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## Attorney Guidance

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In order to manage a person's affairs relating to property and financial matters and/or health and welfare, you will need to have been appointed by them as an attorney under a lasting power of attorney. There is a separate document for each power, one for property and financial matter and one for health and welfare.

A donor may appoint you as an attorney for just one power, or both. Each power has their own requirements and limitations.

Being an attorney requires you to take on certain responsibilities and act in a particular way. This guidance provides you with important information to help you act as an attorney and will help you avoid any problems.

The person who has appointed you as their attorney is referred to in this guidance as "the donor."

### WHAT DOES THE LASTING POWER OF ATTORNEY ALLOW ME TO DO?

#### PROPERTY AND FINANCIAL AFFAIRS

The lasting power of attorney gives you power to make decisions about the donor's property and financial affairs. These decisions include:

- Claiming welfare benefits
- Opening, closing and operating a financial account
- Arranging and managing investments
- Buying or selling property
- Paying bills
- Dealing with tax affairs

#### HEALTH AND WELFARE

The lasting power of attorney gives you power to make decisions about the donor's health and welfare at a time when the donor lacks capacity to make their own decisions.

This can include:

- Where the donor should live
- Who may have contact with the donor
- Right to access to health and social care person information
- Consent to or refusing consent to medical treatment

## CAN YOU MAKE DECISIONS IMMEDIATELY?

The power must be registered with the Office of the Public Guardian and validated before it can be used.

Property and Financial power of attorneys can be used both when the donor does have capacity, at their request, and also when they lack capacity.

Health and Welfare power of attorneys can only make decisions once the donor lacks capacity to make a decision. The level of capacity required varies depending on the decision that needs to be made and is not determined by the donor's diagnosis, but rather their ability to understand.

## MAKING DECISIONS WITH OTHER ATTORNEYS

If you have been appointed to act with another person, it may be that you have to:

- Deal with all matters together (a joint appointment); or
- Act together or independently (joint and several appointment); or
- Make some decisions together and some independently.

Even if one of you makes more decisions under the power than another, attorneys are expected to consult with each other about what they are doing and keep each other informed.

You cannot delegate your responsibilities to a person who is not an attorney: the appointment is personal to you.

## FOLLOWING THE PRINCIPLES OF THE MENTAL CAPACITY ACT 2005 AND CODE OF PRACTICE

When making decisions you must follow the Principles set out in Mental Capacity Act 2005 and have regard to its Code of Practice. This means:

- You must assume that the donor can make their own decisions, unless it is established that they cannot do so because they lack mental capacity.
- You must help the donor to make as many of their own decisions as possible.
- You must not treat the donor as unable to make the decision in question unless all practicable steps to help them to do so have been made without success.
- You must not treat the donor as unable to make the decision in question simply because the donor wishes to make a decision you consider is unwise.
- You must make decisions and act in the donor's best interests when they are unable to make the decision in question.
- Before you make the decision in question or act for the donor, you must consider whether you can make the decision or act in a way that is less restrictive of the donor's rights and freedom but still achieves the purpose.
- The Code of Practice, provides important guidance and information to help you follow the legislation. Important chapters you may find useful are Chapters 2 - 7 which you can obtain from:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/224660/Mental\\_Capacity\\_Act\\_code\\_of\\_practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf)

#### WHAT IS MEANT BY 'MENTAL CAPACITY?'

A person lacks capacity, if they are unable to make a specific decision, at the time it needs to be made, because of an impairment of, or disturbance, in the functioning of their mind or brain. A person can lack capacity permanently or temporarily, and it is not based on a diagnosis.

A person is considered to lack capacity to make a decision, if they are unable to understand, retain, use and weigh, information relevant to the decision, or communicate their decision by any means.

The relevant information will vary depending on the decision, but usually includes the nature of the decision, its purpose, the consequence, and any options or alternatives.

You should try to help the donor make their own decisions, but if the donor lacks capacity to make a particular decision, at the time it needs to be made, you can make the decision for them.

#### WHAT IS MEANT BY 'THE DONOR'S BEST INTERESTS?'

If the donor lacks capacity to make a decision, then you can make the decision, on their behalf, in their best interests.

You should:

- Consider all the relevant circumstances, particularly:
  - ✓ The likelihood of the donor recovering in the foreseeable future and being able to make the decision;
  - ✓ The donor's past and present wishes and feelings;
  - ✓ The donor's beliefs and values that would be likely to influence their decision, if they had capacity; and
  - ✓ Other factors that the donor would be likely to consider, if they were able to do so.
- Involve the donor in the decisions, so far as practical.
- If practicable and appropriate, consult with carers, relatives, friends, co-attorney or court-appointed deputy, who have an interest in the donor's welfare.
- If possible, try and achieve the outcome the donor would want.

#### INSTRUCTIONS AND PREFERENCES

The donor may have included restrictions or conditions (instructions) and/or guidance (preferences) in the power, which set out how you should make decisions. It is important that you follow these. If you exceed your authority, you could be removed as attorney. If the LPA is restricted, and you need wider powers you should apply to the Court of Protection for authority.

If you have any doubt about how you should make decisions, you should seek professional legal advice.

#### LIMIT ON MAKING GIFTS

You may make limited gifts on 'customary occasions', such as religious festivals, birthdays, and weddings, provided it is for a friend or relative, (including yourself).

Gifts can also be made to a charity, if the donor has made gifts to the charity in the past or if not, in the circumstances they might be expected to make gifts to the charity.

However, in all cases, the size of the gift must be reasonable in the circumstances and in relation to the size of the total value of the donor's assets. You should be cautious and avoid interfering in succession plans under the donor's Will. In all cases, you should consider if the donor might need the asset for their own use in the future, for example to fund their care and outgoings.

If you have any doubt or wish to make gifts not covered by the above, you should seek professional legal advice.

#### MAINTAINING ACCOUNTS

Banks and other financial institutions have different ways of dealing with attorneys. Some will allow you to continue to operate the donor's account, whilst others will want a new account to be opened. Many financial institutions allow jointly held accounts to operate as normal, once the power has been registered with them. If you have difficulties, read the consumer guide and the guidance framework for bank and building society staff available at:

<https://www.bba.org.uk/publication/leaflets/guidance-for-people-wanting-to-manage-a-bank-account-for-someone-else-2/>

If you have to open a new account, it should be opened in your name 'as attorney for' the donor.

You should not open an account in your own name without identifying that the asset belongs to the donor, as this may cause complications with your own tax and financial affairs, including succession under your own Will or if you do not have one, your intestacy. If it is not possible to hold the asset in this way, it is appropriate to identify the true ownership in a 'Declaration of Trust'. Legal advice should be sought in such situations.

As an attorney you still have a duty to keep accounts. It is sensible to keep financial statements and retain all receipts in one place. This is because the Office of the Public Guardian could ask you to account for your dealings with the donor's money. You should also keep the donor's money separate from your own.

#### YOU MUST NOT BENEFIT FROM YOUR POSITION

You must not use the donor's money or property for your own benefit, even if it were a loan or you believe, if they had mental capacity, they would agree to this.

An attorney must act with honesty, integrity and in good faith, using reasonable standards of care and skill. You must keep the donor's affairs confidential, unless you are legally required, such as a request from the Office of the Public Guardian, an order from the Court, or if there is good reason to disclose information.

### FINANCIAL ADVICE

You must act using reasonable standards of care and skill. You should consider taking independent financial advice on how best to invest and hold funds belonging to the donor. How and where funds should be invested and managed will largely depend on the following:

- The donor's age and life expectancy
- The value and nature of the donor's resources, taking into account tax and costs implications of making changes
- The donor's financial needs including any responsibility to others
- The donor's attitude to risk and views of others
- The impact of any investment on state support

Any investment will need to be suitable and spread between different investments to limit the risk of a poor return. From time to time the investments will need to be reviewed.

### WORKING WITH HEALTH OR SOCIAL CARE PROFESSIONALS

If the donor lacks mental capacity to make decisions about health and/or social care needs, others may make decisions and provide care and treatment for the donor, provided they believe it is in the donor's best interests. For example, care workers may provide personal care services, or doctors and nurses may provide health care and treatment.

If it is appropriate and practical they may consult with you about the decisions they plan to make. However, they cannot make a decision which you disagree with. This does not mean you can demand medical treatment is given, if those treating the donor do not think it is in the donor's best interests, or demand that social services use their resources to fund a care package. This is because you only have the same rights that the donor would have, if they had mental capacity.

### MAKING AN END OF LIFE DECISION

You may have been given authority in the power to give or refuse consent to life sustaining treatment. This is treatment that in the view of those treating the donor, is considered by them to be necessary to sustain the donor's life.

There may come a time, where those treating the donor have to consider whether treatment should be given or continue to be given. You should expect to be consulted about the options, (unless it is inappropriate or impracticable). Your role

is to either give consent or refuse consent to the treatment being given. You may refuse consent to treatment, which those treating the donor may be prepared to give, for example, performing CPR (cardiopulmonary resuscitation) or providing treatment which will provide little benefit, or not what the donor would have wanted. You can do this if you think, overall it is the donor's best interests.

It is advisable to find out what the donor's wishes are about end of life care, before the donor is too unwell to have this conversation. The donor may have set out their wishes in the power.

#### **PAYING YOURSELF AND REIMBURSEMENT OF PERSONAL EXPENSES**

You are not allowed to be paid for acting as an attorney, unless the donor has authorised it in the power. You can however, recover reasonable out of pocket expenses, which have been personally incurred such as petrol and stamps, and in most cases, this is unlikely to exceed more than a few hundred pounds a year. The donor's own expenses, such as care costs and items they need for their own use, such as clothes, day to day outgoings and holidays, as well as any legal fees are paid out of the donor's funds.

If you believe you should be recompensed for your role as an attorney, you should apply to the Court of Protection for this to be authorised. You should take legal advice on this.

#### **WHAT COULD HAPPEN IF AN ATTORNEY DOES NOT ACT IN THE DONOR'S BEST INTERESTS?**

The Office of the Public Guardian may investigate any concerns about the decisions an attorney has made. If the concerns are not addressed or resolved, an application can be made to the Court of Protection for the attorney's removal. The Court of Protection may make additional orders to safeguard the donor and could agree that the press can publish the name of an attorney who has been removed.

#### **WHAT HAPPENS WHEN THE DONOR DIES?**

Your authority to act under the LPA ends when the donor dies. The capacity to deal with the deceased's affairs then falls to the executor who has the legal authority to administer the deceased's estate. If there is not a will, then the person will have died intestate for which there is a specific order of entitlement.

#### **USEFUL LINKS AND INFORMATION**

The address for the Office of the Public Guardian is:

Office of the Public Guardian  
PO Box 16185  
Birmingham  
B2 2WH

The Office of the Public Guardian has useful guidance on its website regarding all of the information and powers that attorneys have which can be found below:

<https://www.gov.uk/government/organisations/office-of-the-public-guardian>