



## **RESPONSIBILITIES AND DUTIES FOR ATTORNEYS FACTSHEET**

### **1. What is proof of my authority to act on behalf of the Donor (the person who made the Power of Attorney)?**

An Attorney derives authority under either an Enduring Power of Attorney (EPA) or a Lasting Power of Attorney (LPA). There are two types of Lasting Power of Attorney - a Property and Financial Affairs Lasting Power of Attorney and a Health and Welfare Power of Attorney.

All Lasting Powers of Attorney must be registered with the Office of the Public Guardian before they can be used by an Attorney.

An Enduring Power of Attorney has to be registered when the Attorney is of the view that the Donor of the Power is or is becoming mentally incapable.

Enduring Powers of Attorney could only be made before October 2007 and Lasting Powers of Attorney came in to effect from 1st October 2007.

Where an Enduring Power of Attorney or a Lasting Power of Attorney appoints more than one person as Attorney, those persons will be either appointed jointly or jointly and severally.

If they are appointed jointly, then they all have to sign all documents and be involved in all decisions.

If they are appointed jointly and severally, then any of the Attorneys can make decisions or deal with matters belonging to the Donor on the Donor's behalf.

### **2. What can I deal with on behalf of the Donor?**

Before acting under an LPA, Attorneys must make sure that the LPA has been registered with the Office of the Public Guardian and take all practicable and appropriate steps to help the Donor make a particular decision for themselves. Where a Donor is able to make a decision for themselves the Attorney must only act as instructed by the Donor.

When acting under a Lasting Power of Attorney, Attorneys should: -

- Ensure that the statutory principles of the Mental Capacity Act are followed; and
- Check whether the person has the capacity to make that particular decision for themselves.

At all times Attorneys should remember: -

- Any decisions made on behalf of the Donor under the authority of the LPA must be in the Donor's best interests.
- Anyone acting as an Attorney must have regard to the parts of the Mental Capacity Act 2005 guidance and the Code of Practice that are relevant to the decision that is to be made
- Attorneys must act honestly and in good faith in their fulfillment of their responsibilities and duties to the Donor

If an Attorney nominated under a Property and Financial Affairs LPA becomes bankrupt at any point, they will no longer be allowed to act as an Attorney for Property and Financial Affairs. However, Attorneys who become bankrupt can still act as an Attorney for Health and Welfare LPAs.

Provided that the Donor has not restricted any decisions that the Attorneys can make in the LPAs, Attorneys will be able to act on behalf of the Donor in respect of any or all of the person's property and financial affairs including: -

- 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 all benefits, pensions, allowances and rebates
- 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 of nursing home fees
- Applying for any entitlement to funding for NHS care, social care of adaptation
- Using the Donor's money to buy a vehicle or any equipment or other help they need
- Repaying interest in capital and any loan taken out by the Donor

It is important for Attorneys to keep all receipts and statements regarding income and expenditure for the Donor. The Attorneys are advised to keep annual accounts which can be produced to the Office of the Public Guardian if ever they are requested. The Code of Practice recommends that Donors may like to appoint someone (perhaps a family member or professional) to go through their accounts with the Attorney from time to time. This has the benefit of reassuring Donors that somebody will check their financial affairs when they lack capacity to do so and it is also helpful for Attorneys to arrange a regular check that everything is being done properly. LDJ Solicitors are experienced in dealing with attorney accounts and would be happy to carry out an annual audit or preparation of attorney accounts if required.

### **3. Gifts**

An Attorney is allowed to make reasonable gifts of the Donor's money or belongings to people that are related to or connected with the Donor (including the Attorney) on specific occasions including: -

- Birthdays
- Weddings or Wedding Anniversaries
- Civil Partnership Ceremonies or Anniversaries
- On any other occasion when families, friends or associates usually give presents

Any gift must be reasonable in relation to the size of the Donor's estate and similar to gifts made by the Donor themselves previously

Some limited gifts may be possible for Inheritance Tax planning purposes but it is essential to obtain legal advice before making gifts for that purpose.

#### **4. Charitable donations**

If the Donor has previously regularly or occasionally made donations to a particular charity or charities, the Attorney is entitled to continue doing this on behalf of the Donor.

Any charitable donation must be reasonable in relation to the size of the Donor's estate

#### **5. What are my duties as Attorney?**

Attorneys acting under an LPA have a duty to: -

- Follow the statutory principles of the Mental Capacity Act
- When making decisions on behalf of the Donor where the Donor is unable to make that decision for themselves to do so in the Donor's best interests
- Have regard to the guidance in the Code of Practice
- Only make those decisions that the LPA authorises them to make.
- Attorneys must consult the Donor in respect of any decision that is to be made on behalf of the Donor.

Any Attorney acting under an LPA is acting as the chosen agent of the Donor and therefore has certain duties towards the Donor and has to comply with the Donor's instructions.

In particular Attorneys have a duty to: -

- Apply certain standards of care and skill when making decisions - this means that an Attorney must apply the same care, skill and diligence that he or she would use to make decisions about his or her own life, property and affairs.
- Carry out the Donor's instructions
- Not take advantage of their position and not benefit themselves but benefit only the Donor - this means that an Attorney must not allow their personal interest to conflict with their duties. If the Attorney is involved in making a decision in which they might have a personal interest that could conflict with those of the Donor, they should obtain legal advice or discuss the matter with the Office of the Public Guardian. An example of this might be where it is necessary to dispose of an asset that might have been bequeathed to the Attorney under the Donor's Will.
- Not to delegate decisions unless authorised to do so

- Acting in good faith. This means acting with honesty and integrity
- Keep the Donor's affairs confidential
- Comply with any directions of the Court of Protection
- Not give up the role without telling the Donor and the Court of Protection
- In relation to Property and Financial Affairs LPAs, Attorneys have a duty to keep proper accounts and to keep the Donor's money and property separate from their own.

## **6. Can I make decisions on behalf of the Donor?**

The starting point is to always assume that a person has the ability to make a decision for themselves unless it has been established that they cannot. Even though the Donor may not be able to manage their finances and affairs in general terms each decision that needs to be made must be considered individually.

The Donor may be able to make some decisions but not others and if the Donor is capable of making a particular decision for themselves you must not take the decision on behalf of the Donor but should act as they instruct.

If it is difficult for a person to make their own decision you should assist them as much as possible to help them make that decision for themselves and should only consider making the decision for them if they cannot make the decision even with help and support.

It is important to explain clearly to the Donor any information they may need to make the decision including the risks and benefits or the effect that the decision may have upon people close to them.

Try to use simple language and break information down into small parts that may be easier to understand and try to provide the information in a balanced way so that the Donor can make their own decision from all the options. Sometimes it may be necessary to repeat information again or even talk to the Donor about it again on another day.

To assess whether someone is capable of making a decision for themselves you must first be satisfied that (at the time the decision needs to be made) the Donor has an impairment of or disturbance in the functioning of the mind or brain. This may be due to a condition such as Alzheimer's, a condition associated with mental illness or it may be due to the symptoms of an injury or stroke. If the condition is temporary the decision should only be made on behalf of the Donor if the decision has to be made before the Donor regains capacity.

If a person does have an impairment of or disturbance in the functioning of the mind or brain you must then assess whether or not the Donor has capacity to make the decision. When assessing the Donor's ability to make a decision you should be careful not to make assumptions based upon age, appearance, their condition or aspects of their behaviour and you should apply the following four stage test: -

- Can the Donor understand the information that needs to be understood for them to be able to make the particular decision? For example, if it becomes necessary to sell the Donor's home (e.g. where the Donor is permanently in a residential home), does the Donor understand that the house needs to be sold either because the money to pay the fees must be found or where the house is becoming an expensive burden due to deterioration of the property, the need for garden maintenance, insurance etc. or can they not understand the need to raise money for the fees or the costs and difficulties of maintaining an empty house and are only able to make an emotional response based upon their wish that their house is not sold?
- Is the Donor able to retain the information long enough to make an informed decision? This does not mean that the Donor must be able to recall what was discussed an hour later but that, whilst they are making the decision, they are able to remember all of the relevant facts.
- Is the Donor able to weigh that information as part of the process of making the decision? For example can the Donor understand the pros and cons of a particular decision and weigh them up in their mind before coming to a decision? If the Donor is able to weigh up the information and realises that there are consequences of their decision, but they decide to make that decision anyway, you may not take the decisions for the Donor merely because you believe that the decision they have made is an unwise one. The Donor is entitled to make bad decisions without interference from their Attorney provided they understand the consequences of their decision.
- Is the Donor able to communicate their decision? The Donor may have difficulty speaking but they should be assisted to communicate their decision in whatever way possible if they are otherwise capable of making the decision for themselves. This may be communication by way of sign language, pictures or other means. If the ability to communicate is the only reason why it is believed that a Donor cannot make a decision the Attorney should consider whether the Donor would be able to communicate with specialised help and, if so, that help should be sought.

Where a major decision is made on behalf of the Donor it would be wise to keep a written note of the steps that were taken to assess the Donor's capacity to make the decision for themselves and the reasons for making the decision that was made.

## **7. Requirement to register EPAs**

If you are the Attorney under a valid EPA which was made prior to 1st October 2007 you must ensure that the EPA is registered with the Office of the Public Guardian if the Donor begins to lose the ability to make decisions for themselves. If you have been using an unregistered EPA and the Donor begins to lose the ability to make their own decisions they you should stop using the EPA and you should not act under the EPA until it has been properly registered with the Office of the Public Guardian.

## **8. What are my responsibilities where the Donor is unable to make a decision for themselves?**

Where you have assessed the Donor's capacity to make a decision and have decided that they are unable to make the decision for themselves you must still consult with the donor before making the decision.

The Donor may not be able to weigh or retain the information in order to make their own informed decision but they may be able to express their views. When making any decision on behalf of the Donor you must do so in the Donor's best interests.

Your assessment of what is in the Donor's best interests will include taking account of the Donor's past or present wishes and feelings, beliefs and values but you must also consider any other relevant factors.

It may also be wise to consult with the Donor's family members, carers or other professionals involved in the Donor's care before making any decision. These consultations should help you to assess what would be in the best interests of the Donor.

## **9. Deprivation of Liberty**

Sometimes it may be necessary either in your capacity as Attorney (where you are the Attorney under a Health and Welfare LPA) or as a family member, to make decisions in connection with care and treatment which may amount to a deprivation of liberty. For example where a person is living at home but is a danger to themselves it may be necessary to move them into a residential care home, alternatively a person may already be resident in a care home but wishes to leave (even though they would be unable to care for themselves at home). However if the person does not agree to the move any attempt to forcibly move them to a care home or to prevent them from leaving is likely to amount to a deprivation of their liberty and this can only be done if the move is formally authorised by the Court of Protection or, where the person is already in a care home but is being prevented from

leaving, by obtaining formal authorisation under the Deprivation of Liberty safeguards. This is a complicated area and if you find that you have to make a decision of this nature we would be happy to advise you further.