Lasting powers of attorney

Practice note

Legal policy

6 October 2011

Contents

1. Introduction

1.1 The following practice note is intended to assist solicitors in advising clients who wish to draw up a Lasting Power of Attorney (LPA), as well as solicitors who are acting as an attorney under an LPA. It also covers the ongoing arrangements for Enduring Powers of Attorney (EPA).

1.2 LPAs were created by the Mental Capacity Act 2005 (MCA 2005). The MCA 2005 covers England and Wales and provides a statutory framework for adults who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. Everyone working with and caring for adults who lack capacity, including solicitors, health and social care professionals, families and other carers, must comply with the MCA 2005.

1.3 The Mental Capacity Act 2005 Code of Practice (the Code of Practice) supports the MCA 2005 and provides guidance and information to all those working under the legislation. Certain categories of people are required to have regard to the relevant guidance in the Code of Practice, including the attorney under an LPA and anyone acting in a professional capacity – such as a solicitor.

1.4 An LPA enables a person aged 18 or over (the donor) to appoint another person or persons (their donee or attorney) to act on their behalf, following the principles of the MCA 2005, if they subsequently lose capacity. This has replaced the EPA as the type of power of attorney that can operate after a person ceases to have capacity. Unlike EPAs, a person can choose to delegate decisions affecting their personal welfare - including healthcare and medical treatment decisions - as well as decisions concerning their property and financial matters to their attorney(s).

1.5 Any solicitor intending to give advice about an LPA or act as an attorney under an LPA must be aware of the provisions in the MCA 2005 and the Code of Practice. Solicitors should also be familiar with the relevant guidance produced by the Office of the Public Guardian.

1.6 The MCA 2005 repealed the Enduring Powers of Attorney Act 1985 and it is no longer possible to create a new EPA. However, EPAs which were executed before the MCA 2005 came into force on 1 October 2007, whether they have been registered or not, will continue to be valid. The result is that for the foreseeable future there will be two distinct regimes catering for those who lack capacity. EPAs are considered in section 15 of this practice note.

1.7 Ordinary Powers of Attorney can still be created but they will become invalid if the donor loses capacity to make decisions within the scope of the particular power of attorney.

1.1 Professional conduct

The following sections of the SRA Code are relevant to this issue:

Chapter 1 on Client Care

Chapter 4 on Confidentiality and disclosure

1.2 Status of this practice note

Practice notes are issued by the Law Society for the use and benefit of its members. They represent the Law Society's view of good practice in a particular area. They are not intended to be the only standard of good practice that solicitors can follow. You are not required to follow them, but doing so will make it easier to account to oversight bodies for your actions.

Practice notes are not legal advice, nor do they necessarily provide a defence to complaints of misconduct or of inadequate professional service. While care has been taken to ensure that they are accurate, up to date and useful, the Law Society will not accept any legal liability in relation to them.

For queries or comments on this practice note, contact the Law Society's Practice Advice Service.

1.3 Terminology

Must - A specific requirement in legislation or of a principle, rule, outcome or other mandatory provision in the SRA Handbook. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or the SRA Handbook.

Should -

Outside of a regulatory context, good practice for most situations in the Law Society's view.
In the case of the SRA Handbook, an indicative behaviour or other non-mandatory provision (such as may be set out in notes or guidance).

These may not be the only means of complying with legislative or regulatory requirements and there may be situations where the suggested route is not the best possible route to meet the needs of your client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why the alternative approach you have taken is appropriate, either for your practice, or in the particular retainer.

May - A non-exhaustive list of options for meeting your obligations or running your practice. Which option you choose is determined by the profile of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

SRA Code - SRA Code of Conduct 2011

SRA - Solicitors Regulation Authority

IB -indicative behaviour

2. SRA Principles

There are ten mandatory principles which apply to all those the SRA regulates and to all aspects of practice. The principles can be found in the SRA Handbook.

The principles apply to solicitors or managers of authorised bodies who are practising from an office outside the UK. They also apply if you are a lawyer-controlled body practising from an office outside the UK.

3. General overview: property and affairs LPAs and personal welfare LPAs

2.1 Property and affairs LPAs can be used to appoint attorneys to make a range of decisions – including the buying and selling of property, operating a bank account, dealing with tax affairs, and claiming benefits (see paragraphs 7.32 – 7.39 of the Code of Practice). A personal welfare LPA might authorise the attorney(s) to make decisions about where the donor should live, consenting to or refusing medical treatment on the donor's behalf, and day-to-day care, including diet and dress (see paragraphs 7.21 – 7.31 of the Code of Practice).

2.2 There are two separate prescribed forms, one for a property and affairs LPA and one for a personal welfare LPA. Both forms are divided into three parts: PART A – Donor's statement This part of the form includes: the donor's details; details of the attorney(s) being appointed and how they are to act; details of the persons to be notified when an application to register the LPA is made; and a number of statements which must be confirmed by the donor. PART B – Certificate provider's statement This part must be completed by an independent third party (known as the certificate provider) after he or she has discussed the contents of the LPA with the donor without, if possible, anyone else present. The certificate provider must confirm that in his or her opinion: the donor understands the purpose and scope of the LPA; no undue pressure or fraud is involved in the decision to make the LPA; and there is nothing else to prevent the LPA being created. Part C – Attorney's statement Each attorney named in Part A of the LPA must complete a separate statement confirming that he or she understands their duties and

obligations as an attorney. Both LPA forms also include the prescribed information which must be read by the donor, certificate provider and attorney(s).

2.3 The LPA must be registered with the Office of the Public Guardian before it can be used. A property and affairs LPA can be used while the donor still has capacity, unless it specifies that it can't, while a personal welfare LPA can only be used when the donor no longer has capacity to make the particular decision affecting their health or personal welfare.

4. Who is the client?: property and affairs LPAs and personal welfare LPAs

4.1 Where a solicitor is instructed to prepare an LPA, the donor is the client. A solicitor should not accept instructions where he or she has reasonable grounds to suspect that those instructions have been given by a client under duress or undue influence – until the solicitor is satisfied that they represent the client's wishes (IB 1.28, see Outcomes in Chapter 1 on Client Care, SRA Code of Conduct 2011). When asked to prepare an LPA on written instructions alone, a solicitor should always consider carefully whether these instructions are sufficient, or whether he or she should see the client to discuss them.

4.2 A solicitor should be instructed by the client. Where instructions for the preparation of an LPA are given by someone other than the client, a solicitor should not proceed without checking that the client agrees with the instructions given (IB 1.25, see Outcomes in Chapter 1 on Client Care, SRA Code of Conduct 2011). In any case of doubt the solicitor should attempt the see the client alone or take other appropriate steps, both to confirm the instructions with the donor personally after offering appropriate advice, and also to ensure that the donor has the necessary capacity to make the power (see section 5 below).

4.3 Once the LPA has been registered and the donor lacks the capacity to make the relevant decision, instructions may be accepted from the attorney(s) but the solicitor continues to owe his or her duties to the donor. In the case of a property and affairs LPA being used as an Ordinary Power of Attorney, instructions may be accepted from the attorney(s) after the LPA has been registered.

5. Capacity to make an LPA: property and affairs LPAs and personal welfare LPAs

5.1 The solicitor should be satisfied that, on the balance of probabilities, the donor has the mental capacity to make an LPA. Some LPAs may be made when the donor is already losing capacity and consequently he or she could be unaware of the implications of their actions and more likely to be vulnerable to exploitation.

5.2 A valid LPA must include a certificate completed by an independent third party known as the certificate provider (who can be a solicitor) confirming that 'the donor understands the purpose of the LPA and the scope of the authority under it' and that no fraud or undue pressure is being used (see sections 7.5 and 7.6 below).

5.3 Section 2 of the MCA 2005 provides the core definition of incapacity that applies to decisions made under this Act: '…a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

5.4 There is however no specific definition or test of what level of capacity is required to make an LPA. It is assumed that a court if asked to make a declaration on this point would use the principles of the MCA 2005 as a starting point – and in particular the following principles: 'A person must be assumed to have capacity unless it is established that he lacks capacity.' (s.1(3)) 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.' (s.1(4)) It is likely that the courts will also consider established case law on EPAs.

5.5 If there is any doubt about the donor's capacity, a medical opinion should be considered. In cases where the LPA is being contested, for example by a family member, it may be necessary for the matter to be decided by the Court of Protection if the dispute cannot be resolved by other means. See chapter 15 of the Code of Practice for guidance on resolving disputes and disagreements.

5.6 Solicitors assessing a client's capacity to create an LPA should refer to sections 2 and 3 of the MCA 2005 and chapters 2 - 4 of the Code of Practice. Further guidance can be obtained from Assessment of Mental Capacity: Guidance for doctors and lawyers issued by the Law Society and the British Medical Association.

6. Risk of abuse: property and affairs LPAs and personal welfare LPAs

6.1 When advising clients of the benefits of LPAs, the solicitor should also inform them of the risks of abuse, particularly the risk that the attorney(s) could misuse the power. Throughout this practice note, an attempt has been made to identify possible risk areas and to suggest ways of preventing abuse, which the solicitor should discuss with the donor (see for example sections 7.14 and 14 below). Written information for clients on both the benefits and risks of LPAs, whether in a brochure or correspondence, may also be helpful.

6.2 During the initial stages of advising a client, the solicitor should consider that there may be circumstances when an LPA may not be appropriate, and a later application to the Court of Protection for deputyship, with the oversight of the Office of the Public Guardian, may be preferable. This may be advisable, for example:

- where there are indications of persistent family conflicts suggesting that an LPA may be contested, or

- where the assets are more substantial or complex than family members are accustomed to handle, or

- in cases where litigation may lead to a substantial award of damages for personal injury.

7. Taking instructions for an LPA: property and affairs LPAs and personal welfare LPAs

The solicitor should take full and careful instructions from the donor, and ensure that the following matters, where applicable, are considered by the donor when giving instructions. Please note that this section of the practice note covers issues common to both property and affairs LPAs and personal welfare LPAs. For issues specific to property and affairs LPAs see section 8 below. For issues specific to personal welfare LPAs see section 9 below.

7.1 Choice of attorney(s)

The choice of attorney(s) is clearly a personal decision for the donor, but it is important for the solicitor to advise the donor of the various options available, and to stress the need for the attorney(s) to be absolutely trustworthy (see section 6 above). The donor should be advised that the appointment of a sole attorney, whether this be for a property and affairs LPA or a personal welfare LPA, may provide greater opportunity for abuse and exploitation than appointing more than one attorney (see section 7.2 below). The solicitor should ask questions about the donor's relationship with the proposed attorney(s) including any replacement attorney (see section 7.11 below) and, depending on which type of LPA is being created, whether the attorney(s) has the skills required to manage the donor's property and financial affairs or to make decisions about the donor's personal welfare. The donor should also consider the suitability of appointing a family member or someone independent of the family, or a combination of both. If the donor wishes to create both a property and affairs LPA and a personal welfare LPA then they should consider whether they wish to appoint different attorneys for each LPA.

7.2 More than one attorney

Where more than one attorney is to be appointed for a property and affairs LPA or for a personal welfare LPA, they must be appointed to act 'jointly', 'jointly and severally', or 'jointly in respect of some matters and jointly and severally in respect of others' (s.10(4), MCA 2005). The LPA forms do not use these legal terms but instead refer to attorneys working 'together', 'together and independently' or 'together in respect of some matters and together and independently in respect of others.' One of these alternatives must be ticked by the donor in the prescribed form. If more than one attorney has been appointed and it is not stated whether they are appointed jointly or jointly and severally, then when the LPA is registered they will be treated on the basis that they are appointed jointly. This default position however does not extend to EPAs and failure to specify on the prescribed form whether the attorneys should act jointly or jointly and severally invalidates the instrument as an enduring power. The differences between a 'joint' and 'joint and several' appointment should be explained to the donor.

- In addition to the explanatory information in the prescribed form to the effect that joint attorneys must all act together and cannot act separately, the donor should be advised that an LPA with joint attorneys will terminate if any one of the attorneys: disclaims; dies; becomes bankrupt (this only applies to property and affairs LPAs); or lacks capacity. It

will also terminate with the dissolution or annulment of the marriage or civil partnership between the donor and the attorney (unless it specifically states otherwise in the LPA). However, joint appointments may provide a safeguard against possible abuse, since each attorney will be able to oversee the actions of the other(s).

- Similarly, in addition to the explanatory information in the prescribed form to the effect that joint and several attorneys can all act together but can also act independently if they wish, the donor should be advised that, where there is a joint and several appointment, the LPA will not be automatically terminated by the: disclaimer; death; bankruptcy; dissolution/annulment of marriage/civil partnership; or incapacity of one attorney. In these circumstances the LPA would continue and the remaining attorney(s) can continue to act.

See also section 7.11 below regarding replacement attorneys.

(I) The donor may have to make difficult choices as to which member(s) of the family or others to appoint as his or her attorney. This may partly depend on the type of LPA being created and the different types of decisions that can be taken under a property and affairs LPA and a personal welfare LPA. It is possible to allow some flexibility, for example the donor may wish to appoint:

(II) A family member and a professional to act jointly and severally with, perhaps, the family member dealing with day-to-day matters, and the professional dealing with more complex decisions. However the donor and the attorneys should consider the potential for conflict that could arise from this arrangement. A professional attorney will have a higher duty of care and usually will be remunerated, and this could create tension between the attorneys: for example, if the professional wishes to take a cautious approach and perhaps seek a court declaration or medical opinion – which would result in costs being incurred.

(III) His or her spouse or civil partner as attorney, with their adult child(ren) appointed as replacement attorneys (see section 7.11 below) should the spouse or civil partner die or become incapacitated. Alternatively, the donor could appoint everyone to act jointly and severally, with an informal understanding that the children will not act while the spouse or civil partner is able to do so.

(IV) His or her three adult children as attorneys to act jointly and severally, with a proviso that anything done under the power should be done by at least two of them. This could be achieved by careful wording of the LPA document.

(V) His or her three adult children to act in respect of some decisions as joint attorneys and as joint and several attorneys in respect of other decisions. However the donor should consider that this arrangement may be confusing for the attorneys and third parties, such as banks and healthcare professionals, and could prove difficult to administer in practice. The prescribed form includes a large text box for the donor to explain how this should work and it is important that this is drafted clearly and precisely to avoid confusion.

Solicitors should be aware that time may be needed to explain the benefits and drawbacks of requiring specific decision to be made jointly, jointly and severally, or jointly in respect of some matters and jointly and severally in respect of others as it may be confusing for the donor and

attorneys.

7.3 General or limited authority

The donor must be clear whether the LPA is to be a general power, giving the attorney(s) authority to manage all the donor's property and affairs or to make all personal welfare decisions, or whether any restrictions and/or conditions are to be placed on their power (see also sections 8.1 and 9.1 below). Any restrictions and/or conditions should be carefully drafted and clearly set out in the prescribed form. In relation to a personal welfare LPA the solicitor should emphasise that a general power will include all healthcare decisions, except: giving or refusing consent to life-sustaining treatment (unless the LPA document expressly authorises this); where the donor has made a valid advance decision; refusing or consenting to medical treatment for mental disorder where the donor is detained under the Mental Health Act 1983; or where the donor is subject to guardianship under the Mental Health Act 1983 (see sections 8.1 – 8.3 below). The solicitor should also discuss with the donor what arrangements should be made for the management of those property and financial affairs or personal welfare decisions that are not covered by the LPA. The donor should be advised that if they leave a 'gap' it may be necessary for the Court of Protection to intervene and appoint a deputy - or for other people to make ‘best interests’ decisions on the donor’s behalf under section 4 of the MCA 2005. Where the donor wishes to give discretionary powers to their attorney(s) – such as discretionary investment management powers or authority to disclose the donor’s will if necessary, then these should be included in the ‘restrictions and/or conditions’ section of the prescribed form.

7.4 Guidance

As well as placing restrictions and/or conditions on the attorney(s), the prescribed forms for both property and affairs LPAs and personal welfare LPAs also allows guidance to be provided to the attorney(s) when making decisions in the donor’s best interests. Any restrictions or conditions if deemed valid will be binding on the attorney(s) whereas the guidance, although clearly pertinent, is not binding on the attorney(s). It is important that a solicitor advising the client makes clear the distinction and difference between restrictions/conditions and guidance. It will also be important that the drafting of this section of the prescribed form reflects this distinction and that the language used does not suggest that any guidance is binding. The solicitor could also explain to the donor and the attorney(s) that because guidance is not binding on the attorney(s) a situation could occur where even after taking into account the guidance in the LPA, the attorney(s) might still come to the conclusion that it would be in the overall best interests of the donor – having used the ‘best interests checklist’ set out in section 4 of the MCA 2005 – to do something different from that suggested in the guidance section of the LPA. However it should also be stressed that the guidance would be relevant in assessing the best interests of the donor.

7.5 The certificate

A valid LPA – whether it be a property LPA and affairs or personal welfare LPA - must include a certificate completed by an independent third party known as the 'certificate provider' confirming that in his or her opinion:

- the donor understands the purpose of the LPA and the scope of the authority under it;
- no fraud or undue pressure is being used to induce the donor to create the LPA; and
- there is nothing else that would prevent the LPA being created.

The donor must be clear that choosing a suitable certificate provider is an important safeguard and without their statement the LPA cannot be registered and used. The choice of certificate provider is clearly a personal decision for the donor, but it is important for the solicitor to advise the donor of the various options available. It may also be important to advise on the quality of the options available – for example where a family dispute may lead to the certificate being challenged, the solicitor may need to advise on the most suitable choice of certificate provider, taking into account the individual circumstances of the case (see also section 8.6 below). There are two types of certificate provider: a knowledge-based certificate provider who is someone who knows the donor personally and has done so for the previous two years – or a skills-based certificate provider who has the relevant professional skills and expertise to certify the LPA. A skills-based certificate provider must fit into one of the following categories:

- a registered healthcare professional (including GP)
- a registered social worker
- a barrister, solicitor or advocate
- an Independent Mental Capacity Advocate
- someone who considers they have the relevant professional skills and expertise to be a certificate provider

A certificate provider cannot be:

- under 18
- a member of the donor's or attorney's family
- a business partner or paid employee of the donor or attorney(s)
- an attorney appointed in this or another LPA or any EPA made by the donor

- the owner, director, manager or an employee of a care home in which the donor lives or their family member or partner

- an employee of a trust corporation appointed as attorney in this LPA (this only applies to someone certifying a property and affairs LPA)

A person who signs an LPA as a certificate provider will also need to be able to demonstrate:

- they understand what is involved in making an LPA

- they understand the effect of making an LPA

- that they have the skills to assess that the donor understands what an LPA is and what is involved in making an LPA

- that they can assess that the donor also understands the contents of their LPA and what powers they are giving to the attorney(s)

- that they can verify that the donor is under no undue pressure by anyone to make the LPA

- that they have sufficient knowledge and understanding of the donor's affairs to able to be satisfied that no fraud was involved in the creation of the LPA

The donor should also be advised of the benefits of appointing a certificate provider who has the appropriate knowledge or experience of issues relating to mental capacity and in particular the provisions of the MCA 2005 including the core principles.

7.6 Solicitors providing a certificate

7.6.1 A skills-based certificate

Solicitors are one of the professional groups specifically listed in the prescribed form as capable of providing a skills-based certificate. The role of the certificate provider is a vital safeguard against the abuse of vulnerable adults and it is crucial that anyone agreeing to be a certificate provider fully comprehends the significance. A solicitor must ensure that they do not fall into one of the categories of people who cannot provide a certificate (see section 7.5 above). In particular, a solicitor cannot provide a certificate if he or she is:

- a business partner or paid employee of the attorney; or

- an attorney appointed under any LPA or EPA made by the donor. This would mean for example that a solicitor could not provide a certificate if in the past the client executed an EPA in favour of the solicitor, even though the EPA was never used or registered and was perhaps even revoked.

However a solicitor could be the certificate provider if he or she is a business partner or paid employee of the attorney of an EPA or another LPA. A solicitor signing such a

certificate will need to have taken a suitably detailed personal and financial history from the donor, and if necessary insist on seeing them on their own, to satisfy the requirements concerning undue pressure and fraud. This may have both time and costs implications. The solicitor should also be aware that if, for example, a family member objects to the LPA at the point when it is registered then the certificate provider may be called to the Court of Protection to account for their opinion. The certificate provider's duty of care is to the donor. In cases where the attorney is a solicitor and another solicitor from a different firm is to act as the certificate provider, then the client will be a client of both solicitors and separate client care letters should be sent by each.

7.6.2 A knowledge-based certificate

A solicitor may be approached by clients, former clients, friends or acquaintances asking them to provide a certificate on the basis that the solicitor has known them personally over the last two years. It is recommended that a solicitor should exercise caution before providing a certificate on this basis. According to the LPA notes 'personally' means that that the donor is known to the certificate provider as more than a passing acquaintance. In addition the certificate provider cannot be related to the donor or to any of the attorneys – and must not fall into any of the other categories of people who cannot provide a certificate (see section 7.5 above). A knowledge-based certificate provider has the same responsibilities as a skills-based certificate provider, for example they must discuss the contents of the LPA with the donor without, if possible, anyone else present. He or she must also confirm that: the donor understands the LPA they are making and that they are not being forced into making it (see section 7.5 above). In order to do this a detailed personal and financial history may need to be taken from the donor - however a fee cannot be charged for providing a knowledge-based certificate. A knowledge-based certificate provider may also be called to the Court of Protection to account for their opinion if, for example, a family member objects to the LPA. The Court may impose a higher standard of care and skill if the knowledge-based certificate has been provided by a solicitor and the donor is their client or former client.

7.6.3 Referral arrangements

A solicitor may wish to refer a client to another solicitor in order to provide the certificate – or to provide a second certificate where the donor decides not to include anyone to be notified (see section 7.8 below). The solicitor must however consider the SRA Principles before making such a referral. .

7.7 Registration of the LPA

The donor must understand that the LPA cannot be used until it has been registered with the Office of the Public Guardian. The LPA can be registered anytime after it has been completed and signed by all those who are required to sign (see section 11 below). It is important that the solicitor clearly explains to the donor the implications of not registering the LPA shortly after it has been made. For example if the donor of an unregistered personal welfare LPA faced a medical emergency their attorney(s) would not be authorised to act on their behalf until the power is registered, which at the very least

would take between five and six weeks (see section 12.5 below). Once registered, a property and affairs LPA can be used while the donor still has capacity, unless it specifies that it can't, while a personal welfare LPA can only be used when the donor no longer has capacity to make the particular decision affecting their healthcare or personal welfare.

7.8 Notification of intention to register the LPA

Solicitors should explain to the donor that they can name up to five people to be notified when an application to register the LPA is made. An attorney of the LPA cannot be specified as a named person. If the donor decides not to include anyone to be notified then a second person will be needed to provide an additional certificate (see section 7.5 above). The donor should be clear that including a named person is an important safeguard because if he or she lacks capacity at the time of registration they will be relying on these people to raise concerns. The donor should be advised to make their named person(s) aware of the LPA, whether it is a property and affairs LPA or personal welfare LPA and what is required of them when an application to register is made, before the LPA is completed. This will ensure that where a person does not wish to take on this role, someone else can be appointed. The donor may also want to tell his or her named person(s) who they have appointed as attorney(s). This will allow them to raise any queries or concerns with the donor and may reduce unfounded objections being made when the application to register the LPA is made, avoiding extra costs and lengthy delays to the process.

7.9 The LPA Register and disclosure of information

The Office of the Public Guardian is responsible for maintaining a register of all LPAs - as well as a register of EPAs and of court appointed deputies. Clients should be aware that once their LPA is registered certain basic information about their LPA will be available to anyone who applies to search the register and pays a fee – such as:

- the donor's name (and previous names) and date of birth;
- whether it is a property and affairs LPA or a personal welfare LPA but not the contents;
- the date the LPA was created and registered;
- the name(s) of the attorney(s);
- the nature of the appointment (joint or joint and several); and
- whether the LPA contains any restrictions, conditions or guidance but not the details of the restrictions, conditions or guidance; and
- whether or not a note has been attached to the LPA, but no details of what the note says.

Clients should also be aware that anyone can also, on application and payment of a fee, undertake a 'second tier search' for further information about their LPA. This will require the applicant to explain in greater detail to the Office of the Public Guardian why they require the information and to demonstrate that the request is in the donor's best interests.

7.10 Delegation by the attorney

It is a basic principle of the law of agency that an attorney cannot delegate his or her authority. Alternatively, this could be expressed as a duty on the part of an agent to perform his or her functions personally. Such a duty is imposed because of the discretion and trust reposed in the attorney(s) by the donor. There are exceptions to this general rule and, like any other agent, an attorney acting under an LPA has an implied power in certain circumstances to delegate:

- any functions which are of a purely administrative nature and do not involve or require the exercise of discretion;

- any functions which the donor would not expect the attorney to attend to personally; or

- through necessity or unforeseen circumstances;

Any wider power of delegation must be expressly provided for in the LPA itself.

7.11 Substitute appointments

Whilst an LPA cannot provide for an attorney to make a substitute or successor appointment, it can appoint a replacement attorney to act if one or any of the attorneys cannot continue to act. If the donor of a property and affairs LPA or a personal welfare LPA wants to appoint a replacement attorney he or she can appoint as many replacements as they like. It will be important that the donor sets out clearly how they are to be appointed and how they are to act, for example solely or jointly (see section 7.2 above). If the donor has more than one attorney, he or she can specify who the replacement attorney can replace and who they cannot replace. If no restrictions are put in place by the donor then the first replacement will replace the first attorney who needs replacing. The donor can only appoint a replacement attorney for the original attorneys. The solicitor should advise that when considering whether a replacement attorney should be appointed, it is important that the donor chooses someone they know well and trust to make decisions in their best interests in the same way as would be the case for their first choice attorney(s).

7.12 Solicitor-attorneys

Where a solicitor is appointed as the attorney of an LPA it is recommended that their current terms and conditions of business (including charging rates and the frequency of billing) are discussed with and approved by the donor at the time of granting the power.

The prescribed forms for both property and affairs LPAs and personal welfare LPAs include a section where the donor can confirm that they have agreed for their attorney to be paid a fee and set out the arrangements which have been agreed. It is recommended that any decisions about payments should be recorded with the appropriate level of detail necessary. A solicitor acting as an attorney of a property and affairs LPA must be aware of their money laundering compliance requirements (see section 8.7 below). Further information on making decisions under an LPA and the implications for solicitors is provided in section 14 below.

7.13 Medical evidence

It may be worth asking the donor to give advance consent in writing authorising the solicitor to contact the donor's GP or any other medical practitioner if the need for medical evidence should arise at a later date to assess whether the donor has capacity to make a particular decision.

7.14 Safeguards against abuse

Solicitors should discuss with the donor appropriate measures to safeguard against the power being misused or exploited. This could include notifying other family members or friends (who are not named on the prescribed form as someone to be notified) of the existence of the power, why they have chosen the attorney(s) and how the donor intends it to be used. This may help to guard against the possibility of abuse by an attorney and may also reduce the risk of conflict between family members at a later stage. The solicitor could also consider offering an auditing service, by inserting a clause into the power requiring the attorney to produce to the solicitor, on a specified date each year, an account of his/her actions as attorney during the last 12 months. If the attorney failed to render a satisfactory account, the solicitor could contact the Office of the Public Guardian (see section 14 below). Again a charging procedure for this auditing service must be agreed with the donor in advance.

8. Taking instructions - property and affairs LPAs

This section of the practice note covers issues specific to property and affairs LPAs. For issues common to both property and affairs LPAs and personal welfare LPAs see section 7 above. For issues specific to personal welfare LPAs see section 9 below.

8.1 Scope

A registered property and affairs LPA can be used whilst the donor retains capacity as an Ordinary Power of Attorney. Alternatively the LPA can specify that it can only be used when the donor no longer has capacity. The LPA could enable the attorney(s) to take a wide range of actions such as - the buying, selling, or mortgaging of property or dealing with the donor’s tax affairs, or claiming benefits on behalf of the donor (paragraph 7.36 of the Code of Practice provides a more extensive list). The donor can limit the power of

the LPA by specifying that the LPA only grants authority to the attorney(s) to execute certain specific tasks - or it can include a general authority to act (see section 7.3 above).

8.2 Gifts

Section 12 of the MCA 2005 gives the attorney(s) limited authority to make gifts of the donor's money or property:

- The recipient of the gift must be either an individual who is related to or connected with the donor (including the attorney(s)), or a charity to which the donor actually made gifts or might be expected to make gifts if he or she had capacity.

- The timing of the gift must occur within the prescribed parameters. A gift to charity can be made at any time of the year, but a gift to an individual must be of a seasonal nature, or made on the occasion of a birth or marriage/civil partnership, or on the anniversary of a birth or marriage/civil partnership.

- The value of the gift must be not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

The donor cannot confer wider authority on the attorney than that specified in section 12, but it is open to the donor to restrict or exclude the authority which would otherwise be available to the attorney(s) under that subsection. This should be considered by the donor, since improper gifting in relation to EPAs was a widespread form of abuse in attorneyship. The donor may wish to specify in the power the circumstances in which the attorney(s) may make gifts of money or property. The Court of Protection can authorise the attorney(s) to act so as to benefit themselves or others, otherwise than in accordance with section 12, provided that there are no restrictions in the LPA itself and the court is satisfied that this would be in the donor’s best interests (s.23(4), MCA 2005). Solicitors must also take account of IB 1.9, see Outcomes in Chapter 1 on Client Care, SRA Code of Conduct 2011concerning gifts from clients.

8.3 Investment business

Unless the power is restricted to exclude investments as defined by the Financial Services and Markets Act 2000, the attorney(s) may need to consider the investment business implications of his/her appointment. A solicitor who is appointed as the attorney under an LPA is likely to be conducting investment business and if so, will need to be authorised under the Financial Services and Markets Act 2000. In addition, the solicitor will need to consider whether the Solicitors’ Financial Services (Scope) Rules 2001 apply.

8.4 Trusteeships held by the donor

The solicitor should ask whether the donor holds:

- any trusteeships; and
- any property jointly with others.

Under the Trustee Delegation Act 1999 the general rule is that any trustee functions delegated to an attorney (whether under an ordinary power or an enduring/lasting power) must comply with the provisions of section 25 of the Trustee Act 1925, as amended by the 1999 Act. However, section 1(1) of the 1999 Act provides an exception to this general rule. An attorney can exercise a trustee function of the donor if it relates to land, or the capital proceeds or income from land, in which the donor has a beneficial interest. This is, of course, subject to any provision to the contrary contained in the trust instrument or the power of attorney itself.

8.5 The donor's property and affairs

It may be helpful for solicitors to record and retain information relating to the donor's property and affairs, even where they are not to be appointed as an attorney themselves. The Law Society's Personal Assets Log, which is sometimes used when taking will-drafting instructions, could be suitably adapted for this purpose. In addition, there are certain requirements under the Solicitors' Financial Services (Conduct of Business) Rules 2001 where solicitors safeguard and administer documents of title to investments e.g. share certificates.

8.6 Disclosure of the donor's will

Solicitors are under a duty to keep their clients' affairs confidential (Chapter 4 on Confidentiality and disclosure, SRA Code of Conduct 2011). However, the attorney(s) may need to know about the contents of the donor's will in order to avoid acting contrary to the testamentary intentions of the donor (for example, by the sale of an asset specifically bequeathed, when other assets that fell into residue could be disposed of instead). The question of disclosure of the donor's will should be discussed at the time of making the LPA, and instructions should be obtained as to whether disclosure is denied, or the circumstances in which it is permitted – which should be incorporated into the LPA. For example, the donor may agree that the solicitor can disclose the contents of the will to the attorney(s), but only if the solicitor thinks that disclosure of the will is necessary or expedient for the proper performance of the attorney's functions. This type of discretionary power would need to be included in section 6 of the prescribed form under 'restrictions and/or conditions'. The attorney(s) also has a common law duty to keep the donor's affairs (including the contents of a will) confidential.

8.7 Money laundering

The preparation of an LPA for clients does not itself constitute a ‘financial transaction’ for the purposes of the Money Laundering Regulations 2007. However, a solicitor acting for an attorney, or as an attorney themselves, is likely to be undertaking ‘relevant business’. Guidance is available to help solicitors understand their money laundering compliance requirements (see www.moneylaundering.lawsociety.org.uk) and help may also be obtained from the Law Society's Practice Advice Service.

8.8 Statutory wills

An attorney cannot execute a will on the donor's behalf because the Wills Act 1837 requires a will to be signed by the testator personally or by someone in his or her presence and at his or her direction. Where a person lacks testamentary capacity, the Court of Protection can order the execution of a statutory will on his or her behalf. The Court's will-making jurisdiction is conferred by section 18 of the MCA 2005.

9. Taking instructions - personal welfare LPAs

This section of the practice note covers issues specific to personal welfare LPAs. For issues common to both property and affairs LPAs and personal welfare LPAs see section 7 above. For issues specific to property and affairs LPAs see section 8 above.

9.1 Scope

Solicitors should make their clients aware that a registered personal welfare LPA only becomes operative once the donor has lost capacity to make the specific personal welfare decision which is required at the material time. Clients should also be informed that, unless the donor adds restrictions or conditions, the attorney(s) of a personal welfare LPA will have authority to make all personal welfare, including healthcare, decisions, except for:

- decisions relating to life sustaining treatment, unless the LPA expressly authorises this (see section 9.2 below);
- where the donor has made a valid advance decision to refuse the proposed treatment (see section 9.3.1 below);
- consent or refusal of medical treatment for a mental disorder where the donor is detained under the Mental Health Act 1983; and
- decisions about where a donor subject to guardianship under the Mental Health Act 1983 is to reside, nor any other decisions which conflict with those of a guardian.

Although the MCA 2005 does not define ‘personal welfare’, chapter 7 of the Code of

Practice gives some guidance and suggests that a personal welfare LPA might include decisions about:

- where the donor should live and who they should live with
- 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
- complaints about the donor's care and treatment

A personal welfare LPA could be a very powerful document because of the wide ranging decisions that could be made on behalf of the donor and therefore clients need to make an informed decision about the scope of the power. Clients should be encouraged to consider this carefully and may want to discuss the scope of authority with their prospective attorney(s) and, where appropriate, their GP or any relevant health or social care professionals. The personal welfare LPA could of course be limited to specific decisions and it may be helpful to create a checklist of questions and a range of suggested clauses which the client might wish to include when creating a personal welfare LPA. For example, a clause could be included to restrict the power to accommodate the donor at another location without consulting specific members of the family. Clients can also set out their wishes and preferences for personal care, including healthcare, which are not legally binding but which their attorney(s) will take into account in deciding best interests by completing the guidance for attorney(s) at section 8 of the prescribed form (see also section 8.4 above). Possible points for the client to consider when deciding whether to make a personal welfare LPA could include:

- do you want your attorney to be able to decide where you will live?
- do you want the attorney to be able to decide whether other members of your family or your friends can visit you?
- do you want your attorney to be able to make all types of health and medical decisions on your behalf including giving consent to have an operation?
- do you want your attorney to decide whether or not you receive life sustaining treatment?

• do you want to limit the scope of the decision–making and leave decisions to the medical team treating you at that time?

Solicitors will need to exercise care in drafting so that the client's instructions are clear to any health or social care professional who inquires as to the scope of the attorney(s) authority under the LPA.

9.2 Life sustaining treatment

Decisions to give or refuse life sustaining treatment can only be made by the attorney(s) if the donor has specifically confirmed this in section 6 of the prescribed form - in the presence of a witness. The witness must be over 18 and cannot be the attorney (see also section 12.2 below). Life sustaining treatment is defined in section 4 (10) of the MCA 2005 as 'treatment which in the view of a person providing healthcare for the person concerned is necessary to sustain life.' Further guidance is provided in paragraphs 5.29 - 5.36 of the Code of Practice.

9.3 Relationship with advance decisions and advance statements

9.3.1 Advance decisions Some clients may ask about making a 'living will' - which is described in the MCA 2005 as an 'advance decision' - and whether they should make an advance decision rather than a personal welfare LPA or vice versa. An advance decision allows a person with capacity to refuse specified medical treatment at a point in the future when he or she lacks the capacity to consent to that treatment. If an advance decision is both valid and applicable in the particular circumstances, it has the same effect as a contemporaneous refusal of treatment by a person with capacity. This means that the treatment specified in the decision cannot lawfully be given. Further information and guidance is provided in chapter 9 of the Code of Practice. It will be prudent for the solicitor to be prepared with perhaps an information sheet about the differences between a personal welfare LPA and an advance decision together with more detailed clauses which might be included in a personal welfare LPA. Possible points for the client to consider when choosing between an advance decision and personal welfare LPA include:

• A personal welfare LPA allows a donor to give general authority for the attorney(s) to consent or refuse life sustaining treatment where Option A, section 6, of the prescribed form is completed. Unlike an advance decision it is not necessary to specify a particular treatment. This of course requires a high degree of trust by the donor towards the attorney(s).

• Under a personal welfare LPA the attorney(s) must make decisions in the donor's best interests – and follow the checklist in section 4 of the MCA 2005 which includes consultation with those close to the person who lacks capacity. Where an advance decision is being followed the best interests principle does not apply – and it must be carried out even if the healthcare professionals think it goes against the person's best interests.

• There are stringent requirements for completing and registering an LPA – whereas the MCA 2005 does not impose any particular formalities concerning advance decisions except for decisions relating to life sustaining treatment. This relative informality may be attractive for some clients but it can also lead to uncertainty over whether an advance decision exists or is valid.

Clients should be made aware that where a person makes a personal welfare LPA (regardless of whether it provides authority to consent/refuse life sustaining treatment) and subsequently makes an advance decision, which is valid and applicable in the circumstances, the advance decision takes priority. An LPA made after an advance decision will make the advance decision invalid, if the LPA gives the attorney authority to make decisions about the same treatment. The solicitor should also advise that the law relating to euthanasia and assisted suicide has not been changed, and the introduction of personal welfare LPAs and statutory advance decisions does not legitimise euthanasia.

9.3.2 Advance statements

The client should also be aware that the MCA 2005 provides for creation of an 'advance statement', which enables a person with capacity to set out their wishes and feelings in writing about the care and treatment they would like to receive should they lose capacity in the future. Advance statements are not legally binding but should be taken into account by decision makers – including attorney(s) - when making best interest decisions under section 4 of the MCA 2005. A client could decide to make an advance statement as a separate exercise to providing guidance for their attorney in section 8 of the prescribed form. Further information on advance statements is provided in paragraphs 5.37 – 5.45 of the Code of Practice

10. Drawing up the LPA – property and affairs LPAs and personal welfare LPAs

10.1 The prescribed forms

The LPA must be in the form prescribed by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No. 1253) (the regulations). Solicitors should be aware that new regulations may be issued in the future and ensure that the LPA is in the form prescribed by the regulations in force at the time of execution by the donor. Where the instrument differs from the prescribed form in an immaterial respect, the Office of the Public Guardian may treat it as sufficient (Schedule 1, Part 1, Para. 3(1) to the MCA 2005). The Court of Protection has the power to treat an LPA as valid even if it is not in the prescribed form, if it is satisfied 'that the persons executing the instrument intended it to create a lasting power of attorney' (Schedule 1, Part 1, Para. 3(2) to the MCA 2005).

10.2 Completing the form

Solicitors should be aware that the prescribed LPA forms are significantly longer than the previous EPA forms – the property and affairs LPA is 25 pages long and the personal welfare LPA is 24 pages long – and this will have implications for both the time spent with clients and the cost. The donor of the LPA must have read (or have read to him or her) the prescribed information about the LPA and will need to sign a statement in the LPA to that effect. Any solicitor preparing an LPA should consider the time and cost implications of this obligation. It may take time to provide the client with the appropriate information for him or her to decide whether they want to 'tick the box' to dispense with the provision to notify anyone when the power is registered (see section 7.8 above). The attorney(s) will have to file a statement confirming that they have read the relevant information, or part of it, and understand the duties imposed on the attorney of an LPA with particular reference to section 1 of the MCA 2005 (the principles) and the duty to have regard to the Code of Practice. This again may have cost implications as explaining these provisions could take time – and simply sending or arranging for the attorney(s) to sign the document is unlikely to be sufficient. There is space on the prescribed form to provide details of two attorneys. Where it is intended to appoint more than two attorneys, their details may be included on a separate sheet which must be attached securely at the back of the LPA. Where more than two attorneys are to be appointed, details of the first two attorneys should be given in the main document, followed by the words 'and (see additional names on attached sheet)' and the details given on a sheet to be attached to the main document marked clearly 'Part A, section 3: Names of additional attorneys.' This should be also be signed and dated. The prescribed form also contains space to appoint a replacement attorney (see section 7.11 above). If the donor wishes to appoint more than one replacement attorney, the above paragraph applies in that the details given on the separate sheet must be attached to the main document and marked clearly. An LPA may be refused registration because of a defect in the form or the wording of the instrument. In some cases, registration may be possible after the filing of further evidence to overcome the defect. Solicitors who have assisted a donor in drawing up an LPA which is subsequently refused registration because of a defect that is material may be liable for the additional costs of deputyship, since at that point the donor may not have the capacity to execute a new LPA.

11. Executing the LPA - property and affairs LPAs and personal welfare LPAs

11.1 The regulations require that an LPA must be executed by the donor, the certificate provider and the attorney(s) in the following sequence:

- the donor must read (or have read to him/her) the prescribed information;
- the donor must complete and sign (in the presence of a witness) Part A of the document;
- the certificate provider(s) must complete Part B and sign it;
- the attorney(s) must read (or have read to him/her) the prescribed information;

- the attorney(s) must complete and sign (in the presence of a witness) Part C of the document.

This sequence is necessary because the certificate provider must confirm that they have read Part A and because the attorney(s) cannot accept a power which has not yet been conferred. Execution by the donor, certificate provider and attorney(s) need not take place simultaneously – however the regulations require that each stage outlined above must take place as soon as reasonably practicable after the previous stage. (Note, that section 6 of a personal welfare LPA must be signed and witnessed simultaneously, see section 9.2 above.)

11.2 Execution by the donor and the attorney(s) must take place in the presence of a witness (but not necessarily the same witness) who must sign Part A or Part C of the prescribed form, as the case may be, and give his or her full name and address. There are various restrictions as to who can act as a witness, and in particular:

- the witness must be at least 18
- the donor and attorney must not witness each other's signature;
- it is not advisable for the donor's spouse or civil partner to witness his or her signature - this is because of the rules of evidence relating to compellability; and
- at common law, a blind person cannot witness another person's signature.

11.3 If the donor is physically disabled and unable to sign, he or she may leave a mark. Alternatively, the donor may authorise another person to sign the LPA at his or her direction, in which case it must be signed by that person in the presence of the donor and two witnesses. Similarly an attorney who is unable to sign can leave a mark or authorise another person to sign at his or her direction in the presence of two witnesses. A certificate provider can leave a mark but cannot authorise someone to sign at his or her direction.

12. The registration process - property and affairs LPAs and personal welfare LPAs

12.1 A key difference between LPAs and the old EPA procedure is that an LPA is not created unless the instrument conferring authority has been registered with the Office of the Public Guardian. So even if the LPA has been correctly filled in and properly signed it will have no authority until it is registered.

12.2 There is no time limit for making the application to register the LPA (however see section 7.7 above). The application can be made by the donor, or all the attorneys if the LPA is a joint power, or if a joint and several power by any of the attorneys.

12.3 The donor or the attorney(s) making the application to register must give notice to

everyone named by the donor in the LPA as a person who should be notified, of an application to register using the prescribed form of notice (LPA001). It may be helpful for the donor or attorney(s) to send the notice with an accompanying letter explaining the circumstances because, in the absence of such an explanation, there may be cause for concern. Giving an appropriate explanation and information at this stage may prevent the application from becoming contentious. Although there is no statutory requirement to do so, a copy of the LPA could also be sent to the named person(s), in view of the fact that one of the grounds on which they can object to registration is that the power purported to have been created by the instrument is not valid as a lasting power.

12.4 When the application to register is made by the attorney(s), the Office of the Public Guardian will notify the donor that the application has been received - using the prescribed form of notice (LPA003B). Where 'it appears there is good reason to do so' the Office of the Public Guardian will inform the donor personally. When the application is made by the donor, the Office of the Public Guardian will notify the attorney(s) using the prescribed form of notice (LPA003A). The attorney(s) is not obliged to inform the donor of their intention to register the LPA but it is recommended that the donor should be informed either in writing or in person. This should if possible take place at the same time as the named person(s) are notified.

12.5 There is a prescribed period of 5 weeks during which objections can be raised with the Public Guardian. The grounds for objecting include:

- the LPA has been revoked
- the requirements to make an LPA have not been met
- fraud or undue pressure was used to create the LPA
- the attorney has behaved or is behaving in a way that contravenes his or her authority or is not in the best interests of the donor or proposes to behave in a way that would contravene his authority or would not be in the donor's best interests

Where there are no objections or defects, the Office of the Public Guardian must register the power within 6 weeks of the date the notices were sent to the named persons.

12.6 The donor should be told that a fee will be payable for the registration of the LPA. A separate fee will be charged for a property and affairs LPA and for a personal welfare LPA – even if they have been made by the same donor.

12.7 The registered LPA document will be stamped on every page by the Office of the Public Guardian. A copy of the instrument is retained by the Office of the Public Guardian and the original will be returned to the person(s) who applied for registration. A prescribed notice of registration is sent to the donor and the attorney(s) (LPA004).

12.8 Following registration the existence of an LPA can be proved by the original stamped instrument, an office copy or a certified copy. If there is any doubt, a third party may search the register of LPAs which is maintained by the Office of the Public Guardian (see section 7.9 above).

13. Decision making under an LPA - property and affairs LPAs and personal welfare LPAs

13.1 The functional and time-specific test of incapacity and best interests

Unlike the old EPA regime where registration demonstrates to a third party that the attorney has responsibility and the authority to make financial decisions involving the donor's assets, the MCA 2005 does not have such a readily identifiable point where the attorney(s) takes over. This is because section 2 of the MCA 2005 sets out a 'functional and time-specific' test of incapacity, which means capacity will vary according to the particular decision to be taken at the particular time. For example, a donor may be able to make decisions about household spending but not about selling his or her home. One month later their capacity to make these decisions may have changed – either improved or become worse. This means that there will not generally be any one point where a person loses capacity to make all decisions and therefore there is no one point when the donor stops acting and the attorney(s) takes over. Instead, the MCA 2005 sets out a joint approach where the attorney and the donor work together. The starting assumption must always be that a donor has the capacity to make a decision, unless if can be established that they lack capacity (s.1(1), MCA 2005) and a donor should not be treated as unable to make a decision unless all practical steps to help him or her to do so have been taken without success (s.1(3), MCA 2005). Further guidance is provided in chapters 2 and 3 of the Code of Practice. Where it is established that the donor lacks the capacity to make a particular decision, section 4 of the MCA 2005 requires the attorney to act in the donor's 'best interests'. The MCA 2005 sets out a checklist of factors that should always be considered by a person deciding what is in the best interests of a person who lacks capacity. This includes, amongst other considerations, consulting, where appropriate, with the relatives, carers and others who have an interest in the donor's welfare. It also includes, where reasonably practical, permitting and encouraging the donor to participate as fully as possible or improving their ability to participate in making the decision – which could involve deferring making a decision or setting up further assistance in order to enable the donor to make a decision. This may be particularly relevant in relation to personal welfare LPAs as these will only operate where the person lacks capacity to make the decision. Further guidance on best interests is provided in chapter 5 of the Code of Practice. The functional and time-specific test of incapacity and determining the donor's best interests under section 4 of the MCA 2005 are likely to prove challenging for solicitors acting as attorneys, and the increased cost implications for the client as well as for firms will need to be considered.

13.2 Duties and responsibilities of attorneys

An attorney has a duty to act within the scope of his or her powers set out in the LPA - but the authority conferred by the LPA is also subject to the provisions of the MCA 2005, in particular section 1 (the principles) and section 4 (best interests). The MCA 2005 also places a specific obligation on attorneys and anyone acting in a professional capacity to have regard to the Code of Practice. Attorneys also have a duty:

- of care
- to carry out the donor's instructions
- not to take advantage of the position of the attorney
- not to delegate unless authorised to do so
- of good faith
- of confidentiality
- to comply with directions of the Court of Protection
- not to disclaim without complying with the relevant guidance

In relation to property and affairs LPA there is also a duty to

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

Solicitors acting as attorneys under an LPA are also required to display a higher standard of care and skill. According to paragraph 7.59 of the Code: '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 abide by their own professional rules and standards.' Further guidance on the duties and responsibilities of attorneys is provided in Chapter 7 of the Code of Practice.

13.3 Relationship between property and affairs and personal welfare LPAs

The attorney(s) has a duty to act within the extent of his powers, so a property and affairs LPA does not give the attorney(s) power to make personal welfare decisions – and vice versa. An attorney will however be expected, if practical and appropriate, to consult with the attorney(s) of any other LPA made by the donor, whenever his or her best interests are being considered (s.4(7)(c), MCA 2005 and paragraph 5.55 of the Code of Practice). It is also likely that EPA attorney(s) would also be consulted (see

section 15.5 below). Attorneys should also be aware that the demarcation between decisions made under a property and affairs LPA and a personal welfare LPA may not always be clear. For instance the choice of nursing home may have both welfare and financial implications for the donor. It will be important in these types of cases for the attorneys to consult each other and seek to reach agreement. If there are conflicts then an application could be made to the Court of Protection to resolve the issue but this will in itself have cost implications and should only be considered as a last resort.

13.4 Disclaiming an appointment

An attorney or proposed attorney can disclaim his or her appointment by completing the prescribed form (LPA005) which must be sent to the donor and copied to the Office of the Public Guardian and any other attorney(s) appointed under the power.

13.5 Support for attorneys

Section 22 of the MCA 2005 provides that the Court of Protection can determine questions about the validity and revocation of LPAs (both registered and unregistered), and can direct that the instrument should not be registered, or where it has been registered and the donor lacks capacity, that it should be revoked. However, the Court should not be seen as being available to 'hold the hand' of the attorney, who should in normal circumstances be able to act in the best interests of the donor, taking advice where necessary from a solicitor or other professional adviser. It should be noted that, although the Court may interpret the terms of an LPA or give directions as to its exercise, it does not have power to extend or amend the terms of the LPA as granted by the donor.

14. Where abuse is suspected – property and affairs LPAs and personal welfare LPAs

If solicitors suspect that an attorney may be misusing an LPA or acting dishonestly they should contact the Office of the Public Guardian immediately. They should also contact the police if they suspect physical or sexual abuse, theft or serious fraud. It may also be necessary – particularly in cases involving personal welfare LPAs – to refer the matter to local adult protection authorities. Further guidance is provided in paragraphs 7.69 - 7.74 and Chapter 14 of the Code of Practice.

15. Enduring Powers of Attorney

15.1 The Enduring Powers of Attorney Act 1985 was repealed by the MCA 2005, but it is reintroduced almost in its entirety, in Schedule 4 to the MCA 2005. The amendments take account of the changes to the Court of Protection and the new role of the Office of the Public Guardian in the registration process. It is not possible to make new EPAs, although the operation of existing EPAs made before 1 October 2007 will fall under

Schedule 4 to the MCA 2005.

15.2 Schedule 4 paragraph 1 (1) to the MCA 2005 specifically excludes the principles of the MCA 2005 applying to the EPA attorney. However under the law of agency, the EPA attorney has certain duties towards the donor (these are listed in section 13.2 above and further guidance is provided in paragraphs 7.58 – 7.68 of the Code of Practice).

15.3 According to paragraph 7.5 of the Code of Practice, EPA attorneys do not have a legal duty to have regard to the Code - but the Code's guidance will still be helpful to them. A solicitor acting as an EPA attorney may still be considered to have a duty to have regard to the Code of Practice since he or she will be acting in a 'professional capacity' for the purposes of section s.42(4)(e)of the MCA 2005. However, Schedule 4 of the MCA 2005 retains the EPA concept that there is one point in time when a person is deemed to lack capacity and that the power must be registered with the Office of the Public Guardian when the attorney believes that the donor is becoming or has become incapable of managing his or her financial affairs. This is different to the concept of incapacity used in the rest of the MCA 2005 which is both function and time-specific (see section 13.1 above). It would appear to be the case that the effect of this is that the Code will selectively apply to the professional EPA attorney as there will not be a requirement to assess capacity on each and every decision being made.

15.4 Under an EPA the attorney is under a common law duty to act in the donor's best interests. This does not apply where the client has capacity and the EPA is unregistered and being used as an Ordinary Power of Attorney – although the normal duties under the law of agency apply.

15.5 The attorney of an EPA is not specifically named as a person to be consulted when a decision maker is making a best interests determination under section 4 of the MCA 2005. However it is likely that in the majority of cases any EPA attorney will be considered to be a person who is 'interested in his welfare' for the purposes of section 4(7)(b) of the MCA 2005, and therefore would be consulted. This appears to be confirmed in paragraph 5.55 of the Code of Practice.

15.6 The Office of the Public Guardian is responsible for maintaining a register of EPAs which can be searched by any person on payment of a fee (see section 7.9 above).

16. Further information

16.1 Further products and support

16.1.1 Practice Advice Service

The Law Society provides support to solicitors on a wide range of areas of legal practice. The service is staffed by solicitors and can be contacted on 0870 606 2522 from 09.00 to 17.00 on weekdays.

www.lawsociety.org.uk/practiceadvice.

16.1.2 Professional Ethics Helpline

Solicitors Regulation Authority's Professional Ethics Helpline for advice on conduct issues.

16.2 Acknowledgements

The Law Society wishes to thank members of the Wills and Equity Committee for their assistance in drafting this Practice Note.