

Registering Enduring Powers of Attorney

It is no longer possible to make a new Enduring Power of Attorney (EPA). In October 2007, the EPA was replaced by the [Lasting Power of Attorney](#).

However, any EPAs that were made before 1st October 2007 are still valid. So, if a loved one made an EPA before the cut-off, it is still possible for that EPA to be used, and/or registered in the event of your loved one losing the capacity to make decisions for themselves.

This help guide examines when EPAs must be registered and how this can affect matters for you and your loved one. It also includes information on what you must do if you have been appointed as an Attorney under an EPA.

Registration

When does an EPA have to be registered?

An EPA must be registered when the Donor (the person who made the EPA) has become, or is becoming, mentally incapable.

Depending on its terms, an EPA usually allows the Attorneys (the people appointed to make decisions for the Donor) to use their powers even if the Donor still has mental capacity. However, if a Donor loses mental capacity or there are signs that they may be losing mental capacity, the EPA can no longer be used until it has been registered.

How does registration change the status of the EPA?

Registration does not change the powers granted to Attorneys under the EPA but it does bring about three important changes:

1. The Attorneys must now answer to the Office of the Public Guardian (OPG) or, potentially, to the [Court of Protection](#) if their actions are called into question.
2. The Donor will be unable to end the EPA unless they obtain confirmation from the Court of Protection.
3. The Attorneys will be unable to retire from their duties unless they give notice to the OPG.

Can the Donor still manage their own affairs after registration?

Registering an EPA means that the Attorneys will take over full responsibility of managing the property and affairs of the Donor. The Donor will be considered unable to manage their own affairs.

Should the Donor feel they are capable of being involved in managing some aspects of their affairs, it is for them and their Attorneys to decide how this should work. Roche Legal can provide specialist legal advice on making such arrangements.

Can the Donor make a Will?

As long as the Donor has the required mental capacity, they can make a Will or codicil (an amendment to a Will) in the same way that anyone else can. However, if this is being done after the EPA has been registered, it could encourage others to challenge the Will after the Donor's death – potentially arguing that the Donor lacked capacity at the time.

To establish whether someone has the required mental capacity to make a Will, a specific legal test is used. This is different from the test applied in most other situations where mental capacity is uncertain. For more information on this, and other tests to determine mental capacity, please read our separate ['Mental Capacity'](#) help guide.

It can be difficult to resolve the question of capacity after the Donor has died. Therefore, it is advisable to seek legal and medical advice if the Donor wishes to make a new Will after the EPA is registered.

It can also be problematic if changes need to be made to the Donor's testamentary arrangements, but the Donor no longer has the mental capacity to make the changes themselves. For example, they may not have made a Will, or their current arrangements would result in something happening which they would not have wanted. In these situations, it may be possible to apply to the Court of Protection to make a [Statutory Will](#).

If you would like to know more about Statutory Wills, have a look at our separate help guide – or please feel free to [get in contact with us](#).

Can the Donor cancel their EPA?

If the Donor has the mental capacity to do so, they can cancel their EPA at any time before it has been registered. As mentioned above, if the EPA has been registered, it cannot be revoked unless the Court of Protection confirms the revocation.

Revoking an EPA involves the preparation of a legal document called a Deed of Revocation, which the Donor will sign.

If the Donor cancels their EPA they may wish to make a Lasting Power of Attorney instead. Our separate help guide on [‘Replacing an Enduring Power of Attorney’](#) contains information on the benefits of switching to a Lasting Power of Attorney.

What happens if the Donor dies?

If the Donor dies, the EPA automatically comes to an end. It is important to notify the Office of the Public Guardian as soon as possible after the death of a Donor. You, and any other Attorneys, should immediately stop using your powers under the EPA. Because the EPA is no longer in effect, you will not have legal authority to deal with the Donor’s property.

If you would like advice on what to do when a loved one has passed away, please feel free to [contact us](#). Alternatively, our free e-book, [‘What to do When Someone Dies’](#) provides information to guide you following a death.

Acting as an Attorney

What are the powers and duties of an Attorney?

The terms of the EPA will set out the powers which have been granted to the Attorneys. You should read these terms carefully to ensure you are fully aware of what the EPA allows you to do on behalf of the Donor. If you are at all unsure, you should seek specialist legal advice.

Attorneys also have a number of legal duties and responsibilities as part of their role. They must:

- always act in the best interests of the Donor and consider the Donor’s needs and wishes as far as possible;
- not take advantage of their position, or of the trust the Donor has placed in them, 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 2005 and the supporting Code of Practice when acting on behalf of the Donor.

Our separate '[Mental Capacity](#)' help guide contains more detail on acting in the best interests of the Donor and the different aspects to consider when making decisions for them.

Some common questions on the extent of an Attorney's powers are considered below:

Can Attorneys 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 of Protection 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 Attorneys make gifts of the Donor's property?

Attorneys have limited powers to make gifts of the Donor's property, whether this is to themselves or to others. Seasonal gifts can be made, for example at Christmas or to mark other religious festivals, or on occasions such as anniversaries, births or marriages/civil partnerships. However, these must be to people who are related to, 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 of Protection.

The Court may order that any gifts which do not meet these criteria are to be paid back to the Donor.

Can the Attorney decide where the Donor should live?

An EPA does not give Attorneys the legal right to decide where the Donor should live. However, a Health and Welfare Lasting Power of Attorney can grant Attorneys the right to determine the Donor's living arrangements.

Practical considerations when acting as an Attorney

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 the Donor's income and expenditure. This includes receipts, bank statements etc. The Donor's money and assets should also remain in the Donor's name.

The Court can order Attorneys to 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 (the Donor's Executors or Administrators) in relation to their dealings.

Are Attorneys repaid for time and expense?

Professional Attorneys such as solicitors or accountants may charge for their services if the EPA allows for this. Lay 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 a reasonable will vary according to the circumstance of each case. It will largely depend on what the Attorneys are required to do and the value of the Donor's estate.

The OPG can investigate any complaints concerning Attorneys claiming excessive expenses. If expenses are considered unreasonable, the Attorney may have to repay them. In extreme cases, the OPG may apply to the Court to cancel the Attorney's appointment.

This is a complex area, so it is always advisable to seek professional advice before looking to recover expenses incurred as an Attorney.

What should the Attorneys do with the EPA document?

Attorneys will often need to provide a certified copy of the EPA document to relevant people and organisations. This is proof of their legal authority to make certain decisions on behalf of the Donor. You should keep the original EPA document safe at all times. When required to send the EPA document anywhere, you should send a certified copy instead to avoid the risk of losing the original document.

How does the OPG work with Attorneys?

The OPG does not supervise Attorneys actions or tell them how to manage the Donor's affairs on a day-to-day basis. However, the OPG will investigate, where necessary, any complaints they may receive about an Attorney's conduct.

Can the OPG 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 of the Court revoking Powers of Attorney where there has been an abuse of power, or where it is in the best interests of the Donor to do so. In such cases, the Court can decide to appoint a Deputy instead.

For more information on Deputies, including the similarities and differences between them and Attorneys, please read our separate help guide: ['Powers of Attorney -v- Deputyship Orders: What's the Difference?'](#)

Can Attorneys retire from their duties?

Attorneys can cease to act in their 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 has not been registered, you only need to notify the Donor of your resignation. If the EPA has been registered, you must also notify the OPG.

If the retiring Attorney is the only Attorney of the EPA (whether it is registered or unregistered), and believes the Donor needs to have a Deputy appointed for them, they should try to find someone who would be suitable to act as a Deputy for the Donor. That person can then make a [Deputyship application](#) to the Court so that they may have the authority to make decisions on the Donor's behalf.

Roche Legal offers professional Attorney and Deputyship services and we can provide you with advice and assistance should this be required.

If the outgoing Attorney has been appointed **jointly** with another Attorney (i.e. they must always act together), then the EPA can no longer be used after the resignation.

Alternatively, if the Attorneys have been appointed B (i.e. they can act independently of each other **or** together), the remaining Attorney or Attorneys can continue to act under the EPA.

How Roche Legal can help

Dealing with legal issues can be confusing and stressful. We understand this, and we're always on hand to untangle jargon and offer support.

If you need advice on any of the issues raised in this help guide, please don't hesitate to [get in touch](#). Roche Legal is an award-winning legal practice, offering practical and caring advice.

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