



Powers of Attorney

An Introduction

An Introduction to Powers of Attorney

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A power of attorney is simply a legal document by which one person (the “donor”) authorises another (the “attorney”) to make certain decisions or carry out acts on his or her behalf.

Powers of attorney are commonly used in business and commerce, where one person appoints another to carry out some legal function or execute a legal document.

This note focuses on the use of powers of attorney by individuals, particularly in the context of caring for the elderly or infirm, or those with issues of mental capacity.

Powers of attorney fall broadly into the following categories:

Ordinary power of attorney

This can either be specific, which allows the attorney to carry out one or more specified activities (for example, operating a bank account or investment portfolio); or more commonly a **general power of attorney**, which permits the attorney to do on behalf of the donor anything he could lawfully do by an attorney.

The key advantage of a general power of attorney is its simplicity – the form is prescribed by statute and is no more than a few lines in length. It is therefore extremely useful where the donor is unable, for example, to sign cheques due to some kind of physical incapacity.

There is however one major drawback. If the donor loses mental capacity an ordinary power of attorney automatically comes to an end. Paradoxically, the attorney is unable to act exactly when he or she is most needed.

Recognising this, legislation introduced new statutory forms of attorney, namely enduring powers of attorney and, more recently, lasting powers of attorney (see below).

Enduring Power of Attorney

The Enduring Power of Attorney (EPA) was introduced by statute in 1971. Its key feature was that it remained in force (i.e. “endured”) if the donor lost mental capacity. In the event of the donor’s mental capacity the EPA would need to be registered with the Office of the Public Guardian (OPG). Various relatives of the donor would be notified before the EPA could be registered.

From 1 October 2007 EPAs were replaced by the new Lasting Powers of Attorney (see below), so no new EPA may be created after that date. Existing EPAs remain valid and may be registered if the donor loses capacity.

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Lasting Powers of Attorney

Lasting Powers of Attorney (LPAs) share the same key feature as the EPAs they replaced, in that they continue (i.e. “last”) in the event that the donor no longer has mental capacity to act.

They are more flexible and sophisticated than EPAs but the forms are lengthier and more complex.

There are two separate types of LPA – one dealing with property and financial affairs and the other with decisions relating to health and welfare.

Key features are:

- one or more attorneys may be appointed
- if the donor chooses to appoint more than one attorney, he can specify if they are to act “jointly” (i.e. all attorneys must agree to a particular decision or action) or “jointly and severally” (i.e. any one attorney may act). The former provides additional security for the donor but may be more cumbersome from an administrative point of view
- additional attorneys may be appointed to act as substitutes or replacements
- the forms allow the donor to give guidance to his attorneys. Although not legally binding on them, the attorneys have a legal duty to consider the donor’s wishes in any decision they make
- the powers given to the attorneys may be restricted in such manner as the donor stipulates. For example, the donor may include a restriction to the effect that there is to be no sale of her home without the attorneys consulting specific family members

- the donor may specify up to five people to be notified when the LPA is registered
- for additional protection, an independent person who has known the donor for at least two years, or alternatively a professional with relevant expertise such as a doctor or solicitor (known as the “certificate provider”) must review the forms together with the donor and certify that the donor understands the nature of the LPA and is not being pressurised into entering into the arrangements
- if the donor has not specified anyone to be notified of registration, two certificate providers are needed
- unlike EPAs which only needed to be registered if the donor was losing mental capacity, LPAs are only effective when they are registered
- a property and financial affairs LPA will come into effect as soon as it is registered and operate as an ordinary power of attorney, unless the donor includes a restriction to the contrary
- a health and welfare LPA allows the attorneys to make decisions concerning medical treatment, accepting or refusing particular forms of health care and decisions about whether the donor is to remain at home or move into residential care.

If a person loses their mental capacity without an LPA in place, an application needs to be made to the Court of Protection for someone else (typically a family member) to be appointed as their “deputy”.

The application is a lengthy and costly process and dealing with the affairs of the patient will be held up until that process is completed. The activities of the deputy are also more closely supervised by the court, which can lead to additional costs while the deputyship remains in place.

Although more complicated (and therefore more expensive to implement) than the EPAs they replaced, LPAs are therefore still the best way of ensuring that one’s needs are taken care of in the event of mental incapacity.

For more information in relation to powers of attorney, please contact any member of the Private Client team.

Trustee power of attorney

An ordinary power does not operate in relation to decisions or actions of the donor that he makes in the capacity of trustee (for example of a family trust, a charitable trust or as executor of a will). This requires a special trustee power of attorney.

Like an ordinary power of attorney, a trustee power of attorney may be restricted to specific powers or assets, or it can be general.

A trustee power of attorney cannot last for longer than 12 months, although it can be renewed every year.

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Services for individuals include:

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- creation and administration of trusts and charities
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 - marriage and cohabitation (pre-nups/post-nups/cohabitation agreements)
 - relationship breakdown (divorce/civil partnerships dissolution and financial settlement)
- our specialist children's unit dealing with residence and contact, adoption and surrogacy, international child abduction and children disputes
- residential property
- employment law advice
- reputation management and defamation

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