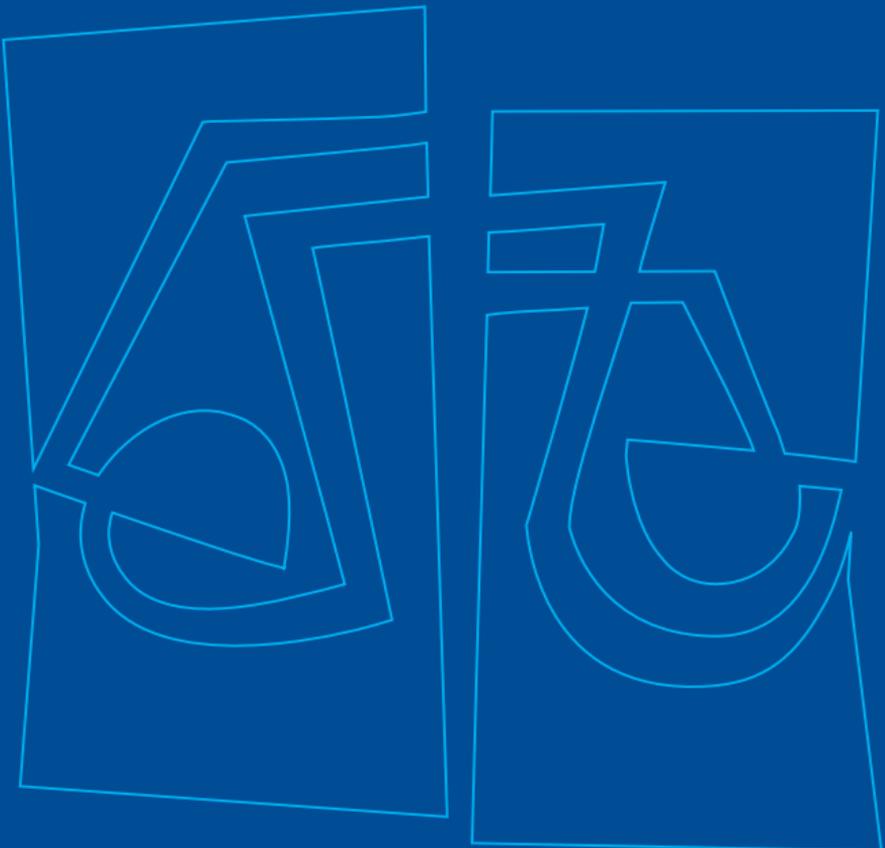


July 2014



enduring power
of attorney (epa)



What is a power of attorney?

A power of attorney is the legal document by which a person (the donor) allows another person (the attorney) to represent the donor or to act in the donor's place, either generally or for specific purposes. It comes to an end if the donor becomes mentally incapacitated or dies.

The law governing EPAs is the Powers of Attorney Act 1996

What is an EPA?

An Enduring Power of Attorney (EPA), on the other hand, is a legal document by which the donor states that the attorney will in the future have power to act on the donor's behalf if the donor becomes unable or incapable mentally of looking after his or her interests. It comes to an end on the death of the donor or it can be revoked by the donor during his/her lifetime.

Important: Both of these Powers transfer considerable responsibility and control to the appointed person. You should be extremely careful in how you set them up. You are strongly advised to seek legal advice, especially when deciding what conditions and restrictions to apply to the powers you are giving to your attorney.

Why is an EPA useful?

- It will allow you to appoint someone of your choice to control your affairs should you become mentally incapacitated, for example through brain damage, Alzheimer's disease, or other forms of dementia.
- It will allow you to avoid a **Ward of Court** application being made for you in the future. Here the court gets the power to make decisions on your behalf, where you have been proven as an adult to be of unsound mind. Your property and money comes under the control of the court and the Courts Service will have the duty of overseeing these in your best interest.

Who can be an attorney?

You can ask anyone you like to be your attorney, subject to the list of excluded categories of people below. Given the powers involved, it should be someone you can trust. However, it can also be a professional person. Normally, if you appoint a professional person as attorney, you will have to pay for that service.

You may appoint more than one person to act as your attorney and it is important to appoint two attorneys if possible, in case of the death, incapacity or unsuitability of one of these attorneys. Attorneys can be appointed to act jointly (together) or severally (independently of each other).

Persons who are not permitted to be attorneys include:

- People under the age of 18 years.
- People who have been declared bankrupts.
- People convicted of an offence involving fraud or dishonesty.
- People disqualified under the Companies Acts from acting as directors.
- An individual, a trust or a corporation who owns a nursing home in which you live or an employee or an agent of the owner (that is, unless that person is also your spouse, child or sibling).

What are the duties of an attorney?

Where an attorney acts on behalf of a donor, he or she must observe the following duties:

- To follow the terms of the power of attorney as described in the document setting up the power;
- To act in good faith;
- To avoid conflicts of interest;
- To keep accurate accounts and records.

How do I create an EPA?

There are a number of steps to creating an EPA which are described in law. Unless you meet these required steps, your EPA will not be valid. You will need the services of both a doctor and a solicitor to complete these steps. They include a description of the format of the EPA document as well as the steps involved. In summary, the Regulations describe:

The Regulations that govern the creation of an EPA are part of the Powers of Attorney Act 1996 – they are called Statutory Instrument (SI) No. 196/1996 and SI No. 287/1996

- (i) The various options which the donor has when granting an EPA;
- (ii) A statement signed by the donor that he/she has read the explanatory information regarding the creation of an EPA or has had it read to him/her.
- (i) The duties and obligations which an attorney may have under EPA;
- (ii) A statement signed by the attorney that he/she understands these duties and obligations.
- The obligation on the attorney to keep adequate accounts.
- The remuneration, if any, of the attorney who is entitled to out of pocket expenses, even if no form of remuneration is provided for in the EPA.
- The execution requirements of an EPA.
- A statement by a solicitor in the format provided that he/she is satisfied the donor understood the effect of the EPA.
- A statement by a medical practitioner in the format provided that, in his opinion, the donor had the mental capacity at the time of execution to understand the effect of creating an EPA.

The role of the solicitor:

Your solicitor must be satisfied that the EPA is not being created as a result of fraud and/or undue pressure. In law, the document creating the EPA must follow a prescribed form and must include the following statements by your solicitor:

- That he/she is satisfied that you understood the effect of creating the power.
- That you are acting of your own free will and not under another's influence.

The role of the doctor:

You will need a letter from your doctor verifying that, at the time the EPA was drawn up:

- You had sufficient mental capacity.
- You understood the effect of creating the power.

Your role:

- You are required to make a statement that you have understood the effect of creating the power. These statements act as legal safeguards to ensure that you are creating the EPA in full legal knowledge of what is involved and that there has been no undue pressure placed on you to create this power.
- You must also notify at least two other people when you create an EPA – neither of them can be the attorney you are appointing. These two people are called the **notice parties**. If the attorney later applies to register the EPA, these notice parties must be informed in writing.
 - ▼ If you have a spouse or civil partner and he or she is living with you, then he or she must be one of these notice parties.
 - ▼ If you are unmarried, separated or widowed, one of the two people you must notify must be your child (if you have children) or else a relation such as a parent, sister or brother, nephew or niece.
 - ▼ Otherwise, anyone you like can be a notice party.

When does the EPA come into effect?

The EPA can only come into operation when it has been registered in the High Court. A solicitor or the chosen attorney normally holds the EPA documents until such time as they are registered.

When your attorney sees that you are becoming mentally incapable, he/she applies to register the EPA to the Office of Wards of Court, a division of the High Court.

Before making an application, your attorney must notify you of his/her intention to do so. The attorney must have a medical certificate confirming that you are no longer capable of managing your affairs. This notice must be given to you and to the notice parties.

Is it possible to object to the registration of an EPA?

The donor and the notice parties have five weeks from the date they receive this notification of registration to lodge an objection with the Office of Wards of Court.

An objection might be made about, for example:

- the unsuitability of an attorney;
- any suspected fraud or undue pressure on the donor to create an EPA;
- an assertion that the donor of the EPA is in fact mentally fit.

How can I revoke an EPA?

An EPA can be revoked by the donor at any time before an application is made for registration.

What happens if concerns arise after registration of an EPA?

A person who has a concern about the operation of the power of attorney by the attorney, can write an affidavit (which is a written statement describing a situation, sworn before a Notary Public or other legal officer) to the Office of Wards of Court about this concern.

Attorneys are not required to keep the courts informed of their actions. However, the donor, the attorney or any other interested person can apply to the court for an Order, which can include directions on how the attorney manages or disposes of the donor's property. The attorney can also be obliged to keep records and accounts of all financial transactions if necessary.

Can an EPA be revoked after registration?

When someone wants to revoke an EPA after its registration, he or she must apply to the High Court. The court can make an Order cancelling the EPA where, for example, it finds that:

- there was fraud or undue pressure put upon the donor to create the EPA;
- the attorney is unsuitable (typically, where only one attorney has been appointed);
- the donor is mentally capable and will probably remain so.

What decisions can I authorise my attorney to take on my behalf?

With an EPA, you may give your attorney(s) a general authority to act for you in relation to all your affairs. You may include an authority to the attorney(s) to make personal care decisions on your behalf. These do not usually include medical decisions. At all times decisions must be made in your best interest.

Where possible, the attorney should consult with your family members and carers when making these decisions. This is to ascertain what your views are, what would be in your best interest to do or what you would be

likely to do in the circumstances. Personal care decisions may only include:

- Where and with whom you should live;
- Whom you should see and not see;
- What training and/or rehabilitation you should receive;
- Your dress and diet;
- The inspection of your personal papers;
- What housing, social services and other benefits you need.

The list does not cover health care decisions, though the distinction between personal care decisions and health care decisions can sometimes seem unclear.

Must I give my attorney power over all my affairs?

No, you decide which powers your attorney will have over your affairs. You can make the EPA subject to particular restrictions or conditions. However, unduly restrictive conditions contained in the EPA may lead to the donor being made a ward of court.

Can I change the person who is nominated as my attorney?

Yes, as long as the stage of registration has not begun.

Can I change my mind after executing an EPA?

Yes, once the stage of registration has not begun. See above for concerns after registration of an EPA.

When does an EPA cease?

On death, unless previously revoked.

Legal Aid

You may be eligible for legal aid if you are a person of moderate means. To qualify for legal aid in civil cases your disposable income and assets must be below a certain limit, there must be merit to the case and there must be no other satisfactory way of resolving the problem. After approval, the Legal Aid Board provides you with the services of a solicitor and, if necessary, a barrister. You can apply for legal aid for more than one matter at a time. The Board's offices are called Law Centres and are located around the country. For the location of your nearest Law Centre, call 1890 615 200.

All those who are granted legal advice and/or legal aid must pay a fee called a contribution to the Board. The minimum contribution is €30 for legal advice and €130 for legal aid. Law centre staff will advise what a person's actual contribution will be as each person is assessed on an individual basis

Before you qualify for legal aid, you must first satisfy a means test. Your disposable income must be less than €18,000 and your disposable capital cannot be more than €100,000.

If you are in receipt of allowances, they will be taken into account and they are deductible when calculating disposable income. The maximum allowance on childcare facilities if you are working is €6,000 per child per year and the maximum allowance on accommodation costs (e.g. rent) is €8,000 per year. The Public Service Pension Related Levy and the Universal Social Charge are now also considered and are deductible for the purposes of assessment.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property). If your capital resources exceed €4,000, you must complete a Statement of Capital.

For further details on financial eligibility requirements or for details of other allowances, contact your local Law Centre. A

full list is available at www.legalaidboard.ie.
FLAC has prepared a guide to the state legal aid system which you can download at bit.ly/CLAflacsheet.

Useful addresses:

Office of the Wards of Court

3rd Floor, 15/24 Phoenix Street North,
Smithfield, Dublin 7. Tel: 01-888 6189.

This office is principally concerned with the registration stage of EPAs.

Need more information?

Legal information leaflets are also available from FLAC on a variety of other areas of law. They are free to download as PDFs from the FLAC website or in print from your local FLAC centre or Citizens Information Centre.

FLAC Mission Statement

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all.

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FLAC is grateful to John Costello, solicitor, for his help in updating and revising this leaflet.

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