

Wills, Trusts and Probate Briefings

Being an attorney under a lasting power of attorney

Agreeing to be an attorney

When someone (the "donor") makes a lasting power of attorney (LPA), they appoint one or more individuals (the "attorneys") to make decisions on their behalf. The LPA specifies what kinds of decisions the attorney will be able to take, and under what circumstances - typically when the donor no longer has the mental capacity to do so.

Before agreeing to be an attorney, you should think carefully about what you might be letting yourself in for. Being an attorney could involve difficult decisions about issues such as healthcare (eg should the donor be moved into residential care) or finances (eg claiming benefits and dealing with taxes on behalf of the donor). Although you can reclaim reasonable expenses, the role is unpaid (unless you are a professional attorney).

If you do not think you are likely to be able to fulfil the role - for example, if you do not think you have the expertise, or the energy - you should let the donor know. This is preferable to accepting the role only to surrender it at a later date, when the donor may no longer be in a position to make other arrangements.

Your legal responsibilities

As an attorney, your legal responsibilities include:

- Acting in the donor's best interests and taking reasonable care when making decisions on their behalf.
- Acting in accordance with the terms of the LPA (see below).
- Helping the donor to make their own decisions where possible rather than simply taking control.

More detailed guidance on your responsibilities is available in the Code of Practice (available from the Office of the Public Guardian). You should obtain a copy of this guidance, as you must take it into account. As part of the process of making the LPA, you will be required to sign a statement confirming that you understand your legal responsibilities as an attorney.

You could be ordered to compensate the donor for any losses they suffer if you have not performed your duties properly. You could also face criminal charges if you ill-treat or wilfully neglect the donor.

Your authority

An LPA does not give you unlimited authority to make decisions on behalf of the donor.

There are two types of LPA. An LPA can be either a Property and Affairs LPA (which allows the attorney to make decisions about finances and property) or a Personal Welfare LPA (healthcare and personal welfare decisions). Being appointed under a Property and Affairs LPA does not give you the authority to make personal welfare decisions - and vice versa - though you can be appointed as an attorney under both kinds of LPA.

In addition:

- You cannot act under an LPA until it has been registered with the Office of the Public Guardian.
- An LPA may only authorise you to act if the donor lacks the mental capacity to make the decision (see below). This restriction automatically applies to any Personal Welfare LPA.
- If you have been appointed under a Personal Welfare LPA, you can only take decisions on whether the donor accepts "life-sustaining" treatments if the LPA specifically says so.
- The LPA may also include further restrictions on the decisions you can take.
- The donor may discuss their wishes with you, or include guidance in the LPA. You should take this guidance into account

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when making decisions. When appropriate, you may also need to consult with the donor's family or friends.

- An LPA may appoint more than one attorney. If so, the attorneys may be required to make some or all decisions together (ie unanimously) rather than independently.
- If the donor has made more than one LPA (or other kinds of power of attorney), you may need to cooperate with other attorneys where your authorities overlap. You should take advice if the extent of your authority to make decisions independently is unclear.

If you are only authorised to act if the donor lacks mental capacity, you will need to check whether the donor has the capacity on a decision-by-decision basis. For example, the donor might be capable of making small decisions (such as what to wear) but not complex decisions about where to live or financial issues. In each case, you should start from the assumption that the donor is capable - and look for ways to help the donor make the decision - rather than just taking control.

To help decide whether the donor lacks capacity, you can apply a two stage test:

- Is the donor's mind or brain impaired or disturbed in some way?
- Does this make the donor unable to take the decision at the time it needs to be taken?

If you are unsure whether the donor has capacity, you can get an expert opinion (eg from a doctor). Bear in mind that simply disagreeing with you, or making foolish or eccentric decisions, does not mean that the donor lacks capacity.

Practical issues

If the donor loses capacity before the LPA has been registered, you can apply to the Office of the Public Guardian to register it. You should do this as soon as possible - there will be a six week delay (at least) before the registration takes effect.

Once you are acting as an attorney, there are several practical issues you need to take into account:

- If you are acting under a Property and Affairs LPA, you must keep the donor's finances and possessions separate from your own. You must also keep accurate accounts showing what you have done.
- If you need to make a decision but do not know what the best decision would be, you can take advice. For example, you could consult a financial adviser about investments. However, you cannot delegate decision-making to someone else unless the LPA authorises you to do so.
- If you feel that a decision needs to be taken that is not within your powers, you can apply to the Court of Protection. For example, if you are an attorney under a Property and Affairs LPA and want to make large gifts as part of an inheritance tax planning strategy, you are likely to need court approval.
- If the donor dies, you should send the LPA and a copy of the death certificate to the Office of the Public Guardian. You have no further power to act for the donor (unless you are appointed as an executor under the donor's will)
- If you no longer wish to be an attorney, you can surrender the role. If the LPA has not yet been registered, you should give formal notice to the donor. If the LPA has been registered, you must contact the Office of the Public Guardian.

Again, further guidance is available in the Code of Practice.