

Best Intentions: Common pitfalls for attorneys



As the population ages, the need to nominate someone to assist us in making decisions or to make decisions on our behalf when we are no longer able to do so becomes more important. One of the best ways to plan for this is to put in place a [Lasting Power of Attorney](#) ('LPA'). This is a legal document in which a person (the 'donor') appoints one or more people (the 'attorneys') to assist the donor in making decisions or to make certain decisions on the donor's behalf when the donor no longer has the mental capacity to do so.

LPAs are regulated by the Office of the Public Guardian ('OPG'), the government body responsible for monitoring use of LPAs and attorneys' actions.

Attorneys are expected to act in the donor's best interests at all times. Even with the best intentions, however, attorneys frequently fall foul of the law. Common mistakes include making unauthorised gifts on behalf of the donor, mixing their own finances with the donor's and instructing investment professionals without formal authority.

Gifts

Generally, attorneys cannot make gifts from the donor's estate without specific authority from the Court of Protection (which assists the OPG to regulate LPAs). However, if the attorneys can demonstrate that the answer to all three questions below is 'yes', they can make gifts without the Court's authority.

1. Is the gift to someone who is related or connected to the donor or to a charity which the donor would have supported when they had capacity?
2. Is the gift made on an occasion such as a birthday, wedding or anniversary?

3. Is the gift of reasonable value, taking into consideration the size of the donor's estate and their expected future needs?

This is a useful exception to the general rule but if unsure whether it does apply, attorneys will find additional guidance in the [OPG Guide to Attorneys on giving gifts](#).

If still unsure, they should seek legal advice as there are serious consequences for making gifts, which are not of a reasonable value, without Court approval.

Mixing funds

Attorneys must ensure that the donor's funds are not mixed with their own personal funds. Setting up accounts and keeping records may not be the first priority when an attorney has other responsibilities (such as being the main carer for the donor) but it is important to keep the donor's money separate. A clear paper trail provides protection for the donor and for the attorney if their actions are challenged at some later date. Attorneys should keep the donor's funds in separate accounts in the donor's name and retain copies of all invoices and bank statements.

Investment decisions

Making appropriate investment decisions in relation to a donor's funds is important not only to generate income to supplement a donor's current standard of living but also to grow their capital for future expenditure. An attorney may sensibly decide to revert to an investment professional such as an Independent Financial Adviser or a Discretionary Fund Manager to make these decisions but the OPG has issued guidance which appears to prevent attorneys from delegating their powers in this manner unless the LPA specifically authorises them to do so.

If the wording of an LPA does not already contain authority, donors and attorneys should seek legal advice on the most cost and time effective way of remedying this.

Being an attorney can be a burden but, if an attorney is aware of their obligations and consistently seeks to meet them, the opportunity to assist a loved one during what may be a very challenging time in their life can be incredibly rewarding.



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