

Lasting Powers of Attorney – Help or Hindrance?

It is now 6 months since Lasting Powers of Attorney (LPAs) were introduced as a successor to Enduring Powers of Attorney (EPAs). It is clear from our attempts to register the new LPAs that even the Office of the Public Guardian (OPG) is struggling with the change.

In their effect an LPA Property and Affairs and an EPA are no different. But administratively the LPA is much more involved.

Registration

First and perhaps most significantly LPAs must be registered to be effective.

There is no requirement for the LPA to be registered immediately after it is signed. And given that there is a rather convoluted registration process and a £150 court fee per power, one might argue registration is best left until absolutely necessary. However registration currently is taking much longer than the anticipated 6 weeks, and so unless the power is already registered and ready to go it will be of no practical use in an emergency.

Once an LPA is registered any of the attorneys can obtain from the OPG a copy of the Power and use it straight away without reference to the giver whether or not the giver is in full possession of his mental faculties. It is still possible to prevent this, by specifying that the power becomes effective only on the giver's loss of capacity but that is not without its problems – appropriate evidence of loss of capacity (typically a report from the GP) will be required, and then the OPG notified. All of which takes time.

EPAs by contrast (and unless it is specified to the contrary) are effective from the moment they are signed, lapse on the giver's loss of capacity, but revive on registration. They do not need to be registered until the giver loses capacity, and pragmatic attorneys often continue to use the powers even after the giver has lost capacity on the basis that "no-one will know", and that they would not object if they did.

This EPA registration system has a practical benefit too. Generally, powers were left unrestricted so that they did indeed become effective as soon as they were signed, and to protect against them being used until loss of capacity they are locked up in the lawyer's safe from where they can be taken out and used as occasion demands.

Certificates

Secondly, a LPA will be effective only if signed under the supervision of a suitably qualified person (typically a lawyer or doctor). That person certifies that the giver of the power fully understands what he is doing, and is acting entirely of his own free will.

All laudable stuff, but the rules for certificate providers are such that a client wanting to appoint his solicitor will need to go to a different solicitor (or his GP) for the certificate. His own solicitor cannot provide the certificate, and neither can anyone in his firm. This adds cost and inconvenience.

There was no such requirement for EPAs. It was suggested that a doctor should witness the signature of an elderly client making an EPA, or that in certain circumstances there should be two witnesses rather than one, but this was more judgement than rule.

Notification of Registration

The registration process of both LPAs and EPAs involves notifying certain people of the application to register. This has been improved for LPAs. EPAs require notice be given to prescribed relatives; LPAs, notice to anyone the giver of the power may choose (with the exception only of the attorneys themselves). If the giver has no close family, or relationships are strained he can choose people who will be in a better position to judge whether registration is appropriate.

If the giver wants no-one to be notified that too is allowed, but requires two certificates instead of just one. To get round this it has been suggested specifying notice be given to say Gordon Brown, the Queen, or the master of the OPG. There is no requirement for a connection with the giver.

So is there any good news?

In the writer's view, not much.

LPA Welfare

The extension to Welfare (rather than simply property and financial affairs) is seen by some as a good development. The most significant aspect of this is that you can give your attorney the power to authorise the giving or withholding of life sustaining treatment – a step towards legal recognition of the living will.

Your Welfare attorney also has power to decide “where you live, what you wear and how you spend your day”. For some this might be of little practical significance, but for others, particularly those with strong religious or ethical views, it will be of great comfort to know such decisions are in the hands of an attorney who shares or will respect those values.

The best news

If you have an existing EPA it is still effective, and is governed by the old EPA rules. And should you want a Welfare power then you can make one of those to run along side your existing EPA.

A help or a hindrance?

The changes were introduced to stamp out abuse. And although the new practical measures should go some way towards this, they will not stop the determined crook, particularly if those most at risk do not wish to attempt a 24 page form themselves (even with the 60 page guidance note). The proliferation of forms, and questions means greater scope for error in completion and registration, particularly if people decide to prepare and register powers themselves, and this is now further delaying (the now almost compulsory) registration.

So what advice can we give?

There is no substitute for appointing someone you know you can trust (provided of course they are happy to take this on). Concern over unauthorised use of the power post registration then becomes secondary.

For those who do not want the expense and inconvenience of registering an LPA a practical alternative might be a combination of a General Power of Attorney (one which lapses on loss of capacity) a flexible attitude to when capacity is lost, and an LPA in reserve.

For those lucky enough to have an EPA –
hang on to it.



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