

LAW SOCIETY GUIDELINES



ENDURING POWERS OF ATTORNEY (CREATED UNDER THE TERMS OF THE POWERS OF ATTORNEY ACT 1996) - GUIDELINES FOR SOLICITORS

UPDATE OF 2009 Guidelines

JULY 2016¹

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. In 2004 the Law Society published Guidelines for Solicitors in relation to Enduring Powers of Attorney (EPAs) created under the provisions of the *Powers of Attorney Act 1996* (1996 Act), with those guidelines being updated in 2009.
- 1.2. In December 2015 the *Assisted Decision-Making (Capacity) Act 2015* (2015 Act) was enacted with Part 7 of the Act dealing with EPAs. (Part 7 has not yet been commenced). The 2015 Act provides that subject to certain exceptions, the 2015 Act will not apply to EPAs created under the 1996 Act. It also provides that from the date of the commencement of Part 7 - *a person shall not create an enduring power of attorney under the Act of 1996 and the Act of 1996 shall not apply to an enduring power of attorney created after that date* (i.e. EPAs created under the 2015 Act). Therefore, until the commencement of the new provisions relating to EPAs, EPAs will continue to be created under the provisions of the 1996 Act and the 1996 Act will continue to apply to them even if they come into effect – i.e. are registered - after the commencement of the 2015 Act.
- 1.3. The Law Society therefore decided to update the Guidelines for Solicitors in relation to EPAs being created under the provisions of the 1996 Act to take account of developments in common law since the guidelines were updated in 2009 and also having regard to the enactment of the 2015 Act. (Further Guidelines will be published in relation to EPAs to be created under the provisions of Part 7 of the 2015 Act when commenced).
- 1.4. **The following points should be noted when advising a client creating an EPA under the 1996 Act:**
 - 1.4.1. There is a presumption in common law (given statutory effect in the 2015 Act and will be a statutory presumption on the coming into force on the commencement of the 2015 Act) that every adult has the capacity to make a decision unless the contrary is clearly indicated. It must not be assumed that a *person lacks capacity to make a decision solely because of their age, disability, appearance, behaviour, medical condition (including intellectual disability, mental illness, dementia or scores on tests of cognitive function), their beliefs, their apparent inability to communicate, or the fact that they may make a decision that appears unwise.* (HSE National Consent Policy para 5.3).
 - 1.4.2. The decision of the High Court in *Fitzpatrick v K (No.2) [2008] IEHC* stated that decision-making capacity is to be defined on a functional or decision specific basis. Capacity is therefore to be assessed on the basis of a person's ability to understand the nature and consequences of a decision in the context of available choices at the time the decision has to be made. It is therefore not an across the board assessment of capacity but is issue specific and time specific. **It is important that the donor of an EPA fully**

understands the purport of creating an enduring power of attorney, intends the power to be effective only when the donor lacks decision-making capacity and the EPA is registered.

- 1.4.3. Since the High Court's 2008 *Fitzpatrick* decision, the functional approach to the assessment of capacity is now contained in *HSE National Consent Policy* and the Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (7th edition 2009 and [8th edition 2016](#)). The functional approach must therefore be used in the assessment of capacity to create an EPA. (The 2015 Act also gives statutory effect to the principle that decision-making capacity is to be construed functionally and will become a statutory obligation on the commencement of the 2015 Act).
- 1.4.4. Best practice and to comply with international human rights standards requires that a person is supported and assisted to maximise his or her decision-making ability. (This current obligation is given statutory effect in the 2015 Act and will become a statutory obligation on the commencement of the 2015 Act).
- 1.4.5. It is also current best practice to have regard to the Guiding Principles set out in [S.8](#) of the *Assisted Decision-Making (Capacity) Act 2015*. Those principles (some of which already have statutory force in the 1996 Act) are extremely relevant once the EPA comes into effect – to include *the need to permit and encourage the donor to participate, or to improve the donor's ability to participate, as fully as possible in any decision affecting the donor.* (S.6 (7) 1996 Act).
- 1.4.6. Ireland is due to ratify the [Hague Convention on the International Protection of Adults 2000](#) in 2016. Therefore an Irish EPA created under the 1996 Act may take effect in other jurisdictions but it is necessary to advise a client what jurisdictions come within the terms of the Hague Convention and also that the law applicable to **the manner of the exercise of an EPA is the law of the country where it is exercised.**
- 1.4.7. An EPA created under the 1996 Act can be revoked at any time while the donor has the decision-making capacity to do so and should the client wish. Once Part 7 of the 2015 Act is commenced the donor could revoke the EPA created under the 1996 Act and create an EPA under the 2015 Act. The solicitor should at this stage explain the reasons why a client might wish to do so. For example, there are annual reporting provisions contained in the 2015 Act. Also, at time of the registration of a 2015 EPA, the Director of the Decision Support Service is required to ascertain if the attorney/s appointed are suitable to carry out the functions of an attorney. These are possible safeguards that the client should be informed about. **It should be stressed to the client that once a 1996 Act EPA is created it will remain valid**

(unless amended or revoked) even after the commencement of the 2015 Act.

- 1.4.8. Other legislation enacted since the 2009 Guidelines were published also need to be considered when advising a client with regard to the creation of an EPA under the 1996 Act. Examples: *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* and the *Personal Insolvency Act 2012*.

- 1.5. In advising clients with regard to the execution of an EPA, solicitors should note that different considerations apply in relation to donors who have full decision-making capacity and who wish to make provisions for a time when they may no longer have decision-making capacity and those donors whose decision-making capacity may be in question due to ill health or age and potentially are at a vulnerable stage but nevertheless have capacity to create an EPA but are more likely to be vulnerable to undue influence, fraud or exploitation.

2. Execution of Enduring Power of Attorney

2.1. Who is the client?

- 2.1.1. 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 arrange to meet the client personally 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 or not the intending donor wishes the solicitor to act for him/her. If such instructions are received, then the donor is your client and you must ensure that the donor is being fully and independently advised without regard to the interests of any third party and that the donor is not under pressure or being influenced to create an EPA.
- 2.1.2. A solicitor is obliged as part of the formal execution of an EPA to state that the solicitor is satisfied that the donor understood the effect of creating the enduring power and has no reason to believe that the instrument 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. (S.5 (2) 1996 Act).
- 2.1.3. A solicitor should presume that the donor has the capacity to create an EPA unless the contrary is shown. If it is necessary to assess the donor's capacity to create an EPA then a functional assessment of capacity is required to comply with common law and in line with the national policy guidelines. (This obligation to construe decision-making capacity in a functional manner will become a statutory obligation when the 2015 Act is commenced).
- 2.1.4. Part A of the EPA containing explanatory information is part of the EPA instrument and should not be detached from it. The intending donor should be advised to read Part A, or have it read to him/her and if necessary have the detail explained 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 understands the effect of creating the EPA, intends the power to be effective only when the donor lacks decision-making capacity and once the EPA is registered.

2.2. Decision-making Capacity

- 2.2.1. It is important for a solicitor to explain fully the effect of creating the EPA and to 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 and that the client has the necessary decision-making ability to create an EPA. In the attendance note of the meeting with the client, a solicitor should record the client's understanding of the effect of creating the EPA. The scope and purpose of the power must be explained to the donor by the solicitor with a sufficient degree of clarity to ensure that the donor understands that the EPA creates a power of far-reaching effect. (See [SCR \[2015\] IEHC 308](#)).
- 2.2.2. Understanding the effect of creating the EPA means the client must understand that he or she will effectively be passing over control of their assets to the attorney to take decisions with regard to those assets in the event that the donor lacks capacity to make decisions for him or herself at a later date and will be making critical decisions with regard to personal care. An EPA may also be created giving limited or simple authority to the attorney to do specified things on behalf of the donor and an EPA in this form may be more appropriate for a person whose decision-making capacity is limited but is able to make decisions about those specific issues.
- 2.2.3. Given that the assessment of decision-making capacity to create an EPA is a legal test and not a medical test, the obligation is for the solicitor to establish whether or not the client has the capacity to create an EPA.

2.3. Is an EPA appropriate?

- 2.3.1. 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 the client lacks decision-making capacity, the attorney has control over the assets of the client and has the authority to make certain decisions on behalf of the client which may include care decisions which will affect the wellbeing of the donor.
- 2.3.2. Appropriate advice to the client includes advising the intending donor of the EPA of the alternative to having a registered power in place at the time they lack decision-making capacity, i.e. currently being made a Ward of Court and, on the commencement of the 2015 Act, of the alternative assisted decision-making mechanisms available.

2.3.3. 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 dispute between family members as to the management of assets and there is no alternative suitable person available for appointment. However, in certain circumstances the client may have specific wishes as to what is to happen in the event that he/she lacks decision-making capacity and perhaps an EPA limited to 'personal care' decisions may be appropriate. If this is the case, it should then be pointed out to the client that in the event of them lacking decision-making capacity it may be necessary for a court to appoint someone to make decisions on their behalf.
- The value of the client's assets is substantial and there is no person with the appropriate skills to manage the assets.

2.3.4. Solicitors should note that there is a **mandatory requirement** for a person entering into a debt settlement arrangement or a personal insolvency arrangement to make provision for the manner in which the debtor's debts are to be treated in the event that the debtor lacks decision-making capacity. (S.65 and S.99 *Personal Insolvency Act 2012*). It is important to emphasise to the donor that the attorney to be appointed in such circumstances will have very clear obligations to fulfil in carrying out the debtor obligations under such an arrangement and therefore the appointment of an attorney with suitable skills to deal with such matters is essential.

2.4. Choice of Attorney

2.4.1. Although the choice of an attorney is a personal matter for the client, a solicitor should stress the need to appoint an attorney who is trustworthy and suitable to act as attorney. A solicitor should also advise the client that, in the event of the registration of the EPA, the attorney's actions will be subject to little or no supervision or reporting requirement under the 1996 Act. Solicitors should consider advising clients of the possibility that an additional 'condition' (as provided for in S.6 (2) of the 1996 Act) might be inserted into the EPA to specifically reference the fact that the donor wishes the attorneys to comply with the reporting obligations and provisions of the 2015 Act when commenced. (See S.75 of the 2015 Act).

2.4.2. A solicitor should make enquiries about the client's choice of potential attorney in terms of the relationship with the client, suitability, trustworthiness, skills necessary to manage the client's financial affairs and empathy with the client's wishes with regard to his/her personal care decisions. A solicitor should also advise the client that a **conflict of interest**

may arise for an attorney, for example, where the attorney has an interest in property owned by the client (i.e. shareholder in the same company or co-owner of property) or is a potential beneficiary in the donor's estate. If there is potential for such conflict of interest the client should be advised of the option to create the EPA with 'conditions and restrictions' which could deal with such a potential problem. (S.6 of the 1996 Act).

2.4.3. 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 that the donor has the option, 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.

2.4.4. In such circumstances clients should be advised of the implications of S. 14(3) of the 1996 Act which provides:

“where two or more persons are appointed (or are deemed to be appointed) to act jointly as Attorneys, then, in the case of the death, lack of capacity 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.”

2.4.5. 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 attorneys. Any provision for substitute attorney must be made at the time of execution of the EPA.

2.5. **Notice Parties**

2.5.1. 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 ([SI 196 of 1996](#)).

2.5.2. 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:

- i. The donor's spouse/civil partner, if living with the donor, or
- ii. If (i) does not apply (if the donor is unmarried, widowed or separated), notification must be given to a child of the donor (if applicable), or

- iii. If (i) and (ii) do not apply, to any relative (that is, parent, sibling, grandchild, widow(er) of a child, nephew or niece, in that order.

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

2.5.4. 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 and affidavits of service sworn. Care should be taken to safely retain the documentary evidence of posting, as this will be the subject of an averment - perhaps many years later - in the affidavit grounding the application to register the EPA.

2.6. **Scope of Authority**

2.6.1. **Business and financial affairs**

The solicitor should advise the client of the meaning of giving a general authority or a limited power to the attorney. The type of restrictions that 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. A solicitor should point out to the client that, if assets are sold by their attorneys after the EPA has been registered, this may have implications for specific bequests contained in a Will. The client should therefore be encouraged to review a Will at the time of the execution of an EPA.

If the EPA is being executed with limitations a solicitor should advise the client of the consequences of that - it may be necessary to have the client taken into Wardship (or if registered after the commencement of the 2015 Act to have the court appoint a decision-making representative) should it become necessary to make a decision/s for which authority is not given in the EPA.

The solicitor should ascertain if the client owns any property jointly with others and, if so, to ascertain:

- Does a presumption of a resulting trust arise?
- Does the presumption of advancement arise?

- Was there an intention to benefit the joint owner, either at the date of transfer or at the date of death?
- Details of the client's investments should be ascertained and the client's wishes with regard to investments should also be ascertained and discussed.

2.6.2. **Personal Care Decisions**

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

A solicitor should also enquire as to whether or not the client has separately executed any form of **advance healthcare directive** with regard to the refusal of or consent to medical treatment. The client should be advised to inform the attorney of such directive.

Where it is intended to grant powers over personal care decisions 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 the 1996 Act do not extend to healthcare decisions).

The costs of long-term care should be discussed with the client and their wishes with regard to care at home or in an alternative facility should be noted.

The conferring of personal care decisions **does not give the attorney any authority** to detain or restrain the donor.

In preparing the statutory form for 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 completed 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.

2.7. **Gifts and Remuneration**

2.7.1. A donor of an EPA can specifically provide that an attorney has the authority to make gifts of the donor's assets when the EPA takes effect.

2.7.2. As the provision for making gifts is open to abuse, a solicitor should advise the client of S.6 (5) of the 1996 Act which limits the making of:

“gifts of a seasonal nature or at a time, or on an anniversary, or 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.”

- 2.7.3. In the case of provision for remunerating the attorney, 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. (See 2.8 below).

2.8. **Solicitor – Attorney**

- 2.8.1. When a solicitor is being appointed an attorney, the client should be advised that there will be a professional charge for acting and the client approval should be obtained for the making of such charges. For the avoidance of doubt, if a solicitor is being appointed an attorney, then a charging clause should be included in the EPA. A solicitor should also advise the client that, in the event of the registration of the EPA, provision should be made for the solicitor’s professional fees 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).*
- 2.8.2. For the avoidance of doubt, a partner or a colleague in the same firm may sign the certificate.
- 2.8.3. A solicitor who is being appointed attorney in their professional capacity should consider their professional indemnity insurance and how matters will be dealt with on retirement from practice.

2.9. **Order of Execution**

- 2.9.1. After the donor has signed the EPA, then the attorney(s) should sign and then the doctor. The solicitor should ensure that the registered medical practitioner is aware of the form of statement required by him or her. It should state:

“That in his or her opinion at the time the EPA was executed, the donor had the mental capacity, with the assistance of such

explanations as may have been given to the donor, to understand the effect of creating the EPA." (S.5 (2) 1996 Act).

2.9.2. When the instrument has been completed, a solicitor should ensure that it is properly executed in accordance with the 1996 Act and should discuss with the client where the original of the instrument should be kept.

2.10. Revocation before Registration

A solicitor should advise the client that he/she 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 to the execution of an EPA should be complied with - that is notice should be served on the notice parties and a solicitors statement should confirm that the client understands the effect of revocation, and a registered medical practitioner should state that the donor had the necessary mental capacity (with such explanations that may have been given to the donor) to understand the effect of revocation. A functional approach to capacity is required to comply with common law and in line with national policy guidelines.

Once the EPA is registered a court application is necessary to effect any revocation or cancellation of the registration. A solicitor should advise the client of the effect of registration and in particular the provision of S.11 (1) (c) which includes a restriction on the donor to extend or restrict the scope of the authority given in the EPA.

2.11. Disclaimer by attorney prior to registration

No disclaimer, whether by deed or otherwise, of an EPA that has not been registered shall be valid unless and until the attorney gives notice of it to the donor.

2.12. Invalidation of an EPA

See the provisions of S.5 (6), (7) (8) and (9) of the 1996 Act, as amended by S.50 (a) of the *Family Law (Divorce) Act 1996* and S.104 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* for the circumstances in which an EPA shall be invalidated.

2.13. 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 safely.

3. Prior to registration

3.1. 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 High Court may exercise any power with respect to the EPA, or to the attorney appointed to act under it if the Court is of the opinion that it is necessary. This could apply where, for example, the attorney has not taken steps to register the EPA. (S.8 1996 Act).

3.2. Substitute Attorney

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

3.3. Validity of EPA

If there is any question as to the validity of the EPA prior to registration, then an application may be made by the attorney to the High Court for its determination (S.9 (3) 1996 Act).

3.4. 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 Wards of Court may register the EPA. Notwithstanding that the EPA does not comply with the legislative provisions, the High Court may admit the EPA for registration (S.10 (5) 1996 Act).

3.5. Foreign EPAs

There have been instances where EPAs under the legislation of England and Wales have been admitted for registration under S.10 (5) of the 1996 Act. (See Practice Direction of the Wards of Court Office on website at <http://www.courts.ie> and Introduction above for comments on the impact of Ireland ratifying the Hague Convention).

4. 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).

4.1. Role and Obligation of 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:

- 4.1.1. The circumstances in which a person is disqualified from acting as an attorney or the circumstances when a person may be considered unsuitable to act 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/civil partner/cohabitant and there has been a subsequent annulment or dissolution of marriage or dissolution of the civil partnership or an ending of the cohabitant arrangement, disqualification under the Companies Acts or a connection with the nursing home in which the donor resides. (See S.5 (4) and (7) of the 1996 Act as amended by the S.50 of the *Family Law (Divorce) Act, 1996*).
- 4.1.2. S.5 (4) of the 1996 Act provides that a person who has been adjudicated bankrupt will also be disqualified from being appointed as attorney. Prudence would indicate that disqualification would also extend to a person who had entered into a debt settlement arrangement or a personal insolvency arrangement following the enactment of the Personal Insolvency Act 2012.
- 4.1.3. The attorney should also consider his/her suitability in the context of conflicts of interest, both present and future.
- 4.1.4. 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/make decisions pending registration if an application for registration has been made and the donor does not have the decision making capacity to make the relevant decision or take the relevant action. (S.7 (2) of the 1996 Act). In determining whether the donor has decision-making capacity to make a relevant decision, a functional approach to capacity is required to comply with common law and in line with national policy guidelines.

- 4.1.5. If the scope of the authority includes personal-care decisions, advise what decisions can be made, and whether the EPA provides that any other party be consulted.
- 4.1.6. There is a statutory requirement on the attorney under the 1996 Act to act 'in the best interests' of the donor in making personal care decisions. 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. (S.6 (7) of the 1996 Act). This statutory requirement **includes having regard to the past and present wishes and feelings of the donor** and the factors which the donor would consider if he or she were able to do so and the need to permit and **encourage the donor to participate or to improve the donor's ability to participate as fully as possible in any decision**, and consulting with persons caring for the donor or interested in the donor's welfare. Best practice and compliance with international human rights standards requires a person to be supported and assisted to maximise his or her decision-making capacity.
- 4.1.7. Where the scope of the authority permits the attorney to decide where the donor may live, the attorney should ascertain whether the donor has the relevant decision-making capacity to decide where he or she wishes to live and if so implement or assist with implementation of those wishes. In the absence of the relevant decision-making capacity the solicitor should advise the attorney of the significance, both legally and for the donor, of considering whether the donor should change residence from their 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).
- 4.1.8. If the EPA created by the donor extends to the compliance by the donor with his/her mandatory requirements of entering into a debt settlement or personal insolvency arrangement then the attorney needs to be advised of the obligations of the donor under any such arrangement. (See S.65 and S.99 *Personal Insolvency Act 2012*).
- 4.1.9. The requirement to keep accounts of the donor's property and affairs and, if required, to produce the accounting records to the High Court. The current best practice is for the records of the attorney to include proper annual accounts and financial records in relation to the donor's income and expenditure and to include an annual account in writing of the performance of functions by the attorney. The accounts should also include details of all costs, expenses and remuneration paid to and claimed by the attorney on an annual basis.
- 4.1.10. The requirement, if applicable, to make tax returns in respect of income and capital gains to the Revenue Commissioners on behalf of the donor.

- 4.1.11. The requirement to keep the donor's property separate from the attorney's property – an attorney is simply an agent of the donor. (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).
- 4.1.12. The requirement in relation to the separation of funds may not be required depending on all the circumstances where funds are held jointly for spouses/civil partner and one of the spouses/civil partner is the donor and the other spouse/civil partner is the sole attorney.
- 4.1.13. The requirement not to profit from position as an attorney.
- 4.1.14. 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).
- 4.1.15. The provisions in the EPA and the legislation in relation to gifts. (See 2.7 above).
- 4.1.16. The provisions in the EPA and legislation in relation to expenses incurred by attorney(s) and remuneration of attorneys.
- 4.1.17. 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) and the limitations of this power. (S.6(4) of the 1996 Act).
- 4.1.18. The fact that the attorney is an agent of the donor and that the attorney must use proper care in exercising the authority under the EPA. It is important that the attorney understands that the scope of his/her authority is limited to the authority set out in the EPA and as provided for by the legislation.
- 4.1.19. 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.
- 4.1.20. The attorney should also be advised that the High Court has extensive functions with regard to registered EPAs, which includes power to cancel the registration of an EPA. (See generally S.12 of the 1996 Act).
- 4.1.21. The attorney should be advised if any conditions or restrictions are set out in the EPA by which he/she is to exercise the authority given to attorney in the EPA – for example is there a condition that the attorney must file annual reports to the Director of the Decision Support Service when the 2015 Act has commenced?

If a solicitor suspects that an attorney may be misusing an EPA or acting dishonestly, he/she should notify the Registrar of the Wards of Court Office.

The High Court may cancel the registration of an instrument – for example on being satisfied that having regard to all the circumstances, the attorney is unsuitable to be the donor’s attorney; on being satisfied that fraud or undue pressure was used to induce the donor to create the power. In the case of theft or fraud, the Gardaí should be notified.

4.2. Application for Registration

4.2.1. 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 understanding that the assessment is a legal test and not a medical test. The solicitor should ensure that in making this assessment the donor’s capacity is construed functionally as is required in common law and in line with national policy guidelines.

4.2.2. The following steps should be taken in registering an EPA:

- (i) 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. The solicitor should write to the registered medical practitioner explaining the necessity to consider the issues from a functional perspective making reference to the common law assessment of capacity and the national policy guidelines. (In particular the registered medical practitioner should be referred to the Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners 8th edition 2016).
- (ii) 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, first schedule to the 1996 Act 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 Registrar Wards of Court.
- (iii) Serve the donor by registered post with the notice as indicated at (ii)(a) above, i.e. notice of intention to apply for registration.

- (iv) Have an affidavit of service in connection with serving the notice of intention to apply for registration on the donor sworn.
- (v) Serve the notice parties by registered post with the notice as indicated at (ii)(b) above, i.e., notice of intention to apply for registration.
- (vi) Have affidavits of service in connection with serving the notice of intention to apply for registration on the notice parties sworn.
- (vii) Serve notice (by ordinary post) on Registrar of the Wards of Court of the intention to apply for registration.
- (viii) Wait for five-week notice period to expire.
- (ix) 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.
- (x) File the following documentation (together with affidavits of service at (xii) 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, 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 (ix) above.
- (xi) 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.

- (xii) a) Swear affidavit of service of application for registration on donor,
- b) Swear affidavit of service of application for registration on notice parties.

5. Post Registration Matters

5.1. **Notification to the Registrar Wards of Court after registration and when the EPA has come into effect**

The attorney should be advised to notify the Registrar Wards of Court if any of the following events occur post registration:

- Change of address of attorney.
- Change of address of donor.
- Death of donor.
- Where the attorney no longer has capacity to carry out his/her functions as attorney, then notification of this should be made by their attorney/committee or decision-making representative (if applicable).
- Where the attorney dies their personal representative should make the notification.
- Any other event which would terminate or invalidate the EPA, for example, if the donor recovers decision-making capacity, or if the attorney is adjudicated a bankrupt. It would also be prudent to notify the Registrar if the attorney enters into a debt settlement arrangement or a personal insolvency arrangement.

5.2. **Revocation by donor of EPA**

A revocation post registration of an EPA by a donor is not valid unless and until the court confirms the revocation. The application must be on notice to the attorney(s) (Ss.11 (1) (a) and 12(3) of the 1996 Act).

5.3. **Disclaimer/resignation by attorney**

5.3.1. The attorney should be advised that, in the event of the attorney wishing to disclaim/resign as attorney post registration of the EPA, he/she may only do so with the consent of the court upon application made on notice to the donor (S.11 (1) (b) 1996 Act).

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

5.4. **Assets of the donor**

The attorney should be advised of the following regarding the assets of the donor:

- To prepare a full inventory of assets to act as a checklist if any disputes arise in the future
- The donor's money and property remain the property of the donor and should stay in the donor's name. The attorney has authority to deal with the property and assets but not to transfer/convert them into the ownership of the attorney.
- On no account should the money of the donor be intermingled with that of the attorney, save that if the attorney is a person who habitually held money in joint names with the donor (for example a spouse/civil partner) then that can continue.
- Keep full accounts for production if necessary to the High Court.

5.5. Complaints about an attorney

5.5.1. The attorney should be advised that the provisions of the 2015 Act (once commenced) regarding complaints about an attorney apply whether the EPA is signed and/or registered before or after the coming into force of the 2015 Act (S.76 (2) of 2015 Act). In other words EPAs created under the 1996 Act will come within the complaints provisions of the 2015 Act when the 2015 Act is commenced. This provides that **any person** (or the Director of the Decision Support Service on his/her own initiative) can make a complaint that

- An attorney is acting outside the scope of the powers given by the donor.
- That an attorney is unable to perform the duties or obligations imposed by the EPA.
- That fraud, coercion or undue pressure was exercised to force the donor to sign the EPA.

5.5.2. The Director of the Decision Support Service has power to fully investigate the complaint and, if the complaint is upheld, can make an application to the Circuit Court for a direction, including a direction that the attorney be removed as attorney.

5.6. Termination of EPA

The attorney should be advised that the functions of an attorney cease immediately 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 (S.12 (5) of the 1996 Act).

End.