POWERS OF ATTORNEY

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1. Definition: power of attorney

A power of attorney is a document by which one person ("donor") gives another person ("attorney") the power to act on his behalf and his name. It may be completely general, entitling the attorney to do – almost – everything the donor could himself do, or it may be limited to certain defined objects.

The practical purpose of a power of attorney is not only to invest the attorney with power to act for the donor, but also to provide him with a document defining the extent of his authority, which he can produce as evidence to the third parties with whom he is to deal.

2. Enduring powers of attorney

An enduring power of attorney is one which gives an authority which continues even if the donor becomes mentally incapable. Until the 1985 Act came into force on 10 March 1986 (Enduring Powers of Attorney Act 1985 (Commencement) Order 1986), every power was automatically revoked if the donor became mentally incapable. This gave rise to two major inconveniences. First, it was not often clear when the donor became incapable, particularly in the case of a donor gradually failing with the onset of old age. The validity of the power was therefore frequently questionable. Secondly, there was no way in which a person could privately arrange in advance to give someone authority to handle his affairs when, at a later date, he had become incapable. The only mechanism, which the law provided was an application by someone else to the Court of Protection to be, appointed receiver. That application was made after the patient had become incapable and without his having any say in the selection of the person concerned.

Enduring powers meet both these objectives, while introducing safeguards to avoid abuses. The previous procedures remain unaffected: donors can still grant ordinary powers of attorney, and the Court of Protection can still appoint receivers.

This is the procedure for creating and using enduring powers of attorney. An enduring power must be granted in a prescribed form, which makes it clear to the donor that the power will continue to be effective even if he becomes mentally incapable. It also requires to be executed by the attorney. This achieves two ends. It
ensures that the attorney accepts that he should be appointed, an ordinary power could be granted to an attorney who knows nothing of the appointment and is not prepared to accept it. Further the attorney must acknowledge the statutory duty which he may later have to register the power. That duty arises when he has reason to believe that the donor is, or is becoming, mentally incapable. He must then apply to the Court of Protection to register the power, having given notice to the donor of the power and to certain of the donor’s relatives. The powers of an attorney appointed under an enduring power vary, depending on the status of the donor, and the stages in the registration procedure. Until the attorney has reason to believe that the donor is incapable, or is becoming so, he has the full authority conferred by the power. When that time arrives, the attorney’s powers are all suspended, but his duty to apply to register arises. Once he has made the application, certain limited authority is automatically restored. When the court registers the enduring power, the attorney can once again exercise all his functions under it.

The Court of Protection has a general jurisdiction over enduring powers of attorney. This includes authorising an attorney to do acts which he would not otherwise be able to do, and revoking the power on exercising its powers under Pt VII of the Mental Health Act 1983.

3. Authority granted

 a) Ordinary powers of attorney

 A normal power of attorney not only delimits the attorney’s authority, but it can also specify the way in which he is to exercise his powers. A power of attorney does not oblige the attorney to take any action; it merely authorises him to do so if he chooses. It has been called a „one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract“ (Chatenay v Brazilian Submarine Telegraph Co (1891) 1 QB 79, 85 per Lindley LJ). This emphasises that the consent of the attorney is not required when a power of attorney is executed in his favour. He has the option not to exercise the authority it confers. A power of attorney is normally granted by deed poll.

 The attorney’s position may change as soon as he takes action pursuant to a power. He then assumes an obligation, after selling part of the donor’s property he may be bound to deposit the proceeds of sale in a particular bank account. This duty is more in the nature of a trust than a contract.

 Contractual duties may arise in connection with a power of attorney. The donor normally agrees to ratify the attorney’s act under the power and that is a matter of a contract. The power itself may be granted as part of a contract. Also, the attorney may independently have contracted to exercise the powers granted, as in the case of a solicitor who becomes his client’s attorney to conclude a transaction in which he has accepted professional instructions.
b) Enduring powers of attorney

The formalities to create an enduring power of attorney are different from those of an ordinary power. An attorney appointed under an enduring power is a party to it and must execute the instrument.

The statutory duty, which the attorney does undertake by executing the enduring power of attorney, is to register the power as soon as he has reason to believe that the donor is becoming or has become, mentally incapable. Once that duty has arisen, and until the attorney has made the application to register, his authority is suspended.

Although an enduring power does not generally oblige the attorney to carry out what it merely authorises him to do, there are special formalities if he wishes to disclaim so that he surrenders his position as attorney. Until the time he has a duty to register the power, the attorney must give written notice to the donor and after that time has arisen, to the court.

4. Limits on powers of attorney

There are limits on the powers that can be delegated by a power of attorney. The general form of power prescribed by the 1971 Act confers “authority to do on behalf of the donor anything which he can lawfully do by an attorney” (s10 (1)). This formula is also used by the 1985 Act (s3(2)). Neither statute defines those limits.

Some restrictions on delegation stem from the donor’s position, others from the nature of the action to be performed. There may also be practical limitations.

a) Agents

The maxim *delegatus non potest delegare* means that an attorney cannot further delegate his authority by appointing an attorney to carry out those functions in his stead, unless the terms of the appointment permit it. An enduring power of attorney cannot give the attorney the right to appoint a substitute or successor (1985 Act, s 2(9)).

b) Appointments

Those who have appointments of a personal nature cannot delegate their functions to an attorney. This applies, for example, to a director of a company. It also applies to those elected or appointed to public office, and to those employed whether under a contract of service or a contract for services.

c) Statutory authority

Statutory authority granted to a particular person cannot be delegated. This applies, for example, to the right to practise as a doctor or a solicitor on duly qualifying, and to the rights conferred on the grant of a licence. However, a distinction
must be drawn between a licensee’s privileges and administrative collateral matters. A person licensed to sell alcoholic liquor cannot appoint an attorney to sell drink on his behalf.

d) **Wills**

A will must be “signed ... by the testator, or by some other person in his presence and by his direction” (Wills Act 1837, s 9, as substituted by the Administration of Justice Act 1982, s 17), unless made by certain soldiers and sailors. This is a formality that cannot be delegated. There is a special statutory provision which authorises a person to execute a will on behalf of a mental patient, under an order of the Court of Protection (Menatl Health Act 1983, s 97).

**Forms of document**

**A POWERS OF ATTORNEY FOR GENERAL USE**

1. **Statutory general power**

   THIS GENERAL POWER OF ATTORNEY is made this day of 20
   by of
   I appoint of
   (or of of
   and of
   jointly or jointly and severally) to be my attorney in accordance with section 10 of the Powers of Attorney Act 1971.

   IN WITNESSES etc

2. **Power for particular purpose**

   THIS POWER OF ATTORNEY is granted on 20
   I, of
   appoint of
   to be my attorney for the following purposes:
   1 To (special purpose)
   2 For that purpose:
      a) To sign or execute in my name and on my behalf any contract, document or deed
      b) To engage or commission any contract, advisor or agent, agreeing their terms of engagement and paying them for the services
      c) To do anything else reasonably necessary so that the object can be achieved as effectively as if I had done it myself
And I undertake to ratify whatever my attorney does under the authority or
purposed authority of this power

IN WITNESSES etc

CLAUSES FOR POWERS OF ATTORNEY

A) Appointment

Firm as attorney

I appoint the partners for the time being in the firm of ABC and Co solicitors jointly
and severally to be my attorneys. This power shall at any time have effect as if it had
individually named the then partners in that firm

Nominated partner as attorney

I appoint as my attorney the partner in the firm of ABC and Co solicitors nominated by
the firms then senior partner. No change in the constitution of the firm shall affect the
appointment of my attorney, but the then senior partner may at any time revoke a nomination
and make another

Company nominee as attorney

I appoint as my attorney the director or employee of XYZ Ltd nominated by resolution
of the board of directors of the company. The board may at any time revoke a nomination
and make another

One attorney until child attains 21, then eldest child

I appoint as my attorney a) for the period until one of my children attains the age of
21 years: b) the first of my children to attain the age of 21 years, for the period beginning
when he or she attains that age

Trustee in bankruptcy

I, as the trustee of the estate of AB, a bankrupt, appoint CD of .................... to be my
attorney

B) Authority conferred on attorney

To sell house

To sell my house “Blackacre”, Casterbridge, by private treaty or public auction for at
least ......................... (gross) (after deduction of sale expenses) and for that purpose to
sign and execute all necessary documents and deeds and employ agents and professional
advisers
To buy house
To buy (“Blackacre, Casterbridgee), (a house for me to occupy with my family) for no more than .................. (including) (excluding) purchase expenses and for that purpose to sign and execute all necessary documents and deeds and employ agents and professional advisers

To take lease
To take a lease or tenancy agreement of living accommodation for my family on such terms and conditions as he thinks fit

To operate bank accounts
To open in my name one or more accounts of any type with Bank plc, Casterbridge, and to operate them by depositing, withdrawing and transferring money, and authorising payments direct to the accounts of other people (but without power to borrow money from the bank for me)

To borrow money
To borrow money on my behalf (for the purposes mentioned above) from such persons and on such terms, as to interest, repayment and security on my property, as my attorney decides

To litigate
To take, defend, accept service of, and take steps in any legal proceedings on my behalf and for that purpose to appear and instruct solicitors and counsel in any court or tribunal

To insure
To make a proposal for, effect and maintain any policy of insurance against any risk to which I or my property or estate may be exposed

C) Restrictions on authority

Not to make gifts to charity
This power of attorney does not give (any of) my attorney’s power to make gifts to charity from my property

Spouses’s agreement to house sale
Only to sell or mortgage my house with the written concurrence of my (wife) (husband)

D) General

Ratification
I agree to ratify all acts done, deeds executed and contracts signed by my attorney on my behalf under the authority or purported authority of this power
Irrevocability

This power is given by way of security to secure (a proprietary interest of my attorney) (the performance of an obligation owed to my attorney) and I declare that this deed is irrevocable

E) Execution

Person unable to read

SIGNED SEALED AND DELIVERED by (the donor), after (I) (someone in my presence) had read and explained to /him/ /her/ the terms of the deeds and he stated that he understood in the presence of:

Person unable to write or physically disabled

SIGNED SEALED AND DELIVERED by AB by direction and in the presence of (the donor) in accordance with subsections (1) and (2) of the Powers of Attorney Act 1971 and in the presence also of:

(Two witnesses)

RÉSUMÉ

The text provides a general description of the powers of attorney, showing the important enduring powers of attorney, authority granted and limits on powers of attorney. This article contains some examples of the forms of document and clauses for powers of attorney.

LITERATURE

Mental Health Act 1983.