

## Can an attorney act as a trustee? A quick read

Synopsis: When attorneys, who are appointed under lasting powers, can act as trustees.

Date published: 16.04.2025

This is actually a question that comes up quite often. The question is, if a settlor has made a lasting power of attorney, can the attorney under the power exercise the powers of the donor acting as a trustee? So, the scenario is where an individual has usually settled their own trust, they are one of the trustees, and they also had appointed an attorney under a lasting power.

And then the question is, can the attorney step into the donor's shoes, into those trustee's shoes and exercise the powers of the trustee? To start with, it is important to say that what we're talking about here is subject to the law of England and Wales. There are different rules that apply in Scotland.

Well, the general rule is that an attorney, under a lasting power of attorney, cannot act as a trustee. Basically, they cannot step into the trustee's shoes. There's a very straightforward and simple reason for this. The lasting powers are dealt with under the mental Capacity Act 2005. This Act provides that an attorney has power over the donor's estate. So, it is important to know what a donor's estate is. These are the assets that belong to the donor in the donor's personal capacity. So, a trust estate, which is the assets held in trust, are not the same as the donor's estate. Basically, the rule is that an attorney cannot step into the trustee's shoes under the power.

There are, however, two specific exceptions to this rule, and this relates to delegation of powers. There are two possible scenarios...

- First of all, there is Section 25 of the Trustee Act 1925, which allows a trustee to delegate trustee functions for a period not exceeding 12 months.

To do this it's necessary to execute a special power of attorney in specific words and the period must not be more than 12 months. Obviously, in order to execute such a power, the trustee who will be the donor of the power still must have capacity to do this.

- The second exception to the rule is that an attorney can exercise a trustee function of the donor if it relates to land or the capital proceeds or income from land in which the donor has a beneficial interest.

This is provided for in section 1(1) of the Trustee Delegation Act 1999, which came into effect in 2000. Basically, the problem was for scenarios such as, for example, where an individual is life tenant under a trust, is occupying a property and is also a trustee. In such a case, if the individual has lost capacity but has appointed an attorney under power, then, in order to basically allow land or the house to be sold or dealt with in any way it is

essential that some rules exist that will allow this to happen without having to go to court. So, section 1(1) of the 1999 Act basically allows the attorney to act on behalf of the incapacitated donor, who is also a trustee, as long as that person has a beneficial interest in land.

Typically, there will be more than one trustee. So, if there is a requirement for all the trustees to be involved in the decision, for example proceeds of the sale of the house are being invested on behalf of the trust, then all the trustees need to make an application, and, subsequently, all the trustees need to deal with the investment. In such a case, the attorney can actually act on behalf of the donor trustee.

These are the only exceptions that are currently available.

You may have heard of an old exception for enduring powers of attorney where, actually, it was possible for an attorney to act on behalf of the trustee. However, it was, basically, not very good drafting which allowed this to happen. It was never intended, and it was repealed by the 1999 Act. It applied to certain powers which were registered before 2001, but not since. So, very occasionally, there may be such a case.

- But, in principle, the general rule is that attorney cannot step into the trustee's shoes except for those two exceptions to the rule. The first one is a delegation for up to 12 months where the donor still has capacity. And second is where it involves the sale of land and investment of the proceeds.

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