

THE LAW REFORM COMMISSION  
AN COIMISIUN UM ATHCHOIRIU AN DLI

LRC 31 - 1989

REPORT ON LAND LAW AND CONVEYANCING LAW:  
(2) ENDURING POWERS OF ATTORNEY

IRELAND  
The Law Reform Commission  
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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First Published

The Law Reform Commission 1989  
September 1989

## THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4 January 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty Reports containing proposals for reform of the law. It has also published eleven Working Papers, two Consultation Papers and Annual Reports. Details will be found on p 27.

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### Note

This Report was submitted on 22 September, 1989 to the Attorney General, Mr John L Murray, SC, under Section 4(2)(c) of the *Law Reform Commission Act, 1975*

While these proposals are being considered in the relevant Government Departments, the Attorney General has requested the Commission to make them available to the public at this stage, in the form of this Report, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject



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*CHAPTER 1 INTRODUCTION*

1 On 6th March 1987, the then Attorney General, in pursuance of section 4(1)(c) of the *Law Reform Commission Act 1975* requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was

"Conveyancing law and practice in areas where this could lead to savings for house purchasers "

The Commission has already published a Report containing General Proposals in the areas of Land Law and Conveyancing Law (LRC 30-1989). During the course of its work, the Working Group established by the Commission to deal with this area considered the possibility of the introduction of a system of Enduring Powers of Attorney in this jurisdiction. Enduring Powers of Attorney are somewhat different in nature from the topics considered in the first Report in this area. Apart from other considerations, they involve a much more detailed examination of comparative law in other jurisdictions. It thus seemed appropriate to make them the subject of a separate report.

The members of the Working Group appointed were Mr John F Buckley, Commissioner (Convener), Miss Justice Mella Carroll, Professor JC Brady, Mr George Brady SC, Ms Mary Laffoy SC, Mr Ernest B Farrell, Mr Rory McEntee, Solicitors. Miss Justice Carroll resigned from the Working Group in November 1988 following her appointment as a judge of the Court of the International Labour Organisation.

The Commission would like to record its deep appreciation of the contribution which the members of the Working Group have made to the Commission's examination of this difficult and technical area of the law. Their knowledge and experience were invaluable in enabling the Commission to formulate practical proposals for alterations in the law. As usual, however, the Commission emphasises that it alone is responsible for the contents of this Report.

*CHAPTER 2 THE PRESENT LAW**POWERS OF ATTORNEY*

2 A Power of Attorney is a document which appoints a person, called the donee or attorney, and invests him with power to act either generally or in a manner specified on behalf of a person who gives the power, called the donor. Powers of Attorney are not governed generally by any statute law in Ireland and the law governing them is therefore almost exclusively of common law origin, Powers of Attorney being regarded as a branch of the general law of Agency. There is a clear case for the review of the law governing Powers of Attorney generally in Ireland and for the introduction of legislation governing the creation and operation of Powers of Attorney. Powers of Attorney are most frequently used when the donor is going to be absent from Ireland and are given either for special purposes, such as the sale of the donor's house, or general purposes, e.g. to manage the donor's properties and investments in Ireland while he is abroad. Powers of Attorney can of course be given when the donor is not leaving the country but simply wishes to appoint somebody else to look after a particular transaction or transactions on the donor's behalf.

3 In the Republic of Ireland, there are no special statutory provisions governing the creation of a power of attorney by a donor, though at common law it is necessary for him to execute a deed.<sup>1</sup> The *Conveyancing Act 1881* deals to some extent with powers of attorney. It provides in section 48(1) that an instrument creating a power and which provides that the donor cannot revoke the power within twelve months from the date of its coming into effect, may be deposited in the Central Office of the High Court and memorials of such instruments may be registered in the Registry of Deeds. The Act also authorises an attorney to execute documents in his own name as well as in that of the donor. It does not, however, attempt to delimit the scope of a power and in this sense does not in any real way provide a statutory scheme for powers of attorney.

At common law, a Power of Attorney is revoked automatically by certain events - the donor's death, insanity,<sup>2</sup> marriage or bankruptcy<sup>3</sup> It is also revoked on the expiration of the time for which the instrument was created or on the completion of the specific transaction for which it was created

#### *THE PROBLEM*

4 An Enduring Power of Attorney is a power of attorney which, subject to conditions and safeguards, continues in force even after the maker of the power (the 'donor') becomes mentally incapable of handling his or her affairs

There is no provision in this jurisdiction for Enduring Powers of Attorney The result of this is that a person who is concerned that he or she might become incapable of managing his or her affairs is unable to make provision for that possibility It appears that one result of the increase in the life expectancy of the population is that there is an increase in the number of people who become senile We would also be concerned with, for example, people in the early stages of Alzheimer's disease

At present, a person who would like to deal with the possibility of his or her becoming incapable of managing his or her affairs may only hope that arrangements will be made in due course to have him or her made a ward of court Wardship is a procedure under which a person who becomes incapable is taken into the care of the High Court A person, called a Committee, is appointed to look after the person of the Ward while the High Court, the jurisdiction being vested in the President, takes charge of the property of the Ward Whereas normally arrangements would be made for the Ward to continue to reside in the Ward's own house and that property would not be sold, it is the practice for any investments to be brought into court A manager may be appointed over any trading or business concern to which the Ward is entitled There is no active management of any investments of the Ward

It is understood that some attorneys have continued to act even when the donor became mentally incapable This could result in the attorney being personally liable for any transactions entered into on behalf of the donor

#### *WARDSHIP*

5 The wardship laws in this jurisdiction are contained in the *Lunacy Regulation (Ireland) Act 1871* We have been informed that more and more elderly people are coming into wardship Wardship is a complex procedure involving a petition to the President of the High Court, medical evidence of total incapacity (from two doctors and a medical visitor) and service of such evidence on the prospective Ward A Committee is then appointed to manage the Ward's affairs The form of management by Committee is, however, fairly passive A Committee may not, for example, deal in equities and has no power to actively manage an investment portfolio Stocks and

shares of a ward may be kept but, in relation to rights issues and bonus issues, for example, an application must be made to the Registrar of Wards of Court who then takes advice from a stockbroker. An attorney, on the other hand, need not have a passive role and may manage any investments and affairs of the donor in the way the donor would wish.

There are obviously difficulties involved in giving an enduring attorney absolute control of his principal's estate. Other jurisdictions have considered these problems and have dealt with them in different ways which we discuss later.

#### *REFORMS ELSEWHERE*

6 Over the past twenty years a number of Law Reform Commissions in other jurisdictions has considered the question of Enduring Powers of Attorney<sup>4</sup> and they have subsequently been introduced in several of them.<sup>5</sup> Enduring Powers of Attorney are also called Special, Durable and Extended Powers of Attorney, all will be referred to as EPAs. It would appear, upon careful consideration of the experience of other jurisdictions, that we can devise a system of EPAs best suited to Ireland's needs. It is important to create a comprehensive system with safeguards, but not to the extent that it is so complex and expensive as to discourage the use of EPAs. From an examination of the schemes in force throughout the world, it would appear there is no one system which has gained universal acceptance and each scheme varies to some extent from all other schemes.

EPAs have proved to be very popular in those jurisdictions where they have been introduced.

## FOOTNOTES TO CHAPTER 2

- 1 *R v Martin* (1831) Glasc 33
- 2 *Drew v Nunn* (1879) 4 QBD 661
- 3 *Tungley v Muller* [1917] 2 Ch 144 esp at 183 (per Bray J)
- 4 Ontario Law Reform Commission, *Report on Powers of Attorney* (1972), Law Reform Commission of New South Wales, *Working Paper on Powers of Attorney*, (1973), Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney*, (1974), Law Reform Commission of New South Wales, *Report on Powers of Attorney and Unsoundness of Body or Mind* (1974/1975) LRC 20, The Law Reform Commission of British Columbia *Report on the Law of Agency, Part 2 - Powers of Attorney and Mental Incapacity* (1975), The Law Commission *The Incapacitated Principal* (1976) Working Paper No 69, The Law Commission - *The Incapacitated Principal* (1983) Cmnd 8977, Report of Law Reform Committee of South Australia Relating to Powers of Attorney (1981), Law Reform Commission of Tasmania, *Report on Powers of Attorney* (1984) Report No 39 Newfoundland Law Reform Commission, *Working Paper on Powers of Attorney* (1987), WP 2, Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory Third Report Enduring Powers of Attorney* (1988)
- 5 *Powers of Attorney Act RSO 1980*, c 386 (Ontario), *Power of Attorney Act RSBC 1979*, c 334 (British Columbia), *The Powers of Attorney Act SM 1980* c P 97 (Manitoba), *The Powers of Attorney Act SS 1983*, c P-20 1, *Mental Health (Powers of Attorney) Amendment Act 1983*, Act No 27 (New South Wales), *Enduring Powers of Attorney Act 1985*, c 29 (England and Wales) and *Powers of Attorney Amendment Act 1987*, Bill 18 (Tasmania) Three quarters of the States in the USA have legislation providing for Enduring Powers of Attorney

*CHAPTER 3 FEATURES OF ENDURING POWERS OF ATTORNEY*

7 It is proposed to deal with this subject under various headings, with the findings of the other Law Reform Commissions summarised thereunder

*CREATION OF AN ENDURING POWER OF ATTORNEY*

8 It is important to strike a balance between simplicity and protection

*EXPRESSION OF INTENTION*

9 The first question is whether the document creating the EPA should expressly state that it is intended to be an EPA (i.e. that it will come into effect on the mental incompetence of the donor) or whether all Powers of Attorney should automatically be presumed to be EPAs in the absence of any express intention

The other Law Reform Commissions are all in favour of a requirement that an intention to create an EPA be evidenced in the instrument creating it<sup>1</sup> and this has also been incorporated in EPA legislation where introduced<sup>2</sup>. The reasons for this requirement are fairly obvious. It is primarily to ensure that the donor has fully considered the consequences of his action and that an EPA is not created unintentionally. It is interesting to note that the New South Wales working paper had originally suggested that all Powers of Attorney should be treated as EPAs unless the instruments state otherwise. This idea was abandoned in the later Report.

*We recommend that an intention to create an EPA should be evidenced in the instrument creating it*

*WHO MAY EXECUTE AN EPA AND WHO MAY BE AN ATTORNEY'*

**(a) Donor**

10 The Tasmanian Report recommended that the donor must have the required mental capacity at the time the grant is made. The Law Commission of England and Wales ("the Law Commission") did not think there should be any restrictions greater than those currently applicable to ordinary powers with the result that both minors and undischarged bankrupts would be able to create Enduring Powers of Attorney. The Law Commission felt an EPA would have to be granted by someone who satisfied the general legal test of mental capacity i.e. someone able to understand the nature and effect of an EPA. Hoffmann J in *Re K*<sup>3</sup> held that the validity of an EPA depends on whether the donor understood its nature and effect, and not whether he would hypothetically have been able to perform all the acts which it authorised.

*We recommend that the same conditions which apply to the capacity of donors to make ordinary powers of attorney should apply to enduring powers of attorney*

**(b) Attorney**

**(i) NUMBER**

11 The majority of Law Reform Commissions are in favour of not limiting the donor's choice in this area.<sup>4</sup> No EPA legislation puts any limit on the numbers of attorneys who may be appointed. *The Commission takes the same view*

**(ii) CAPACITY**

12 It is obviously desirable to have as few restrictions as possible. All Law Reform Commissions recognise that it is necessary that the attorney be of age and of sound mind. The EPA legislation reflects this feeling. For example, section 2(7) of the *Enduring Powers of Attorney Act 1985* in England states that the attorney must be over 18 years of age and must not be a bankrupt. It is interesting to note that the English legislation in the same section expressly provides that a trust corporation may be an attorney. It can be argued that other jurisdictions would allow a trust corporation to be an attorney by implication in that there are very few restrictions placed on the donor's ability to choose an attorney, and the legislation refers to "person[s]" in the definition sections.

Both the Law Commission of England and Wales in their Report and the subsequent *Enduring Powers of Attorney Act 1985* deal with the question of the appointment of joint attorneys. Under section 11 of the 1985 Act the donor must elect to appoint attorneys jointly or jointly and severally. If the attorneys are appointed jointly, the incapacity of one means that the others cannot operate without that person. If on the other hand, they are appointed jointly and severally, the others may continue without that person. The *Powers of Attorney Act 1980* of Ontario also expressly provides for a situation where two attorneys are appointed.

*The Commission recommends that it should be up to the donor to specify in the instrument whether the attorneys are appointed jointly or jointly and severally. Where the power is silent there should be a presumption that they are appointed jointly.*

#### WITNESSES

##### (a) Necessity

13 Under common law, Powers of Attorney are not required to be witnessed. There are, however, advantages in requiring an EPA to be witnessed: it confirms the donor's identity, helps to prevent forgery and ensures the absence of physical duress, as pointed out by the UK Working Paper.<sup>5</sup> The British Columbia Report also indicated that formalities impress on the donor the gravity of the action and help to prove the authenticity of the document for a third party.

There may be a danger that the introduction of too many formalities could (i) discourage people from creating EPAs and (ii) result in many EPAs being invalid on technicalities.

At the same time, however, the Commission feels that witnessing can hardly be regarded as an unusual formality and the advantages far outweigh the disadvantages. Law Reform Commissions in Ontario, Manitoba, England, Tasmania, Australia and Newfoundland were in favour of a witness requirement, while the New South Wales Commission declined to make any recommendations on the matter. The British Columbia Report suggested that witnessing be encouraged but not mandatory<sup>6</sup> while the Law Commission Report suggested that failure to abide by the attestation rule would mean that the defective EPA would operate as an ordinary power of attorney.<sup>7</sup> In a scheme where the power of attorney only comes into operation on the incapacity of the donor this would not seem to be of any great value.

Most legislation introducing EPAs requires that the execution of the power be witnessed.<sup>8</sup> The English requirements are found in Regulation 3 of the *Enduring Powers of Attorney (Prescribed Form) Regulations 1987*<sup>9</sup> which provides for the witnessing of both the donor and the attorney's signatures. *The Commission recommends that there should be a requirement that the instrument creating an EPA be witnessed.*

##### (b) Eligibility

14 Once it is mandatory that the document be witnessed, the next question is whether or not restrictions should be placed on the type of person who may witness the document. The vast majority of the Commissions have canvassed this question,<sup>10</sup> and have come to conclusions ranging from a requirement of two witnesses,<sup>11</sup> one of whom must be a doctor or lawyer,<sup>12</sup> to placing very few restrictions at all.<sup>13</sup> Doubts have also been expressed about



allowing near relatives of the donor to be witnesses, and it was clear to all of the Commissions that the Attorney could not be a witness

15 The Commission is of the opinion that it is extremely important to ensure that the donor of a power receives independent legal advice before executing an EPA. In order to establish that this was the case, the Commission feels that it would be preferable that the power should be witnessed by a solicitor. We would not, however, favour the attorney's solicitor being the witness as we envisage a totally independent witness. We feel that it is important that the donor should receive independent legal advice before executing a power and that the fact that the donor has either received such advice or, it having been suggested that such advice should be taken, has declined to take such advice, should be stated in the instrument. The donor's solicitor could advise him as to the effect of the power and his witnessing the execution of the instrument would be available to confirm the competence of the donor at the time. As we have stated before, the Commission does not favour unnecessary formalities and we would not therefore make this latest requirement a mandatory one.

*We recommend that the donor's solicitor should be capable of acting as a witness but that neither the attorney nor his solicitor should be capable of so acting. We also recommend that there should be a statutory requirement that the donor should be advised of the wisdom of taking independent legal advice on the effect of an EPA before executing an EPA and that this should be evidenced in the instrument creating it.*

**(c) Number**

16 The Tasmanian, Australian and Manitoba Law Reform Commissions suggest that there should be two witnesses, while three other Reports recommend that one would suffice<sup>14</sup>. All of the EPA legislation requires one witness,<sup>15</sup> except for the Tasmanian legislation which requires two<sup>16</sup>.

*We do not recommend that there should be a requirement for more than one witness.*

**OTHER FORMALITIES**

17 We are of the opinion that it is preferable to have as few formalities as possible, because otherwise the system may become too technical and complex.

The EPA should, of course, be in writing and, as outlined above, should be signed and witnessed.

The Law Commission in England attaches great importance to explanatory notes – i.e. to explain the nature and effect of an EPA. The Tasmanian Law Reform Commission was also in favour of this,<sup>17</sup> while the Newfoundland Commission was not<sup>18</sup>. Section 2(2) of the *Enduring Powers of Attorney Act 1985* together with the *Enduring Powers of Attorney (Prescribed Form)*

*Regulations 1987*<sup>19</sup> gives legislative force to the Law Commission's recommendations. A copy of this prescribed form is contained in the Appendix.

*While a standard form of EPA should be prescribed the Commission would not be in favour of making the use of the prescribed form mandatory. As with a will compliance with the requirements of the law should be sufficient. Failure to use a prescribed form should not disqualify the power of attorney from being effective. We recommend however that there should be a standard form available which would contain explanatory notes in plain English.*

#### DURATION

18 All of the Law Reform Commissions feel that EPAs should not be statutorily limited to a fixed period of time<sup>20</sup>. It is also widely felt that the donor should have power to limit the duration of the EPA.<sup>21</sup> The Commission agrees that the donor should be able to limit the duration of the power. *In the event however of the donor becoming incompetent before the expiration of the specified time we are of the opinion that the EPA should not be allowed to lapse as this would defeat the purpose of the EPA.*

#### NO WAIVER

19 The Ontario, British Columbia, Manitoba and Newfoundland Law Reform Commissions recommend that the donor should not be able to waive the special statutory provisions concerning the creation and use of EPA which are aimed at his protection. The Tasmanian Law Reform Commission would not allow parties to contract out of the legislation either.<sup>23</sup> It goes without saying that the formalities built into a statutory scheme are to protect the donor's interests and if waiver were allowed, there is the possibility that prospective attorneys might persuade donors to waive these formalities. The English legislation by implication does not permit waiver.<sup>24</sup> *The Commission recommends that there should be no waiver allowed.*

#### REGISTRATION

20 Because of the seriousness of the consequences of an EPA, Law Reform Commissions have considered a special system of registration for them. Registration seems to be dealt with at two different stages:

- (i) at the time of execution, and
- (ii) when the donor becomes mentally incompetent

#### (a) At the time of execution

21 A requirement of registration at this time, the Ontario Commission argues,<sup>25</sup> performs a useful function. It puts the power of attorney on public record and publicly identifies the attorney. The Manitoba and Tasmanian

Reports recommend that EPA's should be filed in the appropriate offices of the relevant courts.<sup>26</sup> The Manitoba Report would go further and require the filing to be done within 15 days of execution.<sup>27</sup>

Other Reports rejected the need for registration at the time of execution,<sup>28</sup> the main reason being that supervision over the EPA at that stage would seem out of place while the donor remained mentally capable. *The Commission agrees with this view and is not in favour of registration at the time of execution*

**(b) When the donor becomes mentally incompetent**

22 The Ontario Commission suggests that the attorney would be required to register the EPA within 15 days of having learned of the donor's incapacity.<sup>29</sup> This area was dealt with in great detail by the English Law Commission, and their recommendations were implemented in the *Enduring Powers of Attorney Act 1985*, with the technical details contained in the *Court of Protection (Enduring Powers of Attorney) Rules 1986*.<sup>30</sup> The attorney is under a statutory duty to apply to the Court of Protection for registration of the EPA once he has reason to believe that the donor is becoming, or has become, mentally incapable.<sup>31</sup> The English scheme provides for the compulsory notification of at least three of the donor's relatives by the attorney of his intention to apply for registration. He must also inform them of their right to object if they wish.<sup>32</sup> A list of relatives is set out in the Act<sup>33</sup> and the attorney must choose them in order of priority, class by class, as set out in the Act. The Law Commission sensibly pointed out that non-objection by the relations would be the best available guarantee that the attorneyship would not be fraught with difficulties caused by friction within the family.<sup>34</sup>

Under Schedule 1, Part 1 of the 1985 Act, the attorney must also notify the donor of his intention to apply for registration. The Law Commission felt it would be undesirable that the donor should be unaware of the proposed registration.<sup>35</sup> We agree with this view and also feel that non-notification of the donor might infringe his constitutional rights.

The Law Commission recommended that, on receipt of the application, the court should be bound to grant the application and register the EPA in the absence of any valid objection or any other reason for not doing so (now s 6 of the 1985 Act).

The system in England is that, pending registration, and in the absence of any stipulation to the contrary, the EPA is in effect an ordinary power. This means that, pending the determination of the application, the power is actually revoked but the attorney is given limited authority to act under the power -that is, to maintain the donor and prevent loss to his estate.

Pending registration, the attorney cannot disclaim the power until he has given valid notice of his intention to disclaim to the court.<sup>36</sup>

The position after registration in England is that (i) the donor may not revoke the power unless and until the court confirms the revocation, (ii) no disclaimer of the power is valid unless and until the attorney gives notice of it to the court, (iii) the donor may not extend or restrict the scope of the authority conferred by the instrument.<sup>37</sup>

The Commission has examined the English provisions in great detail and has come to the conclusion that the system there provided is highly satisfactory. *We accordingly recommend that such a system be established in Ireland.*

**(c) Protection of attorneys and third parties**

23. Section 9 of the 1985 English Act states that where the registered instrument did not create a valid power of attorney, an attorney who acts in pursuance of the power shall not incur any liability (either to the donor or any other person) by reason of the non-existence of the power. This is subject to qualifications.<sup>38</sup>

The section goes on to provide that any transaction between the attorney and another person shall, in favour of that person, be as valid as if the power had then been in existence. There is also special provision to protect purchasers.<sup>39</sup>

*We recommend the adoption of the English procedure*

**AUTHORITY AND DUTIES OF THE ATTORNEY**

**(a) Authority**

24. In England, a donor may confer general authority on the attorney to act on the donor's behalf *vis-a-vis* all or part of his property and affairs, or may merely refer to specific transactions.<sup>40</sup> If general authority is conferred, it enables the attorney to do on behalf of the donor anything which the donor may lawfully do by an attorney.<sup>41</sup> The attorney may act so as to benefit himself or any other person to the extent that the donor might be expected to provide for his or that person's needs.<sup>42</sup> There are also specific provisions relating to gifts.<sup>43</sup> All of the Commissions are in favour of allowing the donor to decide the extent of the authority he wishes to give to the attorney, a view which we share.

The Law Commission envisaged that the attorney's authority would be largely unaffected by registration.<sup>44</sup>

*We recommend that, where a general power is conferred, the law should provide that the attorney may act so as to benefit himself or any other person to the extent that the donor might be expected to provide for his or that person's needs.*

**(b) Positive duties**

25 The donee of a power of attorney is, if unpaid, required to use such skill as he possesses and show such care and diligence as he would display in conducting his own affairs. The British Columbia Commission thought it would be desirable to cast certain positive duties on enduring attorneys to act for the benefit of donors<sup>45</sup> namely that of exercising his powers for the benefit of the donor having regard to the nature and value of the property and the circumstances and needs of the donor and his family. They felt that without some underlying requirement of this nature, the appointment of an enduring attorney may be an act of futility on the part of the donor. The Tasmanian Commission would agree with this.<sup>46</sup> The British Columbia Report calls the duty one of "prudent management" and suggests that it should arise at the time an EPA is created but, so long as the donor remains competent, that duty is subject to any explicit instructions given by him to the attorney.<sup>47</sup> The Tasmanians are in favour of imposing the same duty of care imposed on a trustee on an enduring attorney as this would reflect the seriousness and importance of an EPA.<sup>48</sup> The Law Commission in England is not in favour of imposing any statutory duty to act,<sup>49</sup> and the British Columbia Commission realised that trusteeship was too strict an obligation. The Newfoundland Working Paper declined to make a recommendation in this area.

26 The Law Commission is not in favour of placing any extra duties on an enduring attorney above those already imposed on ordinary attorneys, for example, that of acting in good faith.

*We are of the opinion that the duty of prudent management and that of a trustee are too onerous and we feel that a duty of good faith is a sufficiently reasonable and practicable one to impose on an attorney.*

**WHEN DOES THE DUTY ARISE?**

27 The British Columbians would say at the time the power is created<sup>50</sup> while the English suggest that the attorney's duties would be the same as those of an attorney under an ordinary power, until the donor becomes incompetent.<sup>51</sup>

*We recommend that the duty of the attorney to the donor should come into effect as soon as the attorney becomes aware of the power.*

**DUTY TO KEEP ACCOUNTS**

28 At common law, the attorney is under a duty to keep accounts and produce them to the donor. This is obviously an important deterrent against abuse of a power of attorney. It is equally obvious that it is of little use if the donor is incompetent.

The Law Reform Commission of Tasmania recommended that an independent body should be able to inspect the attorney's accounts. This view is endorsed by most of the other Law Reform Commissions.<sup>57</sup> The New South Wales Working Paper and Report are against the idea and suggest that only the donor should be entitled to apply to the court to require the attorney to furnish accounts. The EPA legislation incorporates accounting provisions.<sup>58</sup> The 1985 Act introduced in England enables the court to ask the attorney to account.<sup>54</sup> The Law Commission stressed that this would only be if suspicions were aroused and would not be a routine matter.<sup>55</sup> The Manitoba Report suggests that the attorney should be required to file annual accounts with the Public Trustee,<sup>56</sup> something which the Newfoundland Law Reform Commission were not in favour of.<sup>57</sup> Reports in several jurisdictions provide that an application invoking the general supervisory power (including the power to direct the attorney to produce accounts) can be made by "an interested party" to the court or the Public Trustee as the case may be.<sup>58</sup> This has been implemented in legislation also.<sup>59</sup> In Manitoba it was recommended that the Public Trustee have supervisory power on his own initiative,<sup>60</sup> as the Court of Protection has in England.<sup>61</sup> Again, however, the Law Commission envisaged that the court would have a purely corrective function.<sup>62</sup>

*The Commission recommends that the court should be empowered to look for accounts where it appears reasonable to do so*

#### *SUBSTITUTION OF ATTORNEYS AND DELEGATION OF POWERS*

##### **(a) Substitution**

29 The donor may, of course, substitute attorneys before he becomes mentally incompetent. The English Law Commission did not wish the attorney to be enabled to appoint a substitute or successor to himself as this would be contrary to the special relationship of trust subsisting between the EPA donor and attorney and would undermine some of the safeguards in their scheme.<sup>63</sup> As a result of this recommendation, s2(9) of the *Enduring Powers of Attorney Act 1985* provides that a power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power. The Ontario, Manitoba and New South Wales Reports provide for substitution of an attorney by the court,<sup>64</sup> while the British Columbia Report decided that should circumstances arise in which an attorney ought to be removed the EPA should be terminated and the donor's estate be placed under the custody of a guardian.<sup>65</sup> The Newfoundland Report correctly pointed out that if one allows interested parties, for example, to replace the attorney, the whole concept becomes very similar to guardianship. The Newfoundland Commission would be in favour of allowing substitution if a person was named specifically in the EPA instrument<sup>66</sup> while the Tasmanian Report was against substitution under any circumstances, for the same reasons as the English Commission.<sup>67</sup>

*The Commission believes that the donor should be entitled to appoint a substitute in the power itself and that the court should be empowered to substitute an attorney in the event of there not being a full complement of attorneys*

**(b) Delegation**

30 The Newfoundland Commission felt that as the element of trust between donor and agent is even more pronounced in the case of an EPA, the *maxim delegatus non potest delegare* (a delegate is not entitled to sub-delegate) should apply and an enduring attorney should not be permitted to delegate any of his powers and duties<sup>68</sup> The Law Commission felt that the situation should be the same as with ordinary powers - i.e., the EPA attorney would have implied power to delegate any of his functions which were not such that the donor would have expected the attorney to attend to them personally Any wider power to delegate would have to be provided for expressly in the instrument<sup>69</sup> The other Law Reform Commissions appear to be silent on this issue The position adopted by the Law Commission seems to be the most appropriate one

*We accordingly recommend its adoption*

**TERMINATION/REVOCATION OF EPAS**

31 The Australian and Newfoundland Commissions submit that, apart from the fact that an EPA would not be terminated by reason of the donor's unsoundness of mind, there is no reason to exclude the other events<sup>70</sup> which have traditionally been regarded as terminating a power All of the Commissions recognise that the court's function in terminating the EPA is (to quote from the British Columbia Report) "the simple greatest safeguard against the abuse of an enduring attorney's power"<sup>71</sup> Consequently, all of the Commissions' papers and the legislation implementing their recommendations provide for mechanisms whereby the court may terminate an EPA Some Reports felt this should be when an "interested party"<sup>72</sup> applies to the court and others give the court inherent power of its own - see for example s 8 of *Enduring Powers of Attorney Act, 1985*

The Manitoba and British Columbia Reports also state that the EPA should automatically terminate on the appointment of a committee under their equivalent of our wardship laws<sup>73</sup> The Law Commission point out that termination would end the power in its entirety there would be no question of its continuing as an ordinary power

The donor would be entitled to revoke the power at any time until his incompetency

32 The majority of the Reports provide that the donor of a registered EPA (or, where the donor has become incompetent, in jurisdictions which do not have registration provisions) should not be able to make an effective

revocation of the power without applying to the court for confirmation of the revocation. This is obviously to avoid the uncertainty that would arise if the donor did purport to revoke a registered EPA and it was unclear to both the attorney and third parties whether the donor had the capacity to revoke.

*We recommend that the court should have power to terminate an EPA only where there is evidence that the power is not being operated properly.*

#### CONCLUSION

33 The introduction of a system of EPAs in all of the above-mentioned jurisdictions would seem to have met with very little, if any, opposition. The general feeling towards them appears to be one of welcome. The EPA legislation in England has proved to be very popular as a simple solution to a large problem.<sup>74</sup>

It will be noted that perhaps more attention was given to the English legislation in this paper. This is because we feel that the English system is the most comprehensive. It is also a fact of life that there are great similarities between the legal system in that jurisdiction and our own, and that a system that works so well in England would have a good chance of equal success here.

In conclusion, therefore, the Commission is of the view that the introduction of a system of Enduring Power of Attorney would be a welcome and indeed a necessary addition to the law in this jurisdiction.



## FOOTNOTES TO CHAPTER 3

- 1 The Ontario Report at p 25, The Manitoba Report at p 11, The New South Wales Report at p 31 The British Columbia Report at p 21, The Law Commission Report at p 25 The Tasmanian Report at p 14, The Newfoundland Working Paper at p 25 and the Australian Report at p 11
- 2 *Powers of Attorney Act RSO 1980* Section 5, *Power of Attorney Act RSBC 1979* Section 7 *The Powers of Attorney Act SM 1980*, Section 3, *The Powers of Attorney Act SS 1983* Section 3, *Enduring Powers of Attorney Act 1985*, section 2, *Powers of Attorney Amendment Act 1987*, section 11A.
- 3 The Times, 27 October 1987
- 4 The British Columbia Report at p 29, The Tasmanian Report at p 16 and the Newfoundland Report at p 54 Contra the English Working Paper at p 42 and the English Report at p 22
- 5 At p 33
- 6 At p 25
- 7 At p 26
- 8 *Powers of Attorney Act RSO 1980*, section 6, *Powers of Attorney Act RSBC 1979*, section 7, *The Powers of Attorney Act SM 1980*, section 3, *The Powers of Attorney Act SS 1983*, section 3 and *The Powers of Attorney Amendment Act 1987*, section 11A.
- 9 SI 1612/1987
- 10 The Manitoba Report, The Ontario Report, The Law Commission and the Newfoundland Reports
- 11 The Manitoba Report at p 11 and The Tasmanian Report at p 14
- 12 The Manitoba Report at p 11
- 13 The Newfoundland Report at pages 30-34
- 14 The Law Commission Report at p 26. The Newfoundland Working Paper at p 35 and The Ontario Report at p 25
- 15 *Powers of Attorney Act RSO 1980*, Section 6, *Powers of Attorney Act RSBC 1979*, Section 7, *The Powers of Attorney Act SM 1980*, Section 3, *The Powers of Attorney Act SS 1983*, Section 3
- 16 *Powers of Attorney Amendment Act 1987*, Section 11A.
- 17 At p 14 See also the Australian Report at p 12
- 18 At p 56
- 19 SI 1612/1987
- 20 The Newfoundland Working Paper at p 51, The British Columbia Report at p 28, The Law Commission Report at p 29 and The Tasmanian Report at p 15 This was not discussed in the other Reports
- 21 The Tasmanian Report at p 15, British Columbia Report at p 28, The Law Commission Report at p 30
- 22 The British Columbia Report at p 32, The Ontario Report at p 27, Newfoundland Working Paper at p 48, The Manitoba Report at p 14 and The Law Commission Report at p 24
- 23 At p 16
- 24 *Enduring Powers of Attorney Act 1985*, section 2
- 25 At p 26
- 26 At pages 12 and 14 respectively
- 27 At p 12
- 28 New South Wales Working Paper and Report, The British Columbia Report at p 24, The Newfoundland Working Paper at p 39 The Law Commission at pages 19 and 20 and the Australian Report a p 14
- 29 At p 26
- 30 SI 127/1986
- 31 S 4 of the 1985 Act
- 32 Schedule I, Part 1 of the 1985 Act
- 33 Schedule I, Part 1
- 34 At p 33
- 35 At p 33

- 36 Section 4(6) of the *Enduring Powers of Attorney Act 1985*  
 37 Section 7(1) of the 1985 Act  
 38 Namely unless at the time of acting he knows (a) that the instrument did not create a valid enduring power or (b) that an event has occurred which if the instrument had created a valid enduring power would have had the effect of revoking the power or (c) that if the instrument had created a valid enduring power the power would have expired before that time s 9(2)
- 39 Where the interest of a purchaser depends on whether a transaction between the attorney and another person was valid it shall be conclusively presumed in favour of the purchaser that the transaction was valid if (a) the transaction between that person and the attorney was completed within twelve months of the date on which the instrument was registered or (b) that person makes a statutory declaration before or within three months after the completion of the purchase that he had no reason at the time of the transaction to doubt that the Attorney had authority to dispose of the property which was the subject of the transaction S 9(4)
- 40 Section 3(1) of the 1985 Act  
 41 Section 3(2) of the 1985 Act  
 42 Section 3(4) of the 1985 Act The Australian Report is also in favour of what it calls the substituted judgment principle see p 18  
 43 Section 3(5) of the 1985 Act  
 44 At p 39  
 45 At p 31  
 46 At p 16  
 47 At p 31  
 48 At p 16 The Australian Report expressly disagrees with the Tasmanians at p 16  
 49 At p 41  
 50 At p 31  
 51 At p 30  
 52 British Columbia Report The Ontario Report Manitoba Report and The Law Commission Report  
 53 *Powers of Attorney Act RSO 1980* section 9 *Enduring Powers of Attorney Act 1985* section 8 and *Powers of Attorney Amendment Act 1987* section 11E  
 54 Section 8(2) of the 1985 Act The Australian Report recommends that the Public Trustee should be allowed to call for accounts at p 19  
 55 At p 46  
 56 At p 12  
 57 At p 42  
 58 The Ontario Report at p 26 The Manitoba Report at p 12 The Tasmanian Report at p 15 and Newfoundland Report at p 40  
 59 The *Powers of Attorney Act RSO 1980* section 9 and *Powers of Attorney Amendment Act 1987* section 11E  
 60 At p 12  
 61 Section 8 of the 1985 Act  
 62 At p 45  
 63 At p 27  
 64 At pages 27 13 and 37 respectively Cf the Australian Report at p 19  
 65 At p 22  
 66 At p 44  
 67 At p 16  
 68 At p 62  
 69 At p 27  
 70 See para 3 for a list of these events  
 71 At p 21  
 72 There seems to be some disagreement as to what would constitute an interested party In Manitoba an interested party is a member of the family or a person who provides board and lodgings to the donor In some circumstances a creditor of the donor would so qualify The term family may at the court's discretion include siblings nieces and nephews as well as parents and children The Newfoundland Report would include the Registrar of the Supreme Court as an interested party but is silent as to who else might be one

- 73 At pages 13 and 21 respectively  
74 The Public Trustee in England, Mr John Boland, told the Commission that his experience of the Enduring Powers of Attorney Act has been, this far, entirely favourable

*SUMMARY OF RECOMMENDATIONS*

- 1 A system of Enduring Powers of Attorney should be introduced in Ireland
- 2 An intention to create an EPA should be evidenced in the instrument creating it
- 3 The current restrictions on donors concerning ordinary powers of attorney should apply to EPAs
- 4 There should be no limit on the number of attorneys that may be appointed
- 5 It should be up to the donor to specify in the power itself whether the attorneys are appointed jointly or jointly and severally. Where the power is silent there would be a presumption that they are appointed jointly
- 6 There should be a requirement that the instrument creating the power be witnessed
- 7 The donor should be capable of acting as a witness but neither the attorney nor his solicitor should be capable of so acting
- 8 There should be a statutory requirement that the instrument creating the EPA should evidence the fact that the donor has either received independent legal advice or having been advised of the wisdom of taking such advice has declined to do so
- 9 There should be a standard form EPA which should contain explanatory notes in plain English. The use of this form should not be mandatory

- 10 A donor should be allowed to limit the duration of an EPA. In the event, however, of the donor becoming incompetent before the expiration of the specified time the EPA should not be allowed to lapse
- 11 No waiver of the statutory requirements should be allowed
- 12 A system of registration similar to that in England should be established
- 13 The protection given to attorneys in England should be given to attorneys here
- 14 Where a general power is conferred on an attorney, the law should provide that the attorney may act so as to benefit himself or any other person to the extent that the donor might be expected to provide for his or that person's needs
- 15 A duty of good faith should be imposed on an attorney
- 16 The court should be empowered to look for accounts where it appears reasonable to do so
- 17 The donor ought to be entitled to appoint a substitute in the power itself and the court should be empowered to substitute an attorney in the event of there not being a full complement of attorneys
- 18 The attorney should have an implied power to delegate any of his functions which were not such that the donor would have expected the attorney to attend to them personally
- 19 Save where the donor is taken into wardship, where the court should have discretion as to the termination of the EPA, the court should have power to terminate an EPA only where there is evidence that the power is not being operated properly



## Appendix

### SCHEDULE

### REGULATIONS 2 AND 3

#### Enduring Power of Attorney

##### Part A: About using this form

1 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)

On the form, at the place marked 1, show what you have decided by crossing out one of the alternatives

2 If you give your attorney(s) general power in relation to all your property and affairs, it means that they will be able to deal with your money or property and may be able to sell your house

3 If you don't 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) must not act on your behalf until they have reason to believe that you are becoming mentally incapable, or a restriction that your attorney(s) may not sell your house. Any restrictions you choose must be written or typed on the form in the place marked 2

4 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. 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

5 Your attorney(s) can recover the out-of-pocket expenses of acting as your attorney(s). If your attorney(s) are

professional people for example solicitors or accountants, they may be able to charge for their professional services as well

6 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) will have to apply to the Court of Protection for registration of this power

7 Before applying to the Court of Protection for registration of this power, your attorney(s) must give written notice that that is what they are going to do, to you and your nearest relatives as defined in the Enduring Powers of Attorney Act 1985. You or your relatives will be able to object if you or they disagree with registration

8 This is a simplified explanation of what the Enduring Powers of Attorney Act 1985 and the Rules and Regulations say. If you need more guidance, you or your advisers will need to look at the Act itself and the Rules and Regulations. The Rules are the Court of Protection (Enduring Powers of Attorney) Rules 1986 (Statutory Instrument 1986 No 127). The Regulations are the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (Statutory Instrument 1987 No 1612)

9 Note to Attorney(s)  
After the power has been registered the attorney(s) should notify the Court of Protection if the donor dies or recovers

**You can cancel this power at any time before it has to be registered**

**Part B: To be completed by the 'donor' (the person appointing the attorney(s))**

Please read the notes in the margin

Donor's name and address

I \_\_\_\_\_  
of \_\_\_\_\_

Donors date of birth

born on \_\_\_\_\_

Attorney(s) name(s) and address(es)

appoint \_\_\_\_\_

See note 1 on the front of this form. If you are appointing only one attorney you should cross out everything between the square brackets

of \_\_\_\_\_

• (and \_\_\_\_\_

of \_\_\_\_\_

Cross out the one which does not apply (see note 1 on the front of this form)

1. • jointly  
• jointly and severally)

to be my attorney(s) for the purpose of the Enduring Powers of Attorney Act 1985

Cross out the one which does not apply (see note 2 on the front of this form)

- with general authority to act on my behalf
- with authority to do the following on my behalf:

If you don't want the attorney(s) to have general power, you must give details here of what authority you are giving the attorney(s)

Cross out the one which does not apply

- in relation to
- all my property and affairs
  - the following property and affairs:



**Part B: Continued**

Please read the notes in the margin

If there are restrictions or conditions, insert them here; if not, cross out these words (See note 3 on the front of this form)

2 · subject to the following restrictions and conditions:

I intend that this power shall continue even if I become mentally incapable.

I have read or have had read to me the notes in Part A which are part of, and explain, this form.

Your signature

Signed, sealed and delivered by me \_\_\_\_\_

Date

on \_\_\_\_\_

Someone must witness your signature

In presence of \_\_\_\_\_

Signature of witness

Full name of witness \_\_\_\_\_

Your attorney(s) cannot be your witness. If you are married it is not advisable for your husband or wife to be your witness

Address of witness \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Part C: To be completed by the attorney(s)**

- Note
- This form may be adapted to provide for sealing by a corporation with its common seal
  - If there are more than two attorneys attach an additional **Part C**

Don't sign this form before the donor has signed Part B

I understand that I have a duty to apply to the Court for the registration of this form under the Enduring Powers of Attorney Act 1985 when the donor is becoming or has become mentally incapable

I also understand my limited power to use the donor's property to benefit persons other than the donor

I am not a minor

Signature of attorney

Signed, sealed and delivered by me \_\_\_\_\_

Date

on \_\_\_\_\_

Signature of witness

in the presence of \_\_\_\_\_

Each attorney must sign the form and each signature must be witnessed. The donor may not be the witness and one attorney may not witness the signature of the other

Full name of witness \_\_\_\_\_

Address of witness \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

To be completed only if there is a second attorney

I understand that I have a duty to apply to the Court for the registration of this form under the Enduring Powers of Attorney Act 1985 when the donor is becoming or has become mentally incapable

I also understand my limited power to use the donor's property to benefit persons other than the donor

I am not a minor

Signature of attorney

Signed, sealed and delivered by me \_\_\_\_\_

Date

on \_\_\_\_\_

Signature of witness

in presence of \_\_\_\_\_

Each attorney must sign the form and each signature must be witnessed. The donor may not be the witness and one attorney may not witness the signature of the other

Full name of witness \_\_\_\_\_

Address of witness \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_