



MOORE BLATCH
solicitors

Decision making for other people

This factsheet explains the various types of powers of attorney and arrangements that can be put in place to make decisions on behalf of other people.

If you or a family member is unable to or no longer wishes to make decisions for themselves, then you can put in place a power of attorney. A power of attorney gives someone you trust the legal authority to make decisions and act on your behalf.

Nobody has an automatic right to administer another's affairs, even if they are married to or in partnership with them. Powers of attorney give the opportunity for the donor to appoint someone to help them at times of:

- Physical and/or mental incapacity
- Travel
- Difficulty in managing day to day paperwork

Types of power of attorney

There are three types of power of attorney:

1. A lasting power of attorney (LPA)
2. An enduring power of attorney (EPA)
3. A general power of attorney (GPA)

Each type of power of attorney may be created, as long as the individual (donor) has mental capacity to do so, and is over 18, as is any attorney.

How can attorneys act?

You can appoint more than one attorney and it is very helpful to do so. Attorneys may act in one of three ways. The best way in our opinion is jointly and severally, which means that each attorney may act on their own (as opposed to jointly or jointly for some decisions and individually for others). This emphasises the importance of only appointing people who are able to deal with your affairs and who you trust implicitly. Any appointment which includes an element of joint appointment will cause a problem if there is a death, divorce, bankruptcy or falling out within the family.

Lasting powers of attorney (LPA)

There are two types of LPA.

1. Property and finance LPA

This provides authority to deal with:

- Banks and building societies
- Purchasing and/or sale of property
- Investments
- Benefits
- Payment of bills
- Tax
- Any other financial matter that may arise

This document must be registered with the Office of the Public Guardian (OPG) before it can be used, which may take up to four months. Once registered, it can also be used by the attorney, whether or not the donor has mental capacity. If the donor still has capacity then the attorney is only able to act on their wishes.

2. Health and welfare LPA

This provides authority to deal with:

- Life sustaining treatment
- Where someone lives
- Who visits them
- Type of care they receive

Again this document must be registered with the OPG before it can be used, which may take up to four months. However it cannot be used by the attorney unless the donor no longer has the requisite mental capacity to deal with the relevant issue. Each decision is made at the time it is needed, so one day someone may be able to decide and the next not.

Some people make an advanced directive or a living will which set out details of specific treatment. These can be quite helpful but must be written in accordance with the law to be valid and reviewed at regular intervals. In our opinion it is usually simpler and more flexible to put in place a health and welfare LPA and then add a letter of wishes which can be altered at any stage.

Southampton



Lymington



Richmond



London

Enduring powers of attorney (EPA)

An enduring power of attorney is the predecessor to the property and financial affairs LPA. This would have been made before the 1st October 2007 and is still valid. An EPA does not have to be registered before it can be used which makes them particularly helpful if the donor is physically incapable or they are unable to sign their name for any reason. There is a duty for the attorney to register the EPA at the OPG if the donor becomes, or is becoming, mentally incapable of dealing with their financial affairs. Once this has happened the donor is unable to deal with any of their financial affairs

General power of attorney (GPA)

This is a very simple document which does not need to be registered at the OPG and may be used as soon as they are signed. They are therefore ideally suited to someone who is physically incapable of getting to the bank etc. However a GPA is really only useful for the first 12 months, after that it becomes more complicated to use, as the attorney would need to prove each time they acted under it that the donor was still mentally capable and that the document was still valid. Also a GPA ceases to be valid if the person giving the power becomes mentally incapable of dealing with their financial affairs, even if that is within the first 12 months.

There are some **alternatives to powers of attorney** that provide some authority for others to be appointed to act on someone's behalf. The powers they convey are very limited and have numerous flaws when compared to powers of attorney.

Department of Work and Pensions (DWP) appointeeship

This is an authority provided when the DWP appoints someone to look after someone else's benefits if they are unable to do so.

The problem is that although the DWP suggest that a separate account is opened it must be in the name of the appointee. Unless this account is marked in some way as showing the money belonging to the person whose benefits they are, it is difficult to distinguish it from the appointees other money. The best way to overcome this is to have the name of the appointee's followed by "on behalf of X" so it is clear whose money it is.

It is also surprisingly difficult to remove an appointee once made as the DWP usually ask permission of the previous one before they appoint another one in their place. They do this even if they have concerns that the previous one has misused the money.

This is only appropriate if the only money that a person has to manage is from the benefits received from the DWP.

Third party authorities

This is an authority which allows for others to deal with the account as well as themselves.

A bank may suggest a joint account instead. There are consequences to having a joint account, most notably tax, inheritance and divorce issues. Also, a third party authority cannot be used if the account owner becomes mentally incapable of dealing with their finances.

If the only financial assets a person has are the bank account, this may be a good way of dealing with that account. However, a third party authority does not allow that person to speak to anyone else on the donor's behalf, for example utility companies, pension providers, an agent in respect of the sale of a property etc.

Deputyship

If someone has lost the capacity to create a power of attorney of any type or never had such capacity then an application will need to be made to the Court of Protection for an individual or individuals to be appointed as deputy for the person who lacks capacity. As with attorneys, the best type is jointly and severally. The court will issue an order giving the deputy power to deal with the relevant affairs. This takes 5 to 6 months to obtain.

There are two types of Deputyship:

- Property and Finance (Common)
- Health and Welfare (A general one is difficult to obtain)

The orders will deal with the same issues as LPAs.

Who should/could be a deputy is one of the main issues, as there is a list of priority. This starts with relations and includes the Local Authority, even though there may be a conflict of interest, and ends with a professional. Even if a professional deputy is not appointed, it is possible to use a solicitor to assist with the various tasks deputies have to undertake including annual accounts and tax returns.

Although an attorney/deputy has the right to administer the donor's affairs on a day-to-day basis, there are certain things they will not be able to do unless there is a court order in place.

1. Statutory wills

An individual without capacity may have a Will that is out of date or may not have one and the intestacy rules do not produce the desired result. In this instance, it is possible to apply to the Court of Protection for a Will to be made upon what the court perceives is in the best interests of the individual.

This may not necessarily be what they would wish. Anyone who would benefit under intestacy or under a previous Will would need to be notified and make representations to the court.

2. Gifting

This is an area where many attorneys/deputies run into problems. The main defence when questioned about gifts is "my mother/father would have wanted me to have the money". There is no **right** to make gifts under any circumstances or in accordance with inheritance tax planning, even with a recommendation to do so from an Independent Financial Advisor. Unauthorised gifts will not be valid for inheritance tax purposes.

Supervision

Many people worry about the power they are giving away when any of the above are contemplated. All attorneys, under a registered power, of whatever kind, can be investigated at any time by the OPG and anyone can raise an issue including solicitors, family, friends, social workers etc. Deputies have to work under a strict regime and produce accounts each year for the OPG.

Legal Representation

We are a leading law firm offering a full range of legal services to individuals and businesses.

- Education
- Health and social care
- Court of Protection matters
- Personal injury and clinical negligence claims
- Disability discrimination
- Healthcare law
- Tax and trusts
- Employment
- Housing issues

If you wish to seek professional advice or representation with regards to powers of attorney, please contact us on **023 8071 8000** or email tim.spring@mooreblatch.com

M O O R E B L A T C H
solicitors

www.mooreblatch.com