



Power of Attorney

What is a Power of Attorney?

A Power of Attorney ("POA") is a document which allows a person ("the Donor") to nominate others to act on his/her behalf and in his/her name. They are mainly used in two sets of circumstances – firstly when a person will be unavailable to sign documents at a crucial time, for instance when the person is due to complete on the sale or purchase of a house and is out of the country, and secondly when a person is worried about losing mental capacity and not able to manage his/her affairs.

In the first case, you would normally use what is called a general power of attorney. This would specify who is to be appointed and what he/she is authorised to do.

In the second case, where there is a risk of mental incapacity, the person giving the power, must execute an Enduring Power of Attorney ("EPA"). The main difference being that a POA will end if the Donor should become mentally incapable whereas an EPA will continue to be effective.

What is an Enduring Power of Attorney?

An EPA is a document which allows a person who has mental capacity, to nominate other people ("the Attorneys") to act on his/her behalf and to permit the Donor to direct that the EPA shall continue to be in force notwithstanding the Donor subsequently losing mental capacity. If the Donor has already lost mental capacity then he/she will not be able to make an EPA as he/she will no longer have the mental capacity to understand or sign the document.

It is important to note that English Lasting Powers of Attorney can cover decisions regarding the donor's health but this is not the case with an Isle of Man EPA.

Due to conflicts of law issues, English Lasting Powers of Attorney tend not to be used in the Isle of Man, and overseas clients are usually recommended to put in place an Isle of Man Enduring Power of Attorney where he/she has assets which are held in the Isle of Man, rather than have to argue with an Isle of Man financial institution regarding whether an English Lasting Power of Attorney is recognised in the Isle of Man.



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When considering what is required of an EPA, there are a number of questions to ask:

- Who do I want to act as my Attorney?
- When do I want this EPA to become effective ie from the date of the EPA or only on the Donor losing mental capacity?
- Do I want any limitations or restrictions on what property my Attorney(s) can deal with?
- How many Attorney(s) do I want to appoint?

Who can be an Attorney?

Anyone who is over the age of 18 and not subject to bankruptcy proceedings can be an Attorney. They also need to be capable of understanding the terms of the EPA and their duties as an Attorney. There is no formal criteria regarding who may be appointed as an Attorney, and many people appoint family members or close personal friends. Many professionals such as Advocates and Accountants are willing to be appointed as attorney(s). They would be entitled to charge for their services whereas family members are not so entitled to charge.

Under an EPA, it is usually a good idea to have at least one attorney who is familiar with the Donor and his/her affairs, as this will make matters much simpler should the Donor become mentally incapable.

When does an EPA come into effect?

The key consideration is whether the Donor of the EPA wishes the EPA to become effective before the Donor loses capacity, in which cases the EPA may come into effect upon the date it is signed by all parties. Alternatively the Donor may wish the EPA to become effective when the Donor loses capacity. If the Donor wishes the EPA to be effective immediately upon the signing of the EPA then the Attorney(s) will be able to deal with the Donor's property whilst the Donor is still mentally capable.



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Alternatively, the EPA can be drafted in such a way as to not to come into effect until the Donor has lost mental capacity. This means that so long as the Donor is mentally capable of dealing with his/her own affairs, no one else will be able to deal with the Donor's property without his/her consent. This does not prevent the Donor from granting a separate power of attorney if the Donor wishes the attorney or some other person to be appointed to do acts on the Donor's behalf whilst he/she still has mental capacity.

Once it is established that the Donor has lost or is losing mental capacity, it is a requirement of the legislation for the Attorney(s) to apply to the Isle of Man Courts of Justice for the EPA to be registered. The application will need to be accompanied by medical evidence that states the Donor has lost or is losing mental capacity. Written notice must be given to the Donor, joint and several attorneys (if any) and the Donor's nearest relatives (as specified in the Power of Attorney Act 1987) and a copy of the EPA is to be provided to any of those persons upon request.

When is an EPA useful?

An EPA is necessary should the Donor become or is becoming mentally incapable but it can also be useful when the Donor is physically incapable of managing his or her own affairs, although an existing general power of attorney can still be used in such circumstances.

What about any limitations and restrictions?

An EPA can be drafted in such a way as to include various restrictions or the limits on the Attorney(s) authority. For example a restriction that so long as the Donor is mentally capable, the Attorney(s) may not sell the Donor's house or a restriction that the EPA does not come into effect until the Donor loses mental capacity. Again, the restrictions reflect a trade-off between the flexibility to have the Attorney(s) do as much as possible to assist the Donor, and the Donor's wish to retain control whilst he/she is fit and well. An EPA can also be drafted so that the Attorney has general or wide form of authority over the Donor's assets or alternatively can be drafted so that the Attorney has specific authority to deal with those aspects of the Donor's affairs which have been specified in the EPA.



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How many Attorneys?

One of the ways in which a Donor sometimes seeks to ensure protection is to appoint more than one Attorney so for example to appoint two Attorneys acting jointly in relation to the affairs of the Donor.

There are two ways in which Attorneys can be appointed. They can be appointed jointly, which means all decisions that are made in relation to the Donor and his/her property and affairs have to be made by all the Attorneys appointed to act, with them all being in agreement. Alternatively, Attorneys can be appointed to act jointly and severally. This means that the Attorneys can make decisions individually regarding the Donor's property and affairs, as well as together. How Attorneys are to be appointed must be carefully considered before signing the EPA.

What if a person loses capacity and there is no EPA in place?

If a person loses mental capacity and does not have an EPA in place then it can make it difficult for those closest to the person to be able to manage and handle his/her affairs. Depending on how the assets of the person, who has lost capacity, are held, the only option may be to apply to the Isle of Man Courts for a mental health receiver to be appointed. The receiver can then deal with the person's affairs on his/her behalf. The cost of a receivership application generally outweighs the costs of signing and registering an EPA and the person who has lost capacity has no control over who can make that application.

Contact Us

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