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SOLICITORS

**EXECUTING AN
ENDURING POWERS OF
ATTORNEY UNDER THE
*ASSISTED DECISION-
MAKING (CAPACITY) ACT*
2015 – IT WAS NEVER
GOING TO BE EASY!**

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What is an Enduring Power of Attorney?

An Enduring Power of Attorney (EPA) is a document that allows someone (an “Attorney”) to act on your behalf, should you become mentally incapable to look after your affairs in the future due to illness, injury, dementia or some other cause. It means that Attorney can take all the legal steps that would be required to act on your behalf in those circumstances. You will generally appoint one or more family members to act as your Attorney on your behalf. We recommend this to all our clients, to protect against their legal affairs being completely tied up if they become very unwell.

Under the EPA, you are recorded as “the Donor”.

When the Enduring Power of Attorney is signed by you and the Attorney/s, then your Doctor / Medical Consultant must certify in writing that at the time you signed the EPA you were capable of understanding its meaning. The process also requires that at least two other parties (generally family members) are notified that you have signed the document. In addition, all your children must be notified. They are described as “Notice Parties”.

Previously

Previously, under the Power of Attorney Act 1996, it was merely necessary for a Donor to execute the EPA and in turn for the appointed Attorneys to also sign the same document. In turn the Solicitor would sign a Certificate that the document had been properly executed. The Donor`s GP would then be requested to sign a Certificate that the Donor had the necessary mental capacity. The EPA document would then be kept in a safe place in the event that it was required in the future, should the Donor become mentally

incapacitated. **Only at that point, and only in that event**, was it necessary in turn to register the EPA with the High Court, Wards of Court Office, in order for the Attorneys to then have power to deal with the Donor's property and affairs.

All has now changed

This has all now changed since the enactment of the *Assisted Decision-Making (Capacity) Act 2015* (the "new Act").

Under the new Act (enacted only thereafter on the 26th April 2023) the process for completion of an EPA has now become much more complicated. Not only must the EPA be signed by the Donor and the Attorneys and the 2 Notice Parties notified; but the Spouse (where appropriate) and **all** children must also be notified and in turn the EPA **must be registered with the Decision Support Service (DSS)** and recognised as properly registered **by the DSS** before the EPA is legally effective.

Government bodies sometimes tend to minimize the role of Solicitors in certain functions. This has certainly been the case in the establishment of the new process for execution and registration of EPA's, where the DSS has been concerned. In setting up the Online process for the execution and registration of EPA's back in April 2023 the DSS thought that the system would work where the Donor and

the Attorney would simply go online onto the DSS website, complete up the necessary documents and in turn, in advance of uploading those documents to the DSS website, they would call in to their Solicitor to get the Solicitor to sign the Solicitors Legal Statement.

The Solicitors Legal Statement

Applications to register, vary, revoke or rescind an EPA, must be accompanied by a statement from a Solicitor, to be created after interviewing the Donor and making any necessary enquiries, to specify:

- That the solicitor is satisfied that the Donor understands the implications of creating, varying, revoking or rescinding an EPA.
- That, where relevant, the Donor is aware that they may amend or revoke the EPA prior to registration and prior to its notification.
- That the Solicitor is satisfied that there is no reason to believe that the Instrument is being created, varied, revoked or rescinded by the Donor as a result of fraud, coercion, or undue pressure. (Solicitors will note that this certification is expanded from that required under the *Powers of Attorney Act, 1996* and now includes being satisfied that the action(s) of the Donor are not as a result of coercion).

These requirements are critically important as the DSS may, as part of an investigation (e.g. in respect of the validity of an EPA or suitability of the Attorney), request relevant records or information

and/or summon the Solicitor as a witness. As such, the provision of the Legal Statement is not a perfunctory exercise and the Law Society has advised that any Solicitor who provides such a statement will have to engage fully with the client, taking a detailed attendance note in accordance with good professional practice and the requirements of the DSS's Code of Practice for Legal Practitioners. Furthermore, the Law Society advises that the level of engagement required for a Solicitor to be in a position to provide the necessary statement as to capacity for the purposes of completion of an EPA creates a Solicitor/Client relationship. As such, Solicitors will be required to observe all requirements for those relationships which include obtaining Anti-Money Laundering documentation, issuing Terms and Conditions of Engagement, taking full and comprehensive instructions from the client and providing advice in a manner / setting which mitigates against the risk of undue influence, coercion, or fraud by third parties.

Further, and in order to be in a position to provide the necessary legal statement, Solicitor will need to engage with the client on the EPA, advising and counselling them in relation to its impact, in much the same manner as would have been the case for an EPA created under the *Powers of Attorney Act, 1996*.

The Law Society has advised that Solicitors should have regard to the High Court judgment *In the Matter of an Application for Registration of an Enduring Power of Attorney of SCR dated 1st November 2013* [\[2015\] IEHC 308](#), which discusses the purpose of a certification of capacity in the creation of an EPA, and the factors to be taken into account in making such an assessment. While this

judgement relates to an EPA under the *Powers of Attorney Act, 1996*, given the similarity of the solicitor's certification under that Act and the new ADM(C)A regime, the Law Society advises that it remains relevant until and unless there is further judicial guidance on what is required of the solicitor in respect of certification under the new ADM(C)A regime. The judgment of the court in the above-referenced case in relation to the requirements incumbent upon a solicitor would suggest that where a practitioner is unable to undertake a thorough engagement with the person wishing to create an EPA, they are unlikely to be able to provide the requisite legal statement.

There is no way therefore that a Solicitor can merely meet with their Donor client to simply sign the Legal Statement without being involved in the process from start to finish.

The Precautions which must be taken by the Advising Solicitor

There is often a mistaken understanding that executing an EPA is something similar to making a Will and that the costs might be somewhat similar. There are a number of factors that make the execution of an EPA more complex and difficult than that of a Solicitor being instructed to make a Will.

For instance, the Donor is on many occasions prompted to execute an EPA when they have been diagnosed with a condition that may lead to mental incapacity in due course. This raises a very heavy

duty of responsibility on the Solicitor and Medical Practitioners involved in confirming that the Donor understands the nature and effect of what they are executing. Given the potential for fraud or abuse, there are an extensive number of safeguards built into the “execution” phase, to include countersigning of the EPA by the proposed Attorney or Attorneys, notification to at least two Notice Parties, certification of capacity by the instructed Solicitor and indeed certification of capacity by a registered Medical Practitioner after the EPA has been executed. It is frequently the case that the Medical Practitioner would need to be consulted before the execution of the EPA as well.

Over and above the steps already outlined above we, as your solicitor, must also consider and advise on the following Guidelines which are issued by the Law Society; namely:

- Does the Donor have sufficient capacity to execute the EPA at this time?
- Are there any circumstances where the Donor might be vulnerable and subject to undue influence;
- In considering the capacity of the Donor, the Solicitor must be conversant with the presumptions which now exist at Common Law on Mental Capacity and which have been given Statutory effect under the Assisted Decision-Making (Capacity) Act 2015 and the functional tests which apply in accordance with HSE National Consent Policy and various High Court Caselaw;
- At all times, it is important for the Solicitor to remember that the Donor is the Client and the Client’s instructions are paramount;

- The Solicitor must be satisfied that the Donor/Client understands fully the effect of creating the EPA and its consequences;
- There will be circumstances when an EPA is not appropriate;
- The Solicitor will be obliged to advise on the choice of Attorneys and extreme care should be taken on this;
- The Solicitor will be obliged to write to the Attorneys pointing out their duties and be satisfied that they realise their obligations;
- The Solicitor will be endeavouring, in this process, to ensure that the Attorneys have no Conflict of Interest at the time of appointment / no possible Conflict of Interest at later relevant dates;
- The Solicitor will need to advise on appropriate Notice Parties;
- The Solicitor will need to advise on the Scope of Authority under the EPA;
- The EPA could be set aside by a Court at a later date if it was found that there was any defect in the manner in which the EPA had been set up or advised.

The Functional Test for Capacity

A key feature of the new Act is the introduction of a functional test for capacity.

That is, capacity is assessed on the basis of a person's ability to understand, at a time a decision has to be made, the nature and consequences of the decision to be made in the context of available choices.

As far back as 2008, Ms Justice Laffoy J in *Fitzpatrick v K (No. 2)* [2008] IEHC held that that decision-making capacity is to be defined on a functional or decision specific basis. The *Fitzpatrick* case concerned the lawfulness of administering blood transfusions during childbirth to an individual who had refused to consent to the transfusion. The individual concerned, Ms K, was a member of the Jehovah's Witnesses faith and on the basis of that faith had refused to consent to the transfusions. The Court was asked to determine whether she had the capacity to so refuse. During her decision Laffoy J held that in the first instance when approaching an assessment of capacity there is a presumption of capacity and further held that the assessment of capacity must be issue specific and time specific. However, it is not just the signing of the Legal Statement which has provided some concern under the new Act, but also the process by which the EPA is now signed by the Donor and the Attorneys and in turn registered with the DSS.

The Execution of EPA's under the New Regime

The execution of the EPA by the Donor and the Attorneys has now become much more complicated. For the Enduring Power of Attorney to be legally effective, it must then be registered with the DSS. The writer suggests that this compulsory registration should not have been necessary where, in the past, it has not been necessary to register the EPA with the former Wards of Court Office particularly where most Donors did not become mentally incapacitated during their lifetimes. It is respectfully the opinion of the writer that this has only led to further unnecessary legal cost for the client.

The Process of Execution

Matters have however been further complicated by the manner in which the DSS originally decided that EPA's should be executed and registered with the DSS. Originally, there was an expectation that the Donor and Attorneys would log on to the DSS website, complete the necessary forms and in turn, having secured the Solicitors Legal Statement and a Certificate of Mental Capacity from the Donor's Medical Practitioner and duly notified the required Notice Parties, that all documents would be uploaded by the Donor/Attorneys to the DSS website for registration. This system was not however as easy as thought by the DSS. For instance, not every Donor has the capacity or the wish to go online. Furthermore, it is necessary for both the Donor and the Attorneys to secure a Public Services Card and a verified account with *MYGOVID* before they can even start the process.

Concerns raised by the Law Society

Arising from concerns raised by the Law Society after the enactment of the new Act a compromise was reached whereby the web-based form could be downloaded as a paper-based system for the Solicitors and their clients to work around.

We will refer to this as the *Manual Process*. A Solicitor can now write to the DSS with a Letter of Authority signed by the Donor for the Solicitor to be recorded as an Authorised Contact. If the Donor is not in a position to create an online account, for any reason, then (along

with the Letter of Authority) the Solicitor can supply a form to verify the identity of the Donor. In response, the DSS will write to inform the Solicitor that the Donor's identity has been verified and the Solicitor has been added to the DSS system as an Authorised Contact in respect of the EPA, in accordance with the Letter of Authority. If the Donor is unable to use the My DSS portal at this point the DSS will also enclose an EPA paper application form unique to the Donor. The Solicitor returns the completed Application Form to the DSS by post or email.

On receipt of the completed application form, the DSS will create an online entry on the system for the EPA application. The DSS then generates the supporting documents which are:

- EPA instrument template
- Donor Declaration
- Attorney Declaration
- The Solicitor's Legal Statement
- The Medical Practitioner's Statement of Capacity
- Notice Form
- Notice Party Details Form

The DSS sends these documents to the solicitor to be completed. The solicitor returns the completed documentation to the DSS for processing, review and registration as per the provisions of the 2015 Act. The fee for registration is payable at this point.

The difficulty with the Manual Process is however that, as more Donors, with the assistance of their Solicitors, start to use this manual process, the system will become very slow, where it is

necessary for the DSS firstly to consider the application lodged initially by the Solicitor and in turn, after the delivery of the completed manual forms by the Solicitors to the DSS, for the DSS to populate all of that information onto their online system for registration.

Will there be sufficient time?

While many Donors consider the making of an EPA when they are fit and well, this luxury is not always available. What if a Donor is starting to suffer from Dementia and there are concerns surrounding that Donor's capacity to execute an EPA within only a short period of time which may be available. Bear in mind that the EPA is not legally effective until it has been **processed and registered by the DSS**. This manual process, allowing for the manual registration process, could take anything in excess of 6 months? What if the Donor becomes mentally incapable before the manual EPA is registered? Would the EPA be legally effective in those circumstances? While this may ultimately fall to be decided by the High Court in a specific case at a later date, the writer would respectfully submit that the EPA would not be legally effective in those circumstances.

It is in those circumstances that we have made a decision to advise clients to register through the Online Process, with our assistance.

The Online Process

This is the process which the DSS prefers but, for reasons which have already been explained in this Article, the Online Process simply cannot be done by many Donors and Attorneys on their own. The process can be summarised as follows:

- The necessity for both Donor and Attorneys to acquire Public Service Card registration and a verified account with MyGovID;
- The Solicitor, on meeting with the Donor, is required to gather in all other necessary information contact details to prepare the draft EPA;
- The Solicitor meets with the Donor to upload that information online to the website of the DSS;
- The Solicitor in turn meets with the Donor and Attorneys to execute the EPA;
- The Solicitor is required to sign the Legal Statement to confirm that the EPA has been properly executed;
- The executed EPA is given to the Donor to attend with their Doctor/Medical Consultant for the Doctor/Medical Consultant to confirm that the Donor had the necessary mental capacity to sign the EPA in the first place;
- On return of the signed Doctor's Certificate the Solicitor arranges to upload all signed documents to the website of the DSS;
- The Solicitor deals with any enquiries raised by the DSS pending registration of the EPA, and

- In due course the EPA is registered by the DSS and then deemed legally effective.

A complicated, but a necessary process

After reading through this Article you, as a person who is considering executing an EPA, might wonder why you should put yourself through this process? It is however a very sensible course of action to execute an EPA. That way, you retain control over who can make decisions on your behalf and for your benefit in the event that you are subsequently rendered mentally incapable of taking care of your affairs.

If you don't undertake the execution of an EPA, then you have no decision or scrutiny as to who will ultimately be responsible for your personal care and property in the event that you do subsequently become mentally incapable of looking after your affairs.

You should not however wait until you are older or until you may have been diagnosed as suffering from an illness which may lead you to be incapable. For instance, what if you were rendered incapable by reason of injuries sustained in a road traffic accident?

The earlier you decide to draw up an EPA, the better.

So, why not contact your solicitor about this process today?

For further information contact Morgan McManus solicitors:

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