



Guide to an Enduring Power of Attorney

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Contents

Preface	2
1. Law Governing the Enduring Power of Attorney (“EPOA”)	3
2. What is a Power of Attorney (“POA”)?	3
3. What Exactly is an EPOA?	3
4. Creating an EPOA	3
5. Mental Capacity	3
6. Who Makes an EPOA?	3
7. Requirements Necessary for Creating an EPOA	4
8. Appointing an Attorney	4
9. Appointing More than one Attorney	4
10. How to End an EPOA?	4
11. How can you Revoke the Power of Attorney?	4
12. Fees	4
13. No One can Predict the Future	4



Preface

Set out below is some useful information on Enduring Powers of Attorney. Powers of Attorney in the Bahamas are governed principally by the Powers of Attorney (1992), the Statute Laws of the Bahamas. We regularly assist clients who wish to establish an Enduring Power of Attorney. For further information please contact the Private Client & Wealth Management team at Higgs & Johnson.

Law Governing the Enduring Power of Attorney (“EPOA”)

Powers of attorney are subject to the provisions of the Powers of Attorney Act (1992) and the Common Law. The Common Law is derived from many sources, the primary one being common practice.

What is a Power of Attorney (“POA”)?

A POA is a written document in which you appoint another person to act as an agent on your behalf, thus conferring authority on the agent to perform certain acts or functions on your behalf. Powers of attorney are routinely granted to allow persons to handle a wide array of financial and personal transactions, such as maintaining a safety-deposit box or leasing property. Powers of attorney can be written to be broad and in general terms or may be limited to special circumstances.

A POA ends:

- on your death;
- or if you should become mentally incompetent.

A POA may be revoked at any time.

What exactly is an EPOA?

An EPOA is a formal document in which you grant someone (“the Attorney”) the power to deal with your financial affairs and property. The Attorney must be over 18 years of age. An EPOA can be used as long as it is registered at the Supreme Court Registry of The Bahamas. The Power of Attorney takes effect from the time the EPOA is registered unless the EPOA specifies that it is only to be used if you become mentally unable to manage your affairs in the future. Essentially, an EPOA allows you to decide who should deal with your affairs if you become mentally incapacitated.

Creating an EPOA

Unexpected serious illness or mental incapacity may result in an inability to manage your affairs. Therefore, it may be as sensible for people in the best of health to consider creating an EPOA, as it is to have an up-to-date will. Generally at law a power of attorney ends on the subsequent mental incapacity of the person or death. An EPOA, however, is a creature of statute. The EPOA is an important development, whereby a person can give a power of attorney which would survive his or her mental incapacity.

If you were to become mentally incapacitated, then without an EPOA, an application would have to be made to the Court to have someone appointed to manage your affairs. Such a judicial process involves higher costs and can take a long time. In the meantime, who knows what will happen to your financial affairs?

Mental Capacity

The first thing to note is that it is presumed that when the power of attorney was granted, you are of a sound mind; hence, the requirement of the EPOA to provide for “any subsequent mental incapacity”. While the Powers of Attorney Act does not specify the mental capacity needed to execute an enduring power, it is well established in the common law that the capacity to execute such a power exists when the person had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of the power.

To understand the nature and effect of the power, it must be shown that you understand:

- that the attorney will be able to assume complete control over your affairs;
- that the attorney will be able to do anything with your property that you can do;
- that the authority will continue if you should be or become mentally incapable; and
- that if you should be or become mentally incapable, the power will be irrevocable without any confirmation from a court of law.

This does not mean that persons with cognitive disabilities may not create an enduring power of attorney. Such persons may have the requisite capacity to establish an EPOA, so long as their level of understanding regarding the EPOA is sufficient.

Who Makes an EPOA?

Any adult can make an EPOA, as long as he/she understands its legal effect. Moreover, there is no limit to the number of enduring powers of attorney that you may create. You may create an EPOA governing your bank account, and another EPOA governing your home. You may also create one power in favour of one individual and another in favour of another, subject to certain restrictions. An EPOA may grant specific powers to the attorney or, if it is intended, the power of attorney can be written broadly enough so that the hands of the attorney

are not bound in the case of unforeseen and unexpected circumstances.

Requirements Necessary for Creating an EPOA

An EPOA is a sub-species of powers of attorney generally. Therefore, it must comply with the formalities necessary to create a power of attorney. To create an EPOA, the following requirements must be met:

- It must be the form specified in the Act.
- An express provision must be written into the power of attorney which provides that the authority is to continue notwithstanding any mental incapacity you may have.
- The EPOA must be signed by YOU or at your express direction and your attorney.
- The EPOA must be signed by a witness to your signature.
- The EPOA must be verified by an affidavit or declaration.
- The EPOA must then, along with the affidavit or declaration, be deposited in the Registry of the Supreme Court.

Appointing an Attorney

It is important to remember that the person you appoint as your attorney can have complete power over your money, savings, investments and property. If you decide to give the Attorney general authority with no restrictions, he or she will be able to sign your cheques, pay your bills, deal in your shares or buy and sell houses with the authority you have appointed to them. You should bear in mind that if you become mentally incapable, you will not be able to monitor what he or she is doing. So, when choosing your attorney consider how well they handle their own financial affairs and whether you can trust them to act in your best interests. ***It is important to note that powers of attorney and EPOA's deal only with property and cannot extend to personal care.*** You should remember that an EPOA is not the equivalent of a living will as present Bahamian law does not provide for such an instrument.

Appointing More than one Attorney

You may also consider appointing more than one Attorney as a safeguard. If you decide to appoint more than one person to be your attorney, the power of attorney must state whether they are appointed to act:

- jointly, (so the attorneys must act together),

- jointly and severally, (so the attorneys can act together or separately), or
- severally (so the attorneys can act separately).

If you appoint your attorneys to act jointly and one of the attorneys can no longer act for any unforeseen reason, such as death or incapacity, then this will automatically end the EPOA. If you appoint your attorneys to act jointly and severally or severally, then the EPOA will continue even when one of the attorneys can no longer act.

It is important that if you plan to appoint more than one attorney, that you choose people who can cooperate with each other and work together in your best interests. An EPOA may also contain conditions or restrictions which limit any authority conferred on your Attorney.

When Does an EPOA End?

An EPOA ends:

- when your attorney dies or can no longer act as your attorney;
- when you revoke the power (so long as you have the mental capacity at the time); or
- on your death.

The EPOA may also end for more complex legal reasons such as insolvency. We advise that, should such complex legal matters arise, you seek legal advice about these matters.

How Can You Revoke the Power of Attorney?

You can revoke your EPOA at any time so long as you have the mental capacity to understand what you are doing at the time you revoke it.

Fees

The fees for establishing an EPOA begin at \$600.

No One can Predict the Future

Most importantly, the EPOA offers peace of mind. The EPOA may never need to be used, but it gives you the reassurance that, should mental incapacity occur, your affairs will be managed by someone whom you have personally chosen. The EPOA can save your family the worry and expense of a Court application to appoint a receiver under the Mental Health Act to manage your affairs.