



Being an Attorney Under A Property and Financial Affairs LPA



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This document provides general guidance about what is involved in acting as an attorney under a property and financial affairs lasting power of attorney (LPA). Your Private Client lawyer will be able to provide specific advice based on your circumstances.

Acting as an LPA attorney for a relative or friend is an important responsibility that should be fully understood before the role is accepted and taken on. This guide aims to provide an overview of the powers and responsibilities of a property and financial affairs LPA attorney and explains what steps you are likely to need to take in managing your loved one's affairs.

What is an LPA?

An LPA is a legal document that enables an individual (the donor) to appoint one or more trusted people (known as attorneys or donees) to manage their affairs and make decisions on their behalf in the event that they lose mental capacity. Before an LPA can be used, it must be registered with the Office of the Public Guardian (OPG).



There are two types of LPA: an LPA for delegating decisions relating to the donor's property and financial affairs and an LPA for delegating decisions relating to the donor's health and welfare. This guide considers the role of an attorney under a property and financial affairs LPA.



What tasks will I need to carry out on behalf of the donor?

Subject to any specific restrictions in the LPA form, a property and financial affairs attorney will typically carry out the following tasks on behalf of the donor:

- using their bank and building society current and savings accounts
- claiming their pensions and any other benefits and allowances to which they are entitled
- dealing with their tax affairs
- paying their household, care and other bills
- making gifts on their behalf, within certain limits

broadly speaking, the attorney's power to make gifts on behalf of the donor is limited to making gifts to family members or friends of the donor on 'customary occasions' and gifts to charity. Any such gifts must be of reasonable value given the size of the donor's estate and must be within what the donor can comfortably afford. If you wish to make gifts outside of these limits (eg the payment of school or university fees or letting someone live in the donor's property without paying market rent) then you should seek legal advice as an application to the Court of Protection is likely to be required to authorise the gift

- making and selling investments for them
- dealing with the donor's properties—eg buying or selling property, paying any mortgage or rent, collecting rental income where appropriate
- note that you will need to obtain legal advice if the sale is below the market value or if you want to buy the property yourself
- maintaining or repairing their home
- using the donor's money to buy things they need, such as clothes



What are my key duties as an LPA attorney?

As a property and affairs LPA attorney, you should always:

- **act in accordance with the scope of your authority under the LPA** (see 'Familiarise yourself with your powers under the LPA' below)
- **act in accordance with the principles set out under the Mental Capacity Act 2005** (see 'Key principles when making decisions on behalf of the donor' below)
- **act with honesty and integrity** at all times when dealing with the donor's affairs
- **keep the donor's finances separate from your own or anyone else's**, for example by opening a separate bank account for the donor. The main exception to this rule would be where you are the husband, wife or partner of the donor and you have a history of joint banking
- **avoid conflicts of interest**—ie do not put yourself in a position where your personal interests conflict with your duties as attorney or where you receive any profit or personal benefit from your position
- **keep records**—it is important that you keep a record of all financial decisions made on the donor's behalf. This would include recording all significant transactions and keeping receipts for major purchases
- **keep the donor's affairs confidential** unless the donor agreed, when they had capacity, that certain information could be revealed for a particular purpose or there is some other good reason to release it (such as being in the donor's best interests or in the public interest or where there is a risk of harm to the donor or others)



Familiarise yourself with your powers under the LPA

Check section 7 of the LPA form for any instructions and/or preferences the donor might have included. You are bound to follow any instructions. Preferences are not legally binding but you should always consider them when making decisions and try to follow them where appropriate.

If there are other attorneys appointed, make sure you understand how you are required to take decisions together. There are three options in section 3 of the LPA form:



- **jointly and severally:** if the donor has selected this option, the attorneys can make decisions on their own or together. This means that all the attorneys can get together to make important decisions if they wish but are free to make simple or urgent decisions on their own. It's up to the attorneys to choose when they act together or alone. It also means that if one of the attorneys dies or is no longer able to act, the LPA will still be valid and the remaining attorneys can continue to act
- **jointly:** jointly appointed attorneys must agree unanimously on every decision, however big or small. If one attorney dies or becomes unable to act, the LPA will stop working unless replacement attorneys are appointed

It is also worth remembering that, whilst joint attorneys must all agree on decisions, they don't necessarily have to carry them out together. However, some organisations such as banks might require all joint attorneys to be present to withdraw funds, for instance

- **jointly for some decisions, jointly and severally for other decisions:** this means that attorneys must agree unanimously on some decisions but can make others on their own. If the donor has selected this option, you should familiarise yourselves with which decisions you need to make jointly and which you can make alone. This information should be set out on Continuation sheet 2 of the LPA form

It is important to bear in mind that, as a property and financial affairs attorney, you are not authorised to make decisions about the donor's health and welfare unless the donor has also appointed you as attorney under a separate health and welfare LPA. You may however need to provide your input into health and welfare decisions, for example, in respect of the affordability of different care options.

Key principles when making decisions on behalf of the donor

Before you start making decisions on behalf of the donor, it is important that you familiarise yourself with the key principles in the Mental Capacity Act 2005 (MCA), which govern all decision making on behalf of people without mental capacity. The key points to note are as follows:

- **the donor should make decisions for themselves unless it can be shown that they're unable or don't want to make them**

the donor might be able to manage a small 'pocket money' account and make everyday decisions about purchasing food or clothes but be unable to understand and make more complex decisions, such as about selling their house. Their mental capacity may also fluctuate, so they may be able to make decisions at some times but not others

- **you should give the donor all the help they need to make a decision before deciding they can't make that decision**

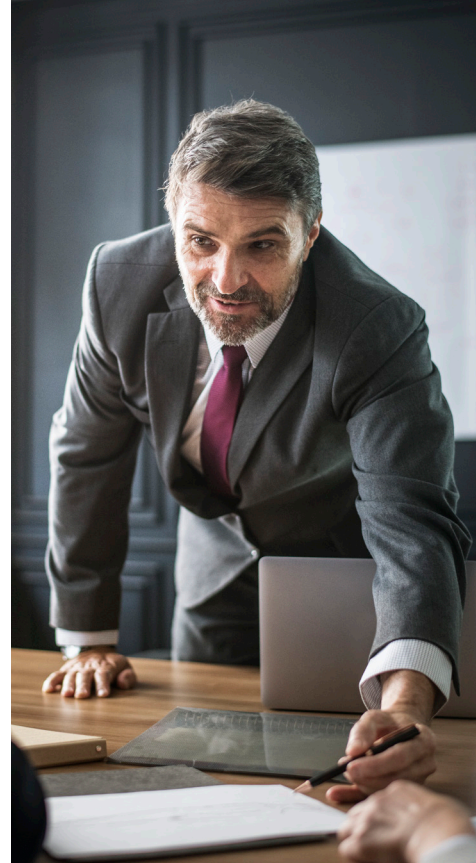
for example, the donor may be less confused in a familiar setting like their home, rather than in an unfamiliar environment. Perhaps there are times of day when the donor is more alert and better able to take decisions. You could also try different ways of communicating, such as pictures or sign language, to explain a decision to the donor. If the donor has difficulties speaking, can they communicate by nodding, blinking, squeezing your hand or in some other way?

- **the donor should not to be treated as unable to make a decision just because they make an unwise or eccentric decision**

- **any decision you make for the donor must be in their best interests**

in addition to following any instructions and considering any preferences expressed by the donor in the LPA form, you should consider the values and wishes of the donor, including any moral, political or religious views they have held. You should also think about what the donor would have decided if they had the capacity to take the decision themselves. It is also important not to make any assumptions based on the donor's age, gender, ethnic background, sexuality, behaviour or health but instead to think about what they as an individual would want

- **anything you do on behalf of the donor should restrict their basic rights as little as possible**



If you are unsure whether the donor has the capacity to make a particular decision, the OPG's guidance for LPA attorneys suggests that you ask yourself the following questions:

- do they have a general understanding of the decision that needs to be made?
- do they have a general understanding of the consequences of the decision?
- can they retain and weigh up this information to make a decision?

If you are still unsure, you could ask the donor's doctor to assess them.

Get to know the donor

The more you know about the donor and about how they managed their property and financial affairs whilst they had capacity, the better you will be able to make decisions for them and in their best interests. Therefore, if the donor still has mental capacity, it is important to talk to them to find out as much as possible about how they manage their affairs and about their future wishes. Some good questions to ask might include the following:

- do they make any regular birthday, Christmas or other customary gifts to children, grandchildren or other friends and relations? If so, how much?
- do they make regular donations to any particular charities? If so, how much?
- if the donor needs to move into a care home, would they want you to sell or rent out their home?
- what are the donor's investment preferences? For example, do they like always to use their ISA allowances? What is their appetite for risk? Do they have a preference for ethical investments?
- do they prefer to keep a minimum bank balance?
- how much do they typically spend on things like clothes, books, trips etc?



On a practical level, it is a good idea also to ask the donor where they keep their financial information and where the original LPA is stored. It is also a good idea to ask the donor for details of any trusted advisers such as accountants, solicitors, investment managers etc.

You should also ask for details of online accounts and passwords, including details of any cryptoassets.

When can I start to use the LPA?

It is important to check section 5 of the LPA form to see when you are able to start making decisions on the donor's behalf.

If the donor has stated that their attorney can act as soon as the LPA has been registered, you will be able to act as soon as registration has taken place, even if the donor still has capacity to manage their affairs. This could be useful if, for example, the donor is abroad, needs to go into hospital, or has difficulty carrying out some tasks such as going to the bank. It is important to note that, whilst the donor still has capacity, you may only act with their consent.

If the donor has stated that you can only act once they have lost capacity, you will only be able to act once the LPA has been registered with the Office of the Public Guardian (OPG) and when the donor lacks capacity to manage their property and financial affairs themselves.

You can tell whether the LPA has been registered by checking the original LPA form. Once registered, each page of the form will have a mark saying 'Validated-OPG'.



When should I apply to register the LPA?

It's generally advisable to register the LPA as soon as possible because, if the LPA contains any mistakes or if there are other problems, it might only be possible to correct them whilst the donor still has mental capacity.

If the donor has lost capacity, you should apply to register it.

The application to register the LPA can be made either by the donor (if they still have capacity) or by the attorney(s). If you have been appointed to act jointly with one or more other attorney(s), you'll all need to register the LPA together.

How do I prove my authority to act under the LPA?

Traditionally, banks and other financial bodies would need to see the original or a certified copy of the LPA before they would give you access to the donor's accounts. They may also ask to see proof of your address and the donor's.

A certified copy of the LPA form needs to be certified on each page as being a true copy of the original. If the donor has mental capacity they can make certified copies themselves. Otherwise, a solicitor or notary can also make certified copies but they will charge a fee for doing so.



If you cannot find the original LPA, you can request certified copies from the OPG at a cost of £35 each.

If the LPA was registered on or after 1 September 2019 and you and the donor are resident in the UK, you should consider registering the LPA with the OPG's online 'Use an LPA' service. This service enables donors and attorneys to view a summary of their LPA online, and to share these details online with other people and organisations. Where the organisation you wish to deal with is registered with this service, you may not need to provide a certified copy of the LPA to prove your authority to act. However, there are still some circumstances in which an organisation may request to see the original or certified copy LPA form—for example, if there are instructions and preferences on the LPA, as this information is not visible on the online service.

Can I be paid for my time spent or expenses incurred in acting as attorney?

You can't claim fees for time spent acting as an attorney unless the LPA expressly states that you may charge. Such permission to charge would be included in Section 7 of the LPA form. Professional attorneys, such as solicitors, are usually paid whereas most attorneys who are friends or family are not.

Both lay and professional attorneys can claim out-of-pocket expenses if they're in proportion to the size of the donor's estate and the duties undertaken by the attorney.

When claiming fees and expenses, you should remember that you have a duty not to take advantage of your position or to put yourself in a position where your personal interests conflict with your duties as an attorney.



Can I employ a professional to help manage the donor's affairs?

As an attorney, you are entitled to employ professionals to help manage the donor's affairs, providing the services you pay for are in keeping with the task they're needed for and the donor's funds.

As an illustration as to what might be considered reasonable, the OPG suggests that it would be reasonable to pay accountants to prepare the donor's annual tax return if they had a large investment portfolio or complex investments but it might not be appropriate to employ a solicitor to do something straightforward like paying the donor's nursing home fees.

It is important to note that, whilst you may seek expert advice about the donor's property and finances, you cannot delegate your decision-making responsibility. So, you will still need to take the decisions yourself, albeit based on professional advice.

Dealing with disputes and disagreements in your role as attorney

What happens if the donor disagrees with a decision I am making?

If the donor still has capacity to take the decision then you must not make the decision.

If the donor lacks capacity then you may go ahead and make the decision providing you believe it is in the donor's best interests and providing it is within your powers as attorney. When deciding whether the decision is in the donor's best interests you should take the donor's wishes and feelings into account but you will need to balance these against all the other relevant factors.

If you are still unsure about the decision then you may contact the OPG.

What happens if my co-attorney and I cannot agree on a decision for the donor?

Where attorneys are appointed to act jointly, they must agree unanimously on all decisions made on behalf of the donor. If jointly appointed attorneys can't agree on a decision for the donor, you should contact the OPG for advice. The OPG can also advise on resolving disputes between attorneys and friends and family members of the donor.

You should keep a record of any disputes about your attorneyship and how they were resolved.

In what circumstances will the power of attorney come to an end?

The LPA will terminate automatically on the death of the donor.

Your attorneyship will terminate if you are made bankrupt and so it is important that you tell the OPG if you become bankrupt in the future. Your attorneyship will also end if you are the donor's husband, wife or civil partner and you get divorced or separated.

You may choose to stop acting as an attorney by disclaiming your attorneyship but you will need to notify the donor, any other attorneys named in the LPA and the OPG, if the LPA is registered.

The donor may revoke the LPA whilst they still have capacity and would be required to notify you of any such revocation.

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