

# CFU Carers' Support Group



**For carers and relatives of people with fronto-temporal dementia and semantic dementia**

## **Newsletter**

**November 2007**

**[www.cfucarers.org.uk](http://www.cfucarers.org.uk)**

# Welcome

Hello! Welcome to the November issue of the CFU carer's support group newsletter. As many of you will know, it's been a very successful year for us this year, with a whole host of talks and newsletters crossing a wide range of topics. From the financial implications of being a carer, through to the medical, behavioural, and psychological aspects of frontotemporal dementia and semantic dementia, we hope we've helped to provide you with some tools to understand the disorders and cope with the problems you may have to deal with on a daily basis. To end the year, we were delighted to welcome solicitor Margaret Seed to our November

meeting, who gave a very detailed and interesting talk on the changes in the law surrounding Power of Attorney. We have summarised her talk that highlights these changes and hope that it helps you to get a basic understanding of what appears to be an incredibly confusing area! All that remains is for us to thank all of our speakers from this year who have given their time to provide us with such fantastic talks, and also to thank you, the carers, for taking such an interest in our meetings and newsletters and providing us with the positive feedback that makes the carer's support group work so well. And before we forget: **MERRY CHRISTMAS!!!!**

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# Changes in the law: from Enduring Power of Attorney to Lasting Power of Attorney

**Margaret Seed, Solicitor, Potter-Rees Serious Injury Solicitors**

## Enduring Power of Attorney

Until 1 October 2007, it was possible to make an Enduring Power of Attorney (EPA) whereby a person (the 'donor') could appoint somebody else as their attorney to look after their financial affairs. On 1<sup>st</sup> October 2007, the Mental Capacity Act 2005 came into force, meaning that the EPA has now been replaced by Lasting Power of Attorney (LPA).

Before describing this change to LPA, it is important to make several points:

- **EPAs made before October 1<sup>st</sup> are still valid and the same rules and procedures still apply.**
- **If the donor becomes or is becoming incapable of making their own financial decisions, the EPA must be registered. The procedure for doing this is exactly the same as before and this registration costs £120.**
- **For a reminder of EPA procedures and contacts see:**
  - Office of the Public Guardian website:  
[www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)
  - Summaries of Margaret Seed's previous talks at:  
[www.cfucarers.org.uk](http://www.cfucarers.org.uk)
  - Newsletters December 2004 and January 2006

## Lasting Power of Attorney

For those of you who have not yet made such arrangements, it is now only possible to make a Lasting Power of Attorney (LPA). The LPA is more complex than the EPA and there are two types, involving the two separate issues of Property and Affairs and Personal Welfare.

Property and Affairs LPAs allow a person to designate the handling of finances to another person (or persons), a little like the original EPA. The financial duties of an attorney under a property and affairs LPA have not been changed from those previously applied to an EPA. The attorney is in a position of trust called a 'fiduciary' duty. They must keep accounts and keep the donor's money and property separate from their own.

Personal Welfare LPAs allow a person to plan ahead by choosing one or more people to make decisions on their behalf regarding their healthcare and personal welfare.

Given the wide scope of this subject, it is not possible to cover it all in one session. It is the 'Property and Affairs' LPAs that we will be covering in this article.

## Making the LPA

To make an LPA, you must understand what it means to do so, i.e. you must have 'mental capacity'. This was also required for an EPA, but it was only in cases where this was in doubt that assessment of mental capacity was made, typically by a doctor.

The assessment of a person's mental capacity is now an integral part of the procedure for making an LPA. The new act requires the donor to choose a 'certificate provider' who independently verifies the circumstances under which the attorney is making an LPA. The certificate provider can be:

- Anyone who has known the attorney for 2+ years
- A GP, registered healthcare professional, social worker, solicitor
- Any person who has relevant professional skills (these must be stated, although the rules do not specify or give examples)

You cannot be a certificate provider if:

- You are a member of the donor's OR the attorney's family
- You are a business partner or paid employee of the donor or attorney
- You are already an attorney under an EPA or another LPA or are to be appointed as attorney
- You are an owner, director, manager, or employee of a care home in which the donor lives, or their family member
- You are a director or employee of a trust corporation appointed as attorney in a property and affairs LPA.

In all of these cases, it is considered that there would be a potential conflict of interest.

The certificate provider must certify that:

- They have read the LPA and notes (which are 24 pages long!)
- They have discussed the contents of the LPA with the donor **without the attorney(s) being present.**
- They have made efforts to discuss the LPA with the donor alone, or if this is not possible that they should state who was present when the LPA was discussed. (An example of a situation where it might be unfeasible to discuss the LPA alone might be when the donor has communication difficulties e.g. deafness)
- They have completed the certificate straight after discussing the LPA with the donor.
- The donor understands the purpose of the LPA and the scope of the authority under it.
- No fraud or undue pressure is being used to induce the donor to create the LPA.
- There is nothing else that would prevent the LPA being created.

## How the LPA can be used

To get a good idea of how an LPA can be used, Margaret Seed devised the following example scenario:

Mrs Hutchinson is in the early stages of Alzheimer's disease and wants to get all her affairs in order while she still has the capacity to do so. She owns her house jointly with her 80 year-old husband who is in good health. They have a joint account for living expenses and a savings account in joint names.

They also have some separate investments in addition.

Mrs Hutchinson wants her husband to look after their affairs as much as possible. She would like him to be able to sell their house if he decided this would be sensible. He would **not** be able to do this if she were unable to sign a contract of sale. So, she decides to appoint **two attorneys** – her husband and her solicitor – together and independently, but with a guidance clause stating that her husband (or his **replacement**, their daughter) is to have primary responsibility for managing her property and affairs. She authorises him to appoint an investment manager if he thinks this is appropriate in relationship to her independent investments. She also explains in the **guidance** that the second attorney (her solicitor) has been appointed in case it is necessary to sell their house but she states that this should not be done without her husband's consent. She also states that she is prepared to pay the reasonable fees of her solicitor.

It would be sensible for Mr Hutchinson to consider making an LPA at the same time as his wife and also for them to review their will arrangements.

As the solicitor is acting as attorney, she cannot be the **certificate provider**. Mrs Hutchinson's best friend therefore agrees to take on this role.

An LPA cannot be used until it is **registered** with the Office of the Public Guardian (OPG). The LPA specifies who should be given notification of the registration. If no notified person is

listed, there must be an additional certificate provider.

So, to summarise some of the main points:

- More than one attorney can be appointed
- Specific guidance clauses can be placed in the LPA to ensure that finances are dealt with in a particular manner (e.g. appointment of investment managers, making sure ethical investments are made)
- Replacement attorneys can be appointed in case the donor outlives the attorney, or in case of a rift between the donor and the attorney. This is important as it can help to avoid the costly process of receivership. The bonus of employing a solicitor for this role is that they are independent and have insurance.

### **Acting as attorney**

When acting under an LPA, the attorney must make sure that the five statutory principles of the Mental Capacity Act are followed:

1. A person must be assumed to have capacity unless it is established that they lack capacity. This is particularly relevant to the Personal Welfare LPA because if the donor has capacity to make a decision the LPA cannot be used. In contrast, the Property and Affairs LPA can be used even if the donor has not lost capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them have been taken without success.

3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act carried out or decision made under an LPA must always be done in their best interests. There is a detailed checklist for this, with emphasis on encouraging the participation of the person affected and finding out their views. The Act is supported by the Code of Practice and an attorney must have regard to the guidance in this code that is relevant to the decision that is to be made. The general notion is that the donor should be involved in decisions as much as possible, and the LPA should be used only when necessary.
5. Before an act is carried out, or a decision made, it is necessary to consider whether the endpoint can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

### **Gifts**

An attorney can only make gifts of the donor's money or belongings to people who are related to or connected with the donor (including the attorney) on specific occasions such as birthdays, weddings, or other occasions when families, friends, or associates might usually give presents. No limits are specified, but it is likely that gifts will be costed. Charitable gifts must be reasonable and in proportion to the size of the donor's estate.

### **How much will it cost?**

The new LPA is far more detailed than the EPA. This is reflected in the costs. It can be extremely expensive, especially if you employ a solicitor to undertake the whole process. Doing so might cost you around £700. If you feel confident enough to plough through all the paperwork yourself, you can do it relatively independently. By doing it this way, you will only need to pay the registration fee of £150.

### **Where can I get more information?**

The Office of the Public Guardian (OPG) administers LPAs. The website for this is:

[www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

This contains all of the information you will need, including the forms that you will need to make the LPA.

For more specific advice on the legal aspects of your situation, it is advisable to seek advice from your solicitor.