

ADVISER GUIDE

Powers of attorney

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Introduction

The most commonly used third party authority is a power of attorney (POA). A POA is a legal document by which one person (the ‘donor’) gives another person (the ‘attorney’) the power to act on their behalf. A POA can be used in respect of financial, personal and welfare matters.

Generally, there are three main types of POA:

- ordinary POA;
- lasting POA; and
- enduring POA.

Trustee powers can also be delegated via a POA, 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’.

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.

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 (post-2007)

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

- health and welfare lasting POAs; and
- property and financial affairs lasting POAs.

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 lasting POA

The Office of Public Guardian (OPG) provides specific forms that must be used for lasting POAs. These are about 11–16 pages in length.

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 lasting POA, a donor can also nominate replacement attorneys, to replace an attorney(s) if at some point they 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 lasting POA. 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 POA 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).

Registration

Unlike an enduring POA (see below), a lasting POA 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 lasting POA

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 lasting POA is registered or restrict its use until they have lost capacity.

A lasting POA 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 lasting POA and make a new one, again while they still had capacity.

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

A lasting POA 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.

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.

Lasting and enduring POAs 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 enduring POA 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 enduring POA.

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.