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# GUIDANCE FOR A PROPERTY AND FINANCIAL AFFAIRS ATTORNEY

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

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

## What the lasting power allows you to do

This Lasting Power of Attorney gives you power to make a Property and Financial Affairs decision at a time when the donor lacks capacity to make their own decision. The power may also allow you to make decisions when the donor has capacity, if the donor has made this choice in Section 5 of the LPA.

Property and Financial Affairs decisions include:

- claiming welfare benefits
- opening, closing and operating a financial account
- arranging and managing investments
- buying or selling property
- entering or terminating a tenancy
- paying bills
- dealing with tax affairs

You should read the power, as it may contain useful guidance and/or set out limits on the decisions you can make.

## When can you make decisions?

If the power has not been registered with the Office of the Public Guardian, you cannot use it to make decisions. You should apply for the power to be registered.

Once the power has been registered, and provided there are no conditions or restrictions preventing you from acting at this point, you may use the power immediately, either because the donor has asked you to, or because they do not have capacity to make financial decisions. You will be able to act for the donor for the rest of their life (as long as the power is not cancelled).

If there is a condition in the power which prevents you from using the power until the donor is mentally incapable of managing their financial affairs, you will usually need to produce evidence of the donor's incapacity to third parties, such as banks and building societies, before they will accept your authority.

Even if the donor lacks mental capacity to manage their own property and financial affairs, it does not necessarily mean they lack capacity to make a health or welfare decision. The level of capacity required varies depending on the decision to be made. It is not determined by a person's diagnosis, but their ability to understand, retain, use and weigh relevant information.

## **Making decisions with others**

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 separately (joint and several appointment); or
- make some decisions together and some separately (a hybrid appointment).

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.

## Guidance in the Code of Practice

The Code of Practice, provides important guidance and information to help you follow the legislation, 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)

The following chapters of the Code are particularly helpful:

- **Chapter 2:** What are the statutory principles and how should they be applied?
- **Chapter 3:** How should people be helped to make their own decisions?
- **Chapter 4:** How does the Act define a person's capacity and how should capacity be assessed?
- **Chapter 5:** What does the Act mean when it talks about 'best interests?'
- **Chapter 7:** What does the Act says about Lasting Powers of Attorney?

## What is meant by 'mental capacity?'

A person lacks capacity, if they are unable to make a specific decision, at the time the decision needs to be made, because of an impairment of, or disturbance, in the functioning of their mind or brain.

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 including the available options or alternatives.

You should try to help the donor make their own decisions, but if you form a view that it is more likely than not, that the donor lacks capacity to make a particular decision, at the time it needs to be made, you can make the decision for them. However, you may be able to make a decision when the donor has mental capacity if they have set out this choice in their LPA and they ask you to make a decision.

## 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 and/or friends or others, such as another attorney or court-appointed deputy who has 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 instructions and/or preferences in the power, which should be considered when you 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.

## Limits 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. This limit on making gifts applies even where the donor has mental capacity to make larger gifts.

It is important to have sight of the donor's Will, (if they have one), so you are informed about their wishes. You should be cautious and avoid interfering in succession plans under their 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 others

You are able to use the donor's money to maintain their spouse, civil partner, cohabitee, or the donor's child if under 18 years of age (if any). The donor may have named other people they would expect you to maintain, within the power. Any maintenance payment must be reasonable in the circumstances and affordable for the donor. There is no set sum you can give for maintenance- it depends on the donor's financial position, their own financial needs and the circumstances.

## Managing finances

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.gov.uk/government/publications/deputy-and-attorney-guidance-dealing-with-banks>

If you operate an account for the donor, you should sign your usual signature and then underneath your signature add the words 'as attorney'. If you have to open a new account, it should be opened in your name 'as attorney for' the donor. You will then only have to sign your usual signature to deal with the account.

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.

## Keeping accounts

You 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 you believe, if they had mental capacity, they would agree to this. Such action must be authorised by the Court of Protection when the donor lacks mental capacity or where they have mental capacity the donor must make any benefit directly and not by the lasting power. If you have any doubt, seek legal advice.

## Financial advice

You must act using reasonable standards of care and skill. You should consider the value and nature of the donor's assets and if appropriate take independent financial advice on how best to invest and hold funds. 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
- The terms of the donor's Will (if any)

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.

## 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. Consider taking legal advice if you have concerns.

## Other responsibilities

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 to third parties.

## Your right to retire

You do not have to take on this role indefinitely, and have the right to retire, by 'disclaiming your appointment'. But if you decide to do this you will need to tell the donor and send the original power to the Office of the Public Guardian, with Form

LPA 005, which is available on <https://www.gov.uk/government/publications/disclaim-a-lasting-power-of-attorney>

If the donor has appointed a replacement attorney, that person will act in your place.

## **What could happen if an attorney does not act in the donor's best interests?**

People or organisations an attorney has dealings with may raise concerns with the Office of the Public Guardian, which may investigate these concerns. 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.

You must send the original LPA to the Office of the Public Guardian so they can cancel the LPA. Their address is:

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

## **Office of the Public Guardian Guidance**

The Office of the Public Guardian has the following useful guidance on its website:

- LP11: getting started as a Property and Financial Affairs Attorney  
<https://www.gov.uk/government/publications/getting-started-as-an-attorney-property-and-financial-affairs>
- LP14: How to act as a Property and Financial Affairs Attorney  
<https://www.gov.uk/government/publications/how-to-be-an-attorney>
- PN7: Giving gifts: a guide to the legal background for deputies and attorneys  
<https://www.gov.uk/government/publications/public-guardian-practice-note-gifts>
- OPG2: Giving gifts for someone else A guide for attorneys and deputies

<https://www.gov.uk/government/publications/giving-gifts-a-guide-for-deputies-and-attorneys>

- SD14: OPG's approach to family care payments

<https://www.gov.uk/government/publications/public-guardian-practice-note-family-care-payments>

- Public Guardian practice note notification of death

<https://www.gov.uk/government/publications/public-guardian-practice-note-notification-of-death>

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