



Law Society of Ireland

Enduring Powers of Attorney

Guidelines for Solicitors

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Enduring Powers of Attorney

Guidelines for Solicitors

Introduction:

The following guidelines have been prepared by the Probate, Administration and Taxation Committee of the Law Society and are intended to assist solicitors when advising clients who wish to execute an Enduring Power of Attorney (EPA). These guidelines should be read in conjunction with *A Guide to Professional Conduct of Solicitors in Ireland (2nd edition), 2002*.

The guidelines are drafted in accordance with the laws of Ireland but if there is property in other jurisdictions it will be necessary for the client to obtain advice as to what is appropriate in relation to those jurisdictions.

PART 1 - EXECUTION OF EPA

1.1 Who is the client:

A solicitor should ensure that instructions are taken directly from the intending donor of an EPA.

When written instructions are received from a client, a solicitor should consider whether such instructions are adequate but the more prudent course is for a solicitor to meet with the client and discuss the implications of, and advise the client with regard to, the execution of an EPA.

When instructions are received from a third party for the preparation of an EPA, a solicitor should obtain instructions directly from the intending donor as to whether the intending donor wishes the solicitor to act for him/her and, if such instructions are received, then the solicitor must ensure that the donor is being fully and independently advised without regard to the interests of any third party.

As a solicitor is obliged as part of the formal execution of an EPA to certify that the solicitor is satisfied that the donor '*understood the effect of creating the enduring power and [has] no reason to believe that [the] document is being executed by the donor as a result of fraud or undue pressure*', a solicitor should ensure that instructions are given freely by the client. (See *Guide to Conduct 2.1 Acceptance of Instructions - Duress and Undue Influence*).

Part A of the EPA, containing explanatory information, is part of the EPA form and should not be detached from it. The intending donor should be advised to read Part A, or have it read to him/her. However, the fact that Part A has been read by or to the intending donor does not relieve a solicitor of the obligation to interview the intending donor and make enquiries to satisfy the solicitor that the intending donor understood the effect of creating the EPA.

1.2 Capacity:

It is important for a solicitor to explain fully the effect of creating the power and ensure that the client understands this. (By explaining the provisions in detail and questioning the client as to his/her wishes, it should be possible to ascertain whether or not the client understands the provisions of the EPA. It would be prudent if the client is elderly to keep an attendance note of the meeting to demonstrate the client's understanding).

Many older people execute an EPA when they are losing capacity. A solicitor should be satisfied that the client has the mental capacity **to give instructions** and to execute an EPA. As part of the formal execution of an EPA a statement is required from a registered medical practitioner (at Part D of the form) that '*at the time [the] document was executed by the donor [he/she] had the mental capacity ...to understand the effect of creating the power.*'

However, if a solicitor has doubts about the mental capacity of the client **at the time of taking instructions** then it would be prudent to obtain a medical opinion at that initial stage. A solicitor should explain to the doctor the circumstance for which the opinion is sought. (See *Guide Conduct 2.3 Termination of Retainer – Client of Unsound Mind*).

Even where no such doubt exists, a solicitor should ensure that the registered medical practitioner completing the statement at Part D of the form has examined the donor at a time sufficiently proximate to the execution of the EPA as to be able to make a judgment as to the donor's mental capacity to understand the effect of creating the power. (See below under 'Order of Execution' where reference is made to a maximum period of 30 days after execution as the preferable timescale.)

1.3 Is an EPA appropriate:

A solicitor should advise the client, in addition to the benefits involved in the execution of an EPA, of the risks – that in the event of the client's incapacity that the attorney(s) has/have control over the assets of the client and can make certain decisions on behalf of the client. (See below under 'Scope of Authority').

A client should be advised of the alternative substitute decision-making mechanisms available. Good and appropriate advice also includes advising the intending donor of the EPA of the alternative to having a registered power in place at the time of incapacity i.e. being made a Ward of Court.

An EPA may not be appropriate in the particular client's circumstances where:

- There have been persistent family disagreements particularly if there is likely to be a dispute between family members as to the management of assets. (However, in certain circumstances, the client may have specific wishes as to what is to happen in the event of incapacity and perhaps an EPA limited to personal care decisions would be appropriate. If this is the case, then it should then be pointed out to the client that in the event of incapacity it may be necessary to have the client made a Ward of Court in relation to their general affairs).
- The value of the client's assets is substantial and there is no person with the appropriate skills to manage the assets.

1.4 Attorney:

Although the choice of an attorney is a personal matter for the client, a solicitor should stress the need to appoint an attorney or attorneys who is/are trustworthy. (See 3.1 below). A solicitor should also advise the client that on the registration of the EPA the attorney's actions will be subject to little or no supervision.

A solicitor should make enquiries about the client's choice of potential attorney – in terms of relationship with the client, suitability, trustworthiness and skills necessary to manage the client's financial affairs. A solicitor should also advise the client that a conflict of interest may arise for an attorney where the attorney is also a potential beneficiary in the donor's estate. (Note the provisions of Section 5(3) and 5(4) of the *Powers of Attorney Act, 1996*).

The issue as to whether the client should appoint joint attorneys should include advice on the greater opportunity for abuse which the appointment of a sole attorney provides. The solicitor should explain the donor's choice when appointing more than one attorney to specify whether the attorneys are to be permitted to act jointly, or jointly and severally, i.e. whether they must act together when making decisions.

In such circumstances the client should be advised of the implications of Section 14(3) of the *Powers of Attorney Act, 1996* which provides:

“Where two or more persons are appointed (or are deemed to have been appointed) to act jointly, then, in the case of the death, incapacity, or disqualification of any one or more of them the remaining attorney or attorneys may continue to act whether solely or jointly as the case may be, unless the instrument creating the power expressly provides to the contrary.”

A solicitor should take clear instructions as to whether the client wishes to appoint joint attorneys or whether the client wishes to appoint a sole attorney or joint attorneys with substitute(s). Any provision for a substitute attorney must be made at the time of execution of the EPA. (See Sections 5(3) and 5(5) of the *Powers of Attorney Act, 1996*).

1.5 Notice Parties:

Notice of the execution of an EPA is required to be given to at least two persons. It is important that a solicitor advises the client carefully of **the order of persons who must be notified** which are clearly set out in Paragraph 7 of the *Enduring Powers of Attorney Regulations 1996*.

The donor must give notice of the execution of the EPA as soon as practicable to at least two persons. None of them may be an attorney under the power. At least one must be:

- 1 the donor's spouse, if living with the donor; or
- 2 if (1) does not apply (if the donor is unmarried, widowed or separated) notification must be given to a child of the donor (if applicable); or
- 3 if (1) and (2) do not apply, to any relative (i.e. parent, sibling, grandchild, widow/er of a child, nephew or niece, in that order).

Where a spouse is appointed as attorney, the spouse may not be a notice party and the donor should notify a child, or another relative if there are no children or the child/children are also appointed as attorneys under the power.

There is no period of notice prescribed by the legislation but the notice should be served by registered or recorded post *as soon as practicable* (preferably within 30 days) of the execution of the EPA. Care should be taken to retain the documentary evidence of posting safely, as this will be the subject of averment – perhaps many years later – in the affidavit grounding the application to register the EPA. (See 1.13 below).

1.6 Scope of Authority:

(a) Business and Financial Affairs

A solicitor should advise the client of the meaning of giving a general authority or limited power to the attorney. The type of restrictions which are possible in an EPA should be explained to the client, for example, a restriction that the attorney may not sell the donor's house. A solicitor should then obtain clear instructions as to whether the authority to be given is with regard to all, or only specified, assets of the client. If the client wishes the authority to be subject to *restrictions and conditions* then careful drafting is required.

If the EPA is being executed with limitations, a solicitor should advise the client of the consequences of that, i.e. that the client would have to be taken into wardship should it become necessary to make a decision for which authority is not given by the power. (See Section 5(9) of the *Powers of Attorney Act, 1996*).

A solicitor should advise the client of the possibility of granting powers of personal care decisions and ascertain if the client wishes anyone other than the attorney to be consulted with regard to such decisions.

(b) Personal Care Decisions

Where it is intended to grant powers of personal care to the attorney, a solicitor should draw the attention of the donor to the categories of personal care decisions in respect of which an attorney may be given authority, and delete any which the intending donor does not wish to grant. Note that personal care decisions under an EPA do not extend to consents to medical treatment. (Note also the provisions of Section 5(8) of the *Powers of Attorney Act, 1996*).

In preparing the statutory form of an EPA, a solicitor should ensure the correct Schedule is being completed. The form set out in the First Schedule is appropriate when general authority is being given and it includes personal care decisions. The form in the Second Schedule should only be used if the authority being given is restricted to personal care decisions only.

1.7 Gifts and Remuneration:

A donor of an EPA can specifically provide that an attorney has the authority to make gifts out of the donor's assets when the EPA takes effect. As the provision of making gifts is open to abuse, a solicitor should advise the client of the provisions of Section 6(5) of the *Powers of*

Attorney Act, 1996 which limits the making of gifts *of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including the attorney) who are related to or connected with the donor and gifts to any charity to which the donor made or might be expected to make gifts, provided the value of each such gift is not unreasonable having regard to all the circumstances, and in particular, the extent of the donor's assets.*

In the case of provision for remunerating the attorney(s), clear instructions should be obtained from the client as to the circumstances in which remuneration should be paid. A solicitor should discuss with the client whether it is necessary to provide for the payment of remuneration at all.

In cases where a professional advisor is being appointed, a charging clause should be included as the attorney is acting in a fiduciary capacity and would otherwise be unable to charge. (See below under Solicitor-Attorney).

1.8 Solicitor-Attorney:

For the avoidance of doubt, when a solicitor is being appointed an attorney, a charging clause should be included in the EPA. (See *Guide to Conduct 2.2 Proper Standard of Legal Services –Solicitor who holds Power of Attorney*).

A solicitor should also advise the client, that in the event of the registration of the EPA, provision could be made for the solicitor's costs to be approved by an independent third party.

A solicitor who is appointed as an attorney should not sign the prescribed certificate. (A potential conflict of interest may arise where a solicitor is being appointed, particularly as sole attorney. It is best to avoid any circumstances where such an issue can be raised). For the avoidance of doubt, a partner or a colleague in the same firm may sign the certificate.

1.9 Order of execution:

When the donor has signed the EPA, then the attorney(s) should sign. The statement of capacity by a medical practitioner (who should indicate medical qualifications) and the certificate of the solicitor should ideally be completed within 30 days of the signing by the donor.

When the document has been completed, a solicitor should ensure that it is properly executed in accordance with the *Powers of Attorney Act, 1996* and should discuss with the client where the original of the EPA should be kept. (See 1.13 below).

1.10 Revocation before Registration:

A solicitor should advise the client that the client can revoke an EPA at any time before it is registered.

The form of revocation (which need not be by deed) should specifically identify the EPA being revoked. The original EPA or a copy thereof should be exhibited in the revocation.

Notice of revocation should be served on the named attorney(s).

As a matter of prudence and in order to avoid difficulties at a later stage, the formalities that apply for the execution of an EPA should be complied with, i.e. notice should also be served on the notice parties and a solicitor's certificate should confirm that the client understands the effect of revocation and a medical practitioner should certify that the donor had the mental capacity to understand the effect of revocation. (See 3.4 below).

1.11 Disclaimer by Attorney prior to registration:

No disclaimer, whether by deed or otherwise, of an EPA which has not been registered, shall be valid unless and until the attorney gives notice of it to the donor. (Section 5(10) of the *Powers of Attorney Act, 1996*).

1.12 Invalidation of an EPA:

See the provisions of Section 5 subsections (6), (7), (8) and (9) of the *Powers of Attorney Act, 1996* and of Section 50(a) of the *Family Law (Divorce) Act, 1996* (amending section 5(7) aforementioned), for the circumstances in which an EPA shall be invalidated.

1.13 Storage of Documents:

If the client is not retaining the original documents personally, a solicitor should ensure that the original EPA together with relevant certificates, copy of notices to notice parties and evidence of service of notices, should be stored as original documents and not retained on or with a file.

PART 2 - PRIOR TO REGISTRATION

2.1 Jurisdiction of the Court:

On application by any interested party, and whether or not the attorney has made application for registration of the EPA, the Court, if it is of the opinion that it is necessary, may exercise any power with respect to the EPA or to the attorney appointed to act under it. This could apply where, for example, the attorney has not taken steps to register the EPA. (See Section 8 *Powers of Attorney Act, 1996*).

2.2 Substitute Attorney:

Where a named attorney has died or disclaimed the EPA, evidence of death or disclaimer must be produced to the Registrar of Wards of Court to enable registration of the EPA with the substitute attorney.

2.3 Validity of EPA:

If there is any question as to the validity of the EPA prior to registration, an application may be made by the attorney to the court for its determination. (See Section 9(3) of the *Powers of Attorney Act, 1996*).

2.4 Defective EPA:

Where the EPA differs in an immaterial respect in form or mode of expression from the form prescribed in the regulations, the Registrar of Wards of Court may register the EPA. (See Section 10(5)(a) of the *Powers of Attorney Act, 1996*).

Notwithstanding that the EPA does not comply with the legislative provisions, the Court may admit the EPA for registration. (See Section 10(5)(b) of the *Powers of Attorney Act, 1996*).

2.5 Foreign EPAs:

There have been instances where EPAs under the legislation of England and Wales have been admitted for registration under Section 10(5) of the *Powers of Attorney Act, 1996*. (See Practice Direction of the Wards of Court Office on website at <http://www.courts.ie>).

PART 3 - REGISTRATION OF EPA

Prior to, and on the registration of an EPA, instructions may be accepted from an attorney but a solicitor continues to owe a duty to the client (donor of the EPA).

3.1 Attorneys:

A solicitor should advise the attorney of his/her role and obligation to the donor and in particular should deal specifically with the following points:

- the circumstances in which a person is disqualified from acting as an attorney. It should be explained to the client that in certain circumstances a person will be disqualified from acting as an attorney, for example, where the attorney is a spouse and there has been a subsequent annulment or dissolution of marriage (Section 5(7) of the *Powers of Attorney Act, 1996* as amended by section 50(a) of the *Family Law (Divorce) Act, 1996*), minority, disqualification under the Companies Acts or a connection with the nursing home in which the donor resides (see Section 5(4) of the *Powers of Attorney Act, 1996*);
- the scope of the authority given in the EPA and the fact that the EPA does not come into force until it has been registered but that the attorney may take certain actions/decisions pending registration once an application for registration has been made. (See Section 7(2) of the *Powers of Attorney Act, 1996*);
- if the scope of the authority includes personal care decisions, advise what decisions can be made and if the EPA provides that any other party be consulted;
- the requirement to act ‘in the best interests’ of the donor in making personal care decisions. This includes having regard to the past and present wishes and feelings of the donor, facilitating the donor’s participation as fully as possible in any decision and consulting with persons caring for the donor or interested in the donor’s welfare. The concept of ‘best interest’ also involves considering whether there is an alternative method of obtaining the same result which would be less restrictive of the donor’s freedom of action. (See Section 6(7) of *Powers of Attorney Act, 1996*);
- where the scope of the authority permits the attorney to decide where the donor may live, the solicitor should advise the attorney of the significance, both legally and for the donor, of considering whether the donor should change residence from his/her home to a care facility, including the need for the attorney to seek relevant medical and legal advice (and to consult with named individuals, discussed below);

- the requirement to keep accounts of the donor's property and affairs and to produce the accounting records to the Court if required (See *Enduring Powers of Attorney Regulations 1996*);
- the requirement to keep the donor's property separate from the attorney(s)' property. (The registration of the EPA should be noted on the accounts of the donor held by financial institutions and the proceeds of the accounts should not be transferred into the name of the attorney.);
- the requirement not to profit from the position as an attorney;
- if relevant, the requirement to consult with named individuals. (Even if not required by the EPA to consult with named individuals, a solicitor should advise an attorney that it is prudent to keep family members generally informed of transactions in relation to the donor's assets on an annual basis.);
- the provisions in the EPA and the legislation in relation to gifts (See Section 6(5) of the *Powers of Attorney Act, 1996*);
- the provisions in the EPA and legislation in relation to expenses incurred by the attorney(s) and remuneration of the attorney(s). (See *Enduring Powers of Attorney Regulations 1996*);
- the provisions in the legislation and the EPA in relation to the use of the donor's assets for the benefit of others (including the attorney(s)) and the limitations of this power (See Section 6(4) of the *Powers of Attorney Act, 1996*);
- the fact that the attorney is in a fiduciary relationship with the donor and that the attorney must use proper care in exercising the authority under the EPA;
- the fact that the attorney may disclaim at any time up to registration of the EPA and thereafter only on notice to the donor and with the consent of the High Court.

The attorney should also be advised that the court has extensive functions with regard to registered EPAs which include the cancellation of the registration of an EPA. (See generally Section 12 *Powers of Attorney Act, 1996*). An example would be if the attorney had become mentally incapable (See Section 12(4)(f) of the *Powers of Attorney Act, 1996*).

3.2 Formalities:

A solicitor on receiving instructions to register an EPA should personally satisfy him/herself that the donor is, or is becoming, incapable of managing his/her affairs.

The following steps should be taken in registering an EPA:

1. Obtain a medical certificate from a registered Medical Practitioner to the effect that the donor is, or where appropriate, is becoming, incapable by reason of a mental condition of managing and administering his/her own property and affairs.

2. Arrange with the attorney(s) to sign the following forms of notice of intention to apply for registration (a separate form is signed in respect of each notice party) -,
 - (a) Notice of intention to apply for registration addressed to the Donor
 - (b) Notice of intention to apply for registration, addressed to the notice parties. (Note Part 1 of First Schedule to *Powers of Attorney Act, 1996* as to the order of precedence of entitlement to notice of intention to apply, where notice parties are deceased or otherwise)
 - (c) Notice of intention to apply for Registration addressed to the Registrar of the Wards of Court.
3. Serve the Donor by registered post with the notice at 2(a) above, i.e. Notice of intention to apply for Registration.
4. Have an Affidavit of Service in connection with serving the Notice of intention to apply for Registration on the Donor sworn.
5. Serve the notice parties by registered post with the notice at 2(b) above, i.e. Notice of intention to apply for Registration.
6. Have Affidavits of Service in connection with serving the Notice of intention to apply for Registration on the notice parties sworn.
7. Serve notice (by ordinary post) on the Registrar of the Wards of Court of the intention to apply for Registration.
8. Wait for five-week notice period to expire.
9. Arrange for the Attorney(s) to swear an affidavit grounding the application for Registration setting forth fully the facts and/or circumstances giving rise to the application. (See Order 129 Rule 3 of the *Rules of the Superior Courts 1986*).
10. File the following documentation (together with affidavits of service at 12 below) with the Registrar of the Wards of Court Office:
 - (a) Application for Registration of EPA (See Form No. 1 in the Appendix to Order 129 Rule 3 of the *Rules of Superior Courts 1986*).
 - (b) Original EPA.
 - (c) Copy Notice of execution by the Donor of the EPA given to the notice parties at the time of the execution of the EPA.
 - (d) Copy Notice of intention to apply for Registration given to the Donor.
 - (e) Copy Notice of intention to apply for Registration given to the notice parties.
 - (f) Affidavit of Service in relation to the service on the notice parties of the Notice of execution.

- (g) Affidavit of Service in relation to the service on the Donor of the Notice of intention to apply for Registration.
 - (h) Affidavit of Service in relation to service on the notice parties of the Notice of Intention to apply for Registration.
 - (i) Medical Certificate from a registered Medical Practitioner.
 - (j) Affidavit sworn by attorney(s) at 9 above.
11. (a) a copy of this Application for Registration should be personally served on the donor; and
- (b) a copy of this Application for Registration should be served on the notice parties by registered post.
12. (a) Swear affidavit of service of Application for Registration on donor.
- (b) Swear affidavit of service of Application for Registration on notice parties.

3.3 Notification to the Registrar of Wards of Court after registration:

The Attorney should be advised that the Registrar of Wards of Court should be notified if any of the following events occur after the registration of the EPA:

- change of address of attorney
- change of address of donor
- death of donor
- where the attorney becomes mentally incapable then their committee/attorney should notify the Registrar
- where the attorney dies, their personal representative should notify the Registrar
- any other event which would terminate or invalidate the EPA e.g. if the donor recovers capacity or if the attorney is adjudicated a bankrupt.

3.4 Revocation by donor after registration:

A revocation by a donor of an EPA is not valid unless and until the Court confirms the revocation. The application to the Court must be on notice to the attorney(s). (See Sections 11(1)(a) and 12(3) of the *Powers of Attorney Act, 1996*).

3.5 Disclaimer/Resignation by attorney after registration:

The attorney should be advised that in the event of the attorney wishing to disclaim/resign as attorney after the EPA has been registered he/she may only do so **with the consent of the court**, upon application made on notice to the donor. (See Section 11(1) (b) of the *Powers of Attorney Act, 1996*).

If there is a joint attorney and the authority provides for several liability then the continuing attorney will be in a position to act. Likewise if the EPA provides for a substitute attorney

and the substitute attorney is willing to act, then resignation will be effective. (See 2.2 above).

3.6 Inventory of Assets:

A solicitor should advise the attorney(s) to prepare a full inventory of assets at the time of registration and this will act as a useful checklist if any disputes arise in the future.

On the death of the donor a full inventory should be prepared by the attorney and passed to the personal representative of the donor.

3.7 Termination of EPA:

The functions of an attorney cease on the death of the donor of the EPA.

Where the Court cancels the registration of an EPA it shall by order revoke the EPA. (See Section 12(5) of the *Powers of Attorney Act, 1996*).

PART 4 - LEGISLATION

Acts:

Powers of Attorney Act 1996 (1996 Act)

Family Law (Miscellaneous Provisions) Act 1997 (amends Section 20 and Section 25 of the 1996 Act)

Family Law (Divorce) Act 1996 (amends Section 5(7)(a) and the Second Schedule of the 1996 Act)

Statutory Instruments:

SI 195 of 1996 Powers of Attorney Act 1996 (Commencement Order)

SI 196 of 1996 Enduring Powers of Attorney Regulations 1996

SI 287 of 1996 Enduring Powers of Attorney (Personal Care Decisions) Regulations 1996

Rules:

Order 129 of the Rules of the Superior Courts 1986 (inserted by S.I. No. 66 of 2000)

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