STE1 Guidance Note: Safeguarding provisions in lasting powers of attorney (England and Wales)

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WHY SAFEGUARDS SHOULD BE INCLUDED

Lasting Powers of Attorney (LPAs) are easy to make and, particularly in the case of a property and financial affairs LPA, easy to abuse. As with any form of abuse, it is difficult to detect, as it requires the victim to report it. It is impossible to know the prevalence, or identify which attorney will misuse the power with any certainty. With this in mind, it makes sense to include provisions to reduce the risk.

Often, attorneys who are removed by the Court of Protection do not see they have done anything wrong, asserting: ‘Mum wanted me to have the house’, ‘I'll inherit it all in the end’, or ‘I deserve it because of everything I do’. They explain their behaviour by reference to their relationship to the donor, and do not understand their fiduciary and statutory responsibilities.

It is insufficient simply to advise a donor to choose an attorney who is trustworthy. The proposed attorney might be disorganised, indecisive, challenging, self-serving, domineering, or easily influenced by others, all of which can impact on their ability to make good decisions. Attorneys do not know what they don’t know, and need guidance on how to act as an attorney.

PROFESSIONAL ADVICE IS A SAFEGUARD

The professional adviser can act as a safeguard for the donor to:

- Ensure the donor wants to make the power and is not acting under undue pressure.
- Ensure the donor understands what the attorney will be able to do, and any limits.
- Ensure the donor has the required capacity to make the power.
- Draft the power to include safeguards to reduce the risk of abuse or misuse.
- Ensure the attorney is provided with relevant information as to their role.
- Ensure the attorney understands they can make gifts to a charity or to people who are related to or connected to the donor on customary occasions, provided that the value of each gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor’s estate, but that they cannot make larger gifts without court of protection authority.
- Explain to the attorney what might happen if they do not act in the donor’s best interests or exceed their authority.

SUGGESTED SAFEGUARDS

1. INCLUDE SOME FORM OF SUPERVISION CLAUSE SO THERE IS ACCOUNTABILITY TO A THIRD PARTY

These can be complex or very simple, and enable a third party to see whether the attorney is acting within the scope of their authority.
This precedent should be inserted in the box at section 7 (instructions) or continuation sheet 2.

‘My attorney(s) must keep an account and submit it [annually][half yearly] to [name(s)].’

or

My attorney(s) shall, within [two] months of the first anniversary of the [registration][use] of this power and each subsequent anniversary, have prepared [and audited] by a chartered accountant accounts of their dealings as my attorneys. [I further direct that the said accounts shall be disclosed by my attorneys to [name] within [xx weeks] of the date of their preparation].’

or

‘If [name][any of my other children] ask(s) to see my bank statements or any paperwork concerning the management of my property and financial affairs my attorney(s) shall comply with such request, as soon as is reasonably practicable.’

or

‘I direct that my attorneys shall provide copies of my financial statements on a [monthly/quarterly/annual] basis to my [friend/brother/sister/daughter/son etc.].’

2. EXPRESSLY STATE THE LIMITED POWER TO MAKE GIFTS

Strictly speaking, there is no need to insert this provision into the property & financial affairs LPA, because this limited authority is conferred on the attorney(s) by virtue of section 12(2) of the Mental Capacity Act 2005 (MCA 2005). Nevertheless, it may be sensible to include it in the LPA as a reminder to the attorney(s) of the limited scope to make gifts, but it also puts third parties, such as financial institutions, on notice of any transaction where the attorney or someone close to the attorney is benefiting from a gift, which may exceed their authority.

(i) My attorneys may make gifts (a) on customary occasions to persons (including themselves) who are related to or connected with me, or (b) to any charity to which I made or might have been expected to make gifts, provided that the value of each such gift is not unreasonable having regard to all the circumstances, and in particular the size of my estate.

(ii) No permitted gift should exceed the sum of £[ ].
3. EXPRESSLY INCLUDE PEOPLE WITH WHOM THE ATTORNEY SHOULD CONSULT

This precedent should be inserted in the box at section 7 (instructions) or continuation sheet 2. This helps best interest decision making, so the attorney knows who should be consulted, and for a stated purpose. Consultees also help keep the attorney in check.

If it is practicable and appropriate, in determining what is in my best interests, my attorney(s) must consult with [my (explain relationship(s))], [insert name(s)] and take into account [his/her/their views] [if and when decisions are proposed to be made about gifts over [£50], the sale of my home, and/or any application is made to the Court of Protection which concerns me.]

4. INCLUDE AN INVESTMENT CLAUSE THAT IS LARGELY ALIGNED TO A DEPUTYSHIP ORDER (IT HAS BEEN LIMITED TO INVESTMENTS IN ENGLAND AND WALES)

This precedent should be inserted in the box at section 7 (instructions) or continuation sheet 2. Lay attorneys are unlikely to know how to invest and need to be prompted to obtain proper advice.

(i) My attorney(s) must exercise such care and skill as is reasonable in the circumstances when investing my assets.

(ii) My attorney(s) may make any kind of investment that I could make.

(iii) In exercising this power to invest, my attorney(s) must have regard to the standard investment criteria under the Trustee Act 2000, namely the suitability of the investments and the need for diversification, in so far as is appropriate in the circumstances which affect me.

(iv) My attorney(s) must from time to time review the investments and consider whether, having regard to the standard investment criteria, they should be varied.

(v) Unless my attorney(s) reasonably conclude(s) that in all the circumstances it is unnecessary or inappropriate to do so, before exercising any power to invest, my attorney(s) must obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised. ‘Proper advice’ is the advice of a person who my attorney(s) reasonably believe(s) to be qualified to give it by his ability and practical experience of financial and other matters relating to the proposed investment.

(vi) If my attorney(s) consider(s) it is in my best interests to do so, [he/she/they] may appoint an investment manager, who is regulated and authorised to undertake investment business, to manage the assets on a discretionary basis under the standard terms and conditions applicable to such service from time-to-time, and to permit the investments to be held in the name of the investment manager nominee company.
5. EXPRESS REQUIREMENT TO SUPPORT AND CONSULT THE DONOR AND TAKE INTO ACCOUNT HIS VIEWS

This precedent should be inserted in the box at section 7 (instructions) or continuation sheet 2.

Lay attorneys are unlikely to seek out and read the MCA 2005 or its Code of Practice (the Code). They are also unlikely to read the peripheral information contained in the prescribed form. By expressly including a provision, the attorney’s attention is drawn to what they should do: to support the donor to make those decisions he can make, involve him when making a decision on his behalf, and understand the weight to be attached to the donor’s views, wishes, feelings and beliefs.

The donor’s views, wishes and so on should be captured within the preference box in section 7 or on the continuation sheet. These can be updated by a side letter, as they all form 'written statements', which should be taken into account when making a decision in the donor’s best interests.

My attorney(s) must:

(i) apply the principles set out in section 1 of the Mental Capacity Act 2005 and have regard to the guidance in the Code of Practice to the Act, and in particular, support me to make those decisions I am capable of making, and in this respect, have regard to chapter 3 of the Code;

(ii) if I cannot make my own decisions or choose to not make a decision, my attorney(s), so far as is reasonably practical, should encourage my participation, and take into account my (current and past) views, feelings, beliefs and values and any other factor that I would consider important, in making a decision which is in my best interests; and

(iii) try to achieve the outcome I would want, where my views are rational, sensible, responsible and pragmatically capable of implementation in the circumstances.

6. NOTIFY A THIRD PARTY AFTER REGISTRATION

This gives a non-attorney 'permission' to remain interested and raise any concerns with the Office of the Public Guardian (OPG)'s safeguarding team. It can be dovetailed with the supervision clause in the LPA, set out in 1 above.

Dear [x]

Re: [insert the name of the donor]

We act for [insert the name of the client], and [he/she] wishes you to be told [he/she] has made a [property and financial affairs] [and] [health and welfare] Lasting Power of Attorney, appointing [insert relationship and name of attorney(s)] to make decisions on [his/her] behalf.
The Power can be used, if and when [insert the name of the client] lacks mental capacity to make [his/her own] decisions.

[insert the name of the client] has included provision in [his/her] power for you to be given financial information by the attorney(s), so you can see how money is being invested and spent.

The attorney is able to make gifts to charities or people who are connected to [insert the name of the client] on customary occasions, such as birthdays, anniversaries or religious days, but these must always be reasonable in size and in the circumstances.

In most cases, an attorney acts appropriately, but to reduce the risk of its misuse, [Insert the name of the client] wants you to know about the Power, as [he/she] believes that if you had a concern about the way in which the attorney(s) were making decisions, you would raise it with the Office of the Public Guardian (OPG).

The OPG is a safeguarding body and can investigate concerns, and take action, if they think it is necessary. You can be assured they will handle any concern on a confidential basis.

Their contact details are:

Office of the Public Guardian

Safeguarding Unit
PO Box 16185
Birmingham
B2 2WH

opg.safeguardingunit@publicguardian.gsi.gov.uk

Telephone: 0115 934 2777

Please keep this letter in a safe place, in case you later need to refer to it.

Yours sincerely,

7. PROVIDE BASIC INFORMATION TO THE ATTORNEY

Information for an attorney acting under a property and financial lasting power of attorney

The role of an attorney is one of responsibility; 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 LPA made by the donor gives you power to deal with their financial affairs. You must do only 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 OPG, and provided there are no conditions or restrictions preventing you for acting at this point, you may use the power immediately. You should do only 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 LPA you must follow the Principles set out in MCA 2005 and have regard to the Code. 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.

The Code provides important guidance and information to help you follow the legislation, and is available at https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

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 that 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 and 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, while others will wish a new account to be opened. Many financial institutions allow jointly held accounts to operate as normal, once 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 your 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 OPG could ask you to account for your dealings with the donor’s money.

You must not benefit from your position

You must not use the donor’s money or property for your own benefit, even if you believe the donor would, if they had mental capacity, agree with your proposed use – for example, as a loan. 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 OPG, 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 that 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.

8. **OBTAIN YOUR CLIENT’S ADVANCE CONSENT FOR PERMISSION FOR YOU TO DISCLOSE CONFIDENTIAL INFORMATION TO SAFEGUARD THEIR PROPERTY IF THEY ARE UNABLE TO SAFEGUARD THEMSELVES**

Please see the precedents for obtaining advance consent on the following two pages.
ADVANCE CONSENT
TO SAFEGUARD YOU AND/OR YOUR PROPERTY

There might be a time in the future, when you are less able to protect yourself and/or your property because for example, you lack mental capacity or are vulnerable to abuse of trust, coercion, duress, manipulation, or undue influence from another person, or you may be unintentionally neglecting yourself.

Solicitors must not disclose confidential information without their client’s consent. Confidential information includes records of meetings, advice provided and details of legal transactions.

Our legal practice is encouraging clients to consider whether to give consent to the disclosure of limited confidential information, which would allow your solicitor to take such steps as he or she considers is necessary and appropriate to safeguard you and/or your property.

The information disclosed would only be provided to people working in a professional capacity, for example those working in social, health, environmental health, housing, police, financial institutions, the Office of the Public Guardian and the Court of Protection.
ADVANCE CONSENT
TO DISCLOSE CONFIDENTIAL INFORMATION

I [insert client’s full name and address] give my consent to:

[insert legal practice’s name and address] (the legal practice) which includes any successive or amalgamated practice which has resulted in a change of its name or address:

1. To disclose any confidential information held or known in respect of me, to personnel working in social, health, environmental health, housing, financial institutions, the Office of the Public Guardian and the Court of Protection or other organisation which has a safeguarding role, for the purpose of protecting my interests, if it is reasonably believed that I am not in a position to safeguard myself and/or my property and harm may occur unless action is taken.

2. I understand that any confidential information disclosed will be limited to what is considered by the legal practice at the time to be necessary and appropriate.

Signed…………………………………………………………………………………………………………………………

Dated…………………………………………………………………………………………………………………………