Lasting powers of attorney

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Any solicitor intending to give advice about a lasting power of attorney (LPA) or act as an attorney under an LPA must be aware of the provisions in the Mental Capacity Act 2005 (MCA 2005) and the Mental Capacity Act 2005 Code of Practice (Code of Practice).

Solicitors should also be familiar with the relevant guidance produced by the Office of the Public Guardian (OPG).

The practice note provides an overview of LPAs and also covers the ongoing arrangements for enduring powers of attorney (EPA). It does not deal with situations with an international element, for example, using an LPA to sell a foreign property, or a non-UK individual who wishes to make an LPA.

This practice note is the Law Society's view of good practice in this area, and is not legal advice. For more information see the legal status.

1. Introduction

1.1 Who should read this practice note?

Solicitors who advise clients on drawing up a lasting power of attorney (LPA) and solicitors who are acting as an attorney under an LPA or an enduring power of attorney (EPA).

This practice note may be helpful to conveyancers where a seller or buyer is acting under a power of attorney.

1.2 What are the issues?

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 Mental Capacity Act 2005 (MCA 2005) and the Mental Capacity Act 2005 Code of Practice (the Code of Practice).

Solicitors should also be familiar with the relevant guidance produced by the Office of the Public Guardian (OPG).

The practice note provides an overview of LPAs, and also covers the ongoing arrangements for EPA.

It does not deal with situations with an international element, for example using an LPA to sell a foreign property, or a non-UK individual who wishes to make an LPA.

Professional conduct

The following paragraphs of the SRA Code of Conduct for Solicitors are relevant to this issue:

- paragraph 1 on maintaining trust and acting fairly
- paragraph 3 on service and competence
- paragraph 4 on client money and assets
- paragraph 6 on conflicts of interests, confidentiality and disclosure
- paragraph 8 on client identification

2. Powers of attorney

2.1 Lasting powers of attorney

There are two current separate prescribed forms for LPAs available from GOV.UK:

- LPA for property and financial affairs (LP1F)

- LPA for health and welfare (LP1H)

Property and financial affairs LPA

A property and financial affairs LPA 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
- claiming benefits

See paragraphs 7.32 to 7.39 of the Code of Practice for more information.

Health and welfare LPA

A health and welfare LPA can be used to appoint attorneys to make decisions on, for example:

- where the donor should live
- day-to-day care (including for example, diet and dress)
- whether to give or refuse consent to medical treatment

See paragraphs 7.21 to 7.31 of the Code of Practice for more information.

All LPAs must be registered with the OPG before they can be used.

The OPG keeps a register of LPAs which is free and easy to search using the form on its website.

In urgent situations, NHS and local authorities may request a search and the OPG aim to provide a response within 24 hours during the working week.

2.2 Enduring powers of attorney

The MCA 2005 repealed the Enduring Powers of Attorney Act 1985 and it is no longer possible to create a new EPA.

An EPA can only deal with finances and property.

However, valid EPAs that were executed before the MCA 2005 came into force on 1 October 2007 will continue to be valid even if they have not been registered.

It is important to note that an EPA is only registered when the attorney believes the donor is or is becoming mentally incapable of managing or administering their property and affairs because of a mental disorder. This is a major distinction between the LPA and the EPA.

See section 16 on enduring powers of attorney for further information.

2.3 Ordinary powers of attorney

Section 10 of the Power of Attorney Act 1971 provides for the making of an ordinary power of attorney (OPA) to manage the donor's affairs.

An OPA is usually made when it is difficult for the donor to manage their affairs, for example because of a physical disability or when the donor is travelling abroad.

An OPA will cease when the donor becomes mentally incapable. Therefore, whilst they can serve a very useful purpose, where there are issues of fluctuating capacity, an LPA provides a more flexible solution.

3. The donor's capacity

3.1 Assessing capacity

You should be satisfied that the donor has the mental capacity to make a power of attorney. It is important that the donor is aware of the implications of their actions and you should be alerted to possibilities of exploitation.

When assessing a client's capacity to create an LPA, you should refer to sections 2 and 3 of the MCA 2005 and chapters 2-4 of the Code of Practice. See also the judgment of Mr Justice Poole in *The Public Guardian v RI, D, RS, RO [2022] EWCOP 22* which sets out the information the donor should understand, retain, use or weigh to have capacity to make their LPA, namely:

- the effect of the LPA
- who the attorneys are
- the scope of the attorney's powers and the MCA 2005 restricts the exercise of their powers
- when the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective
- the scope of the assets the attorneys can deal with under a property and financial affairs LPA
- the power of the donor to revoke the LPA when they have capacity to do so, and
- the pros and cons of executing the particular LPA and of not doing so

The judge referred to *Re Collis (unreported) 27 October 2010*, which referred to the donor needing to understand the LPA needed to be registered before use. It is very likely that Mr Justice Poole's judgment intended to follow Re Collis in this regard.

For further guidance, see *Assessment of Mental Capacity: a practical guide for doctors and lawyers* and our guidance on working with clients who may lack mental capacity.

3.2 Where there is doubt about a donor's capacity

If there is doubt about the donor's capacity, a medical opinion should be strongly 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.

Mr Justice Poole in *The Public Guardian v RI, D, RS, RO [2022] EWCOP 22* set out the following helpful evidence in relation to retrospective assessments of capacity where there is a dispute about past capacity which the court is required to determine:

- the certificate provider's experience – in particular in making a sufficient assessment of the capacity of a prospective donor who is known to have a learning disability or other impairment which might affect their capacity to execute an LPA – their usual practice or their specific recollections of the making of the LPA
- evidence from carers and family members relevant to the donor's capacity to execute an LPA at the relevant time and to any changes in their condition, relevant to capacity, over time
- medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date when the LPA was executed
- an assessment by a suitably qualified and experienced person of the donor's current capacity and reasoned opinion as to their capacity to execute the LPA at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members

You may want to ask the donor to give advance consent in writing authorising you 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.

3.3 Incapacity: the functional and time-specific test

With the EPA regime, registration demonstrated to a third party that the attorney has responsibility and the authority to make decisions relating to the donor's property and affairs.

Unlike this, the MCA 2005 provisions for LPAs do not have such a readily identifiable point where the donor is deemed to lack capacity and the attorney is required to make best interest decisions rather than acting on the instruction of the donor.

This is because sections 2 and 3 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 their home. One month later their capacity to make these decisions may have changed – either improved or become worse.

There may not be any one point where a person loses capacity to make all decisions.

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 it can be established that they lack capacity (section 1(2) MCA 2005).

A donor should not be treated as unable to make a decision unless all practical steps to help them to do so have been taken without success (section 1(3) MCA 2005).

Involving the donor as fully as practicable could involve deferring making a decision or setting up further assistance in order to enable the donor to make a decision.

Chapter 3 of the MCA Code of Practice contains useful guidance on how people can be supported to make their own decisions.

This should be considered, particularly where the donor has elected that their attorney acting under their property and financial affairs LPA should only make decisions when they lack mental capacity, and health and welfare LPAs only operate when the person lacks capacity to make the decision.

Further guidance is provided in chapters 2 and 3 of the Code of Practice.

3.4 Acting in the donor's best interests

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", taking into account the relevant circumstances.

The MCA 2005 sets out a checklist of factors that should be considered by a person deciding what is in the best interests of a person who lacks capacity.

This includes, where practicable and appropriate to do so, consulting with anyone the donor has named to be consulted, and people who have an interest in the donor's welfare, such as the relatives, carers and any co-attorney.

It also includes, where reasonably practicable, permitting and encouraging the donor to participate as fully as possible or improving their ability to participate in making the decision.

Further guidance on supporting people is provided in chapter 3 and on best interests is provided in chapter 5 of the Code of Practice.

4. Risk of abuse

You should, when advising clients of the benefits of LPAs, also inform them of the risks of abuse, particularly the risk that the attorney(s) could misuse the power.

You should discuss with the donor appropriate measures to safeguard against the LPA being misused or exploited, such as:

- a requirement to consult with particular people for more significant decisions
- an express requirement to produce all financial statements to non-attorneys or the replacement attorneys
- guidance which sets out what the donor considers would be a reasonable size for gifts on a customary occasion

The donor may also wish to discuss with other family members or friends (who are not named persons to be notified of an application to register the LPA) 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.

4.1 Deputyships

There may be situations where a deputyship could be viewed as being more appropriate and protective than the creation of an LPA.

A deputy will only be appointed where there is no appropriate registered LPA or EPA in place, and the donor lacks capacity to make new LPA. This may be advisable, for example:

- where the assets are more substantial or complex than family members are accustomed to handle and there is no suitable professional to appoint as attorney, or
- in cases where litigation may lead to a substantial award of damages for personal injury

It is important to be aware that the court will not approve a deputyship application as a matter of course.

In most situations, the Court of Protection will not appoint a health and welfare deputy as most care and treatment decisions can and should be made collaboratively, relying on section 5 of the MCA 2005.

However, the case of *Re Lawson, Mottram and Hopton (Appointment of Personal Welfare Deputies) [2019] EWCOP 22* confirmed there is no presumption against such appointment: the court may appoint do so if it is in the person’s best interests.

The person’s wishes and feelings will be very important in making such determination, which will be balanced with the requirement that decisions must be least restrictive of the person's rights and freedoms.

5. Taking instructions for an LPA

Where you are instructed to prepare an LPA, the donor is the client. You should ensure that you have taken and recorded the instructions from the client.

You must not accept instructions where you have reasonable grounds to suspect that those instructions have been given by the client under duress, coercion or undue influence.

It is important that the donor is independently represented, and that any solicitor acting for a family member is not also acting for the donor of the LPA as there is likely to be either a conflict of interests or a significant risk of a conflict of interests arising (paragraphs 6.1 and 6.2 of the Code of Conduct).

5.1 Verifying instructions

You should be instructed by the client.

When asked to prepare an LPA on written instructions alone, you should always consider carefully whether these instructions are sufficient, or whether you should see the client to discuss the instructions with them.

You must also not act on instructions until you are satisfied that the instructions represent the client's wishes (paragraph 3.1 of the Code of Conduct).

Where instructions for the preparation of an LPA are given by someone other than the client, you must not proceed without checking that the client agrees with the instructions given.

If you have doubts you should try to see the client alone or take other appropriate steps to confirm:

- the instructions with the client personally after offering appropriate advice free from the undue influence of others, and
- that the donor has the necessary capacity to make the power (see section 2 above)

5.2 Your duty to the donor after the LPA is registered

Only once the LPA has been registered, if the attorney is acting within the scope of the authority, can the attorney give instructions on the donor's behalf, as the donor's agent.

It is good practice to let the donor know that you have received instructions, as your duties of care to the donor still remain in place.

It is important to obtain clear written instructions from the donor at the time of drafting the LPA as to whom, and on what basis, any copy of the registered LPA, or any other of the donor's documents, such as their will, can be released.

However, if this is not provided, the default position is that the donor consents to the attorney seeing a copy of their will, unless otherwise stated within the LPA, or elsewhere.

See the following multi-agency guidance note confirming the same, and detailing the actions that a solicitor should take if such a request is received from an attorney, as some major exemptions apply.

The attorney can obtain a copy of the registered LPA from the OPG, or can register for the OPG's 'use my LPA' service, so third parties may see a summary of the LPA, making it easier for the attorney to act when it is necessary.

There are disadvantages to not providing a certified copy to the attorney on registration.

The attorney may need to make decisions quickly and will not be able to get a copy from the solicitor outside of working hours. In particular, this may negate the benefit of having a health and welfare LPA when the power extends to life-sustaining treatment decisions.

6. Drafting the LPA

6.1 Choice of attorney(s)

The choice of attorney(s) is a personal decision for the donor, but it is important for you to advise the donor of the various options available, and to stress the need for the attorney(s) to be trustworthy.

When considering whether to remove an attorney, the court can consider the attorney's behaviour in the wider world, not just in their role as attorney (*Re J, [2011] COPLR Con Vol 716)*.

The donor should be advised that the appointment of a sole attorney may provide greater opportunity for abuse and exploitation than appointing more than one attorney.

You should ask questions about:

- the donor's relationship with the proposed attorney(s) including any replacement attorney 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 health and welfare

The donor should be advised to 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 types of LPAs they may choose the same or different attorneys.

You should advise them on the benefits and risks of appointing different attorneys for each LPA.

6.2 More than one attorney

Where more than one attorney is to be appointed, they may be authorised to act:

- "jointly"
- "jointly and severally", or
- "jointly in respect of some matters and jointly and severally in respect of others" (section 10(4) MCA 2005)

If more than one attorney has been appointed and it is not stated whether they are appointed jointly or jointly and severally, they will be treated on the basis that they are appointed jointly when the LPA is registered. This is most likely to occur when the donor has appointed a sole original attorney and more than one replacement attorney.

This default position does not extend to EPAs and failure to specify on the prescribed form whether the attorneys should act jointly or jointly and severally would normally invalidate the instrument as an enduring power.

The differences between a 'joint' and 'joint and several' appointment should be explained to the donor.

You should explain to your client that when making a joint appointment:

- joint attorneys must all act together and not separately
- the LPA will terminate if any one of the attorneys disclaims, dies, becomes bankrupt (bankruptcy only applies to financial LPAs), or lacks capacity. Unless the LPA specifically states otherwise it will also terminate with the dissolution or annulment of the marriage or civil partnership between the donor and the attorney. However, this may be avoided if the LPA is drafted to reappoint the remaining attorneys who are able to act, either alone or with the remaining joint attorneys (if any)
- joint appointments may provide a safeguard against possible abuse, since each attorney will be able to oversee the actions of the other(s)

You should explain to your client that, when making a joint and several appointment:

- that joint and several attorneys can all act together but can also act independently if they wish, and
- the LPA will not be automatically terminated by the disclaimer, death, bankruptcy (in relation to financial LPAs), dissolution/annulment of marriage/civil partnership (between the donor and attorney), or incapacity of one attorney. In these circumstances the LPA would continue and the remaining attorney(s) can continue to act

Your client may wish for their attorneys appointed under an LPA to act jointly in respect of some matters and jointly and severally in respect of others.

The donor may have to make difficult choices as to which member(s) of the family or others to appoint as their attorney. You may wish to inform the donor that it is possible to allow some flexibility.

One option could be that the donor appoints their spouse or civil partner as attorney, with their adult child(ren) appointed as replacement attorneys should the spouse or civil partner die or become incapacitated.

Where jointly or jointly and severally appointed attorneys are unable to work together to such an extent that they are unable to operate the LPA for the purpose that it was intended, they may be removed on the basis that they are not acting in the donor's best interests (*Re EL (revoking a lasting power of attorney) [2015] EWCOP 30: Re KC [2020] EWCOP 62*).

The donor could appoint a family member and a professional to act jointly and severally, for example with the family member dealing with day-to-day matters, and the professional dealing with more complex decisions.

However, you may wish to consider and advise on the potential difficulties that could arise from this arrangement; for example, how will the professional know about decisions which the family member makes?

A professional attorney will have a higher duty of care and will usually be remunerated, and this could create tension between the attorneys.

Further problems could arise if, for example, the professional wishes to take a cautious approach and perhaps seek a court declaration or medical opinion, which would result in costs being incurred.

There may also be issues in respect of the professional's insurance that may prevent this arrangement being entered into.

Extended time may be needed to explain the benefits and drawbacks of requiring specific decisions to be made jointly, and jointly and severally, as these areas can be confusing for the donor and attorneys.

6.3 Conditions, restrictions and preferences

As well as allowing for the specification of conditions and restrictions (which the prescribed form refers to as ‘instructions’ on the authority of attorney(s), the prescribed forms for LPAs also allow preferences to be provided to the attorney(s) when making decisions in the donor's best interests.

Any conditions or restrictions, if deemed valid, will be automatically binding on the attorney(s) and can only be overturned by the court, whereas the preferences, although clearly pertinent, are not binding on the attorney(s).

You should ensure that you make the distinction between conditions/restrictions and preferences clear to the client.

It is important that the drafting of this section reflects this distinction and that the language used does not suggest that any preferences are binding.

You should explain to the client, and if practicable the attorney(s) that the preferences must be considered when making decisions in the best interests of the donor, but the attorney(s) may conclude that, having used the 'best interests checklist' set out in section 4 of the MCA 2005, it would be in the overall best interests of the donor to act differently from the preferences stated.

The attorney(s) are entitled to act differently from suggestions within the preferences section of the LPA.

Care must be taken to ensure that the clauses chosen to instruct and guide attorneys:

- are clear and non-contradictory, and
- do not require the attorney to carry out acts that would otherwise be illegal or act in a manner that is not in the best interests of the donor

It is open to the OPG to make an application to the Court of Protection for any clause which is ineffective to be severed. This means that the LPA will simply be interpreted as not having featured the severed clause in the first place.

The case of *the Public Guardian's Severance Applications (Rev 1) [2016] EWHC COP 10* should be referred to for further guidance on the court’s approach.

The OPG has provided further advice on the difference between preferences and instructions, and some sample wording in guidance contained in OPG guidance LP12.

Specific care should be taken when considering giving attorneys guidance on benefitting, gifting or maintaining themselves or third parties.

When considering these issues, the case of *Re Various Lasting Powers of Attorney [2019] EWCOP40* sets out very clear guidance and a helpful decision tree.

Unless it states otherwise, a registered property and financial affairs LPA can be used whilst the donor retains capacity.

Section 5 of the property and financial affairs LPA allows the donor to limit its use to when the donor lacks mental capacity.

You should explain that this type of restriction might be rejected as unworkable by financial institutions (*XY v the Public Guardian [2015] EWCOP 35*).

It is very common for a donor who has had a diagnosis of a condition which will result in cognitive deterioration, to fear losing independence and control over decision making. They may wish to limit the financial LPA to being used only when they lack mental capacity.

You should explain to the donor and if possible to the attorney, that the attorney should work in partnership with the donor to support them to make their own decisions. There may however come a time when the donor cannot make any decision, in which case the attorney will make all decisions for the donor.

If the donor wants to limit the LPA because they do not trust the attorney to act only when appropriate this may raise questions as to the appropriateness of their appointment.

When including such a limit, the solicitor will need to consider and advise how evidence of the donor's incapacity should be established.

For example, when seeking to use a health and welfare LPA, it is most likely that incapacity will be confirmed by the people or organisation accepting the attorney's authority, such as the doctor. However, a financial organisation may seek medical evidence before accepting authority for the attorney to act.

The solicitor will need to consider and advise the donor as to whether preferences should be contained separately in a letter of wishes, to allow easy updates.

However, inclusion in the LPA provides a permanent and transparent record of the donor's wishes and can be used by third parties to hold the attorney to account for their decisions.

Instructions should be included in the LPA, otherwise they are not binding on the attorney.

7. Certificate providers

A valid LPA must include a certificate completed by an independent third party known as the 'certificate provider' confirming that, in their opinion:

- the donor understands the purpose of the LPA and the scope of the authority conferred 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

You should inform the donor that choosing a suitable certificate provider is an important safeguard and without the certificate 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 you to advise the donor of the various options available.

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 (whether or not it is revoked)
- the owner, director, manager or an employee of a care home in which the donor lives or their family member
- a director or employee of a trust corporation appointed as attorney in this LPA (this only applies to someone certifying a property and financial affairs LPA)

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

- understand what is involved in making an LPA
- understand the effect of making an LPA
- have the skills to assess that the donor understands what an LPA is and what is involved in making an LPA
- can assess that the donor also understands the contents of their LPA and what powers they are giving to the attorney(s)
- can verify that the donor is under no undue pressure by anyone to make the LPA, and
- 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

It is important that the certificate provider is aware of the significance of making clear notes relating to the certification of the LPA.

These notes should be kept for as long as is necessary and at least until the LPA is registered, in case there is a challenge against the validity of the LPA.

7.1 If you provide a certificate as a professional

Solicitors are one of the professional groups permitted to act as a certificate provider.

However, you must ensure, on the facts of the particular case, that you do not fall into one of the excluded categories.

In particular, you cannot provide a certificate if you are:

- a business partner or paid employee of the attorney(s), this includes firms operating as limited liability partnerships or limited companies (despite being a separate legal entity), or
- an attorney appointed under any LPA or EPA made by the donor. This would mean, for example, that you could not provide a certificate if in the past the client executed an EPA in favour of you, even though the EPA was never used or registered or was revoked.

Before signing the certificate, you should take a suitably detailed personal and financial history from the donor.

If necessary, you should insist on seeing them on their own, to satisfy the requirements concerning undue pressure and fraud. This may have both time and cost implications.

You should also be aware that if, for example, a family member objects to the LPA during the registration process then the certificate provider may be called to the Court of Protection to account for their opinion.

You should retain any notes you have made in your role as a certificate provider for as long as is necessary and at least until the LPA is registered, and provide these to the Court of Protection if they are relevant to any challenge regarding the LPA.

7.2 If you provide a certificate as a 'non-professional'

As a solicitor or retired solicitor, you may be approached by clients, former clients, friends or acquaintances asking you to provide a certificate on the basis that you have known them personally over the last two years, such as a friend, neighbour, colleague or former colleague.

The OPG's guidance LP12 states that it should be someone the donor has known well for at least two years – "they must be more than just an acquaintance".

A non-professional certificate provider may 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 expect a higher standard of care and skill if the certificate has been provided by a solicitor and the donor is their client or former client.

If you have retired from practice, you should consider why the donor has asked you to be their certificate provider.

You should ensure that the donor has not specifically chosen you based on the skills and knowledge you have developed when practising as a solicitor as opposed to you having known them personally for the last two years.

8. Registering the LPA

An LPA is not created unless the instrument purporting to confer authority has been signed by all parties and registered by the OPG.

The OPG may raise concerns if the LPA has not been signed by all parties within 12 months.

You should explain to the donor and, where practicable, the attorney(s) that the LPA cannot be used until it has been registered.

The LPA can be registered any time after it has been completed and signed by all those who are required to sign.

It is important that you clearly explain to the donor the implications of not registering the LPA shortly after it has been made.

For example, if the donor of an unregistered LPA for health and welfare decisions 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 approximately 10 to 13 weeks.

Additionally, should there be any issues with the execution of the LPA and the donor loses capacity between the creation and the registration, then this could prove hugely problematic for the donor, as the LPA will then not be able to be used.

Refer to the OPG section of the GOV.UK website for current registration times.

You should inform the donor that a fee will be payable for the registration of the LPA and that a separate fee will be charged for a property and financial affairs LPA and for a health and welfare LPA even if they have been made by the same donor.

Once registered, a property and financial affairs LPA can be used while the donor still has capacity, unless it specifies otherwise.

Under a registered health and welfare LPA, decisions can only be used when the donor no longer has capacity to make the particular decision affecting their healthcare or personal welfare.

8.1 Time limits for registration

There is no time limit for making the application to register the LPA.

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.

8.2 Notifying named persons of an application to register an LPA

You 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 or replacement attorney appointed in the LPA cannot be specified as a named person. The prescribed form uses the term ‘people to notify’, whereas the legislation uses the term ‘named person’.

There is no requirement to have a named person.

However, you should advise the donor that including a named person may be a safeguard, particularly if the power is not registered shortly following execution, because if the donor lacks capacity at the time of registration they will be relying on these people to raise concerns.

You should advise the donor to make their named person(s) aware of the 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 notified.

The donor may also tell their named person(s) who they have appointed as attorney(s). This allows the person(s) to raise any queries or concerns with the donor and may reduce objections when the application to register the LPA is made, avoiding extra costs and delays.

You should give careful consideration as to who to advise the donor to notify as a named person.

The donor or the attorney(s) making the application to register must give notice on the prescribed form (LP3) to everyone named by the donor in the LPA as a person who should be notified of an application to register.

8.3 Verifying the registration

The registered LPA document will be stamped on every page by the OPG.

You should check that each page has been stamped and that there are no missing pages, or unintentional additional pages attached.

8.4 The LPA register and disclosure of information

The OPG is responsible for maintaining a register of all LPAs, EPAs and court appointed deputies.

You should inform the donor that a registered LPA is a public document and certain information about their LPA will be available to anyone who applies to search the register.

Copies of the registered power can also be obtained from the OPG for a fee. Furthermore, donors or attorneys can apply to the OPG to utilise its ‘use my LPA’ scheme, where a code is given to the donor or attorney which allows third parties such as financial institutions to see a summary of the registered LPA.

Health and social care organisations may also apply to the OPG to search the register, and can obtain a result within 24 hours in urgent situations.

9. Attorneys

9.1 Duties and responsibilities of attorneys

An attorney has a duty to act within the scope of their powers set out in the LPA.

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).

Attorneys and anyone acting in a professional capacity in relation to the person who lacks capacity also have a specific obligation to have regard to the Code of Practice (section 42(4) MCA 2005).

In addition, attorneys have common law fiduciary duties:

- 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 notifying the donor, the other attorneys, and the Public Guardian, and
- complying with the relevant guidance.

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

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

The court has also held that an attorney owes a duty not to interfere with the donor's succession plans, as far as reasonably possible (see *Attorney-General v the Marquis of Ailesbury (1887) App Cas 672*; *Re Joan Treadwell (Deceased)*; *OPG v Colin Lutz [2013] EWHC 2409 (COP)*).

According to paragraph 7.59 of the Code of Practice:

> "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."

Further guidance on the duties and responsibilities of attorneys is provided in chapter 7 of the Code of Practice.

9.2 Delegation by the attorney

It is a basic principle of the law of agency that an attorney cannot delegate their authority. Alternatively, this could be expressed as a duty on the part of an agent to perform their 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, although caution should be exercised before relying on this exception

In *Re Putt* (unreported), 22 March 2011, Court of Protection, the court rejected a delegation clause which authorised the attorney to delegate his functions where it was not strictly necessary or expedient to do so. Delegation and substitution are not interchangeable.

Where the donor's investments are managed or are intended to be managed via a discretionary investment management scheme, it is good practice to include a power to enable the attorney to manage the investment in this way.

However, omission of such a provision should not mean the attorney cannot invest in such a scheme, as the attorney is unlikely to possess the skills to make such investment decisions and the donor when they had capacity or the attorney will set the remit of those investments.

See 7.61 of the Code of Practice.

9.3 Replacement attorney

While an LPA cannot provide for an attorney to make a substitute or successor appointment, the donor can appoint a replacement attorney to act if any of the attorneys cannot continue to act when there is a "terminating event".

If the donor of an LPA wishes to appoint a replacement attorney(s), they should clearly state how replacements are to be appointed and how they are to act, for example solely or jointly and severally.

If the donor has more than one attorney, they can specify which original attorney the replacement attorney is to succeed.

The donor can only appoint a replacement attorney for the original attorneys, and not subsequent attorneys in place of the replacement.

In *Re Druce* (unreported), 31 May 2011, Court of Protection, the court stated "there is nothing in section 10(8)(b) of the MCA 2005, which deals with the appointment of replacement attorneys, to displace the fundamental principle that the survivor of joint attorneys cannot act. Where one of the original joint attorneys can no longer act, the replacement(s) will step in and act alone, to the exclusion of the surviving original attorney."

However, in *Miles & Beattie v The Public Guardian [2015] EWHC 2960 (Ch)*, the court confirmed that it was possible for the survivor of joint attorneys to continue to act if the LPA contained express provision for the attorney to be reappointed, to act alone or with any remaining jointly appointed attorney(s).

You should advise the donor 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).

Refer to part A4 of the OPG's guide make and register your lasting power of attorney for a full breakdown of the operation of replacement clauses in different circumstances.

9.4 Solicitor-attorneys and costs

Where you are appointed as the attorney of an LPA, you should discuss with the donor your current terms and conditions of business (including charging rates and the frequency of billing).

You should have these approved by the donor at the time of granting the power.

You should ensure that the donor is aware that there is a likelihood that the costs provided may change with time.

The donor should also be provided with sufficient information regarding the options for appointing a lay attorney, such as a family member.

Decisions about payments should be recorded as an ‘instruction’ within the prescribed form, with the appropriate level of detail, as necessary.

9.5 Disclaiming an appointment

An attorney or proposed attorney can disclaim their appointment by completing the prescribed form (LPA005) which must be sent to the donor and copied to the OPG and any other attorney(s) appointed under the power.

9.6 Retirement as attorney

Before agreeing to act as an attorney in your capacity as a professional solicitor, you should consider how matters will be dealt with if you retire from practice.

See our practice note on fiduciary roles and retirement or departure from practice by a private client practitioner for more information.

9.7 Providing information to the attorney about their role

Although the donor remains your client, as the attorney is the donor’s agent, the attorney should be provided with information about their role.

This may avoid subsequent misunderstandings and/or poor decisions being made if the attorney has to act.

This can be provided at the same time the attorney signs the LPA. The OPG has produced guidance for this purpose:

- LP14: how to be a property and finances attorney
- LP15: how to be a health and welfare attorney

10. Property and financial affairs LPA

10.1 Limiting the LPA

The donor can limit the power of the LPA by specifying that the LPA only grants authority to the attorney(s) to deal with certain specific assets.

10.2 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 they had capacity
- the timing of the gift must occur within the prescribed parameters, such as on customary occasions. The value of the gift must not be 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 section

The attorney must only make gifts when relying on section 12, if they have considered all the circumstances and consulted with the relevant people as a best interest decisions as set out in section 4.

The donor may include guidance in the power on the circumstances in which the attorney(s) may make gifts of money or property but these should not exceed the limits specified in section 12.

Any attempt to expand or circumvent the scope of the provisions of section 12 is likely to be challenged by the OPG. Circumventing section 12 by inserting what is in effect a restriction in the guidance section will be severed by the court.

The court confirmed in *Re GM [2013] COPLR 290*, that it is permitted for the attorney to make further "*de minimis* gifts", without obtaining the court's authority.

These are limited to £3,000 per year as the inheritance tax annual exemption and the small gifts exemption of £250, up to a maximum of 10 people. This means the gifts cannot exceed £5,500 per annum.

This can only occur when:

- the donor has a life expectancy of less than five years
- the donor has an inheritance taxable estate of over the nil rate band
- the gifts are affordable having regard to the donor's costs of care and will not adversely affect their standard or care and quality of life, and
- there are no reasons to suggest the donor would be opposed to such gifts

It is not possible to make larger gifts without the Court of Protection's authority where the donor lacks mental capacity.

The attorney is not empowered by section 12 to make larger gifts using the LPA where the donor has mental capacity. In such a situation, the donor should make the gift themselves and not through the LPA.

The OPG's guidance note on giving gifts: a guide for deputies and attorneys explains the limits of permitted attorney gifting, which covers gifts and maintenance issues.

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 the donor lacks mental capacity and this would be in the donor's best interests (section 23(4) MCA 2005).

There have been a series of decisions (*PBC v JMA & ors [2018] EWCOP 19 and FL v MJL (By His Litigation Friend, the Official Solicitor) [2019] EWCOP 31*) in the Court of Protection setting out further information in respect of what the court will take into account when making this determination.

In addition to bearing in mind the SRA principles and the need to ensure that clients receive independent advice when any gift to you is considered, solicitors should also keep in mind the Bribery Act 2010 and any internal policy in the firm on the receipt of gifts when considering the same.

10.3 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 their appointment.

If you are an attorney and conducting investment business, you will need to be authorised under the Financial Services and Markets Act 2000.

In addition, you will need to consider whether the SRA Financial Services (Scope) Rules 2001 apply.

10.4 Trusteeships held by the donor

The solicitor should ask whether the donor holds:

- any trusteeships, and/or
- any property jointly with others

In cases of jointly owned property, you should exercise caution and consider any concerns or problems that may arise from your actions which affect the other joint owner.

Under the Trustee Delegation Act 1999 (the 1999 Act) the general rule is that any trustee functions delegated to an attorney 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.

The transfer or deed must be made to two distinct trustees, not one person acting in two different capacities, subject to any provision to the contrary contained in the trust instrument or the power of attorney itself.

10.5 Disclosure of the donor's will

You are under a duty to keep your clients' affairs confidential (paragraphs 6.3 to 6.5 of the Code of Conduct)).

However, the attorney(s) may need to know about the contents of the donor's will in order to avoid acting in a manner 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.

If disclosure is to be denied, the donor needs to be advised that this could result in the attorney making a decision without relevant information.

The default position is that the donor consents to the attorney seeing a copy of their will, unless it states otherwise within the LPA, or elsewhere.

We have produced guidance on this issue in conjunction with the SRA, OPG, STEP and others. See access and disclosure of an incapacitated person's will.

The attorney(s) also has a common law duty to keep the donor's affairs (including the contents of a will) confidential.

10.6 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 on the instructions of an attorney of a property and financial affairs LPA, or acting as an attorney themselves, is likely to be undertaking "relevant business".

For further advice, see the Legal Sector Affinity Group's anti-money laundering guidance for the legal sector.

10.7 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 their presence and at their direction.

Where a person lacks testamentary capacity, the Court of Protection can order the execution of a statutory will on their behalf.

The court's will-making jurisdiction is conferred by section 18 of the MCA 2005.

11. Health and welfare LPA

11.1 Scope

An attorney appointed in a registered health and welfare LPA has no authority to make a decision which the donor has capacity to make for themself.

This is not the case for a registered property and financial affairs LPA and you should ensure that your client understands the difference.

Clients also need to know that, unless the donor adds restrictions or conditions, the attorney(s) of a health and welfare LPA will have authority to make almost all personal welfare and healthcare decisions.

Important exceptions include:

- decisions relating to life-sustaining treatment, unless the LPA expressly authorises this, and
- cases where a valid and applicable advance decision made by the donor to refuse the proposed treatment takes precedence

A health and welfare LPA is a powerful document because of the wide-ranging decisions that can be made on behalf of the donor.

Clients therefore need to be in a position to make an informed decision about the scope of the power.

In addition to considering the scope of authority with you, clients may also want to discuss it with, for example, their prospective attorney(s) and, where appropriate, their GP or any relevant health or social care professionals.

A health and welfare LPA can be limited to specific decisions. It may be helpful to create a checklist of questions and a range of suggested clauses which the client might wish to consider including when creating a health and welfare LPA.

The guidance box in section 7 of the prescribed form enables clients to set out their wishes and preferences for personal care, including healthcare, in a way that is not legally binding but which their attorney(s) will need to take into account in deciding best interests.

For example, the donor may wish to include guidance stating that the attorney should consult specific members of the family, before making a decision about change of residence, or the type of medical treatment which they would not want to receive, such as cardiopulmonary resuscitation (more often referred to as ‘CPR’).

When drafting the LPA, you should ensure that the client's instructions are clear and comprehensible to any health or social care professional who enquires about the scope of an attorney's authority under the LPA.

11.2 Life-sustaining treatment

Decisions to give or refuse consent to life-sustaining treatment can only be made by the attorney(s) if the donor has specifically conferred this authority in section 5 of the prescribed form in the presence of a witness.

The witness must be over 18 and cannot be an attorney appointed in the instrument.

Life-sustaining treatment is defined in section 4(10) of the MCA 2005 as "treatment which in the view of a person providing health care for the person concerned is necessary to sustain life".

Further guidance is provided in paragraphs 5.29 to 5.36 of the Code of Practice.

11.3 Relationship with advance decisions and advance statements

Advance decisions ('living wills')

Some clients may ask about making a 'living will' – which is described in the MCA 2005 as an 'advance decision'.

They may ask whether they should make an advance decision rather than a health and welfare LPA or vice versa.

It is good practice to use the MCA terminology, as it is the term the medical profession are most familiar with.

An advance decision allows a person, provided they have capacity, to refuse medical treatment that might be given at a time in the future when they lack capacity to refuse 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.

Possible points for the client to consider include:

- a health and welfare LPA allows a donor to give general authority for the attorney(s) to give or refuse consent to life-sustaining treatment where option A, section 5, of the prescribed form is completed. Unlike an advance decision it is not necessary to specify a particular treatment or particular circumstances where treatment is refused. This of course requires a high degree of trust by the donor towards the attorney(s)
- under a health and 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 any co- attorney and those close to the person who lacks capacity. In contrast, where an advance decision is being followed the best interests principle does not apply – if it is valid and applicable it must be respected 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 (section 25(6)). 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
- in some cases when dealing with a seriously or terminally ill person it may be prudent to consider with them whether to combine a health and welfare LPA with an advance decision, but this will need careful drafting to avoid conflict and uncertainty. The LPA may take time to register, but the advance decision takes effect immediately and can be used before the LPA has been registered

Clients should be made aware that where a person makes a health and welfare LPA (regardless of whether it provides authority to give or refuse consent to life-sustaining treatment) and subsequently makes an advance decision, which is valid and applicable in the circumstances, the advance decision takes priority in respect of the treatment covered by the advance decision.

A health and welfare 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.

Whilst it is lawful for an attorney with express authority to refuse life sustaining treatment, if they believe it is in the donor's best interests, it is not lawful for the attorney to give treatment or seek to instruct others to give treatment with the purpose of bringing about the donor's death.

Euthanasia and assisted suicide remains a criminal offence.

In respect of organ donation, the default position is that all adults agree to become organ donors when they die, unless they have made it known via the NHS organ donation service that they wish to opt out.

There is an exemption to this for people that lacked mental capacity to understand this change at the point that the change came in, and continue to do so.

An attorney can opt out on your behalf whilst the donor is alive.

Advance statements

The donor may want to make an 'advance statement' (as distinct from an 'advance decision'), which enables a person with capacity to set out their wishes and feelings in writing about, for example, 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(6) 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 7 of the prescribed form.

12. Using the prescribed LPA forms

The current prescribed LPA forms can be found on GOV.UK.

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.

Where you have assisted a donor in drawing up an LPA which is subsequently refused registration because of a material defect, you may find it alleged that you should be liable for the additional costs of deputyship, since at that point the donor may not have the capacity to execute a new LPA.

Once the LPA has been signed, any mistakes or errors cannot simply be corrected, even if the donor still has capacity.

13. Executing the LPA

An LPA must be executed by the donor, the certificate provider and the attorney(s) in the correct order.

In *Re Sporne, (unreported)*, 13 October 2009, the Court of Protection refused to exercise its discretion to validate the LPA under paragraph 3(2) of schedule 1 of the MCA 2005, as failing to sign the LPA in the correct order was a significant procedural error.

Execution by the donor, certificate provider and attorney(s) need not take place simultaneously, but the regulations require that each stage must take place as soon as reasonably practicable after the previous stage.

Be aware that the date for signing the registration element of the LPA form must be after or on the same date as the last attorney to sign.

(Note, that for section 5 'life-sustaining treatment' of a health and welfare LPA must be signed and witnessed at the same time).

13.1 Witnesses

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 section 5 of a health and welfare LPA and/or section 9 and/or section 11 of the prescribed form as appropriate and give their full name and address.

There are various restrictions as to who can act as a witness, in particular:

- the donor and attorney/replacement attorney must not witness each other's signature
- it is not advisable for the donor's spouse or civil partner to witness the donor's signature because of the rules of evidence relating to compellability

There are specific provisions in relation to a donor who is unable to sign.

See the LPA form and supporting guidance for more information.

14. Relationship between the different types of LPAs

Depending on the decision to be made, an attorney may reasonably be expected to consult with the attorney(s) of any other LPA made by the donor, whenever the donor's best interests are being considered (section 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.

Attorneys should also be aware that the demarcation between decisions made under a property and financial affairs LPA and a health and welfare LPA may not always be clear.

For example, where the donor lives is a welfare decision that also has financial implications.

If there are conflicts, then an application can be made to the Court of Protection to resolve the issue, but this should only be considered as a last resort.

15. Reporting suspected abuse of an LPA

If you suspect that an attorney may be misusing an LPA or acting dishonestly, you should immediately call the Safeguarding Unit of the OPG on **0300 456 0300** or email opg.safeguardingunit@publicguardian.gsi.gov.uk.

You should also contact the police if you suspect psychological, physical or sexual abuse, theft or fraud.

It may also be necessary, particularly in cases involving health and welfare LPAs, to refer the matter to the local authority Adult Protection Unit.

Find out more about addressing suspected abuse in our financial abuse guidance.

Further guidance is provided in paragraphs 7.69 to 7.74 and chapter 14 of the Code of Practice.

16. Enduring powers of attorney

The Enduring Powers of Attorney Act 1985 was repealed by the MCA 2005, but it was reintroduced almost in its entirety in Schedule 4 of the MCA 2005.

The amendments take account of the changes to the Court of Protection and the role of the OPG 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 of the MCA 2005.

An EPA can only authorise attorneys to make decisions about the donor's property and financial affairs. EPA attorneys have no authority to make health and welfare decisions for the donor.

If the donor has full mental capacity, an EPA does not have to be registered before it can be used.

The donor may have limited the scope of the attorney's authority within the EPA to allow the attorney to act only when the donor lacks mental capacity.

The EPA must be registered with the OPG as soon as the donor starts to lose capacity.

Registration of an EPA may be cancelled on the donor's recovery, if applicable.

16.1 Duties under an EPA

The principles of the MCA 2005 are specifically excluded from applying to an EPA attorney (Schedule 4, paragraph1(1) MCA 2005).

However, under the law of agency, the EPA attorney has certain duties to the donor (some of these are indicated in section 10.1 above). Further guidance is available in paragraphs 7.58 to 7.68 of the Code of Practice.

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.

16.2 Solicitors acting as an EPA attorney

If you are acting as an EPA attorney, you may be considered to have a duty to have regard to the Code of Practice (PDF) since you will be acting in a "professional capacity" for the purposes of section 42(4)(e) of the MCA 2005.

This is not straightforward because under Schedule 4 of the MCA 2005 the EPA must be registered when a person is becoming or has become incapable of managing their own affairs and from this point on it is the attorney who manages the donor's affairs. This is different to the concept of incapacity used in the rest of the MCA 2005 which is both function and time-specific.

It appears that the Code of Practice will therefore selectively apply to the professional EPA attorney, as there will not be a requirement to assess capacity on each decision being made.

See our guidance on working with clients who may lack mental capacity

16.3 Acting in the donor's best interests

Paragraph 1(1) of schedule 4 of the MCA 2005 is somewhat ambiguous, stating:

> "Where an individual has created a power of attorney which is an enduring power within the meaning of this schedule... and, accordingly, section 1 of this Act does not apply."

However, as the EPA attorney would be making decisions under the MCA 2005, the attorney must follow the best interest process for making decisions (section 4(8)(b) MCA 2005).

In addition, under an EPA, an attorney has a common law duty to act in the donor's best interests.

This duty is reinforced by paragraph 5.2 of the Code of Practice which states that the best interests principle "covers all aspects of financial, personal welfare and healthcare decision-making and actions. It applies to anyone making decisions or acting under the provisions of the Act, including attorneys appointed under a lasting power of attorney or registered enduring power of attorney."

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 appointed by the 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.

16.4 EPA Register

The OPG keeps a register of EPAs which is free and easy to search using the form on its website.

17. Further information

17.1 References

Legislation

Bribery Act 2010

Mental Capacity Act 2005

Enduring Powers of Attorney Act 1985

Power of Attorney Act 1971

Financial Services and Markets Act 2000

Trustee Delegation Act 1999

Trustee Act 1925

Money Laundering Regulations 2007

Wills Act 1837

Guidance

Fiduciary roles and retirement or departure from practice by a private client solicitor

Financial abuse

Working with clients who may lack mental capacity

Mental Capacity Act 2005 Code of Practice

LP12: Make and register your Lasting Power of attorney

OPG2: Giving gifts for someone else

Access and Disclosure of an incapacitated person's will

Cases

Re Collis (unreported), 27 October 2010, Court of Protection

Re Lawson, Mottram and Hopton (Appointment of Personal Welfare Deputies) [2019] EWCOP 22 Re J, unreported, 6 December 2010

Re EL (revoking a lasting power of attorney) [2015] EWCOP30

Re Various Lasting Powers of Attorney [2019] EWCOP40

XY v the Public Guardian [2015] EWCOP 35)

Miles & Beattie v The Public Guardian [2015] EWHC 2960 (Ch)

Re Sporne, (unreported), 13 October 2009, Court of Protection

Re Putt, (unreported), 22 March 2011, Court of Protection

Re Druce, (unreported), 31 May 2011, Court of Protection

The Public Guardian's Severance Applications [2016] EWHC COP10

PBC v JMA & ors [2018] EWCOP 19

FL v MJL (By His Litigation Friend, the Official Solicitor) [2019] EWCOP 31

Websites and publications

Ministry of Justice website

GOV.UK website

Assessment of mental capacity: a practical guide for doctors and lawyers

17.2 Further products and support

Practice Advice

Our Practice Advice Service offers free and confidential support and advice on legal practice and procedure. The service is staffed by solicitors and you can contact them on **020 7320 5675** from 9am to 5pm on weekdays.

Professional Ethics Helpline

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

Other Law Society Practice Notes

Meeting the needs of vulnerable clients

Trust corporations

17.3 Acknowledgements

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

Legal status

Practice notes 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, and do not necessarily provide a defence to complaints of misconduct or poor service. While we have taken care to ensure that they are accurate, up to date and useful, we will not accept any legal liability in relation to them.

For queries or comments on this practice note contact our Practice Advice Service.

SRA Principles

There are seven mandatory principles in the SRA Standards and Regulations which apply to all aspects of practice. The principles apply to all authorised individuals (solicitors, registered European lawyers and registered foreign lawyers), authorised firms and their managers and employees, and to the delivery of regulated services within licensed bodies.

Terminology

Must – a requirement in legislation or a requirement of a principle, rule, regulation or other mandatory provision in the SRA Standards and Regulations. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or regulations.

Should – outside of a regulatory context, good practice, in our view, for most situations. In the case of the SRA Standards and Regulations, a 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

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 route to meet the needs of a particular client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why your alternative approach is appropriate, either for your practice, or in the particular retainer.

May – an option for meeting your obligations or running your practice. Other options may be available and which option you choose is determined by the nature of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

Archived versions

02 December 2019

30 May 2018

06 June 2016

08 December 2011

Private client

Mental capacity