

Powers of Attorney and making gifts

[The Mental Capacity Act 2005](#) and [Code of Practice](#) set out the roles and duties placed upon Attorneys appointed to act under an Enduring or Lasting Power of Attorney. One of the key areas where we are often asked to advise is in relation to the making of gifts ; an area that is commonly misunderstood.

We are often asked by Attorneys, whether or not, when acting as an Attorney, they are able to make gifts upon behalf of the donor (i.e the person for whom the Attorneys are acting). If the donor is mentally capable then the donor is obviously free to make whatever gifts they wish. However, if the donor lacks the necessary mental capacity, the position is very different and it is important that Attorneys are aware of the restrictions placed upon them when considering gifts.

As a general rule, an Attorney does have the power to make gifts but only in very limited circumstances and these are clearly defined in Section 12 of the Mental Capacity Act 2005. In summary, Section 12 states that :

1. The recipient of the gift must be either an individual who is related to or connected with the donor (including the attorney(s)), or a charity to which the donor actually made gifts or might be expected to make gifts if they had capacity.
2. The timing of the gift must occur within the prescribed parameters. A gift to charity can be made at any time of the year, but a gift to an individual must be of a seasonal nature, or made on the occasion of a birth or marriage/civil partnership, or on the anniversary of a birth or marriage/civil partnership.
3. The value of the gift must not be unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

The circumstances where Attorneys can make gifts are therefore very limited and the donor cannot confer wider authority on his or her Attorneys than that specified in section 12. However, the donor could restrict or exclude the authority to make gifts which would otherwise be available to the Attorney(s) under Section 12.

If Attorney(s) did want to make gifts that do not fit within the narrow parameters of Section 12 of the MCA 2005, then the consent of the Court is required and a formal application would have to be made to the Court of Protection. This can be a complicated and lengthy process and it is important that professional legal advice is sought before proceeding.

For more Information of Powers of Attorney, please click of the link below :

<http://www.lawsociety.org.uk/advice/practice-notes/lasting-powers-attorney/>

If you require any further information on the above, please contact

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