



# Lasting Powers of Attorney

## Lasting Powers of Attorney - 8 December 2011

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## **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.

### **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 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.

### **1.3 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

### **1.4 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](#).

## 1.5 Terminology in this practice note

**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

**LPA** – Lasting Powers of Attorney

**EPA** – Enduring Powers of Attorney

**MCA2005** – Mental Capacity Act 2005

**Code of Practice** – Mental Capacity Act 2005 Code of Practice

## 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 Powers of Attorney

### 3.1 Lasting Powers of Attorney

There are two separate prescribed forms for Lasting Powers of Attorneys (LPAs) available from the [Ministry of Justice website](#):

- property and financial affairs LPA; and
- health and welfare LPA.

### 3.1.1 Property and financial affairs LPAs

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; and
- claiming benefits.

See paragraphs 7.32–7.39 of the [Code of Practice \(PDF\)](#) for more information.

### 3.1.2 Health and welfare LPAs

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); and
- whether to give or refuse consent to medical treatment.

See paragraphs 7.21–7.31 of the [Code of Practice \(PDF\)](#) for more information.

All LPAs must be registered with the Office of the Public Guardian **before** they can be used.

## 3.2 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.

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.

See section [17 Enduring Powers of Attorney](#) for further information.

## 3.3 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.

## 4 The donor's capacity

### 4.1 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 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 \(PDF\)](#). See also the 2010 judgment of the Senior Judge of the Court of Protection in [Re Collis \(unreported\)](#), 27 October 2010, Court of Protection.

For further guidance, see [Assessment of Mental Capacity: a practical guide for doctors and lawyers](#) (Law Society 2010).

#### **4.2 Where there is doubt about a donor's capacity**

If there is 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.

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.

#### **4.3 Incapacity: the functional and time-specific test**

Unlike the EPA regime where registration demonstrates to a third party that the attorney has responsibility and the authority to make decisions relating to the donor's property and affairs, the [MCA 2005](#) provisions for LPAs do not have such a readily identifiable point where the attorney(s) takes over.

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 will not often 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 him or her 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.

This may be particularly relevant for health and welfare LPAs as these only operate where the person lacks capacity to make the decision.

Further guidance is provided in chapters 2 and 3 of the [Code of Practice \(PDF\)](#).

#### **4.4 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 the relatives, carers and others who have an interest in the donor's welfare.

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 best interests is provided in chapter 5 of the Code of Practice.

## 5. 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.

You may also notify 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.

### 5.1 Deputyships

There may be situations where a deputyship (once the person has lost capacity) could be viewed as being more appropriate and protective than the creation of an 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, however, that the court will not approve a deputyship application as a matter of course and that, particularly for health and welfare matters, is likely to be reluctant to do so. See *G v E [2010] EWHC 2512 (COP)*.

## 6 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 or undue influence.

You must also not act on instructions until you are satisfied that the instructions represent the client's wishes (IB 1.28, see Outcomes in Chapter 1 – Client Care SRA Code of Conduct 2011).

## **6.1 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.

Where instructions for the preparation of an LPA are given by someone other than the client, you should not proceed without checking that the client agrees with the instructions given (IB 1.25, see Outcomes in Chapter 1 – Client Care SRA Code of Conduct 2011).

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

the instructions with the client personally after offering appropriate advice, and that the donor has the necessary capacity to make the power (see section 3 above).

## **6.2 Your duty to the donor after the LPA is registered**

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) however your duties to the donor still remain in place.

It is important to obtain clear instructions from the donor at the time of drafting the LPA as to whom and on what basis any copy of the registered LPA can be released.

## **7 Drafting the LPA**

### **7.1 Choice of attorney(s)**

The choice of attorney(s) is clearly 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.

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 a property and financial affairs LPA and a health and welfare LPA you may wish to advise them to consider appointing different attorneys for each LPA.

## 7.2 More than one attorney

Where more than one attorney is to be appointed, they may be authorised to act 'jointly', or '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 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 property and financial affairs 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; and
- 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, 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.

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.

You should advise your client that the court may not accept this arrangement if it believes that such an arrangement fetters the LPA by providing the attorneys with unreasonable discretion.

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, for example the donor may wish to 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 highlight that 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 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.

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.

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.

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.

### **7.3 Guidance, restrictions and conditions**

As well as allowing for the specification of restrictions and conditions on the authority of attorney(s), the prescribed forms for LPAs also allow 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) and can only be overturned by the court, whereas the guidance, although clearly pertinent, is not binding on the attorney(s).

You should ensure that you make the distinction between restrictions/conditions and guidance 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 guidance is binding.

It is also important to inform the client that guidance within an LPA will be public and therefore visible to third parties. It also means that if the donor wishes to change the guidance, and does so in a side letter, for example, the previous guidance will remain in the LPA, apparently still valid, unless a new LPA is made.

You should explain to the client, and if practicable the attorney(s) that because guidance is not binding, the attorney(s) are entitled to act differently from suggestions within the guidance section of the LPA.

In this situation, 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 guidance.

However it should also be stressed that the guidance must be considered in assessing the best interests of the donor.

As a registered property and financial affairs LPA can be used whilst the donor retains capacity, restrictions that attempt to limit the attorney's power to use the LPA whilst the donor still has capacity are difficult to draft.

You should explain that this type of restriction may not be accepted by the court and might be rejected as unworkable by financial institutions.

If the donor does not trust the attorney to only act when appropriate this may raise questions as to the appropriateness of their appointment.

## 8. 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;
- 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 be 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.

### **8.1 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, 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 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.

### **8.2 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. You should exercise considerable caution before providing a certificate on this basis.

The guidance given on the LPA instrument suggests that the requirement to know the donor 'personally' means the certificate provider should have known the donor 'for at least two years and as more than 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.

## 9 Registering the LPA

An LPA is not created unless the instrument purporting to confer authority has been registered by the Office of the Public Guardian (OPG).

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 anytime 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 health and 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 approximately 13 weeks.

Refer to the health and in capacity law section of the [Directgov 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 affairs LPA and for a personal 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, while a health and welfare LPA can only be used when the donor no longer has capacity to make the particular decision affecting their healthcare or personal welfare.

### 9.1 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.

### 9.2 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.

If the donor decides not to include anyone to be notified then a second person will be needed to provide an additional certificate. 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 appointed. 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.

The donor or the attorney(s) making the application to register must give notice on the prescribed form ( [LPA001](#)) to everyone named by the donor in the LPA as a person who should be notified of an application to register.

### 9.3 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.

### 9.4 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.

## 10 Attorneys

### 10.1 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 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 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.

According to paragraph 7.59 of the [Code of Practice](#) (PDF):

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](#) (PDF).

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### • 10.2 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.

See 7.61 of the [Code of Practice](#) (PDF).

### 10.3 Replacement attorney

Whilst an LPA cannot provide for an attorney to make a substitute or successor appointment, it can appoint a replacement attorney to act if any of the attorneys under a joint and several LPA cannot continue to act.

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. If the donor has more than one attorney, he or she can specify who the replacement attorney can and cannot replace. The donor can only appoint a replacement attorney for the original attorneys.

In *Re Druce*, (unreported), 31 May 2011, *Court of Protection*, the court stated that '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'.

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).

#### **10.4 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) and 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.

The prescribed forms for 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.

Decisions about payments should be recorded here with the appropriate level of detail, as necessary.

#### **10.5 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.

#### **10.6 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.

## **11 Property and financial affairs LPAs**

### **11.1 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.

### **11.2 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. 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 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 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 Public Guardian. Circumventing section 12 by inserting what is in effect a restriction in the guidance section is also likely to be rejected by the court.

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 (section 23(4) MCA 2005).

Solicitors must also take account of the professional rules concerning gifts from clients (IB 1.9, see Outcomes in Chapter 1 – Client Care SRA Code of Conduct 2011).

### **11.3 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.

### **11.4 Trusteeships held by the donor**

The solicitor should ask whether the donor holds:

- any trusteeships; and
- 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.

### **11.5 Disclosure of the donor's will**

You are under a duty to keep your clients' affairs confidential (Chapter 4 – 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 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 no sufficient authority is available the attorney(s) should apply to the Court of Protection for a specific order for the contents of the will to be disclosed.

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

### **11.6 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 for property and financial affairs LPA attorney, or acting as an attorney themselves, is likely to be undertaking 'relevant business'.

For further advice see the Law Society's practice note on Anti-money laundering.

### **11.7 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.

## **12. Health and welfare LPAs**

### **12.1 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 himself or herself. This is not the case for a registered property and financial affairs power 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 and therefore clients 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 and it may be helpful to create a checklist of questions and a range of suggested clauses which the client might wish to consider 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 take into account in deciding best interests.

For example, the donor may wish to include guidance stating that the attorney should not accommodate the donor at another location without consulting specific members of the family.

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.

## **12.2 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 5.29-5.36 of the Code of Practice.

## 12.3 Relationship with advance decisions and advance statements

### 12.3.1 Advance decisions ('living wills')

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 health and welfare LPA or vice versa.

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 (PDF).

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 those close to the person who lacks capacity. 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. 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. 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.

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.

If necessary, you may need to advise that the law relating to euthanasia and assisted

suicide has not been changed, and the introduction of health and welfare LPAs and advance decisions does not legitimise euthanasia.

Clients may also want information about registering their decision in relation to organ donation. The [NHS Organ Donor Register](#) website has further information about signing-up online and carrying a donor card.

### 12.3.2 Advance statements

You should advise the donor that the [MCA 2005](#) provides for creation of 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.

Further information on advance statements is provided in paragraphs 5.37 – 5.45 of the [Code of Practice \(PDF\)](#).

## 13 Using the prescribed LPA forms

The current prescribed LPA forms can be found on the [Ministry of Justice website](#).

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, although on occasion and for minor points the OPG may suggest this as a solution and accept the amended document.

## 14 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, [Court of Protection](#), where Part C of the LPA was signed before Part B and the donor subsequently lost capacity, 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 it

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.

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

#### **14.1 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 Part A and/or Part C 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.

### **15 Relationship between property and financial affairs and health and welfare 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](#) (PDF)). 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 which 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.

### **16 Reporting suspected abuse of an LPA**

If you suspect that an attorney may be misusing an LPA or acting dishonestly you should contact the [Compliance and Regulations Unit](#) of the OPG immediately.

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.

Further guidance is provided in paragraphs 7.69-7.74 and Chapter 14 of the [Code](#)

[of Practice \(PDF\)](#).

## 17 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 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 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 you can use it, unless there is an express condition requiring registration.

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.

### 17.1 Duties under an EPA

The principles of the [MCA 2005](#) are specifically excluded from applying to an EPA attorney (Schedule 4, paragraph 1(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 ? 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.

### 17.2 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 \(PDF\)](#) will therefore selectively apply to the professional EPA attorney as there will not be a requirement to assess capacity on each decision being made.

### 17.3 Acting in the donor's best interests

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'.

However, Paragraph 1(1) of Schedule 4 of the MCA 2005 is somewhat ambiguous, stating that: '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'.

You should therefore err on the side of caution and take into the account the best interests principle.

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.

## **17.4 EPA Register**

The OPG is responsible for maintaining a register of EPAs which can be searched by any person on payment of a fee.

## **18 Further information**

### **18.1 References**

#### **18.1.1 Legislation**

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

#### **18.1.2 Guidance**

Mental Capacity Act 2005 Code of Practice

#### **18.1.3 Cases**

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

G v E [2010] EWHC 2512 (COP)

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



#### **18.1.4. Websites and publications**

[Ministry of Justice website](#)

[Directgov website](#)

[\*Assessment of Mental Capacity: a practical guide for doctors and lawyers\*](#)

### **18.2 Further products and support**

#### **18.2.1 Practice Advice**

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](http://www.lawsociety.org.uk/practiceadvice).

#### **18.2.2 Professional Ethics Helpline**

Solicitors Regulation Authority's [Professional Ethics Helpline](#) for advice on conduct issues.

### **18.3 Acknowledgements**

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

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