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Property and financial affairs: Lasting Power of Attorney FAQs

A lasting power of attorney (LPA) is a legal document that allows a 'donor' to appoint one or more people to make decisions and/or act on their behalf. This can be at a time when they are incapacitated by illness or an accident, when they are suffering from a loss of mental capacity, or even while they are out of the country.

There are LPAs for 'property and financial affairs' and also for 'health and welfare'.

At a glance – property and financial affairs

- This type of lasting power of attorney allows attorneys to deal with a person's property and financial affairs.
- Attorneys must always act in the donor's best interests.
- Attorneys must follow the principles set out in the Mental Capacity Act 2005 and its code of practice.
- An attorney can sell the donor's assets, if such a sale is in the donor's best interests and there is no restriction preventing it.
- An attorney may make limited gifts on the donor's behalf, unless there is a restriction preventing gifts.

FAQs about the role of the attorney

What does a property and financial affairs lasting power of attorney (LPA) allow an attorney to do?

It allows the attorney to deal with the property and financial affairs of the person who has made the LPA (the donor). It does not authorise them to make other types of decisions, such as where the donor should live, or whether they should have medical treatment. If the donor has included any restrictions and conditions in the LPA, the attorneys are bound by them.

If an attorney has been appointed to act with other attorneys, they may have been appointed to act:

- Jointly, which means that they must always act together.
- Jointly and severally, which means that they may act together, or that any attorney may act independently.
- Jointly for some decisions, and jointly and severally for other decisions. The LPA will stipulate which decisions can be made jointly, and which may be made jointly and severally.

When can an LPA be used?

All LPAs must be registered with the Office of the Public Guardian before they can be used. If the LPA has not been registered, please contact us for advice.

Once registered, an LPA can be used straightaway, subject to any conditions or restrictions that prevent the attorneys from acting in particular circumstances.

If the donor is able to make decisions about their property and financial affairs, the attorneys should only act with their consent.

If they lose the mental capacity to make decisions about their property and financial affairs, the attorneys can make decisions for them.

What are the principles of the Mental Capacity Act 2005?

Attorneys acting under an LPA must follow the principles of the Mental Capacity Act 2005, as well as the Mental Capacity Act Code of Practice.

The main principles are as follows:

- The attorneys must assume that the donor can make their own decisions, unless it is established that they cannot do so.

- The attorneys must help the donor to make as many of their own decisions as they can. They cannot treat the donor as unable to make a decision unless all practical steps to help them do so have been made, without success.
- They must not treat the donor as unable to make a decision simply because they make an unwise decision.
- The attorneys must make decisions and act in the donor's best interests when they are unable to make a decision.
- Before the attorneys make the decision in question or act for the donor, they must consider whether the they can make the decision or act in a way that is less restrictive of the donor's life and freedom, while still achieving the ultimate goal.

The Code of Practice contains useful practical guidance.

What is meant by acting in a donor's best interests?

If a donor is unable to make a decision for themselves, the attorneys must act in their best interests. This means that they must consider all of the relevant circumstances, and in particular:

- The likelihood of the donor recovering in the foreseeable future and being able to make decisions again.
- Ways to involve the donor in the decision, as far as possible.
- The donor's past and present wishes and feelings.
- The donor's beliefs and values.
- Any other factors that the donor would be likely to consider, if they were able to do so.

If practical and appropriate, the attorneys should consult carers, relatives, friends and/or other people with an interest in the donor's welfare, such as other attorneys or a court-appointed deputy.

Can an attorney make gifts on the donor's behalf?

The donor may have included a restriction or condition so that the attorneys cannot make gifts. If this is not the case, certain gifts can be made as follows:

- To people who are related to or connected to the donor.
- On customary occasions, such as Christmas, birthdays or weddings.
- To a charity, if the donor has made gifts to the charity in the past, or if they might be expected to make gifts to the charity.

In all cases, the size of the gift must be reasonable, including in relation to the total value of the donor's estate. It should be remembered that the donor may need the asset in the future, so a cautious approach should be adopted.

Gifts that are not covered by these criteria, including those made for the purposes of tax planning, are not authorised by an LPA. The attorneys may, however, be able to make an application to the Court of Protection for the necessary authority: please contact us for advice about making such an application.

How should an attorney operate a bank account under an LPA?

This depends on the bank or building society.

If the attorneys are able to continue operating the donor's account, they will need to sign their usual signature and add "as attorney" underneath it.

If the attorneys are acting as attorney for the donor's spouse or civil partner and have a joint account, they may be able to operate the account as normal.

If the attorneys are required to open a new account, it should be opened in their name "as attorney for [name of donor]". The attorneys will then be able to use their own signature to operate the account.

Opening an account in the attorneys' names without identifying that it is an attorney account may cause problems with the attorneys own tax affairs or entitlement to state benefits, and therefore is not recommended.

Should the attorneys keep accounts?

The attorneys have a duty to keep accounts, and we would advise them to keep bank statements and receipts. They may be asked by the Office of the Public Guardian to account for their dealings with the donor's money.

Can the donor's assets be sold?

Yes, if such a sale is in the donor's best interests, and there is no restriction in the LPA preventing a sale.

It may be necessary to check the donor's will if the attorneys need to take certain actions, such as selling the house or investments, or closing an account. This is because the donor may have made a gift of the

asset in their will. Please contact us for advice if this is the case.

How can we help?

We can provide advice on the following:

- what an attorney can and can't do;
- applications to the Court of Protection – the Court of Protection can make decisions on behalf of someone who is mentally incapable of making particular decisions themselves; and
- resolving disputes and/or bringing claims, for example under the Inheritance (Provision for Family and Dependants) Act claims, where someone has died without making proper provision for the donor.

Applications can be made:

- for a statutory will where the donor has not made a will, or has made a will that is no longer appropriate to their circumstances;
- for authorisation to make certain gifts on the donor's behalf, such as gifts made for tax planning purposes;
- where there is a dispute about a serious personal welfare issue and the donor has not made a health and welfare LPA;
- where an attorney appointed under a LPA is no longer able to act, or there are concerns about how they are acting;
- when buying and selling property on behalf of the donor, and regarding tenancy agreements and boundary disputes.