

# 7 What does the Act say about Lasting Powers of Attorney?

This chapter explains what Lasting Powers of Attorney (LPAs) are and how they should be used. It also sets out:

- how LPAs differ from Enduring Powers of Attorney (EPAs)
- the types of decisions that people can appoint attorneys to make (attorneys are also called ‘donees’ in the Act)
- situations in which an LPA can and cannot be used
- the duties and responsibilities of attorneys
- the standards required of attorneys, and
- measures for dealing with attorneys who don’t meet appropriate standards.

This chapter also explains what should happen to EPAs that were made before the Act comes into force.

In this chapter, as throughout the Code, a person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

## Quick summary

*Anyone asked to be an attorney should:*

- consider whether they have the skills and ability to act as an attorney (especially if it is for a property and affairs LPA)
- ask themselves whether they actually want to be an attorney and take on the duties and responsibilities of the role.

*Before acting under an LPA, attorneys must:*

- make sure the LPA has been registered with the Public Guardian
- take all practical and appropriate steps to help the donor make the particular decision for themselves.

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*When acting under an LPA:*

- make sure that the Act's statutory principles are followed
- check whether the person has the capacity to make that particular decision for themselves. If they do:
  - a personal welfare LPA cannot be used – the person must make the decision
  - a property and affairs LPA can be used even if the person has capacity to make the decision, unless they have stated in the LPA that they should make decisions for themselves when they have capacity to do so.

*At all times, remember:*

- anything done under the authority of the LPA must be in the person's best interests
- anyone acting as an attorney must have regard to guidance in this Code of Practice that is relevant to the decision that is to be made
- attorneys must fulfil their responsibilities and duties to the person who lacks capacity.

## What is a Lasting Power of Attorney (LPA)?

- 7.1** Sometimes one person will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so. Under a power of attorney, the chosen person (the attorney or donee) can make decisions that are as valid as one made by the person (the donor).
- 7.2** Before the Enduring Powers of Attorney Act 1985, every power of attorney automatically became invalid as soon as the donor lacked the capacity to make their own decision. But that Act introduced the Enduring Power of Attorney (EPA). An EPA allows an attorney to make decisions about property and financial affairs even if the donor lacks capacity to manage their own affairs.
- 7.3** The Mental Capacity Act replaces the EPA with the Lasting Power of Attorney (LPA). It also increases the range of different types of decisions that people can authorise others to make on their behalf. As well as property and affairs (including financial matters), LPAs can also cover personal welfare (including healthcare and consent to medical treatment) for people who lack capacity to make such decisions for themselves.

- 7.4 The donor can choose one person or several to make different kinds of decisions. See paragraphs 7.21–7.31 for more information about personal welfare LPAs. See paragraphs 7.32–7.42 for more information about LPAs on property and affairs.

### **How do LPAs compare to EPAs?**

- 7.5 There are a number of differences between LPAs and EPAs. These are summarised as follows:
- EPAs only cover property and affairs. LPAs can also cover personal welfare.
  - Donors must use the relevant specific form (prescribed in regulations) to make EPAs and LPAs. There are different forms for EPAs, personal welfare LPAs and property and affairs LPAs.
  - EPAs must be registered with the Public Guardian when the donor can no longer manage their own affairs (or when they start to lose capacity). But LPAs can be registered at any time before they are used – before or after the donor lacks capacity to make particular decisions that the LPA covers. If the LPA is not registered, it can't be used.
  - EPAs can be used while the donor still has capacity to manage their own property and affairs, as can property and affairs LPAs, so long as the donor does not say otherwise in the LPA. But personal welfare LPAs can only be used once the donor lacks capacity to make the welfare decision in question.
  - Once the Act comes into force, only LPAs can be made but existing EPAs will continue to be valid. There will be different laws and procedures for EPAs and LPAs.
  - Attorneys making decisions under a registered EPA or LPA must follow the Act's principles and act in the best interests of the donor.
  - The duties under the law of agency apply to attorneys of both EPAs and LPAs (see paragraphs 7.58–7.68 below).
  - Decisions that the courts have made about EPAs may also affect how people use LPAs.
  - Attorneys acting under an LPA have a legal duty to have regard to the guidance in this Code of Practice. EPA attorneys do not. But the Code's guidance will still be helpful to them.

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## How does a donor create an LPA?

- 7.6 The donor must also follow the right procedures for creating and registering an LPA, as set out below. Otherwise the LPA might not be valid. It is not always necessary to get legal advice. But it is a good idea for certain cases (for example, if the donor's circumstances are complicated).
- 7.7 Only adults aged 18 or over can make an LPA, and they can only make an LPA if they have the capacity to do so. For an LPA to be valid:
- the LPA must be a written document set out in the statutory form prescribed by regulations<sup>26</sup>
  - the document must include prescribed information about the nature and effect of the LPA (as set out in the regulations)
  - the donor must sign a statement saying that they have read the prescribed information (or somebody has read it to them) and that they want the LPA to apply when they no longer have capacity
  - the document must name people (not any of the attorneys) who should be told about an application to register the LPA, or it should say that there is no-one they wish to be told
  - the attorneys must sign a statement saying that they have read the prescribed information and that they understand their duties – in particular the duty to act in the donor's best interests
  - the document must include a certificate completed by an independent third party,<sup>27</sup> confirming that:
    - in their opinion, the donor understands the LPA's purpose
    - nobody used fraud or undue pressure to trick or force the donor into making the LPA and
    - there is nothing to stop the LPA being created.

## Who can be an attorney?

- 7.8 A donor should think carefully before choosing someone to be their attorney. An attorney should be someone who is trustworthy, competent and reliable. They should have the skills and ability to carry out the necessary tasks.

<sup>26</sup> The prescribed forms will be available from the Office of the Public Guardian (OPG) or from legal stationers.

<sup>27</sup> Details of who may and who may not be a certificate provider will be available in regulations. The OPG will produce guidance for certificate providers on their role.

**7.9** Attorneys must be at least 18 years of age. For property and affairs LPAs, the attorney could be either:

- an individual (as long as they are not bankrupt at the time the LPA is made), or
- a trust corporation (often parts of banks or other financial institutions).

If an attorney nominated under a property and affairs LPA becomes bankrupt at any point, they will no longer be allowed to act as an attorney for property and affairs. People who are bankrupt can still act as an attorney for personal welfare LPAs.

**7.10** The donor must name an individual rather than a job title in a company or organisation, (for example, ‘The Director of Adult Services’ or ‘my solicitor’ would not be sufficient). A paid care worker (such as a care home manager) should not agree to act as an attorney, apart from in unusual circumstances (for example, if they are the only close relative of the donor).

**7.11** Section 10(4) of the Act allows the donor to appoint two or more attorneys and to specify whether they should act ‘jointly’, ‘jointly and severally’, or ‘jointly in respect of some matters and jointly and severally in respect of others’.

- Joint attorneys must always act together. All attorneys must agree decisions and sign any relevant documents.
- Joint and several attorneys can act together but may also act independently if they wish. Any action taken by any attorney alone is as valid as if they were the only attorney.

**7.12** The donor may want to appoint attorneys to act jointly in some matters but jointly and severally in others. For example, a donor could choose to appoint two or more financial attorneys jointly and severally. But they might say then when selling the donor’s house, the attorneys must act jointly. The donor may appoint welfare attorneys to act jointly and severally but specify that they must act jointly in relation to giving consent to surgery. If a donor who has appointed two or more attorneys does not specify how they should act, they must always act jointly (section 10(5)).

**7.13** Section 10(8) says that donors may choose to name replacement attorneys to take over the duties in certain circumstances (for example, in the event of an attorney’s death). The donor may name a specific

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attorney to be replaced, or the replacements can take over from any attorney, if necessary. Donors cannot give their attorneys the right to appoint a substitute or successor.

### How should somebody register and use an LPA?

- 7.14** An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. An unregistered LPA will not give the attorney any legal powers to make a decision for the donor. The donor can register the LPA while they are still capable, or the attorney can apply to register the LPA at any time.
- 7.15** There are advantages in registering the LPA soon after the donor makes it (for example, to ensure that there is no delay when the LPA needs to be used). But if this has not been done, an LPA can be registered after the donor lacks the capacity to make a decision covered by the LPA.
- 7.16** If an LPA is unregistered, attorneys must register it before making any decisions under the LPA. If the LPA has been registered but not used for some time, the attorney should tell the OPG when they begin to act under it – so that the attorney can be sent relevant, up-to-date information about the rules governing LPAs.
- 7.17** While they still have capacity, donors should let the OPG know of permanent changes of address for the donor or the attorney or any other changes in circumstances. If the donor no longer has capacity to do this, attorneys should report any such changes to the OPG. Examples include an attorney of a property and affairs LPA becoming bankrupt or the ending of a marriage between the donor and their attorney. This will help keep OPG records up to date, and will make sure that attorneys do not make decisions that they no longer have the authority to make.

### What guidance should an attorney follow?

- 7.18** Section 9(4) states that attorneys must meet the requirements set out in the Act. Most importantly, they have to follow the statutory principles (section 1) and make decisions in the best interests of the person who lacks capacity (section 4). They must also respect any conditions or restrictions that the LPA document contains. See chapter 2 for guidance on how to apply the Act's principles.

**7.19** Chapter 3 gives suggestions of ways to help people make their own decisions in accordance with the Act's second principle. Attorneys should also refer to the guidance in chapter 4 when assessing the donor's capacity to make particular decisions, and in particular, should follow the steps suggested for establishing a 'reasonable belief' that the donor lacks capacity (see paragraphs 4.44–4.45). Assessments of capacity or best interests must not be based merely on:

- a donor's age or appearance, or
- unjustified assumptions about any condition they might have or their behaviour.

**7.20** When deciding what is in the donor's best interests, attorneys should refer to the guidance in chapter 5. In particular, they must consider the donor's past and present wishes and feelings, beliefs and values. Where practical and appropriate, they should consult with:

- anyone involved in caring for the donor
- close relatives and anyone else with an interest in their welfare
- other attorneys appointed by the donor.

See paragraphs 7.52–7.68 for a description of an attorney's duties.

### **Scenario: Making decisions in a donor's best interests**

Mr Young has been a member of the Green Party for a long time. He has appointed his solicitor as his attorney under a property and affairs LPA. But Mr Young did not state in the LPA that investments made on his behalf must be ethical investments. When the attorney assesses his client's best interests, however, the attorney considers the donor's past wishes, values and beliefs. He makes sure that he only invests in companies that are socially and environmentally responsible.

## **What decisions can an LPA attorney make?**

### **Personal welfare LPAs**

**7.21** LPAs can be used to appoint attorneys to make decisions about personal welfare, which can include healthcare and medical treatment decisions. Personal welfare LPAs might include decisions about:

- where the donor should live and who they should live with

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- the donor's day-to-day care, including diet and dress
- who the donor may have contact with
- consenting to or refusing medical examination and treatment on the donor's behalf
- arrangements needed for the donor to be given medical, dental or optical treatment
- assessments for and provision of community care services
- whether the donor should take part in social activities, leisure activities, education or training
- the donor's personal correspondence and papers
- rights of access to personal information about the donor, or
- complaints about the donor's care or treatment.

**7.22** The standard form for personal welfare LPAs allows attorneys to make decisions about anything that relates to the donor's personal welfare. But donors can add restrictions or conditions to areas where they would not wish the attorney to have the power to act. For example, a donor might only want an attorney to make decisions about their social care and not their healthcare. There are particular rules for LPAs authorising an attorney to make decisions about life-sustaining treatment (see paragraphs 7.30–7.31 below).

**7.23** A general personal welfare LPA gives the attorney the right to make all of the decisions set out above although this is not a full list of the actions they can take or decisions they can make. However, a personal welfare LPA can only be used at a time when the donor lacks capacity to make a specific welfare decision.

### Scenario: Denying attorneys the right to make certain decisions

Mrs Hutchison is in the early stages of Alzheimer's disease. She is anxious to get all her affairs in order while she still has capacity to do so. She makes a personal welfare LPA, appointing her daughter as attorney. But Mrs Hutchison knows that her daughter doesn't always get on with some members of the family – and she wouldn't want her daughter to stop those relatives from seeing her.

She states in the LPA that her attorney does not have the authority to decide who can contact her or visit her. If her daughter wants to prevent anyone having contact with Mrs Hutchison, she must ask the Court of Protection to decide.

**7.24** Before making a decision under a personal welfare LPA, the attorney must be sure that:

- the LPA has been registered with the OPG
- the donor lacks the capacity to make the particular decision or the attorney reasonably believes that the donor lacks capacity to take the decisions covered by the LPA (having applied the Act's principles), and
- they are making the decision in the donor's best interests.

**7.25** When healthcare or social care staff are involved in preparing a care plan for someone who has appointed a personal welfare attorney, they must first assess whether the donor has capacity to agree to the care plan or to parts of it. If the donor lacks capacity, professionals must then consult the attorney and get their agreement to the care plan. They will also need to consult the attorney when considering what action is in the person's best interests.

### **Personal welfare LPAs that authorise an attorney to make healthcare decisions**

**7.26** A personal welfare LPA allows attorneys to make decisions to accept or refuse healthcare or treatment unless the donor has stated clearly in the LPA that they do not want the attorney to make these decisions.

**7.27** Even where the LPA includes healthcare decisions, attorneys do not have the right to consent to or refuse treatment in situations where:

- **the donor has capacity to make the particular healthcare decision (section 11(7)(a))**  
An attorney has no decision-making power if the donor can make their own treatment decisions.
- **the donor has made an advance decision to refuse the proposed treatment (section 11(7)(b))**  
An attorney cannot consent to treatment if the donor has made a valid and applicable advance decision to refuse a specific treatment (see chapter 9). But if the donor made an LPA after the advance decision, and gave the attorney the right to consent to or refuse the treatment, the attorney can choose not to follow the advance decision.
- **a decision relates to life-sustaining treatment (section 11(7)(c))**  
An attorney has no power to consent to or refuse life-sustaining treatment, unless the LPA document expressly authorises this (See paragraphs 7.30–7.31 below.)

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- **the donor is detained under the Mental Health Act (section 28)**  
An attorney cannot consent to or refuse treatment for a mental disorder for a patient detained under the Mental Health Act 1983 (see also chapter 13).

- 7.28 LPAs cannot give attorneys the power to demand specific forms of medical treatment that healthcare staff do not believe are necessary or appropriate for the donor's particular condition.
- 7.29 Attorneys must always follow the Act's principles and make decisions in the donor's best interests. If healthcare staff disagree with the attorney's assessment of best interests, they should discuss the case with other medical experts and/or get a formal second opinion. Then they should discuss the matter further with the attorney. If they cannot settle the disagreement, they can apply to the Court of Protection (see paragraphs 7.45–7.49 below). While the court is coming to a decision, healthcare staff can give life-sustaining treatment to prolong the donor's life or stop their condition getting worse.

### **Personal welfare LPAs that authorise an attorney to make decisions about life-sustaining treatment**

- 7.30 An attorney can only consent to or refuse life-sustaining treatment on behalf of the donor if, when making the LPA, the donor has specifically stated in the LPA document that they want the attorney to have this authority.
- 7.31 As with all decisions, an attorney must act in the donor's best interests when making decisions about such treatment. This will involve applying the best interests checklist (see chapter 5) and consulting with carers, family members and others interested in the donor's welfare. In particular, the attorney must not be motivated in any way by the desire to bring about the donor's death (see paragraphs 5.29–5.36). Anyone who doubts that the attorney is acting in the donor's best interests can apply to the Court of Protection for a decision.

### **Scenario: Making decisions about life-sustaining treatment**

Mrs Joshi has never trusted doctors. She prefers to rely on alternative therapies. Because she saw her father suffer after invasive treatment for cancer, she is clear that she would refuse such treatment herself.

She is diagnosed with cancer and discusses her wishes with her husband. Mrs Joshi knows that he would respect her wishes if he ever had to make a decision about her treatment. She makes a personal welfare LPA appointing him as her attorney with authority to make all her welfare and healthcare decisions. She includes a specific statement authorising him to consent to or refuse life-sustaining treatment.

He will then be able to consider her views and make decisions about treatment in her best interests if she later lacks capacity to make those decisions herself.

## **Property and affairs LPAs**

- 7.32** A donor can make an LPA giving an attorney the right to make decisions about property and affairs (including financial matters). Unless the donor states otherwise, once the LPA is registered, the attorney is allowed to make all decisions about the donor's property and affairs even if the donor still has capacity to make the decisions for themselves. In this situation, the LPA will continue to apply when the donor no longer has capacity.
- 7.33** Alternatively a donor can state in the LPA document that the LPA should only apply when they lack capacity to make a relevant decision. It is the donor's responsibility to decide how their capacity should then be assessed. For example, the donor may trust the attorney to carry out an assessment, or they may say that the LPA only applies if their GP or another doctor confirms in writing that they lack capacity to make specific decisions about property or finances. Financial institutions may wish to see the written confirmation before recognising the attorney's authority to act under the LPA.
- 7.34** The fact that someone has made a property and affairs LPA does not mean that they cannot continue to carry out financial transactions for themselves. The donor may have full capacity, but perhaps anticipates that they may lack capacity at some future time. Or they may have fluctuating or partial capacity and therefore be able to make some

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decisions (or at some times), but need an attorney to make others (or at other times). The attorney should allow and encourage the donor to do as much as possible, and should only act when the donor asks them to or to make those decisions the donor lacks capacity to make. However, in other cases, the donor may wish to hand over responsibility for all decisions to the attorney, even those they still have capacity to make.

- 7.35 If the donor restricts the decisions an attorney can make, banks may ask the attorney to sign a declaration that protects the bank from liability if the attorney misuses the account.<sup>28</sup>
- 7.36 If a donor does not restrict decisions the attorney can make, the attorney will be able to decide on any or all of the person's property and financial affairs. This might include:
- buying or selling property
  - opening, closing or operating any bank, building society or other account
  - giving access to the donor's financial information
  - claiming, receiving and using (on the donor's behalf) all benefits, pensions, allowances and rebates (unless the Department for Work and Pensions has already appointed someone and everyone is happy for this to continue)
  - receiving any income, inheritance or other entitlement on behalf of the donor
  - dealing with the donor's tax affairs
  - paying the donor's mortgage, rent and household expenses
  - insuring, maintaining and repairing the donor's property
  - investing the donor's savings
  - making limited gifts on the donor's behalf (but see paragraphs 7.40–7.42 below)
  - paying for private medical care and residential care or nursing home fees
  - applying for any entitlement to funding for NHS care, social care or adaptations
  - using the donor's money to buy a vehicle or any equipment or other help they need
  - repaying interest and capital on any loan taken out by the donor.

<sup>28</sup> See British Banking Association's guidance for bank staff on '*Banking for mentally incapacitated and learning disabled customers*'.

- 7.37** A general property and affairs LPA will allow the attorney to carry out any or all of the actions above (although this is not a full list of the actions they can take). However, the donor may want to specify the types of powers they wish the attorney to have, or to exclude particular types of decisions. If the donor holds any assets as trustee, they should get legal advice about how the LPA may affect this.
- 7.38** The attorney must make these decisions personally and cannot generally give someone else authority to carry out their duties (see paragraphs 7.61–7.62 below). But if the donor wants the attorney to be able to give authority to a specialist to make specific decisions, they need to state this clearly in the LPA document (for example, appointing an investment manager to make particular investment decisions).
- 7.39** Donors may like to appoint someone (perhaps a family member or a professional) to go through their accounts with the attorney from time to time. This might help to reassure donors that somebody will check their financial affairs when they lack capacity to do so. It may also be helpful for attorneys to arrange a regular check that everything is being done properly. The donor should ensure that the person is willing to carry out this role and is prepared to ask for the accounts if the attorney does not provide them. They should include this arrangement in the signed LPA document. The LPA should also say whether the person can charge a fee for this service.

### **What gifts can an attorney make under a property and affairs LPA?**

- 7.40** An attorney can only make gifts of the donor's money or belongings to people who are related to or connected with the donor (including the attorney) on specific occasions, including:
- births or birthdays
  - weddings or wedding anniversaries
  - civil partnership ceremonies or anniversaries, or
  - any other occasion when families, friends or associates usually give presents (section 12(3)(b)).
- 7.41** If the donor previously made donations to any charity regularly or from time to time, the attorney can make donations from the person's funds. This also applies if the donor could have been expected to make such payments (section 12(2)(b)). But the value of any gift or donation must be reasonable and take into account the size of the donor's estate. For example, it would not be reasonable to buy expensive gifts at Christmas if the donor was living on modest means and had to do without essential items in order to pay for them.

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**7.42** The donor cannot use the LPA to make more extensive gifts than those allowed under section 12 of the Act. But they can impose stricter conditions or restrictions on the attorney's powers to make gifts. They should state these restrictions clearly in the LPA document when they are creating it. When deciding on appropriate gifts, the attorney should consider the donor's wishes and feelings to work out what would be in the donor's best interests. The attorney can apply to the Court of Protection for permission to make gifts that are not included in the LPA (for example, for tax planning purposes).

### Are there any other restrictions on attorneys' powers?

**7.43** Attorneys are not protected from liability if they do something that is intended to restrain the donor, unless:

- the attorney reasonably believes that the donor lacks capacity to make the decision in question, *and*
- the attorney reasonably believes that restraint is necessary to prevent harm to the donor, *and*
- the type of restraint used is in proportion to the likelihood and the seriousness of the harm.

If an attorney needs to make a decision or take action which may involve the use of restraint, they should take account of the guidance set out in chapter 6.

**7.44** Attorneys have no authority to take actions that result in the donor being deprived of their liberty. Any deprivation of liberty will only be lawful if this has been properly authorised and there is other protection available for the person who lacks capacity. An example would be the protection around detention under the Mental Health Act 1983 (see chapter 13) or a court ruling. Chapter 6 gives more guidance on working out whether an action is restraint or a deprivation of liberty.

### What powers does the Court of Protection have over LPAs?

**7.45** The Court of Protection has a range of powers to:

- determine whether an LPA is valid
- give directions about using the LPA, and
- to remove an attorney (for example, if the attorney does not act in the best interests of the donor).

Chapter 8 gives more information about the Court of Protection's powers.

**7.46** If somebody has doubts over whether an LPA is valid, they can ask the court to decide whether the LPA:

- meets the Act's requirements
- has been revoked (cancelled) by the donor, or
- has come to an end for any other reason.

**7.47** The court can also stop somebody registering an LPA or rule that an LPA is invalid if:

- the donor made the LPA as a result of undue pressure or fraud, or
- the attorney behaves, has behaved or is planning to behave in a way that goes against their duties or is not in the donor's best interests.

**7.48** The court can also clarify an LPA's meaning, if it is not clear, and it can tell attorneys how they should use an LPA. If an attorney thinks that an LPA does not give them enough powers, they can ask the court to extend their powers – if the donor no longer has capacity to authorise this. The court can also authorise an attorney to give a gift that the Act does not normally allow (section 12(2)), if it is in the donor's best interests.

**7.49** All attorneys should keep records of their dealings with the donor's affairs (see also paragraph 7.67 below). The court can order attorneys to produce records (for example, financial accounts) and to provide specific reports, information or documentation. If somebody has concerns about an attorney's payment or expenses, the court could resolve the matter.

## **What responsibilities do attorneys have?**

**7.50** A donor cannot insist on somebody agreeing to become an attorney. It is down to the proposed attorney to decide whether to take on this responsibility. When an attorney accepts the role by signing the LPA document, this is confirmation that they are willing to act under the LPA once it is registered. An attorney can withdraw from the appointment if they ever become unable or unwilling to act, but if the LPA has been registered they must follow the correct procedures for withdrawing. (see paragraph 7.66 below).

**7.51** Once the attorney starts to act under an LPA, they must meet certain standards. If they don't carry out the duties below, they could be removed from the role. In some circumstances they could face charges of fraud or negligence.

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## What duties does the Act impose?

7.52 Attorneys acting under an LPA have a duty to:

- follow the Act's statutory principles (see chapter 2)
- make decisions in the donor's best interests
- have regard to the guidance in the Code of Practice
- only make those decisions the LPA gives them authority to make.

### Principles and best interests

7.53 Attorneys must act in accordance with the Act's statutory principles (section 1) and in the best interests of the donor (the steps for working out best interests are set out in section 4). In particular, attorneys must consider whether the donor has capacity to make the decision for themselves. If not, they should consider whether the donor is likely to regain capacity to make the decision in the future. If so, it may be possible to delay the decision until the donor can make it.

### The Code of Practice

7.54 As well as this chapter, attorneys should pay special attention to the following guidance set out in the Code:

- chapter 2, which sets out how the Act's principles should be applied
- chapter 3, which describes the steps which can be taken to try to help the person make decisions for themselves
- chapter 4, which describes the Act's definition of lack of capacity and gives guidance on assessing capacity, and
- chapter 5, which gives guidance on working out the donor's best interests.

7.55 In some circumstances, attorneys might also find it useful to refer to guidance in:

- chapter 6, which explains when attorneys who have caring responsibilities may have protection from liability and gives guidance on the few circumstances when the Act allows restraint in connection with care and treatment
- chapter 8, which gives a summary of the Court of Protection's powers relating to LPAs
- chapter 9, which explains how LPAs may be affected if the donor has made an advance decision to refuse treatment, and
- chapter 15, which describes ways to settle disagreements.

## Only making decisions covered by an LPA

- 7.56** A personal welfare attorney has no authority to make decisions about a donor's property and affairs (such as their finances). A property and affairs attorney has no authority in decisions about a donor's personal care. (But the same person could be appointed in separate LPAs to carry out both these roles.) Under any LPA, the attorney will have authority in a wide range of decisions. But if a donor includes restrictions in the LPA document, this will limit the attorney's authority (section 9(4)(b)). If the attorney thinks that they need greater powers, they can apply to the Court of Protection which may decide to give the attorney the authority required or alternatively to appoint the attorney as a deputy with the necessary powers (see chapter 8).
- 7.57** It is good practice for decision-makers to consult attorneys about any decision or action, whether or not it is covered by the LPA. This is because an attorney is likely to have known the donor for some time and may have important information about their wishes and feelings. Researchers can also consult attorneys if they are thinking about involving the donor in research (see chapter 11).

### Scenario: Consulting attorneys

Mr Varadi makes a personal welfare LPA appointing his son and daughter as his joint attorneys. He also makes a property and affairs LPA, appointing his son and his solicitor to act jointly and severally. He registers the property and affairs LPA straight away, so his attorneys can help with financial decisions.

Two years later, Mr Varadi has a stroke, is unable to speak and has difficulty communicating his wishes. He also lacks the capacity to make decisions about treatment. The attorneys apply to register the personal welfare LPA. Both feel that they should delay decisions about Mr Varadi's future care, because he might regain capacity to make the decisions himself. But they agree that some decisions cannot wait.

Although the solicitor has no authority to make welfare decisions, the welfare attorneys consult him about their father's best interests. They speak to him about immediate treatment decisions and their suggestion to delay making decisions about his future care. Similarly, the property and affairs attorneys consult the daughter about the financial decisions that Mr Varadi does not have the capacity to make himself.

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## What are an attorney's other duties?

7.58 An attorney appointed under an LPA is acting as the chosen agent of the donor and therefore, under the law of agency, the attorney has certain duties towards the donor. An attorney takes on a role which carries a great deal of power, which they must use carefully and responsibly. They have 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 their position and not benefit themselves, 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.

In relation to property and affairs LPAs, they have a duty to:

- keep accounts
- keep the donor's money and property separate from their own.

### Duty of care

7.59 'Duty of care' means applying a certain standard of care and skill – depending on whether the attorney is paid for their services or holds relevant professional qualifications.

- Attorneys who are not being paid must apply the same care, skill and diligence they would use to make decisions about their own life. An attorney who claims to have particular skills or qualifications must show greater skill in those particular areas than someone who does not make such claims.
- If attorneys are being paid for their services, they should demonstrate a higher degree of care and skill.
- Attorneys who undertake their duties in the course of their professional work (such as solicitors or corporate trustees) must display professional competence and follow their profession's rules and standards.

## **Fiduciary duty**

**7.60** A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They also must not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor's expense.

## **Duty not to delegate**

**7.61** Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. The attorney may seek professional or expert advice (for example, investment advice from a financial adviser or advice on medical treatment from a doctor). But they cannot, as a general rule, allow someone else to make a decision that they have been appointed to make, unless this has been specifically authorised by the donor in the LPA.

**7.62** In certain circumstances, attorneys may have limited powers to delegate (for example, through necessity or unforeseen circumstances, or for specific tasks which the donor would not have expected the attorney to attend to personally). But attorneys cannot usually delegate any decisions that rely on their discretion.

## **Duty of good faith**

**7.63** Acting in good faith means acting with honesty and integrity. For example, an attorney must try to make sure that their decisions do not go against a decision the donor made while they still had capacity (unless it would be in the donor's best interests to do so).

## **Duty of confidentiality**

**7.64** Attorneys have a duty to keep the donor's affairs confidential, unless:

- before they lost capacity to do so, the donor agreed that some personal or financial information may be revealed for a particular purpose (for example, they have named someone they want to check their financial accounts), or
- there is some other good reason to release it (for example, it is in the public interest or the best interests of the person who lacks capacity, or there is a risk of harm to the donor or others).

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In the latter circumstances, it may be advisable for the attorney to get legal advice. Chapter 16 gives more information about confidentiality.

### **Duty to comply with the directions of the Court of Protection**

**7.65** Under sections 22 and 23 of the Act, the Court of Protection has wide-ranging powers to decide on issues relating to the operation or validity of an LPA. It can also:

- give extra authority to attorneys
- order them to produce records (for example, financial accounts), or
- order them to provide specific information or documentation to the court.

Attorneys must comply with any decision or order that the court makes.

### **Duty not to disclaim without notifying the donor and the OPG**

**7.66** Once someone becomes an attorney, they cannot give up that role without notifying the donor and the OPG. If they decide to give up their role, they must follow the relevant guidance available from the OPG.

### **Duty to keep accounts**

**7.67** Property and affairs attorneys must keep accounts of transactions carried out on the donor's behalf. Sometimes the Court of Protection will ask to see accounts. If the attorney is not a financial expert and the donor's affairs are relatively straightforward, a record of the donor's income and expenditure (for example, through bank statements) may be enough. The more complicated the donor's affairs, the more detailed the accounts may need to be.

### **Duty to keep the donor's money and property separate**

**7.68** Property and affairs attorneys should usually keep the donor's money and property separate from their own or anyone else's. There may be occasions where donors and attorneys have agreed in the past to keep their money in a joint bank account (for example, if a husband is acting as his wife's attorney). It might be possible to continue this under the LPA. But in most circumstances, attorneys must keep finances separate to avoid any possibility of mistakes or confusion.

## How does the Act protect donors from abuse?

### What should someone do if they think an attorney is abusing their position?

- 7.69** Attorneys are in a position of trust, so there is always a risk of them abusing their position. Donors can help prevent abuse by carefully choosing a suitable and trustworthy attorney. But others have a role to play in looking out for possible signs of abuse or exploitation, and reporting any concerns to the OPG. The OPG will then follow this up in co-operation with relevant agencies.
- 7.70** Signs that an attorney may be exploiting the donor (or failing to act in the donor's best interests) include:
- stopping relatives or friends contacting the donor – for example, the attorney may prevent contact or the donor may suddenly refuse visits or telephone calls from family and friends for no reason
  - sudden unexplained changes in living arrangements (for example, someone moves in to care for a donor they've had little contact with)
  - not allowing healthcare or social care staff to see the donor
  - taking the donor out of hospital against medical advice, while the donor is having necessary medical treatment
  - unpaid bills (for example, residential care or nursing home fees)
  - an attorney opening a credit card account for the donor
  - spending money on things that are not obviously related to the donor's needs
  - the attorney spending money in an unusual or extravagant way
  - transferring financial assets to another country.
- 7.71** Somebody who suspects abuse should contact the OPG immediately. The OPG may direct a Court of Protection Visitor to visit an attorney to investigate. In cases of suspected physical or sexual abuse, theft or serious fraud, the person should contact the police. They might also be able to refer the matter to the relevant local adult protection authorities.
- 7.72** In serious cases, the OPG will refer the matter to the Court of Protection. The court may revoke (cancel) the LPA or (through the OPG) prevent it being registered, if it decides that:
- the LPA does not meet the legal requirements for creating an LPA

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- the LPA has been revoked or come to an end for any other reason
- somebody used fraud or undue pressure to get the donor to make the LPA
- the attorney has done something that they do not have authority to do, or
- the attorney has behaved or is planning to behave in a way that is not in the donor's best interests.

The court might then consider whether the authority previously given to an attorney can be managed by:

- the court making a single decision, or
- appointing a deputy.

### What should an attorney do if they think someone else is abusing the donor?

- 7.73** An attorney who thinks someone else is abusing or exploiting the donor should report it to the OPG and ask for advice on what action they should take. They should contact the police if they suspect physical or sexual abuse, theft or serious fraud. They might also be able to refer the matter to local adult protection authorities.
- 7.74** Chapter 13 gives more information about protecting vulnerable people from abuse, ill treatment or neglect. It also discusses the duties and responsibilities of the various agencies involved, including the OPG and local authorities. In particular, it is a criminal offence (with a maximum penalty of five years' imprisonment, a fine, or both) for anyone (including attorneys) to wilfully neglect or ill-treat a person in their care who lacks capacity to make decisions for themselves (section 44).

### What happens to existing EPAs once the Act comes into force?

- 7.75** Once the Act comes into force, it will not be possible to make new EPAs. Only LPAs can then be made.
- 7.76** Some donors will have created EPAs before the Act came into force with the expectation that their chosen attorneys will manage their property and affairs in the future, whether or not they have capacity to do so themselves.

- 7.77 If donors still have capacity after the Act comes into force, they can cancel the EPA and make an LPA covering their property and affairs. They should also notify attorneys and anyone else aware of the EPA (for example, a bank) that they have cancelled it.
- 7.78 Some donors will choose not to cancel their EPA or they may already lack the capacity to do so. In such cases, the Act allows existing EPAs, whether registered or not, to continue to be valid so that attorneys can meet the donor's expectations (Schedule 4). An EPA must be registered with the OPG when the attorney thinks the donor lacks capacity to manage their own affairs, or is beginning to lack capacity to do so.
- 7.79 EPA attorneys may find guidance in this chapter helpful. In particular, all attorneys must comply with the duties described in paragraphs 7.58–7.68 above. EPA attorneys can also be found liable under section 44 of the new Act, which sets out the new criminal offences of ill treatment and wilful neglect. The OPG has produced guidance on EPAs (see Annex A for details of publications and contact information).