

Powers of Attorney Act, 1996 - Legal Office Notice No. 3 of 2010

The Powers of Attorney Act 1996 (1996 Act) came into operation on 1st August 1996 and effected changes in the law relating to powers of attorney.

A power of attorney is an authority given by one person (the donor) to another (the donee) to perform certain acts which the former has power to perform. It developed under common law (i.e. the ancient unwritten law and later judge-made law) and under statute law (notably the Conveyancing Acts of 1881 and 1882 and the 1996 Act).

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1. Creation of Power

At common law the power was required to be made under the seal of the donor. Under the 1996 Act sealing is no longer required (section 15(2)). The 1996 Act also provides that the power of attorney may be created in an instrument signed by the donor. It may also be signed at his direction (e.g. where he is physically incapable of signing) in his presence and in the presence of another who attests the instrument as witness. The Act prescribes a form of general power of attorney as follows:

This GENERAL POWER OF ATTORNEY IS

MADE THIS day of 19 by AB of

I appoint CD of

[or CD of and EF of

jointly (or jointly and severally)] to be my attorney [s] in accordance with section 16 of the Powers of Attorney Act, 1996.

IN WITNESS etc.

It may also be in a form to the like effect expressed to be made under the Act. Where there is to be more than one attorney, they may be appointed to act jointly or jointly and severally. In this case, the power may be exercised by any one of them. Witnessing is not essential except where the power is signed by the direction of the donor. In practice it may be expected that all powers will be

witnessed.

2. Donee of a Power

Only a person can be appointed an attorney (either a natural person or a corporation sole or aggregate) (in relation to donee corporations see section 17(3) of the 1996 Act). An unnamed office holder is not a person and therefore such powers of attorney are not acceptable to the PRA.

3. Delegation of Power

Delegatus non potest delegare, a delegate cannot delegate and a donee of a power of attorney cannot delegate his/her power to a third party.

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4. Foreign Power

4.1 A power of attorney is generally read according to the law where the acts pursuant to the powers are to be done (*lex loci solutionis*) i.e. in relation to applications in the PRA the 1996 Act.

4.2 Note section 64(2)(b)(iv) of the Companies Act 2014 and Rule 74(5) of the LR Rules 2012 in relation to an application for registration which includes a deed executed by a foreign body corporate otherwise than under seal of the said body. The PRA will proceed with registration of such an application without further query if accompanied by the certificate specified in Rule 74(5) provided the PRA is not on notice to the contrary. Note also Paragraph 11.4 of Practice Direction [“Transfers of Registered Land”](#).

5. Types of Powers

They may be general, enabling the donee to perform all the acts the donor could perform or specific, limited to a particular act or acts.

The 1996 Act also provides for an “enduring” power, to be effective during any subsequent mental incapacity of the donor, provided it is registered with the Registrar of Wards of Court.

6. Effect of Power

6.1 It gives the donee the power to act on behalf of the donor in accordance with the terms of the instrument. Where the power is a general power in the form set out in the Act or in a form to the like effect expressed to be made under the Act, it shall operate to confer on the donee or donee's authority to do on behalf of the donor anything which the donor can lawfully do by attorney [section 16 (1) of the 1996 Act]. This does not extend to functions which the donor has as a trustee or personal representative or as tenant for life within the meaning of the Settled Land Act 1882 or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act [section 16 (2) of the 1996 Act].

6.2 Where the power is an enduring power and complies with the provisions of section 5 of the Act and the regulations made thereunder, it shall, subject to any conditions or restrictions contained in the instrument, operate to confer on the donee or donee's authority to:

- do on behalf of the donor anything which the donor can lawfully do by attorney
- execute or exercise any of the powers or discretions vested in the donor as a tenant for life within the meaning of the Settled Land Act 1882
- act under the power for the attorney's benefit or that of other persons if the donor might be expected to provide for his or her or that persons needs respectively and do whatever the donor might be expected to do to meet those needs
- make gifts to relatives or charities, if same is authorised by the instrument
- make personal care decisions on the donors behalf

7. Duration of Power

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At common law the power lapsed or was revoked automatically on the donor's death, insanity, marriage or bankruptcy. The 1996 Act now provides for enduring powers of attorney which come into effect only on mental incapacity and are not defeated by it. At common law a power could also be revoked by the donor himself unless it was coupled with an interest (e.g. the interest of a mortgage). It could be released or disclaimed by the donee.

The instrument creating the power could contain a provision that it was

irrevocable. Section 8 of the Conveyancing Act 1882 provided that if a power of attorney, given for valuable consideration (e.g. a mortgage or charge) is in the instrument creating the power expressed to be irrevocable then as far as a purchaser is concerned, the power shall not be revoked either by anything done by the donor without the concurrence of the donee or by the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donor of the power.

Section 9 of the same Act contains a similar provision in relation to a power of attorney, whether given for consideration or not, expressed to be irrevocable for a fixed time specified therein, not exceeding one year.

The 1996 Act repealed both sections and provides that if the power is expressed to be irrevocable and to be given by way of security, a person dealing with the donee shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee (section 18(3) of the 1996 Act).

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8. Execution of documents under power of attorney

8.1 Section 46 of the Conveyancing Act 1881 provided that the donee of a power of attorney may execute any instrument in and with his own name and signature and his own seal, or in the name and with the signature and seal of the donor.

The 1996 Act repealed this section but largely re-enacted it. Section 17 thereof provides that the donee may execute any instrument with his or her own signature, and where sealing is required, with his or her own seal or with the name signature and seal of the donor.

It also provides that where the donor is a company the donee may either execute the deed with his or her own signature and seal or by signing his or her own name as acting in the name or on behalf of the company in the presence of a least one witness and affixing his or her own seal. (This gives statutory effect to the decision in the Cork Shoe Company case: I.D.A. -v- Moran [1978] IR 159.)

8.2 Where the donee is a company it may appoint a person to execute the deed in the name of the donor (section 17(3) of the 1996 Act). The original or certified copy of the power of appointment should be lodged.

8.3 While there is no prescribed Form dealing with the execution by an

attorney, the execution clause by the attorney should indicate that s/he is acting under a power of attorney dated [] day of 20 [] on behalf of X (the donor) (i.e. there should be no ambiguity). If the execution clause does not so indicate then the PRA requires evidence (e.g. solicitors certificate) that the deed of transfer (or other deed) dated [] day of 20 [] was executed by Y (the donee) under a power of attorney dated [] day of 20 [] granted by X (the donor).

9. Form 1, Form 2 and Form 16

It is the PRA position that the donee of a power of attorney [and this includes a receiver who is also appointed attorney under a security document] cannot make a Form 1, Form 2 or Form 16 on behalf of a donor purporting to impart for the benefit of the PRA matters known only to the donor. It does not appear that s/he would have the necessary knowledge of the facts required in relation to the affidavit of discovery averments contained in all three forms and also to confirm that the map correctly shows the boundaries of the property (see paragraph 3 and Schedule Part 1 of Form 1 and 2 of the LR Rules 2012).

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10. Protection of third parties

10.1 As set out above, purchasers were afforded protection by section 8 and 9 of the Conveyancing Act 1882.

The 1996 Act provides in section 18(2) that where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person be as valid as if the power had then been in force. This applies to a power of attorney whenever created but only to acts and transactions after the commencement of the Act.

This will obviate the necessity for the production to the Authority of evidence that the principal (donor) was alive at the time of the execution of the instrument (transfer or charge) and that the power was then unrevoked.

10.2 In cases where the power of attorney does not contain a provision that it is irrevocable but rather sets out circumstances or events which could result in the power no longer continuing in force, evidence that the relevant circumstance or event has not occurred is necessary. However the legal statement as set out in

paragraph 12(i) and (iii) below satisfies PRA requirements in this matter.

11. Proof of the power

The original instrument creating the power is proof of same.

Section 48 of the Conveyancing Act 1881 provided for the deposit in the Central Office of the High Court of the instrument, creating the power of attorney and the issue of “office” copies of same by the Central Office.

The 1996 Act repeals section 48 and provides that a power may be proved by:

- the original power or
- a copy of which is certified by the donor or by a solicitor to be a true copy of the original [it is immaterial how many removes or intermediate copies there are between the copy and the original or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made] or
- a copy which is attested by the Central Office of the High Court if the original is deposited in that office. This attested copy may be a certified copy as at (ii), stamped or marked by the Central Office or it may be a copy prepared by the Central Office itself

Rule 55 of the Land Registration Rules 2012 refers to production of the power, a certified or an attested copy. This applies to powers whenever executed.

12. Protection against fraud

There have been numerous instances in other jurisdictions, with similar title registration regimes, of fraudulent transfers and charges involving the use of forged powers of attorney. As part of the PRA counter-fraud strategy, PRA practice is set out below.

(i) Henceforth it will be a requirement that a power of attorney be accompanied by a legal statement from the solicitor for the donee that they have reviewed and discussed the original signed and witnessed power with their client donee, and the clients have confirmed that they are the lawful party named in the document, that it is still in force and that they are acting within the scope of the power

granted.

(ii) A solicitor's statement in the terms set in sub-paragraph (i) above shall not be required in the case of a receiver executing under a power of attorney contained in a security document. However the solicitor should confirm, in such cases, that the receiver who is executing under a power of attorney contained in a security document is a professional insolvency practitioner.

(iii) Where a financial institution appoint a named staff member or named office holder as attorney, the PRA will accept, instead of the statement set out in sub-paragraph (i) above, in relation to each application lodged depending on such power of attorney, a legal statement from the solicitor for the financial institution confirming that the donee was acting under a power of attorney dated day of 20 when s/he executed the deed of transfer (or other deed) dated day of 20 and that the power was still in full force at the date of the said deed and the donee was acting within the scope of the power granted.

John Murphy
Deputy Registrar

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6 May 2010

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