

Lasting Powers of Attorney & Deputyship

Part 1 – The Basics Lasting Power of Attorney (LPA)

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* sets out the steps to be taken in that regard:

www.legislation.gov.uk/ukpga/2005/9/section/4

The Mental Capacity Act 2005 Code of Practice gives further useful guidance that should be followed:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

Glossary

Advance Decision

In England & Wales, an advance decision made by you that at a later time and in circumstances specified by you, and when you're not otherwise able to consent or refuse the treatment, you don't wish a specified treatment to be carried out or continued. Also known as a Living Will.

Advance Directive

A written record of decisions about your future health care.

Attorney

A person who has authority to act on behalf of another.

Best interests

In England & Wales, the Attorney must act in and consider the Donor's best interests. The term is undefined but there are a number of matters that must be taken into account.

Certificate provider

A person who provides the certificate required by the Lasting Power of Attorney.

Court of Protection

When a person who does not have mental capacity has not made, or is not capable of making, a power of attorney, the Court of Protection can decide who can handle that person's affairs.

Donor

A person who grants a Power of Attorney.

Life-sustaining treatment

Treatment which in the view of the person providing health care is necessary to keep someone alive.

Limited power

An authority that is restricted to specified acts or type of acts, or to a specified time period.

Office of the Public Guardian

Protects people who may not have the mental capacity to make certain decisions for themselves, such as about their health and finances.

Mental Capacity Act 2005 ('the Act')

Main principles

- The Donor is assumed to be mentally capable of making all decisions for him/herself unless or until shown otherwise.
- A finding of lack of capacity for one decision does not mean they cannot make other decisions for him/herself.
- The donor is only treated as unable to make a decision once all practical steps have been taken to help the donor come to that decision him/herself and the donor is still unable.
- An unwise or eccentric decision doesn't mean someone is incapable.
- Any act done on behalf of the donor must be done in his/her best interests
- Before the act is done or decision made, regard must be had as to whether the same purpose can be achieved in a way that is less restrictive of the donor's rights and freedoms.

What is capacity & when does someone lack capacity?

Section 2 of the Mental Capacity Act defines when someone lacks capacity.

In short, it says that someone lacks capacity if they are unable to make a decision because of brain impairment or difficulty with functioning of the mind.

Section 3 of the Act states that someone is unable to make a decision where they are unable to understand, retain, or weigh the information necessary to make that decision.

Remember that the ability to make decisions is time and issue specific; a person may be able to make decisions about paying an electricity bill, but not investing their funds.

What the Deputyship Order/Power of Attorney document says

Deputyship Order

The Deputyship Order will set out specific powers and limitations, usually in section 2. Powers could apply to any aspect of the person's (donor's) life e.g. finance and/or personal welfare. Usually where you have been given financial responsibility, the Order will state that a Deputy should take investment advice especially where donor has substantial assets. The Order may well contain powers or restrictions about dealing with donor's property.

You should:

- *Always* make decision in the donor's best interests
- Only make decisions within the scope of the Court order
- Respect the principles in the *Mental Capacity Act* (above)

Power of Attorney

The Lasting Power of Attorney document must be registered with the Office of the Public Guardian (OPG) before you can use it. There are 2 parts: Health & Welfare and Property & Financial.

If the document doesn't specify restrictions on the decisions an Attorney can make, the Attorney can make decisions in respect of any aspects of the donor's property and financial affairs.

For both Deputyship and Attorneyship, your powers may be sole, joint or joint and several. If they are joint, you must always act alongside your Co-Deputy or Attorney.

If the donor has investments, consider the points below about using or continuing to use donor's investment advisor.

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