

The Director  
Decision Support Service  
Waterloo Exchange  
Waterloo Road  
Dublin 4  
D04 E5W7

Date: 19 May 2023  
Our Ref: ASC/NT/30838/  
Your Ref:

**Re: Enduring Powers of Attorney (EPA) under the Assisted Decision-Making (Capacity) Act 2015**

Dear Director

We are writing with a number of concerns in respect of the newly introduced Enduring Power of Attorneys system which has already arisen for our clients. Clearly these serious concerns apply countrywide but are of particular concern in rural Ireland. As you are aware, the Assisted Decision Making (Capacity) Act 2015 commenced on the 26<sup>th</sup> April 2023 with no prior release of the process which would need to be followed in order to create and register an EPA with the Decision Support Service.

**Initial set up of an EPA**

The majority of our clients who wish to create an EPA are elderly, some of whom may already be in the early stages of dementia and therefore we have a requirement and an obligation to our clients to act quickly in order to appoint the attorneys they know and trust to act during their incapacity. Our concerns lie with the difficulties arising for anyone wishing to create an EPA under the new “online only” process as follows:

- access to a computer is necessary to create an EPA under the new “online only” system
- in order to begin the process, the donor and all attorneys must create a myDSS account online
- to create a myDSS account, the donor and all attorneys must have their own email address and a PPS number
- to verify a myDSS account, the user must have a verified MyGovID account

- to create a MyGovID account, the user must have a mobile phone and a Public Services Card (PSC)
- to obtain a PSC card, the user must make an appointment and present in person at their Public Services Card Centre with sufficient identification

All of the above is extremely restrictive in circumstances where some people do not have access to a computer, others may not have a PSC which will likely lead to further delays in the setting up process. In addition, some attorneys (i.e., children of the donor) may not have a PPS number in circumstances where they may not have been born in Ireland albeit that their parents now reside in Ireland.

### **Access to the portal**

Under the new regulations, only the person making application for an EPA can set up an online portal with the DSS. We have been informed by the DSS that Wolfe & Co LLP Solicitors (and all legal firms) cannot set up a portal to facilitate access on behalf of our clients.

This decision is definitively obstructive to our clients who need assistance and very peculiar in the light of the fact that legal firms operate direct portals, on a daily basis, with the Revenue, PIAB and other state bodies in the provision of legal services to their clients. Why would solicitors be refused a direct portal in respect of EPA's particularly in light of the reality that the particular client cohort is often not tech savvy.

### **The immediate provision of a direct portal to legal firms would go some way towards alleviating the above-described obstacles.**

It is noted that at the commencement of PIAB that that body attempted to prevent direct legal representation and that both the High Court and Supreme Court struck this down in the matter of *O' Brien v PIAB [2008] IESC 71*.

### **Certification of solicitor**

It appears that the goal of the new process is that a donor will create the EPA online themselves and then arrive at a solicitor's office with the EPA Instrument and present the solicitor with a Legal Capacity Statement for signing by them. As the solicitor will not have been involved in any stage of the creation of the EPA and in circumstances where the EPA is created online, it is hugely difficult to establish, at face value, whether the donor has had assistance or has been under any pressure in the process. The solicitor is thereafter required to interview the donor and ascertain whether the donor understands the implications of creating the EPA, ensure that the donor is aware that they can vary or revoke the EPA and then certify that they have no reason to believe that the donor is executing the instrument as a result of fraud, coercion or undue influence. This is an onerous certification to make when one has not been involved in any stage of the creation of the EPA. The likelihood of this process is that, at the very

least, the donor has had the assistance of their attorneys in the creation of the EPA and so this certification process may prove an impossibility for a conscientious solicitor.

In addition, and most worryingly for all solicitors, is that solicitors who do certify that a person was not under any coercion or undue influence may in fact be investigated by the Director of the Decision Support Service. They may be summonsed to attend as a witness before the Director, be examined on oath and asked to produce to the Director any document in their power or control that they may have relied on. In the event that the person fails to comply with a requirement, hinders or obstructs the investigation they shall be guilty of an offence. The very fact that the solicitor is not involved in the process makes it, in our opinion, next to impossible for a solicitor to take on the risk and responsibility of signing such a certificate. It seems to us that such a certification process is not advisable.

### **Attorneys**

**By far the worse and most impractical part of the process is that** the donor, all attorneys and two witnesses must all be present in the same room at the same time in order to sign the declaration forms. In many cases, the donor will likely wish to appoint their nearest and dearest and natural choices, i.e., their children, as their attorneys. In rural Ireland, many of our family members will have moved abroad for work or lifestyle. To expect them to go to the trouble and expense of returning to Ireland in order to sign the form is utterly impractical and unreasonably onerous. This requirement will surely preclude the donor in many cases from appointing the people that they wish to appoint in circumstances where their preferred attorneys cannot travel to Ireland to sign a declaration form.

We already have one such situation where the EPA cannot be made as both children of the donor are out of the country at the present time. This obstacle came as a great shock to our client and was the cause of great upset. The EPA is now postponed and is needlessly putting the donor's legal protections in jeopardy.

In summary, it is our considered opinion that the entire process appears to have been created in an authoritarian and bureaucratic manner with little or no consideration for the people whom it is actually intended to serve and benefit. Whilst we of course welcome the move towards supporting our vulnerable people with the two levels of decision-making support whilst capacity is assumed, and the decision-making representative when it is not, we very much believe that the EPA process has now been interfered with in an arduous, obstructive and complicated fashion.

We would very much welcome your thoughts on this with a view as to what measures need to be taken urgently to amend the process and allow a more simplified and welcoming process.

**It appears to us that two immediate steps would relieve this difficult situation being (1) the provision of solicitor's direct access to the DSS portal and (2) the removal of the necessity to have all parties present at the same time.**

We request your urgent support and assistance.

Yours faithfully

---

Helen Collins, Managing Partner.  
Colette McCarthy, Partner  
Vivienne Ring, Partner.  
Aislinn Collins, Solicitor and EPA expert.  
Jan Ackary, EPA expert.  
**WOLFE & CO. LLP**  
info@wolfe.ie

CC: Roderic O’Gorman, Minister for Children, Equality, Disability, Integration and Youth

CC: The Law Society

CC: Holly Cairns TD

CC: Christopher O’Sullivan TD

CC: Michael Collins TD

CC: West Cork Solicitors Bar Association

CC: Southern Law Association

CC: Dublin Solicitors Bar Association

Document ID: 1019475