

## **Can you make gifts if you are an attorney or a deputy? What you need to know**

Whether you can make gifts if you are an attorney or a deputy.

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Being an attorney or a deputy is a responsible position, they look after someone else's finances and manage their affairs on a day-to-day basis. Deciding whether to make a gift is an important part of being an attorney or deputy and can help maintain relationships with family and friends of the Donor.

It is important for you to be able to articulate to your clients the limitations of making gifts and doing inheritance tax planning where a lasting power of attorney (LPOA) or enduring power of attorney (EPA) is involved.

### **Fundamentals**

#### **What is a Power of Attorney?**

A Power of Attorney (POA) is a legal process whereby an individual appoints family or friends to manage their money, property and sometimes their welfare. It is commonly used by elderly individuals to enable someone to step in when they are unable to either due to illness, old age or just because they feel unable to manage their affairs. The person they appoint is called their "attorney" and this should be someone they completely trust as at some point they will be managing the individual's whole estate, i.e. cash, investments, property, etc. It is set up whilst the individual still has capacity and can be used immediately or at some time in the future when the individual is incapable or no longer wishes to look after their affairs.

LPOA could first be created on 1 October 2007. Since then, no new EPA can be created. However, an EPA that was created before 1 October 2007 can still be registered on or after 1 October 2007.

#### **What is a guardianship order?**

A guardianship order is similar to the POA however it is created when an individual has already lost capacity and there is no POA in place. It is a more complex process, as it is the Court of Protection who has to decide who will look after the individual's affairs. It can also be a costly and lengthy process involving a number of different agencies. The court appoints a "deputy" to deal with either or both financial and welfare affairs of the individual.

#### **What is a gift?**

Normally when you think about gifts it's in the context of a birthday present or Christmas presents. However, lending money to an individual and not charging interest is also a gift. Selling a property for less than the current market value is

classed as a gift and so is creating a trust and placing assets into it. An attorney or a deputy has a duty of care and a legal obligation to act within the law and the scope of the powers granted to them. They may think they are acting in the best interest of the Donor and gifting as if they would if they were able, but, in reality, there is limited scope to make gifts.

### **The law about gifts**

The [law](#) states that an attorney or a deputy can only make a gift if it's either...

- To a family member, friend or acquaintance of the person on a "customary occasion" (birthday, wedding, Christmas, Diwali, Chinese New Year, etc.); or
- To a charity.

In both cases, it is essential the gift is of a reasonable value given the size of the person's estate and that they are acting in the best interests of the Donor.

Remember, an attorney or deputy cannot give the person's property away as gifts in order to avoid paying care home fees.

### **What if they need to make a larger gift?**

As you can see from the previous section there is very limited scope to make gifts if you are an attorney or a deputy. If the Donor has a large estate and they need to do some inheritance tax planning what is the process?

Any large gifts have to be authorised by the Court of Protection BEFORE they proceed.

The attorney or deputy has to put a case forward to the courts detailing their proposals and reasons behind the gift.

### **Exceptions to the rules - the de minimis exceptions**

The Court of Protection has recognised that there are times where an attorney or deputy may want to make gifts which are outside of their authority but do not justify an application to the courts. They have given guidance on what they are willing to accept without a court application which they have called the "de minimis exceptions".

#### *The de minimis exceptions*

As long as the person's estate is worth more than £325,000, the exceptions can be taken as covering the annual inheritance tax exemption of £3,000 and the annual small gifts exemption of £250 per person, up to a maximum of, say, ten people when...

- the person has a life expectancy of less than five years;

- their estate is worth more than the nil rate band for inheritance tax purposes (currently £325,000);
- the gifts are affordable, taking into account the person's care costs, and won't adversely (negatively) affect their standard of care and quality of life;
- there is no evidence that the person would be opposed to gifts of this value being made on their behalf.

Being able to gift small amounts up to the inheritance tax exemption without the permission of the court doesn't mean that they can carry out inheritance tax planning without the court's permission.

The de minimis exceptions do not apply to the following...

- loans to the attorney or to members of their family;
- investments in the attorney's own business;
- sales or purchases below value;
- any other transactions where there is a conflict between the interests of the person and the attorney's own interests.

### **What happens if they make a gift outside their authority?**

One of the duties of an attorney or deputy is to keep records of gifts and the situation that they were given in, so that they can explain the gifts if needed to. The Office of Public Guardian (OPG) oversees, and has the power to investigate, complaints and concerns about the way a deputy or an attorney is carrying out their duties. The OPG can require the deputy or attorney to supply information and documents.

If gifts are made that go beyond their authority without getting approval from the Court of Protection beforehand, the OPG may...

- apply to the court to have them removed from their role as deputy or attorney (and, if appropriate, ask the court to appoint a new deputy);
- apply to the court to suspend them temporarily from their role as deputy or attorney and to freeze the accounts of the person for their protection;
- apply to the court for a deputy's security bond (a kind of insurance) to be called in – the bond provider would then seek repayment from them personally;
- instruct them to apply to the court for retrospective approval of the gift (approval after they have given it) – this is normally only in circumstances where the OPG considers that such an application would have a reasonable chance of success;
- ask that they return the gifts or try to return the gifts made to others;

- refer the matter to the police or other organisations with legal powers.

For more information, please see the OPG guides [Giving gifts](#) and [Giving gifts for someone else](#).

### **Planning**

As you can see, making a gift on behalf of another person can be a complex procedure and care must be taken to ensure the attorney or deputy does not step outside the powers that they have been granted. They may think they have the best intentions of the Donor at heart. However, they must act inside the provisions of the law.

Remember that it is not possible to delegate trustee powers using a standard power of attorney, so they cannot act as a trustee on behalf of the Donor.

It is vital that clients consider carefully the clauses and powers they want contained within their LPOA to enable their families to be able to mitigate inheritance tax in the future.

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