

# Madden Law's Guide to Making an Enduring Power of Attorney



## What is an Enduring Power of Attorney and what effect does it have?

An Enduring Power of Attorney (EPA) is a document created in compliance with the Powers of Attorney Act 1996, executed by a person (known as the Donor), appointing Attorney(s) to act on their behalf over their affairs, if the person loses capacity to manage their own affairs.

It allows a person to pass control of their assets to the attorney, to take decisions about those assets when the donor lacks capacity to make decisions for him or herself later.

## When can it be made?

It can be made anytime once the person has decision-making capacity. A person is assumed to have decision-making capacity unless the contrary is shown, regardless of their age or medical condition.

## What is decision-making capacity?

Decision-making capacity is defined on a functional or decision specific basis. Capacity is assessed on a person's ability to understand the nature and consequences of a decision in the context of available choices, at the time the decision must be made. It is not a general assessment of capacity but is issue specific and time specific. The assessment of decision-making capacity to create an EPA is a legal test and not a medical test. It is the role of the solicitor to establish whether the person has the capacity to create an EPA.

## What decisions can an attorney make on behalf of a person?

An EPA may limit the authority given to the attorney to do specified things on behalf of the donor. For example, a restriction that the attorney may not sell the donor's house. If it is not restricted, the attorney has the power to deal with the person's assets freely. While personal care decisions can be made, healthcare decisions cannot.

## What decisions can an attorney not make on behalf of a person?

The Attorney cannot make decision outside of the scope of the power granted by the EPA and the law. The Attorney cannot make health care decision on behalf of the person.

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## Choice of Attorney

There are no formalities about who can be appointed attorney. It is a personal choice for the person creating the EPA. It is advisable to consider the attorneys skills necessary to manage the persons financial affairs and knowledge of the wishes about his/her personal care decisions.

## Who are the Notice Parties and what are their role?

Notice of the creation of the EPA must be given to at least two people. One person must be

1. The donor's spouse/civil partner, if living with the donor, or
  2. If 1 does not apply (if the donor is unmarried, widowed or separated), notification must be give to a child of the donor (if applicable) or parent, sibling or grandchild (in that order or priority).
- An Attorney cannot be a notice party.

## When does the EPA take effect?

If the person who made it loses capacity to manage their own affairs, the EPA must be registered in the Wards of Court Office. Once registration is completed a certificate of registration will issue and the EPA takes effect from this date.

## Does the Attorney keep records of the persons affairs?

The attorney must keep accounts of the donor's property and affairs and produce them to the High Court, if required. The accounts should also include details of all costs, expenses and remuneration paid to and claimed by the attorney. The attorney must keep the donor's property and accounts separate from the donor.

## Can the EPA be cancelled?

Yes. It can be revoked by the donor at any time before it is registered, while the person has the decision-making capacity to do so. Once the EPA is registered, a court application is necessary to revoke it.

## Does the EPA become ineffective on the death of the person who made it?

Yes.

## How is the process started?

Call Madden Law on **041 9803336** to discuss the process, time frame and costs with Shona.