

The role of an attorney under a property and financial affairs Lasting Power of Attorney

Introduction

The Mental Capacity Act 2005 (the 'Act') which came into force on 1 October 2007 allows a person (the 'donor') to make a power of attorney called a 'lasting power of attorney' or 'LPA' which remains effective even if the donor lacks capacity. There are two types of LPA; a property and financial affairs LPA and a health and welfare LPA. This information sheet is designed to give some general guidance and information about the role of an attorney appointed under a property and financial affairs LPA.

When can an attorney act under a property and financial affairs LPA?

A property and financial affairs LPA can be used at any time once it has been registered at the Office of the Public Guardian (OPG), whether or not the donor has capacity (but subject to any conditions in the LPA itself). If the donor has capacity the attorney cannot ignore the donor's instructions and the donor can cancel the LPA at any time (although the OPG must be notified).

As an attorney you may find yourself in one of the following situations:

- taking no action while the LPA remains in readiness for future use if needed;
- acting with the knowledge and consent of the donor;
- making decisions on behalf of a donor who lacks capacity or;
- acting on behalf of a donor who has capacity to make certain decisions while lacking capacity to make others.

How should an attorney act under a property and financial affairs LPA?

An LPA is part of a wider statutory framework set out in the Act. As well as providing a formal structure for decisions to be made, the Act sets out clearly when decisions can be made for persons who lack capacity and how those decisions should be made. An attorney must therefore follow the principles set out in section 1 of the Act:

- it should be assumed that everyone can make their own decisions unless it is established otherwise.
- a person should have all the help and support possible to make and communicate their own decisions before anyone establishes that they lack capacity to make their own decisions.
- a person should not be treated as lacking capacity just because they make an unwise decision.
- actions carried out or decisions made on behalf of someone who lacks capacity must be in that person's best interests.
- actions carried out or decisions made on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

Acting in the best interests of the donor

The requirement to act in a person's best interests is a fundamental requirement of the Act. An attorney (or any other person or body making a decision on behalf of a person who lacks capacity) is required to act in that person's best interests. In

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deciding whether or not you can make a decision on behalf of the donor you must:

- not make assumptions based on the donor's age, appearance or condition;
- consider whether the donor will regain capacity;
- encourage the donor to participate in any decision made or act carried out on behalf of the donor;
- consider the donor's past and present wishes and feelings, beliefs and values (and in particular any written statement); and
- where practical and appropriate consult with anyone caring for the donor, close relatives and anyone else with an interest in the welfare of the donor, as well as any attorney appointed by the donor or any deputy appointed by the Court of Protection.

What can an attorney do under a property and financial affairs LPA?

As an attorney you can make most legal decisions that the donor could make in person. Some decisions (such as making gifts) are restricted by the Act, while others (such as making a Will or settlement) are prohibited altogether. The LPA in this case relates only to a person's property and financial affairs and not to the making of any welfare decisions. However, an LPA should always be exercised to support the welfare of the donor. So you cannot consent to a particular medical treatment but you can ensure that funds are made available to provide the best level of care.

So long as the donor has capacity, you are assumed to act with the knowledge and approval of the donor unless the LPA has

been cancelled or you have notice of contradictory instructions. For instance, you may not sell investments or buy a property if the donor expressly refuses consent.

Can an attorney make gifts?

An attorney acting under a property and financial affairs LPA has very limited power to make gifts on behalf of the donor. Unless there is a restriction in the LPA, gifts can only be made to:

- people who are related to, or connected with, the donor (including attorneys) on specific occasions such as birthdays, wedding or civil partnership ceremonies or anniversaries, or any other occasions when family, friends or associates usually give presents; and
- charities where there is a history of regular payments, or even from time to time.

The gifts must be reasonable having regard to all the circumstances and in relation to the donor's assets.

Where the donor lacks capacity the Court of Protection can – on a formal application by the attorney or other person – authorise larger gifts on behalf of the donor. If there is any doubt as to whether a particular gift can or should be made then an application should be made to the Court of Protection.

Legal obligations

As an attorney you have certain legal obligations when acting on behalf of the donor and must, in general:

- not exceed the scope of your authority under the LPA or in law

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- not make gifts except to the limited extent permitted
- keep accounts and financial records and produce them to the OPG and/or to the Court of Protection on request
- apply relevant standards of care and skill (duty of care) when making decisions
- carry out any express instructions (which the donor has capacity to provide)
- not take advantage of your position and not benefit from acting as an attorney
- not delegate decisions, unless authorised to do so
- act in good faith
- respect confidentiality
- not give up the role without telling the donor (if capable) and the OPG; and
- keep the donor's money and property separate from your own money.

The Code of Practice

An attorney – or anyone making decisions on behalf of another person who lacks capacity – must have regard to the Code of Practice issued under the Act. This is a useful, if lengthy, document which aims to provide help and guidance with illustrations of particular dilemmas faced by those having to make decisions. Copies are available from the Stationery Office or in PDF form from the OPG website at:

<http://www.publicguardian.gov.uk>

Avoiding problems

Problems often arise where there is a lack of understanding over what an attorney can and cannot do or where one attorney fails to co-operate with another or to consult with

other interested parties. It is important to keep in mind at all times that your responsibilities are to the donor. If you have any queries or concerns over your role, you should seek further advice.

Why Thomson Snell & Passmore

We have a great deal of experience in this area of practice. We have looked after the affairs of our clients for generations and frequently act as attorneys and deputies for them. We have one of a handful of dedicated teams of lawyers in the country specialising in Court of Protection work, acting for deputies, attorneys and relatives in all aspects of Court of Protection proceedings, including contested applications for the replacement of attorneys or deputies, the making of settlements, gifts and wills.

Disclaimer

This information sheet is written as a general guide. As any course of action must depend on your individual circumstances, you are strongly recommended to obtain specific professional advice before you proceed. We do not accept any responsibility for action which may be taken as a result of having read this information sheet.

The law is stated as at 30 June 2020.

If you require further information, please discuss with your usual contact in the firm or email Una Angus at una.angus@ts-p.co.uk

Alternatively, please speak with Una or another member of the Private Client team on 01892 510000.

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