

AF1/J02

Part 8: Powers of Attorney

This is a specific learning outcome in the J02 syllabus and there will be at least one, and possibly two questions on this subject. It will almost certainly appear as part of a question on AF1.

The milestones are to understand:

- The key points of a General Power of Attorney.
- The 5 principles of the Mental Capacity Act 2005
- The differences between supported and substituted decision making
- The differences between a Deputyship order and a Lasting Power of Attorney.
- How to set up an LPA
- The duties and powers of an attorney and a deputy
- The role of the Court of Protection, the Office of the Public Guardian and the Independent Mental Health Advocate

A General Power of Attorney

- A Power of Attorney (POA) is a deed executed by a donor that gives another person, the attorney, to act on the donor's behalf.
- It must be signed by the donor and witnessed by at least one other person
- It can be made for a specific matter, (to pay bills from the donor's bank account whilst the donor is absent) or general (basically to give the attorney a free hand over the donor's affairs)
- It usually lasts for a fixed period.
- It does not permit the attorney to make health or welfare decisions on behalf of the donor.
- The attorney can sign legal documents on behalf of the donor but cannot make a will on behalf of the donor nor amend an existing one.
- The attorney cannot give away the donor's property unless that power is specified in the deed. There is an exception for "habitual" gifts such as Christmas or birthday gifts.
- A POA can normally be revoked at any time by the donor.
- It is automatically revoked if the donor:
 - dies
 - loses mental capacity
 - becomes bankrupt

Decision making and mental capacity.

Individuals who lack mental capacity are unable to make decisions for themselves. This raises a number of issues:

- How can an individual's mental capacity be assessed?
- What is the situation if someone can make a decision but needs assistance?

Whilst mental capacity can be lost in an instant following a stroke or brain trauma, it is more common to see a gradual deterioration in mental faculties as people get older.

Paul is 78. His son Adam has noticed that his father seems to be suffering from some memory loss and gets confused easily.

This does not mean that Adam can (assuming it was legally possible) take control of his father's assets. How he, and anyone else in this situation, should deal with this situation is covered by **The Mental Capacity Act 2005**, which came into effect in 2007.

The five principles of the MCA.

1. An individual over 16 is deemed to have capacity unless proved otherwise.

This means that Adam must assume that Paul is able to make his own decisions unless he can show that his father has lost mental capacity

2. An individual must be supported to make their own decisions

This means that Adam, or another person, should help Paul decide but it must be Paul's decision and not Adam's.

3. Making an unwise decision should not trigger a presumption of lost capacity.

If Paul tells Adam that he's lost £10,000 in a crypto currency, Adam can't use that as evidence that Paul has lost mental capacity.

The first three principles deal with decisions made **by** Paul and at this stage Adam doesn't need any formal or legal agreement to help his father.

Once Paul has lost mental capacity the final two principles come into play.

4. Actions taken for an incapacitated individual should be done for their best interest.

This means that Adam, or any other person who is authorised to make decisions on Paul's behalf must always act in his best interest.

5. Rights and freedoms of the incapacitated individual should be preserved where possible

For example, Adam shouldn't put his father into the cheapest care home he can find if there are better alternatives.

These last two principles relate to decisions taken **for** Paul. The Act refers to these two types of decision making as

- **Supported decision making.** The process of helping someone whose decision making is impaired to help them make their own decisions.
- **Substituted decision making.** Making a decision for someone because they cannot make that decision themselves else.

There doesn't need to be any formal agreement for someone to give supported decision making provided the other person is happy to accept this and the first three principles are followed. Substituted decision making can only be done by:

- An attorney appointed under a Lasting Power of Attorney (or an Enduring Power of Attorney)
- A Deputy acting under a Deputyship order.

Before looking at how mental capacity can be assessed, let's look at the situation if Paul's condition deteriorates.

Paul's mental capacity continues to worsen. He is diagnosed with Alzheimer's disease and he no longer recognises Adam as his son. Unfortunately, Paul never made any arrangements for this and as he has no mental capacity, Adam cannot make any decisions on behalf of his father, be they financial or for his health and welfare. Neither can he access Paul's bank account or his other assets to pay for his needs.

Adam's only course of action is to seek to become his **father's deputy**.

Deputyship order

Adam would have to apply to the **Court of Protection**. The application fee is £371 and should a court hearing be needed there is a further fee of £494. There is a further £100 if Adam has not previously been a deputy

There may also be a fee for a medical to assess his father's mental state.

Adam cannot be certain that the Court will agree to appoint him, and it may choose to appoint a firm of solicitors or the social services department of the local authority.

Assuming they agree to Adam's request the Court will give Adam a **Deputyship Order**. This will state exactly what Adam can do, both financially and for his father's welfare. If he wants

to do anything outside that he must go back to the Court to seek permission and that will incur another fee.

There will also be an annual supervision fee of £320 although this would be reduced to £35 if his father's assets are under £21,000. Adam must also submit an annual return of income and expenditure to the **Office of the Public Guardian**.

Finally the Court will probably require Adam to purchase a **Security Bond** from an insurance company to insure against him defrauding his father. This might cost £300 a year. The cost of these will come from his father's assets but it is a very bureaucratic process and it could have been avoided if Paul had set up a Lasting Power of Attorney.

Lasting Power of Attorney

If Paul (the donor) had set up an LPA with Adam as his attorney, Adam could make decisions on behalf of Phil even when his father had lost mental capacity. In comparison to being made a deputy:

- The cost could be as little as £82
- Phil could be certain that Adam would be his attorney.
- Phil could indicate preferences and give instructions as to how Adam should act as his attorney.
- Adam would not need to submit details of income and expenditure to the Office of the Public Guardian.

The Lasting Power of Attorney was introduced as part of the Mental Capacity Act 2005 and its key principles are

- It can only be set up whilst the donor is of sound mind but can continue when mental capacity is lost.
- It becomes effective when registered by the Office of the Public Guardian (OPG)
- Anyone over 18 who is not bankrupt can set up an LPA
- Anyone over 18 who is not bankrupt can act as an attorney
- It is available in two parts. The first is for financial decisions. The second is for personal welfare (e.g long term care and medical treatment). The donor can complete one or both and have different attorneys for each if they wish.

Setting up an LPA.

- This must be done on the prescribed form must which is available on line.
- It nominates a person or persons who are to act as the attorney(s).
- It must be signed by an independent third party (the Certificate Provider) who confirms the donor understands the document and isn't being put under any pressure to make it. This can either be someone known personally to the donor for at least two years or it can be a professional such as a solicitor.

- As an additional safeguard the donor is recommended to list up to five people who must be notified when the LPA is registered. This enables them to raise objections.
- It must be signed, dated and witnessed.
- It comes into force when it is registered by the **Office of the Public Guardian (OPG)**

Practical issues in setting up an LPA

There is no need to use a solicitor to set up an LPA, it can be completed on line using the prescribed form and then sent to the OPG for registration. The practical issues to consider are:

Choice of attorney

There are three main points to consider:

- The donor must trust the attorney
- The attorney should be willing and capable of acting as the attorney.
- The LPA should be able to continue if the attorney becomes ineligible.

Anyone over 18, of sound mind and not bankrupt can be an attorney. The donor may prefer to use a professional attorney such as a solicitor. They will charge for their services so an instruction will be put into the LPA allowing this to be done. Non-professionals can't charge but can claim for any expenses which could include the cost of hiring an accountant to complete the donor's tax return.

In most cases the donor will select a family member and often this will be their spouse, CP or partner as the sole attorney but this may not be a wise course of action

James who is 68 appoints his wife Julie who is 70 as his sole attorney. Julie dies before James which means the LPA is revoked and a new one must be set up. A similar situation would arise if they were to divorce.

This situation can be avoided if the donor appoints a **replacement attorney** who becomes a full attorney if the original one dies or becomes ineligible to act.

James appoints Julie as his sole attorney with his daughter as replacement attorney. If Julie dies before James, the LPA can continue with his daughter acting as sole attorney.

An alternative is to appoint two attorneys but the donor must then decide how they should work together. This can be either **jointly** or **jointly and severally**.

When attorneys are appointed on a **joint basis they must act unanimously**. Should they disagree on a proposed course of action then that action cannot be taken. If one attorney dies or becomes ineligible to act the other attorney can no longer act and the LPA will fail.

James appoints Julie and his daughter as joint attorneys on a joint basis. Some years later Julie becomes bankrupt and the LPA is revoked.

If the jointly and separately option is chosen, then decisions can be made on by an attorney acting individually or all together. This can be useful since minor or urgent decisions can be made by one attorney but major ones can be agreed on by all attorneys. The other benefit is that if one attorney dies or become ineligible to act, the LPA is still valid.

When it will come into force.

The LPA becomes valid when it is registered. Until that happens it has no legal status. There may seem no immediate need to send it to the OPG for registration until mental capacity is lost but this would be unwise. If there are errors or omissions on the form the OPG will return it for correction. This is not a problem if the donor still has mental capacity but if it has been lost then the donor cannot amend it.

An attorney can only make decisions on a Health and Welfare LPA when mental capacity is lost.

For a Financial LPA there are two options on the form:

- As soon as my LPA has been registered (and also when I don't have mental capacity)
- Only when I don't have mental capacity

Again it may seem better to choose the second option because the donor might feel the first will allow the attorney to pop down to the bank, show the LPA and take all the money. This would not be the case.

As long as the donor has mental capacity, he or she has control of their finances. They can ask the attorney to give **supported decision making** but the attorney must be invited to do this. Choosing the first option also allows the donor to ask the attorney to pay bills and generally take care of the donor's day to day financial matters.

Once mental capacity has been lost the attorney can give **substituted decision making**. Mental Capacity is assessed by the following three step process:

- **The individual must be able to understand the information relevant to the decision.**
- **The individual must be able to retain this information long enough to make the decision**
- **The individual must be able to use that information to make a choice.**

Each of these can be tested by asking the donor to explain what the donor has just said.

If **any of these** aren't satisfied, then the attorney can make the decision.

Preferences and Instructions.

The LPA form has a section in which the donor can ask the attorney to do certain things. This can either be:

- A preference. This is a request and does not commit the attorney to follow it. It will use words such as “prefer” or “would like”
- An Instruction. This tells the attorney what they must do on your behalf. It will use words such as “must” or “should”

“I prefer my investments to be in ethical funds”. “I would like to donate £100 a year to Battersea Dogs Home.” These would be preferences

“The attorney must not invest outside the UK.” “My attorney must continue to make charitable gifts for which I have set up direct debits or standing orders” These would be instructions.

Life sustaining treatment (health and welfare LPA only)

The form has two options:

Option A- I give my attorneys authority to give or refuse consent to life-sustaining treatment.

Option B – I do not give my attorneys authority to give or refuse consent to life sustaining treatment on my behalf.

Further preferences or instructions can be given for option A

“My attorney must not agree to life sustaining treatment if I am in a persistent vegetative state.” (Instruction)

“If I were in the last days or a terminal illness, I would only want treatments to make me comfortable. I wouldn’t want treatments to prolong my life.” (Preference)

Notifying other people

The donor can name five other people who must be informed by the OPG when they receive the LPA form. This provides a further level of security for the donor.

Kate has been notified by the OPG that her father has submitted an LPA application nominating her brother as the attorney. Kate knew nothing about this and her brother had not discussed it with her. She is suspicious and tells the OPG that she objects to this. It won’t be registered until it gets further clarification.

The fact that other people are aware of the LPA also gives further ongoing protection.

Kate didn't raise any objections when the LPA application was made but some years later she is concerned that her brother is driving a very expensive car and made some major improvements to his home. She is suspicious that her brother is using their father's assets for his own benefit and asks the OPG to investigate. They could then refer it to the Court of Protection to adjudicate.

The powers of an attorney

Whilst a deputy can only do what is listed in the Deputyship order, an attorney can do almost anything the donor would have done themselves in relation to their financial affairs. They can use the donor's assets to maintain the donor, that is paying for day to day expenses, additional home help or paying care home fees. They can also maintain the donor's spouse and civil partner of their children under 18. They can also make investment decisions.

They cannot make a new will for the donor, neither can they amend an existing one.

Attorneys have limited powers to make gifts from the donor's assets. Using the donor's assets for anything other than the donor's maintenance would be considered a gift including:

- Making payments into trusts funds for grandchildren
- Paying grandchildren's school fees.
- Making interest free loans to family members
- Selling the donor's assets for less than the market price

The donor cannot make gifts with regards to IHT planning without getting permission from the Court of Protection **before** the gift is made. Guidance from the COP has said that gifts up to the annual exemption (£3,000) or small gifts (£250 for up to 10 people) can be made without reference to the COP provided:

- The estate is more than the Nil rate Band (£325,000)
- The donor's life expectancy is less than 5 years
- The gifts are affordable and would not affect the donor's standard of living
- There is no evidence that the donor would be opposed to these gifts.

The donor can make charitable donations as well as "habitual and seasonal gifts" without reference to the COP provided the donor would have made these and are reasonable and wouldn't affect their standard of living.

The duties of an attorney and Deputies

These are:

- Follow the five principles of the MCA 2005 particularly only making decisions in the donor's best interest.
- Consult with the donor prior to taking any action, wherever possible, and with others who may have an interest in the donor's affairs.

- Apply a high standard of care including getting professional advice where appropriate.
- Consider what the donor has done in the past when they had mental capacity
- Keep their own assets separate from that of the donor.
- Keep financial records.
- Keep the donor's affairs confidential.
- Ensuring there is no conflict of interest.

If the attorney breaches their duties:

- They can be required to compensate the donor for any losses.
- If the attorney has mistreated or purposely neglected the donor they could be fined/imprisoned/removed as an attorney.

Revoking an LPA

The donor can revoke an LPA at any time as long as they have mental capacity.

An LPA will be revoked automatically on the:

- Death of the sole remaining attorney
- Bankruptcy of the attorney or the donor's bankruptcy (although this would not affect the welfare part)
- Dissolution of marriage between donor and attorney
- Incapacity of the attorney
- The death of the donor since their affairs will then be taken over by their executors or administrators
- The OPG can also revoke an LPA if the donor is abusing their position.

Enduring Powers of Attorney

These were the predecessor of an LPA and ceased to be available after 30 September 2007. Existing ones remain valid. An EPA cannot be changed to a LPA but if the donor is of sound mind it can be revoked and a LPA set up. It is also possible to keep the EPA in force and take out a LPA for the welfare part only as this wasn't available with an EPA

In brief:

- It had to be set up whilst the donor was of sound mind
- Unlike an LPA the attorney could act before it was registered but the donor could still "step outside the power" and make their own decisions.
- If the attorney believed the donor was becoming mentally incapable, the attorney would register it with the Court of Protection
- Their attorney's power to make decisions was withdrawn whilst it is awaiting registration but once registered the attorney could then act on the donor's behalf

The three main legal bodies

Mention has been made of three legal institutions and their main roles will now be summarised.

The Court of Protection

The COP has jurisdiction to make decisions about the management of property, welfare and financial affairs of individuals who lack mental capacity.

In particular:

- It can decide whether an individual has mental capacity.
- Make orders on behalf of people who lack mental capacity.
- Appoint deputies where there is no LPA.
- Decide whether an LPA or EPA is valid.
- Remove deputies or attorneys who fail to carry out their duties.
- Hear cases when there is an objection to the registration of an LPA.

The Office of the Public Guardian

The OPG is the executive arm of the COP. Its main roles are to:

- Protect individuals lacking mental capacity from abuse
- Register LPA's and EPA's
- Supervise deputies appointed by the Court of Protection.
- Investigate concerns about deputies and attorneys.

The Independent Mental Health Advocate

This supports individuals lacking mental capacity who have no family and no one to speak for them on decisions involving serious medical treatment or long term care
It can challenge decisions made by attorney's deputies.

That concludes this part so you should now understand:

- The key points of a General Power of Attorney.
- The 5 principles of the Mental Capacity Act 2005
- The differences between supported and substituted decision making
- The differences between a Deputyship order and a Lasting Power of Attorney.
- How to set up an LPA
- The duties and powers of an attorney a deputy
- The role of the Court of Protection, the Office of the Public Guardian and the Independent Mental Health Advocate

Further Reading

<https://www.gov.uk/power-of-attorney>

<https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney> (this link will allow you to download the guide to how to set up an LPA)

<https://www.gov.uk/courts-tribunals/court-of-protection>

<https://www.alzheimers.org.uk/get-support/legal-financial/deputy-dementia>