a nursing home for the person, you must ensure that it is suitable for his or her needs. You may have to refer to any assessment made by social services to establish what type of care is needed.

Being made an attorney would not enable you to make decisions which are against the law. For example, you would not be permitted to help the person commit suicide or travel to a country where assisted suicide is legal – to do so would be a criminal offence.

If the person were to be detained under the Mental Health Act 1983, you would not have the power to consent to or refuse treatment for a mental disorder.

As a Lasting Power of Attorney for Health and Welfare only applies when the person lacks the mental ability to make his or her own decisions, if the person regains mental capacity or has capacity to make a particular decision, then you must not make the decision(s) for him or her. This is not, however, to be confused with the Lasting Power of Attorney for Property and Financial Affairs which (in the absence of a restriction to the contrary) can be used at any time once it has been registered if the person wishes.

## *Attorneys' duties applicable to both types of Lasting Power of Attorney*

As an attorney you must:

- Act in the person's best interests
- Follow any instructions which he or she leaves in the Lasting Power of Attorney document (please refer to the restrictions and guidance sections of the document(s))
- Keep the person's matters confidential
- Not profit or benefit from being attorney; although you can claim reasonable expenses that you incur in carrying out your duties – such as petrol, telephone and postage costs
- If the person dies, you must stop using the Lasting Power of Attorney immediately and return the Lasting Power of Attorney document(s) to the Office of the Public Guardian with his or her death certificate. The person's bank or building society account(s) will be frozen as soon as the bank is notified of the death

It is important that you know the person well and discuss his or her wishes and the sorts of decisions that you could be required to make.

## **Principles which attorneys should follow**

As an attorney, in carrying out your duties you should follow the principles set out in the Mental Capacity Act 2005:

1. Assume that the person can make his or her own decisions unless it is established that he or she cannot
2. Help the person to make his or her own decisions so far as possible
3. Not treat the person as being incapable of making a decision merely because his or her own decision seems unwise
4. Make decisions and act in the person's best interests when he or she is unable to make his or her own decisions
5. Before making a decision or doing something for the person, you must consider whether you could achieve the same purpose in a way that is less restrictive of the person's freedom

**This booklet is a brief guide only, providing some ideas for you to consider. It is not an exhaustive guide to this area of law and is not intended to provide advice on specific issues or situations.**

If you would like further information, please contact us so that we may advise you as to your situation.









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**In some cases appointments can be made to visit you outside of the office.**