

## Can a donor authorise an attorney to benefit others in their Lasting Power of Attorney?

---



As a general rule, an attorney's power to decide to make gifts out of the donor's property is very limited. The Mental Capacity Act (section 12) specifies the circumstances in which gifts are allowed.

They can be made to individuals to whom the donor is related or connected and to charities which the donor is known, or likely, to support.

The amount must not be unreasonable taking into consideration the circumstances and, in particular, the size of the donor's estate; and any gift to an individual must be linked to a customary occasion, such as a birthday or anniversary.

An attorney who wishes to make a gift which does not meet these criteria, must first apply to the Court of Protection for authority.

With this in mind, the donor may be concerned about the powers that their attorney will have to use funds to benefit others following the donor's loss of capacity, such as maintaining a spouse who is financially reliant on the donor.

The Court of Protection recently considered the extent to which the donor can authorise or request, within the Lasting Power of Attorney, that the attorney benefit or maintain others using the donor's funds, and gave this guidance:

- the use of funds to meet an obligation in this way is different from making a gift on a customary occasion

under section 12;

- an attorney can use the donor's funds to benefit people other than the donor if there is an obligation under general law (for example spousal maintenance obligations) or if it is considered to be in the donor's best interests to do so;
- when assessing what is in the donor's best interests the attorney must have regard to the donor's wishes, feelings, values and beliefs;
- the donor cannot include wording in the Lasting Power of Attorney to authorise the attorney to make gifts which go beyond the power in section 12; but
- the donor can include wording which asks the attorney to use funds to benefit someone other than the donor. However, this must be expressed as a wish and not as a direction. This request will then need to be taken into account when the attorney is deciding what is in the donor's best interests, which can be a complicated balancing act.

## How we can help

This is useful guidance for donors and attorneys alike. If you would like to set up a Lasting Power of Attorney, or are an attorney who is considering using a donor's funds for someone other than the donor, then please get in touch with Stephen Horscroft on +44 (0)1892 506 341 or at [stephen.horscroft@cripps.co.uk](mailto:stephen.horscroft@cripps.co.uk).

Written by



[Stephen Horscroft](#)

Partner