# Your role as an attorney under a property and financial affairs Lasting Power of Attorney

## Introduction

The role of an attorney is an important one, which carries with it a great deal of responsibility.

The Mental Capacity Act 2005 (the 'Act') which came in to force on 1 October 2007 allows a person (the 'donor') to make a power of attorney called a 'lasting power of attorney' or 'LPA' which remains effective even if the donor lacks capacity. 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 property and financial affairs LPA.

## Registration of the LPA

An attorney will only be able to act when the LPA has been registered with the Public Guardian. Thus even if the LPA has been signed by the 'the donor and the attorneys, it cannot be used until it has been registered.

Registration is a simple procedure which allows an LPA to come into operation. The attorneys or the donor (who has capacity) can apply to register and the person applying to register must give notice to the person or persons named in the LPA document. The application is then lodged, with a fee, with the Office of the Public Guardian (OPG). The OPG notifies the attorneys if the application is made by the donor. If there are no valid objections, registration takes place six weeks after the OPG sends out notice.

Often an LPA is made by a donor who has capacity as a form of insurance, so that it can be used if in future the donor lacks capacity. If however the LPA has not been registered and you consider that the donor may lack capacity then you should arrange to register the power as soon as possible.

For further details please refer to the information sheet "Registration of a Lasting power of attorney."

## When can an attorney act under a property and financial affairs LPA?

An LPA can be used at any time once it has been registered (subject to any conditions in the power itself), whether or not the donor has capacity to make the decisions which the attorney is making. If the donor has capacity, then the attorney cannot ignore the donor's instructions and the donor can cancel the LPA at any time, (although the Public Guardian must be notified that the power has been revoked).

As an attorney you may find yourself dealing with one or more of the following situations:

- No action is required while the LPA remains dormant or in readiness;
- You are acting with the knowledge and consent of the donor;
- The donor lacks capacity and you are making decisions on behalf of the donor;
- The donor has capacity to make certain decisions for himself, while lacking capacity to make other decisions.

## How should an attorney act under a property and affairs LPA?

A Lasting Power of Attorney is part of a wider statutory framework set out in the Act.

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# The role of an attorney under a property and financial affairs Lasting Power of Attorney (continued)

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:

1. It should be assumed that everyone can make their own decisions unless it is proved otherwise.
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.
3. A person should not be treated as lacking capacity just because he makes an unwise decision.
4. Actions or decisions carried out on behalf of someone who lacks capacity must be in that person's best interests.
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.

## Acting in the best interests of the donor

The requirement to act in a person's best interests is a fundamental requirement of the Act. An attorney (or any other person or body making a decision on behalf of another who lacks capacity to make that decision) is required by the Act to act in that person’s best interests. In deciding whether or not you can make a decision, or in making a decision on behalf of the donor, you must:

1 Not make assumptions based on the donor’s age, appearance or condition;

2 Consider whether the donor will regain capacity;

3 Encourage the donor to participate in any decision made or act carried out on behalf of the donor;

4 Consider the donor’s past and present wishes and feelings, beliefs and values (and in particular any written statement); and

5 Where practical and appropriate consult with

   a anyone caring for the donor
   b close relatives and anyone else with an interest in the welfare of the donor
   c any attorney appointed by the donor
   d any deputy appointed by the Court of Protection

## What can an attorney do under a property and financial affairs LPA?

As an attorney you can make most legal decisions that the donor could make in person. Some decisions, such as making gifts, are restricted by the Act, while others such as the making of a will or settlement are prohibited altogether. The LPA in this case relates only to a person’s property and financial affairs and not to the making of any welfare decisions. However, a LPA should always be exercised to support the welfare of the donor. Thus you could not consent to a particular medical treatment but you can ensure that funds are made available to provide the best level of care.

# The role of an attorney under a property and financial affairs Lasting Power of Attorney (continued)

So long as the donor has capacity, you are assumed to act with the knowledge and approval of the donor unless the LPA has been cancelled or you have notice of contradictory instructions. For instance you could not sell investments or buy a property if the donor expressly refused consent.

## Can an attorney make gifts?

An attorney acting under a property and affairs LPA has very limited power to make gifts on behalf of the donor.  Unless there is a restriction in the LPA, gifts can only be made:

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

2 to charities where there is a history of regular payments, or even from time to time; and the gifts must be reasonable having regard to all the circumstances and in relation to your assets.

Where the donor lacks capacity the Court of Protection can – on a formal application by your attorney or other person – make larger gifts on behalf of the donor. If there is any doubt as to whether a particular gift can or should be made then an application should be made to the Court of Protection.

## Legal obligations

As an attorney you have certain legal obligations when acting on behalf of a donor. When accepting the role of an attorney and completing your part of the LPA form, you confirm as follows:

"I have read the section called 'Information you must read' on page 2 of this lasting power of attorney.

I understand my role and responsibilities under this lasting power of attorney, in particular:

- I have a duty to act based on the principles of the Mental Capacity Act 2005 and have regard to the Mental Capacity Act Code of Practice.
- I can make decisions and act only when this lasting power of attorney has been registered.
- I must make decisions and act in the best interests of the person who is giving this lasting power of attorney
- I can spend money to make gifts but only to charities or on customary occasions and for reasonable amounts.
- I have a duty to keep accounts and financial records and produce them to the Office of the Public Guardian and/or to the Court of Protection on request."

As an attorney you also have obligations under the general law and must, in general:

1 not exceed the scope of your 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 (which the donor has capacity to provide);

4 not take advantage of your position and not benefit from acting as an attorney;

# The role of an attorney under a property and financial affairs Lasting Power of Attorney (continued)

5 not delegate decisions, unless authorised to do so;

6 act in good faith;

7 respect confidentiality;

8 not give up the role without telling the donor (if capable) and the Public Guardian; and

9 keep the donor's money and property separate from your own money.

## The Code of Practice

An attorney – or any person making decisions on behalf of another person who lacks capacity – must have regard to the Code of Practice issued under the Act. 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 Ministry of Justice website at:

http://www.justice.gov.uk/downloads/guidance/protecting-the-vulnerable/mca

## Avoiding problems

Although the obligations of an attorney may appear daunting, they can be undertaken readily if they are acted on with common sense and integrity. Problems often arise where there is a lack of understanding over what an attorney may or may not do or over or where one attorney fails to co-operate with the other attorney or to consult with other relatives. It is important to keep in mind at all times that your responsibilities are to the donor and if you have any queries or concerns over your role, you should seek further advice.

## 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.

NOTE: The law is stated as at 2 January 2012.

At Thomson Snell & Passmore we have a great deal of experience in acting for attorneys and as attorneys as well as in all aspects of Court of Protection proceedings. If you require further information, please discuss with your usual contact in the firm or Edward Fardell, Martin Terrell, Mary Robinson or Heather West on 01892 510000 or by email at:

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