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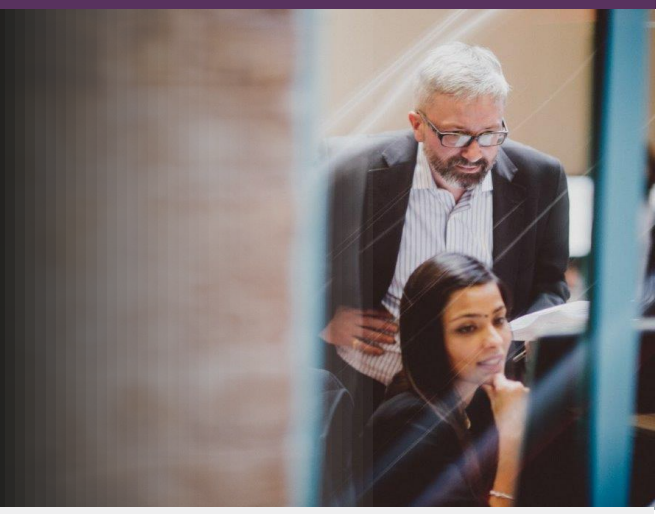
Safeguarding is vital when appointing others to act



April 2019

Increasing numbers of people are taking advantage of a simplified online process to make a Lasting Power of Attorney, which enables others to manage their affairs if they become unable to do so themselves, but alongside there is a surge in reports of abuse by attorneys. "It's important to get guidance and set safeguards in place when permitting others to manage your affairs." says private client specialist, James McMullan who explains how the process works and the ways in which you can protect yourself.

Have you considered who would manage your affairs and make decisions, if you have an illness or accident that leaves you incapable of looking after things yourself? A Lasting Power of Attorney (LPA) enables you to appoint someone you trust to look after your financial affairs or your health and welfare, with minimum effort, delay and expense.

The process of applying has become much simpler since an online system was introduced a few years ago, which has encouraged many more people to prepare an LPA, with digital applications soaring from 14,000 in the year to March 2014 to 164,000 in the year to March 2017. Paper applications have also risen, and a total of almost 560,000 registrations were made in the year to March 2017, compared with 200,000 in March 2012. But while easier to make, they are also easy to abuse, if safeguards are not put in place.

Unfortunately, that is demonstrated by reports of a significant increase in the number of investigations into the actions of attorneys and deputies who have been appointed under an LPA. These have increased by more than 40% in the past year – 1,729 investigations were carried out in 2017-18 – up from 1,199 the previous year, according to the Office of the Public Guardian, which is responsible for administering LPAs.

While the DIY process makes the process more accessible, professional guidance can make the difference in ensuring adequate control on those acting as attorneys, to help avoid mistakes or in the worst case, abuse.

An LPA is a valuable tool, but the right safeguards must be in place and everyone needs to understand what is involved, and the responsibilities it brings.

Understanding LPAs

Why have one?

There are many reasons why you may want to allow someone else to manage your affairs. While the obvious situation is if you are elderly or ill, an LPA can be useful if someone is undertaking long term travel or working overseas for a corporate employer.

By using a Property & Financial Affairs LPA, you can appoint someone to look after your financial affairs on your behalf. You can also make a Health & Welfare LPA, which can be used to appoint someone to deal with issues such as where you live and medical treatment if you become mentally incapable.

Without an LPA, if someone becomes mentally incapable, whatever their age, their financial and personal affairs will have to be managed by a deputy appointed by the Court of Protection. Generally, this makes for a slow and potentially expensive business for families, who will have to apply to the Court for permission to undertake transactions.

How do they work?

Once an LPA has been made, it must be registered with the Office of the Public Guardian before attorneys can act, with a fee of £82 per LPA. Once registered, the LPA can be submitted to any institution such as a bank or utility provider, under a financial LPA, or to health or care professionals under a health & welfare LPA, enabling the institution to deal directly with the appointed attorneys.

An attorney under a health and welfare LPA can only make a decision on your behalf if you are incapable of making the decision yourself.

In the case of financial affairs, once the LPA is registered your attorneys will have power to enter into any transaction, unless you have specifically forbidden it, so they will be able to deal with investments and to write cheques. If you are mentally capable, the attorney should only do what you authorise them to do - for example, if you had physical issues which made it difficult for you to attend a meeting or to sign documents and you instructed the attorney to act on your behalf. If you become mentally incapable and are no longer capable of authorising or consenting to the attorney's decisions or actions, the attorney will be able to make decisions and do things on your behalf. However, there is no cut-off point at which you are presumed to be incapable; capacity is decided on a decision-by-decision basis and the attorney must do everything practicable to help you arrive at your own decision on every occasion.

Three steps to LPA confidence

1. Choose attorneys carefully

An attorney has far reaching powers and problems are likely to arise if they do not appreciate the role they are undertaking, or if there are insufficient checks and balances in the process.

Being granted authority may draw some attorneys into abuse of their position, with intentionally fraudulent activity, but it is just as likely to be misuse of power by family members, who justify their actions as being acceptable because they are making use of assets that will come to them in the end, or because they feel it is reasonable to have a financial contribution for what they do for their relative.

Before appointing an attorney, think about how well they look after their own finances, how well you know them and how sure you are that they will make the right decisions for you. Even where an attorney acts with the best intentions to respond to the trust placed in them, if they are disorganised or indecisive, this can impact on their ability to make good decisions, just as much as if they are self-serving.

2. Make attorneys accountable

You can appoint two attorneys and require that they are both involved in each decision, although that can make transactions more complicated. Another option is to appoint, alongside a family member or friend, a professional attorney whose job it would be to undertake regular checks on how matters are being handled. Alternatively, you can include a requirement within the LPA for the attorney to consult with a third party if a decision exceeds a given threshold or for specific assets. This would allow you to restrict the sale of property or investments without the input of a professional, for example.

At the very least, a clause within the LPA appointing a third party to check whether attorneys are acting within the scope of their authority on an annual basis is a good idea.

Even where there is no specific requirement within the LPA, the Office of the Public Guardian can ask an attorney to account for their dealings with any money they handle and so attorneys should be advised to keep financial statements and receipts carefully.

3. Give good guidance

As well as careful selection and ongoing checks on attorneys, it is important that an attorney has guidance to help them understand their fiduciary and statutory responsibilities, and how to satisfy them, at the outset.

They should appreciate how their role should be performed with reference to the Mental Capacity Act 2005 Principles and Code of Practice, particularly in how they consult with the donor of the LPA and help the donor to make their own decisions, if possible.

They should also be made aware that they must not benefit from their position or use money or property for their own benefit, whatever their relationship to the donor, and even where they imagine it would not pose a problem if the donor were not mentally incapable.

Recognising that they may need to get expert advice, whether legal, financial or otherwise, is also important,

if they are to act within the reasonable standards of care and skill required by an LPA.

For more information contact James McMullan or click here to make an appointment.

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