

Lasting Power of Attorney – Thoughts for Church Leaders

It has almost become a cliché that we are an ageing society, but that fact places a responsibility on church leaders to know how to help older folk in their fellowship, especially those who have no family to support them, or those whose families give minimal support. One of the issues that causes older people most anxiety is how their wishes and best interests will be safeguarded should they lose the capacity to make decisions for themselves.

A Power of Attorney is a legal document that authorises someone to make decisions and act on the behalf of someone who cannot, or does not want to, make decisions and choices for themselves. It is important that church leaders are aware of the processes involved so that they can help older church members make the best arrangements, if family are unwilling, or unable, to be involved.

In this article we will look at the basic facts about Powers of Attorney and then explore some of the issues for church leaders. Details in this article will not apply in Scotland or N Ireland where other systems apply.

Mental Capacity

In most cases the reason for making a Power of Attorney is due to diminishing mental capacity. Briefly, mental capacity can be defined as the ability to make or communicate decisions at the time they need to be made. To have mental capacity a person must understand a decision that has to be made, why it needs to be made and the likely outcome of that decision.

Some people will be able to make decisions about some things but not others - for instance, to decide everyday household matters (what to eat or what to wear) but not financial matters like home insurance. Again, some people can make clear decisions one day and the next be totally incapable of doing so. Powers of Attorney can enable decisions to continue to be made irrespective of mental deterioration.

Slowness in understanding or communicating does not mean a lack of mental capacity. Attempts should always be made to help the person to overcome their difficulties; someone who has mild dementia may still be able to make decisions with a little support. That support must never be coercive, but designed to enable and empower the decision-maker. The time may come when capacity to make decisions is lost and then it will be important for someone else to be given that authority. *It is not possible to set up a Power of Attorney once mental capacity has been lost*, so it should be established when someone still has the ability to know what is being done and why.

Setting up requires someone to sign that the person making the Power of Attorney has mental capacity. This means that they have:

- i. the ability to make the decisions involved
- ii. an understanding of what a PA is, what the options are, and what the consequences are
- iii. decided to take this action freely and without coercion

The person signing the form is called the certificate provider. It can be:

- a professional person – e.g. doctor, social worker, solicitor etc.
- an independent person who has known the individual making the Power of Attorney for at least 2 years; it cannot be a relative, the attorney, or anyone who may benefit from the Power of Attorney

Types of Power of Attorney

There are three types:

- i. Ordinary Power of Attorney
- ii. Enduring Power of Attorney
- iii. Lasting Power of Attorney

Under all three a person, or two or more persons, is authorised to act for the person making the Power of Attorney. That person, or persons, is known as the *attorney*. The person making the Power of Attorney is called the *donor*.

Ordinary Power of Attorney

This allows one or more people to make financial decisions. It is only valid while the donor has mental capacity. The attorney's powers can be limited so that they can only deal with certain assets, e.g. a bank current account but not a savings accounts. The duration of the OPA can also be limited, e.g. while hospitalisation takes place. An OPA only applies while the donor has mental capacity. Citizens' Advice or a solicitor should be consulted when setting up as there is standard wording to be used.

Enduring Power of Attorney

EPAs were replaced by Lasting Powers of Attorney in October 2007. However if one was made and registered before that date it should still be valid. It only covers decisions about property and financial affairs. A Lasting Power of Attorney would need to be set up to deal with health and care matters. It would then work alongside the EPA.

Lasting Power of Attorney

It is important to plan for the future in a realistic way. Old age may well bring frailty, but it is amazing how many people do not want to think about it. Fear and prejudice about old age haunt so many, even Christians. A 74-year-old Christian lady recently said to me, "I don't want to grow old" – but she didn't want to die either. It is difficult to see what she anticipated the future to be, if she ever thought about it.

An LPA allows the donor to plan for the future and to ensure that good arrangements are in place for handling their financial, health and care decisions. An attorney who can be trusted and who knows the values and wishes of the donor gives great peace of mind over critical matters for the future. Like making a will, an LPA takes a great burden off families, who can be content that the parent's wishes and best interests will be looked after.

There are two types of LPA; one deals with property and finances, and the other with matters of health and personal care. Separate LPAs have to be made.

An LPA for property and financial decisions can cover just specific items or can be general to cover all decisions of this nature. The control is in the hands of the donor who is setting up the LPA. The attorney must keep separate accounts from their own personal finances and must make sure that any monies are kept separate from their own. It is possible to build in safeguards to require the attorney to report to the donor, or their solicitor, or members of the family, or any whom the donor requests.

An LPA for health and care will allow the attorney to make decisions about accommodation, medical care, meals, who may contact the elderly person, activities etc. They may also be permitted to make decisions about life-saving treatments. Some people may have made choices about care and treatment using Advanced Decisions or Advanced Statements. These do not always cover every eventuality, whereas an LPA for health and care can authorise an attorney who can then respond to whatever situation arises.

It is often assumed that a spouse can automatically deal with the bank account, pension, house etc. and make decisions about healthcare, once someone has lost mental capacity. That is not the case and, although in some circumstances professionals may take notice of a spouse, it cannot be guaranteed. An LPA will give authority to make decisions that should reflect the donor's wishes.

Setting Up a Power of Attorney

The first decision is who to choose as attorney. It should be someone the donor knows well and who has a good understanding of the donor's values and wishes. Having chosen the person to act for them the donor

needs to be clear about what limits they want to put on the attorney's power or whether the LPA will allow the attorney to handle everything. Anyone who is a bankrupt cannot be an attorney for property and finance.

The process involves completion of a form that can be downloaded from the internet, from the Office of the Public Guardian or through a solicitor. The latter option can be expensive and anyone using this route should compare firms. But a solicitor can save a lot of work and is more likely to avoid mistakes which could invalidate a document. Several charities, including Alzheimer's Society and AgeUK, will advise on the process. The Office of the Public Guardian also has a helpline.

Two LPAs must be completed if both property and finance, and health and care are to be covered. Once the forms are completed they should be registered with the Office of the Public Guardian. There is a charge for this, which is why it is important to make sure forms are completed accurately. Guidance notes are available online and with the forms. Advice from Citizens' Advice and appropriate charities should be taken if there is any doubt about filling in the forms.

Sometimes a second attorney is named as a replacement should the attorney originally appointed become unable to function. Alternatively two or more attorneys may be named together. A variety of ways exist for multiple attorneys to function and this should be set out in the LPA. These ways are:

- i. Jointly – they act together and agree on all decisions. While this can function well for property and finance it is not always suitable for health and care, especially when urgent decisions about treatment are needed.
- ii. Jointly and severally – in this arrangement the attorneys may act together or they may act independently of each other. This is a flexible way of operating.
- iii. Jointly in some matters and severally in others – the LPA will set out when there must be agreement and when individual action may be taken.

The form requires the following signatures:

- i. the certificate provider
- ii. the donor and a witness to the donor's signature
- iii. each attorney

Once completed and duly signed the LPA will be sent to the OPG who will make various checks, especially getting agreement from family members and, if all is in order, register it and send an authorised copy back to the donor. In the case of an LPA for property and finance it can then be implemented whenever the donor and the attorney agree. This may be immediately or it may be delayed for a considerable time while the donor retains full capacity and a desire to look after things for themselves.

Acting as an Attorney

Attorneys have to conduct themselves so that the best interests of the donor are always paramount, and that decisions are made in line with the donors past and present wishes. In regard to financial matters, careful accounts must be kept and all monies belonging to the donor kept separate from the attorney's monies.

These requirements are set out in the Mental Capacity Act 2005 and any failure to comply can lead to an LPA being cancelled. If there is any malpractice by an attorney, or if the attorney appears to be taking advantage of the donor, the Office of the Public Guardian will investigate and may prosecute.

If an LPA needs changes to be made in it, or if the donor wishes to make changes, this must be done through the OPG.

Office of Public Guardian

The Office of Public Guardian is a national body that is charged with the responsibility of protecting people who lack mental capacity to make decisions for themselves. It is responsible for registering and keeping a record of all LPAs. It also deals with any objections to LPAs and complaints about the way an attorney may be acting. There is also a contact centre that answers questions about LPAs, provides forms and offers help in completing forms.

If serious problems do arise the OPG may refer the matter to the Court of Protection who will investigate and adjudicate. There are those who feel that there is a serious lack of accountability in both the OPG and the Court of Protection.

Giving Advice

Most church leaders should be able to point people in the right direction to set up an LPA if they wish. But older people in the church may need more help than mere signposting. Solicitors can be very costly and some people will therefore want help and support in actually completing the forms. Great caution needs to be taken. A wrongly filled out form can be cancelled and monies paid with the form lost. Help should only be given if the leader has confidence that they are really competent. It is often best to accompany an older person to Citizens' Advice or a specialist charity. It normally takes about 9 to 12 weeks for the registration of a form. Professionals and specialists are much the safer route to follow.

Care and caution should also be taken if there are queries about the way an attorney is functioning. Some older people become muddled and confused when someone else is handling their affairs. They may complain that things are being done wrong when that is not the case. There is always a tendency to go along with the older person rather than check carefully whether there is any substance in the complaint. So this a gentle warning to caring and supportive church leaders and members to be wise and cautious in giving advice and listening to complaints.

Accepting Appointment as an Attorney

An older person without family wanting to make an LPA may ask a church leader or a friend in the congregation to act as attorney for them. If the leader or member knows the person well that may be perfectly in order, but there are a couple of precautions to take before agreeing to act.

A lovely couple of Christian ladies had been supporting and caring for an elderly lady in the fellowship they attended. She said she had no relatives and so they agreed to act as attorneys for the old lady. As the lady's mental state began to deteriorate they had some difficult choices looming on the horizon. Unexpectedly a long-lost niece turned up. The validity of the relationship was soon established but friendships were not. The niece wanted to be rid of these two supportive and efficient ladies (whether for good reasons or bad was never established). So threats of legal action and a referral to the OPG etc. began to be made. Despite everything having been done scrupulously well, the niece made numerous complaints to social workers, and (when the old lady was hospitalised for a few weeks) to hospital staff. The old lady sided with her niece, despite the fact that she had not shown an interest in her aunt for many years and was an aggressive unbeliever. Indeed, it seemed that part of the objection to the two Christian ladies was their faith. Eventually, because of the strain and distress caused by the niece the Christian ladies resigned their roles. It was for them a traumatic experience, and it was an issue that for a while cast a cloud over the church's reputation in the area as unfounded complaints and gossip combined.

The point of the story is that competence to act as an attorney, and a desire to help a fellow believer are not sufficient. Care must be taken to ensure the full circumstances of the potential donor are known and that any family, however remote, are involved. In setting up a LPA family members are usually contacted to express agreement. But the system is dependent on the facts being known.

Suspicion of Wrongdoing

It may well be that an attorney behaves in a way that causes concerns to those who know the donor, even though the donor is unaware of those concerns. LPAs are made when someone is clear in their thinking, but when mental capacity begins to fail the LPA is applied and the attorney begins to function.

A very sweet lady was a regular attender at a church but never joined as a member. She was clearly a believer and she delighted in the ministry of the Word. She had made an LPA when she was in her mid-seventies and she was still reasonably hale and hearty as she approached her late eighties. However the signs of early dementia were beginning to show, although she was still capable of looking after herself and enjoying living in her house alone. Increasing memory loss, difficulties with tasks once handled easily, and reducing attention to personal hygiene were all apparent. Her son visited very occasionally and he was the attorney. He also had his own business, which was running into a few cash-flow problems.

The church was surprised when the old lady did not come to church or to the mid-week meeting for a couple of weeks. On enquiry they learned that she had been admitted for two weeks respite care into a nearby nursing home. The old lady was unaware of why this had happened. The home indicated that the son felt his mother was not managing at home, and the GP had agreed that her dementia was getting worse. As so often happens with someone with dementia, the move from her own home meant that the lady became more disoriented and her memory failure increased. While in the home the house was put on the market for sale. Again, the old lady was totally unaware of this – indeed, for some weeks she expected to return home.

After several unsatisfactory conversations with the home, social services and the GP the church felt that something was amiss and so consulted a solicitor. He was very helpful and very cautious about taking matters further. Although the church had grounds for a referral to the OPG he rightly felt the rapid decline in the lady's mental health would go against any case. The house was sold and the old lady settled in the home. But the whole affair left a nasty taste in the church members' mouths. Thankfully, the members of the church conducted themselves well and reasonable relationships were maintained with the family and the home.

It is sad to reflect that families often try to get an advantage out of acting as attorney, even though this is against the spirit and letter of the process. It can be very difficult for churches to sit by and be inactive. There is a duty on us as Christians to fight for the rights of the disadvantaged:

Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy (Proverbs 31:8-9).

But so often in cases involving mental capacity there are great complexities and there has to be very clear evidence before any action can be taken beyond asking questions and supporting the apparently abused person. In cases of concern, Action on Elder Abuse is an organisation that can be very helpful. Concerns about the conduct of an attorney can be discussed with them before any further action is taken.

It is surely not an option to do nothing when something wrong is being done, but where there is only concern and suspicion it is equally wrong to act without evidence.

These last few sections have sought to show some of the sorts of issues that can arise and the need for wisdom and care. The thrust of this article is however to strengthen the hand of church leaders so that in this increasingly significant area, churches will help older people to make wise decisions and always be there to support them once choices have been made.

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