2024

A Guide to Enduring Powers of Attorney

FALKLAND ISLANDS COURT OF PROTECTION
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Part A: Introduction

About this booklet

This booklet is designed to assist those who have either made an Enduring Power of Attorney (EPA) or are acting as an Attorney under an EPA.

It explains what an EPA is for, who is involved in making an EPA and what is involved in registering an EPA.

It also sets out the roles of the Attorney and the Donor.

The glossary at Part F explains the key words and phrases used throughout this booklet and Part G sets out our contact details. All publications mentioned are available to download from our website.

Part B: Enduring Powers of Attorney

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a document appointing a person (an 'Attorney') to manage the property and financial affairs of another person (the 'Donor').

If the Donor becomes unable to make financial decisions, the EPA must be registered with the Court before it can be used or, if it is already in use, before it can continue to be used.

Can I make a Lasting Power of Attorney?

In the United Kingdom Lasting Powers of Attorney can be made for either financial and property matters or personal welfare. These have replaced Enduring Powers of Attorney. This is not the case in the Falkland Islands. In the Falkland Islands an individual is only able to make an Enduring Power of Attorney for financial or property matters.

What is 'Property and Financial Affairs'?

Property and financial affairs include matters such as a home, land, vehicles, personal possessions, bank accounts, pensions, investments and shares. It covers anything the Patient owns or over which they had a 'real' or 'financial interest' in, for example, income from any trust funds.

As more of our lives are moving into digital accounts, e.g. digital library, music, cryptocurrency, a Donor may wish to think about leaving a memorandum of digital assets with their EPA[1]. An Attorney must be mindful of accessing these accounts as it may be in breach of terms of service of the provider and may be a criminal offence. Legal advice should be sought in relation to digital assets.

[1] This is a document listing accounts, usernames and passwords.

Part C: Registering an Enduring Power of Attorney

When should an Enduring Power of Attorney be registered and by whom?

The Attorney is the person responsible for registering the EPA. This is because the EPA is only registered when the Attorney believes that the Donor is becoming or has become mentally incapable of handling his or her own affairs.

What if Attorneys are appointed to act 'jointly and severally'?

Attorneys appointed jointly and severally can act and make decisions independently of any other Attorneys, as well as together with them. Therefore, any one Attorney could apply to register the EPA alone. In this situation the COURT would only accept the application if all the other Attorneys had been properly notified of the application and given the opportunity to object to it. Registration will be effective in favour of all the Attorneys.

Where the Attorneys have acted together in deciding to register the EPA, all their names should be listed on the form EP1: Notice of intention to apply for registration of an Enduring Power of Attorney, notifying the relatives of the Donor –see Registration step. This will ensure that all the named Attorneys can act on behalf of the Donor once the EPA has been registered.

What if Attorneys are appointed to act 'jointly'?

Attorneys appointed 'jointly' must always act together, which means they must always agree before doing anything on the Donor's behalf. If one Attorney does not agree with a proposed action then that action cannot be taken.

If the Attorneys have been appointed in this way then all the Attorneys must apply to register the EPA together. If this is not possible then the EPA cannot be registered.

Registration Step 1: Notifying the relevant people

The Donor and **at least three** of their relatives must be notified of the intention to register the EPA.

In addition, any other Attorney that has been appointed 'jointly and severally' but did not participate in the application must be notified.

Each person must be provided with the EP1 form. There are instructions about completing it on the form itself.

The following are the categories of relatives who must be notified, in priority order.

i. Donor's husband, wife or civil partner;
ii. Donor's children (including adopted children but not stepchildren);
iii. Donor's parents;
iv. Donor's brother and sisters (including half brothers and sisters);
v. widow or widower or surviving civil partner of the Donor's child;
vi. Donor's grandchildren;
vii. Donor's nephews and nieces (children of the Donor's full brothers and sisters);
viii. Donor's nephews and nieces (children of the Donor's half brothers and sisters);
ix. Donor's aunts and uncles (who are full brothers or sisters of a parent of the Donor); and
x. Donor's first cousins (children of the Donor's aunts and uncles who are full brothers and sisters of a parent of the Donor).

If one person in a particular category is notified of the application, then everyone in that category must be notified.

Examples:

1) If the Donor has no husband, wife or civil partner but has 10 children, then all 10 of the children must be notified (not just three of them).
2) If a relative is under 18 or mentally incapable of understanding the notice, they cannot be counted as one of the three relatives who must be notified.
3) If an attorney is also a relative, they do not have to notify themselves, but they still count as one of the three relatives entitled to receive notice. For example, if the attorney is the son of the donor who has no living husband, wife or civil partner but has three children, only the other two children need to receive notice.
4) However, if the donor has no husband, wife, civil partner or parents alive, but has two children who are both attorneys and also has five brothers, the attorneys need to notify all the brothers.
5) If the last example is changed so that the donor has three children who are

What if a relative cannot be located?

All reasonable attempts must be made to locate the relatives who should be notified, in priority order. If this is not possible then the next most appropriate relative should be notified, to make up the requirement to notify at least three relatives.

What if fewer than three relatives are alive?

If this is the case then this should be explained on the application form.

What if telling people will upset the Donor?

If the applicant reasonably believes that giving notice to the Donor or their relatives would be particularly upsetting or undesirable, an application can be made to the Court for notice to be dispensed with. Evidence will be required to support this. The booklet COPGN: A Guide to Receiverships explains the process for making a Court application.

What happens if someone objects to the registration?

Any person who received the EP1 form is entitled to object to the application for registration. If there are objections then it may not be possible to register the EPA until all matters are resolved.

Only objections received within the timeframe set out on the EP1 form and on the following grounds are valid:

- the document made was not a valid EPA, for example it was not properly signed and witnessed or the Donor lacked capacity when it was made;
- the EPA no longer exists, for example it was previously cancelled;
- the application is premature because the Donor is not yet becoming mentally incapable;
- that fraud or undue pressure was used to induce the Donor to create the EPA; or
- that under the circumstances the Attorney is unsuitable to act on behalf of the Donor.

If a valid objection is received, the applicant will be advised that the application has been suspended and the steps they should take next. Only the Court can decide whether to uphold or dismiss the objection.

The Attorney can usually continue to manage the Donor's affairs and prevent loss to their estate, but should act with caution. Attorneys should seek advice if they are unsure about what actions they can continue to take on the Donor's behalf.

Registration Step 2: Submitting the application

The application form EP2: Application to register an Enduring Power of Attorney has accompanying guidance about how to complete it. The form and the guidance can be downloaded from our website or call us for a printed copy.

All information on the application form must be truthful and correct.

The application to register should be submitted to the court as soon as the relevant notifications have taken place and should include:

- the completed form EP2;
- the original; and
- the application to register fee (cheques payable to the court). See the court guidance on fees for more information.

What if the original Enduring Power of Attorney has been lost?

If the original EPA has been lost, destroyed or stolen a certified copy can be registered. If you submit a certified copy, you must confirm the loss of the original EPA in writing. An uncertified photocopy will only be registered on the Court's order.

Must there be medical evidence of lack of capacity?

No, the court does not require formal evidence that the person lacks capacity in order to register the EPA however, it is advisable to have some form of evidence.

How long does registration take?

The court will check that the application is complete and if there are any problems will contact the applicant or their legal practitioner if applicable.

If there are objections or queries then all matters must be resolved before the EPA can be registered.

If the application is complete and there are no objections or queries, we endeavour to register the EPA 35 days from the latest date that the last EP1 notice was sent.

We will return the registered EPA within five days of the date it is registered.

What if registration is refused?

If the Donor has lost capacity to manage their financial affairs but the application to register their EPA is refused then an application may have to be made to the Court of Protection to appoint a Receiver to make financial decisions on their behalf.

Booklet COPGN: A Guide to Receiverships provides more information.

Part D: After the Enduring Power of Attorney is registered

How does registration change the status of the Enduring Power of Attorney?

The EPA must be registered when the Donor 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 Attorney(s) must now answer to the Court if anyone questions their actions; and
- the Donor cannot end the EPA without confirmation from the Court; and
- the Attorney(s) cannot disclaim (retire) unless they give notice of this to the Court.

Can the Donor still manage their own affairs?

Registering the EPA means that the Attorney takes 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 Attorney(s) to decide how this should work.

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 (see the glossary at Part G) 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.

If you have concerns about a will made prior to registration you can also apply to the Court to have a statutory will made.

Can the Donor cancel their Enduring Power of Attorney?

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'. The Donor may wish to seek legal advice for assistance with this.

Can the Court of Protection appoint more Attorneys?

The court does not have the power to appoint more Attorneys or transfer the power to another person, nor does the Attorney.

What happens if the Donor dies?

If the Donor dies the EPA automatically comes to an end. The Attorney should send the original EPA and the death certificate to the Court as soon as possible. The court cannot provide advice about how to deal with the Donor's estate; this is a matter for a legal practitioner or other professional advisor.

Part E: The role of the Attorney

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

The powers of the Attorney 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; and
- keep the Donor's money and property separate from their own and other people's.

What should the Attorney do with the EPA document?

The Attorney may wish to provide a certified copy of the EPA to 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 accurate 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 of 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 Attorney 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 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 Attorney does not seek the Court's approval under these circumstances then the sale may be challenged.

Can the Attorney make the 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 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 the Attorney 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.

Can the Attorney decide on medical Care?

The EPA does not give the Attorney the legal right to make decisions about the medical care of the Donor.

How can the Attorney work out the Donor's 'best interests'?

Acting in the Donor's 'best interests' means the Attorney must make decisions for the benefit of the Donor and not necessarily for anyone else.

In working out 'best interests' think about:

- the Donor's past and present wishes
- their beliefs and values
- the views of family members and carers
- whether the Donor may regain mental capacity and if the decision can wait until then.

Are Attorneys remunerated for time and expenses?

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, stationery and the cost of phone calls from the Donor's estate.

What is considered to be a reasonable expense will vary according to the circumstances 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 court 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 Court may cancel the Attorney's appointment.

Contact the court or a legal professional for advice about expenses.

Can Attorneys retire from their duties?

Yes, Attorneys can cease to act in this role any time they wish. This is known as 'disclaiming the power' and is done by signing a Deed of Disclaimer, although a formal deed is not a legal requirement. If the EPA is not registered the Donor should be notified of the resignation. If the EPA is registered you must also notify the court.

If the retiring Attorney is the only Attorney of a registered or unregistered EPA and believes the Donor needs to have a Receiver 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.

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(s) can continue to act under the EPA.

How does the Court work with the Attorneys?

The court does not supervise Attorneys or tell them how they should manage the Donor's affairs; however, the Court will consider complaints about Attorneys where necessary.

If Attorneys need advice on practical, financial or legal matters, they should seek help from legal practitioners or other professional advisers. The court can provide general guidance on our processes but cannot provide legal advice or services.

Part F: Glossary

Phrase	Definition
Attorney	Someone appointed under an Enduring Power of Attorney who has the legal right to make a decision within the scope of their authority on behalf of the person (the Donor) who made the Power of Attorney
Best Interests	Any decisions made or anything done for a person who lacks capacity to make specific decisions must be for the person's benefit and not necessarily anyone else's (including the Attorney).
Capacity	A person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.
Code of Practice	The Code of Practice is practical guidance to support the Mental Capacity Act. It explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners.
Court of Protection	The specialist Court for issues relating to people who lack capacity to make specific decisions.
Donor	The person who has created the EPA to give someone the authority to make decisions about their finance and property when they are unable, through mental disorder, to do so for themselves.
Enduring Power of Attorney (EPA)	A Power of Attorney created under the Enduring Powers of Attorney Act 1985 appointing an Attorney to deal with the Donor's property and financial affairs.
Property and affairs (also referred to as Property and Financial Affairs)	This includes any possessions owned by a person (such as a house or flat, jewellery or other possessions), the money they have in income, savings or

	investments and any expenditure. Attorneys and Deputies can be appointed to make decisions about property and affairs on behalf of a person who lacks capacity.
Receiver	Someone appointed by the Court with ongoing legal authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in Section 99 of the Mental Health Act 1983 as it applies in the Falkland Islands.

Part G: Contact us

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Document Control

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EPAGN: A guide to Enduring Powers of Attorney

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