

The role of an attorney under a Health and Welfare Lasting Power of Attorney

Introduction

The Mental Capacity Act 2005 came in to force on 1 October 2007. The Act allows you to make a power of attorney called a 'lasting power of attorney' or 'LPA'. 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 health and welfare LPA.

When can an attorney act under a health and welfare LPA?

An attorney can only act under a health and welfare LPA if:

- 1 the LPA has been registered with the Office of the Public Guardian (OPG);
- 2 the attorney has reasonably established that you have lost mental capacity to make the particular decision at the time it needs to be made;
- 3 there is no later and inconsistent Advance Decision (Living Will); and
- 4 in relation to life sustaining treatment, the LPA specifically allows the attorney to make decisions on this.

Acting in your best interests

The requirement to act in a person's best interests is a fundamental requirement of the Mental Capacity Act. An attorney (or any other person or body making a decision on your behalf) is required to act in your best interests, should you lack capacity. Your attorney, in establishing whether or not you

can make a decision, or in making a decision on your behalf, must by law:

- 1 not make assumptions based on your age, appearance or condition;
- 2 consider whether you will regain capacity;
- 3 encourage you to participate in any decision made or act carried out on your behalf;
- 4 consider your past and present wishes and feelings, beliefs and values; and
- 5 where practical and appropriate consult with:
 - a anyone caring for you
 - b close relatives and anyone else with an interest in your welfare
 - c any attorney appointed by you
 - d any deputy appointed by the Court of Protection

Where a decision being made under a health and welfare LPA relates to life-sustaining treatment, your attorney must not be motivated by a desire to bring about your death.

Legal obligations

An attorney also has certain legal obligations when acting on your behalf and must, in general:

- 1 not exceed the scope of his authority under the LPA or in law;
- 2 apply relevant standards of care and skill (duty of care) when making decisions;
- 3 carry out any express instructions;

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| <ul style="list-style-type: none"> 4 not take advantage of his or her position and not benefit from acting as an attorney; 5 not delegate decisions, unless authorised to do so; 6 act in good faith; 7 respect confidentiality; 8 comply with the directions of the Court of Protection and the OPG; 9 not give up the role without telling you and the OPG; 10 keep accounts; and 11 keep your money and property separate from his or her own money. | <ul style="list-style-type: none"> 2 your day-to-day care, including diet and dress; 3 who you may have contact with; 4 consenting to or refusing medical examination and treatment; 5 making arrangements for medical, dental or optical treatment; 6 assessments for and provision of community care services; 7 whether you should take part in social activities, leisure activities, education or training; 8 your personal correspondence and papers; 9 rights of access to personal information about you, including your medical records; or 10 complaints about your care or treatment. |
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An attorney – or any person making decisions on your behalf where you lack capacity – must also have regard to the Code of Practice. 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>

What can the attorney do under a health and welfare LPA?

Unless the LPA contains a restriction, the attorney will be able to make decisions about your personal welfare and health care. Decisions could include:

- 1 where you should live and who you should live with;

There are also three further important limitations on what an attorney can do under a health and welfare LPA:

- 1 the attorney must act in your best interests;
- 2 there is no power to demand specific forms of treatment - the attorney can merely give or refuse authority or consent to someone else – such as doctor or carer – to carry out or withhold a particular treatment or act;
- 3 if you are detained under the Mental Health Act 1983, no decision can be made regarding treatment for a mental condition.

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Statutory principles

An LPA is part of a wider statutory framework laid out in the Mental Capacity 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:

Principle 1

It should be assumed that everyone can make their own decisions unless it is established otherwise.

Principle 2

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.

Principle 3

A person should not be treated as lacking capacity just because they make an unwise decision.

Principle 4

Actions carried out or decisions made on behalf of someone who lacks capacity must be in that person's best interests.

Principle 5

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.

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 2021.

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.