
Acting as an Attorney: Your powers and duties explained

If you are named as an Attorney in a Lasting Power of Attorney, then you may be required to make decisions about the affairs of a friend or family member.

This could be because they ask you to (in the case of financial decisions), or because they now lack capacity to manage their own affairs. The person who appointed you in the Lasting Power of Attorney is called the Donor.

Perhaps your friend or relation has special needs, has had an accident or illness, or is suffering from Alzheimer's or Dementia.

As an Attorney, you'll be authorised by the Donor in advance to make decisions on their behalf, but you need to be mindful of the legal framework within which you are authorised to do so.

There are two types of Lasting Power of Attorney (LPAs):

- Property and Financial affairs - e.g. paying bills or organising investments;
- Health and Care - e.g. making decisions about medical treatment and how someone is looked after day-to-day.

Your loved one may have one or both of these LPAs in place.

Lasting Powers of Attorney must be registered with the Office of the Public Guardian (the 'OPG') before you can use them to make decisions on the Donor's behalf. If the Donor has not already registered their LPAs, then we can deal with this for you, although in most cases the LPAs will have been registered immediately.

The registration process takes about 8 weeks and so early registration is recommended. This ensures no delay, should you need to exercise your decision-making powers at short notice.

Who can be an Attorney?

For both types of LPA, Attorneys must be 18 years or over when they are appointed.

Other than this, there are no restrictions on who can be an Attorney for Health and Care decisions.

For Property and Financial affairs, the Attorney must not be bankrupt. If you are bankrupt and have been appointed as an Attorney, you'll need to tell us straight-away.

Sometimes, a professional, such as a solicitor will be appointed as an Attorney, either alone or with others.

When can an Attorney start to act?

As mentioned above, an Attorney can only act under the LPA after it has been registered.

- A Health and Care Attorney can only act when the Donor loses capacity;
- A Property and Financial Affairs Attorney can act before or after the Donor loses capacity, unless the Donor specifies that the Attorney cannot act until he or she has lost capacity.

For example, a Donor who has capacity but finds it difficult to get about or talk on the telephone, or is out of the country for long periods of time, may want an Attorney to manage some or all of their affairs.

Assessing Mental Capacity

If you are a Health and Care Attorney, you may need to assess the Donor's capacity to make decisions before making them on the Donor's behalf. You must take all possible steps to help the Donor make the decision for him or herself.

If you are a Property and Financial Affairs Attorney, you may also need to assess the Donor's capacity to make decisions, if the LPA says that you can only act after the Donor has lost capacity.

As an Attorney, you do not need to be an expert in assessing capacity, but you must have a reasonable belief that the Donor lacks capacity to make a decision before you can act on his or her behalf.

Sometimes, it may be necessary to get professional involvement in determining capacity, for example, when someone is challenging the decision on capacity, or where the decision to be made on behalf of the Donor has serious consequences.

Capacity must be assessed specifically in terms of the Donor's ability to make a particular decision at the time it needs to be made.

In other words, a Donor may have capacity to make a decision one day, but not on another day, in which case his or her capacity should be reassessed from time to time. Alternatively, a Donor may have a constant condition and frequent assessment of capacity is not necessary.

A person is not to be treated as unable to make a decision merely because he makes an unwise decision. A Donor's capacity must also not be judged simply on their age, appearance, condition or an aspect of their behaviour.

If you need more information about assessing capacity, please ask.

Recording Decisions

It is good practice for an Attorney to record the decisions that he or she makes about a Donor's mental capacity. If you are unsure about the Donor's capacity, you can contact us or the Public Guardian.

Our details are at the bottom of this factsheet and the contact details for the Public Guardian are as follows:

T: 0300 456 0300

E: customerservices@publicguardian.gsi.gov.uk.

Telephone lines at the Public Guardian are open Monday, Tuesday, Thursday, Friday 9 am to 5 pm and Wednesday from 10 am to 5 pm.

Access to the Donor's personal information

In carrying out your duties as an Attorney, you may need to access the Donor's personal information, for example, bank details or medical records, in order to help him or her make a decision in the Donor's best interests.

As long as the information applies to a decision that you, as an Attorney, has a legal right to make, you can ask for this information in the same way the Donor could have done, if he or she had capacity.

Where possible, you should restrict information requests to information that will assist in making the required decision, for example, if you need to know when the Donor should take medication, you should not ask to see the entire health record.

How have you been appointed?

You may have been appointed to act alone, or with other people in relation to the Donor's affairs.

If appointed with others, you may be appointed 'jointly', which means that you'll need to make decisions unanimously. Or, you may be appointed 'jointly and severally', which means that you can make decisions on your own or together.

What are your responsibilities of being an Attorney?

Your duties and responsibilities are set out in the Mental Capacity Act 2005 and you can find further information in the Act and also in the Lasting Power of Attorney document itself.

The key points are set out for you here:

- It must be assumed that the Donor can make their own decisions unless it is established that they can't;
- You must help the Donor to make as many of their own decisions as they can, and take any practical steps available, to help the Donor make their own decisions;
- You must not treat the Donor as being unable to make a decision simply because they make an unwise decision
- You must act and make decisions in the Donor's best interests when they are unable to make a decision;
- Before you make a decision on behalf of the Donor, you must consider whether they can make the decision or act in a way that is less restrictive of their rights or freedoms but still achieves the purpose.

Your key duty is that you must at all times act in the Donor's best interests (see below).

Best Interests

The overarching principle of the Mental Capacity Act 2005 is that Attorneys must act at all times in the Donor's best interest.

As long as decisions are in the best interests of the Donor, an Attorney is protected from liability.

Working out what is in someone's best interests may be difficult and the Mental Capacity Act 2005 gives a non-exhaustive checklist that must be taken into account when deciding best interests:

- Identify all relevant circumstances, including all the things that the Donor would take into account if he or she was making the decision for him or herself;

- Permit and encourage the Donor's participation in the decision;
- Consider whether mental capacity is likely to be regained in the future and potentially putting off the decision until later, if it is not urgent;
- Consider the Donor's past and present wishes and feelings, beliefs and values;
- Consider the views of people who are close to the person who lacks capacity, for example, family members, friends and carers;
- Avoid discrimination and do not make assumptions about the Donor's best interests simply on the basis of the Donor's age, appearance, condition and behaviour.

If you need more advice or guidance, please do not hesitate to contact us.

The Mental Capacity Code of Practice

The Code of Practice has further guidance for people who work with, or care for, people who lack capacity. Attorneys under a Lasting Power of Attorney are legally required to have regard to the Code of Practice.

The Code of Practice is available online or you can ask us to send you a copy. The guidance for Attorneys is set out in Chapter 7 and includes references to other chapters of the Code of Practice that may be helpful to you.

What can I do as an Attorney?

If you are a Property and Finance Attorney, you may be able to make property and finance decisions on behalf of the Donor as soon as the LPA has been registered (with the Donor's permission) or only if the Donor has lost capacity to make their own decisions. You will be able to liaise with banks, building societies and other financial institutions in relation to the Donor's accounts and investments.

You can make deposits and withdrawals on their behalf, pay bills and open or close accounts as required.

You may also be able to make gifts on behalf of the Donor in limited circumstances, although in some cases you'll need to get permission from the Court (see below).

If you are a Health and Care Attorney, and the Donor has lost capacity, you will be able to liaise with doctors, social services, local authorities, carers and other professionals involved in the Donor's care.

You will be able to make decisions on the Donor's behalf about where they live, how they are cared for as well as daily decisions, such as what they eat and wear.

You may also be able to make decisions about 'life sustaining treatment' if the Donor has said this in their Health and Care LPA.

Although there are many decisions that you'll be able to make as an Attorney, there are also certain things that you can't do. We routinely advise Attorneys on complex decision-making.

We also act for Attorneys in the day-to-day management of Donors' financial affairs, by keeping and maintaining good financial records, arranging for bills to be paid, sorting and advising on paperwork for care homes, liaising with financial advisors and accountants in relation to larger financial decisions or investments, and everything in between.

Duty to keep accounts and records

If you are a Property and Finance Attorney, you must keep details of transactions carried out on the Donor's behalf. If the Donor's affairs are straight-forward, bank statements may be sufficient. If the Donor's affairs are more complicated, details accounts may be required. If you need any help, please ask.

Can an Attorney make gifts of the Donor's money or property?

If you are a Property and Finance Attorney, your main duty is to provide for the Donor's needs. Your main focus should be on maintaining and providing for the Donor.

The Mental Capacity Act says that an Attorney has no authority to make gifts except in the following limited circumstances:

- On customary occasions, such as birthdays, anniversary, marriages or civil partnerships, or any other occasion on which presents are customarily given within families or among friends or associates;
- These gifts may be made to persons (including an Attorney) who are related to or connected with the Donor;
- Gifts may also be made to any charity to whom the Donor made or might have been expected to make gifts;
- The value of each gift should not be unreasonable, having regard to all of the circumstances and, in particular, the size of the Donor's estate.

If you are an Attorney for Property and Finance and want to make other gifts, you'll need to apply to the Court of Protection for authority. We can help you with this application, if you need us to.

Can I get paid as an Attorney?

An Attorney is entitled to be reimbursed for out-of-pocket expenses incurred in carrying out his duties. Professional Attorneys, such as Solicitors of accountants, charge for their services although a Donor can also decide to pay a lay Attorney.

The Donor should discuss and record any decisions made about paying Attorneys in the Lasting Power of Attorney itself. If there is nothing noted in the Lasting Power of Attorney itself then a lay Attorney cannot be paid, other than to recover his or her out-of-pocket expenses.

Can an Attorney make a Will for someone who lacks capacity?

Yes, it is possible to make an application to the Court of Protection for what is called a Statutory Will. Please get in touch if you need advice about this.

What if an Attorney disagrees with a decision of another Attorney?

If an Attorney disagrees with a decision of another Attorney, or believes the Attorney is acting outside of his or her powers, or not in the best interests of the Donor, the Attorney should initially raise his or her concerns with the other Attorney. If that does not resolve the situation, only then should the Attorney raise his or her concerns with the Office of the Public Guardian (see above for contact details).

If a decision is being challenged, the Attorney should be able to support his or her claim with evidence that the other Attorney is not acting in the Donor's best interests. The fact that the Attorney disagrees with the decision is not in itself grounds to challenge it.

Can I stop being an Attorney?

Yes, you can stop acting as an Attorney at any time. If the Lasting Power of Attorney is registered, you'll need to tell us and the Office of the Public Guardian.

If you'd like more information call **01904 866139**
or email hello@rochelegal.co.uk



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