

EXPLANATORY NOTES

**LASTING POWERS OF ATTORNEY
(HEALTH & WELFARE)**

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Lasting Powers of Attorney (LPAs) are documents where you appoint people as your Attorneys to look after your affairs should you either want them to do so, or should you no longer be able to look after your own affairs due to the lack of mental capacity. They are extremely important documents to both protect you (and your family) and also to provide you (and again your family) with Peace of Mind.

What is a Health and Welfare LPA?

A Health and Welfare LPA is a legal document where you authorise a named person (or persons) – your Attorney(s) – to act on your behalf to make decisions regarding your welfare and care if you are unable to make those decisions yourself. This includes deciding where you live and what medical treatment you have.

The LPA would normally remain in force until your death and can be used by your Attorneys if you become incapable of looking after your affairs. A Health and Welfare LPA is an insurance policy against problems that might arise in the future.

It is advisable for all adults to consider preparing a Health and Welfare LPA and not just at the post retirement stage as many people believe.

What happens if I do not have an LPA?

If you become mentally incapable for whatever reason – and this could be at any age due to an accident or ill health, or due to an illness such as dementia – and you do not have an LPA, no-one has the authority to decide where you live or what medical treatment you do, or do not, have, until the Court of Protection appoints a Deputy to look after your affairs on your behalf.

A Deputyship application can take months, it is more expensive than an LPA, there are ongoing annual charges and it can be more restrictive than an LPA. Having an LPA in place enables the people you want to be able to help look after you to do so.

What is the position if I have a Health and Welfare LPA?

You choose who will make decisions on your behalf. You can sign a Health and Welfare LPA and direct what decisions your Health and Welfare Attorneys can make on your behalf. The Health and Welfare LPA does not take away any ability for you to take decisions regarding your welfare, but simply puts in place who you would wish to make those decisions for you if you were unable to make the decisions yourself.

Unlike a Property and Financial Affairs LPA, where your Attorney(s) would be authorised to act for you once your LPA had been registered - please see our separate handout – your Attorney(s) would only be able to act in relation to your health or welfare if the LPA had been registered **and** it could be shown that you had lost your mental faculties.

By preparing an LPA you are not restricting your right or ability to carry on looking after your own affairs for as long as you feel able – it simply means that there is someone to take over, if required.

Who should you choose as your Attorney?

You should choose someone you trust, who will be able to deal with your personal affairs should you not be able to do so yourself. The person needs to be over 18, of sound mind and not bankrupt when they sign the LPA. You should bear in mind that it is a considerable responsibility so if you wish to

appoint a family member or friend (and they also have to sign the LPAs agreeing to act as an Attorney), it would be sensible to ask them beforehand if they will act.

You may appoint more than one Attorney, which I would normally recommend. If you do, the Health and Welfare LPA must state whether they are to act “jointly”, or “jointly and severally”.

If appointed “jointly”, they must always act together and cannot act independently. Similarly, if any of them died or refused to act, the Health and Welfare LPA would be ineffective.

If Attorneys are appointed to act “jointly and severally”, they can all act together, but they can also act separately if need be. I would normally recommend that Attorneys are appointed to act “joint and severally” as this offers more flexibility and you would be appointing people you trust.

(You can also choose whether you wish your Attorneys to act “jointly” in some decisions and “jointly and severally” in other matters. However, it is important to make sure your choices will actually work in practice and I do not normally recommend this option.)

What authority can I give my Attorney?

You are required to state whether your Attorney has general authority to act on your behalf, or if you wish to restrict the Attorney’s authority. You also have to say whether your Attorney can deal with all your decisions regarding your health and welfare, or whether you want to restrict or specify the decisions that they can make.

Unless you choose to impose restrictions, your Attorney will have full unrestricted powers to make decisions on your behalf. On the other hand, if only limited powers are given to the Attorney, then they can only act in accordance with those limitations, which could restrict their ability to look after your affairs.

If the Health and Welfare LPA is unrestricted then the Attorney can potentially make decisions regarding:

- where you should live and who you should live with;
- your day-to-day care, including diet and dress;
- consenting to, or refusing, medical examinations and treatment on your behalf;
- arrangement for medical, dental or optical treatment;
- assessments for, and provision of, community care services;
- whether the donor should take part in social activities, leisure activities, education or training;
- your personal correspondence and papers;
- rights of access to personal information about you; and
- complaints about your care and treatment.

Life Sustaining Treatment

One of the decisions you will need to make is whether you wish your Health and Welfare Attorney to be able to make decisions regarding ‘life sustaining treatment’.

Life sustaining treatment is described in the Mental Capacity Act 2005 as ‘treatment which is, in view of the person providing health care for the person concerned, necessary to sustain life’ (s4(10) MCA 2005). There are a variety of circumstances that may involve life sustaining treatment but could include medication, operation, and life support systems.

You must decide in the Health and Welfare LPA whether you do, or do not, authorise your Attorneys to make these decisions on your behalf.

What can my Health and Welfare Attorneys not do?

Basically, an Attorney under a Health and Welfare LPA can do anything you can, **except**:

- remake or alter your Will;
- make decisions about your **financial** affairs. (This would need to be authorised under a Property and Financial Affairs LPA – see our separate handout);
- do anything prohibited or restricted by the Health and Welfare LPA; and
- make decisions regarding life sustaining treatment motivated by a desire to bring about your death.

Named Persons

A Named Person is someone chosen by you who is to be notified when an application is made to register the LPA. They have the right to object to the registration of the LPA if they have concerns about the registration. The Named Person(s) is specified in the LPA form, but we would not normally include this provision now as procedures have changed since LPAs were first introduced in 2008 and Named Persons are no longer normally seen as being necessary. However, please discuss this with me if you have any questions or wish to discuss this further.

Certificate Provider

When completing the LPA, it is necessary for a person to sign the LPA providing a certificate as to your mental capacity and to confirm that you understand and approve the contents of the LPA, and also that you are not under any pressure to make it. The Certificate Provider must be an independent person and can either be:

- a person who has known you personally for more than two years; or
- a person with suitable qualifications and expertise to certify the Property and Financial Affairs LPA.

If I am preparing the LPA for you then I would often be able to act as your Certificate Provider.

What happens if my Attorney needs to use the LPA – Health and Welfare?

Before the Health and Welfare LPA can be used by your Attorney, it must be registered at the Office for the Public Guardian (OPG). It should be noted that the registration of the LPA does not mean that you have lost or are losing mental capacity, as was the case with earlier legislation (Enduring Powers of Attorney).

However, unlike a Property and Financial Affairs LPA, where your Attorney(s) would be authorised to act for you once your LPA had been registered - please see our separate handout – your Attorney(s) would only be able to act if the LPA had been registered **and** it could be shown that you had lost your mental faculties.

The application for registration can take place at any time once the LPA has been completed by you and your Attorney. I normally recommend registration once the LPA has been completed.

If your Attorneys are acting on your behalf because they need to due to your no longer having the mental capacity to manage your own affairs, they need to act on your best interest at all times, as noted above. We will happily discuss matters with your Attorneys if they wish for any advice or guidance.

Summary

From both a practical and health point of view, it makes sense for **everyone** to consider preparing a Health and Welfare LPA, **whatever their age**. Once somebody has become unable to manage their affairs it is often too late to be able to make a valid LPA.

This handout is for information purposes only to cover the basic principles and should not be relied upon. If you would like to discuss LPAs or related matters, please contact me and I will be very happy to discuss this with you further.

This booklet deals in general terms with complex subject. While we believe the contents to be correct, they should not be regarded as sufficiently full, accurate or precise so as to apply to any particular situation. You must always seek legal advice concerning any situations referred to in this booklet and Wanstall Consulting or its author can accept no responsibility for any loss suffered by any person as a result of acting in reliance upon the contents of this booklet.

(May 2024)