

# Planning to protect your pension - PoA

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**There are many issues within pensions that need decisions to be made and require a full understanding - something that some may not be capable of as they get older and/or lose mental faculty.**

On average, at age 55 a person in good health can expect to live until age 82. Remember, this is an average so some will live significantly longer. According to the Alzheimer's society there are currently 850,000 people in the UK who suffer with dementia. This is expected to rise to 1 million by 2025 and 2 million by 2051, indicating there are increasing cases where mental incapacity will become an issue. This is only one of many ailments that may affect people and their ability to make decisions and this is not exclusive to the older generations.

In simple terms, people need to be aware that there are many decisions to be made within a pension that need a full understanding - something that some may not be capable of as they get older and/or lose mental faculty.

The reasons that this may become an issue are far more wide-reaching than just trying to ensure that their death benefit nominations are in order. During the lifetime of a pension plan there will be decisions that need to be made relating to investment choices, when to crystallise benefits, income to be taken (or not), how to take the income, lifetime allowance protection etc. Each one of these decisions not only requires the help of professional advice but also a level of understanding from the plan holder to ensure they fully grasp the impacts of any decisions made and actions that are taken. If this understanding is not there, important actions may not be taken and the consequences may be significant for the member.

## **Example:**

*A person with a pension fund value approaching £1 million has deteriorating mental health. He has been receiving regular advice as to investment options available and has been regularly switching to take advantage of this expert advice to significantly increase the original fund value over the last few years. The client likes to feel they have control over their investments and so has insisted on doing the transactions himself rather than grant any form of switching authority. The stock markets recently have been fluctuating and the urgent financial advice is to move funds into cash to avoid the impending crash. The financial adviser contacts the client to discover that he has unfortunately declined in mental health and his capacity to act has vanished. There had been no provision for a lasting power of attorney being set up previously so there was at this stage no ability for a fund switch to be carried out. As there needs to be mental capacity available to create a lasting power of attorney the only other option would be to apply for a Court of Protection order, which unfortunately takes time. The following day before any action took place, the stock markets crashed and the client lost 1/3rd of his pension fund value with the financial adviser being unable to do anything about it.*

The same scenarios could be applied to the ability to;

- disinvest some of the pension fund to pay for care (as an example)
- reduce the level of income being drawn as this was increasing the value of the client's estate as it was not being spent and was pushing the client into the higher rate tax band unnecessarily.
- stop all income payments and disinvest other less tax efficient assets for income or capital to potentially save tax and reduce the value of the client's estate

- create or amend an expression of wish for death benefit payments.

***It is for the above reasons, amongst others, that the creation of a lasting power of attorney should be considered by all parties.***

### **What is a Lasting Power of Attorney (LPA)?**

A lasting power of attorney is a mechanism to allow someone to give authority to one or more people to act on their behalf for either their personal welfare or for property and financial affairs. There are two types of LPA to cover these scenarios and the individual can apply for either one or both options. The LPA needs to be registered with the Office of the Public Guardian (for a small fee). If the LPA applied for is a personal welfare LPA this will only come into effect when the donor loses mental capacity whereas a property and financial affairs LPA will come into effect the date it is registered unless otherwise stated. This means that an attorney can act on behalf of the donor even if they are still mentally sound.

For the purposes of this article we will continue to discuss the property and financial affairs LPA.

On a standard LPA there are certain general powers granted to the attorney at outset which need to be considered, such as the fact the attorney has no right to create a trust or act as a trustee, change a donor's Will or give benefits themselves from the donor (unless as a customary gift). They do however have full power to make decisions for the donor's best interests and this should generally allow for disinvestment and reinvestment of assets on behalf of the donor. They can also make gifts on the donor's behalf as long as they are deemed customary (such as birthdays and weddings) or to charities. All gifts must be seen as reasonable for the size of the donor's estate.

### **Who can create a lasting power of attorney and who can be an attorney?**

The creation of the last power of attorney has to be done by the donor, who is over the age of 18, not bankrupt and mentally of sound mind. The attorneys themselves must be over the age of 18 and meet the same criteria as the donor of being of sound mind and not bankrupt.

### **How to end an LPA**

The donor while still in good mental health has the right to revoke an LPA at any time. The LPA would automatically be revoked if either the donor or the attorney were made bankrupt for a property and financial affairs LPA. Death or mental incapacity of the attorney is also a trigger event to end the LPA as is also the dissolution of a marriage between the donor and attorney.

If an attorney does not act in accordance with their duties they can be held financially responsible and even fined and face a prison term.

### **Other types of power of attorney that could be used.**

LPAs came into force on 1 October 2007 and replaced the Enduring Power of Attorney (EPA). The EPA was a similar tool to allow someone to act on your behalf. However, the EPA only allowed the attorney a general power to act for the donor initially (during either a specified period of time or until the donor becomes mentally incapable). Once the donor has become or is becoming mentally incapable the attorneys would need to apply to the courts to register the EPA. Only after registration can the attorney continue to act on behalf of the donor.

To apply for a LPA the donor needs to be of sound mind. If this is not the case an attorney can still be appointed but this would have to be done by applying through the courts to the Court of Protection. Generally speaking this is an event that is best avoided as there is a

possibility actions could have been missed or misjudged as the donor is in the process of losing capacity. This highlights the need to sort out a personal LPA to ensure that events cannot overrun the planning and prevent actions being taken.

There are over 21 million people in the UK aged 55 years and over. The Government states that 394,000 LPAs were registered in 2014 to 2015 and 295,000 in 2013 to 2014. Looking at these two sets of figures, along with the dementia statistics this article started with, you can see the need to highlight these issues and the risk that those to plan run. We have talked here in terms of pension schemes and decisions around the actions that can be taken during the life of the donor and scheme; however, remember that these same rules will apply to all other investments and property that you may hold and so by broadening out the potential impacts of mental incapacity you can see how many scenarios need to be discussed.

The one thing that should be highlighted to individuals in all cases is the potential issues that would occur within pension funds that are, generally speaking, the first or second largest asset any person has if mental capacity is lost without any provision in place. For this reason an appropriate precaution would be to consider setting up a LPA in all cases as preparation may prevent any serious issues occurring.

**Don't Delay, contact your lawyer now!**

***Source: Standard Life Technical Consulting.***