

# Private Client Guide to being an Attorney



A Power of Attorney is a legal document that allows someone (known as the Donor) to choose someone they trust (known as the Attorney) to make decisions on their behalf about their property and financial affairs, or their health and welfare, or both. Please refer to our guide on 'Lasting Power of Attorney' for information on how to create a new Power of Attorney.

This guide applies to those who are already appointed as an Attorney whether under:

- ▶ A Lasting Power of Attorney (LPA) for property and financial affairs which has been registered at the Office of the Public Guardian (OPG), whether or not the Donor is mentally capable
- ▶ An Enduring Power of Attorney (EPA) which has not been registered at the OPG because the Donor is mentally capable
- ▶ An EPA which has been registered at the OPG because the Donor is mentally incapable

Please note that throughout this guide the phrase 'Power of Attorney' refers to the documents set out in the points above. If you are acting as an Attorney under an LPA for health and welfare decisions then separate guidance is available on request.

## The Office of the Public Guardian (OPG)

When you are acting as an Attorney, if someone does not agree with your decisions or believes that you are not acting in the Donor's best interests, they can inform the OPG. The OPG can then investigate and decide what, if any, action to take against you. It is therefore important that the information in this guide, and given by the OPG, is followed to avoid criticism.

## When can I begin acting as an Attorney?

You should only act where:

- ▶ The Donor is still mentally capable of making decisions but has asked you to act on their behalf. Where the Donor still has the mental capacity to be involved in decision-making, then you must consult with them on any decision you are making on their behalf
- ▶ The Donor is mentally incapable of making decisions, even with support. You must assume that the Donor has the

mental capacity to make a decision until it is established that the Donor lacks that mental capacity. The Donor is not to be treated as mentally incapable of making a decision merely because they make an unwise decision. Where you have assessed that the Donor lacks the mental capacity to be involved in making certain decisions, you must ensure that the decisions you make on their behalf are in their best interests

Note, if you become bankrupt, you will no longer be allowed to act as an Attorney.

## How do I decide whether or not the Donor has mental capacity?

The Donor is deemed to be mentally incapable if they cannot communicate (by any means) their decisions. Otherwise, the two-stage test for mental capacity is:

1. Does the Donor have an impairment of, or a disturbance in the functioning of, the mind or brain (for example, dementia, brain damage or a medical condition that causes confusion)? If no, the Donor is mentally capable. If yes, consider the second stage.
2. Does the impairment or disturbance mean that the Donor is unable to make the specific decision at the time that it needs to be made? If no, the Donor is mentally capable. If yes, the Donor is mentally incapable.

The Donor is considered unable to make a decision if they cannot **understand** information about the decision to be made, **retain** that information in their mind, and **weigh** that information as part of the decision making process, before being able to **communicate** their decision.

More detailed information on assessing mental capacity, and assisting the Donor in making their own decisions, can be provided on request.

## How do I begin acting as an Attorney?

You will need to notify financial institutions (banks, pension providers etc.) of the fact that the Donor has signed a Power of Attorney, and produce evidence of your identity and possibly complete some forms to 'register' that you are the Attorney. You can notify the financial institutions either by writing to them or visiting a local branch (where possible).

The financial institutions will want to see the original Power of Attorney or a 'certified copy' of it. We can supply certified copies of the Power of Attorney on request.

Financial institutions have been known to refuse to accept certified copies of Powers of Attorney, instead insisting on seeing the original. However, a certified copy of the Power of Attorney must be accepted as proof of the content of the original in accordance with Section 3 of the Powers of Attorney Act 1971, as confirmed by Section 11(3) of The Lasting Power of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007/1253. A certified copy is a photocopy which bears a certificate signed by a solicitor at the end of each page that it is a true copy of the original.

## What decisions can I make as an Attorney?

Subject to any restrictions, conditions or guidance (otherwise known as instructions and preferences) as may appear in the Power of Attorney, you will be able to make almost all the decisions about property and financial affairs that the Donor would have made. This would include, for example, using bank and building society accounts; claiming, receiving and using benefits and pensions; paying household, care and other bills; making and selling investments; and buying or selling property. However, if when selling a property:

- ▶ The sale is below the market value; and/or
- ▶ You want to buy the property yourself

you will need to apply to the Court of Protection before proceeding with the sale.

You should also apply to the Court of Protection before proceeding with a sale of a property if the Donor's Will leaves that property to a specific beneficiary. Applying to the Court in this situation will ensure that the proceeds from the sale of the property still pass to the specific beneficiary in the event of the Donor's death, whereas ordinarily the gift would fail.

## How do I act with another Attorney?

**Jointly (also called 'Together')**: this means that all the Attorneys must always act together. If just one Attorney does not agree with the proposed decision, it cannot be made. This applies to minor decisions such as signing a cheque or major decisions such as selling a property. If one of the Attorneys dies or loses the mental capacity to act then the Power of Attorney cannot be used as the Attorneys will no longer be able to act jointly.

**Jointly and severally (also called 'Together and independently')**: this means that one Attorney can act on their own, or some or all of the Attorneys can choose to act together. If one of the Attorneys becomes ill, dies or loses the mental capacity to act, the remaining Attorney(s) can continue to act. Note that if one Attorney makes a decision on behalf of the Donor, then all of the Attorneys remain responsible for any such decision whether or not they were a party to it.

Jointly (Together) for some decisions and Jointly and severally (Together and independently) for other decisions: this is a combination of the two options set out above.

## Can I claim out-of-pocket expense or charge for my services?

You can claim out-of-pocket expenses, such as telephone calls, postage charges and transport costs that are incurred whilst specifically undertaking your duties as Attorney.

Only a professional can charge for acting in this role unless there is a specific provision made for this in the Power of Attorney.

## What are my duties as Attorney?

When acting as Attorney you must:

- ▶ Act or make decisions in the Donor's best interests
- ▶ Comply with the Mental Capacity Act 2005 and its Code of Practice (which can be emailed to you on request)
- ▶ Act only within the scope of your authority as Attorney
- ▶ Not delegate the powers given to you under the Power of Attorney unless you have been authorised to do so
- ▶ Not benefit yourself but to benefit the Donor, which means avoiding conflicts of interest and in particular not to profit or acquire personal benefit from your position
- ▶ Act with honesty and integrity
- ▶ Keep the Donor's affairs confidential unless the Donor has consented otherwise
- ▶ Comply with the directions of the Court of Protection
- ▶ Not give up the role without telling the Donor and the Court
- ▶ Keep the Donor's money and property separate from your own
- ▶ Keep accurate accounts of your dealings as an Attorney

## What happens when the Donor dies?

The Power of Attorney will automatically come to an end. You should send the original Power of Attorney and death certificate to the OPG as soon as possible. You cannot, for example, close the Donor's bank accounts after their death and distribute the money to their beneficiaries. This is the job of the Executor in the Will, or the Administrator where there is no Will.

## Can I make gifts on the Donor's behalf?

An Attorney has very limited power to make gifts from the assets of the Donor. Any gifts incorrectly made by the Attorney may need to be repaid personally by the Attorney, so great care is needed.

You can only make gifts to people who are related to or connected with the Donor on occasions such as birthdays, weddings or anniversaries, or any other occasion such as Christmas or other religious holidays, when they would have usually given gifts. If the Donor previously gave to charity on a regular basis then you can continue to do so, on their behalf.

The value of any gift you give must be reasonable compared to everything that the Donor owns (the Donor's estate).

You will need to make an application to the Court of Protection for permission to make larger gifts or those that are not considered customary, for example, for Inheritance Tax planning.

## Do I have the right to know the content of the Donor's Will?

Will documents form part of a Donor's financial affairs and so, unless the Donor has provided contrary instructions or there are concerns about the actions of the Attorney, an Attorney is entitled to be provided with a copy of the Will documents (for example, from a solicitor who stores the Donor's Will). The Donor must be notified in advance of the release of the copy Will documents to the Attorney. The original Will documents should not be passed to an Attorney unless ordered otherwise by the Court of Protection.

If you sell or otherwise dispose of an asset which is specifically referred to in the Donor's Will then the gift of that asset, in the event of the Donor's death, will fail which means that the intended beneficiary will not receive it. To avoid this situation, you would need to seek a specific Court Order prior to disposing of the asset in question. Advice can be provided on how to proceed with applying for such a Court Order.

## Can the Donor's Will be changed?

Just because someone cannot deal with their financial affairs does not mean that they cannot make a Will. The Mental Capacity Act 2005 imposes a duty to assume that capacity is present unless it can be shown to be absent, and so this also applies to 'testamentary capacity' (the mental ability to make a Will). If, however, it can be shown that the Donor does not have testamentary capacity, and so cannot make a Will, then it is possible to apply to the Court of Protection for what is known as a Statutory Will to be made on the Donor's behalf.

An application for a Statutory Will needs to set out all the personal, financial and family circumstances of the Donor, to include details of anyone who might expect to inherit

something in the event of the Donor's death, and specifically those who may be disadvantaged by the terms of any Statutory Will. After representations by all parties, including the Official Solicitor on behalf of the Donor, the Court of Protection makes a decision on the terms of any Statutory Will. Advice can be provided on how to proceed with a Statutory Will application.

## Protecting the Donor's assets

If tailored advice is required then please ask – legal fees for such advice can be paid from the Donor's assets. Some general points to consider are:

**Arrange domiciliary care:** domiciliary care, also known as homecare (given that it is care provided in the Donor's own home), is designed to promote the independence of those who still live at home but have care needs. The care can range from a 15 minute check to ensure that medication has been taken, up to and including 24-hour live-in care.

A package of care which works well can help someone to remain in their own home for as long as possible, making it less likely that the Donor will need permanent care in a home. This option should therefore be viewed as a sensible financial planning measure.

We can provide details on request of an independent social worker who can assess the need for, and then arrange, homecare.

**Apply for NHS Continuing Care funding:** if a person has needs which are primarily nursing needs, then it is possible for all care and accommodation costs to be paid by the NHS. This is known as 'NHS Continuing Care funding'. It is a complex area and so we can give advice and assistance on arranging for the appropriate assessment to be carried out, and challenging assessments which incorrectly refuse the funding.

**Claim Attendance Allowance:** Attendance Allowance is a tax-free benefit for people aged 65 and over who need help with personal care because they are physically or mentally disabled. If the Donor is under the age of 65, Disability Living Allowance may be available instead.

You should ensure that Attendance Allowance is claimed where applicable and, where it is already in payment, that it is being paid at the correct rate.

**Claim a reduction in Council Tax:** there is a 25% discount on Council Tax for properties occupied by one person only. If an adult occupant is severely mentally impaired (diagnosed with Alzheimer's disease or similar) then that person is ignored for the purposes of calculating Council Tax under the Class U exemption. This could either result in a 25% reduction in Council Tax where two people live in the property, or a 100% reduction where there is just one person living in the property.

Further, if a property is left empty because the sole occupier moved into a hospital or care home, then no Council Tax is payable under the Classes E and I exemptions.

**Take out a Funeral Plan:** cash in the bank will be taken into account in any financial assessment for care home fees. If some of those funds were used to purchase a Funeral Plan, then they cannot be taken into account by the Local Authority. To purchase a Funeral Plan for the Donor you can contact:

- ▶ Golden Leaves  
www.goldenleaves.com  
Telephone: 0800 85 44 48

**Take out a Pre-Paid Probate Plan:** as mentioned above, cash in the bank will be taken into account for someone who is in a care home. If some of those funds were used to purchase a Pre-paid Probate Plan, which means pre-paying for the cost of administering an estate by a solicitor, then they cannot be taken into account by the Local Authority. Further information about a Pre-paid Probate Plan can be provided on request.

**Obtain independent financial advice:** as an Attorney, it is your duty to safeguard the finances of the Donor. The best way to avoid any criticism is to seek the advice of an Independent Financial Adviser (IFA) who specialises in this area. An appropriately qualified IFA can be recommended to you on request.

For those already in a care home, or who will be moving into one, one option which should be considered by an IFA is an Immediate Care Fees plan (also known as an Immediate Needs Annuity or Immediate Lifetime Care plan), which is essentially an insurance policy to cover any care home fees that become due. The aim of the plan is to provide certainty as to how much capital will be used to meet care home fees, and therefore certainty as to how much capital will be left as an inheritance.

An Immediate Care Fees plan is a plan designed for individuals who need assistance with everyday tasks (known as Activities of Daily Living) or supervision in the case of mental impairment. Needing care in a home is not a necessity and so the plan can be suitable for those wanting to receive care in their own home.

The plan is a contract between the Donor and an insurance company that guarantees to pay a series of regular payments in return for a non-refundable one-off lump sum. The regular payments can start as soon as the premium has been paid.

Typically, the plan pays monthly payments directly to the chosen care provider for the rest of the Donor's life.

The regular payments are tax-free if paid directly to the 'registered care provider' (whether the care home or formal care home agency). If payments are made directly to the Donor then the appropriate income tax rate will be deducted. Note, that this is the current position which HM Revenue & Customs could possibly chance over the life of the plan.

The amount of the lump sum needed to purchase the plan will depend on:

- ▶ The Donor's age
- ▶ The Donor's state of health
- ▶ The income required and whether or not this needs to increase over time
- ▶ Any capital guarantees
- ▶ The frequency of payments

The potential drawbacks of an Immediate Care Fees plan are:

- ▶ The cost of the plan can be expensive (but then again so are the care home fees which are to be paid by the plan!)
- ▶ The premium paid may not be enough to cover all costs of care at the commencement of the plan. Additional funds may therefore be required from elsewhere. Even if an increasing income from the plan is selected prior to commencement of it, the rate of increase chosen is not guaranteed to match future increase in care costs and so any shortfall must be met by the Donor
- ▶ There is no cash-in value, so the Donor could pay for the plan and die soon after, leaving nothing to their estate. At an additional cost, it may be possible to put in place capital guarantees (also known as premium protection) by purchasing life assurance at the same time as the plan. This is an insurance policy taken out so that if the Donor dies during the specified term, a tax-free lump sum will be paid out based on proportion of the single initial premium. The term assurance has no cash-in value
- ▶ Some State and Local Authority benefits are means-tested and the Donor's entitlement to receive them may be affected by the payments from the plan. Non-means-tested benefits are not currently affected

## Key contacts

For further details and tailored advice, contact:

- ▶ Stephen Duffy in Peterborough on 01733 888879
- ▶ Duncan Jackson in London on 020 3709 9462
- ▶ Sarah Westwood in Stamford on 01780 484570
- ▶ Karl Dembicki in London on 020 3709 9460