



Role of an attorney of a property & affairs lasting power of attorney



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“A very professional and efficient service provided in a very kind and considerate manner”

Client comment

When does an attorney need to act?

Once the Lasting Power of Attorney (LPA) has been registered with the Office of the Public Guardian and provided it is unrestricted, the attorney will be able to act for the donor for the rest of his or her life (as long as the power is not revoked), either because he or she asks the attorney to or because he or she has lost the capacity to deal with his or her property and affairs in whole or in part.

If the LPA has not been registered with the Office of the Public Guardian, the attorney will have no legal powers. The donor can register the LPA while he or she is mentally capable or the attorney can apply to register the LPA at any time.

There is no power to make any decision for the donor under the LPA during the registration process. If the LPA has been registered but not used for some time, the attorney should tell the Office of the Public Guardian when you begin to act under it, so that you can be sent relevant, up-to-date information about the working of LPAs.

What actions can an attorney take?

The attorney will be able to do anything the donor could have done in relation to their finance and property, provided there are no restrictions in the document.

This might include:

- buying or selling property;
- opening, closing or operating any bank, building society or other account;
- giving access to the donor’s financial information;
- claiming, receiving and using (on the donor’s behalf) all benefits, pensions, allowances and rebates (unless the Department for Work and Pensions has already appointed someone and everyone is happy for this to continue);
- receiving any income, inheritance or other entitlement on behalf of the donor;
- dealing with the donor’s tax affairs;
- paying the donor’s mortgage, rent and household expenses;
- insuring, maintaining and repairing the donor’s property;
- investing the donor’s savings;
- making limited gifts on the donor’s behalf;
- paying for private medical care and residential care or nursing home fees;
- applying for any entitlement to funding for NHS care, social care, or adaptations;
- using the donor’s money to buy a vehicle or any equipment or other help they need; or
- Repaying interest and capital on any loan taken out by the donor.

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What does an attorney need to consider when acting?

The attorney has important duties and responsibilities, which are set out in the Mental Capacity Act 2005 and explained in the Code of Practice, with which they should be familiar. This can be accessed from the web address below:

www.gov.uk/government/publications/mental-capacity-act-code-of-practice

A hard copy can be obtained by calling 0333 200 2425.

The following are particularly important: An attorney must follow the principles set out in Section 1 of the Act:

Principle 1

It should be assumed that everyone has capacity to make his or her own decisions, unless it is proved otherwise.

Principle 2

A person should have all the help and support possible to make and communicate their own decision, before anyone concludes that they lack capacity to make their own decision.

Principle 3

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

Principle 4

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

Principle 5

Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

An attorney must always act in the donor's best interests. There is guidance in Chapter 5 of the Code of Practice to help, but in general terms, an attorney needs to:

- consider the donor's past and present wishes and feelings, beliefs and values;
- where practical and appropriate consult with;
- anyone caring for the donor;
- close relatives and anyone else with an interest in their welfare; and
- other attorneys appointed by the donor.

Always check whether the donor has the capacity to make a particular decision themselves. An attorney can act if the donor does have capacity, if they have asked the attorney to act and there are no restrictions in the document.

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Only make those decisions the LPA gives the attorney authority to make i.e:

- if the attorney is acting only under a Property and Affairs LPA, they cannot make decisions about the donor's personal care; and
- if the LPA is restricted in any way an attorney's authority may be limited. If any attorney needs further powers in the future, you will be able to apply to the Court of Protection.

Other duties include having a duty to:

- apply certain standards of care and skill (duty of care) when making decisions;
- carry out the donor's instructions;
- not take advantage of your position and not benefit yourself, but benefit the donor (fiduciary duty);
- not delegate decisions, unless authorised to do so;
- act in good faith;
- respect confidentiality;
- comply with the directions of the Court of Protection;
- not give up the role without telling the donor and the Court;
- keep accounts; and
- keep the donor's money and property separate from your own.

How does an attorney decide whether or not the donor has capacity?

An attorney must use the test laid down in the Mental Capacity Act 2005, which comprises two stages:

Stage 1 – Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain? Examples may include conditions associated with some form of dementia, or the long-term effects of brain damage.

Stage 2 – Does the impairment or disturbance mean that the person is unable to make a specific decision? This stage can only be applied if you have taken all practical steps to support the donor in making the decision and this has failed.

A person is considered to be unable to make a decision if they cannot on a balance of probabilities:

1. understand information about the decision to be made (the Act calls this 'relevant information');
2. retain that information in their mind;
3. weigh that information as part of the decision making process; or
4. communicate their decision (by talking, by using sign language or by any other means).

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The Code of Practice offers practical examples which will be very helpful to an attorney, but essentially an attorney needs to give the donor as much opportunity as possible to make his or her own decisions before they decide to act and also, to follow the steps laid down in Chapter 4 of the Code of Practice; suggested steps for establishing 'that the donor lacks capacity to make a particular decision'.

What power does an attorney have to make gifts?

An attorney has very limited powers to make gifts from the donor's property, only:

- to people who are related to, or connected with, the donor (including attorneys) on specific occasions;
- births or birthday;
- weddings or wedding anniversaries;
- civil partnership ceremonies or anniversaries; or
- any other occasions when family, friends or associates usually give presents.

Gifts can continue to be made to charities if the donor was making regular payments, or even from time to time.

An attorney must remember that gifts must be reasonable in relation to the donor's own assets.

The information contained in this document provides background information only. The document may be misleading if relied upon as an exhaustive list of the legal issues involved. If any matter referred to in this document is sought to be relied upon, further information should be sought.