PRACTICAL ASPECTS OF

ENDURING POWERS OF ATTRONEY

STEP LECTURE

16th September 2008

Anne Stephenson
Stephenson Solicitors
stephensonsolicitors@eircom.net
01-2756759

Enduring Powers of Attorney

Introduction

Enduring Powers of Attorney (EPA) are not just for the elderly or those on the cusp of lacking mental capacity but for each and every responsible adult. I believe, and I am sure each and every one of you agrees with me on this, that making a will governing the disposal of your assets on your death of vital importance and I advise every client of mine to make a will. However, how much more important is it to put in place a mechanism to govern the administration of your assets and indeed to authorise a person to make decisions as to your own welfare while you are still alive and incapable of doing so yourself?

There are many excellent lectures and articles on the theory of Enduring Powers of Attorney (EPA) and I do not intend to repeat same here. In this regard see: the CLE lecture on Enduring Powers of Attorney by John Costello, Michael Murphy and Rory O' Donnell of 15th October 1996, John Costello's Book "*Law and Finance in Retirement*" Blackhall Publishing 2nd Edition and The Law Reform Commission Papers "*Vulnerable Adults and the Law: Capacity"* LRC CP 37 2005 chapter 4 and *"Law and the Elderly"LRC* CP 23 2003 to name but a few. The latter paper made extensive recommendations to broaden the remits of EPA which has not yet been implemented and will not, I suspect, be so for some time.

This evening however, I will be considering what is presently in place and that, from a practical approach, rather than a theoretical one i.e. the advising on, preparing of and registering of an EPA and pointing out along the way some pitfalls I have encountered and hopefully how to avoid same.

As you will see the paper covers much more than I will be discussing tonight due to time constraints but I have make the notes as complete as possible for referencing later.

What is an EPA?

An EPA is an instrument which complies with the strict procedural requirements of the legislation, (see below). It is a special type of a Power of Attorney, the consequences of which are significantly different to an ordinary Power of Attorney.

1. This type of Power of Attorney is not revoked by the Donor's subsequent incapacity and
2. Can **only** operate (it has no legal effect until it is registered) if at some point in the future, the Donor (the person who creates the document) becomes mentally incapable of managing his affairs. As long as the Donor is well, the EPA cannot be acted upon by the Attorney.

What is the advantage of same?

Any adult, who has the required level of capacity for execution of an EPA, (see below), can plan for a possible future loss of capacity. In other words, it allows for the appointment of an individual, an Attorney or a trust corporation, as an Attorney to make decisions for the Donor in the sad event of future loss of capacity.

Thus, a major benefit of an EPA is that it is the Donor himself who decides, when capable, who is given such a tremendous power over his life, should he become incapable, in the future and obviates the possibility of being made a Ward of Court if he loses capacity at a later stage.

What are the disadvantages of same?

Obviously, a Donor can only execute an EPA where he has sufficient mental capacity to do so. Further, an EPA ceases to operate if the Attorney dies or becomes himself incapable, unless of course there are two Attorneys appointed or a substitute Attorney is appointed. Amazingly, there is no obligation on an Attorney to visit or supervise the Donor regularly, and it is possible that the Attorney's authority can be challenged and clearly this is a disadvantage.

However, an EPA is still in my opinion the best method - and certainly a far superior method – to being made a Ward of Court for anyone who wants to keep the legal problems to a minimum and to decide for themselves in whose hands the management of their life and finances is placed should they become mentally incapacitated in the future.

Is an EPA appropriate to your client?

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 Part C - scope of authority).

Further a client should be advised of the available alternative substitute decision-making mechanisms e.g. being made a Ward of Court as an EPA may not be appropriate for a client where:

- There have been persistent family disagreements, particularly if there is likely to be a dispute between family members as to the management of the 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 his general affairs.

- The value of the client's assets is substantial and there is no person with the appropriate skills to manage the assets.

It is not a perfect mechanism, but it is the best we have at present, and in my opinion should be offered to every client irrespective of age. When you think about it, we

correctly spend a lot of time advising our clients on the necessity to make a Will which does not actually affect the client at all as it only operates on death and at that point they are beyond caring! How much more necessary therefore, is it to have them, put an EPA in place which comes into operation while they are still alive?

Legislation

The primary legislation governing Enduring Powers of Attorney is the Powers of Attorney Act 1996 (the Act) although the Family Law (Miscellaneous Provisions) Act 1997 which amends section 20 and section 25 of the 1996 Act and the Family Law (Divorce) Act 1996 which amends section 5(7) (a) and the Second Schedule of the 1996 Act also applies. Section 5 of the Act gives the Minister the power to make regulations. It is the Regulations which deal with the mechanics of an EPA and we will be going through the regulations in detail later.

Who is the client?

We are all aware of who the client is; the Donor. However, it is amazingly easy in practice for that fact and the consequences of that fact in terms of our own and of the actions of others to be lost sight of.

Thus, you should ensure that instructions are taken directly from the intending Donor of an EPA and nobody else. If, for what ever reason, instructions are received from a third party for the preparation of an EPA, you need to then obtain instructions directly from the intending Donor as to whether the intending Donor wishes you to act for him. Then, if you receive instructions, you must ensure that the Donor is fully and independently advised by you without regard to the interests of any third party. The Law Society of Ireland has produced guidelines regarding an EPA dated May 2004 (the "Guide"). It states as follows:-

"A solicitor should ensure that instructions are taken directly from the intending Donor of an E.P.A. 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 E.P.A".

When written instructions are received from a client, and sometimes you do receive written instructions, more often than not, by email, you should consider whether such instructions are adequate. However, I think there is no substitute for meeting with the client and discussing the implications of, and advising the client with regard to, the effect and the execution of an EPA.

I will, I admit, accept instructions by email but I would always meet with the Donor, not least, because I, as the solicitor as part of the formal execution of an EPA, certify that I am 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',* See Part D of same below. I feel I cannot do that without a meeting the Donor. Also, without a fact to face meeting, how else can you ensure that the instructions are being given freely by the client?

Who cannot be a Donor?

There is no specific section of the Act which states who may or may not grant an EPA. So effectively we are operating here under Common Law.

- The Donor must have reached the age of majority. Mind you, in practice this is hardly relevant, as I know of few 18 year olds who can accept the idea much less act on it by making a will, that they will die not to mention being able to contemplate their possible future mental incapacity and therefore make an EPA.
- A person who does not have mental capacity cannot be a Donor. **Remember** however a Donor may lack mental capacity in many areas but still be capable of executing an EPA.
- Where a Donor has been made a Bankrupt then they cannot grant an EPA on the basis that under section 44 of the Bankruptcy Act 1988 their property vests in the Official Assignee. However, I do not see why a Bankrupt could not execute an EPA re personal care decisions.

PREPARATION AND EXECUTION OF AN EPA

More than with any other type of Power of Attorney, an EPA is driven by legislation and there is no substitute for reading same carefully as an EPA **can only be** in the form as set out in the Ministerial Regulations applying to the Powers of Attorney Act, 1996 i.e. S.I. No.195 and No 196 of 1996 and S.I. No. 287 of 1996 (the Regulations) and of course Order 129 of the Rules of the Superior Courts 1986 (inserted by S.I. No. 66 of 2000).The form is very different from the format of an ordinary Power of Attorney and if the correct format is not used the EPA is defective and invalid. The mandatory requirement under the 1996 Act requiring the EPA to be exactly as in the prescribed form, while sometimes frustrating, is for the protection of the Donor.

The specific format of an EPA is set out in the First Schedule to S.I. No. 196 of 1996. An EPA which provides for personal care decisions only must be set out in the format set out in the Second Schedule. As the latter is relatively rare, I intend to deal with the former today. See below for a precedent of the format.

BEWARE!

Please note that some time ago the Law Society issued a precedent EPA on disk and many practitioners purchased same, however, **it is incorrect**. Apparently the disk allowed the words "I *intend this power to be effective during any mental incapacity of mine* "to fall off the page and be omitted or deleted which utterly defeated the point of the EPA.

If you prepared an EPA based on The Law Society precedent it would be wise therefore to review the document and if necessary prepare a new EPA and have your client execute same. I understand that the Law Society has recently issued a new correct version.

Instructions

In theory all you need to prepare an EPA is:

- The client's name and address, date of birth, and
- The name and address of his doctor, the Attorney(s) and the Notice Parties.

In practice, you need to know a great deal more to enable you to adequately prepare an EPA and advise a Donor re same. I have included below a basic instruction sheet for an EPA which I have used and added to over many years and which I gratefully acknowledge initially came from John Costello. See below, page 22 for a check list re instructions.

However, for the purposes of this lecture I think the best way of reviewing what you need to establish and advise the client on is to look at the format of the EPA itself which is what I am going to do now.

Part A- Information –See below page 24

- This page of information explains what an Enduring Power of Attorney is and how the prescribed form should be completed. A copy of same should be given to the following: the Donor, the first, (and if applicable) the second Attorney (in the EPA referred to as the "Donee") and in my opinion, it would be wise to also give same to the first and second person to be notified and the Doctor though you are not required to do so.

- Note however that giving the Donor or advising them to read Part A does not in anyway reduce your responsibility to ensure that the Donor understands the effect of creating an EPA.

Part B - Appointment of Attorney - See below page 26/27

- This part contains the actual appointment of the Attorney(s) and sets down the conditions to which the Attorney will be subject.

- It should be executed or signed by the Donor in the presence of one witness and that witness should give his full name and address. It is very frustrating trying to track down a witness from a partial address for example, "Dublin 2". Where the Donor does not sign personally, but directs another person to sign on his behalf, such person so signing must do so in the Donor's presence with a third person acting as witness and attesting the instrument. Remember that the Attorney cannot witness the signature of the Donor nor as we can see when we come to Part C can the Donor witness the signature of the Attorney.

- Although the choice of an Attorney is a personal matter for the client, you should stress the need to appoint an Attorney or Attorneys who is/are trustworthy. You need to advise the client that on the registration of the EPA <u>the Attorney's actions will be subject to little or no supervision.</u> Therefore you should thoroughly discuss with the client his choice of potential Attorney – in terms of relationship with the client, suitability, trustworthiness and the skills necessary to manage the client's financial affairs. You should also advise the client that a conflict of interest may arise for an Attorney where the Attorney is

also a potential beneficiary of the Donor's estate. Note the provisions of section 5(3) and 5(4) of the Act.

- A Donor may appoint more than one person. Your advice 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.

  Further you should explain to the Donor his 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 default the Attorneys shall be deemed to have been appointed to act jointly. See section 14 (1) of the Act. It is in this Part that the Donor selects his preferred option. The Act actually alters the Common Law position as regards joint Attorneys in that it provides in the case of a death incapacity or disqualification of one or more of the Attorneys then unless the EPA itself provides otherwise (which is very rare) then the remaining/ surviving Attorney(s) may continue to act under the EPA. See section 14 (3) and (5) of the Act. Of course it is possible for a Donor to appoint a substitute Attorney but 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 Act.

- If you are to be the Attorney you 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. Have a partner or a colleague in the same firm sign the certificate, Part D.

- You should explain the Attorney's scope of authority very carefully to the Donor. There is a catch 22 situation here, in that the Donor can, in the EPA, impose restrictions or conditions on the power given to an Attorney. On the other hand, if the EPA is too restrictive then you increase the risk that the Attorney will not have the power to handle the property and affairs of the Donor and thus the Donor could end up in exactly the position he is trying to avoid i.e. being made a Ward of Court.

  (a) Business and Financial Affairs - 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. You 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 very careful drafting is required. If the EPA is being executed with limitations, a solicitor should advise the client of the consequences of that as explained above. You 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, you need to explain to the Donor 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 i.e. this is not a "living will" in the Irish/English sense of same and can not include such directions. In preparing the statutory form of an EPA, 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.

(c) Gifts - 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, you should advise the client of the provisions of section 6(5) of the Act 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 (mind you related is not defined!) 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. I think it is wiser to get the Donor to make a specific rule here for clarity.

(d) Remuneration - In the case of provision for remunerating the Attorney(s) (see Part B), clear instructions should be obtained from the client as to the circumstances in which remuneration should be paid. Indeed you 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 "*A Guide to Professional Conduct of Solicitors"* Para 2.2 Proper Standard of Legal Services –Solicitor who holds Power of Attorney. Advise the client, that in the event of the registration of the EPA, provision could be made for your costs to be approved by an independent third party.

Part C - Acceptance of the Attorneyship- See below page 27

- This is where the Attorneys accept the appointment and acknowledge their duties and obligations and that they have read the information in Part A.

- A separate acceptance and acknowledgement is required by each Attorney. Therefore a Part C is sent to each Attorney with a copy of Part A and the Attorney(s) executes same and returns it to you. If the Attorney is a Trust Corporation remember to adapt the form for sealing by a Trust Corporation with its common seal. Further, in such case, the execution of the power must be in accordance with the Company's Articles of Association. Never ever should an Attorney execute Part C before the Donor has executed Part B. This may appear self evident, but I have recently been asked to comment on and then attempt to have such an EPA registered.

- An Attorney must be over 18, not adjudged bankrupt, not have been convicted of an offence involving fraud or dishonesty, or an offence against the personal property of the Donor, nor indeed be the owner of a Nursing Home, or be employed by the Nursing Home where the Donor resides. See section 5(4)(a) and (b) of the Act.

- If an EPA has been made in favour of a spouse, remember it will cease to be in force if there is a subsequent legal separation between the spouses. Therefore, not only should we advise our clients to make a new Will if they separate / divorce it is also necessary to check whether or not they have executed an EPA in favour of the former spouse, and have a new one executed. 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."*

Part D - Statement by Solicitor- See below page 28

- This is the part where the solicitor confirms that having interviewed the Donor and indeed making any necessary enquiries that he is satisfied that the Donor understood the effect of creating the EPA and that there is no reason to believe that the document is being executed as a result of fraud or undue pressure. Ideally, this should be signed at the same time as Part B, the execution of the power. As stated above remember, if you are agreeing to be an Attorney, then Part D should be signed by a different solicitor to avoid any possibility of claims of conflict of interest.

Part E - Statement by Doctor - See below page 28

- This part is sent to the Donor's medical practitioner for execution confirming that the Donor had the mental capacity to execute an EPA. We will be dealing with mental capacity in detail later. It is important that when sending the form to the doctor that you explain what type of capacity is needed. Help the doctor to help you! I have lectured to medical practitioners, and one of the most common issues they raise in relation to solicitors and the question of the capacity of mutual clients is that the solicitor simply sends them a form and asks them to confirm "a client's capacity" without specifying what capacity is required.

- Do not automatically assume that the doctor is an expert in these matters. The quality of the doctor's evidence, which may be vital, depends upon the quality of the instruction that you give him.

- To begin with, I would always include a copy of Part A in my letter to the doctor.

- Be very clear about the specific capacity that you need him to certify. For example, capacity to enter into a contract; capacity to marry; capacity to execute a Will and the capacity to execute an EPA is not the same capacity. Make sure that the doctor is aware that his or her opinion is open to challenge, and indeed as a courtesy you should inform the doctor if the matter is likely to be contentious without of course in any way suggesting that a lower standard of care will be sufficient in a non-contentious case. Restrict your enquiry in a letter to a doctor which will be either the letter seeking confirmation of the client's capacity to execute an EPA if you have doubts of same or in the letter sending the Part E post execution of an EPA if you have no doubts. In other words, avoid asking for simultaneous assessments of a client's capacity for a variety of different transactions. For example, it would be very unfair on the doctor – not to mention the client – to assess in one examination whether the client can make a Will and create an EPA even though you may be drafting both at the same time.

- When you send the letter enclosing the Part E for execution by the doctor diary ahead one week and write a reminder letter when, as is inevitable in my experience, there is no response. When you send the reminder letter diary ahead once again to send another reminder in two weeks. At that point, in the absence of a response from the doctor, you need to send a very stiff letter to the doctor explaining that either the client does not have capacity, in which case, you need to know that fact or, which is more likely, the client does have capacity but the doctor is slow to respond. In the latter case, stress to him that if does not certify same by sending back the Form E (now i.e. within the week, to meet the 30 day rule) then an entire new EPA will have to be prepared and executed by the client at considerable cost and expense. At this point a telephone call also helps. Some, a very few, doctors will not respond until they have been paid. Therefore in your initial letter to the doctor confirm that he will be paid.

Part F Notice Parties - See below page 28

- There will be two, Part F's in each EPA. One to be sent to each person who is to be notified that the Donor has created an EPA.

- This is covered by section 5 (2) (i) of the Act. Please note, these parts are signed by the Donor and sent to the Notice Party together with a copy of Part A. It is essential that notice of the execution of the EPA is given as soon as practicable to at least two persons Article 7 does not actually say who is to give the notice, so strictly speaking it is not necessarily your duty, nor indeed that of the Attorney to do so, however, obviously when the power comes to be registered, the Attorney must be able to show that this provision has been complied with. Thus, in reality it is your job.

- It is vital that a copy of same is kept to exhibit in the Affidavit of Service. If you send out the original without keeping a copy the only way you can then exhibit a copy, which you will have to do if you ever have to register the EPA, is to write to the Notice Parties pointing out your error in not retaining a copy and

asking do they still have the original and can you please have a copy. To be avoided!

- I think it is wisest to send the notice by registered post to the Notice Parties on the day that the Donor signs the EPA. No actual form of service is set out in the Act. The First Schedule, which refers to registered post, does so only in the context of the Notice of Intention to apply for registration. However, if you look at the notes at the foot of the form it does suggest that it should be sent by registered post, and obviously this makes it much easier to show that the Notice of Execution was complied with. See below under Registration.

- It is important that you advise the client carefully of the order of persons who must be notified, these are clearly set out in Paragraph 7 of the Enduring Powers of Attorney Regulations 1996. None of the Notice Parties may be an Attorney under the power for obvious reasons. At least one must be the Donor's spouse if living with the Donor. If the Donor is unmarried, widowed, or separated, but the Donor has a child, then notice must be given to said child or otherwise to any relative – for example: parent, sibling, grandchild, widow/er of child nephew or niece. 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. Please note that the requirement is that one of the Notice Parties be one of the above list (see Paragraph 7(c)) in descending Order the other Notice Party can be a non relative. Obviously the Attorney cannot be one of the Notice Parties. I have had Donors who for various reasons do not wish to inform their child or one of their children of the fact that they are creating an EPA, and in this case for no good reason, except native caution, I had the Donor sign an Affidavit explaining why. When I came to register (as I did in one case) this type of EPA it was initially rejected as the Wards of Court Office wanted an explanation as to why a child had not been notified. The Affidavit satisfied them, but I am not sure what they would have required if I had not had the Affidavit. Presumably, it would depend on the circumstances, but at the very least I would think that a full affidavit of the solicitor explaining why a child was by-passed would be necessary. Therefore, I strongly advise you where the "obvious" people are not Notice Parties that you enquire as to why in some detail and record the reasons.

- 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. As important as I have already but it bears repeating keep a copy of the Notice itself.

Affidavit of Service – - See below page 29

- Strictly speaking this is not part of the format of an EPA, but you cannot register same without an Affidavit of Service therefore in my mind it is part of it and thus I am including it here.

- It should be prepared re the serving by registered post of the Part F's on the Notice Parties. Indeed, absolutely perfect practice would be to also serve Part C by registered post and prepare an Affidavit of Service re same. I strongly recommend that the Affidavit of Service(s) be prepared at the same time as the EPA, and executed within a few days of same. Do not leave it until it is necessary to register the EPA to do so, as at that point it is eminently possible that the person who should execute same is no longer available. The Wards of Court Office will insist on the affidavit of service exhibiting the registered post slip. Therefore, serve same by registered post and keep the registered post slip carefully.

- In fact in my opinion the "job" of preparing an EPA is not completed until the forms that require returning to you are returned, the Affidavit(s) prepared and sworn, and the EPA placed in the Will safe and registered in the Register of EPA. I unfortunately have encountered many cases where once the letters were sent out no other action was taken and when it became necessary to register the EPA it was discovered that not only was there no Affidavit(s) of Service but the Part C (executed by Attorney) had not been returned, and / or the Part E by the medical practitioner had not been returned.

NOTE

At this point it would also be wise to obtain full details of the Donor's marital status and the family law position in relation to all property held by him as this could prove vital later.

Order of execution

I have previously mentioned an unfortunate case I have encountered where the Attorney signed Part C before the Donor had signed Part B thus I made no apologies for mentioning it again and indeed having a separate heading "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 his/her medical qualifications) and the certificate of the solicitor should ideally be completed within 30 days of the signing by the Donor. When the various parts have been completed and returned to you, you should check the EPA as a whole to ensure that it is properly executed in accordance with the Act and should discuss with the client where the original of the EPA should be kept.

Capacity

There is no specific statutory test for capacity in the Act but section 4 (1) of the Act defines mental incapacity for us as "*incapacity by reason of a mental condition to manage his or her own property or affairs"* therefore by definition an EPA can only be executed by a person who has the present capacity to do so.

However the Act does require a statement by a solicitor, Part D and indeed by a medical practitioner (Part E) that the Donor, with the assistance of any explanations given to the Donor by the doctor, had the mental capacity to understand the effect of creating the power.

It is important for a solicitor to explain fully the effect of creating the power to the client and ensure that the client understands this. An explanation by you and the response yes by the client is not sufficient. By explaining the provisions in detail and questioning the client as to his wishes, it should be possible to ascertain whether or not the client understands the provisions of the EPA. It would be prudent especially, if the client is elderly, as a matter of course to keep an attendance note of the meeting to demonstrate the client understands.

There is no Irish case that I am aware of which raised the test for capacity to make an EPA, however, the seminal English case *In Re K (Enduring Powers of Attorney, In Re F*, 1988 Ch 310 which dealt with the test for capacity to execute a general Power of Attorney (which was to continue despite the Donor losing capacity) laid down the test of capacity to create an EPA as follows:

Having stated that the test for capacity to create an EPA was that the Donor understood the nature and effect of the document, the Judge, Hoffman J in the case set out four pieces of information which any person creating an EPA should understand:

- Firstly, if such be the terms of the power, that the Attorney will be able to assume complete authority over the Donor's affairs;
- Secondly, if such be the terms of the power, that the Attorney will be able to do anything with the Donor's property which the Donor could have done;
- Thirdly, that the authority will continue if the Donor should be or should become mentally incapable; and
- Fourthly, that if he or she should be or should become mentally incapable, that the powers shall become irrevocable without confirmation by the Court of Protection.

There are of course, slight differences between an English EPA and an Irish EPA, for example, the fourth test would, in Irish terms, be that the Donor should understand that if the power is registered it will be irrevocable without confirmation by the Wards of Court Office.

There is an oddity here, which commentators, in particular John Costello, in his article "*Powers of Attorney Act 1996*" (1998) 1 CPLJ 35, in that the Donor to have the capacity to execute an EPA does not have to have the capacity to do all the things that the Attorney will have the ability to do under the power. The only capacity the Donor needs is the capacity to create an EPA.

Establishing capacity or the lack of it is sometimes very difficult as while it is a cliché it is nevertheless true that

"…there is no possibility of mistaking midnight from noon but at what precise moment twilight becomes darkness is hard to determine".

Obviously establishing capacity in the former or latter case is a relatively simple matter the problem for practitioners arises in the twilight zone.

Many people only consider an EPA when they are losing capacity and you need to be satisfied that the client has the mental capacity to give instructions and to execute an EPA as remember as part of the formal execution of an EPA a statement is required from you and indeed a registered medical practitioner (at Part D & E 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 you have any 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 above under Part E for discussion of this and also see "*A Guide to Professional Conduct of Solicitors in Ireland* "2nd Edition Conduct 2.3 *"Client of Unsound Mind*" page12.

The Law Society's guidelines regarding an EPA do not assist on how best to assess capacity but the British Medical Association and The English Law Society has published a check list which while not exhaustive gives some idea of what is required. See *"Assessment of Mental Capacity Guidance for Doctors and Lawyers* "Published by the British Medical Association Chapter 3, P29, and Para 3:2:4. Actually, this is a great book re legal tests of capacity in general and is available in the Law Library.

The type of information it lists which you need to obtain to properly assess a person's capacity is as follows:

A <u>Re the extent of the client's property and affairs:</u>

- The value of the person's income and capital including savings and the value of the home;
- Financial needs and responsibilities:
- Whether there are likely to be any changes in the persons financial circumstances in the foreseeable future:
- The skill, specialised knowledge and time it takes to manage the affairs properly and whether the mental disorder (if any) is affecting the management of the assets:
- Whether the person is likely to seek, understand or act on appropriate advice as need in view of the complexity of the affairs.

B. <u>Re personal information :</u>

- Age
- Life Expectancy
- Psychiatric history/ prospects of recovery / deterioration / the extent to which the incapacity could fluctuate.

- The condition in which the person lives.
- Family background/ family and social responsibilities
- The degree of back up and support the person receives or could expect to receive from others.

C. A person's vulnerability :

- Could inability to manage the property and affairs lead to the person making rash or irresponsible decisions?
- Could inability to manage lead to exploitation by others – perhaps even members of that person's family?
- Could inability to manage lead to the position of other people being compromised or jeopardised?

Obviously what information you would seek and what avenues you would explore would depend entirely on the individual circumstances and your level of doubt re the client's capacity. But the above is a good starting point.

PRIOR TO REGISTRATION

Before going on to deal with the registration/ activation of an EPA there are some points that should be noted.

1. Revocation before Registration

Advise the client both when taking instructions and at all times subsequently up to loss of capacity 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 and of course 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.

2. 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. See, section 5 (10) of the Act.

3. Invalidation of an EPA

See the provisions of section 5 subsections (6), (7), (8) and (9) of the Act 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. I have substantially dealt with same above under “when an Attorney cannot act”.

4. Storage of Documents

If the client is not retaining the original documents personally you 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. I put mine in the Wills’ safe and record same in the Wills’ Register.

5. 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 of the Act.

6. A 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.

7. Validity of the EPA or a Defective EPA

While it should not happen, what happens if you take out the EPA and discover 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 Act.

Again while it should not what happens if you take out the EPA and discover it differs in an immaterial respect in form or mode of expression from the form prescribed in the regulations all is not lost as the Registrar of Wards of Court may still register the EPA. See section 10(5)(a) of the Act. 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 Act.

8. A Foreign EPA

There have been instances where an EPA under the legislation of England and Wales has been admitted for registration under section 10(5) of the Act. See the Practice Direction of the Wards of Court Office on its website at http://www.courts.ie.

REGISTRATION OF AN EPA

Normally, the first you hear of the necessity to register an EPA is when the Attorney approaches you seeking the EPA as the Donor is now incapable. The first thing to consider and keep considering very carefully here, is once again, who is the client?

Once again consider: who is the Client?

Obviously prior to, and on the registration of an EPA, instructions must be accepted from an Attorney as at this point the Donor is incapable, assuming of course that the Attorney does not have his own legal adviser. Generally they do not and they chose to consult the solicitor who has prepared the EPA. Remember, however, you continue to owe a duty to the Donor. In effect they are both your clients and great care needs to be taken at this stage to avoid any possibility of a conflict of interest especially in the circumstances where there is some doubt as to lack of capacity.

Read the EPA carefully before you meet with the Attorney and establish in your own mind the scope of his authority e.g. does it include personal care decisions? Does the EPA provide that any other party be consulted?

You should advise the Attorney of his powers and obligations in general but as a minimum you need to deal with explain the following:

- Explain 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 Act).

- Establish whether or not the Attorney wishes to disclaim which he may do at any time up to the Registration. He can of course do so after same but then only with the consent of the High Court.

- Check that the Attorney in front of you is in no way disqualified from acting as an Attorney. For example, where the Attorney is a spouse of the donor and there has been a subsequent annulment or dissolution of marriage (section 5(7) of the Act, as amended by section 50(a) of the Family Law (Divorce) Act, 1996).

- Explain to the Attorney that he cannot delegate his authority for example by appointing an Attorney to carry out his functions see section 5 of the Act.

- Explain the extent of the Attorney's powers to him and the need to act in the "best interests" of the Donor. 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 the Act. There could be a conflict here between the best interests of the Donor and the needs of the Attorney especially where the Attorney is a close family member living with the Donor. For example, it might be in the best interests of the Donor to be in specialised care and the property

may need to be sold to pay for same. In essence just like a trustee the Attorney is in a fiduciary relationship with the Donor and must use the utmost care in exercising his authority. If relevant, explain the requirement to consult with named individuals. Even if not required by the EPA to consult with named individuals, I think it wise to advise an Attorney that it is prudent to keep family members generally informed of transactions in relation to the Donor's assets as at the very least it heads off problems at the pass.

- Explain, that as well as making decisions regarding the business and financial affairs of the Donor and personal care decisions (if permitted), the Attorney has the following powers: - A) Power re Gifts. See section 6 (5) of the Act. See above page 10 under Form C. I have dealt with gifts under Part B above but in short; the Attorney may also make gifts if the E.P.A. permits it. The gifts allowed by the legislation are normally gifts at Christmas, Easter or birthdays or at weddings or gifts to a charity. An individual who receives gifts must be related to or connected with the Donor. The value of any gift must not be unreasonable having regards in particular, to the extent of the Donor's assets and B) The Power to Use Assets of the Donor for the benefit of others (including the Attorney(s)) and the limitations of this. The Attorney may use the Donor's assets, savings or monies to provide for the Attorney's needs or the needs of any other persons, e.g. a spouse and children, if the Donor would normally have provided for these needs. "Needs" is not defined under section 6 (4) of the Act but probably includes food, housing, clothing, education, holidays etc. The amount to be spent on the needs for someone else other than the Donor depends on what the Donor would have done. It is not what would a reasonable person would do but what this particular Donor would do. Thus the question for the Attorney to ask in all cases is "*What, on the assumption that the Donor had full capacity, would he have spent on meeting the particular needs concerned?"*

- Explain the duty, not unlike that of the Trustees, to keep the Donor's property separate from his own property, for example, the proceeds of account should not be transferred into the name of the Attorney but should be left in the Donor's name and the registration of the EPA noted. It is my experience that Attorneys tend to want to have the money transferred into their name not necessary for any nefarious purposes and this should be absolutely resisted. It is long established at common law that the Attorney is in a fiduciary position see *Henry v Hammond 1913.*

- Explain he is not paid for the work done unless remuneration has been set out in the EPA itself. If this was done, it would have been done at part B (6). Inform him that he has a positive duty not to profit from the position as an Attorney. He is of course allowed remuneration for expenses.

- Explain the duty to keep accounts. Under the legislation, an Attorney is obliged to keep adequate accounts relating to the management of the property and affairs of the Donor and in particular, any expenditure incurred on behalf of the Donor. See Regulation 5 of the SI No. 287 of 1996. The legislation does not specify what is meant by adequate accounts but, at a minimum, bank statements should be kept which record all financial transactions.

- Explain that the Court has extensive functions with regard to a registered EPA which include the cancellation of the registration of an EPA. See generally section 12 of the Act, for example, if the Attorney had become mentally incapable section 12(4) (f) of the Act.

While it is now quite common to prepare EPA's the registration of same, which of course is so vitally important, is less common. The Wards of Court Office is very helpful and will send you the list provided below of what paperwork is required in order to have the EPA registered. Any errors in same results in quite long delays therefore I think it is worthwhile not merely giving you a list of the requirements but to look at each requirement and go through the precedents in relation to each one. See below under precedents re registration.

Formalities of Registration

Theory

Sections 9, 10 & 11 of the Act deal with registration of an EPA but as with the format of the EPA itself, it is the Regulations which provide the detail. The Wards of Court Office should be consulted at this point.

Who must be notified of the proposed Registration?

A notice (in the form provided in the Fourth Schedule of the Regulations) of the Attorney's application to register the EPA must be served on the Donor and also on the persons who were notified of the execution of the EPA and are named in it. Any person served with this notice can object to the registration by sending the grounds for objection to the Wards of Court Office within five weeks of receipt of the notice. This does not happy very often for example, since EPA were introduced in 1996 there have only been 16 objections and of those 16, 9 of these powers have been registered.

Very briefly if it does occur i.e. a Notice Party writes to the Wards of Court stating that they object the Wards of Court will write back saying they do not accept a letter and advising the Notice Party that any objections made in relation to the registration of a Power must be lodged in Affidavit form. This in effect means they must contact a Solicitor. Very often this is the end of the objection! The Notice Party if they are continuing must also serve a copy of their Affidavit on the Attorney appointed in the Power. The case would then be listed before the President of the High Court by the Wards of Court in the usual manner.

Once the Attorney has applied for registration, he may act on the EPA, namely to take action under the EPA to maintain the Donor and prevent loss to the Donor's property or savings. He may also make any personal care decisions which are authorised and cannot be deferred until the registration has been completed.

It goes without saying that you should, on receiving instructions to register an EPA, personally satisfy yourself that the Donor is, or is becoming, incapable of managing his affairs. I personally would always go and see the Donor and if necessary consult with his doctor before taking any steps.

The following steps should be taken to register 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 own property and affairs. Have the doctor use this exact wording. Preferably use the Donor's own doctor and do not delay in obtaining same. I would always speak to the doctor before sending out the formal letter. *See Registration of EPA Precedents 1 below.*

2. Arrange with the Attorney 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.
(c) Notice of Intention to apply for Registration addressed to the Registrar of the Wards of Court.

See Registration of EPA Precedents 2 (a-c) below

Note: What do you do if the Notice Parties are dead?

If any of the Notice Parties are dead or are themselves mentally incapable or they cannot be located, then the surviving "*Notice Party*" should be notified. If none of the original Notice Parties are alive or cannot be located or if they have all become mentally incapable, then at least three relatives should be notified. The Act contains a list of relatives to be notified, commencing with the Donor's spouse and then passing on in descending order to the Donor's children, parents, brothers or sisters. The full list is set out in Article 3 of Part 1 of the First Schedule to the Act. See above under Part F.

3. Serve the Donor by registered post with the notice at 2(a) above, i.e. The 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. See Registration of EPA Precedents 2 (d) below.

5. Serve the Notice Parties by registered post with the notice at 2(b) above, i.e. the Notice of Intention to apply for Registration. The Wards of Court Office will insist on the affidavit of service exhibiting the registered post slip. Therefore, serve same by registered post and keep the registered post slip carefully.

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). *See Registration of EPA Precedents 3 below.*

10. File the following documentation (together with affidavits of service at 12 below) with the Registrar of the Wards of Court Office:

- Application for Registration of EPA. See, Form No. 1 in the Appendix to Order 129 Rule 3 of the Rules of Superior Courts 1986. *See Registration of EPA Precedents 4 below.*
- Original EPA. **N.B**. Part A (the explanatory memorandum) is part of the EPA and if same is not lodged with the EPA then the Wards of Court Office will require an Affidavit explaining how same became detached from the original EPA.
- Copy Notice of execution by the Donor of the EPA given to the Notice Parties at the time of the execution of the EPA.
- Copy Notice of Intention to apply for Registration given to the Donor.
- Copy Notice of Intention to apply for Registration given to the Notice Parties.
- Affidavit of Service in relation to the service on the Notice Parties of the Notice of Execution.
- Affidavit of Service in relation to the service on the Donor of the Notice of Intention to apply for Registration.
- Affidavit of Service in relation to service on the Notice Parties of the Notice of Intention to apply for Registration.
- Medical Certificate from a registered Medical Practitioner.
- 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. Swear an Affidavit of Service of Application for Registration on Donor.
Swear an Affidavit of Service of Application for Registration on Notice Parties.

AFTER REGISTRATION

Once the EPA has been registered you receive, a not very impressive document, called a “Certificate of Registration”. Apply for several Court Certified copies of same at this point to avoid delays later.

It is not automatic that the Attorney will require assistance during the administration, or if he does, that he will instruct you. However, if you are instructed to advise the Attorney during the administration the advice must be comprehensive and will be as wide ranging as the assets of the Donor themselves. Thus before agreeing to so act, ensure that you have the requisite knowledge to advise on same.

Anne Stephenson
Stephenson Solicitors

PRECEDENT CHECKLIST RE INSTRUCTIONS FOR AN EPA

1. Essential Information:
    - **a.** the full name and address of the Donor
    - **b.** the date of birth of the Donor
    - **c.** the full name and address of the Attorney
    - **d.** consider whether, if there are two or more Attorneys, the Attorneys are to act jointly, or jointly and severally
    - **e.** whether the Attorney is to have general authority or limited authority
    - **f.** whether that authority is to relate to all the Donor's property or affairs or only to specified property or affairs
    - **g.** whether the Authority is to relate to personal care decisions
    - **h.** whether any restrictions or conditions are to be imposed
    - **i.** the name and address of the Donor's GP or other medical specialist who can certify the capacity of the Donor
    - **j.** get authority from the Donor to speak to the doctor

2. Useful Additional Information:
    - **a.** details of the Donor's assets and liabilities
    - **b.** whether the Donor has made a Will
    - **c.** details of whereabouts of Donor's Will, Title Deeds, Certificates etc
    - **d.** a family tree setting out names, addresses and ages of relatives who may be entitled to receive notices under the 1996 Act
    - **e.** Obtain details of the Donor's marital history and take details re all properties re same and obtain if appropriate an extensive family law declaration from him.

3. Suitability of the Proposed Attorney:
    - **a.** whether there is a likelihood that the Attorney could become mentally incapable
    - **b.** whether the Attorney is aware of the Donor's assets
    - **c.** whether there is a possibility that the Attorney will abuse the limited power to make gifts
    - **d.** whether the Attorney is aware of the contents of the Donor's Will
    - **e.** whether there is a possibility that the Attorney will use the Donor's property to preserve his own expectations at the expense of the interests of other beneficiaries
    - **f.** whether there is a suspicion that the proposed Attorney may be using fraud or undue pressure to induce the Donor to make an Enduring Power of Attorney

g. whether there are conflicts within the Donor's family

h. whether the Donor's relatives are aware of and happy about the proposed appointment

i. whether the proposed Attorney is trustworthy and reliable

j. whether the Attorney is readily accessible to the Donor

k. whether the Attorney has the time, energy, and willpower to do the job required

l. whether the Attorney has the ability or expertise to manage the Donor's property and affairs

4. <u>General or Restricted Power of Attorney:</u>

a. consider whether the Enduring Power of Attorney relates to all or only a specified part of the Donor's property and affairs

b. where there is more than one Attorney, consider whether they should act:-

i. – jointly or

ii. – jointly and severally

c. consider whether the Enduring Power of Attorney relates to any or all personal care decisions and whether the Attorney should consult anyone regarding their decisions

d. consider whether there should be further restriction on the Attorney's power to benefit himself or others

e. consider whether any transactions should be specifically forbidden

f. whether any other particular investment strategy is required

g. whether the Attorney should receive any remuneration

h. whether the Donor wishes to appoint a substitute Attorney

Precedent EPA

PART A, B, C, D, E, AND F AND AFFIDAVIT OF SERVICE OF AN EPA

PART A: EXPLANATORY INFORMATION

[Note: 1. This part may not be omitted from the instrument.
2. If the enduring power is to relate only to personal care decisions, the form in the Second Schedule should be used]

Notice to Donor and Attorneys:

1. Following is a simplified explanation of what the Powers of Attorney Act 1996 provides. If you need any more guidance you or your advisers will need to look at the Act itself.

2. Do not sign this enduring power unless you understand what it means. If you are in any doubt you should obtain legal advice.

Effect of Creating Enduring Power: information for Donor:

3. An enduring power of Attorney enables you to choose a person (called an "Attorney") to manage your property and affairs in the event of your becoming mentally incapable of doing so. You may choose one Attorney or more than one. If you choose more than one, you must decide whether they are to be able to act:

    jointly (that is, they must all act together and cannot act separately), or
    jointly and severally (that is, they can all act together but they can also act separately if they wish).

    In Part B of this document, at the place marked [1], show what you have decided by crossing out or omitting one of the alternatives. If you do not, the Attorneys are deemed to have been appointed to act jointly.

4. If you give your Attorney(s) general power in relation to all your property and affairs, they will be able to deal with your money or property and may be able to sell your house.

5. If you do not want your Attorney(s) to have such wide powers, you can include any restrictions you like. For example, you can include a restriction that your Attorney(s) may not sell your house. Any restrictions you choose must be written or typed at the place marked [2] in Part B of this document.

6. You may authorise the Attorney(s) to take certain personal care decisions on your behalf, e.g. deciding where you shall live. If you decide to do so, your should indicate, at the place marked [3] in Part B of this document, the particular personal care decisions you want to authorise. You should also name any person you would like the Attorney to consult so that the Attorney can have regard to that person's views as to your wishes and feelings and as to what would be in your best interests.

7. Unless you put in a restriction preventing it, your Attorney(s) will be able to use any of your money or property to benefit themselves or other people by doing what you yourself might be expected to do to provide for their needs.

8. If you specifically authorise it, your Attorney(s) will also be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property and subject to any conditions or restrictions you may impose.

9. You may also appoint an Attorney or Attorneys to act in the event that the original Attorney is unable or unwilling to act. Provision for such an appointment is made at the place marked [4] in Part B of this document.

10. You must give notice of the execution of the enduring power as soon as practicable to at least two persons. None of them may be an Attorney under the power. At least one must be the Donor's spouse, if living with the Donor. If the Donor is unmarried, widowed or separated, notification must be given to a child of the Donor (if applicable) or otherwise to any relative (i.e. parent, sibling, grandchild, widow/er of child, nephew or niece). You should give the names and addresses of those notified at the place marked [5] in Part B of this document. The prescribed form of notice is contained in the Third Schedule to the Enduring Powers of Attorney Regulations, 1996.

11. Your Attorney(s) can recover the out-of-pocket expenses of acting as your Attorney(s). You may provide for the Attorney's remuneration as well at the place marked [6] in Part B of this document.

12. If your Attorney(s) have reason in the future to believe that you have become or are becoming mentally incapable of managing your affairs, your Attorney(s) must apply to have the enduring power registered in the High Court. Once registered, an enduring power of Attorney cannot be revoked effectively unless the Court confirms the revocation. You may revoke the power at any time before registration.

13. Before applying for registration of this power, your Attorney(s) must give written notice of intention to do so to you and to the persons you notify of the execution of the enduring power. You and these persons (if they are not then available, certain of your relatives) will be able to object if you or they disagree with registration. The prescribed form of notice is contained in the Fourth Schedule to the Enduring Powers of Attorney Regulations, 1996.

<u>Effect of accepting Enduring Power: information for Attorney:</u>

14. If you have reason in the future to believe that the Donor is, or is becoming, mentally incapable of managing his or her property and affairs, you must apply to have the enduring power registered in the High Court. Before doing so, you must give written notice of your intention to the Registrar of Wards of Court and also to the Donor and the persons whom the Donor has notified of the execution of the enduring power. (If these persons are no longer available, notice must be given to certain relatives, as specified in the Powers of Attorney Act 1996). The prescribed form of the latter notice is contained in the Fourth Schedule to the Enduring Powers of Attorney Regulations, 1996.

15. The enduring power will not come into force until it has been registered. However, once you have applied for registration you may take action under the power to maintain the Donor and prevent loss to the Donor's estate and maintain yourself and other persons in so far as that is permitted under Section 6(4) of the Act. You may also make any personal care decisions permitted under the power that cannot reasonably be deferred until the application for registration has been determined.

16. Unless there is a restriction in the enduring power preventing it, you may use the Donor's money or other property for your benefit or that of other people to the

following extent but no further, that is to say, by doing what the Donor might be expected to do to provide for your or their needs. You may not use the Donor's money to make gifts unless there is specific provision to that effect in the enduring power and then only to persons related to or connected with the Donor on birth or marriage anniversaries or to charities to which the Donor made or might be expected to make gifts. The amounts of any such gifts are subject to any restrictions in the enduring power and, in any event, may be only for reasonable amounts in relation to the extent of the Donor's assets.

17. You are obliged to keep adequate accounts of the Donor's property and affairs and to produce the accounting records to the Court if required.

18. In general, as an Attorney you are in a fiduciary relationship with the Donor. You must use proper care in exercising on behalf of the Donor the authority given by the enduring power and you must act only within its scope. In particular, you must observe any conditions or restrictions imposed by the power and also the limits imposed by the Powers of Attorney Act, 1996.

19. You may recover the out-of-pocket expenses of acting as Attorney. The enduring power may provide for remuneration for so acting.

20. You may disclaim at any time up to registration of the power. Thereafter, you may do so only on notice to the Donor and with the consent of the High Court.

21. After the enduring power has been registered, you should notify the Registrar of Wards of Court if the Donor dies or recovers.

PART B - By Donor

Do not sign this form unless you understand what it means. If you are in any doubt you should obtain legal advice. Do not sign the form before the Donor has signed Part B.

I,

born on appoint

jointly/jointly and severally to act as Attorneys for the purposes of Part II of the Powers of Attorney Act 1996 with general authority to act on my behalf in relation to all my property and affairs and with authority to take my on behalf decisions on the following matters:-

A. Where I should live.

B. With whom I should live.

C. Whom I should see and not see.

D. What training or rehabilitation I should get.

E. My diet and dress.

F. Inspection of my personal papers.

G. Housing, social services and other benefits for me.

(If Applicable) (and should be consulted for their views as to my wishes and feelings as to what would be in my best interests)

I APPOINT jointly /jointly and severally to act as Attorney if an Attorney appointed by this instrument dies or is unable or declines to act or is disqualified from acting

as Attorney. I am required to give notice of the execution of this power to at least two persons. I shall notify the following persons accordingly:-

A.

B.

My Attorney may be paid the following remuneration:-

I intend this power to be effective during any subsequent mental incapacity of mine.

I have read or have had read to me the information in paragraphs one to thirteen of Part A of this document.

SIGNED by me on the

day of 200

in the presence of:-

NAME:

ADDRESS:

OCCUPATION:

PART C ACCEPTANCE BY ATTORNEY

Do not sign this form unless you understand what it means. If you are in any doubt you should obtain legal advice. Do not sign the form before the Donor has signed Part B.

I,

of

understand my duties and obligations as Attorney, including my duty to apply to the High Court for the registration of this instrument under the Powers of Attorney Act 1996, when the Donor is or is becoming, mentally incapable, my limited power to use the Donor's property to benefit persons other than the Donor and my obligation to keep adequate accounts in relation to the management and disposal of the Donor's property for production to the High Court if required.

I have read or have had read to me the information in paragraphs 1, 2 and 14 to 21 of Part A of this document.

I am not a minor or otherwise disqualified from acting as Attorney.

SIGNED by the said

on the day of

200 in the presence

of:-

NAME:

ADDRESS:

OCCUPATION:

PART D STATEMENT BY SOLICITOR

I, Solicitor in the County of Dublin hereby state that after interviewing the Donor and making any necessary enquiries I am satisfied that (the Donor) understood the effect of creating the enduring Power and I have no reason to believe that this document is being executed by the Donor as a result of fraud or undue pressure.

Dated the day of 200

SIGNED by
Note: This Part may not be omitted from the Instrument.

PART E STATEMENT BY REGISTERED MEDICAL PRACTITIONER

I, , a registered medical practitioner, of
hereby state that in my opinion at the time this document was executed by 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 Power.

SIGNED:
DATED:-
Note: This Part may not be omitted fro the Instrument.

PART F NOTICE OF EXECUTION BY DONOR OF ENDURING POWER

To:-
TAKE NOTICE that I, , executed on the day of
2006 an instrument creating an enduring power of Attorney and appointing
of
to act as my Attorney if I should become
mentally incapacitated.
And Appoint of to act
as my Attorney if an Attorney appointed by this instrument dies or in unable or declines to act or is disqualified from acting as Attorney.
SIGNED:-_____

DATED:
INFORMATION FOR DONOR

1. You must give notice of the execution of the enduring power to at least two people.
2. None of the persons to be notified may be an Attorney under the enduring power.
3. At least one must be your spouse, if living with you. If you are unmarried, widowed or separated, notification must be given to your child (if applicable) or otherwise to any relative (ie. parent, sibling, grandchild, widow/er of child, nephew or niece).
4. It is advisable that this notice be sent by prepaid registered post and that the certificate of posting be kept in a safe place.

INFORMATION FOR RECIPIENT OF NOTICE

1. The enduring power will not come into force until the Donor is or is becoming, mentally incapable of managing his or her property and affairs and until it has been registered in the High Court.

2. Notice of intention to apply for registration of the enduring power will be given to you before the Attorney applies for registration.

AFFIDAVIT OF SERVICE ON NOTICE PARTIES

ENDURING POWER OF ATTORNEY

OF

AFFIDAVIT OF SERVICE

I, of aged eighteen years and upwards, MAKE OATH and say as follows:-

1. On the day of 2006, I served a true copy of the within Notice under the Enduring Power of Attorney Regulations 1996 on by posting same to the above address under cover of prepaid Registered Post. I beg to refer to a true copy of said Notice attached hereto upon which marked with the letter "A" I have endorsed my name prior to the swearing thereof.
2. I beg to refer to the registered slip attached hereto upon which I have endorsed my name prior to the swearing hereof.
3. I make this Affidavit from facts within my own knowledge save where otherwise appears.

SWORN ETC

REGISTRATION PRECEDENTS

Precedent 1 - Letter to Doctor Re Activation

Dr …….
The Clinic,
Co Dublin *Date*

Re: Mr X of ……..
Enduring Power of Attorney

Dear Dr ……,

We act for A and B who are the Attorneys appointed under Enduring Power of Attorney of Mr X .

Mr X executed an Enduring Power of Attorney on the……day of ……2006. He appointed Mr A and Mr B as his Attorneys.

We would be grateful therefore if you could let us have a statement from yourself in relation to Mr X that he is incapable or becoming incapable of managing his affairs and return to us, to lodge with the Wards of Court Office for the purpose of registration of the Enduring Power of Attorney. We enclose same.

Yours faithfully,

Re: of

I hereby certify that I attended the above named on the day of 200…

I am satisfied from my examination of my above mentioned patient and from my records that he/she suffers from ……..

I am further satisfied that by reason of the above medical condition, my above patient is/is becoming incapable of managing and administering his/her own property and affairs.

Dated this day of 200…
Signed:_____
Dr

Precedent 2 A&B&C

Notice of Intention to Apply for registration Addressed to the Donor/Notice Party/Registrar

To TAKE NOTICE that I of

The Attorney(s) of (hereinafter called "the Donor") of propose to apply to the High Court for the registration of the instrument creating an Enduring Power of Attorney appointing me/us Attorney(s) and executed by the Donor on the day of 20 .

1. *You have 5 weeks from the date on which this Notice is given to object in writing to the proposed registration of the Enduring Power. Objections should be sent to the Registrar of Ward of Court, Four Courts, Dublin 7 and should contain the following details:*
   - *(a) Your name and address,*
   - *(b) If you are not the Donor, the name and address of the Donor.*

(c) Any relationship to the Donor.
(d) The name and address of the Attorney and
(e) The grounds for objecting to the registration of the Enduring Power.

2. *You may object to the registration of the Enduring Power on any one or more of the following grounds:*

(a) That the Enduring Power purported to have been created was not valid.
(b) That the Enduring Power is no longer a valid and subsisting power.
(c) That the Donor in not, or is not becoming, mentally incapable.
(d) That, having regard to all the circumstances, the Attorney is unsuitable to be the Donor's Attorney.
(e) That fraud or undue pressure was used to induce the Donor to create the Enduring Power.

3. *You are informed that while the Enduring Power remains registered you will not be able to revoke it unless and until the Court confirms the revocation.*

Signed:_____

Signed:_____

Date:_____

<u>Notice to Attorney(s)</u>

1. *This notice must be given to the Donor and also to the other person who were notified of the execution of the Enduring Power and are named in it.*
2. *If any of those persons are dead or mentally incapable or their whereabouts cannot be reasonably ascertained, the notice must be given to the other person or persons who were so notified.*
3. *If all of those persons are dead or mentally incapable or their whereabouts cannot be reasonably ascertained, the notice must be given to the relative (if any) who are entitled to receive notice by virtue of paragraph 3 of the First Schedule of the Powers of Attorney Act, 1996.*
4. *You must also give notice to the Registrar of Wards of Court of your intention to apply to the Court for registration of the power at the same time as you are giving notice to the Donor and those other persons. A copy of each of the notices should be enclosed for the Registrar's information.*

Cover Letter re same

<u>REGISTERED MAIL</u>

RE: of

Dear,

We enclose Notice of Intention to Apply for Registration of the Enduring Power of Attorney in respect of the above mentioned, the application being made by our client, , the Attorney appointed in Mr Enduring Power of Attorney.

Yours faithfully,

Stephenson Solicitors
Enc

Precedent 2 D

AFFIDAVIT OF SERVICE - NOTICE OF INTENTION TO APPLY FOR REGISTRATION

I, , of 55 Carysfort Avenue, Blackrock, Co. Dublin, aged eighteen years and upwards, ***MAKE OATH*** *and say as follows:-*

1. *On the day of I served the original of the within true copy Notice under the Enduring Power of Attorney Regulations 1996 on (DONOR/NOTICE PARTIES)posting same to the above address under cover of prepaid Registered Post. I beg to refer to a true copy of said Notice attached hereto upon which marked with the letter "A" I have endorsed my name prior to the swearing thereof.*
2. *I beg to refer to the registered slip attached hereto upon which I have endorsed my name prior to the swearing hereof.*
3. *I make this Affidavit from facts within my own knowledge save where otherwise appears.*

SWORN etc

Filed *this day of 20*
by Stephenson Solicitors,

Precedent 3

AFFIDAVIT OF ATTORNEY

I, of aged eighteen years and upwards make oath and say as follows:-

1. *This declaration relates to (hereinafter called "The Donor") who is a married man/Woman.*

2. *The present address of the Donor is*

3. *The Donor executed an Enduring Power of Attorney under the Powers of Attorney Act 1996 on the (hereinafter called "The EPA").*

4. *Notice of Execution of the EPA by the Donor was given to , wife of the Donor of on the*

5. *Notice of Execution of the EPA by the Donor was given to son of the Donor then and now of on the*

6. *Notice of Execution of the EPA by the Donor was given to , daughter of the Donor then and now of on or around the*

7. *I this Deponent completed the Statement prescribed in Part C of the form in the First/Second Schedule to the Regulations on the*

8. *The Statement by the solicitor prescribed at Part D of the form in the First/Second Schedule to the Regulations was completed by (insert name of Solicitor) on the day of .*

9. *The Statement by the doctor prescribed at Part E of the form required by the First/Second Schedule to the Regulations was completed by (name of Doctor) Registered medical practitioner on the ……day of……..*

10. *Notice of Intention to Apply for Registration of the EPA was served on the Donor personally on the …..day of……2000.*

11. *Notice of Intention to Apply for Registration of the EPA was served on the Registrar of the Wards of Court on the …… day of…… 2000.*

12. *Notice of Intention to Apply for Registration of the EPA was served on the said by registered post on the being a required Notice Party.*

13. *Notice of Intention to Apply for Registration of the EPA was served on the said by registered post on the being a required Notice Party.*

14. *I, this Deponent aver that the EPA has not been interfered with or altered with in any way since it came into my possession and I confirm that the EPA is in my possession as held by my solicitors, who have held the EPA since its execution by the Donor.*

15. *Dr , a registered medical practitioner has certified on the that the Donor is becoming incapable of managing and administering his own property and affairs.*

16. *There is no other person to whom Notice is required to be given by virtue of the provisions of the First Schedule to the Act.*

SWORN etc

Precedent 4

APPLICATION FOR REGISTRATION

IN THE MATTER OF THE POWERS OF ATTORNEY ACT 1996 AND
IN THE MATTER OF AN INSTRUMENT CREATING AN ENDURING POWER OF ATTORNEY

Executed By Of On The Day Of 200

TAKE NOTICE *that I (Attorney) of*

The Attorney of and (hereinafter called "the Donor") of formerly of hereby apply to the High Court for the registration of the instrument creating the Enduring Power of Attorney appointing me Attorney and executed by the Donor on the day of 1999.

This application is grounded upon the Affidavit of (Attorney) sworn on the day of and the following documents annexed hereto:

(i) The said Enduring Power of Attorney dated the day of 200.

(ii) Copy Notice dated the day of 200 of Execution by the Donor of the Enduring Power of Attorney given to (Notice Party) of being a son of the said .

(iii) Copy Notice dated the of the Execution by the Donor of the Enduring Power of Attorney given to (Notice Party) of 5 being a daughter of the said .

(iv) Copy Notice dated the day of 200 of Intention to apply for registration given to the Donor.

(v) Copy Notice dated the day of 200 of Intention to apply for registration given to

(vi) Copy Notice dated the day of 200 of Intention to apply for registration given to of wife of the Donor

(vii) Affidavits of Service of the Notices referred to at paragraph (iv), (v) and (vi) above.

(viii) Certificate of Dr dated the day of 2001 to the effect that the Donor is becoming incapable by reason of a mental condition of managing his property and affairs.

Dated this day of 200

Signed:_____
(Solicitors Company)

You are informed that while the Enduring Power remains registered you will not be able to revoke it unless and until the Court confirms the revocation.

Signed:_____

Signed:_____

Date:_____

Notice to Attorney(s)

1. This notice must be given to the Donor and also to the other person who were notified of the execution of the Enduring Power and are named in it.

2. If any of those persons are dead or mentally incapable or their whereabouts cannot be reasonably ascertained, the notice must be given to the other person or persons who were so notified.

3. If all of those persons are dead or mentally incapable or their whereabouts cannot be reasonably ascertained, the notice must be given to the relative (if any) who are entitled to receive notice by virtue of paragraph 3 of the First Schedule of the Powers of Attorney Act, 1996.

3. You must also give notice to the Registrar of Wards of Court of your intention to apply to the Court for registration of the power at the same time as you are giving notice to the Donor and those other persons. A copy of each of the notices should be enclosed for the Registrar's information.