

What is a lasting power of attorney?

A lasting power of attorney (LPA) is a legal document where a person (known as the donor) gives another person authority to make certain decisions on his or her behalf. This person is known as an attorney. As a lasting power of attorney is such a powerful document we would recommend that you seek legal advice if you are considering preparing an LPA.

There are two types of lasting power of attorney:-

1. property and financial affairs lasting power of attorney, which gives your attorney authority to deal with your property and finances, as you specify; and
2. health and welfare lasting power of attorney, which allows your attorney to make welfare and health care decisions on your behalf, only when you lack mental capacity to do so yourself. This could also extend, if you wish, to giving or refusing consent to the provision of life saving treatment.

Why should you have a lasting power of attorney?

If a lasting power of attorney for property and financial affairs is in place and you lack the physical and/or mental capacity to deal with your own financial affairs, whether temporarily or permanently, then your attorney can deal with your finances on your behalf. Your bills can be paid, your pension can be collected and your dependents can be looked after. If the health and welfare lasting power of attorney is in place then this can only be used if you lack mental capacity to make a welfare or medical decision for yourself. Your attorney can step in to ensure that your wishes are carried out in these circumstances.

Your attorney

You should take care over whom you appoint as your attorney. An attorney should:

- be trustworthy
- have the necessary skills to make the proposed decisions on your behalf
- be aged over 18
- not be bankrupt (if appointed as property and financial affairs attorney)



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If you appoint more than one attorney, you can appoint them to always act jointly and severally (which means they can act together or independently of each other) or jointly (which means that both must be included in all decisions). There is also an option where you can appoint your attorneys using a combination of these i.e. jointly for some issues and jointly and severally for other issues.

You can appoint a replacement attorney in case one or both of your attorneys dies before you or cannot continue to act as your attorney for some other reason e.g. bankruptcy or simply not wishing to continue in the role.

How to make a lasting power of attorney

For a lasting power of attorney to be valid, you must fully understand the implications of the arrangement at the time of signing the document. You will need to read your lasting power of attorney including the prescribed information and sign the document in the presence of an independent witness. As soon as possible thereafter a certificate provider will need to sign a certificate to confirm that at the same time you signed the lasting power of attorney:

- you understood the purpose of the lasting power of attorney
- you understood the authority you would be providing to your attorney
- nobody was pressurising you into making the document
- there is no other reason which should have prevented the lasting power of attorney being created

A certificate provider is someone who has known you for at least two years, or someone with specialist skills in assessing if a person has the necessary capacity such as a lawyer at Sydney Mitchell LLP. Your attorney will then need to consider the lasting power of attorney and sign this in the presence of an independent witness.

When can your attorney act?

Your attorney will only be able to act under your lasting power of attorney after you, your attorney and your certificate provider have signed it AND the document has been registered at the Office of the Public Guardian. There is one registration fee for each lasting power of attorney. The property and financial affairs lasting power of attorney can be used both when you have

capacity to act, as well as if you lack mental capacity to make a financial decision. The health and welfare lasting power of attorney can only be used if you lack mental capacity to make a welfare or medical decision.

Existing enduring powers of attorney

Any enduring power of attorney validly made before 1 October 2007, can still be used in respect of your property and financial affairs. No new enduring power of attorney can be made after this date. If you wish to give authority over your health or welfare you will need to make a health and welfare lasting power of attorney.

What happens if you have not made a lasting power of attorney or enduring power of attorney?

If you lack capacity to deal with your own affairs then an application will have to be made to the Court of Protection for an appropriate order to be made, such as appointing a person (known as a deputy) to make decisions on your behalf. This is both costly and time consuming. The deputy may or may not be someone who you would have chosen to deal with your affairs if you had been able to appoint them yourself.

Where the Court of Protection appoints a deputy to manage your property and financial affairs on an ongoing basis, the deputy has to keep accounts, enter into a security bond, and report to the Office of the Public Guardian and Court of Protection. They will charge an initial application fee, as well as a yearly fee to cover the cost of supervising the deputy's work.

The information here is only a brief guide and we strongly advise that you speak to one of our specialists in our private client team for advice and further guidance.

Contact us at Sydney Mitchell LLP

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