LASTING POWERS OF ATTORNEY

If you ever become incapable of making your own decisions, no-one has the right to do this for you (not even a spouse/(civil) partner or your children). Making Lasting Powers of Attorney (LPAs) now allows you to choose who will make decisions for you, and avoids significant complications and expense in the future.

What is an LPA?

An LPA is a legal document in which you choose someone (the Attorney) to make decisions and sign documents on your behalf.

You must make an LPA whilst you are mentally capable of doing so, and it can only be used after it is registered with the Office of the Public Guardian (OPG), which can take many months.

The two types of LPA are:

- **Property & Financial Affairs LPA:** this appoints someone to make financial decisions for you. Without it, a very time-consuming and expensive Court of Protection application would be needed before your assets and money could be accessed in the event of your incapacity.
- **Health & Welfare LPA:** this appoints someone to make medical/care decisions for you. Without it, doctors and social services can make 'best interests' decisions for you in the event of your incapacity.

LPAs replaced Enduring Powers of Attorney (EPAs) in 2007 and so if you have an EPA then you should note that this covers financial decisions only, *not* medical/care decisions. In addition, an EPA can only be registered with the OPG in the event of your mental incapacity, and so at a time when the many months of delay with registration could cause severe difficulties for you.

Property & Financial Affairs LPA

A Property & Financial Affairs LPA allows you to choose one or more Attorneys to make decisions on your behalf regarding your property and finances. The Attorney can make almost exactly the same kind of decisions that you can make, such as accessing bank accounts, paying bills, selling your home, managing investments, and making business decisions (that is, the continuation of your 'financial life' without disruption).

A Property & Financial Affairs Attorney can manage your property and finances whilst you still have mental capacity as well as when you lack capacity. Even though your Attorney can act immediately once the LPA has been registered with the OPG, it is common that they do not, and instead you will continue to deal with your own property and finances until assistance is needed.

Health & Welfare LPA

A Health & Welfare LPA allows you to choose one or more Attorneys to make decisions on your behalf regarding your personal healthcare and welfare, to include where you live, who you have contact with, and potentially giving or refusing consent to life-sustaining treatment.

A Health & Welfare Attorney can only act for you once the LPA has been registered with the OPG and when you cannot make the decision yourself.

Who can make an LPA?

Anyone aged 18 or over can make an LPA, but only whilst mentally capable of doing so. It is therefore vital that you consider making an LPA whilst you are able to do so.

The following are the people involved in making an LPA:

Donor: you are the Donor (the person giving authority to the Attorney(s) to act for you).

Attorney: an Attorney is the person you choose to make decisions on your behalf. It is an extremely important role and one that the person chosen must agree to take on. You can appoint more than one Attorney, and/or can appoint a Replacement Attorney to act if your first choice Attorney is ever unable to do so. A bankrupt cannot be an Attorney for property and financial affairs.

Bear in mind that if you lose mental capacity (the ability to make decisions for yourself) then you will not be able to monitor what the Attorney is doing on your behalf.

Person to Notify: you can choose to name one or more persons to be notified when an application is made to register the LPA with the OPG. This person has a limited right to object to the registration of the LPA if they have concerns about it, but will not have any ongoing role nor any power to make decisions for you.

Certificate Provider: a Certificate Provider is a person you choose to confirm that you understand the LPA and that you are not under any pressure to make it. The Certificate Provider will either be a professional person with relevant skills and expertise, or someone you have known for more than two years (who is not a family member).

The Certificate Provider's assessment is a vital part of making an LPA. It can be challenged by the OPG, with the potential for the LPA to be declared invalid, even many years later.

The LPA form

In the LPA form itself, you will need to set out your personal details and details of your Attorney(s). When choosing more than one Attorney you will need to appoint them to act either *jointly and severally*, *jointly* or *jointly for some decisions and jointly and severally for other decisions*:

Jointly and severally: this is the preferred option, and means that one Attorney can act on their own, or some or all of the Attorneys can choose to act together. This can be useful if one of your Attorneys wishes to 'take a back seat'. Also, if one of the Attorneys becomes ill, dies or loses the mental capacity to act, the remaining Attorney(s) can continue to act. Note that if one Attorney makes a decision for you then all Attorneys are responsible for it even if they were not a party to the decision.

Jointly: this option is not advisable, because it means that all of the Attorneys must always act together. If just one Attorney does not agree with the proposed decision, it cannot be made. Whilst this might be viewed as a safeguard, it can cause severe practical difficulties, and if the Attorneys fall out with each other or one of them dies or loses the mental capacity to act then the LPA cannot be used.

Jointly for some decisions and jointly and severally for other decisions: this is a combination of the two options set out above. For decisions that need to be made jointly, the difficulties mentioned above would apply; and the more complex the LPA is, the more difficult it will be to use in practice.

Instructions: you can give instructions to your Attorney(s) on how they should act on your behalf, such as:

- use an investment known as a discretionary management scheme
- undertake certain types of Inheritance Tax (IHT) planning for you, such as putting in place IHT-efficient investments and/or continuing the payment of premiums on a Whole of Life Policy (which may require a separate Deed of Covenant to be made at the same time as your LPA)
- access your digital assets and/or health & social care records
- a duty to produce financial records to a professional

Generally speaking, the more instructions there are in the LPA, the more difficult it can be to use in practice. It is also not advisable to include instructions that have not previously been approved/tested with the OPG given that the registration of the LPA can be rejected (and therefore delayed even further).

You can then choose to set out details of the Person(s) to Notify. The Certificate Provider must then sign to say they are happy that you understand the powers you are giving your Attorney(s) and that there has been no pressure on you to make an LPA.

The Attorney(s) will then need to sign to confirm they understand their responsibilities, such as acting in your best interests and complying with any instructions in the LPA.

What happens next?

You or your Attorney(s) can apply to register the LPA with the OPG at any time after it has been made, but this is usually carried out immediately so that the many months of delay with registration – including the Person(s) to Notify receiving a notice of the registration application – do not affect you (given that this would occur whilst you are mentally capable, and so when the LPA does not need to be used).

This is to be compared with applying to register an EPA which can only be carried out at the time of mental incapacity, when of course the many months of delay with registration can cause serious problems.

Whilst registration of an LPA can be delayed until it needs to be used, this is not advisable given the amount of time that registration takes. If registration occurs and your Attorney attempts to use your LPA before you would want them to do so, you can always cancel the LPA (whilst mentally capable).

There is a Court fee payable on registration (currently £92 per LPA), although this fee may be avoided or reduced if you are in receipt of certain means-tested benefits or have an annual income of less than £12,000. If you think you may qualify for a fee reduction then please speak to the lawyer who is advising you.

Do I need Buckles to make my LPA?

Whilst there is no legal requirement to use a lawyer to make an LPA, at Buckles we can ensure the lengthy process is completed for you (given that many people will start but not finish LPAs!). We also have significant experience in assessing mental capacity and acting as Certificate Provider, which ensures the best possible opportunity for you to make an LPA regardless of age or infirmity. This is especially important when it is noted that an LPA can be declared invalid, even after many years.

We can also give you advice on:

- Instructions to your Attorney(s)
- Choice of Attorney(s) due to the risk of financial abuse
- Choice of Attorney(s) if any reside outside of England & Wales given that there may be additional administration for them in that other legal jurisdiction – for example, the requirement in the USA to file a Foreign Bank Account Report for every account over which they have signature authority
- Issues with choosing a sole Property & Financial Affairs Attorney if you co-own a property with that Attorney
- Issues with more than one Health & Welfare Attorney in situations such as a second marriage
- Any assets you may have outside of England & Wales – given that it should be assumed that any LPA you make will not be valid in any other legal jurisdiction – and how to obtain separate advice from our International Department (or a third-party expert) on request
- Any interest you may have in a business, and how your LPA may (or may not) apply to this
- Safe storage of your LPA, and control over when it is provided to your Attorney(s)

An LPA cannot be amended as time passes. If changes need to be made then a whole new LPA is required. We can help you get it right first time.

Storage of your LPA documentation

See our Terms of Business for details of our policy in relation to storage of your documentation.

We can arrange safe storage of your original LPA documentation. We will also provide you with the option of a digital vault for all your legal documentation and financial information. We have identified Lyfeguard – which is not part of Buckles – as a suitable provider for you.