

Lasting Powers of Attorney will be introduced when the Mental Capacity Act 2005 comes in to effect, due to be in October 2007, and will replace Enduring Powers of Attorney as a means of appointing someone to make decisions on your behalf. Here we provide an overview of these changes.



What effect do Enduring Powers of Attorney have?

Enduring Powers of Attorney (EPAs) allow a person (the "donor") to appoint a person or people (the "attorneys") to deal with the donor's financial affairs on behalf of the donor. An EPA takes effect, unless a specific provision is put in to the contrary, as soon as it is properly signed by all parties.

Nevertheless, unlike a general power of attorney, an EPA will continue to have effect even after the donor loses mental capacity to deal with their financial affairs themselves. At that stage, the attorneys are under a duty to register the EPA with the Court of Protection.

To give a valid EPA, the donor must be at least 18 years old and must have the necessary mental capacity to understand what they are doing in giving the EPA. Where more than one attorney is to be appointed, donors can choose whether the attorneys should act jointly or jointly and severally. If the attorneys are to act jointly, all decisions must be made by the attorneys together. If they are to act jointly and severally, the attorneys can act together or can each act separately.

Donors can also choose whether to make their EPAs cover all their property and financial affairs, or limit them to certain property or financial affairs. Finally, donors can impose particular conditions into the EPA if they wish.

How will this change when Lasting Powers of Attorney are introduced?

Lasting Powers of Attorney (LPAs) will completely replace EPAs and donors will at that stage no longer be able to make EPAs. Existing EPAs will, however, continue to have legal effect.

What effect will Lasting Powers of Attorney have?

Many of the powers outlined above in relation to EPAs will also apply in relation to LPA. Nevertheless, there will also be some significant differences.

- There are due to be two types of LPA: one relating to personal welfare and one relating to property and financial affairs. A person may give either or both types of LPA and can choose different attorneys for each.
- LPAs must be registered with the Office of the Public Guardian before they can be used at all. The proposed Court fee for registering LPAs is £150. This is different from the position with EPAs. EPAs must be registered by the attorneys once the donor is or is becoming mentally incapable of handling their own financial affairs. Before that, EPAs can be used, as soon as they have been validly signed, with no further delay or start-up costs.

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- Property and affairs LPAs can be used, once registered, while the donor has capacity. Personal welfare LPAs can only be used once the donor has lost mental capacity.
- Attorneys under LPAs can be appointed to act jointly, jointly and severally or jointly in respect of some matters and jointly and severally in respect of other matters.
- The donor of an LPA can provide general guidance in the LPA for his attorneys to consider when making decisions using the LPA. The donor can also specify in the LPA information about fees that he has agreed that the attorney may charge when acting under the LPA.
- The donor can also specify particular people who should be notified when the LPA is registered.
- The personal welfare LPA enables the attorney to make specific decisions about the donor's welfare and medical treatment. The attorney will only be able to make decisions about commencing or continuing life sustaining treatment where the donor has specifically authorised the attorney to do this.
- Finally, there is a 'certification process' for LPAs. For EPAs, someone must witness the donor's signature. For LPAs, however, a certifier must confirm that, in their opinion, the donor understands the purpose of the LPA and the scope of its power and that the donor is under no undue pressure to make the LPA. There has been debate in relation to who should be able to act as a certifier. The current proposed list includes lawyers, doctors, other professionals, social workers, librarians and shop keepers.

What is the difference between 'living wills'/'advance decisions' and personal welfare LPAs?

Through a living will, or an advance decision as they are also known, a donor can request medical treatment, refuse medical treatment and appoint someone to make healthcare decisions on their behalf. Nevertheless, it is only the wishes regarding refusal of medical treatment that can be legally enforceable.

Through a personal welfare LPA, the attorney has much wider powers, although these can be limited by the donor. The powers would include, for example, being able to decide where the donor should live, giving or refusing consent to medical examination or treatment and being able to access confidential documents such as medical records.

A further distinction is that, while an advance decision can only be enforceable in relation to refusing medical treatment, or refusing to allow it to continue, attorneys under a personal welfare LPA can positively consent to treatment as well as refusing it, on behalf of the donor.

Where someone has both a personal welfare LPA and an advance decision in place, the wishes expressed in the more recent document will take precedence.

What action should be taken at this stage?

- It is important to review your circumstances and consider whether you would like to give a power of attorney, whether to use now or to have in place for the future.
- You should then consider whether you could like your power of attorney to be set up with no up-front Court fees or administration. If so, it would be worth considering giving an EPA at this stage, before October 2007, rather than waiting for LPAs to come in to effect.

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