



PART 7

ENDURING POWERS OF ATTORNEY

Interpretation — Part 7

58. (1) In this Part—

“disqualified”, in relation to an attorney, means the attorney becomes a person referred to in *section 66* or a person that the court determines under this Part shall no longer act as attorney for the donor concerned;

“donor” has the meaning given to it in *section 59(1)*;

“donor under the Act of 1996” means a person who has created an enduring power under the Act of 1996;

“prescribed” means prescribed by regulations made by the Minister under *section 79*;

“trust corporation” has the meaning it has in section 30 of the Succession Act 1965 but shall not include a designated centre or mental health facility in which the donor resides.

(2) In this Part “person”, in relation to an attorney, includes a trust corporation but only to the extent that the authority conferred under the enduring power of attorney relates to property and affairs.

Enduring power of attorney — general

- 59.** (1) Subject to the provisions of this section and *sections 60, 62 and 63*, a person who has attained the age of 18 years (in this Act referred to as “donor”) may appoint another person who has also attained that age (in this Act referred to as “attorney”) on whom he or she confers either or both of the following:
- (a) general authority to act on the donor’s behalf in relation to all or a specified part of the donor’s property and affairs; or
 - (b) authority to do specified things on the donor’s behalf in relation to the donor’s personal welfare or property and affairs, or both;
- which may, in either case, be conferred subject to conditions and restrictions.
- (2) The authority referred to in *subsection (1)* shall be known as an enduring power of attorney and shall be conferred in writing in an instrument which is in compliance with this Part and regulations made under *section 79*.
- (3) A donor may, in an enduring power of attorney, appoint a person who shall act as attorney for the donor in respect of the relevant decisions specified therein in the event that an attorney on whom authority is conferred dies or is unable to act or is disqualified from acting as attorney.
- (4) An enduring power of attorney shall not enter into force until—
- (a) the donor lacks capacity in relation to one or more of the relevant decisions which are the subject of the power, and
 - (b) the instrument creating the enduring power of attorney has been registered in accordance with *section 69*.
- (5) Where an enduring power of attorney is expressed to confer general authority in respect of all or a specified part of the donor’s property and affairs, it operates to confer, subject to any restrictions provided in the power or in this Part, authority to do on behalf of the donor anything which the donor can lawfully do by attorney.
- (6) A person is suitable for appointment as an attorney if he or she is able to perform the functions of attorney as specified in the enduring power of attorney.

Content of instrument creating an enduring power of attorney

- 60.** (1) An instrument creating an enduring power of attorney shall include the following statements:
- (a) by the donor that he or she—
 - (i) understands the implications of creating the power,
 - (ii) intends the power to be effective at any subsequent time when he or she lacks capacity in relation to one or more relevant decisions which are the subject of the power, and
 - (iii) is aware that he or she may vary or revoke the power prior to its registration;

- (b) by a legal practitioner that, after interviewing the donor and making any necessary enquiries, he or she—
 - (i) is satisfied that the donor understands the implications of creating the power,
 - (ii) is satisfied that the donor is aware that he or she may vary or revoke the power prior to its registration, and
 - (iii) has no reason to believe that the instrument is being executed by the donor as a result of fraud, coercion or undue pressure;
 - (c) by a registered medical practitioner that in his or her opinion at the time the power was executed, the donor had the capacity to understand the implications of creating the power;
 - (d) by a healthcare professional of a class that shall be prescribed, that in his or her opinion at the time the power was executed, the donor had the capacity to understand the implications of creating the power; and
 - (e) by the attorney, that he or she—
 - (i) understands the implications of undertaking to be an attorney for the donor and has read and understands the information contained in the instrument,
 - (ii) understands and undertakes to act in accordance with his or her functions as specified in the instrument creating the enduring power of attorney,
 - (iii) understands and undertakes to act in accordance with the guiding principles,
 - (iv) understands and undertakes to comply with the reporting obligations under *section 75*, and
 - (v) understands the requirements in relation to registration of the power.
- (2) An instrument creating an enduring power of attorney shall include the following:
- (a) the name, date of birth and contact details of the donor;
 - (b) subject to *subsection (3)*, the signature of the donor and the date that he or she signed the power;
 - (c) the name, date of birth and contact details of the attorney;
 - (d) the signature of the attorney and the date that he or she signed the enduring power of attorney;
 - (e) the signatures of the 2 witnesses referred to in *subsection (4)(a)*.
- (3) An instrument creating an enduring power of attorney may be signed on behalf of the donor by a person who has attained the age of 18 years and who is not the attorney or a witness referred to in *subsection (4)(a)* if—
- (a) the donor is unable to sign the instrument,
 - (b) the donor is present and directs that the instrument be signed on his or her behalf by that person, and

- (c) the signature of the person is witnessed in accordance with *subsection (4)(b)*.
- (4) (a) The donor, or the person signing on his or her behalf in accordance with *subsection (3)*, and the attorney shall sign the instrument creating the enduring power of attorney in the presence of each other and in the presence of 2 witnesses—
 - (i) each of whom has attained the age of 18 years,
 - (ii) of whom at least one is not an immediate family member of the donor or the attorney, and
 - (iii) neither of whom is an employee or agent of the attorney.
- (b) Each of the witnesses referred to in *paragraph (a)* shall witness the signature of the donor (or the person signing on his or her behalf) and the signature of the attorney by applying his or her own signature to the instrument creating the enduring power of attorney.
- (5) Where a donor proposes to remunerate an attorney for performing his or her functions as attorney, the instrument creating the enduring power of attorney shall specify the proposed remuneration and the functions to which it relates.
- (6) In this section, “immediate family member” means—
 - (a) a spouse, civil partner, or cohabitant,
 - (b) a child, son-in-law or daughter-in-law,
 - (c) a parent, step-parent, mother-in-law or father-in-law,
 - (d) a brother, sister, step-brother, step-sister, brother-in-law or sister-in-law,
 - (e) a grandparent or grandchild,
 - (f) an aunt or uncle, or
 - (g) a nephew or niece.

Notice of execution of an enduring power of attorney

- 61.** (1) The donor shall, as soon as practicable after the execution of the instrument creating the enduring power of attorney, give notice, in such form as shall be prescribed, of such execution to the following persons:
- (a) a spouse or civil partner of the donor;
 - (b) the cohabitant (if any) of the donor;
 - (c) any children of the donor who have attained the age of 18 years;
 - (d) any decision-making assistant for the donor;
 - (e) any co-decision-maker for the donor;
 - (f) any decision-making representative for the donor;
 - (g) any designated healthcare representative for the donor;

- (h) any other attorney for the donor or attorney under the Act of 1996 in respect of the donor;
 - (i) any other person or persons as may be specified by the donor in the instrument creating the enduring power of attorney as a person or persons to whom notice shall be given under this section and *section 68(3)*.
- (2) Where there are fewer than 3 persons to whom notice may be given pursuant to *subsection (1)*, the donor shall specify 2 persons in the instrument creating the enduring power of attorney as persons to whom notice shall be given under this section and *section 68(3)*.

Scope of authority — personal welfare decisions

62. (1) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to do an act that is intended to restrain the donor unless there are exceptional emergency circumstances and—
- (a) the donor lacks capacity in relation to the matter in question or the attorney reasonably believes that the donor lacks such capacity,
 - (b) the attorney reasonably believes that it is necessary to do the act in order to prevent an imminent risk of serious harm to the donor or to another person, and
 - (c) the act is a proportionate response to the likelihood of the harm referred to in *paragraph (b)* and to the seriousness of such harm.
- (2) For the purposes of this section, an attorney restrains a donor if he or she—
- (a) uses, or indicates an intention to use, force to secure the doing of an act which the donor resists,
 - (b) intentionally restricts the donor's liberty of voluntary movement or behaviour, whether or not the donor resists,
 - (c) administers a medication, which is not necessary for a medically identified condition, with the intention of controlling or modifying the donor's behaviour or ensuring that he or she is compliant or not capable of resistance, or
 - (d) authorises another person to do any of the things referred to in *paragraph (a)* to *(c)*.
- (3) An attorney who restrains a donor shall cease the restraint immediately upon the restraint no longer being necessary in order to prevent an imminent risk of serious harm to the donor or to another person.
- (4) *Subsections (1) to (3)* shall not be construed to prejudice the generality of section 69 of the Mental Health Act 2001 or of rules made under that section.
- (5) A donor shall not, in an enduring power of attorney, include a relevant decision—
- (a) relating to refusal of life-sustaining treatment, or
 - (b) which is the subject of an advanced healthcare directive made by him or her.

- (6) To the extent that an enduring power of attorney includes a relevant decision specified in *subsection (5)*, the power shall be null and void.

Scope of authority — property and affairs

- 63.** (1) An attorney may act under an enduring power of attorney relating to property and affairs for the attorney's benefit or that of other persons to the extent provided for in the power, where specific provision to that effect is made in the power and subject to any conditions or restrictions contained in the power.
- (2) An attorney may not dispose of the property of the donor by way of gift unless specific provision to that effect is made in the enduring power of attorney.
- (3) Where an enduring power of attorney authorises the disposal of the donor's property by way of gift, the attorney's power to make such gifts shall, in addition to being subject to any conditions or restrictions in the enduring power, be limited to—
- (a) gifts made on customary occasions to persons (including the attorney) who are related to or connected to the donor and in relation to whom the donor might be expected to make gifts, and
 - (b) gifts to any charity to which the donor made or might be expected to make gifts, provided that the value of the gift is reasonable having regard to all the circumstances and in particular the extent of the donor's assets and any financial obligations.

Application to joint and joint and several attorneys

- 64.** (1) A donor may, in an enduring power of attorney, appoint more than one attorney and may specify that the attorneys shall act—
- (a) jointly,
 - (b) jointly and severally, or
 - (c) jointly in respect of some matters and jointly and severally in respect of other matters,
- and, in default of the power so specifying, the attorneys shall be deemed to have authority to act jointly.
- (2) Where 2 or more persons have authority to act jointly as attorneys, then, in the case of the death, lack of capacity or disqualification of any one or more of them, the remaining attorney or attorneys may continue to act, whether solely or jointly, as the case may be, unless the enduring power expressly provides to the contrary.

Persons who are not eligible to be attorneys

- 65.** (1) A person shall not be eligible for appointment as an attorney under an enduring power of attorney if he or she—
- (a) has been convicted of an offence in relation to the person or property of the person who intends to appoint an attorney,

- (b) has been the subject of a safety or barring order in relation to the person who intends to appoint an attorney,
 - (c) is an undischarged bankrupt or is currently in a debt settlement arrangement or personal insolvency arrangement or has been convicted of an offence involving fraud or dishonesty,
 - (d) is a person in respect of whom a declaration under section 819 of the Act of 2014 has been made or is deemed to be subject to such a declaration by virtue of Chapter 5 of Part 14 of that Act,
 - (e) is a person who is subject or is deemed to be subject to a disqualification order, within the meaning of Chapter 4 of Part 14 of the Act of 2014, by virtue of that Chapter or any other provisions of that Act,
 - (f) is a person who is—
 - (i) the owner or the registered provider of a designated centre or mental health facility in which the intending donor resides, or
 - (ii) residing with, or an employee or agent of, such owner or registered provider, unless the person is a spouse, civil partner, cohabitant, parent, child or sibling of the intending donor, or
 - (g) has been convicted of an offence under *section 34, 80, 90 or 145.*
- (2) *Subsection (1)(c), (d) and (e)* shall not apply where it is proposed to confer authority only in relation to personal welfare matters.

Disqualification of attorney

- 66.** (1) An attorney shall, with effect from the date on which an event specified in any of *paragraphs (a) to (c)* occurs or, in the case of an event specified in *paragraph (d)*, at the expiry of the period referred to in that paragraph, and unless the instrument creating the enduring power of attorney provides otherwise, be disqualified from being an attorney for the donor where the attorney is the spouse of the donor and subsequently—
- (a) the marriage is annulled or dissolved either—
 - (i) under the law of the State, or
 - (ii) under the law of another state and is, by reason of that annulment or dissolution, not or no longer a subsisting valid marriage under the law of the State,
 - (b) a decree of judicial separation is granted to either spouse by a court in the State or any decree is so granted by a court outside the State and is recognised in the State as having like effect,
 - (c) a written agreement to separate is entered into between the spouses, or
 - (d) subject to *section 2(2)*, the spouses separate and cease to cohabit for a continuous period of 12 months.

- (2) An attorney shall, with effect from the date on which an event specified in *paragraph (a)* or *(b)* occurs or, in the case of an event specified in *paragraph (c)*, at the expiry of the period referred to in that paragraph, and unless the instrument creating the enduring power of attorney provides otherwise, be disqualified from being attorney for the donor where the attorney is the civil partner of the donor and subsequently—
- (a) the civil partnership is annulled or dissolved (other than where the dissolution occurs by virtue of the parties to that civil partnership marrying each other) either—
 - (i) under the law of the State, or
 - (ii) under the law of another state and is, by means of that annulment or dissolution not or no longer a subsisting valid civil partnership under the law of the State,
 - (b) a written agreement to separate is entered into between the civil partners, or
 - (c) subject to *section 2(2)*, the civil partners separate and cease to cohabit for a continuous period of 12 months.
- (3) Subject to *section 2(2)*, an attorney shall, at the expiry of the period referred to in this subsection, and unless the instrument creating the enduring power of attorney provides otherwise, be disqualified from being an attorney for the donor where the attorney is the cohabitant of the donor and subsequently the cohabitants separate and cease to cohabit for a continuous period of 12 months.
- (4) Subject to *subsection (5)*, where, subsequent to the appointment of an attorney—
- (a) the attorney is convicted of an offence in relation to the person or property of the donor or the person or property of a child of the donor,
 - (b) a safety or barring order is made against the attorney in relation to the donor or a child of the donor,
 - (c) the attorney becomes an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement which is current or is convicted of an offence involving fraud or dishonesty,
 - (d) the attorney becomes a person in respect of whom a declaration has been made under section 819 of the Act of 2014 or is deemed to be subject to such a declaration by virtue of Chapter 5 of Part 14 of that Act,
 - (e) the attorney becomes a person who is subject or is deemed to be subject to a disqualification order within the meaning of Chapter 4 of Part 14 of the Act of 2014 by virtue of that Chapter or any other provisions of that Act,
 - (f) the attorney becomes—
 - (i) the owner or the registered provider of a designated centre or mental health facility in which the intending donor resides, or
 - (ii) a person residing with, or an employee or agent of, a person referred to in *subparagraph (i)*,

unless the person is a spouse, civil partner, cohabitant, parent, child or sibling of the intending donor,

- (g) the attorney is convicted of an offence under *section 34, 80, 90 or 145*,
 - (h) the attorney—
 - (i) enters into a decision-making assistance agreement as a relevant person,
 - (ii) enters into a co-decision-making agreement as a relevant person,
 - (iii) has an enduring power of attorney or an enduring power under the Act of 1996 registered in respect of himself or herself, or
 - (iv) becomes the subject of a declaration under *section 37(1)*,
- or
- (i) the attorney is a trust corporation and the trust corporation is dissolved,

the attorney shall be disqualified from being an attorney for the donor with effect from the day on which the attorney falls within any of *paragraphs (a) to (i)*.

- (5) *Subsections (4)(c), (d) and (e)* shall not apply to an attorney insofar as authority is conferred on him or her under the enduring power of attorney in relation to personal welfare matters.
- (6) Where an attorney becomes disqualified under this section, he or she, or in the case of disqualification pursuant to *subsection (4)(h)(iii) or (iv)*, his or her attorney, decision-making representative or the court, as the case may be, shall notify the Director of such disqualification and the particulars relating thereto.
- (7) Where an attorney becomes disqualified, a relevant decision made solely by him or her after his or her disqualification shall be null and void.
- (8) *Subsection (7)* shall not operate to prevent a person who relied on a relevant decision referred to in that subsection from recovering damages in respect of any loss incurred by him or her as a result of that reliance.

Function of court prior to registration

- 67. On application to it by any interested party, the court may, where it has reason to believe that the donor of an enduring power of attorney lacks capacity in relation to one or more relevant decisions, exercise any power which would become exercisable under *section 77(3)* on the registration of the instrument creating an enduring power of attorney and may do so whether or not the attorney concerned has made an application to the Director for registration of the instrument.

Application for registration of instrument creating enduring power

- 68. (1) Where an attorney has reason to believe that the donor lacks capacity in relation to one or more relevant decisions which are the subject of the enduring power of attorney, the attorney shall, as soon as is practicable, make an application, in compliance with this Part and regulations made under *section 79*, to the Director to

register the instrument creating the enduring power of attorney.

- (2) An application to register an instrument under *subsection (1)* shall be made in such form and accompanied by such fee as shall be prescribed.
- (3) The attorney shall, at the same time as he or she makes an application under *subsection (1)*, give notice, in such form as shall be prescribed, of the application and give a copy of the instrument creating an enduring power of attorney to the following persons:
 - (a) the donor;
 - (b) a spouse or civil partner (if any) of the donor;
 - (c) the cohabitant (if any) of the donor;
 - (d) any children of the donor who have attained the age of 18 years;
 - (e) any decision-making assistant for the donor;
 - (f) any co-decision-maker for the donor;
 - (g) any decision-making representative for the donor;
 - (h) any designated healthcare representative for the donor;
 - (i) any other attorney for the donor or attorney under the Act of 1996 in respect of the donor;
 - (j) any other person specified by the donor under *section 61*.
- (4) An attorney may, before making an application to register an instrument creating an enduring power of attorney, apply to the court for a determination on any question as to the validity of the power.
- (5) Where an attorney has made an application to register an instrument creating an enduring power of attorney, then pending determination of the application, the attorney, or if more than one attorney has been appointed to act jointly or jointly and severally, as the case may be, any one of them, may take action under the power—
 - (a) to maintain the donor or prevent loss to the donor's assets,
 - (b) to the extent permitted by the enduring power, to make a relevant decision which cannot reasonably be deferred until the application has been determined, or
 - (c) to maintain the attorney or other persons in so far as that is permitted under the power.
- (6) Following the taking of an action pursuant to *subsection (5)*, an attorney shall report to the Director—
 - (a) what action he or she took,
 - (b) the reasons as to why the action could not be deferred until after the registration of the instrument creating the enduring power of attorney,
 - (c) any measures he or she took to encourage the donor to participate in the action

taken, and

- (d) the outcome of the action.
- (7) An application to register an instrument creating an enduring power of attorney shall be accompanied by—
- (a) the instrument creating the enduring power of attorney,
 - (b) a statement by a registered medical practitioner and a statement by such other healthcare professional of a class as shall be prescribed that in their opinion the donor lacks capacity in relation to one or more relevant decisions which are the subject of the enduring power,
 - (c) details of any existing decision-making assistance agreement, co-decision-making agreement, decision-making order, decision-making representation order, power of attorney (whether an enduring power or otherwise and whether registered or not) or advance healthcare directive in respect of the appointer,
 - (d) a copy of any notice given pursuant to *subsection (3)*,
 - (e) a copy of any notice given pursuant to *section 61*, and
 - (f) the prescribed fee.
- (8) Where there is more than one attorney appointed under an enduring power of attorney, any two or more of the attorneys may make a joint application to register the instrument.

Registration of an instrument creating an enduring power of attorney

69. (1) On receipt of an application under *section 68*, the Director shall review the application and any objections received under *section 71* and shall carry out such reasonable enquiries as he or she considers necessary in order to establish whether the following criteria are met:
- (a) the enduring power of attorney and the instrument creating it are in accordance with *sections 59, 60, 62 and 63*;
 - (b) the attorney is a suitable person within the meaning of *section 59(6)*;
 - (c) the attorney is eligible for appointment within the meaning of *section 65* or not disqualified by virtue of *section 66*;
 - (d) notice has been given in accordance with *section 61* and *section 68(3)*; and
 - (e) the application is in accordance with *section 68*.
- (2) Where, after reviewing an application under *section 68*, the Director is satisfied that the application is in order, he or she shall, subject to *section 71*, register the instrument creating the enduring power of attorney.
- (3) Where, after reviewing an application under *section 68*, the Director forms the view that one or more of the criteria in *paragraphs (a) to (e) of subsection (1)* are not satisfied, he or she shall notify the attorney and the donor of his or her view, provide

reasons for that view and give the attorney and the donor an opportunity, within a reasonable timeframe specified by the Director, to respond.

- (4) Following a review of any response received pursuant to *subsection (3)*, the Director shall—
 - (a) where he or she is of the view that the criteria set out in *paragraphs (a) to (e)* of *subsection (1)* are satisfied, register, subject to *section 71*, the instrument creating the enduring power of attorney, or
 - (b) where he or she remains of the view that one or more of the criteria set out in *paragraphs (a) to (e)* of *subsection (1)* is not satisfied, refuse to register the instrument creating the enduring power of attorney and notify the attorney and the donor of that fact and the reasons for his or her view.
- (5) An attorney whose application under *section 68* is refused may, not later than 21 days after the date of issue of the notification of refusal by the Director, appeal the refusal to the court.
- (6) Upon an appeal under *subsection (5)*, the court may—
 - (a) require the Director to register the instrument creating the enduring power of attorney,
 - (b) affirm the decision of the Director, or
 - (c) make such other order or declaration as it considers appropriate.
- (7) Following registration of an instrument creating an enduring power of attorney, the Director shall send an authenticated copy of the instrument to the attorney and the donor.
- (8) A document purporting to be a copy of an instrument creating an enduring power of attorney which has been authenticated by the Director shall be evidence of the contents of the instrument and the date upon which it was registered.

Effect and proof of registration

- 70.** (1) The effect of the registration of an instrument creating an enduring power of attorney is that—
- (a) no revocation of the enduring power of attorney by the donor shall be valid unless the court confirms the revocation under *section 73(6)*,
 - (b) no disclaimer of the enduring power shall be valid except on notice to the donor and with the consent of the court, and
 - (c) the donor may not extend or restrict the scope of the authority conferred by him or her in the enduring power and no consent or instruction given by the donor after registration of the instrument shall, in the case of a consent, confer any right and in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the consent or instruction.

- (2) *Subsection (1)* applies for so long as the instrument is registered whether or not the donor has for the time being capacity.

Objections to registration

71. (1) Any of the persons referred to in *section 68(3)*, or any other person who appears to the Director to have sufficient interest or expertise in the welfare of the donor, may, no later than 5 weeks from the date on which notice is given in accordance with that provision, notify the Director that he or she objects to the proposed registration.
- (2) An objection under *subsection (1)* shall be in such form and shall be accompanied by such fee as shall be prescribed by regulations made under *section 79* and may be made on one or more of the following grounds:
- (a) that the enduring power of attorney or instrument creating it is not in accordance with *section 59, 60, 62 or 63*;
 - (b) that the notice requirement of *section 61 or section 68(3)* was not complied with;
 - (c) that the donor does not lack capacity;
 - (d) that fraud, coercion or undue influence was used to induce the donor to execute the instrument creating the enduring power of attorney;
 - (e) that a false statement is included in the instrument creating the enduring power of attorney or the application to register the instrument;
 - (f) that the attorney is not a suitable person within the meaning of *section 59(6)*.
- (3) Where the Director receives an objection in accordance with *subsection (2)*, made within the period specified in *subsection (1)*, he or she shall—
- (a) review the objection,
 - (b) consult with the attorney and, where the Director considers it is appropriate to do so, the donor, and
 - (c) consult with such other persons as he or she considers relevant,
- and shall—
- (i) where he or she is of the view that the objection is not well founded, notify the person who made the objection of his or her view, provide reasons for that view and proceed, subject to *section 69(1)*, to register the instrument concerned, or
 - (ii) where he or she is of the view that the objection is well founded, notify the person who made the objection of his or her view and make an application to the court for a determination on the matter and for a determination as to whether the enduring power should be registered.
- (4) The court, pursuant to an application made to it under *subsection (3)(ii)*, may—
- (a) require the Director to register the instrument creating the enduring power of attorney,
 - (b) declare that the instrument creating the enduring power of attorney should not be

registered, or

- (c) make such other declaration or order as it considers appropriate.
- (5) A person who makes an objection under *subsection (1)* may, not later than 21 days after the date of issue of the notification by the Director under *subsection (3)(i)*, appeal a decision to register the instrument concerned to the court.
- (6) Upon an appeal under *subsection (5)*, the court may—
 - (a) require the Director to remove the instrument concerned from the Register,
 - (b) affirm the decision of the Director, or
 - (c) make such other declaration or order as it considers appropriate.

Register of enduring powers

- 72.** (1) The Director shall establish and maintain a register (in this Part referred to as “the Register”) of instruments creating an enduring power of attorney.
- (2) The Register shall be in such form as the Director considers appropriate.
- (3) The Director shall make the Register available for inspection by—
- (a) a body or class of persons prescribed by regulations made under *section 79* for this purpose, and
 - (b) any person who satisfies the Director that he or she has a legitimate interest in inspecting the Register.
- (4) The Director may issue an authenticated copy of an enduring power, or part thereof, on the Register on payment of the prescribed fee to—
- (a) a body or class of person prescribed by regulations made under *section 79* for this purpose, and
 - (b) a person who satisfies the Director that he or she has a legitimate interest in obtaining a copy.
- (5) The Director shall keep a record of any body or person that has inspected the Register or received an authenticated copy from him or her.

Revocation and variation of enduring power

- 73.** (1) An enduring power of attorney may be varied or revoked by the donor, where the instrument creating the enduring power of attorney has not been registered and where the donor has capacity to make the variation or revocation, as the case may be.
- (2) A variation or revocation under *subsection (1)* shall be done in such form as shall be prescribed.
- (3) Subject to *section 60(3)*, a revocation or variation of an enduring power of attorney shall be signed by the donor and his or her signature shall be acknowledged by 2 witnesses and *section 60(4)* shall apply with the necessary modifications.

- (4) A variation or revocation of an enduring power of attorney shall be accompanied by the following statements:
- (a) by the donor, that he or she understands the implication of varying or revoking the enduring power, as the case may be;
 - (b) by a legal practitioner that, after interviewing the donor and making any necessary enquiries, he or she—
 - (i) is satisfied that the donor understands the implication of varying or revoking, as the case may be, the enduring power, and
 - (ii) has no reason to believe that the variation or revocation, as the case may be, is the result of fraud, coercion or undue pressure on the donor;
 - (c) by a registered medical practitioner that in his or her opinion, at the time of the variation or revocation, as the case may be, the donor had the capacity to understand the implication of the variation or revocation;
 - (d) by such other healthcare professional as shall be prescribed that in his or her opinion, at the time of the variation or revocation, as the case may be, the donor had the capacity to understand the implication of the variation or revocation; and
 - (e) by the attorney, that he or she is aware of the variation or revocation and undertakes to act accordingly.
- (5) Subject to *subsection (6)* a donor may, after an instrument creating an enduring power of attorney has been registered, revoke the enduring power where he or she has capacity to do so.
- (6) A revocation referred to in *subsection (5)* is not valid unless an application is made to the court and the court is satisfied that—
- (a) the donor has done whatever is necessary in law to effect an express revocation of the enduring power of attorney and had capacity at the time of the purported revocation, and
 - (b) the donor has given notice to the attorney of the revocation.

Disclaimer by attorney

74. (1) An attorney may disclaim an enduring power of attorney where the instrument creating it has not been registered subject to his or her giving notice of such disclaimer to the donor.
- (2) Where an instrument creating an enduring power of attorney has been registered, the enduring power created by the instrument may only be disclaimed by an attorney with the consent of the court.

Reports by attorney

75. (1) An attorney under an enduring power of attorney which confers authority in relation to property and affairs shall, within 3 months of the registration of the instrument

- appointing him or her as attorney, submit to the Director a schedule of the donor's assets and liabilities and a projected statement of the donor's income and expenditure.
- (2) An attorney under an enduring power of attorney which confers authority in relation to property and affairs shall keep proper accounts and financial records in respect of the donor's income and expenditure and shall—
 - (a) submit such accounts and records as part of a report to the Director under this section, and
 - (b) make available for inspection by the Director or by a special visitor, at any reasonable time, such accounts and records.
 - (3) An attorney shall, within 12 months after registration of the instrument appointing him or her as attorney, and thereafter at intervals of not more than 12 months, prepare and submit to the Director a report in writing as to the performance of his or her functions as such attorney during the relevant period.
 - (4) Every report submitted to the Director pursuant to this section shall be in such form as shall be prescribed by regulations made under *section 79* and shall include details of all costs, expenses and remuneration paid to and claimed by the attorney in the relevant period together with such other matters as are prescribed.
 - (5) An attorney who has restrained the donor at any time during the relevant period shall include in the report details of each such restraint and the date on which, and the place where, such restraint occurred.
 - (6) Where an attorney fails to submit a report in accordance with this section or submits an incomplete report or fails to comply with *subsection (1)* or *(2)*, the Director shall notify the attorney of that failure or incompleteness and give him or her such period of time as is specified in the notification to comply or submit a complete report.
 - (7) Where an attorney fails to comply with a notification under *subsection (6)*, the Director shall—
 - (a) in the case of the submission of an incomplete report and following any necessary enquiries to satisfy himself or herself that the report is substantially in accordance with this section and regulations made under *section 79*, accept the report as if it were in compliance with this section and the relevant regulations, or
 - (b) make an application to the court for a determination as to whether the co-decision-maker should continue as attorney for the donor.
 - (8) Pursuant to an application to it under *subsection (7)(a)*, the court may determine that an attorney who has not complied with this section shall no longer act as attorney for the donor concerned.
 - (9) In this section “relevant period” means the period of time to which the report relates which shall be the period of time between the date of registration of the instrument creating the enduring power of attorney or the date of submission of the previous report, as the case may be, and the date immediately preceding the date of submission of the report concerned.

Complaints in relation to attorneys

76. (1) A person may make a complaint in writing to the Director concerning one or more of the following matters:
- (a) that an attorney has acted, is acting, or is proposing to act outside the scope of his or her functions as specified in the instrument creating the enduring power of attorney;
 - (b) that an attorney is not a suitable person within the meaning of *section 59(6)*;
 - (c) that fraud, coercion or undue pressure was used to induce a donor to appoint an attorney.
- (2) A person may, in respect of an attorney under the Act of 1996, make a complaint in writing to the Director concerning one or more of the following matters:
- (a) that an attorney under the Act of 1996, is acting or is proposing to act outside the scope of the enduring power under the Act of 1996;
 - (b) that an attorney under the Act of 1996 is unable, for whatever reason, to perform his or her duties and obligations as construed in accordance with that Act;
 - (c) that fraud, coercion or undue pressure was used to induce a donor under the Act of 1996 to appoint an attorney under the Act of 1996.
- (3) Following the receipt of a complaint under *subsection (1)* or *(2)*, the Director shall carry out an investigation of the matter which is the subject of that complaint and—
- (a) where he or she is of the view that the complaint is well founded, make an application to the court for a determination in relation to a matter specified in the complaint, or
 - (b) where he or she is of the view that the complaint is not well founded, notify the person who made the complaint of that view and provide reasons for that view.
- (4) A person who receives a notification under *subsection (3)(b)* may, not later than 21 days after the date of issue of the notification, appeal a decision of the Director that the complaint is not well founded to the court.
- (5) The Director may, notwithstanding that no complaint has been received, on his or her own initiative carry out an investigation and make an application to the court for a determination in relation to any matter specified in *subsection (1)* or *(2)*.
- (6) The court may—
- (a) pursuant to an application to it under *subsection (3)(a)* or *(5)*, or
 - (b) pursuant to an appeal under *subsection (4)*,
- make a determination in relation to a matter specified in *subsection (1)* or *(2)* and may, if it considers it appropriate, determine that—
- (i) an attorney shall no longer act as such in relation to the donor concerned, or
 - (ii) an attorney under the Act of 1996 shall no longer act as such in relation to a donor under the Act of 1996.

- (7) The reference to “attorney” in *sections 95 and 96* shall, for the purposes of this section, be construed as including an attorney under the Act of 1996.
- (8) The reference to “relevant person” in *sections 95, 96 and 99* shall, for the purposes of this section, be construed as including a donor under the Act of 1996.

Applications to court

77. (1) Where the Director makes an application to the court for a determination on whether the instrument creating an enduring power of attorney should be registered, the court may, notwithstanding that—
- (a) the enduring power of attorney or the instrument creating it does not comply with *section 59* or *section 60*, or
 - (b) the application to register the instrument was not in accordance with *section 68*,
- register the instrument where it is satisfied that—
- (i) the donor intended the power to be effective during any period when the donor lacks capacity,
 - (ii) fraud, coercion or undue pressure was not used to induce the donor to appoint an attorney,
 - (iii) the attorney is suitable within the meaning of *section 59(6)* to be the donor’s attorney, and
 - (iv) it is desirable in the interests of justice to register the enduring power.
- (2) In determining whether an attorney is suitable within the meaning of *section 59(6)*, the court, in addition to any other matters which it considers relevant shall have regard to—
- (a) the relationship and degree of connection between the donor and the attorney,
 - (b) the degree of involvement which will be required on the part of the attorney in the care of the donor,
 - (c) the willingness of the attorney to carry out his or her functions under the enduring power, and
 - (d) any conflict of interest which may arise.
- (3) Where an instrument creating an enduring power of attorney has been registered, the court may, whether on application by the donor, the attorney, the Director or an interested party—
- (a) determine any question as to the meaning or effect of the power,
 - (b) give directions with respect to—
 - (i) a relevant decision relating to the personal welfare of the donor made or about to be made by the attorney,
 - (ii) the management or disposal by the attorney of the property and affairs of the

donor, and

- (iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision of the enduring power, including directions for the repayment of excessive, or the payment of additional, remuneration,

and

- (c) consent to a disclaimer by the attorney of the enduring power.

- (4) Where the court gives a determination under *subsection (3)(a)*, a direction under *subsection (3)(b)* or a consent under *subsection (3)(c)*, it shall cause the Director to be notified of such direction or consent and the Director shall monitor the giving of effect by the attorney to such direction or consent as the case may be.

Removal of instrument from the Register

- 78.** (1) The Director shall remove from the Register an instrument creating an enduring power of attorney where—

- (a) there has been a revocation in accordance with *section 73(6)*, or
- (b) subject to *subsection (2)*, the attorney appointed under the instrument becomes disqualified.

- (2) Where there is more than one attorney appointed under an enduring power of attorney or where the donor has specified a person who shall act as attorney for him or her in the event that the attorney on whom the authority is conferred dies or is unable to act or is disqualified, then in the circumstances described in *subsection (1)*, the Director shall note on the Register in connection with the power concerned the revocation or disqualification, as the case may be.

Regulations

- 79.** The Minister, having regard to the requirements of this Part, shall prescribe by regulations the following matters:

- (a) the form of an instrument creating an enduring power of attorney;
- (b) the form of notice under *section 61* of execution of an instrument creating an enduring power of attorney;
- (c) the class of healthcare professionals under *sections 60(1)(d)*, *68(7)(b)* and *73(4)(d)*;
- (d) the form of application under *section 68(2)* to register an instrument;
- (e) the form of notice under *section 68(3)* of an application to register an instrument;
- (f) the form of a report under *section 75* to be submitted by an attorney to the Director;
- (g) the form of an objection under *section 71(2)* to the registration of an instrument creating an enduring power of attorney;

- (h) the form of variation or revocation under *section 73(2)* of an enduring power of attorney;
- (i) the bodies or classes of persons under *sections 72(3)* and *(4)* who may inspect the Register and receive an authenticated copy of an enduring power of attorney;
- (j) the fees to be paid in connection with—
 - (i) an application to register an enduring power of attorney,
 - (ii) an objection to an application to register an enduring power of attorney,
 - (iii) the issue of an authenticated copy of an enduring power of attorney.

Offences in relation to enduring powers of attorney

- 80.** (1) A person who uses fraud, coercion or undue influence to force another person to make, vary or revoke an enduring power of attorney commits an offence and shall be liable—
- (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or
 - (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.
- (2) A person who, in an instrument creating an enduring power of attorney, in an application for registration of an enduring power of attorney, or in connection with such an application, makes a statement which he or she knows to be false in a material particular commits an offence and shall be liable—
- (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months, or both, or
 - (b) on conviction on indictment, to a fine not exceeding €15,000 or imprisonment for a term not exceeding 2 years, or both.
- (3) The reference in *subsection (1)* to coercion or undue influence includes any case where a person's access to, or continued stay in, a designated centre or mental health facility, is contingent (whether in whole or in part) on the person having to, or being led to believe that he or she has to, create, vary or revoke an enduring power of attorney.

Transitional provisions

- 81.** (1) Subject to *sections 76(2), 76(3), 76(4), 76(5), 76(6), 76(7)* and *76(8)*, this Part shall not apply to—
- (a) an enduring power of attorney under the Act of 1996,
 - (b) an attorney under the Act of 1996, and
 - (c) a donor under the Act of 1996.
- (2) From the date of commencement of this Part—

[2015.]

Assisted Decision-Making (Capacity) Act 2015. [No. 64.] Pt.7 S.81

- (a) a person shall not create an enduring power of attorney under the Act of 1996,
and
- (b) the Act of 1996 shall not apply to an enduring power of attorney created after that
date.

