

“ Plain speaking legal advice ”

Why We Would Recommend Making a Lasting Power of Attorney

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A power of attorney is a document whereby someone (the Donor) authorises one or more other people (the attorney(s)) to do things on the Donor's behalf. As a general rule a power of attorney ceases to be valid when and if the Donor loses mental capacity. A Lasting or Enduring Power of Attorney (EPA or LPA) is a power of attorney which remains valid regardless of the mental capacity, or lack or mental capacity of the Donor.

LPAs were introduced in October 2007 to overcome what were perceived to be defects of the EPA, in particular the ease with which EPAs could be obtained and used sometimes to defraud vulnerable people of their savings. A secondary and sometimes controversial objective was to enable an Attorney to make decisions about the welfare of the Donor, something that could not be done through an EPA, which was strictly limited to financial matters.

Sadly the introduction of the LPA was fraught with problems. The form (notwithstanding warnings from organisations such as Solicitors for the Elderly) was poorly designed and excessively long, resulting in a huge number of mistakes being made when completing the form. This was compounded by complete chaos at the Office of the Public Guardian (OPG), the department tasked with administering the new law. The consequence was that LPAs were incorrectly completed, then got lost in the OPG for months on end while vulnerable clients and their carers and Attorneys were left tearing their hair out. Two years on things have improved, the OPG does now seem to be doing its job reasonably well, and in October this year a revised and greatly improved form will come into use.

While this is all good news there are still problems, mainly due to the safeguards that have been introduced. The two principal safeguards are the requirement (a) that someone (the Certificate Provider) must certify that the Donor has the necessary mental capacity to understand what he/she is doing and (b) that the LPA must be registered with the OPG before it can be used. The idea of a Certificate Provider is undoubtedly sensible, but it has to be questioned whether it is achieving its objective.

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The requirement of registration is much more questionable, ignoring the problems at the OPG which we hope are now history the process is slow, a minimum of two months, during which the LPA cannot be used. The consequence of this safeguard is that many people are seeking to circumvent the process, while others simply complete the LPA and immediately register it so that it can then be used at will, exactly what this registration process was supposed to stop. Many of us might not object to all of this if it was not for the fact that the whole new process is incredibly expensive.

At Herrington & Carmichael we used to charge about £200 to prepare an EPA. For a LPA our charges start at £450 plus VAT to complete the document. The subsequent registration process costs a similar sum, and to cap all this, the OPG charges £120 registration fee, which means that the typical cost is in the region of £1000. For a couple there are savings, but the final cost is likely to exceed £1000.

Having criticised the new LPA it may surprise readers to learn that at Herrington & Carmichael we are strongly recommending all clients who do not have a valid EPA, and in particular the more elderly, those with complex financial affairs and those suffering from chronic illnesses to make LPAs. Why are we making such a recommendation? In simple terms, because it is the only show in town. There is an alternative to the LPA, the appointment of a Deputy (previously a Receiver) through the Court of Protection but it is even worse and more expensive. This costs around £2000, plus Court fees for the initial appointment of the Deputy with subsequent annual costs varying considerably but frequently amounting to as much as £1000. Flawed as they are, the LPAs look cheap in comparison, even if for many people it is essence an insurance against ill health.

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So what LPAs are available? There are two types - the Property and Affairs LPA, and the Welfare LPA. The first of these relates to all matters financial or in some way financially associated, while the second relates to decisions about your welfare, e.g. where you live, what medical treatment you are to receive and ultimately can include a power to make decisions about whether or not life sustaining treatment should be withdrawn. Inevitably there is some overlap between these, for example, it is all very well for a Welfare Attorney to decide where you are to live but it is the Property and Affairs Attorney who must decide if there is enough money and then provide it. The same people can be both Attorneys but it is quite common for different people to be appointed. There is no obligation to make each sort of Attorney and many people choose only to make the Property and Affairs LPA, leaving welfare decisions to be made pursuant to general legal principles. It's worth mentioning that there are two things no Attorney can do on your behalf, the first is make substantial gifts, the second, which may surprise some people is to make a will on your behalf. Both of these can only be done after obtaining authorisation from the Court of Protection.

Having decided whether or not you require one or both types of LPA, various decisions then have to be made:

- Do you have one or more Attorneys; are they to act jointly in which case they must act together and the death of one will invalidate the LPA or do you have them acting jointly and severally meaning that they can act together or independently. Joint and several is in most cases more practical, but it is never as secure as joint Attorneys for the simple reason that one Attorney alone could make irrational decisions or behave dishonestly while two Attorneys will inevitably keep an eye on each other.
- Do you want a replacement Attorney who can take over if one of the original Attorneys is incapacitated? What about any restrictions that you want to impose (these can be almost unlimited, but must not prevent the Attorney doing his job or are so convoluted that no one really knows what you mean). Alternatively, would you like to offer your Attorneys some guidance?

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- You must name at least one independent person, who potentially could take on the role of acting as your advocate. This person must be given notice of the intention to register your power of attorney, and may object to the registration if they think that it is for any reason inappropriate.
- Finally you must choose your Certificate Provider. This person will certify that you have the capacity to give the LPA; as a general rule the Certificate Provider should have some sort of relevant qualification or experience, but sometimes friends may be able to take on this role.

Once the LPA has been made and registered with the OPG it cannot be used until it has also been seen by the organisations (banks etc) who you want to act on it. The banks are gradually coming to grips with the issue of Powers of Attorney but there is no standardised procedure. Bank procedures take as much as a month to complete and will almost certainly include money laundering checks on the Attorney. This is yet another reason why it is important to get everything in place in advance and not wait until the last minute.

At Herrington & Carmichael we can advise you more fully on each of these points, give you guidance to help you decide on the various options. We can in some instances act as Certificate Providers.

Inevitably an article such as this can only scratch the surface, but it is hoped that this will give you some idea of the advantages of executing a LPA, along with the requirements to be met when preparing one. If you would like further advice please contact a member of our Private Clients' team to arrange a suitable appointment.

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