

HUNTERS

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Lasting Powers of Attorney ('LPAs') under English law

Scope of powers of attorney

Under English Law, any ordinary power of attorney given by an individual ceases to be effective once that individual has lost mental capacity to make decisions for themselves. It is nonetheless possible for an individual (called the '**Donor**') to give the power to another person or persons (called the '**Attorneys**') to make decisions on the Donor's behalf once they have lost mental capacity (and sometimes sooner – see below) by completing a Lasting Power of Attorney ('**LPA**'), which is then registered with the Office of the Public Guardian ('**OPG**'). The Donor must be over 18 and have mental capacity in order to execute an LPA. There are two types of LPAs:

- **LPA for Financial Decisions:** this allows the Attorneys to make decisions about the Donor's property and financial affairs, such as dealing with the tax authorities on the Donor's behalf; managing bank and building society accounts, properties and investments; liaising with investment managers and financial advisors; selling assets; paying bills; and dealing with pensions and other benefits.

A Donor may choose for this type of LPA to become effective on registration with the OPG (even if the Donor still has mental capacity), or only once the Donor has lost mental capacity. The former provides additional flexibility as it would, for example, allow the Attorneys to act if the Donor was to become physically (but not mentally) incapacitated, or if the Donor was out of the country.

Separate LPAs for Financial Decisions can be made where the Donor has an interest in a business, e.g. if they are a sole trader, they run a limited company, or they are a partner in a traditional partnership or LLP. In these circumstances it may be sensible to enter into two separate LPAs, perhaps with different Attorneys, one covering personal financial matters, and one dealing with business matters.

- **LPA for Health and Care Decisions:** this empowers the Attorneys to make decisions about the Donor's health and care, including medical treatment, accommodation (for example, whether the Donor should move to a care home) and daily routine. This type of LPA only becomes effective once it has been registered and the Donor has lost mental capacity.

The Attorneys can only make decisions about life-sustaining treatment for the Donor if this has been specifically permitted in the LPA.

It should be noted that LPAs replaced Enduring Powers of Attorney ('**EPAs**') from 1 October 2007. Although it has not been possible to create an EPA since that date, EPAs made before that date can still be effective and we can advise on their effect and registration as needed.

If an individual has not made an LPA, and they lose mental capacity, then an application may be made to the Court of Protection for a deputyship order. This type of order allows the person appointed under it to make decisions on behalf of a person who lacks mental capacity, operating in a similar way to an LPA (although it should be noted the Court is usually very cautious about appointing a deputy in relation to personal welfare, and more willing to appoint a deputy for property and affairs). Deputyship applications are costly and lengthy, and should therefore be avoided, wherever possible, by the comparatively simple procedure of making an LPA.

LPAs made in England may sometimes be effective in other jurisdictions, but it should be noted that this is a question of foreign law and will depend on whether the law of the relevant jurisdictions recognises LPAs made in England and Wales.

Appointment of Attorneys

The Donor may appoint any number of Attorneys, though it is usual for a maximum of four to be appointed to act together. Where more than one Attorney is appointed, the Donor must decide whether the Attorneys are to act:

- jointly, in which case they have to act together in all matters and no individual attorney can do anything without the other(s), or
- jointly and severally, in which case they can act together or separately in all matters, or
- jointly in relation to some types of decision and jointly and severally in others. If this option is chosen, the Donor must be very clear as to which rule should apply to which decisions.

If the Attorneys are appointed jointly, then on the death, bankruptcy or incapacity of one Attorney, the appointment of all Attorneys ceases. In these circumstances, any replacement attorneys nominated by the Donor in the LPA would step in to act in place of the original Attorneys.

Although a joint appointment should prevent an Attorney acting without the consent of the other Attorneys, it can be impractical. Appointing Attorneys jointly and severally provides the most flexibility and most people choose this option.

Certificate Provider

All LPAs must include a certificate given by someone who has known the Donor personally for at least two years (such as a friend or a neighbour) or someone with the required professional expertise and skill (for example, a solicitor or a doctor). The certificate states that the Donor understands the purpose and scope of the LPA, no fraud or undue pressure is being used to induce the Donor to make the LPA, and there is nothing else that would prevent an LPA from being created.

Registration and use of LPAs

LPAs can only be used once they are registered with the OPG. The OPG registration fee is £82 per LPA. Under normal circumstances, registration takes 8 to 10 weeks, but the process has become lengthier since the beginning of the pandemic, with the current timeline being around 20 weeks. Given that registration can be slow, it is therefore recommended that LPAs are registered as soon as they are made, to avoid the possibility of delays once the Donor has lost mental capacity.

In order to use an LPA, Attorneys will need to:

- In the case of LPAs for Health and Care Decisions, present the original LPA or a certified copy to the medical professionals involved in the care of the Donor; and
- In the case of LPAs for Financial Decisions, register the original LPA or a certified copy with the relevant asset-holder, following their standard procedures. This often requires the Attorneys to provide proof of ID and address.

Hunters' expertise

Hunters Law LLP has a long history of advising clients in relation to LPAs and EPAs. We have a large team of experienced lawyers who routinely deal with the creation of LPAs, the registration of LPAs/EPAs, and the termination of LPAs/EPAs. We can advise on matters of mental capacity, and some of our Partners are members of Solicitors for the Elderly, a national association of independent lawyers specialising in legal services for older and vulnerable people. We have extensive expertise in deputyship applications and Court of Protection matters. Moreover, we work closely with our colleagues in Business Services to advise on business LPAs and related matters.

Hunters also has substantial expertise in advising in relation to Wills, lifetime tax and estate planning, and in relation to the administration of estates after death. In addition, the firm has considerable knowledge and experience in the setting up, management, re-organisation and taxation of lifetime and Will trusts.

Contacts

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