

Enduring Powers of Attorney



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ENDURING POWERS OF ATTORNEY

On the 1st of August 1996 the Powers of Attorney Act was enacted which eliminated major inconveniences experienced by people who lost the ability to manage their own affairs.

An enduring power of attorney is an authority given to an individual to manage the affairs of another should that person become mentally incapable of managing his/her own affairs.

In the past a power of attorney was only as good as the mental ability of the donor of the power. The only correct mechanism which the Law provided to deal with these circumstances was to have the affairs of the individual managed and controlled by the Registrar of the Wards of Court. This procedure has considerable disadvantages. It is expensive, stressful and cumbersome.

The Power of Attorney Act 1996 enables an individual to appoint a person or persons to manage their affairs in the event of subsequent mental incapacity.

The legislation has established certain procedures and defined forms which must be operated if the enduring power of attorney is to become affective. But the enduring power of attorney does not become effective until the person granting the power has suffered loss of mental capacity.

An enduring power of attorney can be extremely flexible. It can relate to all of the affairs of the person granting the power or it can qualify this authority or it can be restricted to decisions of personal care. These would relate to such matters to where the donor should live, with whom the donor should live, whom the donor should see or not see and general diet and dress of the donor.

The legislation has established certain clearly defined procedures which must be followed for the power of attorney to be affective. These include explaining the nature and extent of the power of attorney to the donor. Identifying who should be the attorney or attornies, arranging for both the donor and the attorney/attornies to sign the power of attorney. It must also be signed by the Solicitor retained by the donor.

The attorney's doctor must be notified and must sign a statement that in the opinion of the doctor the power of attorney was executed by the donor who had the mental capacity to understand the full effect of the creation of the power at the time of signing.

When the power of attorney has been explained and signed and the supporting certificate has been completed, notice of completion of enduring power of attorney has to be given to two independent persons who are defined in the Act.

This legislation is designed for "senior citizens" and its purpose is to enable a person or persons close to them in whom they have trust to manage all or part of their affairs should they loose the capacity to do so themselves. It will save the expense and trauma of becoming a Ward of Court. While the Registrar of Wards of Court acts in the best interest of its Ward the Registrar lacks the compassionate understanding that can be provided by a close personal relative or trusted friend.

While the donor has full capacity an enduring power of attorney can be revoked and substituted with another similar power making the necessary changes.

Following is a simplified explanation of what the Powers of Attorney Act 1996 provides.

Effect of creating enduring power: information for donor

- 1 An enduring power of attorney enables you to choose a person (called an "attorney") to manage your property and affairs in the event of your becoming mentally incapable of doing so. You may choose one attorney or more than one. If you choose more than one, you must decide whether they are able to act:

jointly (that is, they must all act together and cannot act separately), or

jointly and severally (that is, they can all act together but they can also act separately if they wish).
- 2 If you give your attorney(s) general power in relation to all your property and affairs, they will be able to deal with your money or property and may be able to sell your house.
- 3 If you do not want your attorney(s) to have such wide powers, you can include any restrictions you like. For example, you can include a restriction that your attorney(s) may not sell your house.
- 4 You may authorise the attorney(s) to take certain personal care decisions on your behalf, e.g. deciding where you shall live. You should also name any person you would like to consult so that the attorney can have regard to that person's views as to your wishes and feelings and as to what would be in your best interests.
- 5 Unless you put in a restriction preventing it, your attorney(s) will be able to use any of your money or property to benefit themselves or other people by doing what you yourself might be expected to do to provide for their needs.
- 6 If you specifically authorise it, your attorney(s) will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property and subject to any conditions or restrictions you may impose.
- 7 You may also appoint an attorney or attorneys to act in the event that the original attorney is unable or unwilling to act.
- 8 You must give notice of the execution of the enduring power as soon as practicable to at least two persons. None of them may be an attorney under the power. At least one must be the donor's spouse, if living with the donor. If the donor is unmarried, widowed or separated, notification must be given to a child of the donor (if applicable) or otherwise to any relative (i.e. parent, sibling, grandchild, widow/er of child, nephew or niece). The prescribed form of notice is contained in the Third Schedule to the Enduring Powers of Attorney Regulations, 1996.
- 9 Your attorney(s) can recover the out-of-pocket expenses of acting as your attorney(s).
- 10 If your attorney(s) have reason in the future to believe that you have become or are becoming mentally incapable of managing your affairs, your attorney(s) must apply to have the enduring power registered in the High Court. Once registered, an enduring power of attorney cannot be revoked effectively unless the Court confirms the revocation. You may revoke the power at any time before registration.

11. Before applying for registration of this power, your attorney(s) must give written notice of intention to do so to you and to the persons you notify of the execution of the enduring power. You and these persons (if they are not then available, certain of your relatives) will be able to object if you do or they disagree with registration. The prescribed form of notice is contained in the Fourth Schedule to the Enduring Powers of Attorney Regulations, 1996.

Effect of accepting enduring power: information for attorney

1. If you have reason in the future to believe that the donor is, or is becoming mentally incapable of managing his or her property and affairs, you must apply to have the enduring power registered in the High Court. Before doing so you must give written notice of your intention to the Registrar of Wards of Court and also to the donor and the persons whom the donor has notified of the execution of the enduring power. (If these persons are no longer available, notice must be given to certain relatives, as specified in the Powers of Attorney Act 1996). The prescribed form of the latter notice is contained in the Fourth Schedule to the Enduring Powers of Attorney Regulations, 1996.
2. The enduring power will not come into force until it has been registered. However, once you have applied for registration you may take action under the power to maintain the donor and prevent loss to the donor's estate and maintain yourself and other persons in so far as that is permitted under Section 6(4) of the Act. You may also make any personal care decisions permitted under the power that cannot reasonably be deferred until the application for registration has been determined.
3. Unless there is a restriction in the enduring power preventing it, you may use the donor's money or other property for your benefit or that of other people to the following extent but no further, that is to say, by doing what the donor might be expected to do to provide for your or their needs. You may not use the donor's money to make gifts unless there is specific provision to that effect in the enduring power and then only to persons related to or connected with the donor on birth or marriage anniversaries or to charities to which the donor made or might be expected to make gifts. The amounts of any such gifts are subject to any restrictions in the enduring power and, in any event, may be only for reasonable amounts in relation to the extent of the donor's assets.
4. You are obliged to keep adequate accounts of the donor's property and affairs and to produce the accounting records to the Court if required.
5. In general, as an attorney you are in a fiduciary relationship with the donor. You must use proper care in exercising on behalf of the donor the authority given by the enduring power and you must act only within its scope. In particular, you must observe any conditions or restrictions imposed by the power and also the limits imposed by the Powers of Attorney Act, 1996.
6. You may recover the out-of-pocket expenses of acting as attorney. The enduring power may provide for remuneration for so acting.
7. You may disclaim at any time up to the registration of the power. Thereafter you may do so only on notice to the donor and with the consent of the High Court.

8. After the enduring power has been registered you should notify the Registrar of Wards of Court if the donor dies or recovers.