

When does an Enduring Power of Attorney need to be registered



0800 220 382
info@tgbaynes.com
tgbaynes.com

Broadway House
208 Broadway
Bexleyheath
Kent
DA6 7BG

Baynes House
5 Market Street
Dartford
Kent
DA1 1DB

Downe House
303 High Street
Orpington
Kent
BR6 0NJ

When does an Enduring Power of Attorney need to be registered?

Unrestricted Enduring Power of Attorney

An Attorney is under a duty to inform the Office of the Public Guardian if they have reason to believe the donor is or is becoming mentally incapable of managing their own financial affairs

Enduring Power of Attorney containing Restrictions as to medical evidence required

If an Attorney has reason to believe that the donor is becoming mentally incapable there is a requirement for them to obtain a doctors report stating this is the case and that the donor is unable to manage his own financial affairs.

Who needs to be informed?

Notice must be given on form EP1PG to the donor and three relatives of the donor.

The order in which the relatives are to receive notice is as follows:

- Donor's husband, wife or civil partner;
- Donor's children (including adopted children but not stepchildren);
- Donor's parents;
- Donor's brothers & sisters (including half brothers and sisters);
- Widow or widower of Donor's child;
- Donor's grandchildren;
- Donor's nephew and nieces;
- Donor's aunts and uncles;
- Donor's first cousins

Notice also needs to be provided to the donor. Where this may upset the Donor, the Attorney can apply to the Office of the Public Guardian to dispense with this requirement. Notice must be given to the Donor by the Attorney and be left with them

Notice does not need to be given to more than three people but in the event that there are more than three people in a class, all need to be notified.

The main reason for serving notices on relatives of the donor's family is to ensure they are fully aware of the situation and to object to the registration if they feel the Enduring Power of Attorney does not need to be registered.

What if I do not know the name and address of a relative?

If you do not know the name and address of a relative and it is not reasonable to find out it out, the attorney is not required to give notice. Anyone under 18 years of age or is mentally incapable is not entitled to receive notice.

What if the Attorney is also a relative?

The attorney may be counted as one of the entitled persons that are to receive notice.

What if there are less than three relatives

This will need to be specified on the application form.

If there is more than one Attorney do they all need to give Notice?

It is advisable otherwise the power conferred by the EPA may be limited by the Court of Protection to the person applying for registration.

Once Notice has been given, What do I do next?

Once all the notices have been served using the form EP1PG, the application form needs to be completed (EP2PG) and forwarded to the Office of the Public Guardian together with a fee of £120.00 and the original EPA. The application form needs to be sent to the Office of the Public Guardian within 10 days of serving the last notice.

Please ensure all the details on the form are correct as it is an offence to deliberately falsify information which may result in a fine, prison or both.

Once the Court of Protection receives the Notice, what happens next?

The Office of the Public Guardian will check the document to ensure it is filled out correctly and if this is the case, a period of around 35 days will be allowed for anyone to raise any objections to the registration of the EPA.

Various grounds include

1. Application is premature and they believe the donor is still mentally capable;
2. That fraud/ undue pressure was placed on the Donor to create the power;
3. The document creating the power has been revoked;
4. The Attorney is unsuitable;
5. The document creating the power is not valid

If no-one raises any objections, is the EPA returned to me?

Yes, within five days of registration the EPA is returned together with the Office of the Public Guardian stamp to show it has been registered.

What do I need to do once the EPA has been registered?

Once the EPA has been registered, the Office of the Public Guardian may call upon the Attorney(s) at any time to provide them with a copy of the accounts to date.

When acting in my role as Attorney, what do I need to consider?

In this role you have important duties and responsibilities, which are set out in the Mental Capacity Act 2005 and explained in the Code of Practice, with which you should be familiar. This can be accessed from the website of the Ministry of Justice: www.dca.gov.uk/legal-policy/mental-capacity/publication.htm or a hard copy obtained from calling 0870 600 5522 or order from customerservices@tso.co.uk

The following are particularly important:

You must follow the principles set out in Section 1 of the Act:

Principle 1

It should be assumed that everyone has capacity to make his or her own decisions, unless it is proved otherwise.

Principle 2

A person should have all the help and support possible to make and communicate their own decision before anyone concludes that they lack capacity to make their own decision.

Principle 3

A person should not be treated as lacking capacity just because they make an unwise decision.

Principle 4

Actions or decisions carried out on behalf of someone who lacks capacity must be in their own best interests.

Principle 5

Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible.

You must always act in the donor's best interests.

There is guidance in chapter 5 of the Code of Practice to help you, but in general terms, you need to consider the donor's past and present wishes and feelings, beliefs and values.

Where practical and appropriate consult with

- Anyone caring for the donor
- Close relatives and anyone else with an interest in their welfare
- Other attorneys appointed by the donor

Always check whether the donor has the capacity to make a particular decision themselves. You can only act if the donor does have capacity if they have asked you to act and there are no restrictions in the document.

Only make those decisions the EPA gives you authority to make i.e:

- You cannot make decisions about the donor's personal care.
- If the EPA is restricted in any way, your authority is limited. If you need further powers in the future, you will be able to apply to the Court of Protection.

Other duties include having a duty to:

- Apply certain standards of care and skill (duty of care) when making decisions
- Carry out the donor's instructions
- Not take advantage of your position and not benefit yourself, but benefit the donor (fiduciary duty)
- Not delegate decisions, unless authorised to do so
- Act in good faith
- Respect confidentiality
- Comply with the directions of the Court of Protection
- Not give up the role without telling the donor and the Court
- Keep accounts

Keep the donor's money and property separate from your own.

How do I decide whether or not the donor has capacity?

You use the test laid down in the Mental Capacity Act 2005, which comprises two stages:

Stage 1 – Does the person have an impairment of , or a disturbance in the functioning of, their mind or brain? Examples may include conditions associated with some form of dementia, or the long-term effects of brain damage.

Stage 2 – Does the impairment or disturbance mean that the person is unable to make a specific decision? This stage can only be applied if you have taken all practical steps to support the donor in making the decision and this has failed.

A person is considered to be unable to make a decision if they cannot on a balance of probabilities:

- Understand information about the decision to be made (the Act calls this 'relevant information')
- Retain that information in their mind
- Weigh that information as part of the decision making process, or
- Communicate their decision (by talking, by using sign language or by any other means)

The Code of Practice offers practical examples which will be very helpful to you, but essentially you need to give the donor as much opportunity as possible to make his or her own decisions as possible before you decide to act and also, to follow the steps laid down in Chapter 4 of the Code of Practice, suggested steps for establishing 'that the donor lacks capacity to make a particular decision'.

What powers to I have to make gifts?

You have very limited powers to make gifts from the donor's property, only

To people who are related to, or connected with, the donor (including attorneys) on specific occasions

- births or birthday
- weddings or wedding anniversaries
- civil partnership ceremonies or anniversaries, or
- any other occasions when family, friends or associates usually give presents.

Gifts can continue to be made to charities if the donor was making regular payments, or even from time to time.

You must remember that gifts must be reasonable in relation to the donor's own assets.