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# Power of Attorney & Court of Protection

**Appointing someone to manage your affairs.**



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# It pays to plan ahead

There are a number of reasons why you might need someone to make decisions for you or act on your behalf. It could just be temporary, for example, if you are in hospital and need help with everyday things such as making sure bills are paid on time. It could also be more long-term, for example, if you have had an accident or been diagnosed with an illness.



## What is a Power of Attorney?

A Power of Attorney is a document by which one person gives another person the power to act on their behalf and in their name. It may be a general power or for a specific purpose. The person giving the power is called the donor and the person receiving the power is called the attorney.

## What types of Power of Attorney are there?

There are different types of Power of Attorney. The main ones are:

- Ordinary Powers of Attorney;
- Enduring Powers of Attorney;
- Lasting Powers of Attorney;

A description of each type of Power of Attorney and how they work is detailed below.

### Ordinary Power of Attorney

An Ordinary Power of Attorney is granted by the donor to one or more attorneys, to enable the attorney(s) to act on behalf of the donor in relation to their financial affairs. An Ordinary Power of Attorney can only be used if the donor has mental capacity.

### Enduring Power of Attorney

From 1 October 2007, no new Enduring Powers of Attorney can be created. Existing Enduring Powers of Attorney remain valid, so long as they were created before 1 October 2007. An Enduring Power of Attorney was only applicable to individuals and it specifically provided for the mental incapacity of the donor.

### Lasting Power of Attorney

Lasting powers of Attorney were introduced on 1 October 2007 and must be registered with the Office of the Public Guardian before they can be validly used.

A Lasting Power of Attorney is a formal legal arrangement that allows you to plan against the future deterioration of your physical or mental capacity.

A Lasting Power of Attorney identifies who you will want to take control over the running of your affairs. It gives someone you trust the legal authority to make financial, health and welfare decisions on your behalf should you be unable to do so yourself.

Once a Lasting Power of Attorney is registered, it can be used whether or not the donor has lost mental capacity. However, a donor can request that the attorney does not take ownership for their affairs until they do lose mental capacity.

When setting up the Lasting Power of Attorney the donor has the option to specify when the attorney can make decisions. This is either when the Lasting Power of Attorney has been registered with the Office of the Public Guardian or when the donor has lost their mental capacity.

There are two different types of Lasting Power of Attorney available, either or both can be set up in advance.

### 1. Property and Financial Affairs

This covers all financial decisions such as paying your mortgage and bills, receiving state benefits on your behalf, dealing with your bank and building society accounts and even selling your home.

### 2. Health and Welfare

This covers any decisions on what you eat, any medical treatment you should or should not receive, or where you live, should you need to move into care.

Only a Property and Financial Affairs Lasting Power of Attorney gives the attorney the power to run the donor's financial affairs. Health and Welfare Powers of Attorney cannot be accepted as authority for the attorney to access the donor's bank or building society accounts.

## How to set up a Lasting Power of Attorney

1. Choose an attorney (this is a person or person(s) you trust to manage your affairs, you can have more than one attorney)
2. Complete the forms to appoint them as your attorney – the form can be found on the Office of the Public Guardian website: <https://www.lastingpowerofattorney.service.gov.uk/home>
3. Register the Lasting Power of Attorney with the Office of the Public Guardian – there is a registration fee but reduction or exemption is available for lower income applicants.

An Lasting Power of Attorney can be cancelled if it is no longer needed, or if you want to make a new one. In order to do so you would need to send the Office of the Public Guardian the original Lasting Power of Attorney and a written statement called a 'deed of revocation'.

## What happens after a Power of Attorney is created?

Registration of a Lasting Power of Attorney does not indicate that the donor of the Power of Attorney lacks the capacity to make relevant decisions. Once registration has taken place:

- The donor can still operate the account for so long as they retain mental capacity to make relevant decisions, despite the fact that an attorney has been appointed.
- The attorney can also operate the account while the donor retains their mental capacity to make relevant decisions, should the donor wish. Provided there are no restrictions written into the Lasting Power of Attorney document that prevents the attorney from acting in this way.
- Once the donor does not have the capacity to make relevant decisions, only the attorney will be able to operate the account.

- The attorney is responsible to act in the best interests of the donor and any withdrawals made should be to support the donor in managing their own property and financial affairs.
- Any funds held in a Power of Attorney account belong to the account holder, which is the donor and not the attorney. Becoming an attorney is not the same as being an account holder. You may be asked to provide evidence/explanation that withdrawals are for the benefit of the donor.

### What if there is more than one attorney?

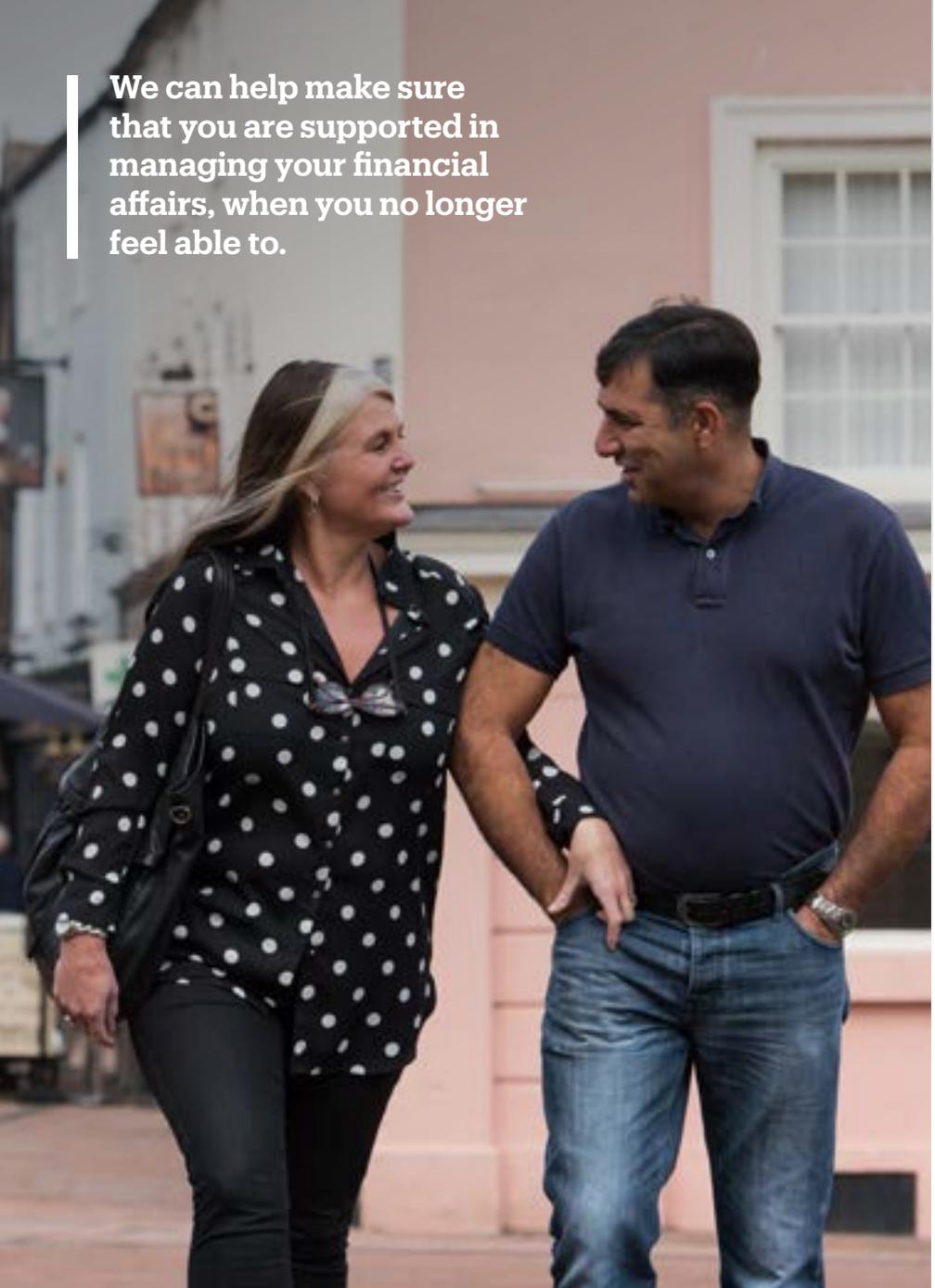
More than one attorney can be appointed under an enduring or lasting power of attorney to act on the donor's behalf. Where there is more than one attorney it is important to identify from the wording of the power whether the appointment was made:

- Jointly;
- Jointly and severally; or
- Jointly in respect of some matters and jointly and severally in respect of others (only possible for Lasting Powers of Attorney).

In most cases, this will be specified in the Power of Attorney. If it is not stated, then:

- In the case of a Lasting powers of attorney, the attorneys must be treated as jointly appointed; and
- In the case of an enduring power of attorney, failure to specify will normally invalidate the power.

Where the appointment is joint, joint attorneys must all act together and not separately. This means that each attorney should oversee the actions of the other(s) so we would need instructions from all attorneys.



We can help make sure that you are supported in managing your financial affairs, when you no longer feel able to.

An enduring or lasting power of attorney will terminate if any one of the joint attorneys:

- Disclaims (voluntarily resigns from their attorney role);
- Dies;
- Becomes bankrupt;
- Becomes subject to a debt relief order (if made on / after 1 October 2012); or
- Lacks the capacity to make relevant decisions.

Where the attorney and donor are married or in a civil partnership, unless the power specifically states otherwise it will also terminate with the dissolution or annulment of the marriage or civil partnership.

Where the appointment is joint and several, the attorneys can act independently of each other. This means that either attorney can operate the account without the other attorney's knowledge or approval. However, if the attorneys wish they are also able to act together. An enduring or lasting power of attorney will not be automatically terminated by the disclaimer, death, bankruptcy, making of a debt relief order, dissolution or annulment of marriage or civil partnership, or incapacity of one joint and several attorney.

In these circumstances, the power will continue and the remaining attorney(s) can continue to act.

Where the appointment is joint in respect of some matters and joint and severally in respect of others, it is important to read the Power of Attorney document carefully.

### Power of Attorney in Scotland

- **Continuing Power of Attorney** – This is the Scottish equivalent to the Lasting Power of Attorney for financial affairs. It must be registered with the Public Guardian before it is valid to be used.

- **Guardianship Order** – If a Continuing Power of Attorney has not been made and a person becomes unable to manage their affairs, a Guardianship Order may be made by the Public Guardian.

### Power of Attorney in Northern Ireland

- **Enduring Power of Attorney** – This operates in the same manner as the Enduring Power of Attorney in England and Wales. It must be registered with the Office of Care and Protection if the donor has lost mental capacity.
- **Appointment of a Controller** – If an Enduring Power of Attorney has not been made and a person becomes unable to manage their affairs, a Controller may be appointed by the Office of Care and Protection.

### Court of Protection Deputyship

This is used when someone no longer has capacity to operate their finances and there is no Lasting Power of Attorney in place. Another person can apply to be appointed as Deputy to run his or her affairs, usually a family member or friend, but if there is no one suitable a professional Deputy such as a solicitor or the local authority can perform this role.

### Department for Work and Pensions Appointee

The DWP can appoint a person /company or local authority to manage state benefits on behalf of an individual who is unable to act for themselves. NOTE: The appointee can only manage state benefits, not other funds. To become an appointee Form BF56 must be completed and submitted to the relevant DWP department.

Evidence of an appointee is given on Form BF57.

### What to do when a young person who lacks mental capacity turns 18

The process for closing an account differs when you manage a Junior ISA for an individual who turns 18 and lacks mental capacity. If the young person is unable to make decisions for themselves, before you can close the account and by providing:

- Power of Attorney.
- financial deputy-ship order

This must authorise a close relative or friend to make financial decisions on the young person's behalf. To get an order they must apply to the:

- Court of Protection in England and Wales
- Office of the Public Guardian in Scotland
- Office of Care and Protection in Northern Ireland.

### What we can accept from you

In summary, where an account holder lacks mental capacity we can accept the following:

- An Enduring Power of Attorney (made before 1 October 2007 - registered with the Court of Protection before 1 October 2007 or registered with the Office or Public Guardian from 1 October 2007)
- Lasting Powers of Attorney registered in relation to Property and Affairs dated after 30th September 2007 and registered at the Office or Public Guardian.
- Court of Protection Receivership/Deputyship Order
- Continuing Power of Attorney (Scotland)
- BF57

### Already an Attorney or Deputy?

Those who are already a deputy for someone should inform the donor's bank or building society. This will allow them to set up the account to be managed by the Attorney or Deputy.

### Frequent asked questions

#### 1. Can a donor certify an unregistered Enduring Power of Attorney, as long as this was done when they still had mental capacity?

Unlike Lasting Power of Attorney, Enduring Power of Attorney can be used without being registered if the 'donor' (the person who made the Enduring Power of Attorney) still has mental capacity – the ability to make decisions for themselves.

If the donor has lost mental capacity, the Enduring Power of Attorney must either:

- Be registered by the Office of the Public Guardian (OPG)
- Already been registered by the Public Guardianship Office – the body OPG replaced.

#### 2. How can you tell if the Enduring Power of Attorney is registered?

You can tell if the Enduring Power of Attorney is registered by looking at the front page of the document, where you will find:

- A perforated stamp at the bottom saying 'Validated'
- A stamp at the top with the date of registration if the Enduring Power of Attorney is unregistered, it will not have these stamps, but must still have been signed inside by all of the following:
  - The donor
  - One or more attorneys (the people the donor appoints to make decisions)
  - Witnesses

To be valid, the Enduring Power of Attorney must have been signed before October 2007, when Enduring Power of Attorneys were replaced by Lasting Power of Attorneys. If the Enduring Power of Attorney was signed after this date, it is invalid.

### 3. If the donor still has mental capacity can they certify their own copy of their Lasting Power of Attorney?

The donor of the Lasting Power of Attorney, that is, the person who has appointed the attorney, can certify a copy of their own Lasting Power of Attorney in the following way: The donors should write at the bottom of every page of the copy: 'I certify that this is a true and complete copy of the corresponding page of the original lasting power of attorney.'

### 4. How to cancel or change a Lasting Power of Attorney?

As long as an account holder still has the mental capacity to make decisions, they can end or cancel a power of attorney.

If you need to change any details, such as the name or address of either your attorney or yourself, you need to: Let the relevant authority know, and then contact us, pop into your local branch or call us on: **0345 734 434** for an appointment.

## Missing Person's Guardian Order General

The Guardianship (Missing Person's) Act 2017 came into force on 31st July 2019.

The Act has created a new third party authority for England & Wales – the Missing Person's Guardian Order which allows an appointed third party to take over running the financial affairs of a person who has been officially classed as missing.

### What powers will the guardian have?

A guardian will have the same rights as an attorney in respect of administering the missing person's bank / savings account, mortgage and other financial commitments – including the power to vary a mortgage or make arrangements for repayment of debt.

## Definition of 'Missing Person'

The Act defines a missing person as being:

- a person absent from his or her usual place of residence;
- a person absent from his or her usual day-to-day activities; and
- one of the two conditions is met (see below)

Condition a) above is met if the person's whereabouts are not known at all, or are not known with sufficient precision to enable the person to be contacted for the purposes of decisions relating to his or her property and financial affairs.

Condition (b) above is met if the person is unable to make decisions relating to his or her property and financial affairs or to communicate such decisions with a view to their implementation (or both), and the reason for that is something beyond the person's control, other than illness, injury or lack of capacity.

### How do you obtain a Missing Person's Guardian Order?

Family members who wish to become a Missing Person's Guardian can apply to the High Court to be appointed. Once appointed, they will be supervised by the Office of the Public Guardian for England & Wales in the same way that Court of Protection Deputies are.

The appointment will be for a fixed term of 4 years with a renewal option if required.

## What can a Missing Person's Guardian do?

Once appointed, the rights and powers that a guardian has are as follows:

- selling, letting or mortgaging the missing person's property;
- making investments;
- executing deeds and other documents;
- recovering money owed to the missing person;
- discharging debts and other obligations of the missing person (whether legally enforceable or not);
- resigning trusteeships held by the missing person;
- bringing or conducting legal proceedings;
- making a gift out of the missing person's property

A guardian is not permitted to:

- execute a will for the missing person; or
- exercise a power vested in the missing person as a trustee in relation to another person's property

The guardian is under a duty at all times to act in the best interests of the missing person.

Requirements on building societies and banks

A Missing Person's Guardian Order should be treated like a Power of Attorney or Deputyship Order and formally registered before it is put into effect.

If there are concerns that the guardian is using their powers inappropriately this should be reported to the Office of the Public Guardian.

If the missing person returns, either the guardian or the missing person should apply to the High Court for the Guardianship to be revoked and once revoked it will cease to have legal effect.

## Useful contacts

### LPAs and Deputyships

- Office of the Public Guardian – England & Wales
- Power of Attorney: <https://www.lastingpowerofattorney.service.gov.uk/home>
- Deputyship: [gov.uk/become-deputy](http://gov.uk/become-deputy)
- Office of Public Guardian: <https://www.publicguardian-scotland.gov.uk/>
- Power of Attorney: <https://www.nidirect.gov.uk/articles/managing-your-affairs-and-enduring-power-attorney>

### Stay up to date

<https://www.gov.uk/power-of-attorney>

Telephone on 0300 456 0300

## Glossary of Terms

### **Advance decision to refuse treatment -**

Sometimes people have clear views about what types of medical treatment they do not want to have and would not consent to. An advance decision allows them to express these views clearly, before they lose mental capacity. They can specify that it is to apply even if life is at risk.

**Attorney** - The person(s) appointed by the donor to act on their behalf and in their name.

**Best interests** - Any decisions made or anything undertaken for a person who lacks capacity to make specific decisions must be in the person's best interests. There are standard minimum steps to follow when working out someone's best interests. These are set out in section 4 of the Mental Capacity Act 2005.

**Capacity** - The ability to make a decision about a particular matter at the time the decision needs to be made. The legal definition of a person who lacks capacity is set out in section 2 of the Mental Capacity Act 2005.

**Court of Protection** - The specialist Court for all issues relating to people who lack capacity to make specific decisions.

**Deputy** - Someone appointed by the Court with ongoing legal authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in Section 16(2) of the Mental Capacity Act 2005.

**Donor** - the person granting the Power of Attorney.

**Enduring Power of Attorney (EPA)** - A Power of Attorney created under the Enduring Powers of Attorney Act 1985 appointing an Attorney to deal with the Donor's property and financial affairs. Existing EPAs will continue to operate under Schedule 4 of the Mental Capacity Act 2005, which replaces the EPA Act 1985.

**An Independent Mental Capacity Advocate (IMCA)** - Is a legal safeguard for people who lack the capacity to make specific important decisions. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.

**Lasting Power of Attorney (LPA)** - A legal document created by the Mental Capacity Act 2005, that enables any individual over the age of 18 who has mental capacity to choose another individual or individuals to make decisions on their behalf.

**Office of the Public Guardian** - An agency of the Ministry of Justice established in October 2007 to support the Public Guardian in registering Enduring Powers of Attorney and Lasting Powers of Attorney and supervising deputies appointed by the Court of Protection.

**Personal welfare** - Personal welfare decisions are any decisions about a person's healthcare, where they live, what clothes they wear, what they eat and anything needed for their general care and well-being. Attorneys and Deputies can be appointed to make decisions about personal welfare on behalf of a person who lacks capacity. Many acts of care are to do with personal welfare.

**Property and affairs** - Any possessions owned by a person (such as a house or flat, jewellery or other possessions), the money they have in income, savings or investments and any expenditure. Attorneys and Deputies can be appointed to make decisions about property and affairs on behalf of a person who lacks capacity.

<http://www.lastingpowerattorney.co.uk/glossary-of-terms.html>

Our experts are here to help and guide you through the process.

