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Practice Note on Enduring Powers of Attorney

Mental Health Law & Capacity Task Force; Probate, Administration & Trusts 22/05/2023

On 2 March 2012, the Law Society's Guidance & Ethics Committee issued guidelines for practitioners on [Transactions involving vulnerable/older adults \(to include requests for visits to residential care settings\)](#).

The guidance acknowledges that all individuals, no matter how vulnerable, have a fundamental right to control and manage their affairs and to have access to a Solicitor. It further states that vulnerable and older adults have a right to be protected from financial abuse and that Solicitors, working in co-operation with others in caring for an individual, can have a pivotal role in ensuring that to be the case.

In order to fulfil all ethical and professional obligations in respect of the execution of Enduring Powers of Attorney (EPA), Solicitors must be vigilant of a wide range of risk factors in the area which include undue influence, unconscionable conduct, conflict of interest and fraud.

Practitioners will be aware of changes to EPAs brought about by the recent commencement of the *Assisted Decision-Making (Capacity) Act 2015* (as amended) (ADM(C)A).

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

- 1 That the solicitor is satisfied that the Donor understands the implications of creating, varying, revoking or rescinding an EPA.
- 2 That, where relevant, the Donor is aware that they may amend or revoke the EPA prior to registration and prior to its notification.
- 3 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the Solicitor is satisfied that there is no reason to believe that the Instrument is being created, varied, revoked or rescinded by the Donor as a result of fraud, coercion, or undue pressure.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).

Section 94 of ADM(C)A requires that the Mental Health Commission appoint a Director of the Decision Support Service (DSS) to perform specific statutory functions.

At [paragraph 2.6.3 of its Code of Practice for Legal Practitioners](#), the DSS requires that practitioners fully explain the scope, purpose, and implications of an EPA, ensuring that the Donor understands each element and making/recording full and detailed notes in the context of providing the Legal Practitioner Certificate.

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 legal practitioner as a witness. As such, the provision of the legal statement is not a perfunctory exercise and any practitioner 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 Practice for Legal Practitioners.

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, practitioners 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*.

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 judgment 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, 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.

Section 79 of the ADM(C)A had originally provided for the Minister to prescribe (by Regulation) the form of an instrument creating an EPA. However, the section was amended by the *Assisted Decision-Making (Capacity) (Amendment) Act 2022* which inserted a new section 79(A) which provides that the Director of DSS may, with the consent of the Minister, specify the form of instrument to create an EPA. Section 79(A)(2) further specifies that the Director will ensure that the forms are made available in accessible formats.

The move to an online portal in respect of the creation of EPAs was not indicated by the DSS, or any other party, during the long lead-up to the commencement of ADM(C)A.

The Law Society is acutely aware of the operational difficulties that this development poses for clients and their Solicitors, and will be making representations to the relevant bodies to alleviate these difficulties.

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