Information for Attorneys

The role of an attorney is one of responsibility, and if in doubt it is better to seek advice, rather than get it wrong. This guidance note provides an outline of important points for acting as a financial attorney.

What the lasting power allows you to do

This Lasting Power of Attorney made by the donor gives you power to deal with their financial affairs. You must only do such things as the power allows you to do. You must not delegate the role to another person, as the appointment is personal to you. It does not give you power to make health or welfare decisions such as medical treatment they should have or where the donor should live.

If you have been appointed with another person it may be that you have to deal with all matters together (a joint appointment); or it could be that you can act together or independently (joint and several appointment); or some decisions together and some independently (a hybrid appointment). Even if one of you makes more decisions under the power than another, attorneys are expected to consult with each other about what they are doing, and keep each other informed.

Can you use it immediately?

Once the power has been registered with the Office of the Public Guardian and provided there are no conditions or restrictions preventing you from acting at this point, you may use the power immediately. You should only do what the donor wants you to do and always act in their best interest. If there is a condition in the power which prevents you from using the power until the donor is mentally incapable of managing their financial affairs you will usually need to produce evidence of the donor's incapacity to third parties, such as banks and building societies before they will accept your authority.

Following the Mental Capacity Act 2005 Principles and Code of Practice

When acting under the Lasting Power of Attorney you must follow the Principles set out in the Mental Capacity Act and have regard to the Code of Practice. This means:

- You must assume that the donor can make their own decisions unless it is established they cannot do so because they lack mental capacity.
- You must help the donor to make as many of their own decisions as possible.
- You must no treat the donor as unable to make the decision in question unless all practicable steps to help them to do so have been made without success.
- You must not treat the donor as unable to make the decision in question simply because the donor wishes to make a decision you consider is unwise.
- You must make decisions and act in the donor's best interests when they are unable to make the decision in question.
- Before you make the decision in question or act for the donor, you must consider whether you 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.

- The Code of Practice provides important guidance and information to help you follow the legislation, which you can obtain from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

It is important that you consider the Code when making decisions, as failure to do so may result in your removal as an attorney.

What is in the donor's best interests?
Decisions as to what is or is not in the donor's best interests are not always easy. You must:

- Consider all the relevant circumstances, particularly:
    - the likelihood of the donor recovering in the foreseeable future and being able to make the decision;
    - the donor's past and present wishes and feelings;
    - the donor's beliefs and values that would be likely to influence their decision if they had capacity; and
    - other factors that the donor would be likely to consider if they were able to do so.
- Involve the donor in the decisions, so far as practical.
- If practicable and appropriate, consult with carers, relatives and/or friends or others, such as another attorney or court appointed deputy who has an interest in the donor's welfare.

Limits of the power
The donor may have included restrictions or conditions in the power, which limit you from making gifts. If this is not the case, you may make gifts on customary occasions, such as religious festival presents, birthday presents and wedding presents, provided it is for a friend or relative (including yourself).

Gifts can also be made to a charity if the donor has made gifts to the charity in the past or if not, in the circumstances they might be expected to make gifts to the charity.

However, in all cases, the size of the gift must be reasonable in the circumstances and in relation to the size of the total value of the donor's assets. You should be cautious to avoid interfering in succession rights under the donor's intended will or their intestacy, and in any event if the donor might need the asset for their own use in the future, for example to fund their care and outgoings.

It is important to have sight of the donor's will, if they had one. You may obtain a copy of the will if it is held with a solicitor.

You are able to use the donor's money to maintain their spouse, civil partner, cohabitee, or the donor's child if under 18 years of age (if any). However, this is subject to any maintenance payment being reasonable in the circumstances and affordable for the donor. There is no set sum you can give or pay for maintenance; it depends on the donor's financial position, their own financial needs an the circumstances.

If you have any doubt or wish to make gifts not covered by the above, you should seek professional legal advice.

Managing finances
Banks and other financial institutions have different ways of dealing with attorneys. Some will allow you to continue to operate the donor's account whilst others will wish a new account to be opened. Many financial institutions allow jointly held account to operate as normal, one the power has been registered with them. If you have difficulties, read the consumer guide and the guidance framework for bank and building society staff available at:
https://www.bba.org.uk/publication/leaflets/guidance-for-people-wanting-to-manage-a-bank-account-for-someone-else=2/

If you operate an account for the donor, you should sign your usual signature and then underneath your signature add the words "as attorney". If you have to open a new account it should be opened in your name "as attorney for" the donor. You will then only have to sign you usual signature to deal with the account.

You should not open an account in your name without identifying that the asset belongs to the donor, as this may cause complications with your own tax and financial affairs, including succession under your own will or intestacy. If it is not possible to hold the asset in this way, it is appropriate to identify the true ownership in a "Declaration of Trust". Legal advice should be sought in such situations.

Keeping accounts
The power may include a condition that you prepare and produce accounts or provide financial statements to be checked by someone else. Even if the power does not say this, you still have a duty to keep accounts. It is sensible to keep financial statements and retain all receipts in one place. This is because the Office of the Public Guardian could ask you to account for your dealings with the donor's money.

You must not benefit from your positions
You must not use the donor's money or property for your own benefit, even if it were a loan or you believe the donor would agree to this, if they had mental capacity. Such action must be authorised by the Court of Protection. It is better to avoid a problem by seeking legal advice.

Other responsibilities
An attorney must act with honesty, integrity and in good faith. You must keep the donor's affairs confidential, unless you are legally required, such as a request from the Office of the Public Guardian, an order from the Court or if there is good reason to disclose information.

Financial advice
You must act using reasonable standards of care and skill. You should consider taking independent financial advice on how best to invest and hold funds belonging to the donor. How and where funds should be invested and managed will largely depend on the following:

- The donor's age and life expectancy.
- The value and nature of the donor's resources, taking into account tax and costs implications of making changes.
- The donor's financial needs including any responsibility to others.
- The donor's attitude to risk and views of others.
- The impact of any investment on state support.

Any investment will need to be suitable and spread between different investments to limit the risk of a poor return. From time to time the investments will need to be reviewed.

Reimbursement of personal expenses

You are not allowed to be paid for acting as an attorney, unless the donor has authorised it in the power. You can, however, recover reasonable out of pocket expenses, which have been personally incurred such as petrol and stamps, and in most cases, this is unlikely to exceed more than a few hundred pounds a year. The donor's own expenses, such as care costs and items they need for their own use, such as clothes, day to day outgoings and holidays, as well as any legal fees are paid out of the donor's funds. Ideally this should be transparent from looking at the donor's financial statements.

Termination of power

The Court of Protection can revoke your power to act as attorney if you do not act properly in relation to your duties and responsibilities as attorney.

What can Hughes Solicitors do for you?

If you require any further assistance whether in the form of advice about your role as attorney or with the administration of someone else's affairs as an attorney, please don't hesitate to contact us on **01435 890101** or call into our office to make an appointment to see one of our Private Client lawyers.