



## ***Powers Of Attorney- The Facts!***

*Note - These notes have been prepared for the guidance of Clients and potential Clients of Cameron Jones Hussell & Howe and are intended to provide a summary of important points. All statements are believed to be accurate but they are not meant to be a complete statement of the law. The notes are not intended to constitute legal advice on their own and they do not obviate the need to discuss matters fully with your Solicitor. If you require further advice or assistance in relation to any of the subjects covered, you should consult Cameron Jones Hussell & Howe for professional advice.*

### ***Introduction***

**A Power of Attorney** is a document by which one person (**the Donor**) appoints another person or persons (**the Attorney or Attorneys**) to do certain specified things on behalf of the Donor that the Donor would normally do himself. This could be for a limited purpose such as perhaps the sale of a property whilst the Donor is abroad or it could be for more general purposes, for example to deal with all of the Donor`s affairs for a given period. The Power of Attorney may be limited in time and it may be subject to conditions.

An Ordinary Power of Attorney is sufficient for these purposes and can be prepared relatively simply and cheaply. Ordinary Powers of Attorney are however subject to a major limitation in that they will automatically be revoked if the Donor subsequently becomes mentally incapable.

**The Mental Capacity Act 2005** created a new form of Power of Attorney known as a **Lasting Power of Attorney (LPA)** The principal characteristic of an LPA is that it will continue in force even if the Donor loses his or her mental capacity.

There are two types of LPA – one relating to **Property and Affairs (LPAPA)** and the other relating to **Health and Welfare (LPAHW)**.

The LPAPA – this Power of Attorney relates only to the property and affairs of the Donor and cannot therefore be used by the Attorneys to deal with personal matters such as where the Donor should live or what medical treatment he or she should receive.

LPAHW – this Power of Attorney relates only to health and welfare and deals with issues such as decisions on medical treatment, place of residence and so on. It cannot be used by the Attorneys to deal with the Donor`s property and financial matters.

If the Donor wants the Attorneys to have full control over both his property and affairs and his personal welfare then it follows that he will need two separate Powers of Attorney, These notes cover both forms of LPA but please see the final section for some notes specifically relating to Health and Welfare LPAs.

If you are considering drawing up an LPA please note the following important points:-

- You will need to decide who is going to act as your Attorney or Attorneys. See below for more information about this. It is essential that you appoint persons that you know and trust.
- An LPA can be prepared in advance, but it cannot be used until it has been registered at the Office of the Public Guardian. There is a registration fee involved (unless you are exempt on income grounds). We recommend applying to register the Power of Attorney as soon as it has been prepared even if it is not intended for immediate use.
- In addition to selecting an Attorney or Attorneys to act for you, you will also need to nominate a Certificate Provider and anyone you would like to be notified when an application to register the Power of Attorney is made. These matters are dealt with below.

The steps which need to be taken in the preparation and registration of an LPA are relatively complicated but they are designed to minimise the risk to you, the Donor, of abuse and fraud. Remember that the main purpose of an LPA is to provide for the management of your affairs should you lose your mental capacity at some later date. For limited purposes an Ordinary Power of Attorney may be a much simpler and cheaper option and we will advise you if such a Power of Attorney may be appropriate in your circumstances.

### ***Mental Capacity***

In order to create a Power of Attorney, the Donor must have mental capacity. This basically means that the Donor must be able to make decisions for himself and is free from any impairment of or disturbance in the functioning of his mind or brain that would affect such decisions. The Donor must understand the nature and purpose of the LPA and the scope of the authority granted by it. Very often this will not present any problem, but should there be any doubt as to the Donor's capacity a medical opinion may be necessary (and this may involve a fee). As your Solicitors however we are able to make a decision to proceed ourselves without medical advice if we are satisfied that you have capacity on the balance of probabilities.

### ***Your Attorneys***

Great care should be exercised in choosing an Attorney or Attorneys to act for you. They must be people that you know well and can rely upon. For various reasons your husband or wife may not be a good choice of Attorney, but your grown up children would often be ideal.

If you choose more than one Attorney, then it is important to consider how they will get on and whether there is likely to be any conflict between them in making decisions. As well as family and close friends, your Solicitor may be a possible choice of Attorney particularly if you have complicated legal or business affairs to deal with.

You can appoint one Attorney only if you wish, but this does pose a greater risk of abuse and may result in problems if the Attorney dies or becomes mentally incapable himself. We would generally recommend therefore that you should consider appointing two Attorneys.

If you do appoint more than one Attorney then you must state whether they are to act:-

Jointly – this means that both of them must act together on every decision and both signatures will always be required for any written instruction including the signing of a cheque for example or

Jointly and severally – this means that your Attorneys can act together but either can also act individually. This provides greater flexibility and would be useful if for example one Attorney was away or unavailable for some reason or

Jointly in respect of some matters and jointly and severally in respect of others – this is basically a mix of the first two arrangements and you would need to specify which would apply to which circumstances.

It is also important to note that if you appoint joint Attorneys the LPA would terminate if either of them disclaims, dies, becomes bankrupt or loses capacity. This is not the case with a joint and several appointment i.e. the LPA will, for example, continue if one of the Attorneys dies.

### ***General or Limited Authority***

You will need to decide whether your Attorney or Attorneys are to have general authority to act in relation to your property and affairs or whether their powers are to be restricted in some way (see also the Notes on Personal Welfare Powers of Attorney as to this topic). If your Attorneys have general authority, then they can do anything that you yourself could legally do in relation to your property and affairs. This could involve for example selling a house, signing cheques, dealing with your tax affairs and similar matters. If you want to restrict the Attorneys` authority however you may do so provided the correct wording is included in the Power of Attorney document. Please remember however that if you restrict the authority of your Attorneys it will mean that they will not have power to deal with certain areas of your affairs which will not then be covered.

### ***Guidance***

In addition to restricting the powers of your Attorneys the Power of Attorney Form also allows you to provide them with guidance. Please note however that whereas restrictions will be

binding upon the Attorneys any guidance that you choose to give them will be for their assistance only and is not binding upon them.

### ***The Certificate***

The concept of Certificate Provider was introduced by the Mental Capacity Act 2005. For an LPA to be valid it must now include a Certificate by an independent third party (the Certificate Provider) confirming that you understand the purpose of the LPA and the scope of the authority under it; that no fraud or undue pressure is being used to induce you to create it and that there is nothing else that would prevent the LPA being created. There are two types of Certificate Provider – a “knowledge based” Certificate Provider who will be somebody you have known personally for more than two years and who knows you and your Attorneys well, or a “skills based” Certificate Provider who will be a professional person considered capable of giving the required opinion. There are a number of people who qualify to be “skills based” Certificate Providers including Doctors, Social Workers and Solicitors. The choice of Certificate Provider is yours, but you will need to discuss the Power of Attorney with them and they will need to be satisfied as to the above matters before they can sign the Certificate. If you have no-one else available, one of the Partners in this Firm may be able to act as a Certificate Provider. This is something that we would need to discuss with you in greater detail however before reaching any decision.

### ***Substitute Attorney***

You can if you wish nominate a Substitute Attorney. This is particularly useful if you are only appointing one Attorney. The Substitute Attorney has no immediate powers, but would take over in the event of the death, insanity or bankruptcy of your first choice Attorney. You should exercise the same care and judgment in selecting a Substitute Attorney as in choosing the originals.

### ***Persons to be notified***

You should choose at least one person to be notified when the application to register the Power of Attorney is sent to the Office of the Public Guardian. This is an additional safeguard. The person you nominate will have the opportunity to raise any concerns before the Power of Attorney is registered. For this purpose you should choose someone well known to you and trustworthy and who might be expected to be aware of any suspicious circumstances.

### ***Lasting Power of Attorney (Health and Welfare)***

Please note the following points which relate specifically to Health and Welfare Powers of Attorney.

A Health and Welfare Power of Attorney (LPAHW) will give your Attorney or Attorneys authority to make personal decisions on your behalf such as:-

- Where you should live and with whom you live (this could include choice of Residential or Nursing Care Home).
- Arrangements for your day to day care including diet and dress.
- Consenting to or refusing medical examination and treatment.
  
- Assessment and provisions of Community Care Services.
  
- What social activities, social activities, education or training you should receive.
- Your personal correspondence and papers.
- Complaints about your care and treatment.

Your Attorneys will not have authority to make decisions in relation to:-

- Life sustaining treatment (unless the LPAHW expressly authorises this).
- Any Medical Treatment if you have made a valid advance decision to refuse that treatment (see below).
- Medical treatment for a mental disorder if you are detained under The Mental Health Act 1983 or about residence if you are subject to Guardianship under that Act or any decision in conflict with the Guardian.

The LPAHW is a powerful document giving your Attorneys power to take a wide range of decisions on your behalf. As with LPAs generally, you can restrict the scope of the authority that your Attorneys will have. This is a subject that you may wish to discuss further with your General Practitioner or other relevant Health or Social Care Professional before you consult us.

You can also provide your Attorneys with guidance setting out your wishes and preferences for personal care and similar matters.

### ***Life Sustaining Treatment***

The LPAHW contains a section asking you to decide whether your Attorneys are to have the powers to make decisions to give or refuse life sustaining treatment. They cannot make such decisions unless they have your specific authority.

### ***Advance Decisions***

This is otherwise known as a "Living Will". This is a possible alternative to making an LPAHW. An advance decision or Living Will allows a person (with capacity) to decide now to refuse to have specific medical treatment at some point in the future when he or she then lacks capacity to consent to that treatment. If the advance decision is valid and applicable it has the same

effect as if the person still had capacity and was refusing the treatment. This would mean that the treatment cannot be given.

This is a particularly sensitive and difficult topic and if you are considering instructing us in the preparation of an LPAHW, we will need to discuss the matter in greater detail.

## **Costs**

The amount of our costs depends upon how much work is involved. Our duty of care requires us to take proper instructions from you and prepare all documents thoroughly. In addition we would normally need to have contact with both the Attorneys and the Certificate Provider.

We will provide you with a better estimate of costs once you give us formal instructions to proceed, but typically the amount will be between £350 to £500. VAT is payable in addition to that.

The current fee for registering the Power of Attorney at the Office of the Public Guardian is £110.

If you engage a “skills based” Certificate Provider such as a Doctor or Solicitor then you may have to pay a fee to them as well. This could be anything up to £150.

You may be able to have the registration fee waived by the Office of the Public Guardian if you are on low income – we will investigate that possibility with you if you decide to proceed.

## **Summary**

We trust that these notes will have been of some assistance to you both in providing you with information about LPAs and answering some of the questions that you may have had on the subject.

If you would now like to take matters further, the next step would be for us to arrange a suitable appointment for you to discuss your requirements with one of our qualified Solicitors.

***Please see overleaf for our contact details.***

*We can arrange to visit you at home or somewhere else (such as a Care Home or Hospital) if you require it.*

*Please note that charges at our standard rate will apply from the commencement of the first interview, whether or not the matter proceeds to completion. Before we arrange our first meeting we will normally ask you to sign what we call a Client Care Letter and make a payment*

on account of costs. *The Client Care Letter will set out details of our terms of business and likely charges.*

*We have also prepared a leaflet intended for potential Attorneys and Certificate Providers. Please ask for a copy if you require it.*

*We may in certain circumstances be able to take instructions from the persons that you propose to appoint as Attorneys, but it will always be necessary for us to attend upon you personally and you will be our Client to whom we owe our duty of care.*

*You may contact the Office to arrange an appointment or for further advice or assistance as follows:-*

**Cameron Jones Hussell & Howe**

**1/3 Grove Place**

**Port Talbot**

**Neath Port Talbot**

**SA13 1HX**

**reception@cjhh.com**

**Tel (01639) 885261**

**Fax (01639) 887138**

**[www.cjhh.com](http://www.cjhh.com)**

**CAMERON JONES HUSSELL & HOWE** provide a wide range of legal services to Clients over retirement age range including Will writing, advice on Residential and Nursing Home fees, Family Trusts and financial and tax affairs. Please contact us for further advice and details.

**[cjhh](http://www.cjhh.com): A service you can rely on.**

