

LEGAL UPDATE:

ENDURING POWER OF ATTORNEY

By Theo T. Burrows, Partner and Alexandria Newton, Pupil

An essential estate planning tool available in The Bahamas that is often overlooked is the Enduring Power of Attorney¹ ("EPOA"). An EPOA is important as it provides you (the "donor") with the freedom to appoint any one or more suitable persons (such as family members or friends) (the "donee") to make property and financial decisions on the donor's behalf in the event of the donor's inability to manage his or her property and affairs, whether due to an unforeseen sickness or mental incapacity².

We provide answers to eight frequently asked questions from our clients with respect to EPOAs.

Question 1: What is an EPOA?

Answer: An EPOA is a legal document where the donor grants to the donee the power to make decisions as it relates to the management and administration of the donor's property and affairs³.

Question 2: Can a donor appoint more than one donee?

Answer: A donor can appoint more than one donee. If there are multiple donees, the donor must specify how such donees are able to act, whether:

- jointly (i.e., they must all act together and cannot act separately);
- jointly and severally (i.e., they can all act together but can also act separately); or
- severally (i.e., they can all act separately).

Question 3: What are the requirements to create an EPOA?

Answer: Subject to the criteria outlined in Question 5 below, in order to create a valid EPOA, the following requirements must be met:

- an EPOA must be in the form specified in the Powers of Attorney Act, 1992 (the "Act");
- an EPOA must contain a provision that provides that the authority to the donee is to continue notwithstanding the mental incapacity of the donor;
- an EPOA must be duly signed by the donor or at the donor's express direction and by the donee(s)
- the signatures of the donor and donee(s) must be duly witnessed;

¹ EPOAs are subject to the provisions of the Powers of Attorney Act, 1992 and the common law.

² An EPOA will continue to have effect upon the mental incapacity of the donor. However, a general power of attorney ceases to have effect upon the mental incapacity of the donor.

³ Subject to any restrictions within an EPOA, these broad and general powers include paying bills, selling a property, making investments, accessing cash and buying or selling shares but will not cover decisions in respect of a donor's personal care or health care.

- an EPOA must be verified by an affidavit or declaration;
- an EPOA must then, along with the affidavit or declaration, be deposited in the Supreme Court Registry (i.e., registered).

Question 4: When does an EPOA take effect?

Answer: As outlined in Question 3 above, in order for an EPOA to be valid (i.e., having operative force and effect), it must be deposited in the Supreme Court Registry. Subject to the foregoing, an EPOA may stipulate that it will take effect on the occurrence of a specific event or contingency, including, but not limited to, the subsequent mental incapacity of the donor.

Question 5: Who can make an EPOA?

Answer: Any person being 18 years of age or older can make an EPOA as long as he or she has the mental capacity to do so.

While the Act does not define the mental capacity required to execute an EPOA, from a common law perspective⁴, the donor's mental capacity to execute an EPOA exists when the donor had at the time of execution the mental capacity (with the assistance of such explanation as he or she may have been given) to understand the nature and effect of executing an EPOA. Although there are no criteria under the Act with respect to the degree of understanding required, the donor must understand the following:⁵

- that the donee will be able to assume complete authority over the donor's affairs;
- that the donee will in general be able to do anything with the donor's property which the donor could have done (if such be the terms of an EPOA);
- that the authority will continue if the donor becomes mentally incapable; and
- that should the donor be or become mentally incapable, the power will be irrevocable with out confirmation by the court.

These criteria are considered to be the basic requirements for confirming that the donor understands the nature and effect of executing an EPOA.⁶

⁴ The common law being revived to fill any vacuum created by the Act.

⁵ Re K [1988] 1 All ER 358.

⁶ It should be noted that a person who has a cognitive disability may still have capacity to make an EPOA as it would depend on his or her level of understanding about the same.

Question 6: When does an EPOA generally come to an end?**Answer:** An EPOA generally comes to an end:⁷

- when the donor revokes it (provided that the donor has the mental capacity to do so⁸);
- on the death of the donor;
- on the death of the donee or where the donee is unable to act⁹.

Question 7: Do I need an EPOA if I already have a Will?**Answer:** It is prudent to have both an EPOA and a Will as each serve very different purposes in relation to your estate planning needs.

It should be borne in mind that an EOPA operates during the lifetime of the donor for the purpose of allowing the donee to make financial and property decisions on the donor's behalf in the event of the donor's inability to manage his or her property and affairs. However, a Will operates after the death of the testator¹⁰ for the general purpose of setting out the testator's terms as to the disposition of his or her estate after death and appointing an executor to carry out such terms.

Question 8: What are some of the benefits of making an EPOA?**Answer:** In addition to offering peace of mind, some other benefits of making an EPOA are:

- it gives the donor the freedom to choose a suitable person to appoint as his or her donee in the event of the donor's inability to manage his or her property and affairs;
- it allows the donor to impose restrictions on the donee in relation to the management of his or her property and affairs;
- it remains effective after the donor becomes mentally incapacitated;
- it provides for the continuity of management of the donor's property and affairs during the lifetime of the donor (which saves the donor's family from having to make an application to court in order to have a receiver appointed under the Mental Health Act).

⁷ Notably, there are more complex legal grounds as to when an EPOA may come to an end (e.g. bankruptcy). In this regard, you should seek legal advice in relation to such matters.

⁸ It should be noted that once an EPOA has been deposited in the Supreme Court Registry, it cannot be revoked until the registrar or deputy registrar of the Supreme Court is satisfied by affidavit or declaration that such EPOA has been revoked.

⁹ In instances where multiple donees are acting either (a) jointly or severally or (b) severally, it should be noted that an EPOA will only come to an end on the death of all donees or where all donees are unable to act.

¹⁰ A person who made the Will.

The information contained herein is provided for the general interest of our readers and is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. The information contained herein can in no way serve as a substitute in such cases.



Theo is a member of The Bahamas Bar Association, the Bar of England and Wales, the Honourable Society of Lincoln's Inn and the Society of Trust and Estate Practitioners (STEP). He is a director of STEP Bahamas Branch. His recent publications include "Doing Business In... The Bahamas", A Chambers Global Practice Guide (August 2019), Estate Planning and Property Disposition in The Bahamas (March 2019) and The Bahamas chapter of 'A Practical Guide to the Transfer of Trusteeships' (2017, Third Edition). In 2020, he was recognised by IFLR1000 as a "Notable Practitioner" for his work in the corporate and financial arena. Theo was also named The Bahamas Financial Services Board's (BFSB's) 2018 Millennial of the Year.

Theo Burrows, Partner
GrahamThompson
T: +1-242-322-4130 | Email: ttb@gtclaw.com

Alexandria Newton is a Pupil Attorney in the law firm of GrahamThompson. Called to The Bahamas Bar in October 2019, she is a member of The Bahamas Bar Association. Alexandria holds an Associate of Arts Degree (AA), Law & Criminal Justice with Honors from the University of The Bahamas, a Bachelor of Law Degree (LLB) with Distinction from the University of The Bahamas, and a Certificate of Legal Education from the Eugene Dupuch Law School in Nassau, The Bahamas.

Alexandria Newton, Pupil
GrahamThompson
T: +1-242-322-4130 | Email: acn@gtclaw