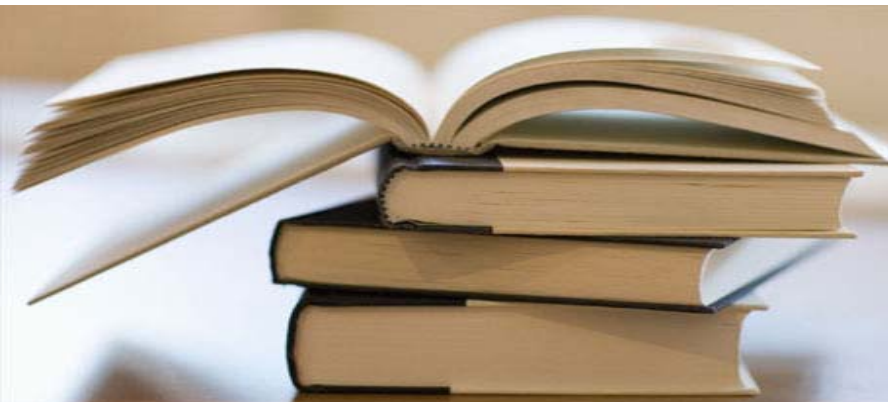


OHT Guide

Enduring Power of Attorney



Setting up an Enduring Power of Attorney (“E.P.A.”).

What is an EPA?

An Enduring Power of Attorney is a document enabling a person to make provision during his lifetime for an attorney to take over if he ceases to be able to look after his own affairs due to an accident, or to a stroke, dementia or similar disability.

In the event of a person’s death his Will takes effect so his personal representative takes over the management of his affairs. In the event of a person living after an accident or illness such as a stroke, but maintaining mental capacity, he can continue to deal with his own affairs. However if a person is injured, or suffers an illness which impairs his mental ability but does not kill him he enters into a legal “limbo” as he cannot legally manage his affairs, but no-one else (not even a spouse who holds assets jointly with him) has legal authority to take over.

The Enduring Power of Attorney legislation is designed to deal with a living loss of mental capacity, by providing that if the person has signed an EPA, then his EPA attorney has legal authority to take over his affairs if he loses mental capacity. The EPA lies dormant while the donor is in full health, as it is not needed; but it can be registered to take effect in the event that the person who gave it (“the Donor”) becomes mentally incapacitated.

If there is no EPA and a person has lost capacity and if it is necessary for someone to deal with his property an application can be made to the Wards of Court Office to have the person made a Ward of the State.

Who Can be an Attorney?

An EPA Attorney must be an adult (i.e. over eighteen) or a trust corporation. There are certain restrictions, for example a person who has been adjudicated bankrupt cannot be an EPA Attorney, and neither can the owner or any employee of a nursing home where the Donor lives.

An E.P.A. in favour of a spouse ceases to have effect if there is a legal separation between the spouses or if the

spouses divorce.

What can an EPA Attorney do?

The EPA appoints an attorney to legally take over making decisions for the incapacitated donor. It is generally advisable to nominate two Attorneys and they can be appointed to act jointly or with one acting as a substitute if the other Attorney is unable or unwilling to act.

The EPA document determines what the attorney can do on behalf of the Donor. The Donor can decide when signing the EPA to leave the terms very wide or to include key restrictions. An EPA Attorney will often be authorized to take financial decisions (e.g. selling property to cover expenses) and personal care decisions (e.g. deciding where the Donor will live). The Attorney has a duty to make personal care decisions in the Donor’s best interest and insofar as possible in accordance with what the Donor would have decided had he been capable.

The Attorney must consult family members and carers in making personal care decisions, which may include the following:

- (i) where the Donor should live.
- (ii) who the Donor should see.
- (iii) selecting rehabilitation treatments.
- (iv) deciding on diet and dress.
- (v) dealing with personal papers.
- (vi) applying for housing, social welfare and other benefits.

Personal care decisions should be distinguished from health care decisions. An EPA Attorney would not to have the power to make a decision as to whether the Donor should undergo surgery.

What is EPA Attorney’s Role?

The main role of an EPA Attorney is to use the Donor’s assets to provide for the Donor’s needs, and the needs of any person who is dependant on the Donor (such as a



spouse and children). The Attorney can also provide for any person the Donor would normally have provided for (foster children etc). The meaning of "needs" is not clearly defined but it would generally cover food, housing, clothing, education etc.

The EPA Attorney may also make gifts on behalf of the Donor if the terms of the EPA are wide enough to permit it. These would normally be gifts on the usual occasions, e.g. Christmas, birthdays, weddings etc and gifts to charity. The question to ask is "*What would the Donor have done in these circumstances?*"

As the EPA Attorney has a fiduciary role of great trust he should keep accounts in relation to his management of the affairs of the Donor.

What are the Safeguards?

An EPA can give wide powers to an Attorney, and a person who is mentally incapacitated is very vulnerable so the legislation provides a number of safeguards.

The Donor must select two Notice Parties (at least one being a family member) neither of whom is an Attorney under the EPA. The Notice Parties must be notified that the EPA has been signed.

The family member Notice Party should be the Donor's closest relative (i.e. spouse living with the Donor, child, parent, sibling, grandchild, niece/nephew etc in that order).

A doctor must certify that the donor is capable of understanding the effect of the EPA. A solicitor must certify that the donor understands the EPA and that there is no duress or undue influence.

When is the EPA Activated?

The EPA remains dormant after it is signed, while the Donor retains his mental capacity. If the EPA Attorney feels that the Donor no longer has the ability to manage

his affairs and make his own decisions he activate the Power by registering it in the High Court. No steps can be taken under the EPA until it is registered.

The EPA Attorney must notify the Donor and the Notice Parties that he is applying to register the EPA. A doctor must certify that the donor is mentally incapable when the notice is given. Any person served with notice can send an objection to the Wards of Court Office within five weeks of receiving the notification.

How can an EPA be Terminated?

While the Donor remains mentally competent he can revoke the EPA at any time. If the EPA has been successfully registered it can only be revoked with court approval.

What is the High Court's Role?

The High Court has power to give directions about the management of an EPA Donor's property and can cancel a registered EPA if it is satisfied that the EPA Donor is mentally capable and likely to remain so, the EPA Attorney is unsuitable, or there has been some fraud or undue influence.

Legislation

EPAs are governed by the Powers of Attorney Act 1996 and the 1996 Regulations. Part 7 of the Assisted Decision -Making (Capacity) Act 2015 provides for new arrangements for EPAs but this legislation has yet not been commenced.

Who should have an EPA?

OHT would recommend that clients should consider signing an EPA if they are elderly, at high risk of accidents due to activities or hobbies, or keymen in a business which will have legal and practical difficulties if the client can no longer sign legal documents.

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Caveat: These notes are intended as a general guide to EPAs. OHT has endeavoured to provide an accurate commentary but the notes cannot cover all circumstances. OHT strongly recommends that formal tax advice be obtained before any steps are taken that may have a tax effect.