

Acting as an Attorney under an LPA? A guide to your duties.

In discussions with clients the subject of a Lasting Power of Attorney (LPA) is often raised. Whilst the importance of making an LPA is well known and covered in another of our Factsheets, nominated attorneys are often appointed with little knowledge of the powers and responsibilities that have been bestowed upon them. Therefore, in this Factsheet, we will look at some of the main points. As always, the content is an overview, intended as guidance only and is no substitute for formal legal advice.

So, you have been appointed as an attorney under an LPA; when do you have the power to act on the donor's behalf?

- In any event, only once the LPA has been registered with the Office of the Public Guardian (OPG), something that is normally done when the LPA is executed.
- If it is a Health & Welfare LPA, you can only act once the donor has lost the capacity to make their own decisions
- If it is a Property & Finance LPA you can act before (with the donor's blessing) or after the donor loses capacity, subject to how the LPA is drafted, so it is important to check the document carefully

Having mentioned the donor's "capacity" to make decisions, perhaps this needs a little more explanation. Capacity is represented by the donor's ability to understand, retain and weigh information and then communicate their decision. It is always based on a decision by decision basis. As such, capacity may vary and may need to be reassessed on a regular basis, but in reality, we are looking at whether-

- There is an understanding of the decisions AND their consequences.
- Can the relevant information be digested and used to make a logical decision?

One important thing – it is good practice to record the details and circumstances around decisions that you make on behalf of the donor.

Making decisions

If the donor has capacity, there is nothing for you to do (unless you are acting on the donor's instructions under a Property & Finance LPA).

However, if there is a concern that the donor has lost capacity to make decisions on their behalf, this is where you as the attorney needs to step in, either to support them in making a decision, or by making a decision on their behalf.

Often it is a case of managing the situation to maybe just help the donor to decide as opposed to taking full control.

Remember that the loss of capacity can be a traumatic time for the donor and other members of a family – this is a time for support and collaboration and for keeping the donor's best interests at the heart of everything.

Working with other attorneys

You may have been appointed as a sole attorney, but more likely there will be other attorneys appointed by the donor. If the LPA states that you act "jointly" then you all must make decisions upon which you all agree. If the terminology used is "jointly & severally" then attorneys can act independently as well as together. Hopefully attorneys will work together for the common cause, but if disputes arise then the OPG may need to intervene.

Remuneration

We are often asked if attorneys are paid for acting on the donor's behalf and in most cases the answer will be "no" unless the donor has specifically authorised it in the LPA.

Attorneys can however, claim reasonable, out of pocket expenses for carrying out their duties. If you feel that your time should be paid for if you must step in to act for the attorney at some future date, then, unless you are a professional, we would suggest that this role is not for you and maybe a professional, such as a solicitor, should be appointed instead.

Cont

Acting as an attorney under an LPA? - A guide to your duties

Your “general” duties

Assuming it has been agreed that the donor has lost the capacity to make decisions independently, then you will step in as the attorney to protect the person’s best interests. This might include-

- Put yourself in the donor’s place and try to think as they would
- Try to help the donor to get involved in some small way in the decision making
- Consider the donor’s beliefs and values when making decisions
- Try to involve other family members

The more practical duties & responsibilities

- Apply the same care and diligence that you would apply to your own welfare
- You cannot derive any unauthorised benefit or profit from your duties
- Confidentiality – the donor’s affairs should be kept confidential unless with good reason, perhaps giving information to the donor’s bank or accountant if necessary.
- Your role is not to delegate – except if the situation requires professional advice from an investment adviser for example. It is important to note that certain functions cannot be delegated without express powers in the LPA.
- Accounts need to be kept, but nothing complex is typically required, but make sure that any transactions and decisions are noted and things such as office mail and bank statements are kept safely. But please make sure that you keep the donor’s assets separate from your own

End of life decisions

If a Health & Welfare LPA gives authority to make decisions about the withdrawal of life sustaining treatment, this needs to be carefully considered in light of the donor’s best interests. Discussions with the doctors and family members need to be noted and recorded to demonstrate that you are taking all things into consideration in this sensitive area of attorney-ship.

Do disputes ever occur?

Of course, this can happen and when it does, it is often a family member who was not appointed as an attorney who will raise objections to something that you have done or propose to do on behalf of the donor. If logical discussion does not alleviate the problems then professional help will be required, but there will be an emotional and financial cost in going down this path, so collaboration and common sense in doing what is best for the donor is key.

The donor has died

The LPA will automatically end, and your final duties will be to inform the OPG, send them the original LPA (and any copies) along with a certified death certificate. Or this can be done by the solicitor who will be winding up the donor’s estate. You should however, keep records safely in case of further scrutiny in due course, such as by the beneficiaries of the estate.

Now what?

So, you have now finished your duties as an attorney knowing that you have acted to the best of your abilities in order to help the donor through the most vulnerable period of their life.

Being asked to be an attorney could be regarded as an honour and maybe demonstrates the esteem in which you are held. Follow the basic rules, act as if you were attorney for yourself and praise yourself for a job well done. If in any doubt we always advise you seek professional advice.

Contact us

01892 612500 or 0800 668 1898 (Freephone)

info@avtrinity.com www.avtrinity.com



“intelligent, independent financial advice”

All information has been prepared with care to ensure accuracy and is based upon our understanding of legislation and HMRC practice, which can be subject to change. This is intended to provide information only and should not be considered as advice.