

PREPARE FOR THE WORST, SO IT WON'T HAPPEN

Lasting Powers of Attorney can prevent a host of problems if you're ever unable to manage your affairs, say *Ziva Robertson* and *Elysa Jacobs* of McDermott Will & Emery

IN THE PAST, powers of attorney have been synonymous with the vulnerable and elderly. However, both physical and mental incapacity can strike at any time and at any age. It is possible to plan for such unforeseen eventualities by making Lasting Powers of Attorney (LPAs), even though, much like an insurance policy, one would hope never to have to use them.

LPAs effectively appoint attorneys, usually family members or friends (but someone who is trusted implicitly), who can make decisions on one's behalf. Since October 2007, there have been two types of LPAs in England and Wales: one in relation to financial decisions and another in respect of a person's health and care. While the LPA for finances can be used at any time (only by direction while the donor retains mental capacity), the health and care decisions LPA must only be used if and when mental capacity is lost.

FROZEN OUT

Imagine a young couple, Mr A and Ms B, who are unmarried but living together. Mr A is a keen cyclist and often rides into central London for work. One morning, he is knocked off his bicycle and breaks his jaw and hip. Unfortunately, Mr A is left bedridden and unable to communicate by phone for several weeks. During Mr A's recovery, Ms B answers a call from Mr A's bank, which needs to speak to him about suspicious activity on his account. The bank account is in Mr A's sole name but is used to pay their rent. If the bank can't speak to him, the account will be frozen.

Legally, there is nothing Ms B can do on Mr A's behalf while he lacks the ability to communicate for himself. Some might assume the bank would be willing to speak to Ms B if they were married and she were therefore his next of kin. However, it is irrelevant, and the same applies to married couples or those in a civil partnership. An LPA relating to Mr A's financial decisions, registered with the Office of the Public Guardian, would have given Ms B the authority to discuss his account.

Unquestionably, LPAs are powerful documents and appointing attorneys creates a burden on those entrusted.

A former Court of Protection judge, Denzil Lush, has openly criticised the lack of safeguards within the system, instead championing the Court of Protection's ability to appoint deputies to manage a person's affairs. From our experience at McDermott Will & Emery, the Court-appointed process can be both lengthy and costly and removes the right to select one's own deputy.

The operation of LPAs can be highly effective, providing that careful consideration is given at the outset to the appointment of attorneys and to any specific wishes. It is often important to seek legal advice regarding these points.

Importantly, LPAs are governed by the Mental Capacity Act 2005, which only covers England and Wales. Although different jurisdictions may have similar arrangements, an LPA is likely to be valid only in these countries. It is advisable to seek relevant advice if you have worldwide assets.

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