



USING A REGISTERED ENDURING POWER OF ATTORNEY

Much of the information in this section also applies to using an EPA before it needs to be registered. If the EPA is unregistered and does not yet need to be registered, the donor should be consulted on many of the matters mentioned below.

The Public Guardianship Office and the Court of Protection will only deal with registered EPAs. They cannot give advice on using an unregistered EPA unless it needs to be registered.

The status of a registered EPA

The law says the EPA must be registered once the donor has become or is becoming mentally incapable. This does not change the powers of the person that has been acting as attorney. But it does bring about two important changes:

- they must now answer to the Court of Protection if anyone questions their actions;
- the attorney and the donor cannot end the EPA without agreement from the PGO or the Court.

Duties of an attorney

- the attorney must act in the best interests of the donor and consider their needs and wishes as far as possible;
- the attorney must not take advantage of the donor's position to gain any benefit for themselves;
- the attorney must keep the donor's money and property separate from their own and other people.

There are very limited powers to make gifts to themselves or others. Remember, they are managing someone else's money and have legal duties which must be respected.

Keeping accounts

There is a duty to keep accurate accounts of all dealings for the donor. These must be ready to produce these at any time. The accounts should include an initial list of the donor's:

- Property;
- Bank and building society accounts; and

- Other investments.

A full record of the entire donor's income and spending must be kept and vouchers relating to each item, including bank statements must be retained. The donor's money and assets should remain in the donor's name.

The Court of Protection can call on the attorney to produce accounts at any time. If satisfactory accounts cannot be produced, the Court may cancel the EPA. You may also have to account to any personal representatives or executors of the donor's estate.

Using the EPA

Everyone who needs to know should be told that the EPA has been registered. This includes banks, the Benefits Agency, the Inland Revenue, pension schemes, nursing homes and so on. These organisations will, in turn, probably need to see a certified or office copy of the registered EPA, although some may want the original.

Selling the donor's property

This can be done if it is felt that it is in the donor's best interests, and as long as there are no restrictions or conditions in the EPA which prevent it. It should be certain that there is no reasonable chance that the donor will be able to return to live at home. Other options such as letting the property should be explored.

There is no need for approval from the PGO or the Court of Protection but they must be contacted if for any reason:

- The sale is below the market value;
- The attorney wants to buy the property themselves; or
- The attorney wants to give it to someone else.

If there is no contact with the PGO about this, the EPA may be cancelled.

Making gifts

There are limited powers for the attorney to make gifts to themselves or others. Seasonal gifts (for example, Christmas presents), or gifts on occasions such as anniversaries, births or marriage to people who are related to or connected with the donor (including the attorney) may be made. Donations to any charity the donor supported or might have been expected to support may also be made. But the value of any gift must be reasonable, particularly in relation to the value of everything the donor owns.

Larger gifts

If the attorney wants to make larger gifts of money or property, perhaps as part of planning for Inheritance Tax, an application to the Court must be made. The Court needs:

- Form EP3;
- A medical certificate which confirms that the donor is mentally incapable; and
- Evidence, including sworn statements.

The Judicial Support Unit at the Court of Protection can give details of what happens next.

If a gift greater than the limits set is given without permission from the PGO or the Court, it may have to be paid back.

Expenses

Professional attorneys, such as solicitors or accountants, may charge. Other attorneys would not normally be paid but can recover reasonable expenses such as postage, stationery and the cost of phone calls. Advice on this is available from the PGO or from ourselves.

Donor making a Will

It is unlikely that most donors of registered EPAs could make a valid Will or Codicil (addition to a Will) because of their mental status. However, if a doctor and a solicitor consider that the donor is mentally able to make a Will, the attorney does not need the permission of the PGO for it to be drawn up and signed. Legal and medical advice is essential.

Can an attorney make a will for the donor

No. If the donor is not mentally able to make a Will but one is needed, an application to the Court for a statutory Will can be made. We will advise on this and if necessary contact the Judicial Support Unit at the Court of Protection.

Contents of a donor's will

The attorney does not have a right to know the contents of the donor's will because a Will is confidential. However, you can apply to the Court if:

- It is believed the attorney needs to see the Will to help them carry out their duties; and
- The person or solicitor who holds the Will refuses to show it to the attorney.

Property left to someone by the donor

The duty of an attorney is to consider the donor's interests over the interests of someone who might inherit something the donor owns. If it is known that the donor has left something in their Will to someone else and the attorney now wants to sell it, consideration needs to be given as to whether this can be done so as to respect the donor's wishes. Legal advice on what to do may be needed and we would be pleased to help.

Ceasing to be attorney

Attorneys can stop at any time. This is known as “disclaiming the power”. If the EPA is registered, the attorney should write to the PGO. Or we can prepare a “Deed of Disclaimer”. It would be helpful if the attorney could suggest how the donor’s affairs should be managed in the future, and who would be willing to do this. If there is only one attorney, the usual alternative is for someone to apply to the Court to appoint a receiver.

Joint attorneys

If one of the attorneys wants to give up, the EPA can no longer be used. The donor’s affairs will have to be managed in another way. We will be glad to help in this event.

Joint and several attorneys?

The remaining attorneys can usually continue to act under the EPA, but they should tell the PGO about the change. They may need to limit registration to the remaining attorneys.

Making another EPA

Since the 31st October 2007 no new EPA’s can be made.

Supervision from the PGO

The PGO do not usually supervise attorneys or tell them how they should manage donors’ affairs.

Advice

If advice is needed on practical, financial or legal matters, help is always available from us. If a particular matter is especially complicated we may consult the P.G.O.

Powers of the Court of Protection

The Court of Protection has powers to intervene in running a registered EPA if anyone suspects you are not acting in the donor’s best interests. It may also ask you to answer for your dealings, provide information and documents, or explain why you did certain things. The Court has the power to suspend or end your duties.

Extra copies of the EPA

The original EPA is an important document and it should be kept in a safe place. If extra copies are needed to show banks or other organisations, please ask us to produce certified copies. If this cannot be done for any reason, the PGO can provide office copies free of charge if requested.

Cancelling or ending the EPA

The Court can cancel the registration or end (revoke) the EPA if a successful application for cancellation is made, and in certain other circumstances. A donor can also end a registered EPA if the Court agrees and is satisfied that the donor is mentally able to make this decision.

Additional attorneys

No one can add extra attorneys to a registered EPA.

Donors continuing to manage their affairs

It is difficult to offer general advice on this point. If further advice is needed, please contact us.

Registering an EPA usually removes the donor's power to manage their own affairs. But other organisations, such as banks or post offices, may be willing to allow a donor to carry out certain transactions with safety measures in place. Donors may feel their independence has been taken away and may, for example, want to continue to collect their pensions. You can sometimes make arrangements for this with the local bank or post office.

Deciding where a donor should live

The EPA does not give the attorney, the legal right to decide where the donor should live. However, the financial dealings they have to carry out for the donor may mean having to consider the financial impact of where the donor lives.

When the donor dies

The EPA automatically comes to an end. The original EPA and the death certificate should be sent to the PGO as soon as possible. They cannot give advice on how to deal with the donor's estate. Please do not hesitate to contact us if advice is needed in this instance.

AUSTEN WHETHAM & GUEST

21 South Street
BRIDPORT
DT6 3NR

SRA No: 000463777

Tel: 01308 422236
Fax: 01308 427772

Email: info@awg-law.co.uk
www.awg-law.co.uk