

Guide for Attorneys Acting under a Power of Attorney November 2015



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Duties of an Attorney

When acting in my role as an Attorney, what do I need to consider?

In this role you have important duties and responsibilities, which are set out in the Mental Capacity Act 2005 and explained in the Code of Practice, with which you should be familiar. This can be accessed from the Government website: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice> or a hard copy from customerservices@publicguardian.gsi.gov.uk

The following are particularly important:

You must follow the principles set out in section 1 of the Act:

Principle 1

It should be assumed that everyone has capacity to make his or her own decisions, unless it is proved otherwise.

Principle 2

A person should have all the help and support possible to make and communicate their own decision before anyone concludes that they lack capacity to make their own decision.

Principle 3

A person should not be treated as lacking capacity just because they make an unwise decision.

Principle 4

Actions or decisions carried out on behalf of someone who lacks capacity must be in their own best interests.

Principle 5

Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

You must always act in the donor's best interests

There is guidance in chapter 5 of the Code of Practice to help you, but in general terms, you need to consider the donor's past and present wishes and feelings, beliefs and values. Where practical and appropriate consult with:

- Anyone caring for the donor
- Close relatives and anyone else with an interest in their welfare
- Other attorneys appointed by the donor

Always check whether the donor has the capacity to make a particular decision themselves. You can only act if the donor does have capacity if they have asked you to act and there are no restrictions in the document.

Only make those decisions the POA gives you authority to make

- You cannot make decisions about the donor's personal care under the EPA or a Financial LPA.
- If the EPA or LPA is restricted in any way, your authority is limited. If you need further powers in the future, you will be able to apply to the Court of Protection.

Other duties include having a duty to:

- Apply certain standards of care and skill (duty of care) when making decisions
- Carry out the donor's instructions
- Not take advantage of your position and not benefit yourself, 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
- Keep accounts
- Keep the donor's money and property separate from your own

Gifts from the Donor's Money

Attorneys are able to make limited seasonal gifts from the Donor's money such as Christmas presents, birthday presents, on births and marriages so long as the EPA or LPA does not contain a restriction preventing this. The Attorney must also take stock of the size of any gift and be satisfied that it is not unreasonable having regard to all the circumstances particularly the size of the Donor's estate. The Attorney should not use gifts in an attempt to avoid Inheritance Tax without the specific authority of the Court of Protection. The Office of the Public Guardian has published a practical note about making gifts: www.gov.uk/government/uploads/system/uploads/attachment_data/file/457921/PGnote_2012_02_gifts.pdf

Where someone is financially dependant on the Donor, the Attorney is able to apply assets towards meeting their needs, unless the EPA or LPA prevents this.

This is a complex area, please contact us on 020 8301 7777 for an appointment if you would like specific advice.

How an attorney signs cheques on behalf of the Donor

All the various institutions need to be aware that you are acting on behalf of the Donor under an Enduring Power of Attorney or Lasting Power of Attorney. They will usually amend any bank accounts to read for example "Mr J Bloggs as Attorney for Mrs A Bloggs" or " Mr J Bloggs poa for Mrs A Bloggs". This is how you would also sign cheques.

Can Attorneys be paid for Acting?

Professional Attorneys such as a solicitor, accountant or a bank, are able to charge for their services, provided the EPA or LPA stipulates this.

Non-professional Attorneys are not expected to charge, but are allowed out of pocket expenses.

The keeping of accounts

An Attorney is under a duty to keep accurate accounts of their dealing with the Donor's money and property. Once the EPA or LPA has been registered with the Office of the Public Guardian, they may call for a copy at any time.

Details of what kind of information is required to be kept:

- property;
- bank and building society accounts; and
- other investments.

An Attorney must keep record of the Donor's income and spending and it is recommended for them to also keep any vouchers relating to them.

Can I sell the Donor's House?

An Attorney is permitted to sell the Donor's house but they must be satisfied that there is no reasonable chance that the Donor will return to the property and that it is in the best interests of the Donor to do so.

The Court of Protection must be notified if for any reason the sale of the property covers any of the issues below:

- The sale is under the market value;
- The Attorney wishes to purchase the property themselves;
- The Attorney wishes to give it to someone else.

Am I entitled to see the Donor's Will?

No because a Will is confidential. If for any reason that you feel the Will does not cover the wishes of the Donor and needs to be changed, you may apply to the Court of Protection to make a "Statutory Will".

Can I decide where the Donor is to live?

The EPA only covers financial matters and not care decisions. A Health and Welfare LPA will give the Attorney power to make this and other similar decisions. A Financial LPA does not give the Attorney the power to make this decision.

What happens when the Donor dies?

The EPA or LPA will automatically end. The Will of the Donor (if one is made) will take over.

The original EPA or LPA and a death certificate will need to be forwarded to the Court of Protection so that their records can be updated.