



Attorneys consideration when acting under a Lasting Power of Attorney?

Attorneys have a duty to act based on the principles of the Mental Capacity Act 2005 and have regard to the Mental Capacity Act Code of Practice. They must follow these principles and cannot simply do whatever they like.

Principles of the Act

Attorneys must follow the following principles under the act:-

1. They must assume that the Donor can make their own decisions unless they establish that the Donor cannot do so;
2. They must help to make as many of the Donor's own decisions as they can. They cannot treat a Donor as unable to make the decision in question unless all practicable steps to help the Donor to do so have been made without success;
3. They must not treat a Donor as unable to make the decision in question simply because the Donor makes an unwise decision;
4. They must make decisions and act in the Donor's best interests when the Donor is unable to make the decision in question;

and

5. Before the attorneys make the decision in question or act, they must consider whether they can make the decision or act in a way that is less restrictive of the Donor's rights and freedom but still achieves the purpose.

Best interests

Attorneys must act in the Donor's best interests in making decisions for them when they are unable to make the decision themselves. They must take into account all the relevant circumstances. This includes consulting with the Donor and others who are interested in their welfare. In deciding what is in the donor's best interests, bear in mind:-

- their past and recent wishes;
- any views the donor has expressed in the past;
- their beliefs and values;
- the views of family members, parents, carers, etc;

- the possibility that the donor could regain capacity;
- any other factors that may be specific to a donor's circumstances; and
- any guidance in the LPA or other written statement.

Other responsibilities of attorneys include:

- a duty of care when making decisions on behalf of the donor;
- to carry out instructions that the donor has made in their LPA;
- a duty not to delegate the powers under the LPA unless the LPA says that this is possible;
- not to benefit themselves but to benefit the donor – meaning that Attorneys should avoid any potential conflicts of interest and not to profit or benefit personally from the position other than where specified within the LPA;
- a duty of good faith – meaning that Attorneys should act with honesty and integrity;
- keeping the donor's affairs confidential unless the donor has specified otherwise;
- to comply with directions of the Court of Protection;
- not to give up the role as Attorney without discussing it with the donor if possible;
- to keep the donor's money and property separate from the Attorneys money and property;
- to keep accurate accounts in all dealings as an attorney.

Additional points to remember

Always bear in mind that the key objective at all times is the best interests of the donor. Even after registering the LPA, it should be assumed that the donor has capacity to make decisions themselves. The Donor should not be treated as unable to make a decision just because they make a decision which, in the Attorney's opinion, is unwise.

An Attorney should only be making decisions for the donor when they:

- are incapable of making decisions for themselves;

and

- may be capable, but have asked the Attorney to make them on their behalf.

It is important to remember that the donor may have a gradually degenerating condition, or may have capacity on one day, but not on another. Therefore, an Attorney should consider assessing the Donor's capacity from time to time and support the Donor in making as many decisions as possible for themselves.



