

Number 16

## Management of a resident's affairs 2

In a previous briefing we looked at the procedure for the Court of Protection to appoint a receiver to administer a resident's affairs. Such an application may be made only when the patient has lost capacity to manage their own affairs.<sup>1</sup>

There are limited possible ways in which an individual's affairs may be managed by another person. In this briefing we look at the role of attorneys, either under a traditional power of attorney or an Enduring Power of Attorney.

### Ordinary and Enduring Powers of Attorney

A Power of Attorney enables an individual to delegate to another the responsibility for any of his or her personal affairs.

There are two types of power. An ordinary power of attorney ceases to have effect when the person who grants the power (the donor) becomes mentally incapable. An ordinary power of attorney could be used to authorise the recipient of the power (the attorney) to do something such as purchase a house on behalf of the donor. An enduring power of attorney (EPA) continues even if the donor loses mental capacity. However the attorney has to apply to the Court of Protection to register the power once the donor becomes mentally incapable.

### What is an EPA?

Broadly an EPA is a legal process in which a donor hands over to an attorney power to manage their financial affairs and property. The power can be specified to be used straight away or only to be used if the donor becomes mentally incapable of managing their affairs in the future.

### Who can make an EPA?

An EPA can be made by an adult with the requisite mental capacity. To determine whether a person has the mental capacity to make an EPA the following conditions have to be satisfied:

- The donor must understand that the attorney can take complete control of their affairs and their property once they become mentally incapable
- The power continues if the donor becomes mentally incapable and can only be ended by the Court of Protection

### Who should be chosen as an Attorney?

There is no real limitation as to who can act as an attorney. The person must be eighteen and must not be bankrupt. It is also sensible, from a practical point of view, to choose someone living in the same area and certainly in the same country. Family members can be appointed as can professional advisers such as solicitors. It can be sensible to appoint a family member as they will have an understanding of the donor's financial situation and personal circumstances.

<sup>1</sup> See Care Homes Briefing No. 15 – copies available on request from RadcliffesLeBrasseur.

CARE HOMES BRIEFING

RadcliffesLeBrasseur  
5 Great College Street  
Westminster  
London SW1P 3SJ

Tel +44 (0)20 7222 7040  
Fax+44 (0)20 7222 6208  
LDE 113

6-7 Park Place  
Leeds LS1 2RU

Tel +44 (0)113 234 1220  
Fax+44 (0)113 234 1573  
DX 14086 Leeds Park Square

25 Park Place  
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035  
Fax+44 (0)29 2034 3045  
DX 33063 Cardiff 1

info@rlb-law.com  
www.rlb-law.com

More than one attorney can be appointed under an EPA. If two or more attorneys are appointed they can act in one of two ways. Firstly, they can act jointly. This means that they have to act together. For example, they would both have to sign cheques. This can create practical problems which may prove inconvenient and lead to delays in dealing with the donor's affairs. Another problem is that if one should become mentally incapable or die the power becomes ineffective.

Secondly, attorneys can be appointed jointly and severally. This means that the attorneys can act on their own. It is up to them to decide who assumes responsibility for what. The only problem is that this may provide a lack of protection for the donor's property.

## What power does an Attorney have?

When drawing up an EPA a donor can decide what power to give an attorney. General or specific authority to act on the donor's behalf can be given. If general authority is given the attorney can do anything the donor would have been able to do. A general power can be very wide-ranging. An attorney could have complete control over a donor's property, investments and savings so careful thought should be given to the extent of the power and the choice of attorney or attorneys. Alternatively a specific authority can be given to deal with a something in particular.

## Limitations of EPAs

An EPA giving general authority to the attorney to act is still a limited power. It does not cover decisions as to the provision or withholding of medical treatment, the execution of a will for the donor or where the donor should live.

## Delay until Donor is mentally incapable

EPAs are commonly drafted to include restrictions on the attorney's authority. Usually the authority is delayed until the attorney believes that the donor is mentally incapable or is becoming mentally incapable.

## Registration of the EPA with the Court of Protection

Once a donor has become mentally incapacitated an attorney is unable to act until the EPA is registered with the Court of Protection. Once the EPA has been registered special duties are imposed on the attorney. A specified list of relatives must be informed of the registration. When the EPA has been registered the donor cannot revoke or restrict it. The only way an EPA can be revoked after it is registered is if the Court of Protection decides it should be.

## Cancellation of an EPA

An EPA can be cancelled at any time before a donor loses mental capacity. Executing a deed of revocation is the best way of doing this. The EPA cannot then be registered at the Court of Protection.

## Change of Law

The proposed Mental Capacity Bill<sup>2</sup> will change the law in this area. However, until that is enacted, when patients lose the ability or capacity to manage their own affairs, this can only be done for them by the appointment of a receiver through the Court of Protection, or the use of an enduring power of attorney.

**Andrew Parsons**  
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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: [andrew.parsons@rlb-law.com](mailto:andrew.parsons@rlb-law.com).

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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RadcliffesLeBrasseur  
5 Great College Street  
Westminster  
London SW1P 3SJ

Tel +44 (0)20 7222 7040  
Fax+44 (0)20 7222 6208  
LDE 113

6-7 Park Place  
Leeds LS1 2RU

Tel +44 (0)113 234 1220  
Fax+44 (0)113 234 1573  
DX 14086 Leeds Park Square

25 Park Place  
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035  
Fax+44 (0)29 2034 3045  
DX 33063 Cardiff 1

[info@rlb-law.com](mailto:info@rlb-law.com)  
[www.rlb-law.com](http://www.rlb-law.com)

<sup>2</sup> A new draft Bill was published on 17 June 2004