



S O L I C I T O R

With you every step of the way

ACTING AS AN ATTORNEY UNDER AN LPA

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 health and welfare LPA attorney and explains what is likely to be involved in taking decisions on behalf of your loved one.

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 health and welfare LPA.

WHAT TASKS WILL I NEED TO CARRY OUT ON BEHALF OF THE DONOR?

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

- deciding where they should live and with whom
- making decisions regarding their day-to-day routine, including what they should eat and wear
- organising community care assessments and services
- arranging appointments with doctors, dentists and opticians
- deciding what leisure or social activities the donor should participate in
- consenting to or refusing health care on behalf of the donor

this could include giving or refusing consent to life-sustaining treatment if the donor has delegated this power in the LPA form

WHAT ARE MY KEY DUTIES AS AN LPA ATTORNEY?

As a health and welfare 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
- **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 key decisions made on the donor's behalf
- **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

POWER TO GIVE OR REFUSE CONSENT TO MEDICAL TREATMENT

A key power of a health and welfare attorney is the power to consent to medical treatment on behalf of the donor by signing 'consent to treatment' forms on behalf of the donor. When taking decisions regarding medical treatment, it is important that you don't impose your own medical choices on the donor but instead think about what the donor would have decided if they had the capacity to take the decision themselves, based on any preferences they are known to have expressed in the past and on their best interests.

It is also important to remember that the power to give or refuse consent to medical treatment on behalf of the donor does not give you power to treat the donor yourself or change prescribed medication or treatment. Any such things should always be agreed with the treating medical professionals.

POWERS IN RESPECT OF LIFE-SUSTAINING MEDICAL TREATMENT

Check section 5 of the LPA form to see whether the donor has granted you power to give or refuse consent to life sustaining medical treatment on their behalf. If the donor has given you this power by selecting Option A then, in the event that such a decision needs to be taken, the doctors would be bound to respect your decision as if it were that of the donor themselves. If the donor has not given you this authority then the doctors would still take into account your views and those of other people interested in the donor's welfare but your views would not be legally binding.

It is important to remember that it is for the doctor to assess whether treatment is life-sustaining in each particular situation and this will depend not only on the type of treatment, but also on the particular circumstances in which it may be prescribed. For example, for an otherwise healthy person with a mild infection, a course of antibiotics would be routine treatment and would not be considered life-sustaining. However, for a frail, elderly person with pneumonia, that same simple course of antibiotics could be life-sustaining.

INTERACTION OF THE LPA WITH ANY ADVANCE DECISION

You should check whether the donor has made an advance decision to refuse treatment and, if so, understand how this interacts with the health and welfare LPA.

If the donor made the advance decision prior to the health and welfare LPA, the LPA will take precedence and you will be able to override what's written in the advance decision so long as the LPA gives you the power to make the decision in question. However, even when an advance decision is no longer valid, wishes expressed in the advance decision may still be relevant factors to take into account when making a best interests decision on behalf of the person.

If the donor has made an advance decision after the health and welfare LPA, you won't be able to override what is written in the advance decision. However, if a decision needs to be made about something that isn't detailed in the advance decision, you would still be able to act, providing you have the necessary power under the LPA.

As health and welfare attorney, you should ensure that a copy of any advance decision is made available to medical professionals, where relevant.

INSTRUCTIONS AND PREFERENCES

It is important to check section 7 of the LPA form to see if the donor has provided any instructions and/or preferences. 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.

Where appropriate, you should share instructions and preferences with care staff or other individuals involved in the donor's care.

MULTIPLE ATTORNEYS

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

- **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. For example, the donor might state that their attorneys must act jointly for decisions about life-sustaining treatment and may act jointly and severally for everything else. 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.

PROPERTY AND FINANCIAL DECISIONS

It is important to bear in mind that, as a health and welfare attorney, you are not authorised to make decisions about the donor's property and finances unless the donor has also appointed you as attorney under a separate property and financial affairs LPA. However, these two aspects of decision making are often interrelated and you should liaise with any separate attorney for property and finances, for example, to ensure that there are sufficient funds to pay for care you wish to put in place for the donor.

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 make everyday decisions about what they should eat and wear but be unable to understand and make more complex decisions, such as where they should live and what care they should receive. 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. 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, the better you will be able to make decisions for them and in their best interests. If the donor no longer has capacity, you should talk to their close family and friends and look at the kinds of decisions they made when they did have capacity. It would be helpful to understand, for example, the sort of food and clothes they liked, the surroundings in their home, the sorts of leisure or social activities they enjoy etc.

WHEN CAN I START TO USE THE LPA?

Unlike a property and financial affairs LPA, which can sometimes be used as soon as it has been registered with the Office of the Public Guardian (OPG), a health and welfare LPA can only ever be used once it is registered with the OPG *and* when the donor lacks capacity to take the relevant decision 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, a third party would need to see the original or a certified copy of the LPA before they would let you take a decision on behalf of the donor. 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. You can't claim fees for time spent acting as an attorney unless it's stated in the LPA. 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.

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. If you are the donor's husband, wife or civil partner, your attorneyship will also end if 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.

If you would like to talk to someone about your role as an attorney please contact info@kjcoxsolitors.co.uk or see our website www.kjcoxsolitor.com