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## **L.E LAW LLP INFORMATION SHEET NO. 10**

### **GUIDE TO LASTING POWERS OF ATTORNEY**

The Mental Capacity Act 2005 introduced reforms and updates to the existing law where decisions need to be made on behalf of individuals who lack mental capacity. Under this legislation, 'lasting' powers of attorney have replaced enduring powers, with effect from 1 October 2007.

This Guide describes how a lasting power is created, the scope of an attorney's powers and the impact on existing enduring powers.

#### **The Key Principles**

The Mental Capacity Act 2005 introduced a new structure for the protection and empowerment of vulnerable people who are not able to make their own decisions. The legislation is based upon five key principles:

- the right of every adult to make their own decisions. They must also be assumed to have the capacity to make such decisions unless it can be proved otherwise
- the right for individuals to be supported to make their own decisions
- individuals must retain the right to make what might be seen as eccentric or unwise decisions
- anything done for or on behalf of people without capacity must be in their best interests
- anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

## **What is a Lasting Power?**

The Mental Capacity Act 2005 introduced lasting powers of attorney (LPAs) as a replacement for enduring powers of attorney. A person making an LPA (a 'donor') can delegate decision-making powers to an attorney or attorneys. The attorney can be given powers relating to the donor's personal welfare as well as their property and affairs.

## **Creating a Lasting Power**

Anyone aged 18 or over and who has the capacity to understand what it means may create an LPA. The power must:

- meet the prescribed form
- stipulate whether the power covers personal welfare or financial affairs or both
- set out any restrictions or conditions which the donor wishes to impose
- must state that the attorney(s) is given authority to act when the donor no longer has capacity to make those decisions themselves.

The powers within an LPA will always operate from the onset of the donor's incapacity. It is also possible to grant powers relating to property and affairs, but not personal welfare, that are effective whilst the donor still has capacity.

The donor can appoint one attorney or more than one. If two or more attorneys are appointed, the donor must specify whether they must act jointly, jointly and severally (i.e. they can either act together or separately) or jointly for some matters and jointly and severally for others.

The LPA must be signed by the donor and attorney(s) and then sent, by either the donor or attorney(s), to the Public Guardian for registration. It must also be accompanied by a certificate, from an authorised person, which confirms that the donor understood the purpose and scope of the LPA, that there was no fraud or undue pressure and that there is nothing that would prevent an LPA from being created. If all requirements are met, the power will be formally registered.

Once registered, the attorney has the authority to act according to the specific terms of the LPA. Third parties dealing with an attorney should ensure that they see the registered power, or an office copy of that power, and that the attorney has the authority to act as proposed.

A donor may revoke their LPA at any time, provided they have the capacity to do so.

Note that the powers given in an LPA cannot be exercised until it has been registered.

This should be contrasted with enduring powers of attorney where the power can operate before registration, provided the donor still has the mental capacity to make their own decisions, and where registration is only required following the donor's mental incapacity.

### **Lack of Capacity**

The Act goes to great lengths to define a person who lacks capacity. Some of the key points are:

- a person's lack of capacity may be only partial or temporary
- a person may lack capacity in respect of one matter but not others
- the inability to make a decision must be caused by an impairment of or disturbance in the functioning of the brain
- when determining capacity a decision should not be made merely on the basis of a person's age, appearance or unjustified assumptions about capacity based on the person's condition or behaviour

### **Inability to Make Decisions**

A person is considered as unable to make their own decisions if they are unable to:

- understand the information relevant to the decision
- retain that information
- use or weigh that information as part of the process of making the decision
- communicate the decision (whether by talking, using sign language or any other means).

### **Attorneys**

Any individual appointed as an attorney must be aged 18 or over. If the power relates only to the donor's property and affairs, it is possible to appoint either an individual, (unless they are bankrupt), or a trust corporation. For personal welfare powers, only an individual (or individuals) can act as an attorney.

The LPA document can itself appoint a person to replace an attorney whose power is terminated (for example by the attorney's death, bankruptcy or lack of capacity). It is not possible for a LPA to give an attorney the authority to appoint a substitute or successor. An attorney's authority to act is also revoked if they lack capacity to act or on the dissolution or annulment of a marriage or civil partnership between the donor and donee.

A power, so far as it relates to property and affairs, is revoked by the attorney's bankruptcy. The one exception to this is where an attorney is the subject of an interim bankruptcy restrictions order, in which case the power is suspended for as long as the order has effect.

## **Property and Affairs Decisions**

### **Scope of Powers**

These are similar powers to those allowed under an enduring power of attorney. They can cover operating a bank account, making investment decisions, signing tax returns and purchasing a property for the donor's residence.

The attorney must always act only in the donor's best interests.

### **Gifts**

For powers giving an attorney authority to deal with the donor's property and financial affairs, there are gifting restrictions (similar to those for enduring powers). An attorney may only make gifts:

- on "customary occasions" (such as birthdays, marriage and Christmas) to persons, including the attorney, who are related or connected with the donor
- to any charity to whom the donor made or might have been expected to make gifts.

The value of such gifts must be reasonable with regard to the circumstances and, in particular, the size of the donor's estate.

The Court of Protection has the power to authorise more substantial gifts if satisfied that this would be in the donor's best interests. This could include lump sum inheritance tax planning arrangements for donors with significant assets.

### **Other Restrictions**

There are certain acts, which are considered of too personal a nature to be delegated to an attorney. These include:

- signing the donor's will
- acting as a personal representative of a will where the donor was named as executor
- appearing in court, in the donor's place, as a witness

- acting as a trustee in place of the donor (although it is possible to delegate trustee functions for up to 12 months, using an appropriate deed, under the Trustee Act 1925).

## **Personal Welfare Decisions**

### **Scope of Powers**

This can cover matters such as where the donor lives, providing care and medical treatment for the donor and restraint of the donor in certain circumstances.

### **Restrictions**

Where an LPA authorises an attorney to make decisions about the donor's personal welfare, certain restrictions apply:

- an attorney can only authorise restraint of the donor to prevent harm and it must be proportionate
- the attorney's authority does not extend to making decisions in circumstances other than those where the donor lacks, or the attorney reasonably believes that the donor lacks, capacity
- the authority is subject to valid "advance conditions" made by the donor concerning the carrying out or continuing of a medical treatment
- an attorney may give or refuse consent to the carrying out or continuation of a treatment by a person providing health care for the donor but this does not extend to refusing life-sustaining treatment unless the LPA expressly says so and is also subject to any conditions or restrictions in the LPA.

## **The Position for Enduring Powers**

From 1 October 2007 it will no longer be possible for a person to create an enduring power of attorney (EPA). The Mental Capacity Act includes provisions covering existing EPAs which can still, whether registered or not, continue to operate beyond 1 October 2007. If the donor of an EPA becomes mentally incapacitated after 1 October 2007, it will still be possible to have that power registered at that time.

## **Summary**

Lasting powers of attorney have replaced enduring powers, since 1 October 2007. Existing enduring powers can still continue to operate beyond this date.

A lasting power can cover financial and/or personal welfare matters. The power has to be executed whilst the donor is mentally capable of understanding their actions. An attorney may act under a lasting power at a time when the donor is mentally incapable of making

relevant decisions relating to the matters covered by the power. An attorney is obliged to always act in the best interests of the donor and any action should be the least restrictive of their basic rights and freedoms.

### **Disclaimer**

This information sheet is for guidance only and does not remove the need to take professional legal advice relevant to the specific facts of any individual case. No responsibility will be accepted for any losses occasioned as a result of any action taken in reliance on the contents of this document.

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