

## ADVISER GUIDE

---

# Powers of attorney

### In this guide:

Background	2
Ordinary power of attorney	2
Lasting power of attorney (LPA) (post-2007)	2
Enduring power of attorney (EPA) (pre-2007)	3
Scotland and Northern Ireland	4
Trustee power of attorney	4
Certification	4
Court of Protection order (deputyship)	5

The information contained in this guide is based on our understanding of current law, practice and taxation which may be subject to change.

This adviser guide covers the different ways a client can grant authority to a third party. This is most commonly done using a power of attorney, but there are other methods.

## Background

A power of attorney is a legal document by which one person (the ‘donor’) gives one or more people (the ‘attorneys’) the power to act on their behalf.

Generally, there are three main types of power of attorney (POA):

- ordinary POA;
- lasting power of attorney (LPA); and
- enduring power of attorney (EPA).

Trustee powers can also be delegated, but the rules are different for them.

In addition, if a donor has become physically or mentally incapable and has not set up a POA, the Court of Protection may appoint a ‘deputy’.

## Ordinary power of attorney

An ordinary power of attorney, sometimes referred to as a ‘general power of attorney’, can provide the attorney with general authority over the donor’s estate or it can be limited to particular transactions or for a particular period of time. An individual might use this, for example, if they are going travelling for an extended time or are having a major operation, and they want someone to manage their financial affairs during that period.

It can be used for property, investments and financial affairs, but not for personal welfare.

An ordinary POA stops if the donor or attorney dies or becomes mentally incapable, or the attorney is declared bankrupt. Otherwise it carries on indefinitely.

The donor can also give instructions.

The POA will usually be a simple one-page document. One ordinary POA document can only grant power to one attorney. (If there is more than one attorney, there must be more than one ordinary POA document.) The Powers of Attorney Act 1971 provides standard wording to be used in the document.

The remit of ordinary POAs is narrower than the lasting or enduring types. However, the lack of formalities means it is still useful for short-term purposes and when age and capacity are unlikely to be an issue.

## Lasting power of attorney (LPA) (post-2007)

The LPA was introduced by the Mental Health Act 2005 and came into effect in October 2007. There are two types:

- health and welfare LPAs; and
- property and financial affairs LPAs.

A health and welfare attorney makes – or helps the donor make – decisions about daily routine, medical care and even where the donor resides.

## Making a LPA

The Office of Public Guardian (OPG) provides specific forms that must be used for LPAs.

Although you can complete the standard forms yourself (and mostly online), the donor, attorneys, witnesses, and the certificate provider must sign them.

Many people use a family solicitor to help them with the process and with completing the forms.

A donor can appoint more than one attorney and they should choose whether they want their attorneys to act jointly only or have the option to act together or separately – known as jointly and severally.

When making a LPA, a donor can also nominate replacement attorneys, in case the original attorney(s) at some point can no longer act.

A certificate provider is an impartial person who confirms the donor understands what they are doing and is not being pressured to make a LPA. They must also confirm the donor has mental capacity.

They must either be:

- a friend or colleague who the donor has known well for at least two years (but not a paid employee); or
- a professional with appropriate skills to make a judgement on the individual's state of mind and circumstances. These are usually lawyers, GPs or social workers.

Asking a friend to be a certificate provider may save an initial fee, but if the LPA is challenged at a later date, the certificate provider may be asked by the Court of Protection to give details of how they ascertained the client had mental capacity (in terms of the Mental Health Act 2005).

## Appointing a discretionary manager

If you are setting up a new LPA it may be prudent for the donor to include a specific provision that allows the attorney to appoint a discretionary manager, or to continue using a manager appointed by the donor before they lost capacity. It used to be the case that if this was not included then the attorney did not have the power to delegate investment management. Although the OPG have now updated their guidance and state this is no longer a legal requirement some institutions may still not accept instructions from the attorney where the donor has lost capacity unless the power is explicitly set out.

## Registration

Unlike an EPA (see below), a LPA has to be registered with the OPG from the outset, and not just when the donor becomes mentally incapable. If it's not registered, it won't be valid.

Although this may mean extra administration at outset, and a court registration fee, it makes the process more consistent and straightforward in the event the donor loses mental capacity compared to other types of POA.

## Changing or ending a LPA

There is a specific section in the form that allows any restrictions on the attorney's powers to be set out.

For example, the donor can choose to allow their attorney(s) to act as soon as the LPA is registered or restrict its use until they have lost capacity.

A LPA can be changed by the donor if they still have mental capacity by contacting the OPG and providing certain documentation. If the donor wanted to add another attorney, though, they would need to end the LPA and make a new one, again while they still had capacity.

To end a LPA, the donor must send the original document to the OPG along with a deed of revocation.

A LPA may automatically end if an attorney dies, loses mental capacity, or becomes bankrupt while they are a property and financial affairs attorney, and if there are no replacement attorneys.

## Enduring power of attorney (EPA) (pre-2007)

It has not been possible to make a new EPA since October 2007, although ones made and signed before that date may still be used.

While the donor is mentally capable, an EPA operates in the same way as an ordinary POA.

Again, EPAs do not apply to personal welfare, so if the donor still has mental capacity, they may wish to consider making a health and welfare LPA (see above).

However, when the donor loses their mental capabilities, the EPAs can remain in force, but only once the attorney registers it with the OPG. The attorney is not authorised to manage the donor's affairs until it has been registered.

EPAs registered before October 2007 will contain the stamp of the Court of Protection and the stamp of the Public Guardianship Office, showing the date of registration. (The Public Guardianship Office is the predecessor of the OPG.) EPAs registered after October 2007 will bear the OPG's mark, which is a security sticker or hologram, and the date of registration.

If the EPA has not been registered, it may still be used if the donor still has mental capacity and there are no limits on the attorney's powers – for example, there is no wording that states the powers are only effective on the donor becoming mentally incapable.

If it is confirmed that the donor has lost mental capacity, an EPA cannot be used until it is registered.

To cancel an EPA, the donor can complete a deed of revocation. The attorney must be notified of the cancellation, as well as the OPG if the EPA has already been registered.

## Scotland and Northern Ireland

Scotland and Northern Ireland have devolved powers in certain areas, and in Scotland's case a separate legal system.

Ordinary POAs in Scotland and Northern Ireland are broadly the same as in England.

LPAs and EPAs do not exist in Scottish law.

Continuing and welfare powers of attorney were introduced by the Adults with Incapacity (Scotland) Act 2000. There are two types:

- continuing power of attorney Scotland – relating to property and/or finances; and
- welfare power of attorney Scotland.

For continuing POAs made after 2 April 2001, the deed must expressly provide that the attorney's powers can continue beyond the donor's incapacity. They must also be registered with the Public Guardian once the donor has lost capacity.

In Northern Ireland, a different type of EPA is used.

It can become effective immediately or only after it is registered, depending on how the donor would like to set it up. Either way, it needs to be registered on incapacity. Therefore, it is a bit like an English EPA.

## Trustee power of attorney

The situation is a bit more complicated with individuals who act as trustees – for example, in the context of trust arrangements and pension schemes, where an individual could be both a member and a trustee.

Wider trust law means that if an individual becomes mentally incapable, they cannot act as a trustee.

However, a trustee with capacity may still wish to delegate their trustee decisions for a limited period of time (for example, if they are abroad for a while or about to undergo a major operation) without resigning as a trustee.

In some pension schemes, the client may be a trustee of their scheme as well as a member.

The key point is that trustee powers cannot be delegated under a conventional POA. They can only be delegated using a trustee POA, as per Section 25(6) of the Trustee Act 1925. The legislation provides specific wording for the trustee POA.

A trustee POA only lasts for a maximum of 12 months. After that, a new POA must be executed.

Unlike an ordinary POA, a trustee POA does not terminate on mental incapacity of the donor. The result is that, in some scenarios, the client will need to execute both an ordinary and a trustee POA.

## Certification

There are specific rules about certified copies. These come from Section 3 of the Powers of Attorney Act 1971.

These state that a copy can only be certified as an original by the donor (while they have mental capacity), a solicitor, a notary public or a stockbroker. The person certifying it must include their full name. Every single page of the document must be signed, dated and contain wording that says it's a "true and complete copy of the corresponding page of the original".

## Court of Protection order (deputyship)

The Court of Protection is a specialist court that deals with issues relating to people who lack the capacity to make their own decisions about property, financial affairs or health and welfare. The Court can make decisions itself on these matters or it can appoint deputies to make the decisions.

If an individual becomes mentally incapable, but they don't have an existing POA in place, a friend, relative or legal representative can ask the Court of Protection to make an order appointing them as a deputy. The terminology is different, but a deputy essentially acts as a court-appointed attorney. The OPG has responsibility for supervising deputies to make sure they don't abuse their position.

The process can be extremely costly and time consuming, both initially and on an ongoing basis, at a very difficult time, which is why it is designed to work as a backstop in cases where there is no POA.