

Introduction

This Briefing Note provides an overview of issues relating to Powers of Attorney, including Lasting Powers of Attorney, the provisions of the Mental Capacity Act 2005, the Court of Protection and the Office of the Public Guardian (OPG). At the end of the document, we provide further information and useful telephone numbers and contact details.

A Power of Attorney is a legal document which enables someone (a “Donor”) to appoint one or more persons as their Attorney(s) to manage their financial affairs and property. There is also a type of Power of Attorney which deals with health and welfare. It is a powerful document and it is therefore important that a Donor fully understands the implications before giving authority to another person to manage their affairs. It is advisable to think carefully about whether a Power of Attorney is needed at all. Control over your financial affairs does not necessarily need to be relinquished because of a physical disability.

There are two types of Power of Attorney:

1. Lasting Power of Attorney;
2. Ordinary Power of Attorney.

Factors relevant to both types of Power of Attorney

A Donor must have mental capacity when making the power. The Mental Capacity Act 2005 states that a person lacks capacity if at the material time he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of, the mind or brain. The Act states that a person is unable to make a decision for himself if he is unable to:

1. Understand the information relevant to the decision;
2. Retain that information;
3. Use or weigh that information as part of the process of making the decision;
4. Communicate his decision (whether by talking, using sign language or any other means).

If the Donor does not have mental capacity, then he/she cannot give a Power of Attorney.

A Donor can appoint more than one Attorney who can act “jointly” or “jointly and severally”. If they are appointed to act “jointly”, Attorneys must always act together. If Attorneys are appointed as “jointly and severally”, they may act together or they may act individually, depending on the terms set out in the Power.

Conditions can be attached to the Power, for example, requiring that Attorneys must produce accounts to an independent person at a specified time.

The Power can be limited in scope and duration. It can relate to all of the Donor’s affairs or be limited to a specific bank account or property, alternatively, it can exclude an account or property. It can be continuous in duration or limited to a certain period of time.

A Donor’s Attorney can be anyone who is willing to act for him/her. They must be at least 18, have mental capacity and must not be bankrupt when they sign the form or at any point in the future.

Lasting Powers of Attorney

The Mental Capacity Act 2005 replaced Enduring Powers of Attorney with Lasting Powers of Attorney (LPA). It is possible to make two types of LPA:

1. Property and Financial Affairs LPA

This allows an Attorney to make decisions relating to a Donor’s property and affairs. It can be drafted so the Power comes into effect immediately or in the event that the Donor loses mental capacity in the future.

2. Health and Welfare Welfare LPA

This type of LPA allows an Attorney to make decisions about a Donor’s personal welfare. This could include decisions about where the Donor should live, consenting to or refusing medical treatment and day-to-day care including diet and dress. A Health and Welfare LPA can only be used in the event that the Donor loses mental capacity.

For both types of LPA, an independent third party must confirm that in his or her opinion the Donor understands, at the time the power is created, the nature and scope of the LPA, no undue pressure or fraud is involved in the decision to make the LPA and there is nothing else that concerns him to prevent the LPA being created.

The LPA must be registered with the OPG before it is used, the details of which appear at the end of this document. Registration costs £130 and takes approximately nine weeks. If a Donor's gross annual income is less than £16,500 he/she may be entitled to a reduction in the fee and if a Donor receives means-tested benefits, he/she may be exempt from paying the fee altogether.

Ordinary Power of Attorney

An Ordinary Power of Attorney can only be used for the same purpose as a Property and Financial Affairs LPA. In other words, it allows the Attorney to make decisions in relation to the Donor's property and affairs. The Donor must have mental capacity to be able to enter into an Ordinary Power of Attorney. If at some point in the future the Donor loses capacity, the Ordinary Power of Attorney will automatically come to an end and an application to the Court of Protection will need to be made to appoint a person, known as a Deputy, to manage the Donor's financial affairs. An Ordinary Power of Attorney cannot be registered with the OPG.

Deputyship

The Mental Capacity Act 2005 sets out how decisions can be made on behalf of those who lack mental capacity and have not put in place a Lasting Power of Attorney (or an Enduring Power of Attorney prior to 30 September 2007). This role is managed by the Court of Protection. The Court of Protection is a specialist Court which deals with all issues relating to people who lack capacity to make specific decisions. The Court has the power to appoint a Deputy to make decisions on behalf of a person who lacks capacity. Decisions can relate to either a person's health and welfare or property and affairs, i.e. a bank account.

In order to be appointed as a Deputy it is necessary to submit an application to the Court of Protection. If the application relates solely to the management of property and affairs, it is not usually necessary to obtain permission from the Court prior to the submission of an application. If the application relates to health and welfare, the Court's prior authority will be required. A fee will be payable when submitting an application.

The Court of Protection will make a Deputyship Order which sets out the specific powers of the Deputy. A Deputy has a number of duties and responsibilities which they must comply with.

Further Information

Office of the Public Guardian - Tel: 0300 456 0300
PO Box 16185 Fax: 0870 739 5780
Birmingham Web: www.justice.gov.uk
B2 2WH

The Office of Public Section Information - Web: www.legislation.gov.uk

The Department of Constitutional Affairs - Web: www.dca.gov.uk
Full text and Code of Practice.

About Stewarts Law

Stewarts Law is the leading personal injury law firm in the United Kingdom with expertise in claims for compensation following spinal injury, brain injury and other serious injuries. Stewarts Law is ranked number one by the two key independent guides to the legal profession, the Legal 500 and Chambers and Partners.

www.stewartslaw.com

Legal Disclaimer

The information provided is for education and for informative purposes. It does not constitute legal advice. The telephone numbers and links to external websites have been carefully selected but Stewarts Law LLP do not provide any endorsement of the content of those sites.

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