

LEONARD GRAY SOLICITORS

Wills, Tax and Estates Department

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A Guide to Enduring Powers of Attorney

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These notes are intended to be a general overview of the law in relation to the subject detailed above.

Legal advice on the issues and the application to a particular case should still be obtained.

This constitutes our understanding of the law as at December 2007.

THIS SECTION

- Donors and Attorneys
- Joint appointments
- Using the EPA
- Activation
- Revoking
- Further advice

What is an Enduring Power of Attorney?

This section of the guide describes what an Enduring Power of Attorney is. It is important to note that as of 1st October 2007, it is no longer possible to execute a new Enduring Power of Attorney. A similar authority can be conferred by a Lasting Power of Attorney (see our Guide to Lasting Powers of Attorney).

An Enduring Power of Attorney (“EPA”) is a very powerful, yet simple document which confers on another person or persons the right to look after an individual’s affairs.

The document

1. Donor

The Donor is the person who makes the EPA and gives to another person or persons the right to look after the Donor’s financial affairs.

2. Attorney

An Attorney is a person who receives power under an EPA to manage the Donor’s affairs.

3. Valid appointments of Attorneys

Any Attorney must be at least eighteen years old and cannot be bankrupt when they agree to accept the authority of the Power or later on.

When an appointment is made of more than one Attorney it is possible to appoint Attorneys, either jointly or jointly and severally. There are distinct differences in how this works.

4. More than one Attorney

If Attorneys are appointed **jointly**, then they must act together in making all decisions and signing all documents. This is similar to having a bank account where two signatures are required to operate that account.

The alternative way of appointing more than one Attorney is to do so **jointly and severally**. This type of appointment is much more flexible and allows either Attorney to make decisions on behalf of the Donor and is similar to a joint bank account where only one signature is required to operate that account.

One important point which must be borne in mind is that if Attorneys are appointed **jointly** and one Attorney then loses mental capacity or dies, the entire document then becomes invalid. However, if Attorneys are appointed **jointly and severally**, if one Attorney becomes unable to use the Enduring Power, the other Attorney or Attorneys may continue to use it.

5. Appointing spouses and children as Attorneys

It is valid to appoint a spouse as an Attorney and then children to act as the Attorneys but only after the spouse has died. This arrangement is implemented by way of two separate Enduring Powers of Attorney with a restriction entered on the second in respect of the children saying that they cannot act until the spouse has either died or is no longer able to use the Enduring Power of Attorney.

6. Extent of the EPA

Once the document is complete, Attorneys can use it to do anything with the Donor's financial affairs that that person can do themselves, including selling property and operating bank accounts.

7. Mental capacity

A Donor must have had mental capacity to make an EPA. There is a test for this and it states that the Donor must be able to understand the following:-

(a) The Attorney can assume complete authority over the Donor's affairs and will, in general be able to do anything with the Donor's property which the Donor could have done himself/herself;

(b) The authority will continue if the Donor should be or become mentally incapable and in that event the Power will be irrevocable without confirmation of the Court of Protection.

Providing the Donor can understand these points when the document is signed, their EPA should be valid.

8. When it can be used

An Enduring Power of Attorney can be used as soon as it has been made to manage the Donor's affairs even before they lose mental capacity. If the Donor of the Power then loses mental capacity before the Attorney has to arrange to register the EPA (See section 2). Once registered, they can continue to use the EPA.

In deciding if a Donor has lost mental capacity, the test for mental capacity described below would need to be applied.

9. Using or "activating" the EPA

If the Donor feels it is necessary for the Attorney to start using the EPA, providing the Donor has not lost mental capacity, the Donor can start to look after part or all of their financial affairs.

They would do this by approaching whichever institution (ie, bank, building society, Benefits Agency, etc) they needed to contact and furnishing them with either the original or a certified copy of the EPA. The institution would then accept their instructions on behalf of the Donor.

The EPA can either be activated on a piecemeal basis or all organisations can be notified at once – there is no rule as to how this is done.

10. Revoking an EPA

The easiest way of doing this is to either destroy the EPA or sign a Deed of Revocation. If the Power is registered with the Court of Protection then they must authorise the revocation.

11. Storage

The original EPA should always be stored some where safe in case further copies of it have to be taken. Organisations will accept copies of the original **provided** the copies have been certified by a Solicitor.

12. Can Attorneys charge?

Professional Attorneys, such as Solicitors and Accountants, can charge for their time. Non-professional Attorneys cannot generally charge for the time that they spend assisting the Donor but they can recover out-of-pocket expenses such as money expended on petrol or telephone bills in managing the Donor's affairs.

13. Further advice

Having read this guide, if you would like any further advice please do not hesitate to contact Clive Burrell of our office who is the head of our Private Client department. He can be contacted on 01245 504904 or by email on cburrell@leonardgray.co.uk.

THIS SECTION

- When
- Procedure
- Objections
- Differences

Registering an Enduring Power of Attorney

This section deals with the procedure known as Registration. It is carried out with the Office of the Public Guardian, a government department appointed to look after the interests of individuals who no longer have mental capacity.

Once an Enduring Power of Attorney is completed, it may be the case that it is not used for many years or at all. Alternatively it may be activated and used regularly. Regardless of how the document is used, if the Donor loses mental capacity it must be registered by the Attorney.

Registration

1. When an EPA must be registered

If a Donor has become or is becoming mentally incapable the EPA should be registered.

2. Procedure

There is no need to supply any evidence to the Court of Protection of the Donor's incapacity and therefore a medical report is not necessary.

There is a set procedure involving notifying relatives to be followed which is generally conducted by a Solicitor in the course of the Enduring Power of Attorney application proceedings. There is a fee, currently £120.00 payable to the Office of the Public Guardian. Providing the document is valid and there are no objections from any relatives as to registration the document will be registered and the Attorney can then proceed with using it to manage the Donor's affairs.

This procedure takes around five weeks.

2. Potential objections to registration

There are only limited grounds upon which an objection can be made against a proposed registration of an Enduring Power of Attorney. These are:-

- (a) The EPA is not valid.
- (b) The EPA no longer subsists.
- (c) The application is premature.
- (d) Fraud or undue pressure was used to induce the Donor to make the Enduring Power of Attorney.
- (e) The Attorney is unsuitable.

3. Differences between Unregistered and Registered EPAs

An Attorney will have no more power under a registered EPA. It does however mean that because the Donor of the Power would have lost mental capacity, they can no longer terminate or revoke the Enduring Power of Attorney. Also, because the Donor will have been deemed to have lost mental capacity they will no longer be able to manage their own affairs as they would have been able to if the Enduring Power of Attorney was still unregistered.

THIS SECTION

- Benefiting others
- Gifts
- IHT planning gifts
- Long term care

Acting under a Registered Enduring Power of Attorney

In this section we look at how Attorneys should act where an EPA has been registered and they are looking after the financial affairs of the Donor who has lost mental capacity.

This is often an area where Attorneys feel they need advice. This is because with the Donor having lost mental capacity they are in sole charge of the Donor's financial affairs. It is important Attorneys understand their obligations and duties in these circumstances.

The Registered EPA

1. Can Attorneys use the Donor's assets to benefit themselves or other people?

This is possible but only to the extent that the Donor may have made provision in the past. Again, a restriction can be entered in the Enduring Power of Attorney to prevent any money being used to benefit other people. However, if, for example, a husband names his wife as his sole Attorney and he has maintained her from his own monies throughout his life she will, if she loses mental capacity, be able to use the Enduring Power of Attorney to continue maintaining herself.

Can gifts be made from the Donor's money?

Yes. Certainly, seasonal gifts such as birthdays and Christmas can be made from the Donor's estate. The value must be reasonable having regard to the size of the Donor's estate and an estate of low value should not be used to therefore provide large gifts.

If a Donor was supporting a charity or might have been expected to support them then gifts could also possibly be made to that charity. Again, it is important that

the size of the Donor's estate is considered carefully before making such a gift as any gift must be reasonable in the circumstances.

What about Inheritance Tax planning gifts?

Often elderly people consider the gifting of large sums of money to relatives such as their children in order to ease the Inheritance Tax bill on their death. If an Attorney feels that in the circumstances such a gift is necessary, taking into account the relevant circumstances, they must make an application to the Court of Protection. A Medical Certificate must be completed by the Donor's medical attendant and evidence by Affidavit must be submitted. Providing the Court approves the gift, and they are likely to do so if it is reasonable in all the circumstances, then the gift can be made. However, Attorneys should be very careful as if large gifts are made without obtaining authorisation from the Court they could end up becoming liable for any loss which is made to the estate.

What about gifts made to seek to reduce any liability to the Local Authority for long term care?

In some circumstances, older people consider giving assets away to reduce the amount of their estate which could potentially pass to a local authority if they were to enter long term care.

The Court of Protection does not view gifts of this sort favourably.