

### What is a Property and Financial Affairs Lasting Power of Attorney (LPA)?

A legal document where a person (the Donor) has given authority to you (the Attorney) to make decisions on their behalf about their property and financial affairs. They were introduced in October 2007 by the Mental Capacity Act 2005 (the MCA).

### What is my role as Attorney?

This is a very important role. You may be able to make the same decisions about the Donor's property and finances that the Donor could normally make. However, you can only act once the LPA has been registered with the Office of the Public Guardian (OPG). Unless there is a restriction otherwise, you will be able to make decisions even when the Donor still has the capacity to make them themselves. However, in these circumstances you must consult with the Donor on any decision you are making.

### What if someone else is appointed with me?

Your appointment will be either jointly (all Attorneys must agree and act together), jointly and severally (each Attorney can act alone or you can act together) or jointly in respect of some matters and jointly and severally in respect of others (the Donor will specify in the LPA which decisions must be taken together).

### What are my duties as an Attorney?

You have a duty to act in accordance with the principles set out in the MCA, and in particular to act in the Donor's best interests. You also have a legal duty to comply with the guidance contained in the Code of Practice (the Code) accompanying the MCA. Your duties and obligations are set out in greater detail in the Code. We strongly advise that you obtain a copy of the Code (available from HM Stationery Office) and read it carefully if you are acting as an Attorney. You may also view the code online at the government website ([www.gov.uk](http://www.gov.uk) and search for Mental Capacity Act Code of Practice).

### When should I act?

The MCA states that every adult is assumed to have capacity to make a decision unless it is established otherwise. Please be aware that the MCA makes it clear that simply making an unwise decision is not sufficient to



show a lack of capacity. Therefore, you should only act when either:-

- the Donor still has capacity but has asked you to act; or
- the Donor is incapable of making the decision themselves.

## How do I decide if the Donor lacks capacity?

The term 'a person who lacks capacity' means someone who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken. When assessing capacity you should consider the following:-

- Does the Donor have a general understanding of the decision they need to make and why?
- Does the Donor understand the consequences of making or not making the decision?
- Can they understand, retain, use and weigh up the information needed to decide?
- Can they then communicate that decision, in whatever form?

Please see chapter four of the Code for more detailed guidance on assessing capacity. If in doubt consider seeking professional guidance and assistance.

## What are 'best interests'?

Unfortunately, the MCA does not define 'best interests'. However, the following is a useful checklist of the factors that you ought to consider and steps to take:-

- Make sure that all relevant circumstances of which you are aware, and which it is reasonable to regard as relevant, are considered.

- You should make all reasonable efforts to encourage and enable the Donor to take part in the decision.
- Take account of any past or present wishes, views, beliefs and values including religious, cultural and moral.
- Consider consulting family members, friends or carers or others close to the Donor.
- If the Donor is likely to regain capacity, can the decision be postponed?
- You should not make a decision based simply on the Donor's age, condition, appearance or behaviour.

If there is a dispute over what are the 'best interests' of the Donor and you cannot reach agreement by talking to others then the OPG can advise on what steps to take next.

## What type of decisions may I need to take?

Unless your power is restricted in any way, you can take any decisions the Donor could take themselves in respect of their property and finances. This could include buying or selling property, operating a bank account, claiming benefits, paying bills or dealing with tax affairs, you can also continue to make gifts on the Donor's behalf to family and friends at birthdays, weddings or other occasions such as Christmas or other religious festivals.

You can continue to make gifts to charity if that was what was the Donor did previously. Any gifts must be in keeping with past behaviour and reasonable in comparison to the Donor's assets. You cannot make larger gifts without the approval of the Court of Protection.

## Other matters of importance

You must always act honestly and with integrity. You have a duty to keep the Donor's affairs confidential unless the Donor has given consent otherwise. You must carry out

your duties personally and not delegate them to someone else. You can of course take professional or expert advice before making a decision.

You must not benefit personally from any decisions you make. You must not give up your role as Attorney without first notifying the Donor and the OPG. You must keep the Donor's money and property separate from your own. You must keep accounts of all your dealings as Attorney. You are allowed to claim out-of-pocket expenses provided they are reasonable but you cannot be paid for acting as Attorney unless the Donor has specifically authorised this.

## Summary

The duties of an Attorney are onerous and wide ranging. An LPA is such an important document that you must be satisfied that you are carrying out your duties to the best of your ability and in the best interests of the Donor. If in any doubt at all seek professional advice. Please note that the cost of any advice would normally be met from the Donor's funds.

## Talk to us...



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