

The role of an attorney under an Enduring Power of Attorney

Introduction

An Enduring Power of Attorney (EPA) is a form of power of attorney whereby one person (the 'donor') appoints one or more persons ('the attorneys') to make decisions and which (unlike an ordinary power of attorney) continues to operate if the donor lacks capacity. However, in that situation, an EPA can only operate if it is registered.

The Mental Capacity Act 2005 (MCA) which came into effect on 1 October 2007 replaced EPAs with a new Property and Financial Affairs Lasting Power of Attorney (LPA). Although an EPA can no longer be made, a valid EPA in existence before 1 October 2007 continues to be effective. The attorney's duties are unchanged, save that the rules governing the operation of EPAs are set out in the MCA and in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; and where an attorney makes a decision on behalf of the donor where the donor lacks capacity, that decision must be in the donor's best interests.

Where a new power of attorney needs to be made then a person (who has capacity) may make an LPA. For further details on LPAs please contact us or refer to our information sheet "Lasting Power of Attorney: frequently asked questions".

Your role as an attorney is an important one which carries with it a great deal of responsibility. This information sheet is designed to give some general guidance and information to assist you in carrying out that role.

Use of the EPA as an ordinary power of Attorney

Unless the EPA contains a specific restriction, it can also be used at any time as an ordinary power of attorney on the authority of the donor so long as the donor has capacity. A donor may for instance instruct the attorney to help with day to day finances or investments, while being able to understand what the attorney is doing.

If we are holding an EPA for a donor who has capacity then we can only release the EPA (or a certified copy) to the attorney if we have the express consent of the donor.

If we are holding an Enduring Power of Attorney for a donor where there is a suggestion that he lacks capacity then we can only release the original EPA to the attorney if we are provided with evidence of the donor's loss of capacity.

When must the EPA be registered?

The attorney must apply to the Office of the Public Guardian (OPG) to register the EPA when the donor is, or is becoming, mentally incapable, by reason of mental disorder of managing his property and affairs. Many EPAs are prepared and used long before this situation arises and it is often unclear whether or when the EPA needs to be registered. There is often a 'grey area' between where the donor needs some help and guidance and is sometimes forgetful and where the donor lacks capacity to make any decision. Many attorneys are reluctant to take a step that may seem invasive or insensitive.

Head Office

Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway

Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

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Where there is doubt on this, further advice should be taken. The presumption of the MCA is that early registration is preferable to leaving it too late and it may be possible to work with the donor to explain the process and allow the donor to participate in this and future decision-making as far as possible.

Please note that if the donor does lack capacity then the EPA is effectively invalid unless and until it is registered. As it may take several weeks for this to be done, an attorney does have limited authority to act so long as his application has been made. The attorney's authority is however limited to making such decisions as are necessary to maintain the donor and prevent loss to the donor's assets.

Registration of the EPA

The registration process is straightforward and protects the attorney from the risk of exceeding his authority (and being personally liable for the consequences), and provides the donor and the donor's family with an opportunity to object if they believe that registration is unnecessary or the attorney is unsuitable.

For further details please refer to the information sheet "Registration of an Enduring Power of Attorney."

What can an attorney do under an EPA?

As an attorney you can make most legal decisions that the donor could make in person. Some decisions, such as making gifts, are restricted by the Mental Capacity Act (see below), while others such as the making of a will or settlement are prohibited altogether. The EPA in this case relates only to the donor's property and financial affairs

and not to the making of any welfare decisions. However, an EPA should always be exercised to support the welfare of the donor. Thus you could not (as an attorney) consent to a particular medical treatment but you can ensure that funds are made available to provide the donor with the best level of care.

Can an attorney make gifts?

An attorney acting under an EPA has very limited power to make gifts on behalf of the donor. Unless there is a restriction in the EPA, gifts can only be made:

- 1 if of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor;
- 2 to any charity to whom the donor made or might be expected to make gifts.

Provided that 'the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.'

An attorney may also maintain or provide for any person whom the donor might be expected to provide for.

Where the donor lacks capacity the Court of Protection can – on a formal application by an attorney or other person – make larger gifts on behalf of the donor. If there is any doubt as to whether a particular gift or other provision can or should be made, then an application should be made to the Court of Protection.

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Legal obligations

As an attorney you also have obligations under the MCA and the general law and must, in particular:

- 1 not exceed the scope of your authority under the EPA or in law
- 2 apply relevant standards of care and skill (duty of care) when making decisions (which would include obtaining appropriate advice where necessary)
- 3 carry out any express instructions (which the donor has capacity to provide)
- 4 not take advantage of your position and not benefit from acting as an attorney (if there is a conflict of interest then the matter in question should be referred to the Court of Protection)
- 5 not delegate decisions, unless authorised to do so
- 6 act in good faith
- 7 respect confidentiality
- 8 not give up the role without telling the donor (if the donor has capacity) and the OPG
- 9 keep the donor's money and property separate from your own money and property
- 10 keep accounts (or at least clear records to show what financial matters you have dealt with)
- 11 respond to any enquiries from the OPG (who has the statutory responsibility to monitor the operation of EPAs).

Acting in the best interests of the donor

The requirement to act in a person's best interests is a fundamental requirement of the MCA. An attorney (or any other person or body making a decision on behalf of another who lacks capacity to make that decision) is required by the Act to act in that person's best interests. In deciding whether or not you can make a decision, or in making a decision on behalf of the donor, you must:

- 1 not make assumptions based on the donor's age, appearance or condition
- 2 consider whether the donor will regain capacity
- 3 encourage the donor to participate in any decision made or act carried out on behalf of the donor
- 4 consider the donor's past and present wishes and feelings, beliefs and values (and in particular any written statement) and
- 5 where practical and appropriate consult the views of
 - a anyone caring for the donor
 - b close relatives and anyone else with an interest in the welfare of the donor
 - c any attorney appointed by the donor under a Lasting Power of Attorney
 - d any deputy appointed by the Court of Protection.

Avoiding problems

Although the obligations of an attorney may appear daunting, they can be undertaken readily if they are acted on with common sense and integrity. Problems often arise

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where there is a lack of understanding over what an attorney may or may not do where one attorney fails to co-operate with the other attorney or to consult with other relatives. It is important to keep in mind at all times that your responsibilities are to the donor and if you have any queries or concerns over your role, you should seek further advice.

If there is a dispute between attorneys, or an attorney needs to exceed his authority under the MCA, or if there are concerns about an attorney's conduct, then an application may need to be made to the Court of Protection to deal with the matter.

Ceasing to act as an attorney

Although you have agreed to take on the responsibilities of an attorney, you are not obliged to act indefinitely if you are unable or unwilling to act. You must however complete a formal disclaimer and, where the EPA has been registered, notify the OPG; if the EPA has not been registered, the donor must be notified.

An EPA is revoked by law in the event of the death or bankruptcy of the donor. The EPA is revoked in favour of an attorney (without affecting the appointment of another attorney where they are appointed jointly and severally) if the attorney is bankrupt, dies or loses capacity. The Court of Protection also has authority to revoke the appointment of an attorney.

If the donor is left without an attorney to manage his property and affairs then urgent steps should be taken to prepare a LPA if the donor has capacity or, if the donor lacks capacity, apply to the Court of Protection for the appointment of a deputy.

The donor's will

Any will made by a donor while he had capacity is a privileged document and cannot be disclosed in favour of or by an attorney without the consent of the donor while he has capacity. However, if the donor has lost capacity it is important for the attorney to have sight of the donor's will when dealing with the donor's estate and in particular when disposing of any property. If there is no instruction to the contrary within the EPA, a full copy of the will may be disclosed to the attorney, unless the disclosing solicitor has cause for concern. Any changes to the will of a person who lacks capacity to make a new will can only be authorised by the Court of Protection.

Disclaimer

This information sheet is written as a general guide. As any course of action must depend on your individual circumstances, you are strongly recommended to obtain specific professional advice before you proceed. We do not accept any responsibility for action which may be taken as a result of having read this information sheet.

The law is stated as at September 2021.

At Thomson Snell & Passmore we have a great deal of experience in acting for attorneys and as attorneys as well as in all aspects of Court of Protection proceedings. If you require further information, please discuss with your usual contact in the firm or Louise Mathias-Williams or Una Angus, on 01892 510000 or by email at:

l.mathias-williams@ts-p.co.uk
una.angus@ts-p.co.uk

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