

Lasting Power of Attorney – Beyond the Standard Form

Introduction

Lasting Powers of Attorney (“**LPAs**”) have been touted as a straightforward and cost-effective way to allow individuals to protect their interests by appointing a considered choice of donee to make decisions and act on their behalf should they lose mental capacity to make their own decisions one day. It is often said that having a LPA in place alleviates the stress and difficulties faced by your loved ones if you should lose mental capacity.

In a Straits Times report published on 20 July 2019 (“**Shorter waiting time to apply for LPA**”), it was reported that about 67,000 people have already appointed someone to make decisions on their behalf if they become mentally incapacitated. According to the data published by the Office of Public Guardian (“**OPG**”), a total of 24,488 LPAs were registered in 2019.

LPAs can be created by filling in one of the two prescribed forms, LPA Form 1 (a simplified form) or LPA Form 2 (a customised form allowing the individuals to spell out specific powers) and executing them before an LPA certificate issuer (i.e., any local practising lawyer, any registered psychiatrist or any specific medical practitioners accredited by the Public Guardian). The executed form must then be filed with the OPG.

According to the OPG’s website, 98% of Singapore citizens use LPA Form 1 to create their LPA. Only a small percentage of individuals use LPA Form 2 for purposes of their LPAs, and an even smaller percentage specify in great detail the powers to be given to their donees. Most of the individuals opt for LPA Form 2 only to bypass the restrictions on the number of donees or replacement donees in LPA Form 1.

LPA Form 1 and LPA Form 2

As mentioned above, LPA Form 1 is a simplified form with a list of specified restrictions. LPA Form 2 is a customised form and allows for greater flexibility in many areas.

We tabulate some of the differences between LPA Form 1 and LPA Form 2 below:

	LPA Form 1	LPA Form 2
Number of donees	No more than 3	Unlimited
Number of replacement donees	No more than 2	Unlimited
Specified restrictions	Yes Donors choose from a list of specified restrictions which sets out the extent of powers that donees have.	Customised in accordance with donors’ needs and requirements. E.g., it can be stipulated that some decisions can only be made jointly by the donees, while other decisions may be made by one donee.

Specified powers	<p>Yes</p> <p>Donors choose from a list of specified restrictions which sets out the extent of powers that donees have.</p> <p>E.g., whether the donees can sign the donor up for clinical trials, whether the donees can sell the donor's residence, whether the donees can make cash gifts on the donor's behalf, etc.</p>	<p>Customised in accordance with donors' needs and requirements.</p> <p>E.g., a more trusted donee may be given powers to manage the donor's business.</p>
Provisions for properties	<p>Only allows donors to impose a binary restriction on dealing with one residential property.</p>	<p>Allows donors to make more granular provisions in relation to multiple properties.</p>

Given the more specific and wide-ranging powers a donor can potentially give to his donees under LPA Form 2, this has to be drafted by a practising lawyer on the donor's behalf. While this has been less commonly done, as we will illustrate below, many disputes, especially where there are multiple donees, could have been avoided had the donors pre-emptively provided greater clarity on the powers (and restrictions thereon) of donees by using LPA Form 2.

Advantages of a customised LPA (LPA Form 2)

In the recent case of *VHI v VHJ* [2020] SGFC 37, a dispute arose between two sisters who were appointed as donees to act jointly and severally for the personal welfare and property and affairs of their father ("P"). While the relationship between the two sisters had always been good, it soured rapidly subsequent to P losing capacity in a series of strokes. Disputes arose over who should take charge of the running of P's sole proprietorship, culminating in acrimonious disputes both in and out of court. In the end, the court stepped in to make modifications to the powers granted under the LPA to allow for one sister to act unilaterally in certain decisions so as to preserve P's interests and avoid further disputes.

This was a situation that may have been avoided if P had chosen to provide for customised powers for his daughters under LPA Form 2, setting out clear roles and powers in relation to the running of the family business.

Also particularly illustrative is the case of *Re TQR* [2016] SGFC 98. *Re TQR* concerned the appointment of deputies under the Mental Capacity Act ("MCA") and the extent of investment powers the deputies were to be given. The court observed in *Re TQR* that even though deputies appointed under the MCA act on behalf of a donor, they are not free to make any decision that a donor may have made if he had capacity:

"If a person has mental capacity, he is free to make any investment decision he wishes, and this remains the case regardless of whether such an investment decision is or is not in his best interests. On the other hand, once a person loses mental capacity, a Deputy who makes an investment decision for him does not have the luxury of making unwise decisions but is

instead required to make decisions that are governed by the overriding consideration of what is in the incapacitated person's best interests."

While these comments were made in the context of deputies, they apply equally to donees appointed under an LPA. In the absence of specified powers, donees under an LPA (e.g., LPA Form 1) are generally bound to err on the side of caution, so as to preserve a donor's assets for his future maintenance. In reality, a donor may often have other wishes (e.g., to make investment decisions with a view towards increasing his asset pool for the eventual benefit of the future beneficiaries of his estate). These cannot be expressed in LPA Form 1, and can only be given voice in LPA Form 2.

The utility of customisable LPA forms can also be seen in the context of England and Wales, where LPAs are customisable by default.

A good example can be seen in the case of *XZ v The Public Guardian* [2015] EWCOP 35, which concerned the LPA of a high net-worth donor. The donor's solicitor drafted an LPA form which ran into "seven continuation sheets" setting out various instructions, restrictions and conditions on the donees' powers in relation to the donor's property and affairs. Most notably, these included: (a) a two-tier structure (dependent on the type of decisions and the values the decisions involved) as to which decisions should be made jointly between all three donees and which decisions could be made jointly and severally; and (b) restrictions on when the powers could be exercised taking into account factors such as whether there was a genuine financial need for the transaction, the value of the transaction and the strength of the psychiatrist's opinion as to the donor's mental capacity and whether the opinion was contested. The Public Guardian refused to register this LPA on the grounds that it imposed an "unreasonable fetter" on the donees' power. The English Court of Protection, however, allowed the registration of the LPA, noting that the donor "[wished for the provisions] to remain as an integral part of the registered instrument for his own reassurance and peace of mind ... it is his will and preference and it should be treated with respect".

In addition to setting out restrictions and conditions for the exercise of the donee's powers, LPAs can also include positive instructions and wishes as to how a donor's property and assets are to be utilised. For example, in *Re Various Lasting Powers of Attorney* [2019] EWCOP 40, the English Court of Protection confirmed that donors could validly indicate their wishes in their LPAs to provide for third parties, even their own donees.

As can be seen, the limitations of LPA Form 1 can pose challenges for high net-worth individuals whose businesses and investments require timely decision-making and attention, individuals with multiple assets who would do well with more customised powers and restrictions over their property and affairs, or for individuals who have particular investment habits, preferences or risk taking appetites. By executing an LPA with express provisions as to when one's donees can exercise specific powers and the restrictions on such powers, one can well avoid lengthy and undesirable disputes and applications before the courts.

Conclusion

The timeliness of making an LPA cannot be overstated. It bears keeping in mind that one can only execute an LPA when he has mental capacity. The frailty of human life can only serve to emphasise the need to ensure we have in place an LPA to allow our trusted and loved ones to care for us without having to surmount legal or administrative hurdles.

An LPA neither replaces a will, nor has the same purpose. An LPA takes effect only when you lose capacity to allow your appointed donees to make decisions whereas a will takes effect on one's death to stipulate how your estate is to be distributed. That said, both wills and well-drafted LPAs are important tools in ensuring that your wishes are carried out in the manner that you want them to, and in making sure that your loved ones are well taken care of.

Where you have a large pool of assets and specific wishes with regard to these assets, or have operating businesses which may require decisions to be made timeously, it will be prudent and advisable to consider customising the LPA by utilising LPA Form 2 to provide clear powers (and restrictions) for the donees for the different types of decisions that may arise. This will also help in ameliorating the incidence of disputes that may arise between your trusted family members when you lose mental capacity.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



SIM Bock Eng

Head – Specialist & Private
Client Disputes

d: +65 6416 8108

e: [bockeng.sim](mailto:bockeng.sim@wongpartnership.com)

[@wongpartnership.com](mailto:bockeng.sim@wongpartnership.com)

Click [here](#) to view Bock Eng's CV.



AW Wen Ni

Partner – Specialist & Private
Client Disputes

d: +65 6416 6870

e: [wenni.aw](mailto:wenni.aw@wongpartnership.com)

[@wongpartnership.com](mailto:wenni.aw@wongpartnership.com)

Click [here](#) to view Wen Ni's CV.

 Connect with WongPartnership.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-

WongPartnership LLP
Beijing Representative Office
Unit 3111 China World Office 2
1 Jianguomenwai Avenue, Chaoyang District
Beijing 100004, PRC
t +86 10 6505 6900
f +86 10 6505 2562

-

WongPartnership LLP
Shanghai Representative Office
Unit 1015 Corporate Avenue 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-

WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-

Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

wongpartnership.com

MALAYSIA

-

Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-

Al Aidarous International Legal Practice
Abdullah Al Mulla Building, Mezzanine Suite
02
39 Hameem Street (side street of Al Murroor
Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

-

Al Aidarous International Legal Practice
Zalfa Building, Suite 101 - 102
Sh. Rashid Road
Garhoud
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-

ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw