

POWERS OF ATTORNEY

What is a power of attorney?

A Power of Attorney is a document by which one person (the donor) gives another person or persons (the attorney or attorneys) power to deal with matters on their behalf. The power can be limited, for instance, to the selling of a house, or can be more extensive.

Powers of Attorney are important because, contrary to common belief, no-one has automatic legal authority to deal with financial matters on behalf of another person, not even the next of kin. If a person becomes incapable of dealing with matters himself or herself, and there is no Power of Attorney in existence, it is necessary to obtain an Order from the Court of Protection, which can be troublesome, time consuming and expensive.

A power of attorney is something that enables someone else to manage your affairs on a long term basis.

What types of powers of attorney are there?

Before 1 October if you wanted to appoint somebody to manage your affairs you had two choices – an ordinary power of attorney or an enduring power of attorney.

What's an ordinary power of attorney?

If you want someone to look after your financial affairs you can grant an ordinary power of attorney, which can relate to all your financial and property affairs or only to specific matters. You shouldn't use an ordinary power of attorney if you have been diagnosed as having, or if you think you may develop, any mental illness or degenerative disease that can lead to mental incapacity. This is because an ordinary power of attorney automatically comes to an end if you lose your mental capacity. An ordinary power of attorney works well if you want someone to act on your behalf because you have had an accident or a physical

illness that prevents you getting out and about – or if you are away for a protracted period of time.

What's an enduring power of attorney?

An enduring power of attorney is like an ordinary power of attorney with one very important difference, an enduring power of attorney can come into effect or continue in force after you have lost mental capacity.

What's changed since 1 October 2007?

The Mental Capacity Act 2005 came into force on 1 October 2007. This new legislation stipulates that it is no longer possible to take out a new enduring power of attorney after 1 October 2007.

I already have an enduring power of attorney – is it still valid?

Yes, enduring powers of attorney that were in force before 1 October 2007 are still valid after that date.

Can I convert my enduring power of attorney to a lasting power of attorney?

No, it will not be possible to effect such a change. If you want a lasting power of attorney you will have to take out a new one.

Why are new enduring powers of attorney being discontinued?

It was felt that, in some cases, they were open to abuse.

What happens if I don't have an enduring power of attorney and want to take one out after 1 October 2007?

Unfortunately it is not possible to take out a new enduring power of attorney after 30 September 2007. You can still take out an ordinary power of attorney after that date this might be right for you. However, if you want something more comprehensive, and that remains in force if you lose mental capacity, from 1 October 2007 you will have to take out a lasting power of attorney.

What are lasting powers of attorney and how do they differ from enduring powers of attorney?

- Like an enduring power of attorney, a lasting power of attorney enables someone to act on your behalf in relation to your financial and property affairs. However, in addition to this 'form', a lasting power of attorney has a further form enabling the attorney to act on your behalf in relation to your welfare.
- An enduring power of attorney is effective from the moment it is drawn up, signed and witnessed – it allows the attorney to act on your behalf immediately. It only has to be registered with the Court of Protection when you lose mental capacity. On the other hand, a lasting power of attorney has to be registered immediately with the Public Guardian, regardless of your mental capacity, before the attorney can act on your behalf. The Public Guardian is a new public official created by the Mental Capacity Act.

Do I have to have a lasting power of attorney that deals with both my financial/property affairs and my welfare?

No, you can elect to have a lasting power of attorney that only deals with your financial and property affairs, or one that only deals with issues relating to your welfare, or one that deals with both.

How does a lasting power of attorney work in relation to my welfare?

Well, first of all, a lasting power of attorney that deals with your welfare only comes into force after you have lost mental capacity. When this happens a lasting power of attorney enables the attorney to make decisions about such things as what you eat, your day to day care, where you live and the power to give or refuse consent to medical treatment.

How does a lasting power of attorney dealing with my welfare differ from one dealing with my financial and property affairs?

A lasting power of attorney that deals with your financial and property affairs comes into force immediately, regardless of whether you have lost mental capacity or not, provided that it has been registered with the Public Guardian.

What is the process for registering an enduring power of attorney?

If the attorney believes that you are losing your mental capacity they have a duty to apply to the Court of Protection to register the enduring power of attorney.

The attorney must also give notice to you and certain specified relatives before applying to the court.

Those receiving notice of the application to register can object to the registration in writing to the Court of Protection stating why they are objecting.

What is the process for registering a lasting power of attorney?

Before a lasting power of attorney can be effective either you or the attorney(s) must make an application to the Public Guardian to register the power.

In addition, when you are drawing up the lasting power of attorney, you are allowed to name up to five people that you want to be notified of the intention to register the power.

Whoever is applying to register the lasting power of attorney must notify these people before making the application for registration to the Public Guardian.

An independent person, someone who has known you for 2 year or one of a list of professionals, should complete a certificate confirming that you understand the purpose of the lasting power of attorney that you are signing.

The Office of Public Guardian will then send notice that the application has been received to both you and the attorney(s).

Those receiving notice of the application to register can object to the registration in writing to the Court of Protection stating why they are objecting.

Who can be an attorney under a lasting power of attorney?

Attorneys must be aged 18 or over and must not be bankrupt.

You can appoint one or up to five attorneys to act.

Where joint attorneys are appointed you must stipulate whether they are to act jointly and severally, or jointly for some matters and jointly and severally for others.

A trust corporation can act as an attorney for property and financial affairs but not for the welfare part of a lasting power of attorney.

What duties do attorneys have?

Attorneys under an enduring power of attorney have no statutory duty to act in your best interests but have a common law duty to do so.

However, attorneys under a lasting power of attorney do have a statutory duty to act in your best interests. They also have a duty to have regard to a Code of Practice which sets out

their fiduciary duty. Broadly these duties encompass: duty to act within the scope of the lasting power of attorney, duty not to delegate, duty of confidentiality, duty of good faith, duty to comply with the Court and duty to keep accounts. The Code of Practice runs to over 300 pages so might put some people off from accepting the role of attorney.

Very importantly the dissolution or annulment of a marriage or civil partnership will revoke the power or terminate the appointment of an attorney under a lasting power of attorney – this is not the case under an enduring power of attorney.

Can an attorney make gifts of my property under a power of attorney?

An attorney's power to make gifts is very similar under both a lasting power of attorney and an enduring power of attorney. An attorney may only make gifts on 'customary occasions', such as birthdays, marriage and Christmas, to persons who are related or connected with you. Also gifts to charity that you might have been expected to make gifts to. The Court of Protection has the power to authorise more substantial gifts if it is satisfied that would be in your best interests.