

Powers of Attorney and Advance Decisions : The Legal Consequences of Mental Incapacity

Mental incapacity may arise at any age. Commonly it occurs in the elderly, for example, with the onset of dementia or Alzheimer's disease but it may happen at any time, perhaps as a result of a serious accident, a head wound or drug abuse.

A Power of Attorney is a document made by a "donor" giving a person or persons (the "attorney" or "attorneys") authority to undertake financial transactions on behalf of the donor. There are five main types of Power of Attorney which are:-

- A general Power of Attorney made under the Powers of Attorney Act 1971
- An Enduring Power of Attorney made under the Enduring Powers of Attorney Act 1985
- A Lasting Power of Attorney in relation to property and affairs made under the Mental Capacity Act 2005
- A Lasting Power of Attorney in relation to personal welfare made under the Mental Capacity Act 2005
- A Trust Power of Attorney made under the Trustee Act 1925 (section 25) as amended by the Trustee Delegation Act 1999

An "Advance Decision" (sometimes called a Living Will) refers to a person's refusal to accept medical treatment at a time when he does not have capacity to refuse such treatment himself.

General Power of Attorney and Mental Incapacity

A Power of Attorney gives an attorney power to act on behalf of the donor according to the terms of a document which may define or limit the authority given to the attorney. If the donor of this type of power becomes mentally incapable the power ceases to have effect immediately and any purported action by the attorney under the power given to him would be in breach of the authority previously bestowed.

Enduring Power of Attorney ("EPA")

Since 1 October 2007 it has not been possible to create an EPA. EPA's created before that date will be effective indefinitely and attorneys may act under the powers given to them.

If the donor of the power becomes mentally incapable it will be necessary to register the power with the Court of Protection; usually, this is a relatively simple procedure. After registration the attorney may continue to act on behalf of the donor.

Lasting Power of Attorney ("LPA")

LPA's were introduced under the provisions of the Mental Capacity Act 2005 and replace EPA's. There are two types of LPA, each requiring completion of a separate form. They are:-

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- A Property and Affairs Lasting Power of Attorney; and
- A Personal Welfare Lasting Power of Attorney.

When an LPA has been registered with the Office of the Public Guardian (“OPG”) certain pieces of information in relation to the LPA will be available to anyone who searches the OPG register. An LPA cannot be used prior to registration with the OPG.

1. Property and Affairs Lasting Power of Attorney

This type of power gives an attorney authority to deal with property and financial affairs which are similar to the powers given to the attorney of an EPA and may be used after the loss of mental capacity.

The formalities to complete the new form are much more cumbersome. Briefly the procedure is as follows:-

Donor

The donor will need to read the notes on the prescribed Property and Affairs Lasting Power of Attorney Form (LPA PA) prior to completion of the 25 page form. He may also wish to read the guidance notes for completing the form which is a 55 page booklet.

The donor will need to decide:-

- Who to appoint as his attorney or attorneys (there is no limit to the number but 2 or perhaps 3 are usually sufficient, the attorneys must be over 18 years of age and they must not be an undischarged or interim bankrupt)
- If more than one attorney is appointed, whether they can act independently of each other or whether they should act jointly (it is possible to state they can act independently in respect of some actions and must act jointly in respect of others)
- If he wishes to appoint a replacement attorney or attorneys in case any of the “first appointed” attorneys are unable to act
- Whether named persons (up to a maximum of 5) should be notified prior to the registration of the LPA
- Who should be the “certificate provider(s)”
- Whether or not the attorney(s) can act before he becomes mentally incapable
- Whether he wishes to limit the decisions that his attorney can make for him
- Whether he wishes to give any (not legally binding) guidance to his attorney
- Whether he wishes his attorney to be remunerated for acting as attorney
- Whether the LPA should be registered immediately with the OPG (it cannot be used until it has been registered)

The advantage of listing people to be notified when an application is made to register an LPA is to safeguard the donor as the listed people will be able to raise any concerns about the attorneys

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acting for the donor at the time of registration of the LPA. Objections to an attorney being appointed at the time of registration can only be made by the donor, other attorneys and the named persons listed in the LPA.

If the donor does not name anyone who should be notified it will be necessary for two certificate providers to complete the LPA; otherwise, it is only necessary to have one certificate provider.

Certificate provider

As stated above one or two certificate providers are required. The certificate provider must read the LPA to be signed including the notes at the beginning of the form. He must also read the Certificate Provider and Witness Guidance Notes which is a 14 page booklet.

There are 2 types of certification:-

- Knowledge certification : That is from a certificate provider who knows the donor personally and has done so for at least 2 years; and
- Skills-based certification : That is from a certificate provider who has the relevant professional skills and expertise to sign such as a GP or solicitor.

Certain people cannot act as certificate providers and they include: a member of the donor's or attorney's family; a business partner or paid employee of the donor or an attorney; most people associated with or working for a care home in which the donor lives.

The certificate provider(s) will need to talk to the donor about the LPA in private. The certificate will not be valid if the attorney is present.

The certificate provider will need to assess the donor's mental capacity before signing the form. When he signs it he should be satisfied that the donor understands what an LPA is, the powers the donor is giving to the attorney, its importance and its effect. Should anyone object to the LPA when it is registered the certificate provider may be required to explain to the Court of Protection why he thought the donor had the capacity to create the power. There are certain questions that it is suggested that a certificate provider should ask of the donor. These include:-

- What is an LPA?
- Why do you want to make an LPA?
- Who are you appointing as your attorney(s)?

Equally important, the certificate provider should be satisfied that the donor is not being placed under pressure to make the LPA.

Attorney(s) and mental capacity

Attorneys will need to complete the form and confirm that they have read the prescribed information in the form. They also need to read the Guide for People taking on the role of Property and Affairs Attorney before agreeing to become an attorney. This is a 50 page booklet published by the OPG.

Attorneys are under a duty to follow the principles of the Mental Capacity Act 2005 which include:-

- To act in the donor's best interests

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- To assume capacity unless it is established that the person lacks capacity
- That merely because a person's decision is unwise, he is not to be treated as unable to make a decision and
- To act in accordance with the Mental Capacity Act 2005 Code of Practice, a document of almost 300 pages

Mental capacity means an ability to make a decision and there is a presumption of capacity. Anyone claiming that a person does not have capacity should be able to provide proof of this. A person is unable to make a decision if they cannot:-

- Understand information about the decision to be made; and
- Retain that information; and
- Use or weigh up that information in the decision making process; and
- Communicate their decision (this provision only applies if the person cannot communicate their decision in any way).

There is no one point at which a person is deemed to lose capacity - he may lack capacity on a temporary or permanent basis and may be able to make some decisions but not others. For example, a person may be unable to make complex investments but be able to manage day-to-day finances. An attorney will need to assess, with the help of doctors and others when appropriate, a donor's capacity to make each decision in question.

A person has the right to be supported to make his own decisions and given all appropriate help before it is concluded he cannot do so.

The OPG will supervise attorneys if necessary. Failure to comply with the provisions set out in the Mental Capacity Act 2005 and the Code of Practice could lead to an application to the Court of Protection to remove the attorney. In some circumstances an attorney may be personally liable to criminal charges of fraud or negligence.

An attorney must keep accounts and produce them to the Court of Protection on request. The donor may include a provision in the LPA requiring the attorney to go through the accounts with a professional or family member from time to time.

Registration

The donor or the attorney can register the LPA with the OPG. This can be done at any time after it has been signed. It is possible to wait until such time as the donor loses capacity. An attorney should inform the OPG when he begins to act under an LPA if the LPA, having been registered, has not used for some time. If the donor registers the LPA the attorney will be notified. If the attorney registers the LPA the donor will be notified and may object. A fee is payable at the time of registration.

2. Personal welfare lasting power of attorney

Nearly all of what has been stated in connection with a Property and Affairs LPA applies to a personal welfare LPA. The form is very similar; there are separate guides issued by the OPG that apply to both donors and the attorneys of Personal Welfare LPA's.

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One of the main differences between the two types of LPA is that an LPA for personal welfare can only be used when the donor lacks capacity to make the particular personal welfare decision in question. There is no one point in time when a person is treated as having lost capacity and the donor may be able to make some decisions but not others.

An attorney with unlimited authority for personal welfare can make all the decisions a donor would make about his welfare, including decisions about where he lives and what medical treatment he receives. The attorney can access the donor's personal information such as medical records. The attorney is not, however, able to make decisions about life-sustaining treatment unless express provision is made for this in the LPA. If no such provision is made then the donor's doctor will make decisions in the patient's best interests unless an advance decision has been made (see below).

A personal welfare attorney may need to work with a donor's attorney for property and affairs, family, carers and possibly the Court to agree what is in the donor's best interests. A donor can restrict the attorney's powers, for example to social care only, and can give guidance which the attorney will have to take into account when making decisions, for example, about a particular type of treatment.

A donor who already has an EPA dealing with financial affairs can make an LPA for personal welfare. However, care will be needed in the choice of certificate provider as it cannot be the attorney of the EPA.

If a person lacks capacity and has no Personal Welfare LPA, doctors and carers must act in the person's best interests. If there is disagreement it is possible to apply to the Court of Protection for a decision. Following implementation of the Mental Capacity Act 2005, the Court may appoint a deputy to take decisions for the person on an ongoing basis.

Advance Decisions

Under the Mental Capacity Act 2005 a person may make an advance decision to refuse specified medical treatment in the future should they lack capacity at that time. If a donor makes an advance decision as well as an LPA for personal welfare great care will be necessary to avoid conflict.

Trustee Power of Attorney

A trustee or personal representative (ie an executor of an estate) may, by power of attorney, delegate trust powers that have been vested in him as a trustee for a period of up to 12 months. (The delegation may also be made by a lasting power of attorney.) It is possible to extend the permitted delegation period by granting an unlimited number of successive powers of attorney, each lasting for 12 months.

It is necessary for the donor of a trust power of attorney to give written notice of delegation to his co-trustees and any person or persons who have power to appoint a new trustee. The donor of the power is liable for the acts of the attorney in the same way as if they were his own acts.

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.