

**Discretionary fund management without express provision**

The OPG in their guidance on making an LPA (LP12) gives the following advice to those drafting the power on page 28:

*‘The only circumstances in which you must write an instruction is in a financial LPA if:*

* *you have investments managed by a bank and want that to continue*
* *you want to allow your attorneys to let a bank manage your investments*

*In these cases you could use wording like this:*

“*My attorney(s) may transfer my investments into a discretionary management scheme. Or, if I already had investments in a discretionary management scheme before I lost capacity to make financial decisions, I want the scheme to continue. I understand in both cases that managers of the scheme will make investment decisions and my investments will be held in their names or the names of their nominees.”*

*However, OPG can’t guarantee that your bank will accept this wording. You must ask your bank to confirm in writing that they’ll accept the wording before you register your LPA. That will minimise any difficulties in using the LPA if you lose mental capacity.*

*You may also want to seek legal advice before you approach the bank. If the LPA has already been registered, the attorney(s) will have to apply to the Court of Protection to allow them to use a discretionary fund manager.”*

**Concern: Is this advice accurate?**

1. One of the basic rules of the law of agency is that an agent cannot delegate their authority. Its application is based on the personal nature of the relationship which exists between a principal (the donor) and an agent (the attorney). The attorney must carry out their duties personally. The attorney may seek professional or expert advice, but they cannot, as a general rule, allow someone else to make a decision that they have been appointed to make, unless this has been specifically authorised. This is broadly reflected in paragraphs 7.58 and 7.61 of the MCA Code.
2. Paragraph 7.62, confirms that *‘In certain circumstances, attorneys may have limited powers to delegate (for example, through necessity or unforeseen circumstances, or for specific tasks which the donor would not have expected the attorney to attend to personally). But attorneys cannot usually delegate any decisions that rely on their discretion.’*
3. Most people do not possess the skills and expertise to invest without proper advice. Discretionary Fund Management (DFM) allows skilled professionals to regularly review investments within agreed risk parameters, so as to react swiftly to changing investment markets, which reduces overall risk and creates management efficiency.
4. Many LPAs have been made, particularly before 2015, which do not contain an express power to delegate the financial management of investments through a DFM. This has resulted in problems, in particular:

(i)Where a person has an existing DFM contract and subsequently makes an LPA without express authority, some DFM providers are requiring the attorney to seek a Court of Protection order to allow the DFM to continue. The Court can only make an order where the donor lacks mental capacity. It is not always the case that the donor lacks capacity, but they may wish the attorney to act. DFM providers are unsure how to deal with such cases as the contract continues, but following the OPG’s advice some now believe they are frustrated from acting via the attorneyship. Furthermore, the last sentence of the OPG’s guidance is wrong as it assumes that the donor always lacks mental capacity under an LPA when it is registered.

(ii)If an attorney wants to transfer funds into a DFM arrangement, they must obtain a Court order. This necessitates the payment of the Court fee and incapacity evidence fee. This is in addition to any professional fees for making the application. At the moment it can take up to 10 months to get an order. This puts many attorneys off applying for an order. The consequence may be that the attorney does not obtain proper investment advice, regularly review investments and/or does not respond promptly to changes in the financial markets.

**Position: The attorney is able continue to act under the donor’s original DFM contract**

1. The rule in ***Imperial Loan Co. v Stone*** [1892] 1QB 599 established that contracts entered into by a mentally incapacitated person are not void but are voidable, and only then if that person can show they were, at the time of contracting, incapable of knowing what they were doing, and that the other party was aware of the incapacity. As a contract is not void, even if one party lacked mental capacity when it was made, it cannot be the case that the subsequent mental incapacity of one party would in itself automatically terminate the contract as a matter of operation of law (See Phillips J comments in Para 30 of***Blankley v Central Manchester & Manchester Children’s University Hospitals NHS Trusts***[2014] EWHC 168 (QB), which was upheld by the Court of Appeal in [2015] EWCA Civ 18).
2. Although the contact is not automatically terminated, the contract technically might be frustrated on the mental incapacity of one party.
3. Lord Radcliffe in ***Davis Contractors Ltd. v Fareham Urban District Council***[1956] A.C.696 at 729 explained the law of frustration as follows:

*‘.. frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.’*

1. Lord Reid observed in the same case (at page 721):

*‘… there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.’*

1. In ***J. Lauriitzen AS v Wijsmuller BV***[[1990] 1 Lloyd's Rep 1](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/1989/6.html" \o "Link to BAILII version), Bingham LJ set out the following five propositions on the law of frustration which are ‘*established by the highest authority and not open to question’*:

(i) The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances;

(ii) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended;

(iii) Frustration brings the contract to an end forthwith, without more and automatically;

(iv) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. A frustrating event must be some outside event or extraneous change of situation;

(v) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

1. As can be seen, if the contract cannot be performed due to an event outside the control of either party, for example one party cannot give instructions, the contract is frustrated and is therefore automatically and immediately discharged. However, due to the nature of the DFM arrangement the contract would not be frustrated, as the terms are usually wide enough to apply to the new situation. Additionally, the Courts are consistent in their approach, that frustration is not to be lightly invoked as the dissolvent of a contract.
2. Furthermore, there is case law to support the assertion that an attorney can adopt the same contract as entered into by the person who now lacks mental capacity *(****Blankley v Central Manchester & Manchester Children’s University Hospitals NHS Trusts***[2015] EWCA Civ 18). There is strong argument that by both entering into a DFM contract and subsequently appointing an attorney under an LPA, it is implied that the donor wished the attorney to take over any contract capable of continuing, and it is implicit within the power that the agent is authorised so to act. This is supported in the leading textbook on agency law, ‘Bowstead & Reynolds on Agency’ at 5.001, which confirms that an agent may delegate his authority in whole or in part with the express or **implied authority** of the principal.

**Position: The attorney is not prohibited from putting funds into DFM regime**

1. Under the common law, an attorney can delegate a decision where they do not possess the skill or expertise to undertake and it is necessary to delegate the decision. Arguably, investment decisions fall within this exception. Part of the DFM function is ministerial in nature: completing the necessary documentation and processes to ensure investments are held and managed efficiently.
2. The attorney’s ability to delegate their function in circumstances in which it is not strictly speaking necessary or expedient to do so, would be almost repugnant to the special relationship of personal obligation and faith that one might reasonably expect to exist between a donor and the attorney of an LPA (**In the matter of *Putt***(case no 11964340) (Decision of SJ Lush, Court of Protection 22nd March 2011). Whilst delegation of investment management decisions might appear at first blush to fall foul of this obligation, the providers of the DFM are exercising their investment discretion within agreed parameters, established by the attorney at the outset, in the usual manner of investment. The discretion that is delegated through the DFM is therefore limited by those set parameters. The discretion exercised is both necessary and expedient where the attorney does not themselves possess the skills and expertise to make the decision.On this basis, there is argument that an attorney may seek to invest through DFM without express authority in the power, provided the attorney believes doing so would be in the best interests of the donor.
3. Furthermore, there is another argument that as the attorney is acting in a fiduciary capacity, similar to that of a Trustee, they should benefit from investment powers, including the appointment of nominees contained in the Trustee Act 2000 (***Re Buckley*** (22nd January 2013).

**Revocation of LPA**

1. There is no automatic revocation of an earlier LPA or EPA by granting a subsequent LPA, *(Re E (Enduring Power of Attorney)* [2000] 1 FLR 882). The donor can only revoke the power, provided they have mental capacity (s13(2) MCA).
2. Neither the MCA 2005, nor the LPA, EPA & PG Regulations 2007 mention anything about where the revocation should be contained.
3. As an LPA is a deed, under common law it can only be revoked by deed.
4. General practice is to revoke the LPA via a separate deed of revocation. This would be particularly important when the donor urgently wants to stop the attorneys from acting, because under common law, the revocation is effective once it is signed by the donor and witnessed. Again neither the MCA nor the 2007 Regulations mention when revocation is effective, as registration is just one element of the valid creation of an LPA. The Attorney is protected in their actions with third parties until they are notified of the revocation (s.14 MCA).
5. It is possible revoke an LPA in a new LPA, this may be because the same attorneys are to be appointed but under different terms, and the donor does not want there to be a gap between LPA 1 being revoked and LPA 2 being registered. In such cases, the LPA would usually make it clear that LPA1 revocation in conditional on the registration of LPA1. This could of course also be done as a separate deed, but this is likely to cause confusion with third parties as to which LPA the attorneys are acting under.
6. There does not appear to be any legal basis for the OPG taking the position that a revocation must always be done in a separate deed. It may be that it is down to their own administration and IT capabilities.

Opinion of Caroline Bielanska, Solicitor, TEP, Independent Consultant

1 December 2020