

* Lasting powers of attorney and discretionary

fund management

You may have made a Property and Finance Lasting Power of Attorney (LPA) which does not include specific power for your attorneys to delegate investment management as it was not standard practice to include such a clause until 2016. This information sheet explains why such a power might be necessary and outlines the possible courses of action open to you.

Why is a power to delegate investment management by attorneys considered necessary?

The modern investment world is fast moving and decisions often need to be taken quickly. It is usual for most investors to deal with the speed and complexity of contemporary investment conditions by giving their advisers (whether a bank, wealth manager, independent financial adviser or firm of brokers) power to manage their investments on a discretionary basis. This means that the advisers will make the day-to-day decisions as to how the investments should be managed and will then account to their clients on a regular basis with a report as to the actions taken and the performance of the investments. If investments are not managed in this way, then advisers have to obtain their clients' instructions each and every time a change is made to the investments which has practical implications.

Discretionary management sounds sensible so why can't my attorneys continue this arrangement?

It is the current view of the body that regulates LPAs and attorneys, the Office of the Public Guardian (OPG), and of others, that attorneys do not have power to allow investments to be managed on a discretionary basis because under the general law attorneys cannot delegate their decision-making powers. Thus there is no power to use discretionary fund management unless the LPA appointing the attorneys includes a clause authorising this. The OPG's view is set out in guidance issued by them in September 2015, although a number of commentators disagree with the OPG's stance on this subject. As a result, some investment advisers will not manage investments on a discretionary basis unless attorneys are given the requisite power in the LPA.

I don't have any investments under discretionary management so does this affect me?

Yes it might. You may not have investments now but if you move into residential care and your home is sold, your attorneys, depending on the sums involved and your likely life expectancy, might be advised to invest the sale proceeds rather than retaining them in cash. At that point whether or not your attorneys have power to use discretionary management would become important.

My Property and Finance LPA does not include this power, what action should I take?

You have three main options as follows:

- 1 **Take no action:** if you take no action and become incapacitated then your attorneys **may** find that your investment advisers are prepared to continue with discretionary management of your investments despite the lack of a clause authorising this in the LPA. If your investment advisers are not prepared to continue with discretionary management then your investments could be moved to an advisory basis (where your investment managers would take your attorneys' instructions each time a transaction is carried out) or your attorneys could apply to the court of protection to request that they are given the required powers.
- 2 **Wait and see for the time being:** some commentators believe that the OPG's view is incorrect so the OPG might in due course change its guidance. However, this may take some time to happen, if it ever does.
- 3 **Make a new Property and Finance LPA** including the required wording: This has obvious cost implications but this course of action is likely to be cheaper than if you choose to do nothing and your attorneys eventually have to make an application to the court of protection to be given the necessary power. Given the uncertainty over the OPG changing its guidance, the desirability of having discretionary investment management powers, and the costs and delay in obtaining a court order, we would view this course of action as being the most advisable.

Further information

For further information on this or on any other Private Capital matter you may have, please contact us via:

[See key contacts](#)

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