

# A Guide to

# Registration and Use of an Existing Enduring Power of Attorney

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- Understand how an existing Enduring Power of Attorney can be used.
- Understand how and when an Enduring Power of Attorney must be registered.
- Understand the obligations and duties of an Attorney.

*This Guide has been designed to assist you with some of the general issues and to answer questions that you may have. This Guide is only intended to be a general overview of the law in relation to the registration and use of an Existing Enduring Power of Attorney. Legal advice should always be obtained from Leonard Gray in application to a particular case.*

## Section

### 1

# Use of an Existing 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 was no longer possible to execute a new Enduring Power of Attorney. A similar authority can now be conferred by a **Lasting Power of Attorney** instead.*

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.

## 1. The EPA

The document sets out the roles in which someone can act, which can be summarized as follows:

- The Donor

The Donor is the person who made the EPA and has given to another person or persons the right to look after the Donor's financial affairs.

- The Attorney(s)

The Attorney is a person who receives power under an EPA to manage the Donor's affairs. Any Attorney must have been at least eighteen years of age and cannot have been bankrupt when they agree to accept the authority of the Power.

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, as follows:

a) Jointly

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.

b) Jointly and Severally

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.

## **2. The 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.

An EPA 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 below). Once registered they can continue to use the EPA.



### **3. 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 (i.e. the bank, building society, Benefits Agency) they needed to contact and furnishing them with 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.

### **4. 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 Office of the Public Guardian then they must authorise the revocation.

### **5. Storage**

The original EPA should always be stored some where safe in case further copies of it have to be taken. Leonard Gray store all EPA's in the firm's strongroom for safekeeping. Organisations will accept copies of the original provided the copies have been certified by a Solicitor.

### **6. Can an Attorney 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.



*The next Section of the Guide details the requirements for the registration of an EPA.*

## Section 2

# Registering an Enduring Power of Attorney

*This Section of the Guide 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 always be registered by the Attorney.

### 1. When an EPA Must Be Registered

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

### 2. Registration 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 £82 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.

### **3. Potential Objections to Registration**

There are only limited grounds upon which an objection can be made against a proposed registration of an EPA which are as follows:

- The EPA is not valid;
- The EPA no longer subsists;
- The application is premature;
- Fraud or undue pressure was used to induce the Donor to make the Enduring Power of Attorney; or
- The Attorney is unsuitable.

### **4. Differences Between an Unregistered and a Registered EPA**

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 EPA. 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 EPA was still unregistered.

*The next Section of this Guide looks at how an Attorney may use the power granted under an EPA.*

**Section  
3**

## **Acting Under a Registered Enduring Power of Attorney**

*In this Section of the Guide 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.

### **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.

### **2. Gifts From the Donor's Finances**

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.

### **3. 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 approve 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.

### **4. Gifts Seeking to Reduce 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 do not view gifts of this sort favourably.

*The next Section of this Guide will look at how to make an appointment.*

## Section 4

# Making an Appointment

If you would like to discuss the issues raised in this Guide further then please contact a member of our team: **Chris Kelly**, **Jenna James** or **Sigourney Rutkowski** who will be happy to do so.

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We are based in Chelmsford town centre, a two minute walk from Chelmsford Rail Station with car parking and disabled access at the rear of our office for the use of clients.

Open Monday to Friday, 9am to 5pm. Alternative times by arrangement.

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