

# POWERS OF ATTORNEY

We talk to a large number of callers each year who may be worried about a friend or relative being able to manage their financial affairs or their health and welfare. This can be for a number of reasons, such as their mental or physical needs, or because a certain transaction needs to take place (such as the sale of a house) and they are not there to sign the necessary documents.

It could also be that you are wanting to plan for the future or in the event that anything happens to either you or your partner.

The best course of action is to look at what needs to be dealt with, the range of assets and the mental capacity of the owner of the assets. In assessing the need and the assets you can decide what needs to be done.

In the meantime there may be things that you can do for a friend or relative, or yourself if you just need a little bit of help and or your assets are limited. This is what we often call informal help and concerns financial matters such as dealing with banks or benefits.

## **Bank accounts**

To give someone the power to operate a bank account on your behalf you need to write to your bank. Many banks have their own form, called a form for third party mandate, which they will ask you to complete and return to them.

On a practical note, the rise of online banking and the flexibility that offers also means there can be more informal arrangements for friends and

relatives to act on your behalf. However, you need to be cautious about this as any abuse of trust that results in money going missing would generally not be recoverable from the bank.

If it is more than one account and more than one bank the better course of action could be a power of attorney, see below.

## **Welfare benefits and tax credits**

If you are temporarily unable to collect your benefit and it is normally paid into your bank or building society account, you should write to your bank or building society, asking them to give temporary power to someone else to operate your account (see above).

If your benefit is normally paid by cheque, you can fill in the back of the cheque to allow someone else to cash it for you. If you want the agent to cash a benefit cheque for you on a regular basis, contact the office that deals with your benefits payments to let them know.

It may be that you need someone to do more, such as fill out forms or write letters and answer queries on your behalf. If that is the case, you may be able to arrange for someone to be an appointee. Or if you have a relative or friend who cannot manage their affairs due to mental or physical incapacity an application can be made to act on their behalf. Only one appointee can act and they can be a friend, relative or organisation such as a local council or social services.

You can find out more about how to apply to be an appointee and what it means [here](#).

## **Power of attorney**

There may be a time in your life when, because you are incapable of managing your property or financial affairs, you will need to appoint someone to do this for you. Powers of attorney are documents which you can use to give another person, your attorney, the right to manage affairs on your behalf. The person giving the power to the attorney is known as the donor.

We are frequently asked for advice from callers about their relatives who need help with this when they recognise there could be problems or when their relative appears to be losing mental capacity. In these cases it has to be remembered that a power of attorney is given, not taken or imposed on an individual. It is therefore for your relative to decide to complete a power of attorney provided they have the mental capacity to do so. If one or both of these elements is missing a power of attorney may not be possible.

To have mental capacity you must know and understand the legal arrangement you are entering into and understand the consequences of this. If your relative does not have mental capacity the matter will have to be referred to the Court of Protection (see below).

## **Who can be an attorney?**

Anyone who has mental capacity can be an attorney provided they are over the age of 18. The person you appoint can be a friend or relative and can include your spouse or your partner. The attorney must also not be subject to a debt relief order or be bankrupt.

## **Types of powers of attorney**

### **Ordinary power of attorney**

If you want someone to handle your financial affairs for a temporary period, possibly due to a physical injury, while you are on holiday or to complete a specific task on your behalf such as signing some

documents, an ordinary power of attorney may be suitable.

This type of document should be drafted by a solicitor or other legal representative and is generally for a limited time, usually linked to a specific issue or while you can supervise what they do. It is not intended that this type of arrangement will last for a significant period of time.

### **Enduring power of attorney**

An enduring power of attorney (EPA) must have been made prior to 1st October 2007. If you have made one of these before that date, it remains valid and does not have to be replaced. For anyone wishing to make a similar arrangement now they will have to create a lasting power of attorney (LPA). An EPA can be used before it is registered if the person who has made it (the donor) still has mental capacity. We do receive calls occasionally from relatives of those who have an EPA where banks and other institutions fail to recognise an EPA (before it is registered) and either require registration or a lasting power of attorney. This can obviously cause some difficulty and will require the attorney to convince the third party it is valid.

It is possible for a donor to cancel an EPA before they lose mental capacity. To do this they need to complete a deed of revocation, keep it with the EPA and notify any banks or other relevant organisations this has been done. The .GOV website has usefully drafted the relevant words to use in these circumstances and this can be found [here](#).

If the EPA has been registered it cannot be revoked unless the Court of Protection confirms this. This will require a special application which may not be granted.

If an EPA is revoked the donor cannot make another EPA but will have to make a Lasting Power of Attorney instead.

In the event that the donor loses mental capacity, the attorney must register the EPA with the Office of the Public Guardian (OPG). There is a process that needs to be completed which includes notifying certain people about the registration. The relevant

form can be found [here](#) and should be sent to the following people:

- the person whose affairs you are going to manage (the donor).
- any other attorneys if there are more than one.
- at least three of the donor's nearest relatives.

Once this has been done you can then apply for the registration. There is very useful guidance and further information, as well as the relevant form found [here](#).

### **Lasting power of attorney (LPA)**

LPA's are now the only powers of attorney which can be used to appoint someone else to look after your financial affairs or health matters should your health decline. Recent statistics show that these are most made by people in their 70's and 80's. The take up for LPA's has steadily increased over the past few years due to a new online process. There are now over 3 million LPA's registered.

There are two types of LPA, one for property and affairs and the other for personal welfare. You may choose to use either or both of these. By doing this you will ensure your financial affairs and personal welfare will be looked after by someone else.

### **When should an LPA be made?**

We are frequently asked when an LPA should be made. This is very much an issue of personal choice and depends whether you like to plan ahead and be prepared for possible future events. It is certainly something which should be considered if you are diagnosed with an illness which may affect your ability to make decisions for yourself in the future. Equally, if a relative starts to suffer with an illness or condition which may affect their ability to manage their own affairs, it is perhaps something which should be discussed with them while they still can.

The issue of mental capacity can sometimes be a complex one. We speak to a lot of callers who describe themselves or relatives as 'having good days and bad days' or 'understanding at the time but five minutes later can't remember what we discussed'. These matters fall under the Mental Capacity Act 2005. You can find useful general

information [here](#) on the Mental Health Foundation website.

There is more detailed guidance to be found [here](#) in the Mental Capacity Act Code of Practice.

This is an important code and if you have been appointed as an attorney, or are expecting to take on that role, it would be useful to look at this to understand your role in these circumstances.

Generally, the law assumes everyone has mental capacity to make decisions for themselves provided they have sufficient support and information. An erratic decision does not mean you lack mental capacity, no matter how many people disapprove or disagree.

### **What is the difference between the two types of LPA?**

The two types of powers of attorney are property and financial and health and welfare.

The property and finances power allows the attorney to assist with decisions relating to:

- opening, closing and using your bank and building society accounts
- claiming, receiving and using your benefits, pensions and allowances
- paying your household, care and other bills
- making or selling investments
- buying or selling your home

The property and finances power of attorney can be used by the attorney before the donor loses capacity, if the donor is in agreement. In contrast, the health and welfare power can only be used once the donor has lost capacity.

The health and welfare power of attorney can be used for decision such as:

- giving or refusing consent to health care
- staying in your own home and getting help and support from social services
- moving into residential care and finding a good care home
- day-to-day matters such as your diet, dress or daily routine

## How do I make an LPA?

To make an LPA, you must have mental capacity (see above) and you must be over 18. You will need to consider who should be the attorney and if there should be more than one. The choice can be quite difficult but things you may wish to consider are:

- Do you trust the person to look after you and/or your finances as you would like?
- Do they live close to you?
- If you choose someone who is not a family member are they someone you have known for long and are they known to your family?
- Is there likely to be a family dispute if you chose one family member and not another?

We do talk to a number of callers who are concerned about a relative's choice of attorney. The process does require the donor to notify relatives of the fact an LPA is being made and there are chances to object (see below). However, it is not a requirement for a relative to be appointed, and as with a Will, a donor has the right to appoint whoever they choose. If you are concerned about what is happening and think your relative may be subject to coercion or abuse, you may object to the registration of the LPA and in serious cases seek further help from organisations such as Action on Elder Abuse [here](#).

To make an LPA you can either download the forms or complete the application online, both of which can be done [here](#). You can either complete this yourself or ask a solicitor to help you.

Making an LPA does have inbuilt safety aspects:

- The LPA application must be signed by a certificate provider. This is someone who has either known you for at least two years or is a professional with relevant skill or knowledge who can make a judgement about your level of understanding. Family members cannot generally be a certificate provider.
- You can include in your application the names of up to five people you may wish to be notified when the application is lodged for registration. This ensures that friends and family are fully

informed of your actions. It is not, however, necessary if you do not wish.

There are very detailed guidance notes available which can be seen [here](#).

Once the LPA is complete you, or your attorney, will need to arrange for it to be registered with The Office of the Public Guardian. For more details of the registration process see [here](#).

At that point friends and relatives will be notified about your actions and will be given the opportunity to comment if they are concerned.

## Legal responsibilities of an attorney

As an attorney, your legal responsibilities include:

- acting in the donor's best interests and taking reasonable care when making decisions on their behalf.
- acting in accordance with the terms of the LPA (see below).
- helping the donor make their own decisions where possible rather than simply taking control.

As part of completing the process of application you will be required to sign a statement that you are aware of these responsibilities and that you understand your role. If these responsibilities are not performed legally and properly you could be ordered to compensate the donor for any loss suffered. If you act criminally, you may also face prosecution.

## Practical responsibilities of an attorney

Once an application to register an LPA has been made it can take up to twenty weeks to be completed. When this has been done there are some practical points you may wish to consider:

- Maintain and keep accurate records and accounts of any money or property you deal with under a financial LPA. All dealings should be kept separate from any matters which are your own.
- Some matters for example, may require decisions which are outside of your lawful remit. If that

is the case, guidance and permission must be sought from the Court of Protection.

- Should you need advice from professionals to assist with any decision making, in relation to investments for example, this can be done. However, no one else can make that decision for you.

### **What happens if I don't want to be an attorney anymore?**

If you have been appointed as an attorney and no longer wish to continue in that role, you will need to complete a notification form to disclaim your position. You can find that [here](#).

Once this is completed, you will either have to send it to the donor if the LPA has not yet been registered or to the Office of the Public Guardian (OPG) if the LPA has already been registered.

### **Can I check if my relative has registered an LPA?**

Sometimes relatives are not aware of an LPA having been made or want to check everything is in order. In these circumstances it is possible to find out if an attorney or deputy (see below) is acting on your relative's behalf. This will, however, only reveal those powers of attorney which are registered and will not include those enduring powers of attorney which are not registered (see above).

To do this you can use the free online service available [here](#) via .GOV website.

### **What happens if there is no lasting power of attorney?**

It is sometimes the case that, unfortunately, it is not possible to make a LPA as the person concerned loses mental capacity. This can be a gradual thing as a result of a debilitating condition such as Alzheimer's or a sudden event such as a stroke. When this happens, we often get calls from concerned friends and relatives about what to do next and how they can manage their loved one's financial affairs when they are unable to do so.

In cases like this it will not be possible to manage their finances until you can apply to the Court of Protection and be appointed as a deputy. There are two types of deputy designed to replicate the two

types of LPA, one for property and financial matters and one for personal welfare. Being a deputy is similar to being an attorney but it is something that you will need to apply for through the court and will be supervised by the Court of Protection.

### **What is a deputy?**

A deputy is someone appointed by the Court of Protection who has the authority of the Court to make decisions on behalf of the person who no longer has capacity. If you intend to apply for a welfare deputyship you will need the consent of the Court before you can make the application. To be appointed as a deputy can take some time and during that time your friend or relative's affairs and finances cannot be dealt with.

To apply to be a deputy is something which can be done without the need to appoint a solicitor, although it can be a complex process. The fees required to be paid to appoint a deputy are often greater than those to register an LPA.

As a deputy your powers are set out in a deputy order given by the Court. Your powers may include receiving income, any pension, and other income such as dividends. You may also be authorised to receive capital sums, such as those from the sale of a house and to spend the money on such things as nursing or care home fees.

It is the responsibility of the Public Guardian to supervise deputies. This means checking that they comply with the terms of the Court order and that the deputy is acting in the best interests of the person lacking capacity.

### **How much time does this take and what is the cost?**

For each type of LPA being registered there is an average waiting time of approximately 20 weeks. Once registration is complete, the documents can be used. Each different LPA attracts a fee of £82. Therefore, if you want to register a financial LPA and a personal welfare LPA the total payable is £164.

To apply to be appointed as a deputy will require an initial application fee of £371 which needs to be submitted with your application. Additionally, there

is an annual supervision fee, the amount of which may vary depending on the level of supervision required. This can be as high as £320 per year.

To be a deputy for financial and property affairs you will also be required to pay a bond (insurance) to protect the finances of the person you are being a deputy for, which will need to be paid before you can start acting. You will have instructions to do this when the court make the order. The usual practice is for the bond to be arranged before the order is completed and sent to you.

Fees and bond payments for deputyship matters can be recovered/reimbursed from the assets of the person for whom the deputyship is required. You will need to keep a record of any such payments made to you where you have paid in advance or to court on an ongoing basis for future years.

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