

POWERS OF ATTORNEY

Law guide - Powers of attorney

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Overview

The information provided here gives you an overview of how to create, register, object to the registration of and revoke a power of attorney (POA).

In relation to the enduring power of attorney (EPA) the information in this law guide only relates to EPAs dated before 26th April, 2023 under the Powers of Attorney Act 1996.

From this date all EPAs must be drafted via the Decision Support Service website (<https://www.decisionsupportservice.ie/>) which provides extensive information regarding the drafting and registration of an EPA.

Create a power of attorney

A power of attorney is a legal device that can be set up by a person, known as the donor, during his or her lifetime when he or she is of good sound mind and body.

The relevant legislation is the Powers of Attorneys Act 1996 and the Enduring Powers of Attorneys Regulations 1996.

There are two types of powers of attorney:

1. Power of attorney - which gives either a specific or general power, and ceases once the donor becomes incapacitated.
2. Enduring power of attorney - which takes effect if the donor becomes mentally incapable of managing his or her own affairs.

Register a power of attorney

A general power of attorney does not need to be registered to be effective, but it automatically loses its effectiveness as soon as the person who made the power of attorney, i.e. the donor, becomes mentally incapable of managing his or her own affairs.

On the other hand an enduring power of attorney (EPA) needs to be registered only if it is to remain effective after the donor has become mentally incapable of managing his or her own affairs.

See the chapter 'Register a power of attorney' for the steps an attorney needs to take when registering an enduring power of attorney.

Before registering an EPA, certain people must be notified of this intention. For more information, see the chapter 'Notice of intention to register'.

Object to registration of EPA

The donor and notice parties will have five weeks from the notice of intention to apply for registration of an enduring power of attorney to lodge a notice of objection in the Office of the Wards of Court. For more information on this see the chapter 'Registration of EPA'.

Revoke a power of attorney

When a POA is revoked it becomes invalid and the authority of the attorney(s) appointed to act on the donor's behalf ends.

If you have created a POA that you wish to revoke, you will find more information in the chapter 'How to revoke a power of attorney'.

Choosing the correct document

Choose the right document

A power of attorney (POA) is, generally speaking, a document that gives another person or persona (called your 'attorney(s)') the authority to act on your behalf. There are different types of POA:

- General power of attorney
- Enduring power of attorney

This chapter will help you to decide which of these is best suited to your needs.

Initial questions

The first issue to decide is whether you want the POA to be valid only while you have the mental capacity to make your own decisions, or whether you want it to remain valid after that point.

You may lose your mental capacity due to factors such as illness, an accident or the onset of conditions like dementia. Your relatives will not automatically have the authority to take control of your affairs and act on your behalf. They can only do so if you have appointed them as your attorney(s) in an appropriate POA that you created while you were still of sound mind. This is referred to as an enduring power of attorney.

If you do not want the POA to remain valid in the event that you lose the capacity to act on your own behalf, then you will need a general power of attorney.

General power of attorney

This document is also known as an ordinary power of attorney.

A general power of attorney cannot be used after the person who made it (the 'donor') has lost the capacity to make his or her own decisions. This type of POA is intended for use over a limited period of time - for example, if you will be out of the country and you need another person to look after your affairs during that time.

Enduring power of attorney

An enduring power of attorney (EPA) will only become effective if you, as the donor, have lost the capacity to act on your own behalf. However, the attorney(s) to be appointed in the EPA will not have the authority to act on your behalf unless the EPA is registered with the Registrar of the Wards of Court.

You may need this type of power if, for example, you are in the early stages of Alzheimer's and you want to ensure that you and all your interests are looked after by a person whom you know and trust.

The EPA may give general authority to the attorney to do anything that the attorney might lawfully do or it might merely give authority to do specific acts on your behalf and can, if you so wish, give the attorney(s) powers to deal with personal care decisions as well.

The attorney(s) appointed by the EPA will have full authority to act on behalf of the donor as soon as the donor no longer has the mental capacity to deal with his or her own affairs and it has been registered with the Registrar of the Wards of Court.

General power of attorney

What is it?

There are different types of power of attorney. The power of attorney may be specific in that it limits the appointed attorney to performing specific tasks or it can be general allowing the attorney to do almost anything that you yourself could do.

A general power of attorney is ideally suited for situations where you need to give certain rights to another person or persons to deal with your property for a limited time. This might be because you are going away on holiday or moving out of the country for a few years and need someone to manage your affairs whilst you are gone. A general power of attorney is also known as an ordinary power of attorney.

A general power of attorney cannot be used in cases where you need someone to act on your behalf because you are mentally incapable of doing these tasks for yourself due to factors such as illness, an accident or the onset of conditions like dementia. If this is what you require, you need an Enduring Power Of Attorney.

The general power of attorney does not need to be registered and is therefore fully effective as soon as the person creating it has signed it.

Why the document is useful

The general power of attorney would be useful if, for example, you are selling your home and the exchange of contracts is due to take place around the time when you will be away on holiday. Therefore, if there are problems while you are away, such as a last-minute amendment to what is included within the fixtures and fittings of the property, these amendments can be signed off by your 'attorney'. Failure to have a power of attorney in place may mean that, in this case, you cannot complete the paperwork in the proper form accepted by solicitors and Land Registry for a property sale, even if you fully know and have agreed to all the amendments.

Revoking a general power of attorney

When you no longer want your general power of attorney to be in force, you can revoke it by completing a deed of revocation.

In addition, since a general power of attorney cannot be used to act on behalf of a person who lacks the mental capacity to make decisions on their own behalf, the general power of attorney will automatically come to an end if the person creating the power of attorney loses this capacity. A general power of attorney automatically ceases on the death of the donor. There may be circumstances where it is difficult to prove the death of the donor if his/her body cannot be found, as in the case of death by drowning. Once the body is found or the donor is declared to be "believed dead" by a court (usually after seven years have passed), the power of attorney (if there was one) ends and their affairs are dealt with in the normal way by will or under intestacy law.

Enduring power of attorney

Enduring power of attorney

An enduring power of attorney (EPA) is used in cases where you lack the mental capacity to act independently, due to factors such as illness, an accident or the onset of conditions like dementia.

You can only create your EPA while you are still mentally capable of making your own decisions. By planning ahead and making an EPA, you are able to give your instructions whilst you are of sound mind, in anticipation of possibly not being able to do in the future.

The enduring power of attorney can deal with personal care decisions as well as property and financial decisions and is laid out in detail in the prescribed form.

They include such decisions as:

Personal care

- where and with whom you should live
- whom you should see and not see
- what training and rehabilitation you should get
- your diet and dress
- inspection of your personal papers
- housing Social and other benefits

Property and financial affairs

- open, close or operate bank accounts
- claim and receive on your behalf all pensions, benefits, allowances, services, financial contributions, repayments and rebates
- make all tax returns and adjust and settle any tax claims
- pay your household expenses
- buy, lease and sell property
- pay for private medical care and residential care costs

An enduring power of attorney does not come into effect until it is registered. However once an application to register the EPA has been made the attorneys who have been appointed may take action under the EPA's powers to maintain you and prevent loss to your estate.

They can also make a number of personal care decisions that cannot practically be deferred pending registration.

Why you might need a lasting power of attorney

It is unpleasant to think that you may ever lose the ability to manage your own affairs. However, by creating an enduring power of attorney you can ensure that if this should ever happen, your financial affairs and personal welfare will be looked after by someone you trust.

If there is no enduring power of attorney

There are occasions when the lack of an EPA can cause problems that could have been easily avoided. For example, you may have had a stroke and been advised that you cannot return home to live on your own any more. A nursing home may have been suggested as the best solution. Unfortunately, your family will have great difficulty in selling your house if you are unable to give the necessary instructions for sale and eventually sign the contract. If an EPA exists, then the attorney can sign on your behalf, thus ensuring that these issues are dealt with promptly.

Safeguards

It is very important that you only appoint someone you trust to act as your attorney(s). An EPA is a very powerful document.

There are a number of safeguards in place to help prevent abuse of the system by any attorney appointed under an EPA. These safeguards are:

- Attorneys have no authority unless an EPA is registered. This registration process acts as a safeguard because certain people have the right to object to the registration.
- Those intending to register an EPA must give notice of their intention to the two people specified within the document listed in the EPA. This is so they have the chance to object.
- An EPA must have at least one certificate from a doctor, who will provide a medical certificate confirming that you have become incapable of managing your own affairs. The doctor would have also given a certificate when the EPA was drawn up confirming that the person who is giving the EPA authority (the 'donor') understands what he or she is doing and has not been influenced or defrauded.
- Donors can place restrictions in the EPA about what they do and do not want their attorney(s) to be able to do.

Revoking an EPA

The donor can revoke an EPA at any time before an application is made to register it. Once the EPA has been registered as outlined above you cannot revoke it, even if at the time it was registered you were mentally capable. To revoke in the latter circumstances require

that an application be made to the High Court to approve such revocation. For more on revoking an EPA see the chapter on 'How to revoke a power of attorney'.

Notice of intention to register

Before you can register an EPA you must give notice of your intention to register it. This requirement is aimed at safeguarding the interests of the person who is granting the power of attorney (the 'donor').

Who must be notified?

An EPA can only be effective when the document is registered. However, before registration can go through, notification must be made to all those listed (if any) in the EPA as persons other than the attorneys that are specified in the document creating the EPA. These are the people whom the donor decided should be notified about the intention to register the LPA before the Registrar of the Wards of Court may register it. These 'people to be told' have five weeks from the date of the notification to object to registration. This functions as a safeguard for the donor. Relatives are not entitled to notice unless they are listed as 'people to be told' in the EPA.

You may proceed with your application to register the EPA as soon as you have notified all of the 'people to be told'. You do not need to wait for them to decide whether they want to object.

How to send notice

You must give notice of intention to register the EPA as soon as practicable to at least two persons. None of them may be an attorney under the power. At least one must be the donor's spouse, if living with the donor. If the donor is unmarried, widowed or separated, notification must be given to the child of the donor or otherwise any relative.

The prescribed form of notice is contained in the Fourth Schedule to the Enduring Power of Attorney Regulations 1996.

How must notice be given?

The attorney must give five weeks' notice to the donor and the notice parties of his or her intention to do so. It is advisable that this notice be sent by prepaid registered post and a certificate of posting be kept in a safe place.

Who can be an attorney?

Anyone who has the mental capacity to be an attorney can act as an attorney. This can include your partner, a relative or friend. Your attorney must be over the age of 18 and, if dealing with your property and affairs, may not be an undischarged or interim bankrupt.

Multiple attorneys

If there is more than one attorney listed in the EPA it is important to check how they have been appointed to act so that you may establish whether they must all apply together to register an EPA.

Attorneys may be appointed to act in any one of the following ways:

1. Jointly – This means they must all act together and cannot act separately. This means that all the attorneys must, at the same time and in the same, apply to register the EPA. Where the attorneys have been appointed to act jointly, the EPA will fail to have any further effect in the event that one of the appointed attorneys is unable to take up or continue with his or her appointment as an attorney. This could happen if one of the attorneys dies, is unable or unwilling to act as an attorney or (where it is a property and financial affairs EPA any of the attorneys become bankrupt. If this happens, the EPA can no longer be used.

2. Jointly and severally – This means they can all act together but they can also act separately if they wish. If the attorneys are appointed like this, they do not all have to apply together to register the EPA One or more of them can apply. There is also no risk that the EPA would fail if one of the attorneys becomes unable or unwilling to act as an attorney. However, this might not present as many safeguards for the donor.

3. Jointly in some matters and jointly and severally in respect of others – This means that the donor has, in their EPA, specified which actions the attorneys need to take jointly and which decisions they may make either on their own or after having agreed with each other. In this case the attorneys do not have to apply together to register the LPA, unless the donor specified this.

Registration of EPA

The EPA can only come into force when it has been registered. However, once an application to register the EPA has been made, the attorney may take action under the EPA's powers to maintain you and prevent loss to your estate. Subject to any conditions in the instrument the attorney can act for themselves or anyone the donor would be expected to provide for, in so far as it is permitted under Section 6 (4) of the Powers of Attorney Act 1996.

The attorney may also make any personal care decisions permitted under the powers that cannot reasonably be deferred until the application for registration has been determined. In order to register an EPA, the future attorney makes an application for registration to the Registrar of the Wards of Court once there is reason to believe that you are or are becoming mentally incapable.

The attorney must have a medical certificate confirming that you are incapable of managing your affairs.

Five weeks before making this application, the attorney must notify you as donor and the notice parties of his/her intention to do so. Within the five weeks, the donor or a notice party can lodge a notice of objection on one of the grounds given in Section 10 (3) of the Act with the Registrar of Wards of Court.

Objection to registration of EPA

The donor and notice parties may within five weeks of the date of notice of intention to apply for registration lodge notice of objection in the Office of the Wards of Court. Where this is done the Powers of Attorney Act stipulates that the court shall neither register the instrument nor refuse the application until it has made such inquiries (if any) as it thinks appropriate in the circumstances of the case.

The grounds for objection are set out in section 10 (3) of the act are as follows:

- (a) that the power purported to have been created by the instrument was not valid
- (b) that the power created by the instrument is no longer a valid and subsisting power
- (c) that the donor is not or is not becoming mentally incapable
- (d) that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney
- (e) that fraud or undue pressure was used to induce the donor to create the power

How to revoke a power of attorney

How to revoke a power of attorney

If a person (the 'donor') appoints another person or persons (the 'attorney(s)') to act on their behalf under a power of attorney (POA), their authority to act continues until the power of attorney is revoked.

A revocation of a power of attorney must be unequivocal, i.e. it must be clear and unambiguous. This means that it is important that you do not add to or amend the revocation, risking it becoming ineffective.

A general power of attorney may normally be revoked at any time. While less common, some powers of attorney are stated to be irrevocable by the donor, i.e. the attorney's consent is required. It is important to ensure that the power of attorney you wish to revoke does not include such a condition.

General power of attorney

The death, incapacity or bankruptcy of the donor or a sole attorney will automatically revoke the validity of any general POA. Unless specified to be irrevocable a power of attorney may be revoked by the donor in writing or by deed.

Enduring power of attorney

The donor can revoke an enduring power of attorney at any time before an application is made to register it. Once an EPA has been registered you cannot revoke it even if you are, for the time being mentally capable. To revoke it you would have to apply to the court and the court approve the revocation.

Termination of power of attorney

The functions of an attorney cease on the death of the donor of the EPA. Where the court cancels the registration of an EPA it shall by order revoke the EPA.

What is mental capacity?

In order to create a valid POA, the donor must have the capacity to appoint an attorney. Capacity, in this context, has a special legal meaning that is related to the ability to understand the implications or consequences of your actions as opposed to simply being able to do something. Legal capacity is discussed below. If the donor does not have the mental capacity to create a POA, it will be ruled invalid.

The following general principles apply:

1. All adults have the right to make decisions for themselves unless it is shown that they are unable to do so. This means that people may not assume that you cannot make a decision for yourself just because you have a particular medical condition or disability, or because of your age or appearance.
2. People should be supported as much as possible to make their own decisions before anyone concludes that they cannot do so. This support may be given through using different ways of communication such as words, pictures or signs, and providing information in different formats. In some cases an independent advocate may be able to help.
3. People are allowed to make a decision that may seem to other people unwise or strange and a person should not be treated as unable to make a decision because of this.
4. If a person lacks capacity, any decisions or actions taken on their behalf must be taken in their best interests (unless they have made a relevant and valid decision in advance to refuse medical treatment). It is still important to involve the person wherever possible in making the decision.
5. People who lack capacity should not be restricted unnecessarily. So the person making the decision or taking the action must decide or act in a way that would cause little interference with the freedom and rights of the person who lacks capacity.

What does it mean to 'lack capacity'?

A person's capacity shall be assessed on the basis of his or her ability to understand the nature and consequences of a decision to be made by him or her in the context of the available choices at the time the decision is made. A person lacks the capacity to make a decision if he or she is unable:

- to understand the information relevant to the decision
- to retain that information long enough to be able to make a decision
- to weigh up the information available to make a decision
- to communicate their decision by any possible means such as talking, using sign language or even simple muscle movements like blinking an eye or squeezing a hand

Company power of attorney

A power of attorney is a document which allows a company to legally empower another person, or a group of persons, to act on behalf of the Company.

A power of attorney is an important legal document with many potential legal and financial consequences for those signing the document. Therefore, it must be ensured that the company have received adequate advice in respect of the legal, financial and taxation implications of permitting the attorney to enter any intended activity or transactions on behalf of the company.

Why appoint an attorney?

The directors of a company can grant a general power of attorney if the company's memorandum and articles of association permit it.

The memorandum of association of the company should be checked to ensure that the company has the power to act through its agents and that the articles of association include the following clause (from Table A of the Companies Act 1963) or similar provisions without restriction:

'The directors may from time to time and at any time by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these regulations) and for such period and subject to such conditions as they may think fit, and any such power of attorney may contain such provisions for the protection of persons dealing with any such attorney as the directors may think fit, and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him'.

Should a company undertake activities in a country whereby the directors of the company are not resident or local, it may be more convenient for the Company to appoint an Attorney based in the area where activities are being undertaken on the Company's behalf.

An attorney may also be appointed when it is not viable for a director of the company to sign documentation for various activities and transactions, should there be a mandatory requirement for activities or transactions to be carried out in person.

The company may benefit from appointing an attorney with the reduction of the associated time and monetary costs that it may be associated with directors undertaking activities for the company in another locality.

There are many reason why a company would execute a POA including enabling an attorney:

- to act for company for all fiduciary, banking and financial matters
- to execute contracts on behalf of the company
- to invest the capital of the company in stocks and shares