A Guide to Making Lasting Power of Attorney

By Richardson's Wills

RICHARDSON'S WILLS

This guide explains what Lasting Powers of Attorney (LPAs) are and how they should be used. It does not replace professional advice but merely hopes to aid in understanding these important documents.

What is a Lasting Power of Attorney (LPA)?

Sometimes one person will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so. Under a power of attorney, the chosen person (the attorney or donee) can make decisions that are as valid as one made by the person (the donor).

Before the Enduring Powers of Attorney Act 1985, every power of attorney automatically became invalid as soon as the donor lacked the capacity to make their own decision. But that Act introduced the Enduring Power of Attorney (EPA). An EPA allows an attorney to make decisions about property and financial affairs even if the donor lacks capacity to manage their own affairs.

The Mental Capacity Act replaces the EPA with the Lasting Power of Attorney (LPA). It also increases the range of different types of decisions that people can authorise others to make on their behalf.

As well as property and affairs (including financial matters), LPAs can also cover personal welfare (including healthcare and consent to medical treatment) for people who lack capacity to make such decisions for themselves.

The donor can choose one person or several to make different kinds of decisions. Therefore, acting as their Attorneys.

How does a person (donor) create an LPA?

- The person (donor) must also follow the right procedures for creating and registering an LPA, as set out below. Otherwise the LPA might not be valid.

- Only adults aged 18 or over can make an LPA, and they can only make an LPA if they have the capacity to do so. For an LPA to be valid:

- the LPA must be in the statutory form produced by the Office of The Public Guardian.

- the document must include prescribed information about the nature and effect of the LPA (as set out in the regulations).

- the donor must sign a statement saying that they have read the prescribed information (or somebody has read it to them) and that they want the LPA to apply when they no longer have capacity.

- the document must name people (not any of the attorneys) who should be told about an application to register the LPA, or it should say that there is no-one they wish to be told.

- the attorneys must sign a statement saying that they have read the prescribed information and that they understand their duties – in particular the duty to act in the donor's best interests.

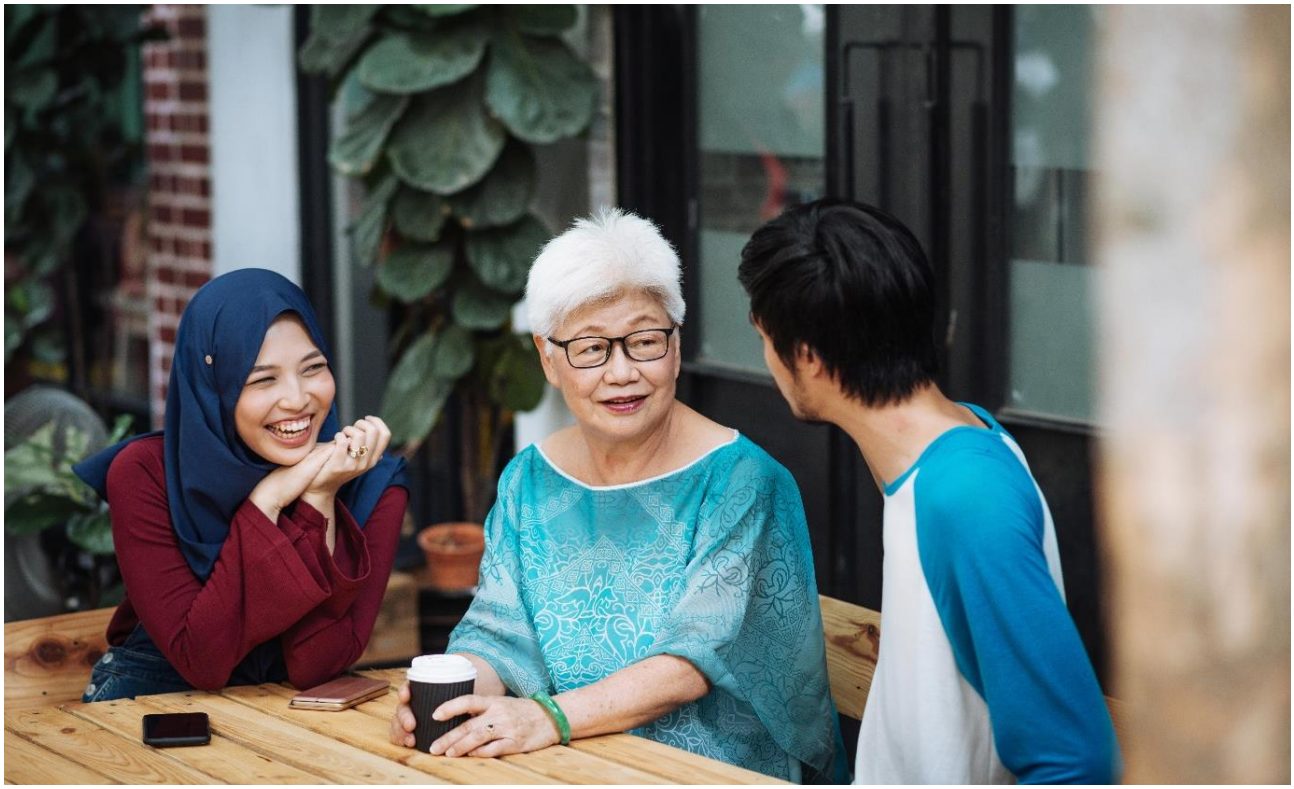
- the document must include a certificate completed by an independent third party, **not one of the attorneys** and who has either the relevant professional expertise or has known the donor for a period of more than two years. Confirming that:

  – in their opinion, the donor understands the LPA's purpose

  – nobody used fraud or undue pressure to trick or force the donor into making the LPA and

  – there is nothing to stop the LPA being created.

Who can be an attorney?



A person (donor) should think carefully before choosing someone to be their attorney. An attorney should be someone who is trustworthy, competent and reliable. They should have the skills and ability to carry out the necessary tasks.

Attorneys must be at least 18 years of age. For property and affairs LPAs, the attorney could be either:

- an individual (as long as they are not bankrupt at the time the LPA is made), or
- a trust corporation (often parts of legal practices, banks or other financial institutions).

If an attorney nominated under a property and affairs LPA becomes bankrupt at any point, they will no longer be allowed to act as an attorney for property and affairs. People who are bankrupt can still act as an attorney for personal welfare LPAs.

The donor must name an individual rather than a job title in a company or organisation, (for example, my son or 'my solicitor' would not be sufficient). A paid care worker (such as a care home manager) should not agree to act as an attorney, apart from in unusual circumstances (for example, if they are the only close relative of the donor).

The donor may wish to appoint two or more attorneys and to specify whether they should act 'jointly', 'jointly and severally', or 'jointly in respect of some matters and jointly and severally in respect of others'.

- Joint attorneys must always act together. All attorneys must agree decisions and sign any relevant documents. This way of appointing your attorneys is quite restrictive as they would need to be together to implement any decision. If one of your attorneys were to lose capacity or die then the surviving attorney would no longer be able to act for you.

- Joint and several attorneys can act together but may also act independently if they wish. Any action taken by any attorney alone is as valid as if they were the only attorney. This is the most flexible way for your attorneys to be appointed.

The donor may want to appoint attorneys to act jointly in some matters but jointly and severally in others. For example, a donor could choose to appoint two or more financial attorneys jointly and severally. But they might say then when selling the donor's house, the attorneys must act jointly. The donor may appoint welfare attorneys to act jointly and severally but specify that they must act jointly in relation to giving consent to surgery.

If a donor who has appointed two or more attorneys does not specify how they should act, they must always act jointly. However; if one of your attorneys passed away then the remaining attorney would not be able to make the decisions where they were required to act jointly.

It's nice to have backup!

Donors may choose to name replacement attorneys to take over the duties in certain circumstances (for example, in the event of an attorney's death). the replacements can only take over from any attorney, if necessary. Donors cannot give their attorneys the right to appoint a substitute or successor.

How do I register and use an LPA?

An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. An unregistered LPA will not give the attorney any legal powers to make a decision for the donor. The donor can register the LPA while they are still capable, or the attorney can apply to register the LPA at any time.

There are advantages in registering the LPA soon after the donor makes it (for example, to ensure that there is no delay when the LPA needs to be used). But if this has not been done, an LPA can be registered after the donor lacks the capacity to make a decision covered by the LPA. Our advice is to register the LPA straight away.

If an LPA is unregistered, attorneys must register it before making any decisions under the LPA. If the LPA has been registered but not used for some time, the attorney should tell the OPG when they begin to act under it – so that the attorney can be sent relevant, up-to-date information about the rules governing LPAs.

While they still have capacity, donors should let the OPG know of permanent changes of address for the donor or the attorney or any other changes in circumstances. If the donor no longer has capacity to do this, attorneys should report any such changes to the OPG.

Examples include:

- an attorney of a property and affairs LPA becoming bankrupt or the ending of a marriage between the donor and their attorney.

This will help keep OPG records up to date, and will make sure that attorneys do not make decisions that they no longer have the authority to make.

For more information and help in completing Lasting power of Attorney please contact Richardson's Wills on **01275 851056** or email **nicola@richardsonswills.co.uk**

This information is taken from the MCA 2005