

“These days a Power of Attorney can be just as important as a will.”

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Powers of attorney

What is a Power of Attorney?

A Power of Attorney is a legal document made by you (the donor) appointing someone you trust (the attorney) to make decisions on your behalf in relation to your property and financial affairs and to manage your financial affairs.

When do I need a Power of Attorney?

What would happen if you were involved in an accident, or became a victim of a disease which does not result in your death but in the loss of your ability to manage your affairs? You could leave your family with considerable practical and financial problems at a time when they are also facing emotional difficulties and struggling to cope.

All this can be avoided if you instruct a solicitor to prepare a Power of Attorney whilst you are still in good health and of sound mind. These days a Power of Attorney can be just as important as a will.

A Power of Attorney can be used in a number of circumstances for example as follows:

- Providing assistance to a family member or friend who may have difficulties in carrying out day to day tasks such as banking;
- Providing assistance to the elderly or disabled, who may have difficulties in carrying out day to day tasks such as banking;
- Providing assistance to someone who is not yet mentally incapacitated,

- but who has a degenerative illness which is likely to result in mental incapacity;
- Fulfilling commercial functions where there may be doubt or complications to having an informal principal/agent relationship; or
- if someone is going abroad for an extended period and needs to appoint someone they trust to manage their matters in their absence.

You may want to act now and give someone you trust the power to manage your affairs should you not be able to do so in the future. A power of attorney can be used for general or specific matters and can restrict powers given to an attorney too. It is important to understand the different types of powers of attorney.

There are three different types of power of attorney documents:

- Ordinary Power of Attorney (OPA)
- Enduring Power of Attorney (EPA)
- Lasting Power of Attorney (LPA)

Ordinary Powers of Attorney

An OPA is made when it is difficult for the donor to manage his or her affairs, e.g. due to a physical disability or the donor is travelling abroad and needs someone to manage his or her finances.

An attorney can be appointed under an OPA to manage all, or a specific aspect of the donor's financial affairs, for example for banking purposes.

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There is no requirement to register the OPA with any authority.

An OPA can be cancelled at any time and becomes invalid if the donor loses capacity to make decisions within the scope of the particular power of attorney.

Enduring Powers of Attorney

It is no longer possible to create a new EPA. However, EPAs which were executed before the Mental Capacity Act 2005 came into force on 1 October 2007 are still valid whether or not they have been registered. If a donor has a valid EPA prior to 1 October 2007 made with full mental capacity this can be used to manage a donor's affairs, unless there is an express condition requiring registration.

For example, the EPA can be used to manage a bank account or access records provided the EPA was signed by the person and his/her attorney(s) and each signature was witnessed before 1 October 2007.

The EPA must be registered with the Office of the Public Guardian as soon as the donor starts to lose capacity.

Lasting Powers of Attorney

From 1 October 2007, you are able to make a new type of power of attorney, called a 'Lasting Power of Attorney' (LPA).

LPAs replaced the Enduring Power of Attorney on 1 October 2007 and are considerably more complicated.

An LPA allows you (the donor) to authorise another person (the

attorney) to make decisions on your behalf in relation to your property and financial affairs and to manage your financial affairs.

The attorney can do anything in relation to the donor's property and financial affairs that the donor could do his or herself, for example, buy and sell property; manage your investments; open and close bank accounts; claim benefits and pensions and carry on your business. The attorney can be given the power just to look after the money and property, or can also allow them to make decisions about other, non-financial, matters, including where the donor lives or the kind of medical treatment you receive.

Donors have complete freedom in their choice of attorney although they must be aged over 18 and be neither bankrupt nor mentally incapable. In the LPA you can give instructions to your attorney about issues that they would like to be taken into account when the attorney has to make decisions for you.

The attorney can only use the LPA once it has been registered with the Office of the Public Guardian (OPG). Anyone agreeing to act as an attorney under an LPA should be aware that they take on significant responsibilities under the Mental Capacity Act 2005. Once the LPA has been registered, the attorney can act both before and after the donor loses the mental capacity to manage his or her own affairs and after he or she has lost capacity.

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Powers of attorney (continued)

Your attorney will have limited ability to make gifts with your money. Any gifts made must be consistent with gifts that you usually make to family and friends on occasions such as birthdays and Christmas.

Can I appoint more than one attorney?

You may choose more than one attorney. If you choose more than one, you must decide if your attorneys must always act together or whether they can also act independently of one another. You may appoint your attorneys to act independently in basic financial transactions but require that they act together when, for example, selling your home. It is important that an attorney knows whether the appointment was made:

- jointly, or
- jointly and severally, or
- jointly in respect of some matters and jointly and severally in respect of others.

If an attorney is appointed jointly and severally the attorneys can act independently of the other attorney. If the attorneys are appointed jointly they must act together with the other attorney when exercising their powers over a donor's estate. If an attorney is appointed to act jointly in respect of some matters and jointly and severally in respect of others you should ensure that you are aware of your duty to act in relation to handling of banking matters and act accordingly.

A joint appointment under a Property and Financial Affairs LPA is brought to an end by the death, bankruptcy or loss of capacity of any attorney.

A joint appointment under a Health and Personal Welfare LPA is brought to an end by the death or loss of capacity of any attorney.

Scope of the power and restrictions

You can apply conditions and restrictions to the use of the LPA by your attorney. For example, you may restrict the power by excluding your attorney's ability to make gifts on your behalf. If you include a restriction that your attorney can only act when you lack capacity, financial institutions may require medical evidence of lack of capacity before accepting your attorney's authority to act.

You can also guide your attorney as to how you would want them to use the LPA and such guidance can be in the LPA itself or in a letter of guidance but the latter will not be binding on your attorney.

The attorney must be clear whether their authority to act is a general power, giving the attorney authority to manage all the donor's property and affairs or whether any restrictions and/or conditions are placed on the power. The Power of Attorney document may specify that an attorney may only have authority to execute certain specific tasks. For example the attorney may have the authority to pay bills on behalf of the donor but not to invest the donor's money for investment purposes.

Safeguards

The LPA contains a number of safeguards to protect the donor's position, which are as follows:

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- You can name up to five people who must be notified when an application to register the LPA is made. This gives the people you have named the right to object to the registration of the LPA.
- An independent person (known as the Certificate Provider) must read through the LPA with you in the absence of the attorney. The Certificate Provider must then certify that you are making the LPA of your own free will and that you understand its purpose and the powers you are giving the attorney.
- The LPA must be registered with the OPG before it can be used.

Registration

Either you or your attorney can apply to register the LPA. Notice must be given to the people you have indicated in the LPA. The current fee payable to OPG on registration is £120. The LPA can be used immediately following registration (unless you have applied a restriction that it can only be used when you lack mental capacity). The OPG will maintain a record of all registered LPAs.

There are two types of LPAs:

- Health and Personal Welfare LPA; or
- Property and Financial Affairs LPA.

Only a Property and Financial Affairs LPA authorises you to deal with bank accounts,

finances and business matters.

Such an LPA must be registered with the Office of the Public Guardian before you can use it to access the donor's bank accounts or records. Registered LPAs have the mark of the Office of the Public Guardian on each page of the original document. An LPA cannot be used until it is registered. It can be registered at anytime after it has been completed and signed by all those who are required to sign.

Once registered, a Property and Financial Affairs LPA can be used while the donor still has capacity, unless the LPA specifies otherwise. A Health and Personal Welfare LPA can only be used when it has been registered and the donor has lost capacity.

Specific obligations and duties on attorneys acting under a LPA

As an attorney you have a duty to act within the scope of your powers as set out in the power of attorney document. The MCA 2005 places a specific obligation on attorneys acting under a LPA to have regard to the MCA 2005 Code of Practice.

Under the Code of Practice the attorney has a duty to:

- apply certain standards of care and skill (duty of care) when making decisions;
- carry out the donor's instructions;
- not take advantage of his or her position and the attorney cannot benefit themselves, but must act for the benefit of the donor (fiduciary duty);

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- not delegate decisions, unless authorised to do so;
- act in good faith;
- respect confidentiality;
- comply with the directions of the Court of Protection;
- not to give up its role without telling the donor and the court.

In relation to Property and Financial Affairs LPAs the attorney also has a duty to:

- keep accounts; and
- keep the donor's money and property separate from your own.

Bank Requirements for Attorneys

Attorneys may need to use the power for a number of situations in practice, e.g. Banking.

The Attorney should check with the donor's bank to find out whether it requires specific information or documents to prove the authority to act.

In most cases the Attorney will be requested by the donor's bank to provide the following documents:

- proof of the name and address of the account holder (if not already known to the bank);
- proof of your name and address (as attorney); and
- evidence of your authority to act for the donor in relation to financial matters.

To prove authority to act on behalf of the donor the attorney may be required to present one of the following documents before the attorney can access bank accounts or records:

- an original EPA or OPA either registered or unregistered; or
- an original registered Property and Financial Affairs LPA; or
- a certified copy or office copy of the original EPA or OPA either registered or unregistered; or
- a certified copy or office copy of the original registered Property and Financial Affairs LPA.

Where an unregistered EPA or OPA is presented as evidence the attorney may also be requested to present written approval from the donor.

For more information on Power of Attorney issues please contact Leena Karia on T: 020 8221 8037 or Email: leena.karia@bowlinglaw.co.uk