
Registering Enduring Powers of Attorney

You can no longer make new Enduring Powers of Attorney, as these were replaced in October 2007 with Lasting Powers of Attorney.

However, if your loved one has an Enduring Power of Attorney that was made before October 2007, then it is still valid and can be registered and used if they lose capacity.

How does registration change the status of the Enduring Power of Attorney (EPA)?

The EPA must be registered when the Donor (the person who made the EPA) has become, or is becoming, mentally incapable. Registration does not change the powers granted to Attorneys under the EPA but it does bring about three important changes:

- The Attorneys must now answer to the Office of the Public Guardian (OPG) or the Court if anyone questions their actions; and
- The Donor cannot end the EPA without confirmation from the Court; and
- The Attorneys cannot disclaim (retire) unless they give notice to the OPG.

Can the Donor still manage their own affairs?

Registering the EPA means that the Attorneys take over full responsibility from the Donor for managing their property and affairs. This means the Donor will be considered as unable to manage their own affairs.

Should the Donor feel they are capable of being involved in managing some aspects, it is for them and their Attorneys to decide how this should work. Please ask us if you have any queries about this.

Can the Donor make a Will?

Yes, a Donor can make a Will or codicil (an amendment to a Will) in the same way that anyone can. However, if the Will or codicil is made after the EPA has been registered it

may encourage others to challenge it after the Donor's death on the basis that the Donor may have lacked the testamentary capacity to make it.

It can be complicated to resolve the question of capacity after the Donor has died, and therefore it is advisable to seek legal and medical advice if the Donor wishes to make or makes a new will after the EPA is registered. Please speak to us if you have any concerns.

If you have concerns about a Donor's Will (or if they don't have a Will), we can advise you about this and also assist in applying to the Court to have a Statutory Will made, if required. Please ask us for more information about Statutory Wills.

Can the Donor cancel their EPA?

If the Donor has the mental capacity to do so, they can cancel their EPA at any time, provided that it has not yet been registered. If the EPA has been registered, it cannot be revoked unless the Court confirms the revocation.

To revoke an EPA the Donor signs a formal document called a 'Deed of Revocation' and we can prepare this document if necessary.

If the Donor cancels their EPA they may wish to consider making a Lasting Power of Attorney.

Can the Office of the Public Guardian or the Court of Protection appoint more Attorneys?

Neither the Court nor the OPG has the power to appoint more Attorneys or transfer the power to another person.

However, there are cases where the Court has revoked Powers of Attorney in cases where there has been an abuse of power, or where it is in the best interests of the Donor. In these cases, the Court may then decide to appoint a Deputy instead. Please ask us for more information about Deputyships.

What happens if the Donor dies?

If the Donor dies, the EPA automatically comes to an end. Please let us know as soon as possible should this occur so that we can notify the Office of the Public Guardian.

We can also assist with dealing with the administration of the estate of someone who has died.

What are the powers, duties and responsibilities of an Attorney?

The powers of the Attorneys will be set out in the EPA. Their duties and responsibilities include to:

- always act in the best interests of the Donor and consider their needs and wishes as far as possible;
- not take advantage of the Donor's position to gain any benefit for themselves;
- keep the Donor's money and property separate from their own and other people's; and
- consider the Mental Capacity Act and the Supporting Code of Practice when acting on behalf of the Donor.

Please just ask if you have any questions about these points.

What should the Attorney do with the EPA document?

The Attorneys will need to provide a certified copy of the EPA to the relevant people and organisations to prove they have authority to make certain decisions on behalf of the person who lacks capacity.

Should Attorneys keep accounts of their dealings?

Yes, Attorneys have a duty to keep separate accounts of their dealings for the Donor. They should have a list of the Donor's bank and building society accounts and other investments, as well as proper records for all of the Donor's income and expenditure. This includes receipts, bank statements etc. The Donor's money and assets should remain in the Donor's name.

The Court can direct that Attorneys produce accounts at any time. If satisfactory accounts are not produced, then the EPA may be cancelled.

After the Donor's death the Attorneys may be required to account to the Personal Representatives of the Donor's estate in relation to their dealings.

Can the Attorney sell the Donor's property?

All actions taken on behalf of the Donor must be in the Donor's best interests. If the Attorney believes that selling the property is in the Donor's best interests **and** the Donor is the sole owner of the property **and** the EPA allows it, then the Attorney may decide to sell the property.

Attorneys do not need approval from the Court or the OPG to sell the Donor's property. However, they must apply to the Court for permission if for any reason the sale is below market value or the Attorney or a family member wants to buy the property. If the Attorneys do not seek the Court's approval under these circumstances, then the sale may be challenged.

If the Donor has a registered Health and Welfare Lasting Power of Attorney, the Attorney may need to discuss matters about the sale of the Donor's property with any Attorneys appointed to make decisions about where the Donor lives.

Can the Attorney make gifts of the Donor's property?

The Attorney has limited powers to make gifts to themselves and others of the Donor's property. Seasonal gifts can be made, for example at Christmas or to mark other religious festivals, or on occasions such as anniversaries, births or marriage/civil partnership to people who are related or connected with the Donor.

Attorneys can also donate to any charity the Donor supported or might have been expected to support. The value of any gift must be reasonable and proportionate in relation to the value of the Donor's estate.

If larger gifts of money or property are to be made, for example, as part of planning for inheritance tax, the Attorneys must apply to the Court.

If a gift larger than the limits set is made without permission from the Court, it may have to be paid back.

Can the Attorney decide where the Donor should live?

The EPA does not give the Attorney the legal right to decide where the Donor should live. Please ask us should you need further guidance about this.

Are Attorneys remunerated for time and expense?

Professional Attorneys such as solicitors or accountants may charge for their services if the EPA provides for this. Attorneys are not normally paid for their work but can recover reasonable expenses such as postage, stationary and the cost of phone calls, from the Donor's estate.

What is considered to be a reasonable expense will vary according to the circumstance of each case. It depends on what the Attorney is required to do and also the value of the estate of the person who lacks capacity.

The OPG can look into any complaints that Attorneys are claiming excessive expenses. If expenses are considered unreasonable they may have to be repaid and in extreme cases the OPG may apply to the Court to cancel the Attorneys' appointment.

This is a complex area, so speak to us for professional advice about expenses.

Can Attorneys retire from their duties?

Yes, Attorneys can cease to act in this role at any time. This is known as 'disclaiming the power' and is done by signing a Deed of Disclaimer. We can prepare this document for you, if you require.

If the EPA is not registered the Donor should be notified of the resignation. If the EPA is registered, you must also notify the OPG.

If the retiring Attorney is the only Attorney of a registered or unregistered EPA and believes the Donor needs to have a Deputy appointed for them, they should try to find someone suitable to make an application to the Court to make decisions on the Donor's behalf.

We provide professional Attorney and Deputyship services and can provide you with advice and assistance should this occur.

If the Attorney is appointed **jointly** with another Attorney (i.e. they must always act together) and one of them retires from the role, then the EPA can no longer be used.

If the Attorneys are appointed **jointly and severally** (i.e. can act independently of each other **or** together) and one of them wishes to retire, the remaining Attorney or Attorneys can continue to act under the EPA.

How does the Office of the Public Guardian work with Attorneys?

The OPG does not supervise Attorneys or tell them how to manage the Donor's affairs, however the OPG will consider complaints about Attorneys where necessary.

If you'd like more information call [01904 866139](tel:01904866139)
or email hello@rochelegal.co.uk



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