

## Lasting Powers of Attorney: Should I Replace my Enduring Power of Attorney?

Powers of attorney allow you to appoint someone, or more than one person, (called your attorneys) to make decisions on your behalf. The types of power of attorney you will hear about most often are the Enduring Power of Attorney (EPA) and the Lasting Power of Attorney (LPA).

The EPA is an older form of power of attorney. When LPAs were introduced on the 1st October 2007, it became impossible to create any new EPAs.

### Is my existing EPA still valid?

Yes, even after the introduction of LPAs, any EPAs created before 1 October 2007 still continue to be valid powers of attorney.

However, the LPA has a number of advantages over the EPA. Whether these would be advantageous to you is likely to depend upon your situation and what you wish to accomplish with your power of attorney. Even so, you should consider whether your existing arrangements are still fit for your purposes; your circumstances may have changed since you created your EPA.

You cannot create an LPA if you do not have the 'mental capacity' to do so at the time (see boxout below). This means, if you have any interest in creating an LPA, or replacing an EPA with an LPA, you should explore your options sooner rather than later. Otherwise, you may miss the opportunity to create an LPA.

### What is 'mental capacity'?

Mental capacity is the term used to describe a person's ability to make legally binding decisions. If someone has lost mental capacity, it could be due to many different circumstances – such as an illness or injury – but essentially it will be because they are unable to make and/or communicate a fully informed decision at the required time. More information on this can be found in our separate Mental Capacity guide.

One of the main reasons for making a power of attorney is to give someone whom you trust the legal authority to make decisions for you – in the event that you lose the mental capacity to make these decisions yourself.

## Some key differences between EPAs and LPAs

### *Enduring Power of Attorney (EPA)*

- Only covers Property and Financial decisions
- Can be used without registration. Must be registered upon the loss of mental capacity
- New EPAs can no longer be created

### *Lasting Power of Attorney (LPA)*

- Can cover Property and Financial decisions and/or Health and Welfare decisions
- Must be registered before it can be used
- LPAs can be created by someone with mental capacity to do so

## The advantages of Lasting Power of Attorneys

This section details some of the advantages to replacing your EPA with an LPA or LPAs. Many people choose to make powers of attorney so that it is easier for their loved ones to manage their affairs for them. If you are entrusting loved ones to make decisions for you, it is natural to want to avoid unnecessary difficulties which they may encounter.

Most of the advantages mentioned below share this common theme of making matters as easy for you and your attorneys as possible.

### Health and welfare decisions

When EPAs could still be created, they could only be used to grant attorneys the power to make decisions over property and financial matters. LPAs, however, come in two different types:

- Property and financial affairs
- Health and welfare

When you create an LPA, you have the choice of creating one LPA (of either type) or two LPAs (one of each type). Putting both types of LPA in place will give your attorneys the widest range of decision-making powers, but your choice will usually depend on what you want the LPA(s) to accomplish.

## Appointing different attorneys

If you create both types of LPA, you do not have to appoint the same people as attorneys in each. You can choose some people as your attorneys for property and financial decisions, and other people as your attorneys for health and welfare decisions.

A health and welfare LPA allows attorneys to make decisions on your behalf concerning many important matters such as:

- Where you live
- Consenting to, or refusing, medical treatment
- Care home arrangements

Health and welfare LPAs can only be used after the person granting the LPA has lost their mental capacity. This is different from EPAs – and property and financial LPAs – as it is possible to use those before a loss of mental capacity has taken place (if their terms allow it).

If you have only an EPA in place, and you lose capacity, then decisions about your health and welfare will not be made by your loved ones, or the attorneys appointed in your EPA. They will be made instead by professional bodies, such as your Local Authority.

### Example 1

John made an EPA appointing his son, Buddy, as his sole Attorney. John has now developed Alzheimer's Disease and has moved into a residential care home. Buddy does not like some of the decisions that the care home are making regarding John's care. He doesn't think that they are what John would want, and are not in John's best interests. However, because John didn't make an LPA for health and welfare, Buddy has no power to make these decisions on John's behalf.

With an LPA for health and welfare, your chosen attorney will be making these decisions for you and can ensure that they are in line with not only your best interests but also any wishes you have let them know about before you lost capacity.

### Example 2

In contrast to Example 1, if John had made an LPA for health and welfare, appointing Buddy as his Attorney, then Buddy would be the one making decisions about John's living arrangements and care. He would be able to refer to John's wishes prior to John's loss of mental capacity, and would be able to act in John's best interests now. Both John and Buddy are likely to be happier with this situation, instead of the alternative described above where a stranger would make decisions regarding John's care.

## The timing of registration

EPAs and LPAs are treated differently in how they must be registered with the Office of the Public Guardian.

LPAs are normally registered once they have been signed and witnessed, as they cannot be used until they have been registered.

EPAs are only registered if the person who granted the power loses mental capacity. When this happens, attorneys can no longer use their powers under the EPA **until** it has been registered. This often results in a lengthy delay at a time when the attorney's powers are needed most.

### Example 3

Bob made an EPA in 2006, appointing Sasha as his attorney. Bob is happy with Sasha handling the majority of his financial affairs for him and only makes a few decisions himself. Bob becomes unwell and loses the mental capacity to make any decisions at all. At this point Sasha can no longer use her powers under the EPA until it has been registered with the Office of the Public Guardian. Sasha applies to register the EPA and it takes 3 months before registration is completed. During this time, no one has authority to manage Bob's financial affairs. If any of Bob's family had objected to the registration, it could have taken significantly longer.

LPA's can be registered with the Office of the Public Guardian at any time. People granting LPAs usually choose to register them straightaway so that they are ready for use whenever they are needed. If the person granting an LPA later loses mental capacity, their attorneys can continue making decisions for them without any disruption or delay.

### Example 4

Suppose that, before Bob lost his mental capacity in Example 3, he had made an LPA to replace his EPA. In his LPA, he appoints Sasha as his attorney to deal with his property and financial affairs, and registers it as soon as it is created so that Sasha can use it straightaway. When Bob becomes unwell and loses his mental capacity, Sasha is able to just continue making decisions for him. The 3-month delay is entirely avoided.

## Less potential for 'failure'

Powers of attorney are a way of making legal provisions for your future. The last thing you want is for these plans to fail when you need them most – undoing the security and peace of mind which powers of attorney are intended to afford.

There are few respects in which EPA's are more prone to failure than a well-drafted LPA:

- **Jointly-appointed attorneys** – If your EPA appoints multiple attorneys to act 'jointly' then if one of the attorneys is unable to act the EPA will cease immediately. LPAs allow you to appoint substitute attorneys in case one or more of your attorneys are unable to act. We normally recommend that multiple attorneys are appointed 'jointly and severally' so that they may also act individually as well as together.
- **Bankruptcy** – An EPA will be revoked automatically if either you or your attorney(s) are declared bankrupt. Whilst this may still affect a property and financial affairs LPA, it does not automatically revoke it. Also, health and welfare LPAs will be unaffected.

Perhaps the main issue with an EPA, however, is that you may only discover these problems when trying to register it with the Office of the Public Guardian. As already mentioned, the need to register an EPA is triggered when the person who has granted it loses mental capacity. If the EPA is found to be invalid when trying to register it, then the person who granted it is unlikely to have the mental capacity required to make a new LPA.

### Example 5

Esther granted an EPA appointing her son, Scott, and her brother John as joint attorneys. They have been using the EPA to manage some of Esther's financial affairs for her. John dies, and this revokes the EPA. However, Scott and Esther believe it is still valid.

Shortly afterwards Esther's mental health deteriorates and she is losing the mental capacity to handle any financial affairs herself. Scott can no longer use the EPA until it has been registered. He applies to register the EPA but the Office of the Public Guardian refuses to do so, on the basis that John's death revoked the EPA. Scott can no longer use the EPA and Esther no longer has the mental capacity to create a new LPA to replace it.

## Greater protection against abuse by attorneys

Granting any power of attorney involves placing trust in the people you appoint as attorneys. If that trust is betrayed, it can be deeply upsetting and financially damaging. LPAs offer some increased protection against attorneys abusing their powers. LPAs cannot be used until they have been registered with the Office of the Public Guardian. This means that there are records of all LPAs which are currently in operation and that if you have a problem with your attorneys you can contact the Office of the Public Guardian for help.

EPAs, on the other hand, can often be used without being registered, as long as the person who granted the EPA still has mental capacity. This means many EPAs are used without any oversight or involvement from the Office of the Public Guardian. The Office of the Public Guardian can only take action against attorneys who abuse their powers if the power of attorney has been registered.

Roche Legal ©