

“ Plain speaking legal advice ”

Everybody needs a Power of Attorney

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Everybody needs a Power of Attorney! Actually a slight exaggeration but we hope it will make you read this article and think about your position. Most people tend to think of Powers of Attorney as something for the elderly and infirm. While there is some truth in that every adult who owns property or any sort should consider whether or not they need an Attorney. If for any reason you are unavailable or become incapacitated a Power of Attorney is the solution, if your absence is planned arrangements can usually be made but if it is unexpected then the Power of Attorney is a useful insurance that comes into its own.

Background

Most people know what a Power of Attorney is; it is a document whereby someone, the Donor, gives authority to another person or persons, the Attorney(s), to act on his or her behalf. A major problem with Powers of Attorney is that if the Donor does not have Mental Capacity then the Power of Attorney ceases to be valid.

In 1985 the Enduring Powers of Attorney Act got over this problem with the creation of the Enduring Power of Attorney (EPA), the effect of which was that the subject to compliance with certain conditions the Attorney's authority continued notwithstanding any loss of capacity by the Donor. Sadly even as the act was going through Parliament it became apparent that there were holes in the act, something that the passage of years has made even clearer. The biggest holes were:

1. The act had insufficient safeguards; as a consequence EPAs could be used with little or no supervision and were frequently abused by Attorneys for their own benefit.
2. An Attorney has no authority over personal welfare with the result that there was no one who could in theory at least make decisions relating to the housing of a Donor or give consent to such things as Medical intervention however necessary.

By the early 1990s a number of Modifications to the Law had been proposed but for complicated political reasons it was not until the dying minutes of the last Parliament that the Mental Capacity Act was passed enacting the necessary legislation.

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The New Law

Most of the law is not something that is of major importance to this article, suffice to say that the aim is empower those, including the Donors of Powers of Attorney, who are suffering from some form of Mental incapacity, in such a way that as far as is possible their needs and wishes are complied with.

So far as Powers of Attorney are concerned the Act created a new form of power of attorney named the Lasting Power of Attorney (LPA) which is to replace EPAs with effect from October 2007 (Originally April 2007 but this date has recently been put back). The intention is that the LPA will overcome the long recognised problems of the EPA, however it should be noted that existing EPAs will continue to be valid.

Sadly the regulations covering the new LPA, which like the legal document itself, have still not been finalised as this article is being written; possibly this is the reason for the deferral of the commencement date to October 2007. The draft regulations and draft LPA which have been seen seek to cover virtually every possible alternative and the good intentions behind the act seem to have been obscured in a mass of complex detail.

For those in legal and other professions who have been crying out for the LPA this is a matter of great disappointment. It may be that stung by the results of its consultation the Department of Constitutional Affairs has started again and a new and more sensible LPA and policy will be produced. Alternatively this writer suspects that within a year or so amending legislation or rules will emerge.

In the meantime if the draft regulations come into force unchanged or substantially unchanged all potential Donors will be faced with a lengthy and complex document. This will have to be prepared by a solicitor or similar qualified professional; DIY will not be possible. A number of safeguards will have to be complied with and a decision will have to be taken as to whether or not the Donor wishes for an Attorney to make personal welfare decisions including whether or not the Attorney can have authority to authorise the withdrawal of life support.

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It is currently estimated that the cost of preparing the new document will be at least £575. On top of this experience has shown that Banks and similar authorities took years to understand and develop procedures for dealing with EPAs, if that is what happened with a comparatively simple document what will happen when they are faced with an 11 page LPA?

What should you do now?

Clearly the first step must be to decide whether or not you need a Power of Attorney. As you will have seen from the first paragraph we believe there is a strong case for all if not most adults to have one. At the very least the following people need to think seriously about one:

- Anyone who travels extensively
- Someone with a chronic illness
- Anyone who has or is about to retire

Just because you are not one of these people does not mean that it is unnecessary so think about it!

Assuming you are still reading this article then you probably need an Power of Attorney and at this stage our recommendation would be to create an EPA now rather than wait for the LPA. With a little thought most of the worst problems of the EPA can be overcome:

- Welfare issues can often be dealt with by some carefully thought out notes and a Living Will/Advanced Directive.
- Security issues. Most of these turn on whether or not a power of attorney is Joint (all Attorneys must act together) or joint and several (Attorneys can act either together or in isolation). An easy answer to this is often to make multiple EPAs, this may sound like yet another complexity but in reality it is very straightforward.
- If need be you will be allowed at some future date to upgrade the EPA to an LPA although at this stage the rules governing this are extremely hazy.

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Conclusion

As with so many legal issues to take action now requires thought and some cost, but to take no action can result in major expense and heart ache for your family. Typically an EPA will cost somewhere between £175 and £300, set against the expected cost of £575 for an LPA or the far greater costs of the Court of Protection, in the circumstances there is a lot to recommend the immediate preparation of an EPA

Further information on EPAs and LPAs can be obtained from the fact sheet section of our website or alternatively the official version can be obtained from the public Guardianship website www.guardianship.gov.uk

If you wish to discuss the issues above further in relation to your particular circumstances please contact Private Client Department on 01252 322 451.

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