

Watchpoints for Attorneys

acting under a Lasting Power
of Attorney (LPA)

How can we help you?

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Watchpoints for Attorneys

An Attorney ‘stands in the shoes’ of the Donor and an LPA is a very important legal power. Any person acting as an Attorney under an LPA needs to be careful to ensure that their decisions and actions are compliant with the law and their obligations to act in the best interests of the Donor. Among the most important considerations are the following:

Having only one LPA means limited decision-making scope

This is primarily an issue for the Donor when they are making their LPA, but it is important for you to be aware that if the Donor only has an LPA for property and financial affairs you cannot make decisions about their health and welfare. This applies in reverse if the Donor only has an LPA for Health and Welfare.

Property and Financial LPA terminates on bankruptcy of Attorney

If you get into money difficulties of your own to the extent that you are declared bankrupt your appointment as an Attorney will terminate and you will not be able to act. Depending on how the LPA document is worded, this may have repercussions for the Donor depending on the appointment of Attorneys within the LPA.

Capacity

An LPA for Property and Financial Affairs can be used at any time after registration with the OPG, with the Donor’s consent. An LPA for Health and Welfare can only be used once the Donor has lost capacity. This is a subjective concept under the Mental Capacity Act 2005 and should be judged on the basis of each decision that needs to be made. Attorneys will be expected to support the Donor to make decisions wherever possible and will need to understand how to judge capacity according to the principles of the law.



Acting with a Co-Attorney

We would always advise a Donor that their Attorneys should be people that get on with one another. However, life does not always go as planned – if you fall out with your Co-Attorney, can you put the Donor’s best interests first? It is worth remembering that even if you are appointed to act jointly and severally, your Co-Attorney’s acts will be legally binding on you and therefore if you are in disagreement you will need to apply to the Court of Protection for directions.

Mixing Donor’s money

If you mix the Donor’s money with your own then it is likely that managing their affairs will become more confusing as you may not be able to keep control of what funds are theirs. This means that you are more likely to fail in your duty to act in the best interests of the Donor as the chances of using their money as yours increases.

Keep accounts

Attorneys dealing with financial decisions must keep details of transactions carried out on the Donor’s behalf. If the Donor’s affairs are straightforward, bank statements may be sufficient. If the Donor’s affairs are more complicated, detailed accounts may be required.



Serious conflicts of interest

You must not compromise your duty to act in the best interests of the Donor by acting where there is an insurmountable conflict of interest. For example, failing to sell a property required to pay care fees where you are also a beneficiary under the Will. Depending on severity, this action may also potentially lead to committing a criminal offence where there are associated issues of neglect.

Paying yourself for your Attorney services

The general rule of law is that Attorneys can only recover out of pocket expenses. Giving yourself an hourly rate for services rendered and charging to the Donor's estate is contrary to your duty to act in the best interests of the Donor and may lead to you being stripped of your Attorneyship.

Gratuitous care payments

Where you act to your own detriment (for example, giving up work to look after a Donor) it may be possible to receive payment from the Donor's estate. The Court of Protection would need to decide this matter and you must not pay yourself until the Court have approved your proposal. Gratuitous care payments may also carry income tax and national insurance consequences.

Gifts

There are strict restrictions on making gifts under an LPA, which should always be restricted to gifts on customary occasions such as Christmas and birthdays, or to charities that the Donor might expect to have made.

The amount of such gifts must be reasonable having regard to the circumstances and the size of the Donor's estate. The guidance is vague and an Attorney is best advised to make an application to the Court of Protection for approval of gifts prior to taking any action. Failure to do so may result in being stripped of your Attorneyship.



Gifts for Inheritance Tax planning

There is very limited scope for making gifts out of a Donor's estate for Inheritance Tax purposes. The amount is generally limited to small gift allowances and annual allowance of £3,000 per year. Any gifting that exceeds this will require Court of Protection approval. Acts taken by Attorneys outside the scope of their authority will not be allowed for Inheritance Tax, even if under other circumstances those gifts would be tax efficient.

Inheritance Tax consequences

Even if you are applying to the Court for approval of Inheritance Tax planning, are you aware of the various rules surrounding Inheritance Tax? Is there a possibility that you may be taking action that will not be tax efficient, or may not even work?

Deliberate deprivation of assets

You will need to consider whether gifts you have made, or are planning to make, would be viewed suspiciously by a local authority if you subsequently need to claim financial assistance from the local authority as funds are no longer within the Donor's estate to meet care costs.

Sale of property to yourself

If you are selling the Donor's home and would like to buy it – think carefully. You will need to make an application to the Court of Protection for the sale to be authorised, even if you are proposing to pay the full market rate.

Loans

An Attorney is not authorised to profit from their position and therefore if you are thinking about making a loan of the Donor's assets you will need to consider whether this is in the Donor's best interests as a starting point. You will also need to consider the terms of the loan and interest provisions. Is giving yourself

an interest free loan from the Donor's funds acting in their best interests? You would be well advised to apply to the Court of Protection for authority to proceed.

Trustee functions

If the Donor of the LPA is also a Trustee then generally the Attorney will not be able to act to carry out the role of Trustee, and an application to the Court of Protection will be required. This can cause problems in matters where the Donor has an interest in a property which is also a trust asset.

The Donor's Will

An LPA does not confer the power on you to make a Will for the Donor. However, if you feel, as part of the management of their affairs, that their Will is out of date or that one needs to be created, then you can apply to the Court of Protection for a Will to be made. This is known as a Statutory Will.

Marriage and divorce

An LPA does not allow you to prevent the Donor getting married or divorced. It should be noted that the legal test for capacity to enter into marriage is relatively low and so the Donor being unable to manage their own property and financial affairs or health and welfare does not necessarily mean that they lack capacity to marry.



An Attorney cannot litigate

Acting as an Attorney does not allow you to issue proceedings at Court on behalf of the Donor, or defend proceedings brought against them. In such cases you would need to apply to Court to be named as a Litigation Friend.

Cannot consent to treatment for a mental disorder

An Attorney acting under a Health and Welfare LPA is not authorised to consent to treatment for a mental health disorder for which the Donor has been sectioned under the provisions of the Mental Health Act 1983.

Life sustaining treatment

What are the Donor's wishes for life sustaining treatment in their health and welfare LPA? If they have checked option B then these decisions will be made by professionals such as Doctors, and if there is a valid Advance Decision in place then end of life decisions should be made by the Doctors in line with the document. If you have the power to consent or refuse to life sustaining treatment decisions then how will you make such a decision and do you know the views of the Donor?

Assisted suicide and euthanasia

Assisted suicide and euthanasia remain illegal in the UK – and the ability to give or refuse consent to life sustaining treatment should not be confused with the power to assist with suicide.



Attorney Watchpoints

Private Clients

A personal approach to legal advice

Trust is the most important aspect when it comes to legal matters.

We believe it is essential that we take time not only to review your legal issue, but also get to know you. From business to personal affairs, a complete understanding of your circumstances and objectives is the starting point. Once we can see the bigger picture, we can focus on the detail.

Talk to us about:

- › Arbitration
- › Buying and selling your home
- › Care Is Our Concern
- › Children
- › Cohabitation
- › Consumer law
- › Contested Will and estate claims
- › Debt recovery
- › Divorce and financial advice
- › Domestic violence
- › Inheritance tax advice
- › Landlord and tenant
- › Lasting Powers of Attorney
- › Litigation
- › Living Wills
- › Personal injury
- › Prenuptial agreement
- › Tax and succession
- › Trusts
- › Wills and probate



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For more detailed advice on watchpoints for attorneys and how it can affect you and your personal circumstances, please contact your nearest HK Law office.

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