

Health and Welfare Lasting Power of Attorney

Please note that there are two different types of Lasting Power of Attorney (LPA), namely a Property and Affairs Lasting Power of Attorney and a Health and Welfare Lasting Power of Attorney. You do not have to have both types of LPA.

If, however, you decide that you would like to enter into both a Property and Affairs LPA and a Health and Welfare LPA please bear in mind that there will be a certain amount of "cross over". For example, what if your Health and Welfare Attorney(s) decides that it would be in your best interests to move into residential care? What if this requires the sale of your present home? In such circumstances your Health and Welfare Attorney(s) would then need to consider your best interests and discuss these with your Property and Affairs Attorney(s). Your Health and Welfare Attorney(s) will not have the authority to sell your house; this power will rest with your Property and Affairs Attorney(s). Clearly there is less of a problem in this regard if your Health and Welfare Attorney(s) and Property and Affairs Attorney(s) are one and the same.

Please see our separate guidance note on "Property and Affairs Lasting Power of Attorney".

The remainder of this guidance note deals solely with the Health and Welfare Lasting Power of Attorney.

What are the advantages of making a Health and Welfare Lasting Power of Attorney (LPA)?

A Health and Welfare LPA enables you (the Donor) to plan in advance the decisions and actions you might want someone to take on your behalf in relation to welfare and healthcare matters at a time when you lack mental capacity.

The person, or persons, you appoint to make these decisions are your Attorneys.

Do I need to see a solicitor to make an LPA?

No. This, however, is what the Office of the Public Guardian (whose job it is to register, track and oversee LPAs) said on the issue of LPAs generally and the obtaining of independent legal advice:-

"...an LPA is a powerful and important document and you may want to seek advice from someone with experience of preparing them, such as a legal adviser. They will be able to offer you legal advice and may be able to help you fill in the form."

Please note that in conjunction with advising generally on both types of LPAs we, as Solicitors, also qualify as Certificate Providers (see below).

Who can act as my Attorney(s)?

Your Attorney should be a person you know and trust who is at least 18. You can choose more than one Attorney.

Attorney(s), when acting under a Health and Welfare LPA, must act in the best interests of you (the Donor).

Your Attorney(s) must have regard to the Code of Practice, which provides guidance on the Mental Capacity Act 2005. The Code of Practice, and more detailed Guidance Notes for Donors, Attorneys and Certificate Providers can all be found on the Office of the Public Guardian's website: www.publicguardian.gov.uk

Is there anything I can do to assist my Attorney(s) in their decision making?

To help your Attorney(s) make decisions that are in your best interests in the future you should talk to them now and make them aware of any specific views or wishes that you may have. For example, you may want to tell them now that you do not wish to move outside of a particular area when they are looking at your living arrangements in the future.

If I appoint more than one Attorney what is the difference between appointing them “together”, as opposed to “together and independently”?

If appointed “together” then your Attorneys must act unanimously. If, however, you appoint them “together and independently” then they can all act together but they can also act separately, if they wish. You may wish to appoint your Attorney(s) together in respect of some matters and together and independently in respect of others.

Are there any potential problems in appointing Attorneys “together” as opposed to “together and independently”?

Possibly. Appointing lots of Attorneys to all work together could mean:

- it is difficult for them to act/make decisions; or
- the LPA could be cancelled if they cannot work together; or
- the LPA could be cancelled if one of them dies or loses the capacity to make decisions as your Attorney.

Why might I need to appoint a Replacement Attorney?

You may wish to appoint a Replacement Attorney in case an Attorney is unable or no longer wishes to continue acting for you. It is not mandatory to appoint a Replacement Attorney.

When can my Attorney act under the Health and Welfare LPA?

An LPA, whether it be a Health and Welfare or Property and Affairs LPA, can only be used when it is registered with the Office of the Public Guardian (OPG).

An Attorney under a Health and Welfare LPA can also only act when you (the Donor) lack the capacity to make a particular decision yourself. In this regard a Health and Welfare LPA differs to a Property and Affairs LPA. A Property and Affairs LPA can be used by an Attorney as soon as it has been registered even if you (the Donor) still have capacity (please see our separate guidance note: “Property and Affairs Lasting Power of Attorney”).

Can I still make decisions even after my Health and Welfare LPA has been registered?

Yes. Registration of an LPA does not mean that you lack capacity. You are assumed to have capacity to act unless it is shown that you do not. Your Attorney(s) is always obliged to help you to make as many of your own decisions as you possibly can. If you do lack the capacity to make a decision, your Attorney can act for you in your best interests according to the contents of your LPA.

What sort of decisions can my Attorney(s) make under a Health and Welfare LPA?

An Attorney under a Health and Welfare LPA may make any decision that you could make about your welfare e.g.:-

1. where you live and with whom,
2. accessing your personal information like medical records,
3. deciding what you wear,
4. what you eat and how you spend your day.

They will also be able to give and refuse consent to medical treatment according to your best interests.

Can I authorise my Attorney(s) to make decisions as regards Life Sustaining Treatment?

Yes, but this must be expressly stated with the LPA. You may want to discuss this with your doctor, you should also discuss this with your Attorney(s).

Can I restrict the powers of my Attorney(s) or add conditions?

Yes, you can put legally binding restrictions and conditions on your Attorney(s)' powers and the scope of their authority in the LPA. But think carefully before inserting such restrictions or conditions as certain decisions concerning your welfare will still need to be made if you lack capacity and other people will therefore have to decide for you. That could involve going back to your doctor or care worker or the Court of Protection.

What sort of conditions could I impose?

By way of example, you could say that your Attorney must always talk to a particular person before making a decision about where you live

What if I choose not to impose any restrictions or conditions on my Attorney(s)?

If you make an LPA that does not contain any restrictions or conditions, once the LPA is registered (and you have lost capacity) your Attorney(s) will be able to do anything that you can do now in relation to your personal welfare. This might include:-

1. deciding where your permanent place of residence should be;
2. deciding what care and accommodation may be appropriate for you;
3. consenting to any medical treatment or procedure or therapy of whatever nature for your benefit and providing access for that, or refusing such consent;
4. deciding, alone or with others, on the level of care which you may require;
5. making decisions about your dress, diet and personal appearance as appropriate;
6. choosing your social and cultural activities;
7. arranging for you to undertake work, education or training;
8. taking you on holiday or authorising someone else to do so;
9. consenting to you being involved in certain types of research that meets the strict rules set out by the Act.

Who are "Named Persons" and why do I need them?

You can name up to five people to be notified when an application to register your LPA is made. You can choose family members or friends or, if you prefer, someone else such as a health or social care worker that knows you to act as your named persons.

Anyone about to apply for registration of an LPA must notify these named persons. This gives you an important safeguard because, if you lack capacity at the time of registration, you will be relying on these people to raise any concerns they may have about the application to register.

It is very important that you keep the addresses/contact details of your named persons up to date. You should do this on a separate sheet and keep this with your completed LPA.

Do I have to include "Named Persons" in my LPA?

No, but if you choose not to name anyone to be notified you will need two Certificate Providers (see below).

Who is the "Certificate Provider" and why do I need one?

The Certificate is a central part of the LPA, it certifies that you (the Donor) fully understand the LPA document and its implications.

The Certificate must be signed by someone (the Certificate Provider) who has explained the nature of the LPA to you and is satisfied that you (the Donor) are making the LPA of your own free will, that you understand its purpose and the powers you are giving your Attorney(s).

It is important that you choose the Certificate Provider not your Attorney(s) or any other person. The Certificate Provider's role is an important one and there is always a possibility that, if someone challenges your capacity to make the LPA, the Certificate Provider may be called upon to explain to the Court of Protection their decision to sign the Certificate.

Must the LPA be registered immediately after having been signed?

No, however, if you do register it immediately after having been signed then it is ready to be used if and when you lose capacity.

What if I change my mind?

You can cancel your LPA even after it is registered, provided you have the mental capacity to do so.

Should you wish for us to act on your behalf in relation to preparing a Health and Welfare Lasting Power of Attorney, or if you have any queries as regards the above, then please contact our William Morgan.

Morgan & Co. Solicitors, 62-64 Bridgnorth Road, Wollaston, Stourbridge, West Midlands DY8 3PA

t: 01384 440069 f: 01384 392202 e: admin@morgansolicitors.com

This Firm is regulated by the Solicitors Regulation Authority (SRA) number 520345.

Partners: William J Morgan BA (Hons) LL.M. & Daniel M Williams BEng LL.B.
