

What are my duties as an Attorney?

If the donor loses mental capacity, you will need to manage his/her property and affairs and make any decisions that he/she is unable to make himself/herself. For example, this might include:

- Paying bills.
- Operating bank accounts.
- Making investment decisions.
- Selling property.

The donor may specify in his/her LPA that you can act as Attorney even while he/she still has the capacity to make financial decisions for himself/herself. This does not mean that you can make all financial decisions for the donor, it just means that you can act on behalf of the donor if he/she allows you to do so at the time. This can be helpful if the donor is unwell (for example, he/she is physically unable to get to the bank) or on holiday for an extended period of time.

Will I be paid?

You can recover all of your out-of-pocket expenses from the donor. Out-of-pocket expenses include, for example, the cost of telephone calls to the donor, travel to the donor's bank and postage to pay the donor's household expenses.

You can only receive fees for acting as an Attorney if the donor has expressly authorised payment in the instructions section (section 7) of the LPA form. If you do not want to take on the role of Attorney without payment, you should discuss this with the donor and check the LPA form carefully before signing.

Are there limits on what I can and cannot do?

Restrictions imposed by law under the Mental Capacity Act 2005. The Mental Capacity Act 2005 (MCA 2005) covers LPAs and what you can do as an Attorney. The MCA 2005 contains the following seven important principles that you must observe:

- **A person must be assumed to have capacity unless it is established that they lack capacity.** This means that you must assume that the donor has capacity to make financial decisions and consider each decision as the donor makes it, giving him/her support to make the decision himself/herself, if he/she is able to do so.
- **A person is not to be treated as unable to make a decision unless all practical steps to help him/her to do so are taken without success.** Some people need help to make or communicate a decision. For example, you may need to help the donor with non-verbal communication (for example, writing down a decision or communicating by sign language) or provide relevant information in a more accessible format. The donor may have fluctuating capacity so there might, for example, be a particular time of day when it is best to try to help him/her to reach a decision.
- **A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.** It is important to recognise that the donor is an individual who may have very different beliefs, values and attitudes to you. This means that he/she may make a decision that you consider unwise, even though he/she does have capacity to make that decision.
- **An act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done or made in his/her best interests.** This is of fundamental importance and should underpin everything that you do on behalf of the donor.
- **Before the act is done, or the decision made, consider whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.** You should always consider whether any act on behalf of the donor could be done in a less restrictive way.
- **Record keeping.** You must keep accounts, receipts and records of financial transactions made on behalf of the donor. The Office of the Public Guardian (OPG) may ask you to produce these at any time. You should also keep your own finances completely separate from those of the donor.
- **Gifts.** There are strict limits on the kinds of gift that you can make on the donor's behalf. For example, you can give birthday, Christmas and wedding presents provided that the gifts are reasonable, with regard to the donor's financial resources. You cannot make gifts for inheritance tax planning or pay school fees for the donor's grandchildren without making an application to court. If you are in any doubt about whether you can make a gift using the donor's funds, seek professional advice or guidance from the OPG.
- **Other restrictions imposed by law.** If you are an unpaid attorney, you must apply the same care and skill that you would use to make decisions about your own life. Attorneys who are paid for their services, or claim to have particular skills or qualifications, must show a higher degree of care and skill.

You must also ensure that you:

- Do not place yourself in a position where your own personal interests conflict with those of the donor or where there is a real possibility that this will happen.
- Do not receive any unauthorised profit from your position as Attorney.
- Keep the affairs of the donor confidential.
- Do not delegate your authority as Attorney to anyone else, although you may take professional advice (for example, from an investment manager if the donor has given express authority in the instructions box in section 7 of the LPA).
- Act with honesty.

Donor's instructions. The donor can place additional restrictions on your authority in the LPA. These are called instructions and you should check any wording that is included in the instructions box in section 7 of the LPA very carefully before you sign it. Common instructions in an LPA for financial decisions include:

- Requiring you to submit annual accounts to a person of the donor's choice.
- Allowing you to appoint an investment manager to make decisions about the donor's investments.

Donor's preferences. The donor can provide advice in the LPA about how he/she would like you to manage his/her affairs. Unlike an instruction, this indicates the donor's preference, rather than something that you must do. For example, it might say that the donor would prefer you not to invest in tobacco companies or that he would like to keep his/her current account at a specific bank.

Can I deal with the donor's business interests?

Generally speaking, an attorney under an LPA can deal with the donor's business interests. However, you should check whether there is anything in the instructions section (section 7) of the LPA that states that you do not have authority to do this. A director of a company cannot delegate his/her powers and responsibilities to an attorney unless the articles of association of the company specifically allow it.

Who checks that I am acting properly?

Anyone who suspects that an attorney is not performing his duties properly, or is exploiting or abusing the donor, can contact the OPG. The OPG then looks into the complaint and may direct one of the team of visitors to visit an attorney and investigate. In more serious cases, the OPG refers the matter to the Court of Protection.

If you have concerns about a co-attorney, you should raise them with the co-attorney first and then, if it cannot be resolved, with the OPG.

Am I protected if things go wrong?

If you act in accordance with your legal duties and, in particular, in the best interests of the donor, then it is very unlikely that you will be criticised for any decisions that you make on behalf of the donor.

If you act under a registered LPA that turns out to be invalid, you will not incur any liability (to the donor or anyone else) unless:

- You knew that the LPA was invalid.
- You were aware of circumstances that would have terminated your authority to act under the LPA, if it was valid.

If you have acted improperly:

- You may need to pay the donor money to compensate for the donor's loss.
- In the case of ill-treatment or wilful neglect of the donor, an attorney can be found guilty of a criminal offence punishable by a fine or imprisonment of up to five years.
- You could be charged with fraud.

Registration

You or the donor can register the LPA with the OPG at any time. However, Attorney(s) can only use the LPA to make decisions on behalf of the donor after it is registered.

To register the LPA, the donor or Attorney(s) must sign the registration part of the LPA form (at the end) and give notice using an LP3 form to anyone that the donor has specified as "people to be told" . If you are applying for registration and are appointed as a joint Attorney, all of the Attorneys must add their details and sign the registration part of the form. If you are appointed as joint and several Attorneys, only one attorney need add their details and sign the registration part of the form.

The OPG charge a registration fee of £82 which is payable from the donor's funds. In cases of financial hardship, a lower fee may be charged or the fee may be waived.

How is the LPA used after registration?

When you start using the LPA, you may need to provide evidence of your authority to:

- Banks.
- Utility companies.
- The local authority.
- Care homes.
- Other third parties.

The requirements of each individual or organisation vary, for example, some may need to see the original registered LPA while others may only want a photocopy.

You should avoid sending the original registered LPA by post to a third party. Offer to supply an office or certified copy instead. You can get office copies from the OPG at a cost of £35 a document. Alternatively, a solicitor or accountant can certify a copy of the LPA.

How does my appointment end?

1. Death of donor or Attorney

When the donor dies, the LPA automatically comes to an end. Send the original LPA and the death certificate to the OPG as soon as possible.

If you are appointed as a joint Attorney and one of the other Attorneys dies, your appointment will end unless a replacement is appointed.

2. Giving up your appointment

You can decide to stop acting as an Attorney at any time. If the LPA is registered, you must send form LPA005 to the OPG to disclaim your appointment. You must also inform:

The donor.

All other Attorneys.

If you require any further information please contact a member of the Wills, Life Planning & Probate Department at Fisher Jones Greenwood.