



# Advice for Service Personnel and their Families - Ordinary, Enduring and Lasting Powers of Attorney



## Power of Attorney

A Power of Attorney is a legal document whereby one person (the "Donor", or "Granter" in Scotland) gives another person or persons (the "Attorney") the power to act on his or her behalf with regard to his or her property and financial affairs. The most common types of Power of Attorney in England and Wales are:

- Ordinary Power of Attorney (OPA)
- Enduring Power of Attorney (EPA) (or Lasting Power of Attorney from October 2007)

### Ordinary Power of Attorney (OPA)

OPAs are created for a set period of time in cases where the Donor is going abroad or is unable to act for some other reason and wishes someone else to have the authority to act on his or her behalf. An OPA will usually end either at a specified time or upon the request of the Donor at any time using a Deed of Revocation and will automatically be revoked if the Donor loses mental capacity.

The OPA gives the Attorney authority to take decisions and actions on behalf of the Donor, as if the Donor were taking them himself or herself, in relation to nearly all the Donor's property and affairs. This could include buying or selling property or shares, signing cheques etc. It does not enable the Attorney to exercise functions, which the Donor has as a trustee or personal representative (i.e. where the Donor is separately the co-owner of land or the administrator of someone else's estate). If the Donor does not wish to give the Attorney a general power, he or she can limit the Attorney's activities to specific areas of the Donor's property and affairs, such as operating specific bank/building society accounts or signing cheques.

There is no requirement for the OPA to be registered (see Enduring Powers of Attorney, below) but it is advisable to check that particular financial institutions or other key companies will act on the OPA's instructions. Companies will not always do so automatically since they must also observe due diligence in the services they provide to customers and they must be satisfied that it is only the Attorney rather than the Donor that is in a position to act. Explaining the circumstances before the Donor (Service person) deploys will help.

As an OPA is revoked in the event of the Donor losing mental capacity, Service personnel may wish to consider whether an Enduring Power of Attorney (EPA) or a Lasting Power of Attorney (LPA) (from October 2007) offer a more durable alternative.

## Enduring Power of Attorney (EPA)

An Enduring Power of Attorney (EPA) is a legal document that enables someone (the Donor) to appoint one or more persons (Attorney(s)) to manage their financial affairs and property, either now or in the future.

Anyone can make an EPA, as long as they can understand how to do so and what it does. The legal test is to ask whether the Donor can understand that:

- The Attorney can take complete power over the Donor's affairs if he/she becomes mentally unable to manage them;
- The Attorney will, in general, be able to do anything with his/her property that he/she could have done; and
- The power will continue if he/she is, or becomes, mentally incapable and it can only be ended by the Court of Protection.

If the Donor is able to understand these points, they can make an EPA but if there is any doubt, medical or legal advice should be sought.

The Attorney can be almost anyone the Donor chooses who is willing to act for them. They must be at least 18 and must not be bankrupt when they sign the form or at any time in the future. Some trust companies (often parts of banks) can also act as Attorneys but someone who holds office (for example, a Director of Social Services) cannot be an Attorney.

If the Donor wishes to restrict the areas that the Attorney can deal with, he/she can specify this on the EPA form. If no restrictions are set, the Attorney may have wide powers over the Donor's money, savings, investments and property. When choosing an Attorney, it is important to consider how well they handle their own money, whether they can be trusted to act in the best interests of the Donor and if they will use any money to provide for the Donor's needs. It is also possible to add conditions to the EPA, for example, requiring the Attorney to provide accounts of expenditure for each year to someone independent such as a solicitor or accountant. There is a statutory restriction on making gifts on behalf of the Donor.

An EPA must be made on a special form, which can be obtained from the Public Guardianship Office (PGO) Customer Services, the PGO website ([www.guardianship.gov.uk](http://www.guardianship.gov.uk)) and stationers who supply legal documents. Solicitors and other professional advisors can also prepare their own forms.

An EPA can be used immediately, or the Donor can specify that the Attorney cannot act until the power is registered. If no restrictions are set, the Attorney can act straight away using an unregistered power. All EPAs must be registered when the Attorney believes that the Donor is, or is becoming, mentally incapable. The EPA must be registered on the EP2 form, which can be obtained from the PGO. There is a fee for registering EPAs – contact the PGO before registering for details of current fees.

EPAs can only be made before October 2007. Any EPAs made after 1 October 2007 will not be valid and a Lasting Power of Attorney should be used instead. EPAs made before October can still be registered after 1 October 2007.

## Lasting Power of Attorney (LPA)

The new system of LPAs will replace the system of EPAs from 1 October 2007.

Any person of 18 and over can choose to appoint someone (an Attorney) to make their health, welfare and/or financial decisions if in the future they lack capacity to make these decisions for themselves. The Attorney can be a friend, relative or a professional person. More than one person can be chosen to act as an Attorney on behalf of a Donor. The Donor decides who will have the power to control their affairs and the precise limits of that power.

There are two different types of LPA:

- A Personal Welfare LPA will give powers to the chosen Attorney(s) to make decisions about both health and personal welfare, such as; where to live, day-to-day care or having medical treatment.
- A Property and Affairs LPA will give powers to the chosen Attorney(s) to make decisions about finances, such as selling the Donor's house or managing their bank account.

The difference between the types of LPA is that a personal welfare LPA will only take effect when the Donor lacks capacity to make decisions. With a property and affairs LPA, the Donor can specify that the Attorney should only start managing their financial affairs after they lack capacity, sometime in the future. If this is not specified, the Attorney can start using the LPA after it is registered, but while the Donor still has capacity.

An Attorney must act in the Donor's best interest when acting under an LPA.

To make an LPA, the Donor needs to complete a form, which can be obtained from the Office of the Public Guardian (OPG) ([www.guardianship.gov.uk](http://www.guardianship.gov.uk)) after October 2007. There are two forms, one for each type of LPA. A certificate, which is part of the LPA form, must be signed by an independent person stating that the Donor fully understands what is involved in making the LPA, what it will mean to have one in place and that no fraud or undue pressure is being used to make the Donor create the LPA. After completing the form and the certificate, the LPA must be registered with the OPG before it can be used. There is a fee payable to register an LPA – contact the OPG before registering for details of the current fees.

Once registered, the OPG can be asked to look into what an Attorney does, if someone thinks they may not be acting in the Donor's best interests. Any serious problems will be referred to a special court called the Court of Protection. The Court has the power to remove the Attorney if it is found that they have not been acting in the Donor's best interest.

## **RECOMMENDATIONS**

- Consider whether your family or personal affairs would benefit from having a Power of Attorney in place to allow an individual to act on your behalf with regard to property or financial affairs in the event of, say, accident, injury or absence on deployment.
- Determine which type of Power of Attorney is right for your circumstances (Ordinary, Enduring or Lasting Power of Attorney).
- Identify a suitable person to act as an Attorney who you are absolutely sure you can trust to act in your, or your family's, best interests.
- Check the financial or other key institutions (with whom you may want the Attorney to act) will accept the Power of Attorney.
- Consider what restrictions you would want to place on the authority you are granting to your Attorney.
- Seek advice from the Citizen's Advice Bureau or your legal advisor before entering into a Power of Attorney.