

MACFARLANES

LASTING POWERS OF ATTORNEY

PRIVATE CLIENT

The Mental Capacity Act 2005 created a new form of powers of attorney called lasting powers of attorney (LPAs). These were introduced on 1 October 2007. They were originally supposed to come into being on 1 April 2007, but their launch was delayed whilst the forms were finalised. LPAs will replace enduring powers of attorney (EPAs), which the government felt were open to abuse by unscrupulous attorneys.

ENDURING POWERS OF ATTORNEY

EPAs are legal documents under which an individual (the donor) can give another person (the attorney) or persons the power to act on the donor's behalf and to decide what is done with the donor's financial affairs and property. EPAs are special in that they remain valid once the donor becomes mentally incapable. To remain fully valid however EPAs have to be registered with the Court of Protection when the attorney believes the donor is or is believed to be losing capacity.

If an individual loses capacity without having completed an EPA, the Court of Protection has to appoint a deputy before his affairs can be dealt with. In addition, the deputy has to apply to the Court of Protection if he wishes to carry out any specific acts, as the Court of Protection rarely gives general authority to act. This can be a costly and time-consuming process.

CHANGES ON 1 OCTOBER 2007

EPAs entered into prior to 1 October 2007 are still valid after the introduction of LPAs, whether registered or not, but it is not possible to create a new EPA.

Some of the differences between LPAs and EPAs are set out below.

- ◆ EPAs only cover property and affairs. There are two different types of LPA – one for property and financial affairs and the other for welfare (including healthcare).
- ◆ Different attorneys can be appointed under LPAs to deal with different aspects of an individual's affairs using the same LPA (or LPAs if you wish to cover matters relating to property and financial affairs and welfare).
- ◆ LPAs must include a certificate confirming that the person appointing the attorney understands the LPA's purpose and that no one used fraud or undue pressure to persuade the individual to give the power. There is no such certificate for an EPA.
- ◆ Under LPAs, a substitute attorney can be appointed to cover the situation where an attorney is unable to act. This is not possible under an EPA.
- ◆ LPAs must be registered before they can be used. EPAs are valid before they are registered, providing the donor still has capacity (unless the donor has expressly provided otherwise).
- ◆ The Office of the Public Guardian must notify the donor and at least three other people from a specific list of relatives when an application to register an EPA is made. Under LPAs it is possible for the donor to state that they do not want anyone to be notified of the registration, although this means the certificate referred to above would need to be signed by two people. Alternatively, the individual can list specific people they want notified who are not necessarily related.
- ◆ Personal welfare LPAs can only be used after the donor loses capacity (the Act envisages that it is possible for an individual to lose and regain capacity and therefore each time a decision is made the attorney must consider whether the individual has capacity or not). EPAs and property and financial LPAs can be used both before and after the individual loses capacity (unless the donor has expressly provided otherwise).
- ◆ Attorneys acting under LPAs have to act in the donor's best interest and must be guided by the Code of Practice (over 200 pages long). There is no code of practice for attorneys acting under EPAs, although they still have a duty to act in the individual's best interest.
- ◆ EPAs are generally four to five pages long. The financial affairs LPA and welfare LPA are often over 11 pages long.

Property and financial affairs LPAs cover similar ground to EPAs but are arguably more flexible. However, they are more onerous to complete and therefore more expensive. There is also the additional cost of registration before the LPA can be used. Part of the reason for changing the law was the fear that EPAs were being abused. Attorneys acting under a property and financial affairs LPA are therefore restricted to making gifts on behalf of the donor on customary occasions, e.g. birthdays or Christmas. The attorney can make charitable donations if the donor could have been expected to make regular or periodic payments to charity. The value of the charitable gift must be reasonable in the context of the donor's estate.

Welfare LPAs cover areas not covered by EPAs. They allow an individual to appoint an attorney (or attorneys) to make decisions in relation to their personal welfare. The Mental Capacity Act 2005 does not specify what decisions can be taken under a welfare LPA, but a non-exhaustive list is given in the code, including:

- ◆ decisions about where the individual should live;
- ◆ decisions about the individual's day-to-day care;
- ◆ giving or refusing consent to medical examination and/or treatment;
- ◆ dealing with the individual's personal correspondence and papers; or
- ◆ exercising rights of access to personal information about the individual.

Restrictions are placed on attorneys' powers under a welfare LPA. These are:

- ◆ An attorney does not have authority to consent to or refuse treatment at any time when the individual has capacity to make that decision for himself (the individual's decision does not have to be the most sensible, as long as he has capacity).
- ◆ An attorney does not have authority to consent to treatment specified by the individual in an advance direction refusing treatment which is valid and applicable in the particular circumstances unless the LPA was created after the advance decision.
- ◆ An attorney does not have power to consent to or refuse life-sustaining treatment, unless the LPA expressly authorises this.

CONCLUSIONS

LPAs are considerably more fiddly and therefore costly to complete. Initial evidence from the Office of the Public Guardian would suggest a good number are being rejected on attempted registration, often because they are incomplete. They offer many more choices and permutations than EPAs and for the future will be the only viable option for those contemplating incapacity. Although the process of creating an LPA is laborious and costly, it is worth doing it at a time when you have the strength and leisure to contemplate it. It will certainly be less troublesome than a deputyship, which is the alternative where no EPA or LPA exists at the onset of incapacity and is subject to heavy Court oversight.

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