

Guidance:

Lasting Powers of Attorney (LPA) & Deputyship

Part 2 - Dealing with a person's property and investing their money - A guide for Attorneys and Deputies.

These guidelines summarise the position of a deputy or an attorney, highlighting the key areas of which you need to be aware. Ignorance of the law is no excuse before the court, so it is important that you understand your duties and the consequences of not carrying them out properly. Remember these guidelines only highlight the areas of concern and you may need to get legal advice or carry out further research if you still have questions.

Remember: your primary duty is to involve the person in decisions about their affairs wherever possible and to act in the best interests of the person for whom you have been appointed.

Section 4 *Mental Capacity Act 2005* detailed in part 1 sets this out.

Bank Accounts

- Attorneys and Deputies should generally keep donor's money separate to their own*.
- Funds should be held in the donor's sole name where possible.

*Where, for instance, a husband and wife have always operated a joint account, this can continue on the same basis as before if considered appropriate. It may be wise to seek advice before making significant withdrawals if they are not for donor's benefit and out of character with what has been done before the donor lost capacity

The British Banking Association, Building Societies Association has produced helpful guidance in conjunction with the Office of the Public Guardian for people wanting to manage a bank account for someone else'. Further guidance can be found at:

<https://www.bsa.org.uk/document-library/press-and-public-affairs/press-releases/3rd-party-mandate-guidance>

Court of Protection - Court order or Deputyship

If you are appointed as a deputy for a person who does not have mental capacity, you will need to contact their bank or building society so that they can set up appropriate arrangements. The bank or building society will need to see the following things before they will give you access to the account.

- The court order or a copy of it.
- Proof of your name and address and the name and address of the account holder

You may also need to fill in a registration form.

Lasting Power of Attorney - Property and Financial affairs

Before you can use your authority, the LPA must be registered with the Office of the Public Guardian (OPG). Having the LPA registered does not mean that the donor has lost their mental capacity.

Once the LPA has been registered with the OPG, the bank or building society will need to see the following things before you can start managing the donor's financial affairs:

- The filled-in and signed LPA form, registered with the OPG.
- Proof of your and the donor's names and addresses (if the bank or building society does not already have them).

The LPA form you give to the bank or building society must be:

- The original document or a copy which the OPG has stamped every page of; **or**
- Signed on every page by the donor, a Solicitor or a notary to confirm that it is a true copy of the original LPA.

You may also need to fill in a registration form.

Investments

For anything non-cash or bank account savings such as Stocks & Shares:

- Investments made on behalf of the donor should be made in the donor's sole name where possible.
- If you are unable to register the investment in the donor's name, and so hold them in your own name you must make a declaration of trust that acknowledges the donor's interest in the asset. You will need to seek legal advice in this respect.
- Wherever appropriate you should seek professional investment advice
- Again, you have an obligation to act in P's best interests.
- You must keep financial records.
- Check what authority your EPA, LPA or Deputyship Order gives you.
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CASE: Re Buckley

In the case of *Re Buckley*, the Attorney made an investment in her own name rather than her donor's and had her Power of Attorney revoked.

http://www.mentalhealthlaw.co.uk/media/Re_Buckley_%282013%29_MHLO_13_%28LPA%29.pdf

In *Re Buckley* the Attorney invested assets in her own reptile business and was penalised.

Good practice of the Deputy or Attorney could involve:

- Obtaining and having regard to proper advice, generally from a Financial Advisor (see below)
- The requirement to review and vary the investments as appropriate
- Ensuring the suitability of the investments
- The need to diversify investments
- The need to keep the donor's assets separate from your own

Develop an understanding of the donor's needs, income and outgoings and capital resources. Also consider if there might be one off items of significant expenditure (or receipts e.g. an inheritance). Consider cash flow modelling for an idea of how long funds might last and the impact of one-off expenses.

Discretionary fund management

The Office of the Public Guardian recently published an update to its guidance on powers of attorney. A key update is to the guidance given on the use of discretionary investment portfolios.

The new guidance suggests that when creating a financial lasting power of attorney (LPA), donors should include specific wording to allow their attorneys to delegate investment management decisions to a discretionary investment manager, such as a bank or IFA. The OPG also suggests that without specific wording within an LPA, attorneys would not be able to use a discretionary management service and would have to make investment decisions themselves. It also suggests that the wording should be checked by the relevant financial institution before the LPA is registered.

If your authority does not specifically give power to use or continue use a Discretionary Fund Manager (DFM) then you may need to apply to the Court of Protection for authority.

Seeking Financial Advice

The chosen Financial Adviser should be acting in your best interests, and therefore in the best interests of the donor.

Questions to ask the financial advisor before employing them would include:

- Are you fully independent or 'restricted' in relation to the advice you give?
- What qualifications do you have?
- What experience do you have of managing and advising on funds for Deputies and Attorneys?
- How do you charge for your advice – both initial advice and on-going monitoring and advice – please give a clear breakdown of all charges involved?
- How do you select investments?
- What measures do you use for assessing 'risk'?
- How have your investments and portfolios for Deputies and Attorneys performed over the last 5-10 years?
- How long has the firm been in business? How long have you been at this firm? How many advisors are there in the firm regularly doing this work?
- You should also make sure that the firm is reputable and financially sound and has

Buying property or shares in property from the donor

- You are not allowed to profit from your role as Deputy or Attorney in any way. This includes not putting your own interests before those of the donor.
- You will need to apply to the Court of Protection for their authority to buy one of the donor's assets or to sell it to a family member, even if it is at market value or they would want you to do it.

As a Deputy or Attorney, you cannot act in a way that causes a conflict of interests. Living in the same house *may* cause a conflict between your personal role and your role as deputy or attorney. If you have any concerns you should seek advice. It is possible to obtain permission to do so but you must apply to the Court.

Where a family member lives with the donor it will be sensible to have an agreement setting out the basis for this including what should happen if the donor moves out for any reason and responsibility for paying utilities etc.

- If there is an independent third party living in the house to act as a carer, there should be a contract of employment. You will have to consider employment liability insurance, National Insurance, PAYE Income tax and pension responsibilities.
- If there is joint ownership of the property with the donor then it is important to check the title and clarify what will happen to the property on the death of the donor. You may need to put a Trust in place.
- If you are to be employed, you will need the permission of the Court.
- If the donor had a tenancy or lease of a property in their sole name or jointly with you, and you or someone else continues to occupy, you and not the donor are responsible for the rent etc. after the donor has moved out. The same considerations apply if the donor occupies a property under the terms of a trust.

Property Extensions

Paying for property extensions/home improvements for the donor to live with you:

Remember that you must not benefit from your position. Perhaps the best way to consider this scenario is by reference to the case *Public Guardian v AW and DH* below

CASE: *Public Guardian v AW and DH*

The Attorney in this case renovated her home to cater for the needs of her mother, using £183,000 of her mother's estate. It was held that this was a disproportionate amount and her LPA was revoked. Her mother, due to the onset of dementia, had been unable to stop the spending of more money. AH's home underwent significant improvements, including the fitting of a new kitchen.

<http://www.bailii.org/ew/cases/EWCOP/2014/28.html>

If you decide to make such renovations/improvements, these guidelines recommend that:

- You acknowledge the beneficial interest of the donor in your home. If extensions have been made it's important to recognise that this doesn't belong to you solely & ensure the title to the land reflects this.
- You shouldn't make these decisions on your own if there are other Attorneys.
- It is best to apply to the Court when making such decisions to protect the interests of both parties.

Paying for property extensions/home improvements to the donor's home:

Does your LPA or Deputyship enable you to incur the cost?

- If the donor is still living there, does the expense make it easier for him/her to do so?
- Is the expense proportionate and affordable for the donor given other expenditure and income?
- If the property is unoccupied make sure you have documented your reasons and your budgets for carrying out the work.
- Consider contacting the OPG for guidance or applying to the Court for authority.

Making Gifts

If you transfer money, property, or possessions from the donor to yourself or to others you are making a gift. There can be no generalised approach to making gifts.

- The safest option is to make no gifts out of the estate of the donor.
- Typically, a Deputy has the power to make gifts on customary occasions to relatives or persons connected to the individual e.g. birthday gifts. It must be a reasonable gift having regard to the size of the estate.
- Deputies usually have the power to make gifts to charities which the donor might have made gifts to. Again, it must be reasonable and proportionate.
- The powers of an attorney are not express but are in line with those of a Deputy.
- The OPG have issued guidance on this – **02/2012 – Gifts**, and OPG2

(<https://www.gov.uk/government/.../public-guardian-practice-note-gifts>) If in doubt apply to the court.

Consequences of unauthorised gifts (i.e. made beyond your powers)

- The Public Guardian can:
- Revoke your deputyship or Power of Attorney.
- Request the return of gifts and compensation for the assets.
- Refer the matter to the police.
- Require you to apply for retrospective approval from the Court if it seems likely that you would have been able to obtain it.

Recovery of expenses and being paid generally

An Attorney or Deputy may recover out of pocket expenses they incur but should not pay themselves or other family members a wage or salary without first getting approval from the Court of Protection. The Office of the Public Guardian has issued guidance on this matter:

- <https://www.gov.uk/government/.../public-guardian-practice-note-gifts>
- <http://www.courtprotectionhub.uk/cases/december-07th-2015>

Keeping accounts

- Property & Financial Affairs Deputies are required by the Order appointing them to keep and annually (or more frequently if requested) submit to the Public Guardian correct accounts for all financial transactions on the donor's behalf.
- You must report each year to the Public Guardian with their form number OPG102 or OPG103 as appropriate. A professional Deputy must also complete the OPG105 outlining future likely costs.
- Property and Financial Affairs attorneys (where there is a registered LPA in place) should keep clear accounts and records for all transactions on the donor's behalf. There are no reporting requirements but the OPG can ask for records at any time.

Deputyship standards

The OPG issued standards in 2014 for Professional Deputies:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf.

These bear careful reading and implementation to ensure you are acting in the donor's best interests and can demonstrate this to the OPG.

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