
ENDURING POWERS OF ATTORNEY

What is a Power of Attorney?

It is the appointment by one person (called the donor) of an agent (called the attorney) to do things on behalf of the donor.

What is special about an Enduring Power of Attorney (EPA)?

An enduring power of attorney continues (or endures) through the donor's incapacity. Until 1988 when enduring powers of attorney became possible under the Protection of Personal & Property Rights Act 1988, an attorney could do no more than the donor was able to do personally at the time. That wasn't much use if the donor was incapacitated.

Does the Attorney immediately take over the donor's affairs?

Definitely not. The donor can (and should) continue to look after their own affairs for as long as possible. Only if the donor becomes incapable of looking after their own affairs should the attorney act without instruction from the donor.

Can an Enduring Power of Attorney be revoked?

The donor can revoke an enduring power of attorney at any time. If they do not have the mental capacity to do so, a Family Court Judge can revoke the enduring power of attorney.

Does the Power of Attorney only deal with assets?

The Act authorises two types of enduring powers of attorney:

- One dealing with property;
- One dealing with personal care and welfare.

Who may be appointed as an attorney?

You may appoint just about anyone you want to, although clearly it has to be somebody you trust. It may be your spouse, partner, a child, other relative, friend or professional adviser. From time to time a partner in our firm is asked to act as attorney. .

What is taken into account in making that decision?

There are a number of points:

- Under current regulations the donor and attorney may not have the same legal adviser. This can make it expensive for spouses to appoint each other if they normally use the same lawyer. Until those regulations are amended, it may be preferable to consider appointing others to be enduring attorneys in case of need, with protection built in to ensure your spouse is consulted and is entitled to information. You can also give your spouse an ordinary power of attorney for use while you are still capable.
- We think that considering your trustees as enduring attorneys is a good start. After all, in your will you have named people you trust to look after your assets when you die. An enduring power of attorney appoints people you trust to look after your affairs while you are still alive but possibly unable to deal with them yourself.
- It is possible to appoint substitute attorneys although the substitute can only act if the first attorney ceases to act for some reason. We think it is a good idea to

appoint one or two substitutes just in case your attorney is unavailable for some reason when you need assistance.

- For your property enduring power of attorney you may appoint attorneys jointly. We think that in many cases that is a good idea. It means that your affairs have to be handled by two or more people acting together.
- For your personal care and welfare you can only appoint one attorney at a time, but substitutes can still be named.

Are there any limits on what an attorney can do under an EPA?

Your attorney can only do what you authorise that person to do in the written enduring power of attorney. You could set out in the document quite specific things which the attorney is authorised to do.

We find that most donors, once they have nominated an attorney whom they trust, are happy to give them full powers over their assets, ie. the attorney can do anything with the assets that the donor could do.

Will the Property Enduring Power of Attorney cover all the Donor's property?

Yes it will, unless you want it to relate to specific property only. Again, we find that most donors are happy to provide that the power will extend to all property.

When does the Power of Attorney start?

For the property enduring power of attorney the donor has a choice. It can start immediately it is signed by the donor and attorney, or it can start when the donor becomes "mentally incapable". We find that most donors are happy to have it start immediately so that they can use it if they go overseas or are ill for a short time.

A personal care and welfare enduring power of attorney only starts when the donor becomes mentally incapable.

What does "Mentally Incapable" mean?

It is defined in the Personal and Property Rights Act 1988 as actually meaning mentally or physically incapable. An accident victim who loses the use of all limbs but who can still communicate would be physically incapable of signing documents and therefore "mentally incapable" for the purposes of triggering an enduring power of attorney. There is a presumption that the donor has capacity and a medical certificate is required to show they do not so that the power of attorney comes into operation.

Can everyone grant an Enduring Power of Attorney?

The only people who cannot grant an enduring power of attorney are persons who are:

- Under 20 years of age;
- Bankrupt;
- Already mentally incapable.

What are the alternatives to an Enduring Power of Attorney?

The only real alternative is a Court Order. Unfortunately it is an expensive option.

Disclaimer – The information contained in this pamphlet is of a general nature and should be used as a guide only. It should not be used or relied upon as a substitute for detailed advice or as a basis for formulating decisions. Before acting, clients should consult a partner of this firm.
