

Here we go again...

Helena Luckhurst examines another new set of LPA forms



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Iwonder if you experienced a sense of déjà vu on 1 October 2009?

After all, you could be forgiven for thinking that we've been here before – on 1 October 2007, to be precise.

The first of October this year marked the introduction of new lasting power of attorney (LPA) forms. Hang on though, you say, is this news? We've been through this before! Yes, there is nothing wrong with your memory. You had the pleasure of acquainting yourself with the 'new' LPA forms on 1 October 2007, but they are no longer new. They are now the 'old' forms, which we will now have to refer to as the 2007 forms. The new forms have different names to the old forms and so we will no doubt refer to them as the 2009 forms.

The consultation process

Maybe a brief explanation of how we got to this state of affairs would help? On 23 October 2008, the Ministry of Justice opened a public consultation ('Reviewing the Mental Capacity Act 2005: forms, supervision and fees') on proposed changes to the Mental Capacity Act 2005, one of which was the design and content of the LPA forms. The consultation paper contained draft versions of revised LPA forms, designed by professional form designers and based on feedback received by the Office of the Public Guardian (OPG) in the first year in which the 2007 forms were in use. Recurring themes in the feedback were that the forms were too lengthy and complicated, and that their layout meant that critical sections and boxes requiring ticks were being missed. Sometimes these omissions invalidated the power, creating considerable delays as a result of the forms having to be signed all over again.

The response to the consultation was published on 11 March 2009. Broadly, the draft revised forms were preferred to the 2007 forms, but they still ran to 25 pages and were considered too long. Therefore a series of further

consultation meetings were held and the draft forms sent back for redesign. Stakeholder user-days were organised in the summer to test the revised drafts.

The culmination of this work was the laying before Parliament on 15 July 2009 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 (SI 2009/1884), which contains the new LPA forms that can be used from 1 October 2009.

Existing enduring powers of attorney and the 2007 prescribed forms

The Regulations do not affect existing enduring powers of attorney, registered or unregistered. Nor are the forms to register them affected.

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The OPG's LPA guidance notes, notification form and the LPA registration form will be unchanged. There will be no new notes for completing the new LPA forms, mainly because, as you will see, the new forms and the information sheet that should now accompany them incorporate the guidance on completion.

Changing nomenclature

So how do the new forms compare to the old? The first thing you will notice, if you are looking for a Personal Welfare LPA, is that it no longer exists. It has been renamed a 'Lasting power of attorney for health and welfare' (LPA(HW)), which seems sensible. A Property and Affairs LPA is now to be referred to as a 'Lasting power of attorney – property and financial affairs' (LPA(PFA)). I suspect many practitioners will be pleased to see

attorneys returning to making decisions 'jointly', 'jointly and severally' or 'jointly for some decisions and jointly and severally for other decisions'. The relatively old phrases of 'together' or 'together and independently' etc, are no more.

The 'prescribed information' that all parties to the LPA were obliged to read has also changed into a much shorter 'Information you must read' section. 'Persons to be notified' are now to be known under the slightly snappier title of 'The people to be told'.

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Length of forms

The other major change that you will notice early on is the new length of the forms. If you do not need any continuation sheets, the number of pages that you have to complete is reduced by half. An LPA(PFA) is now 11 pages long and a LPA(HW) is 12 pages, to accommodate an option granting attorneys authority to consent to or refuse life-sustaining treatment. How has this been achieved?

As mentioned above, the four pages of prescribed information have been axed, and in their place comes half a page of 'Information you must read', which must be read by the donor, certificate providers and attorneys.

Throughout the 2009 forms there is relevant guidance and commentary on the same page as each particular section. For example, in the section on how two or more attorneys are to make decisions, there is now a brief explanation on the form of the differences between joint, joint and several and 'some joint, some several' decisions, and a reference to further information in the guidance notes. It is no small achievement on the part of the form designers that despite this, the forms have somehow ended up shorter.

The danger is that in reality some donors may not get any further than the core information given, which cannot, by its nature, be comprehensive. In fairness, it does not purport to be. On balance, I feel that the embedded guidance is a helpful new feature because it makes the forms more accessible and user-friendly for advisers and clients. It also avoids

the need to cross-refer with separate completion notes, an aspect of the 2007 forms that will probably not be missed. However, it does make the forms seem quite busy in places. Some will find the small type used on the forms a challenge. A large-print version will be made available soon.

There is also a separate LPA information sheet that should be read by the donor. It contains a useful *dramatis personae* of LPAs, explaining terms such as donor, attorneys, the people to be told and independent witnesses, and how

many you need of each. To extend the theatrical metaphor, it also explains more clearly than the 2007 forms that the LPA is essentially a play of three characters, since it needs to be signed by the donor, certificate provider(s) and attorney(s), in that order. It actually seems quite a helpful tool for the busy practitioner because it communicates a lot of essential information in a short space and will probably save you time, as well as being informative for your clients. Its length, at one page, also means that your clients are more likely to read it, human nature being what it is. Just don't forget to send it with the LPA forms.

Space has also been saved by dramatically reducing the size of blank boxes for restrictions, conditions and guidance. If further space is needed, continuation sheet A2 can be completed. This might also be considered a good thing by those who believed that the large blank boxes of the old forms encouraged some donors to try to fill them. Will the new forms result in fewer applications to the Court of Protection to sever unworkable restrictions? Only time will tell.

Continuation sheets

I have already referred to the new continuation sheets. There are in fact several of them:

- Continuation sheet A1: for adding extra original and replacement attorneys (the forms have room for two and one of each, respectively) and people to be told (the form has room for two only).

- Continuation sheet A2: to be used for explanations of 'joint for some/several for some' decisions, restrictions and conditions, and guidance and fee arrangements, where space on the form itself is not sufficient.
- Continuation sheets A3 and A4: for the LPA(HW) and LPA(PFA) respectively, an alternative donor signing page where someone needs to sign at the direction of the donor because of the donor's inability to sign or make a mark.
- Continuation sheet B: for a second certificate provider, if the donor has decided that there should be no 'Persons to be told' (when an application to register is to be made).
- Continuation sheet C: for LPA(PFA)s where a trust corporation is to be appointed as attorney or replacement attorney.

Although the continuation sheets will lengthen the forms, they must surely be welcomed by most practitioners. No more worrying about whether one's impromptu execution page for a trust corporation replacement attorney will pass muster now that we have prescribed forms, which also have a specific section for the donor to sign and date them, so now there's no excuse for overlooking that requirement either. Do ensure, however, that the donor dates the form and the continuation sheet on the same day – a trap of which to be wary.

Other features of the new forms

Many features of the new forms will be familiar, if only because the law underpinning them has not changed. Accordingly, the form is still in three parts: Part A setting out the terms of the LPA and the donor's declaration, Part B for the declaration by the certificate provider(s), and Part C for the declarations by the attorney(s) and replacement attorney(s). The parts should also be signed in the same strict order of A, B and then C. The provisions of the power itself – the option for the donor to appoint two or more attorneys jointly, joint and severally, or jointly in relation to some decisions but jointly and severally in relation to others – remains the same, as does the option to include restrictions or conditions and guidance, and to set out fee-paying arrangements. In an LPA(HW), the donor should still choose whether or not to give their attorney(s) power to

give or refuse consent to life-sustaining treatment by signing one of the two options in the presence of a witness.

The new forms strive to use clearer English to make them more user-friendly. An example of this can be found in the revised version of the five principles of the MCA 2005 when compared with the same section in the older forms.

I suspect many of us will also have been delighted to note that the form no longer requires details of any of the parties' e-mail addresses, telephone and mobile phone numbers. However, before you rejoice too much, unfortunately the registration application forms (which have not yet been revised, and it will take Parliament's involvement to change them) still require this information, along with each attorney's occupation, so do not stop asking for it.

There also remains the need to cross out each blank box and unused section on the new forms, which is a time-consuming feature of their completion.

Another new feature of the form is the checklist on the first page, which needs to be completed with details of how many attorneys, replacement attorneys, persons to be told and certificate providers there are. It reminds me of a tax return in this respect. Hopefully this will not become the new *bête noire* to trip up unsuspecting form-fillers. Its appearance on the front of the form, in close proximity to another new text box reminding all those embarking on the forms that the form could be rejected if it contains any errors (will this encourage members of the public to seek professional advice when completing the forms?), should mean that it is hard to overlook. It should help to prevent fraud by making it difficult for continuation sheets to be added once the donor has signed the LPA.

Certificate providers

If you are acting as a certificate provider, you will be pleased to hear that there is no longer any requirement that you tick a couple of boxes to say that you are over 18 and acting independently of the attorneys. It was reported that the location of the boxes in the 2007 form did trip up practitioners from time to time, resulting in the dreaded letter from the OPG advising you that you must start Parts B and C again. Now your signature on Part B will be taken as confirmation that these, and most other matters for which you

had to remember to tick the boxes, have been complied with.

However, an interesting omission from Part B of the new forms is any reminder of the need for the certificate provider to confirm that they have seen the donor without the attorneys present. In fact there is no mention of this anywhere on the form; instead reliance is placed on the certificate provider reading the certificate provider's guidance note, which is briefly alluded to at the top of the certificate provider's Part B. I wonder how likely it is that this will happen in practice? Also, I question whether certificate providers will take on board the significance of the brief statement at the top of Part B that failure to follow the guidance could result in the LPA being invalid or rejected on

regularly with private clients have the relevant skills?

Protecting the donor

One of the continuing gripes with the 2007 forms was that the safeguards written into them to protect against abuse were insufficient. These were provisions such as the need to notify people of an application to register the LPA or use two certificate providers, and the office of the certificate provider itself, although it was, and remains, sufficient to use a certificate provider who has two years' personal knowledge of the donor. Those who had concerns on this front are unlikely to be cheered by the introduction of the new LPA forms because there are no major measures included to tackle them. The only one appears to be the new

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registration. As a result of this change, if you are advising certificate providers, it may be helpful if you identify and spell out any important requirements that have been relegated from the form to the guidance notes. For example, the guidance note for certificate providers clearly states that the certificate is not valid if the attorney was present when the certificate provider was discussing the LPA with the donor.

If you are completing the certificate on the basis that you have relevant professional skills, for example in your capacity as a solicitor or barrister, it will now no longer be sufficient to only state your profession. The new forms also require you to specify your particular skills that are relevant to your ability to form an opinion on the matters you are certifying, namely that the donor understands the purpose of the LPA, that no fraud or undue pressure is being placed on the donor to create the LPA and, that glorious catch-all, that there is nothing else which would prevent the lasting power of attorney from being created. The form gives the example of 'a consultant specialising in geriatric care'. It has been confirmed by the government that the intention was that solicitors and barristers should feel capable of giving certificates, so one wonders what skills are deemed relevant. Do only advisers who deal

requirement that replacement attorneys contact the OPG if the original attorney's appointment is terminated. However, perhaps this is not surprising as this was not the aim of the consultation process.

Overall, do the new forms represent progress? I believe they do. Some may say that the drive to reduce the length of the forms has resulted in the sacrifice of too much essential information. It was always going to be a tall order to keep everyone happy. However, the length of the forms was offputting to a surprisingly large number of clients. The perceived complexity must also have put off some advisers from discussing LPAs with their clients. Neither state of affairs is in clients' best interests. In the right circumstances, LPAs offer families, couples and friends an opportunity to make provision for themselves and each other should mental incapacity arise, without interference from the state. It is in everyone's best interests that awareness of LPAs be raised, more people feel able to put them in place and advisers be more confident about discussing them with their clients. Where appropriate, we should be championing their cause.

Even if the new forms still have shortcomings, the fact that they are more accessible than their predecessors will hopefully make more clients think about putting LPAs in place and encourage advisers to engage with them. ■