

Enduring Powers Of Attorney

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a document in a set form which is not cancelled by the later incapacity of the Donor (the person giving the power), as long as the power is registered at the Office of Public Guardianship when that incapacity occurs.

Whilst a Donor remains mentally capable, an Enduring Power of Attorney operates as a General Power of Attorney, unless the document otherwise states. Until the Enduring Power of Attorney is registered, it may be cancelled at any time by the Donor.

The ability to sign a new Enduring Power of Attorney came to an end on 30th September 2007. From 1st October 2007, similar powers can be contained in a Lasting Power of Attorney prescribed by the Mental Capacity Act 2005. Please ask for separate advice on Lasting Powers of Attorney

What is the purpose of an Enduring Power of Attorney?

The purpose of an Enduring Power of Attorney is to allow the Donor to decide who he or she would like to deal with his or her financial affairs, even after he or she becomes mentally incapable. For an Enduring Power of Attorney to be valid, it is essential that at the time the deed is signed, the Donor understood the nature and effect of the deed.

Is the authority of the Attorney limited?

An Enduring Power of Attorney normally gives the Attorney general authority to act on behalf of the Donor in relation to all the Donor's property and financial affairs. It was, however, possible to impose restrictions (e.g. not to allow a sale of the Donor's house). If two Attorneys are appointed, they will either have to act jointly or jointly and severally (so that they can act together and separately).

A person who is bankrupt on the date of the appointment, or afterwards, may not act as an Attorney.

The Attorney will be able to use the Donor's money to make gifts, for reasonable amounts, commensurate with the amount of money that the Donor has and the assets owned. There is also a general expectation that such gifts should be such as the Donor would otherwise have expected to make himself or herself. Gifts which are greater than this will require the consent of the Office of Public Guardianship.

An Attorney may recover out of pocket expenses incurred in acting for the Donor. A professional Attorney, such as a solicitor or an accountant, would also expect to charge for their services.

An Attorney has a duty to keep the Donor's affairs confidential, and must keep the Donor's money and other assets quite separately from his own.

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Enduring Powers Of Attorney – continued

What happens if the Donor becomes mentally incapable?

In that event, the power is not revoked, but the Attorney's authority is temporarily suspended. As soon as the Attorney is aware that the Donor is or may be becoming mentally incapable, the Attorney must apply to the Office of Public Guardianship to register the Enduring Power of Attorney.

The Attorney may use his or her judgment in deciding whether the Donor is no longer capable of managing his or her affairs. If the Donor is receiving medical care at the time, a doctor or consultant is usually happy to give a medical opinion in writing.

Before submitting the application, the Attorney must give notice to the Donor and to certain near relatives of the Donor. Once the Attorney has applied for registration, limited authority is restored to the Attorney, thus enabling him or her to maintain the Donor, prevent loss to the Donor's assets, etc. Assuming that no successful objection to registration is made, the Office of Public Guardianship will then register the Enduring Power, and the full authority of the Attorney will then be restored. Once the Enduring Power of Attorney is registered, the Donor loses the ability to handle his or her affairs.

The Donor also loses the ability to revoke the Enduring Power of Attorney, except in extraordinary circumstances (such as the recovery of mental capacity). The Attorney should advise the Office of Public Guardianship both in such circumstances, and when the Donor dies.

Further Advice

If you wish the firm to advise on the use or registration of an Enduring Power of Attorney, please contact one of the solicitors in the Private Client Team at Geldards.

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This is a summary of the subject for general guidance only. Professional advice should be sought to take into account the application of the law to your particular circumstances.

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