

REGISTRATION OF ENDURING POWER OF ATTORNEY

Prior to, and on the registration of an Enduring Power of Attorney (EPA), instructions may be accepted from an attorney but a solicitor continues to owe a duty to the client (donor of the EPA).

Attorneys: - Your role and obligations to the donor:

• Disqualified from acting as an attorney

In certain circumstances a person will be disqualified from acting as an attorney, for example, where the attorney is a spouse and there has been a subsequent annulment or dissolution of marriage.

• The scope of the authority given in the EPA

The EPA does not come into force until it has been registered but the attorney may take certain actions/decisions pending registration once an application for registration has been made. If the scope of the authority includes personal care decisions these decisions will be as provided in the EPA and may also provide that another party be consulted;

There is a requirement to act 'in the best interests' of the donor in making personal care decisions. This includes having regard to the past and present wishes and feelings of the donor, facilitating the donor's participation as fully as possible in any decision and consulting with persons caring for the donor or interested in the donor's welfare. The concept of 'best interest' also involves considering whether there is an alternative method of obtaining the same result which would be less restrictive of the donor's freedom of action.

Where the scope of the authority permits the attorney to decide where the donor may live, the attorney should seek legal advice before considering whether the donor should change residence from her home to a care facility, including the need for the attorney to seek relevant medical advice (and to consult with named individuals, discussed below);

• There are a number of other requirements such as :

1. To keep accounts of the donor's property and affairs and to produce the accounting records to the Court if required.
2. To keep the donor's property separate from the attorney(s)' property. (The registration of the EPA should be noted on the accounts of the donor held by financial institutions and the proceeds of the accounts should not be transferred into the name of the attorney.);
3. Not to profit from the position as an attorney;
4. To consult with named individuals. (Even if not required by the EPA to consult with named individuals, a solicitor should advise an attorney that it is prudent to keep family members generally informed of transactions in relation to the donor's assets on an annual basis.);
4. Provisions in the EPA and the legislation in relation to gifts.
5. Provisions in the EPA and legislation in relation to expenses incurred by the attorney(s) and remuneration of the attorney(s).
6. provisions in the legislation and the EPA in relation to the use of the donor's assets for the benefit of others (including the attorney(s)) and the limitations of this power).
7. Attorneys have a fiduciary relationship with the donor and the attorney must use proper care in exercising the authority under the EPA;
8. The attorney may disclaim at any time up to registration of the EPA and thereafter only on notice to the donor and with the consent of the High Court.
9. The court has extensive functions with regard to registered EPAs which include the cancellation of the registration of an EPA. An example would be if the attorney had become mentally incapable.

• **Formalities:**

A solicitor on receiving instructions to register an EPA should personally satisfy himself that the donor is, or is becoming, incapable of managing her affairs.

The following steps should be taken in registering an EPA:

1. Obtain a medical certificate from a registered Medical Practitioner to the effect that the donor is, or where appropriate, is becoming, incapable by reason of a mental condition of managing and administering her own property and affairs.
2. Arrange with the attorney(s) to sign the following forms of notice of intention to apply for registration (a separate form is signed in respect of each notice party) -
 - (a) Notice of intention to apply for registration addressed to the Donor
 - (b) Notice of intention to apply for registration, addressed to the notice parties.
 - (c) Notice of intention to apply for Registration addressed to the Registrar of the Wards of Court.
3. Serve the Donor by registered post with the notice at 2(a) above, i.e. Notice of intention to apply for Registration.
4. Have an Affidavit of Service in connection with serving the Notice of intention to apply for Registration on the Donor sworn.
5. Serve the notice parties by registered post with the notice at 2(b) above, i.e. Notice of intention to apply for Registration.
6. Have Affidavits of Service in connection with serving the Notice of intention to apply for Registration on the notice parties sworn.
7. Serve notice (by ordinary post) on the Registrar of the Wards of Court of the intention to apply for Registration.
8. Wait for **five-week** notice period to expire.
9. Arrange for the Attorney(s) to swear an affidavit grounding the application for Registration setting forth fully the facts and/or circumstances giving rise to the application.
10. File the following documentation (together with affidavits of service at 12 below) with the Registrar of the Wards of Court Office:
 - (a) Application for Registration of EPA
 - (b) Original EPA.
 - (c) Copy Notice of execution by the Donor of the EPA given to the notice parties at the time of the execution of the EPA.
 - (d) Copy Notice of intention to apply for Registration given to the Donor.
 - (e) Copy Notice of intention to apply for Registration given to the notice parties.
 - (f) Affidavit of Service in relation to the service on the notice parties of the Notice of execution.
 - (g) Affidavit of Service in relation to the service on the Donor of the Notice of intention to apply for Registration.
 - (h) Affidavit of Service in relation to service on the notice parties of the Notice of Intention to apply for Registration.
 - (i) Medical Certificate from a registered Medical Practitioner.
 - (j) Affidavit sworn by attorney(s) at 9 above.
11. (a) a copy of this Application for Registration should be personally served on the donor; and
(b) a copy of this Application for Registration should be served on the notice parties by registered post.
12. (a) Swear affidavit of service of Application for Registration on donor.
(b) Swear affidavit of service of Application for Registration on notice parties.

• **Notification to the Registrar of Wards of Court after registration:**

The Registrar of Wards of Court should be notified if any of the following events occur after the registration of the EPA:

- Change of address of attorney
- Change of address of donor
- Death of donor

- Where the attorney becomes mentally incapable then their committee/attorney should notify the Registrar
- Where the attorney dies, their personal representative should notify the Registrar
- Any other event which would terminate or invalidate the EPA e.g. if the donor recovers capacity or if the attorney is adjudicated a bankrupt.

• **Revocation by donor after registration:**

A revocation by a donor of an EPA is not valid unless and until the Court confirms the revocation. The application to the Court must be on notice to the attorney(s).

• **Disclaimer/Resignation by attorney after registration:**

The attorney should be advised that in the event of the attorney wishing to disclaim/resign as attorney after the EPA has been registered he/she may only do so **with the consent of the court**, upon application made on notice to the donor.

If there is a joint attorney and the authority provides for several liability then the continuing attorney will be in a position to act. Likewise if the EPA provides for a substitute attorney and the substitute attorney is willing to act, then resignation will be effective.

• **Inventory of Assets:**

The attorneys should prepare a full inventory of assets at the time of registration and this will act as a useful checklist if any disputes arise in the future. On the death of the donor a full inventory should be prepared by the attorney and passed to the personal representative of the donor.

• **Termination of EPA:**

The functions of an attorney cease on the death of the donor of the EPA. Where the Court cancels the registration of an EPA it shall by order revoke the EPA.

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