GUIDANCE FOR A HEALTH AND WELFARE ATTORNEY

Being an attorney, requires you to take on certain responsibilities, and act in a particular way. This guidance provides important information to help you act as a health and welfare attorney and will help you avoid problems.

The person who appointed you as their attorney is referred to in this guidance as 'the donor'.

What the lasting power allows you to do

This Lasting Power of Attorney gives you power to make a health and welfare decision at a time when the donor lacks capacity to make their own decision.

Health and welfare decisions include:

- Where the donor should live
- Who may have contact with the donor
- Right to access health and social care records
- Consent to or refusing consent to medical treatment

You should read the power, as it may contain useful guidance and/or set out limits on the decisions you can make.

You cannot make decisions about treatment for a mental disorder if the donor is detained under Part 4 of the Mental Health Act 1983 because they suffer from a mental disorder and the responsible clinicians believe they can only provide care and treatment if the donor is detained.

When can you make decisions?

If the power has not been registered with the Office of the Public Guardian, you cannot use it to make decisions. You should apply for the power to be registered.

You can only make a health or welfare decision, once the power has been registered, and when the donor lacks capacity to make the proposed decision.

Even if the donor lacks mental capacity to manage their own property and financial affairs, it does not necessarily mean they lack capacity to make a health or welfare decision. The level of capacity required varies depending on the decision to be

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made. It is not determined by a person's diagnosis, but their ability to understand, retain, use and weigh relevant information.

Making decisions with others

If you have been appointed to act with another person, it may be that you have to:

- deal with all matters together (a joint appointment); or
- act together or independently (joint and several appointment); or
- make 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.

You cannot delegate your responsibilities to a person who is not an attorney: the appointment is personal to you.

Following the Principles of the Mental Capacity Act 2005 and Code of Practice

When making decisions you must follow the Principles set out in Mental Capacity Act 2005 and have regard to its Code of Practice.

This means:

- You must assume that the donor can make their own decisions, unless it is established that 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 not 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.

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Guidance in the Code of Practice

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/224660/Mental_Capacity_Act_code_of_practice.pdf

The following chapters of the Code are particularly helpful:

- **Chapter 2:** What are the statutory principles and how should they be applied?
- **Chapter 3:** How should people be helped to make their own decisions?
- **Chapter 4:** How does the Act define a person's capacity and how should capacity be assessed?
- **Chapter 5:** What does the Act mean when it talks about 'best interests?'
- **Chapter 7:** What does the Act says about Lasting Powers of Attorney?

What is meant by 'mental capacity?'

A person lacks capacity, if they are unable to make a specific decision, at the time the decision needs to be made, because of an impairment of, or disturbance, in the functioning of their mind or brain.

A person is considered to lack capacity to make a decision, if they are unable to understand, retain, use and weigh, information relevant to the decision, or communicate their decision by any means.

The relevant information will vary depending on the decision, but usually includes the nature of the decision, its purpose, and the consequence.

You should try to help the donor make their own decisions, but if you form a view that it is more likely than not, that the donor lacks capacity to make a particular decision, at the time it needs to be made, you can make the decision for them.

What is meant by 'the donor's best interests?'

If the donor lacks capacity to make a decision, then you can make the decision on their behalf, in their best interests.

You should:

- 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

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    - 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.
- If giving or refusing consent to life sustaining treatment, on behalf of the donor, you must **not be motivated** by a wish to shorten their life, even though their death may occur as a result.
- If possible, try and achieve the outcome the donor would want.

Instructions and preferences

The donor may have included instructions and/or preferences in the power, which should be considered when you make decisions. It is important that you follow these. If you exceed your authority, you could be removed as attorney. If the LPA is restricted, and you need wider powers you should apply to the Court of Protection for authority.

If you have any doubt about how you should make decisions, you should seek professional legal advice.

Other responsibilities

An attorney must act with honesty, integrity and in good faith, using reasonable standards of care and skill. 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 to third parties.

Working with health or social care professionals

If the donor lacks mental capacity to make decisions about health and/or social care needs, others may also make decisions and provide care and treatment for the donor, provided they believe it is in the donor's best interests. For example, care workers may provide personal care services, or doctors and nurses may provide health care and treatment.

If it is appropriate and practical they may consult with you about the decisions they plan to make. However, they cannot make a decision, which you disagree with. But this does not mean you can demand medical treatment is given, if those treating the donor do not think it is in the donor's best interests, or demand that social services use their resources to fund a care package, which you want. This is because you only have the same rights that the donor would have if they had mental capacity.

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Making an end of life decision

You may have been given authority in the power to give or refuse consent to life sustaining treatment (Option A). This is treatment that in the view of those treating the donor, is considered by them to be necessary to sustain the donor's life.

There may come a time, where those treating the donor have to consider whether treatment should be given or continue to be given. You should expect to be consulted about the options, (unless it is inappropriate or impracticable).

Your role is to either give consent or refuse consent to the treatment being given. You may refuse consent to treatment, which those treating the donor may be prepared to give, for example, performing CPR (cardiopulmonary resuscitation) or providing treatment which will provide little benefit, or not what the donor would have wanted. You can do this if you think, overall it is the donor's best interests.

Reimbursement of personal expenses

You can 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.

Your right to retire

You do not have to take on this role indefinitely, and have the right to retire, by 'disclaiming your appointment'. But if you decide to do this you will need to tell the donor and send the original power to the Office of the Public Guardian, with Form LPA 005, which is available on https://www.gov.uk/government/publications/disclaim-a-lasting-power-of-attorney

If the donor has appointed a replacement attorney, that person will act in your place.

What could happen if an attorney does not act in the donor's best interests?

The Office of the Public Guardian may investigate any concerns about the decisions an attorney has made. If the concerns are not addressed or resolved, an application can be made to the Court of Protection for the attorney's removal. The Court of Protection may make additional orders to safeguard the donor and could agree that the press can publish the name of an attorney who has been removed.

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What happens when the donor dies?

Your authority to act under the LPA ends when the donor dies.

You must send the original LPA to the Office of the Public Guardian so they can cancel the LPA. Their address is:

Office of the Public Guardian
PO Box 16185
Birmingham
B2 2WH

Office of the Public Guardian Guidance

The Office of the Public Guardian has the following useful guidance on its website:

- LP10: getting started as a Health and Welfare Attorney

  https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738228/lp10-getting-started-as-an-attorney-health-and-welfare-web.pdf

- LP15: How to act as a Health and Welfare Attorney

  https://www.gov.uk/government/publications/how-to-be-an-attorney/lp15-how-to-be-a-health-and-welfare-attorney-web-version

- Public Guardian practice note (02/2011): notification of death

  https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640994/Notification-of-death-practice-note-02-2011.pdf

This guidance has been written by Caroline Bielanska, a Solicitor who specialises in LPAs and the Mental Capacity Act 2005.

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