

Duties of attorneys

Attorneys acting under an LPA have a duty to:

- follow the Act's statutory principles make decisions in the donor's best interests
- have regard to the guidance in the Code of Practice
- only make those decisions the LPA gives them authority to make.
- apply certain standards of care and skill (duty of care) when making decisions
- carry out the donor's instructions
- not take advantage of their position and not benefit themselves, but benefit the donor (fiduciary duty)
- not delegate decisions, unless authorised to do so
- act in good faith
- respect confidentiality
- comply with the directions of the Court of Protection
- not give up the role without telling the donor and the court.

*For LPA forms and to register one, please go to the following website:

<http://www.justice.gov.uk/forms/opg/lasting-power-of-attorney>



Mental Capacity Act Information Sheet 5



LASTING POWER OF ATTORNEY

The Mental Capacity Act 2005 was implemented by parliament in 2007 and is a vitally important piece of legislation for England and Wales. Applying to all people over the age of 16 it offers the opportunity to plan ahead as to how decisions should be made about you if you ever lose the capacity to decide how you would want to be cared for or make decisions about medical treatment. It also provides a framework and a safeguard for anyone who is currently unable to make decisions for themselves for a number of reasons to ensure they are at the heart of decision making when decisions are being made on their behalf. Certain professionals are legally required to abide by it including doctors, nurses, paid carers, dentists to name a few. The Act introduced a new power for people that have capacity, to complete what is known as a Lasting Power of Attorney, whereby they may formally appoint someone to make decisions on their behalf in the event they lose capacity to make certain decisions in the future. This information sheet is an overview of this power, how you can create a Lasting Power of Attorney (LPA) as well as what your responsibilities are if you are the person appointed to be an attorney; or a professional providing care for someone who has an LPA in place.

In this leaflet:

- What is a Lasting Power of Attorney
- What powers does it afford individuals

For further information regarding our training courses, workshops and consultancy please contact us via one of the following methods.

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Lasting Power of Attorney

A power of attorney is a legal document that gives a person the opportunity to give someone else the authority to make decisions on their behalf. Attorney is the name given to the person appointed with decision-making powers within the LPA. Donor is the name given to the person that has made an LPA. People make LPAs as a safeguard should they lose their capacity to make certain decisions in the future. This means that they can appoint someone to make decisions as if able to themselves.

There are two types of LPAs:

Personal Welfare

Attorneys and/or deputies can be appointed to make decisions about personal welfare, which can include healthcare and medical treatment decisions. The person making the LPA will want to consider whether they want the attorney to be able to make life sustaining treatment decisions or whether they give this responsibility to the relevant medical professional. Personal welfare LPAs might include decisions about where the donor lives; day to day care; consent to treatment; who the donor can have contact with; medical, dental or optical treatment; assessments of care; personal correspondence; rights of access to personal information about the donor or complaints about the donor's care or treatment. This list is not exhaustive.

When attorneys are making best interests decisions they must consider the donor's past and present wishes, feelings, beliefs and values. Donors will want to ensure their attorney is familiar these. Donors can appoint an attorney to make only certain decisions for example about social care but not healthcare or they may appoint different people for different aspects of decision-making. A personal welfare LPA can only be used at a time when the donor lacks capacity to make a specific welfare decision.

Property and Affairs

Once registered, the attorney is allowed to make all decisions about the donor's property and affairs even if the donor still has capacity to make those decisions themselves. Alternatively a donor can state that the LPA should only apply when they lack capacity to make a relevant decision. Decisions may include buying or selling property, opening or closing bank accounts, receiving income on behalf of the donor, dealing with tax, rent, mortgage and household expenses, investing savings, paying for care, applying for NHS or social care funding, using the money to buy a vehicle or equipment or other help the donor needs. This list is not exhaustive.

Lasting Power of Attorney

Restrictions on attorneys powers

Attorneys are not protected from liability if they do something that is intended to restrain the donor, unless:

- the attorney reasonably believes that the donor lacks capacity to make the decision in question, and
- the attorney reasonably believes that restraint is necessary to prevent harm to the donor, and
- the type of restraint used is in proportion to the likelihood and the seriousness of the harm.

Attorneys have no authority to take actions that result in the donor being deprived of their liberty. Any deprivation of liberty will only be lawful if this has been properly authorised and there is other protection available for the person who lacks capacity.

Professional responsibility

Health and social care professionals need to be aware if someone else has responsibility for decision making for a person and what specifically these responsibilities are. Where a person lacks capacity to appoint their own attorney, the Court of Protection can appoint a Deputy, the same rules and responsibilities apply to Deputies as they do to Attorneys. LPAs need to be registered with the Office of Public Guardian*.

Health or social care staff involved in preparing a care plan for someone who has appointed a personal welfare attorney, must first assess whether the donor has capacity to agree to the care plan or to parts of it. If the donor lacks capacity, professionals must then consult the attorney and get their agreement to the care plan. They will also need to consult the attorney when considering what action is in the person's best interests.

If healthcare staff disagree with the attorney's assessment of best interests, they should discuss the case with other medical experts and/or get a formal second opinion. Then they should discuss the matter further with the attorney. If they cannot settle the disagreement, they can apply to the Court of Protection. While the court is coming to a decision, healthcare staff can give life-sustaining treatment to prolong the donor's life or stop their condition getting worse.