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# Briefing Note for Members: Powers of Attorney – June 2016

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# INTERPRETATION

In this guidance

- Words in the singular include the plural and words in the plural include the singular
- For simplicity he/his is used throughout but should be taken to include she/her

# ABBREVIATIONS

The following abbreviations have been used:

**EPA** Enduring power of attorney

**LPA** Lasting power of attorney

**CoP** Court of Protection

**OPG** Office of the Public Guardian

**MCA** Mental Capacity Act 2005

The CoP is a superior court with jurisdiction under the MCA over the property and financial affairs and the personal welfare of individuals who lack capacity to make decisions about such matters.

The OPG is an executive agency operating within the framework of the MCA. The OPG is responsible for maintaining a register of deputies appointed by the CoP and for supervising those deputies ongoing. The OPG deals with applications for registration of EPAs and LPAs and maintains a register of the attorneys appointed. The OPG also investigates reports of abuse of powers by attorneys and deputies.

This briefing note is based on the legislation applying as at 30th June 2016. While every care has been taken in the preparation of this guidance, it does not purport to be a comprehensive statement of the relevant law. The CIOT, the ATT, Geldards Solicitors, Turcan Connell and Tughans Solicitors and all those involved in the preparation and approval of this guidance shall not be liable for any direct or indirect loss, consequential loss, loss of profits or loss of reputation occasioned by reliance on the aforementioned documents. This guidance is not a substitute for taking appropriate legal advice in relation to Powers of Attorney.

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# 1. INTRODUCTION

1.1 This note provides a high level overview of powers of attorney for use by members of the Association of Tax Technicians and the Chartered Institute of Taxation. The briefing note covers the rules applying in England and Wales with differences applying in Scotland and Northern Ireland covered in sections 8 and 9. In particular members may find this guidance useful when:

- a) They have concerns that clients may be losing mental capacity to make decisions (see also [Tax Adviser article Powers of Attorney November 2014](#)) or are providing advice on taxation issues relating to wealth and asset planning.
- b) Where powers of attorney exist for clients and the member may be liaising with the appointed attorneys.
- c) Where the client is an attorney.

1.2 If a member has any concerns as outlined in a) the tax adviser article mentioned provides useful advice. In these circumstances it is essential that these concerns are addressed before any further action is taken. The steps to take include:

- a) Initially broaching the subject with the client, perhaps by asking whether they have any health concerns that could affect their capacity now or in the future and asking whether they have an EPA or LPA in place.
- b) If the client has close family, someone else is likely to be aware of any problems and share a member's concerns, although a member must be aware of the sensitivities around client confidentiality. More particularly, if the client has an EPA or an LPA, there is an onus on the attorney(s) to step in if it is thought that he is losing, or has lost, capacity to make decisions.
- c) If a member is unsure whether there is a problem, they should seek to involve someone with experience of assessing mental capacity. Solicitors regularly go through this process with clients who are making a will or lifetime gift. If they have any cause for concern, they will seek input from the client's GP or another medical expert. Even if the solicitor is satisfied that the client has the necessary capacity to make the decision in question, it may still be appropriate to have on file a formal assessment of capacity by a GP or other suitably qualified medical professional. This may be particularly relevant if the provision the client wishes to make is one that a disaffected family member or other disappointed beneficiary may later seek to challenge.

Ultimately, the court of protection has jurisdiction to determine whether an individual has capacity to make particular decisions and has the authority to make a declaration to that effect.

## 2. GENERAL INFORMATION ON POWERS OF ATTORNEY

### WHAT IS A POWER OF ATTORNEY?

- 2.1 A power of attorney is a deed by which a person confers authority on another to act on his behalf.
- 2.2 Examples of the potential use of powers of attorney include the following:
- a) completing a transaction by deed (such as conveyances or the grant of leases over 3 years in length) in the absence of the donor;
  - b) exercising functions on behalf of a trustee within the limited parameters allowed;
  - c) when a person is going abroad for a period of time and may be unable to deal with property or financial matters at a distance;
  - d) on behalf of an elderly or ill person who does not want to manage their affairs or is unable to owing to loss of physical or mental capacity

Care should be taken by tax advisers taking instructions from an attorney to ensure there is clarity on which party is the client. The Law Society has recently produced a practice note on meeting the needs of vulnerable clients<sup>1</sup> and a number of matters covered will be of similar importance to tax advisers.

- 2.3 Whilst this section of the guidance covers general information on powers of attorney tax advisers will often come across powers of attorney in relation to scenario d). More detailed information is therefore included about enduring (EPAs) and lasting powers of attorney (LPAs) from section 3 onwards.

### HOW A POWER OF ATTORNEY WORKS

- 2.4 A power of attorney creates an agency relationship between the donor and the attorney. As with agency relationships, the general rule is that the donor (or the principal in an agency context) remains responsible for the acts that are performed by the attorney within the remit of the attorney's authority.
- 2.5 However, unlike an agency agreement a power of attorney can only be granted by deed and must be clear in its scope in order to be effective. Once a power of attorney has been granted the donor cannot extend the scope of the attorney's powers informally (a further deed is required). The authority conferred by a power of attorney will be construed strictly by the courts but incidental powers necessary to complete the act will be implied.
- 2.6 Some types of power of attorney (General (Ordinary) powers of attorney but not LPAs) can be granted by companies including Limited Liability Partnerships ('LLPs').
- 2.7 Individuals and companies can be attorneys (in the case of EPA and LPAs individuals or a trust corporation may be appointed). A company will have to be authorised by its constitution to so act. A partnership cannot be an attorney as it is not a legal person (a partnership is a legal person in Scotland (Partnership Act 1890 section 4(2)). A person who is bankrupt cannot be an attorney under an EPA or an LPA in respect of the donor's property and affairs but can be an attorney in relation to the personal welfare of the donor under a personal welfare LPA (sometimes also referred to as a health and welfare LPA).
- 2.8 A single attorney or multiple attorneys can be appointed in the same deed so long as the persons appointed are clearly identified. Where multiple attorneys are appointed the power can be joint or joint and several and this must be clearly prescribed in the deed. If the attorneys are appointed jointly they can only exercise their

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1 [Law Society practice note - Meeting the needs of vulnerable clients](#)

authority together and the acts of one attorney cannot bind the other. If they are appointed with joint and several powers then they can act independently. In the case of joint attorneys, if one of them dies or disclaims or his authority is otherwise terminated by operation of law then the power automatically terminates.

## TERMINATION OF POWERS OF ATTORNEY

- 2.9 Powers of attorney which are limited by time will expire at the specified point and powers of attorney for specific acts will expire when the acts are completed. Powers of attorney can also be revoked at any time (unless it is an irrevocable power<sup>2</sup>). Revocation can in theory be oral but in that case difficult to evidence and, therefore, not recommended, in writing or by deed but it is ineffective until the revocation is received by the attorney. Notice to one joint attorney is effective. Acts of the attorney which are inconsistent with the terms of an enduring or lasting power of attorney can result in the court ruling it invalid.

## WHAT CAN AN ATTORNEY DO/NOT DO?

- 2.10 An attorney is not obliged to exercise the power unless there is some contractual obligation for him to do so. For example, a contract would be required if a solicitor was appointed as an attorney to oblige him to act. Note however section 5.21 in relation to EPAs. An attorney acting under an EPA or LPA should not stop acting without telling the donor and should also tell the OPG particularly if the donor has lost capacity. The OPG must always be told if the attorney is standing down by 'disclaiming' his position if the power has already been registered.
- 2.11 There are a number of duties which apply to the attorney:
- a) An attorney owes a duty of the utmost good faith to the donor of the power.
  - b) An attorney should keep the donor's money separate from his own money (separate bank accounts) and should keep accurate records and accounts. In addition, the Solicitors Accounts Rules will apply to a solicitor who is appointed as an attorney.
- 2.12 An attorney appointed under an LPA or an EPA may be required to supply information requested by the CoP. The court also may make directions in respect of the accounts and records. It is an overriding principle of the MCA that someone taking decisions on behalf of a person who lacks the mental capacity to make those decisions must always act in that person's best interests.
- 2.13 An attorney is under a duty to discharge his duties with reasonable care. The standard of care depends on the qualifications of the attorney. A higher standard of care will be expected from a solicitor, accountant or a tax adviser than an unqualified person. The standard in such cases will be the standard of a reasonable solicitor, accountant or tax adviser as a minimum.
- 2.14 An attorney under an EPA has a duty to register the instrument when the donor is or is becoming mentally incapable of managing his property and financial affairs.
- 2.15 An attorney must not make a secret profit.
- 2.16 An attorney must not exceed the authority conferred by the power.
- 2.17 An attorney is under a duty to keep the affairs of the donor confidential. Disclosure can be justified if it is in the best interests of the donor or in the public interest.

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<sup>2</sup> Commercial arrangements such as mortgages sometimes contain irrevocable powers to authorise the lender to deal with the mortgaged property. An EPA or LPA is revocable at any time whilst the donor of the power still has capacity.

- 2.18 The court has wide powers to give directions to attorneys and the attorney must comply with them.
- 2.19 The attorney has the following rights in relation to the exercise of his power:
- a) An attorney has a right to an indemnity from the assets of the donor for expenses incurred in exercising the powers conferred under a power of attorney. However, there is no right to an indemnity if an attorney exceeds his power.
  - b) An attorney is only entitled to be remunerated for his services if this is expressly set out in the deed or can be implied from it. In the absence of express agreement in respect of the remuneration of the attorney, the court may be prepared to order remuneration on a quantum meruit basis provided that there is a performance and acceptance of services. If the donor appoints a solicitor or accountant as his attorney there will usually be an implied agreement that the attorney should be remunerated. In the case of EPAs and LPAs it is expected that the donor will make express provision in the document for the attorney to charge if appropriate and the CoP may be reluctant to find that there is any implied agreement in the absence of such express provision.
- 2.20 An attorney cannot delegate powers beyond those which he has expressly been given. This means that an attorney cannot generally delegate his authority to act unless the power to delegate is expressly provided for in the power of attorney. However, if the attorney makes managerial decisions he can delegate the implementation of that decision, for example, delegating to an estate agent the job of finding a purchaser for the donor's house but the attorney will retain the decision of whether or not to sell. Personal appointments, such as the appointment of a lawyer, cannot be delegated. A director granted with the power of attorney on behalf of a company cannot delegate their power to act unless the articles of association expressly permit this. A general power of attorney can contain provisions to appoint a substitute. Such provisions need to be express. It is generally the case that the functions of an attorney under EPAs and LPAs cannot be delegated.

## HOW DO YOU GET APPOINTED?

- 2.21 A power of attorney must be granted by deed.
- 2.22 There are further formalities for EPAs made pre October 2007 (see section 5) and the grant of an LPA (see section 6).

## 3. POWERS OF ATTORNEY IN ENGLAND AND WALES

- 3.1 In England and Wales there are three main types of powers of attorney:
- a) Ordinary powers of attorney,
  - b) Enduring powers of attorney (made before 1 October 2007) and
  - c) Lasting powers of attorney (made 1 October 2007 onwards).
- 3.2 In addition there is a specific and limited form of power of attorney permitted under Trustee Act 1925 Section 25.
- 3.3 Each type of power of attorney is covered in more detail below but it is important to understand that ordinary powers of attorney do not survive any loss of mental capacity on the part of the donor.
- 3.4 Enduring and lasting powers of attorney are made in a prescribed form (as an enduring power of attorney before 1st October 2007 or as a lasting power of attorney after that date) with the effect that the authority granted survives any loss of mental capacity on the part of the donor. They are often put in place to plan ahead in case of any loss of mental capacity in old age or in case of unexpected accident or illness affecting capacity.
- 3.5 In the absence of a validly made EPA or LPA an individual's property and financial affairs will effectively be frozen in the event of an unexpected loss of capacity through accident or illness. Many people do not realise that even a spouse or partner cannot automatically access and manage the finances of someone who has lost mental capacity and that joint accounts could be frozen if the bank or other holding company becomes aware that one of the co-owners has lost mental capacity. In the absence of a validly made enduring or lasting power of attorney an order from the CoP appointing a 'deputy' to manage the property and finances of the person who has lost capacity can take several months and cost over £1,000 with additional costs and form filling every year afterwards. If the person who has lost capacity has no assets to be managed and is only in receipt of state pension or other benefits it is possible for an individual or the local authority to apply to the Department of Work & Pensions to become his 'appointee' to deal with his benefits on his behalf (so that an application to the CoP would not be necessary/relevant in that scenario). A friend or relative of the person who has lost capacity or a professional such as a solicitor may apply to be appointee. The DWP will interview the applicant to assess suitability.
- 3.6 For those making a lasting power of attorney under current rules careful consideration is needed around who to appoint and the basis on which the appointment is best made to avoid any problems with the validity of the document on registration and to make sure it is best suited to the donor's needs, circumstances and wishes. A solicitor specialising in this area can guide the donor through formalities and important choices to be made saving time and expense in the long run. This is particularly important because disputes between co-attorneys or between attorneys and other members of the donor's family and attorneys acting contrary to their authority and abusing their position are not uncommon.

## 4. ORDINARY POWERS OF ATTORNEY

- 4.1 An ordinary power of attorney allows the attorney to do on behalf of the donor anything which the donor can lawfully do. Alternatively an ordinary power may be limited to a specific act or to allow a person to act for a specified period of time.
- 4.2 The general rule is that an ordinary power of attorney will be revoked if the donor loses mental capacity. In such circumstances it will be necessary for the family to apply to the CoP under the Mental Health Act 1983 for the CoP to appoint a relative as a deputy to manage the assets of the person who has lost capacity unless there is a valid EPA or LPA in place.
- 4.3 Ordinary powers of attorney can be granted by companies including Limited Liability Partnerships ('LLPs').

## 5. ENDURING POWERS OF ATTORNEY

### WHAT IS AN EPA?

- 5.1 EPAs are a type of power of attorney, which could be made by an individual ('the donor') in a prescribed form and executed in the prescribed manner before 1 October 2007 to give general or specific authority to one or more than one attorney for the management of the donor's affairs.
- 5.2 An EPA can operate like an ordinary power of attorney whilst the donor still has capacity to manage his property and financial affairs (although it is quite common for EPAs to include a restriction so that the authority of the attorneys will only take effect when the donor is or is becoming mentally incapable of managing his affairs). Where no restrictions are included the EPA is effective straight away without the need to wait for registration to be completed, indeed registration is only relevant when the donor is or is becoming incapable of managing their property or financial affairs. This can be particularly useful where a donor is in poor physical health and wants their attorneys to be able to act without restriction in relation to their affairs.
- 5.3 Unlike a general or ordinary power of attorney, an EPA is not cancelled by the donor's loss of mental capacity.

### EPAS POST 1 OCTOBER 2007

- 5.4 Since 1 October 2007 it is not possible to make new EPAs. The new regime of Lasting Powers of Attorney ('LPAs') was introduced to replace EPAs because of the perceived opportunities for abuse within the EPA regime. LPAs include more options for appointing attorneys and the basis on which the attorneys will act.
- 5.5 EPAs validly granted before 1 October 2007 continue to have effect and are governed by provisions set out in the Mental Capacity Act 2005 (MCA 2005) Schedules 4 and 5.
- 5.6 If the formalities for validly executing an EPA prior to 1 October 2007 have not been complied with the appointment of one or more of the attorneys may be invalid depending on the particular circumstances. From a risk management point of view, it is always worth checking that an existing unregistered EPA is still an appropriate choice for the donor, is in the form prescribed at the time it was made and has been correctly executed. Any error on an EPA or provision which is now inappropriate may not otherwise be picked up until an attempt is made to register the EPA with the Office of the Public Guardian (OPG) on loss of capacity. There was no specific facility in the prescribed form for EPAs to appoint a replacement attorney or attorneys so that the donor may be left without effective provision in place if the original appointment comes to an end (for example, where a husband and wife have appointed each other, on the death of one of them) although some people may have made two EPAs to seek to address this, one in favour of their first choice of attorney and the other in favour of those intended to act if that first choice could no longer do so. Once the donor has lost capacity to make a new LPA it will then be too late to make suitable alternative provision.
- 5.7 Individuals who do not have a valid EPA in place or whose EPA is not in line with their current circumstances or does not address the question of a substitute authority should consider making an LPA so that their financial affairs would not be frozen in the event of an unexpected loss of capacity through accident or illness or in old age. In that case the EPA should then be revoked to coincide with the registration of the LPA.
- 5.8 If a person loses capacity to manage property and financial affairs and does not have either a valid EPA or a valid LPA for property and financial affairs in place, an order of the Court of Protection is generally needed for the management of that person's property and financial affairs. The court may, in that case, authorise the appointment of a deputy who will have similar authority to an attorney but who will be actively supervised by the OPG on an ongoing basis. This involves a greater administrative burden for the person managing the affairs of the person who lacks capacity and ongoing administrative fees payable to the OPG out of the estate of the person who lacks capacity. If the person who has lost capacity has no assets and is only in receipt of state

pension or other benefits it is possible for individual or the local authority to apply to the Department of Work & Pensions to become his 'appointee' to deal with his benefits on his behalf (so that an application to the CoP would not be necessary/relevant in that scenario). A friend or relative of the person who has lost capacity or a professional such as a solicitor may apply to become appointee. The DWP will interview the applicant to assess suitability.

- 5.9 Whereas EPAs can only confer authority on attorneys in relation to property and financial affairs, there are two types of LPA, one in relation to property and financial affairs and the other in relation to health and welfare matters. A person who has a validly executed EPA in place in line with their current circumstances and wishes may wish to consider making a personal welfare LPA (sometimes also called a health and welfare LPA).

## ATTORNEYS UNDER EPA AND THEIR AUTHORITY

- 5.10 Attorneys appointed under an EPA may either be individuals who are over the age of 18 and who are not bankrupt or a trust corporation.

- 5.11 The appointment of more than one attorney must be expressed to take effect either:

- a) jointly, in which case all decisions taken by the attorneys must be taken together; or
- b) jointly and severally, so that each attorney may act independently of the other.

Having said that, in the matter of *Re J 2009*<sup>3</sup> the court ruled that an appointment by the donor in an EPA of his wife or in the alternative of his children jointly and severally if his wife was unable to act was valid.

- 5.12 An attorney appointed under an EPA may have general authority to deal on behalf of the donor with all or part of the donor's affairs (to do anything on the donor's behalf which the donor may lawfully delegate to an attorney). Alternatively, the attorney may be empowered only to do specific things.

- 5.13 Any general authority is subject to certain statutory restrictions, notably limiting gifts which an attorney may make. Any gifts must be within the limited scope of the statutory authority (essentially being limited to reasonably sized gifts on occasions such as birthdays and weddings) or expressly authorised by the Court of Protection. In particular, gifts made by attorneys for inheritance tax planning purposes require the express approval of the court subject to a *de minimis* exception which was outlined by the court in the recent case of *Re GM: (2013) MHLO 44*<sup>4</sup>.

- 5.14 An attorney cannot make a Will on behalf of a donor who lacks testamentary capacity. The fact that an EPA has been registered doesn't necessarily mean that the donor does not have testamentary capacity but any Will or codicil made by the donor in those circumstances may be prone to challenge. It is possible to seek a declaration from the Court of Protection that a person has testamentary capacity on production of supporting medical evidence. It is also possible to ask the Court of Protection to consider authorising a statutory will to be made on behalf of a person who is found not to have such testamentary capacity. This may be appropriate if it can be demonstrated that a change to any existing Will, or a move away from the rules of intestacy in the absence of any Will, would be in the best interests of that person (for example, if someone who is not close to the person, such as an estranged relative, stands to benefit under the intestacy rules, or if someone who now plays an important part in the life of the person lacking capacity is not provided for in any existing Will).

- 5.15 Ideally, attorneys should know what is in the Will of the person who lacks capacity. An individual being appointed as attorney should consider asking the donor to supply a copy of his latest Will and any future

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<sup>3</sup> [Re J 2009](#)

<sup>4</sup> [Re GM: \(2013\) MHLO 44](#)

updates to it or to give authority in advance for release of the will to the attorney in future if capacity is lost. This would avoid the need for the attorney to apply to the court to approve such release at some stage in the future when the donor has lost capacity. When the attorney one day assumes responsibility for the management of the donor's property and finances, knowing the terms of the donor's Will means that he can avoid inadvertently skewing the division of the estate between the donor's intended beneficiaries (for example, by selling a particular asset which happens to be the subject of a specific gift in the donor's Will) If the attorney nevertheless feels that the asset in question must be sold, for example, to pay care home fees he can consider any steps that may be appropriate to redress the situation (such as an application for a statutory Will or codicil designed to re-balance the division of the estate between those the donor intended to benefit).

- 5.16 Specific authority is sometimes included in an EPA to allow the attorney to appoint someone as a discretionary manager for the donor's funds (as strictly speaking the appointment of a discretionary fund manager is otherwise an infringement of the general principle that the attorney cannot delegate his or her authority).
- 5.17 The recent case of *Re Buckley* (2013 WTLR 385), contains useful guidance about attorneys taking appropriate financial advice from a suitably qualified and regulated adviser when deciding how best to invest money belonging to the person who lacks capacity. The case also highlights the need for specific CoP approval for transactions involving an element of self-dealing (the attorney had, in this case, invested £72,000 of the funds she looked after for her aunt to establish her own reptile breeding business).
- 5.18 A charging clause may also be included in an EPA to allow a professional attorney to charge for work undertaken in carrying out his role.
- 5.19 Financial institutions will usually only accept the original, a solicitor-certified or OPG official office copy of an EPA as evidence of the authority of an attorney under an EPA.
- 5.20 There is protection for 3rd parties in relation to transactions made in good faith with an attorney who appears to be acting within the scope of an EPA and an attorney acting in pursuance of a power does not incur any liability if he relies in good faith without knowing or having reason to know that the EPA is invalid.
- 5.21 An attorney is under a duty to apply to the OPG for registration of the EPA if he has reason to believe that the donor is or is becoming mentally incapable of managing his affairs. Formal evidence of loss of capacity is not required for registration (though some EPAs may contain a restriction requiring attorneys to seek the input of a medical practitioner as to the donor's loss of capacity before applying for registration). There is a formal process for registering the EPA<sup>5</sup>.
- 5.22 Note that as set out in section 2.11 generally an attorney is not obliged to exercise the power unless there is some contractual obligation to do so. However, an attorney under an EPA (or LPA) who is not acting under a contract does have a duty to act when the donor has become or is becoming mentally incapable and to follow the principles set out in the MCA and the related code of practice. It is possible for the attorney to disclaim his duties under an EPA (or LPA) for which he does not need the consent of the CoP. Where duties are disclaimed under an EPA (or LPA) it is necessary for the attorney to inform the donor and where the EPA (or LPA) are registered the OPG must also be advised.
- 5.23 A registration fee is payable upon registration (subject to any exemption or remission for which the donor may be eligible). Registration takes a minimum of 5 weeks from when the last of the required notices was sent.
- 5.24 The powers of the attorney under an EPA are suspended once it becomes necessary to make an application for registration until registration is complete. In the meantime, the attorney is only able to make emergency decisions and authorise essential payments such as care home fees for the maintenance of the donor (and, in

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<sup>5</sup> <https://www.gov.uk/government/publications/register-an-enduring-power-of-attorney>

certain circumstances, for the maintenance of others). The attorney is, for example, unable to make investment decisions until the EPA has been registered.

- 5.25 Once the power is registered the attorney can continue to act but the Court of Protection has various supervisory powers and can cancel the EPA if the attorney is unsuitable to be an attorney or acts contrary to the powers granted or otherwise outside the scope of his authority.
- 5.26 Registration of an EPA was traditionally taken to mean that the attorney assumed full responsibility for all decision making in relation to the donor's property and financial affairs whereas under the MCA and in relation to an LPA, the question of whether an individual lacks capacity to make a decision is time and issue specific and the attorney under an LPA must only make decisions on behalf of the donor which the donor lacks capacity to make himself at the relevant time.
- 5.27 However, OPG guidance notes say that if the donor of a registered EPA feels able to be involved in some aspects of their property and financial affairs then 'it is for them and their Attorney(s) to decide how this should work'. The position that the donor of a registered EPA can continue to make some of his own decisions depending on the extent of his incapacity was confirmed in the case of *Day v Harris* 2013 EWCA Civ 191.
- 5.28 The OPG keeps a record of EPAs, which have been registered, and it is possible to make a search of those records.

## ACTING IN RELIANCE ON EPAS

- 5.29 It is, of course, prudent for those dealing with an attorney purporting to act on behalf of someone who lacks capacity to satisfy themselves, in so far as possible, that the attorney is duly authorised to act under a validly created and registered power (and to ask for sight of the original, a solicitor certified or OPG office copy of the EPA). The register maintained by the OPG can be searched to check that the power remains in force (bearing in mind, however, that an EPA is only registered if the donor is or is becoming mentally incapable of managing his property and finances and that the EPA may have been drawn up so as to also give the attorney authority to act whilst the donor still has mental capacity ie if no restriction has been included limiting the scope of the power to a time when the donor has lost or is losing capacity).
- 5.30 There is protection for 3rd parties in relation to transactions made in good faith with an attorney who appears to be acting within the scope of an EPA and an attorney acting in pursuance of a power does not incur any liability if he relies in good faith without knowing or having reason to know that the EPA is invalid.

## BRINGING AN EPA TO AN END

- 5.31 A donor can revoke an unregistered EPA at any time whilst he has the relevant level of capacity for that purpose. Ideally, revocation should be made by deed although strictly no particular formalities are required. The donor must give notice of the revocation to the attorneys. After registration, the CoP must be involved in relation to any purported revocation by the donor.
- 5.32 An EPA may also be revoked by an attorney disclaiming his power or by the death, bankruptcy or loss of capacity of an attorney. If the attorney in question is the only attorney or was appointed jointly with others any of these events will bring the EPA to an end. If there is more than one attorney appointed on a 'joint and several' basis and one of the attorneys disclaims, is made bankrupt or loses capacity the powers of the other attorney(s) are not affected by the disclaimer so that the EPA continues.
- 5.33 The CoP can direct the OPG to cancel EPAs where:
- a) the power has expired or been revoked;

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- b) the power was not valid or if there has been fraud or undue pressure to induce the donor to create the power; or
  - c) the attorney is unsuitable to be the donor's attorney
- 5.34 The authority of an attorney under an EPA ends with the death of the donor, at which point authority to deal with the donor's property and finances passes to the personal representatives.
- 5.35 The new LPA regime was introduced because of the perceived opportunities for abuse within the EPA regime. A further problem was the failure to register EPAs when the donor became mentally incapable.

## 6. LASTING POWERS OF ATTORNEY

### WHAT IS AN LPA?

- 6.1 From 1 October 2007, LPAs have replaced EPAs as the way in which an individual can appoint one or more attorneys to make property and financial affairs decisions, which the donor lacks the capacity to make himself.
- 6.2 It is also possible for an individual to make a separate LPA giving authority to one or more attorneys to make health and welfare decisions, which the donor lacks the capacity to make.
- 6.3 LPAs are governed by the MCA 2005 supplemented by the LPA regulations 2007.
- 6.4 There are two separate prescribed forms, one dealing with health and welfare (sometimes referred to as 'personal welfare') and another, dealing with property and financial affairs. New versions of these forms have been introduced for individuals making a Lasting Power of Attorney from 1 July 2015 onwards.
- 6.5 The process of making an LPA includes the provision of a certificate of capacity by an appropriate person known to the donor or with relevant skills (as prescribed by the MCA 2005). People who cannot act as certificate providers include family members or employees of either the donor or the attorney and owners or staff of a care home in which the donor is living.
- 6.6 In the new version of the prescribed forms introduced on 1 July 2015 there is no longer a requirement for an extra certificate provider if the donor has not nominated at least one person to be notified upon registration of the LPA.
- 6.7 In the prescribed form for LPAs available prior to 1st July 2015 the donor was able to specify in the LPA limitations on the attorney's authority. Such restrictions had to be carefully framed. Ambiguous restrictions or those which are unworkable could cause problems. Inappropriately framed restrictions may lead to the Court of Protection 'severing' the offending provisions from the LPA with no power to substitute alternative valid restrictions. The new style form of LPA post 1st July 2015 allows for instructions to be included for example an instruction giving the attorney authority to view a copy of the donor's Will or authority to delegate investment decisions to a discretionary management. Again, care is needed in formulating instructions to ensure these do not infringe any of the limitations on the powers of attorney imposed by the MCA are not inconsistent with the basis on which the attorneys are appointed and don't otherwise render the LPA unworkable.  
  
Solicitors have generally advised their clients that ideally, it is preferable for donors to choose attorneys to whom they are content to give wide powers subject only to the statutory restrictions.
- 6.8 In the new prescribed form for LPAs being made after 1st July 2015 there is specific provision included to allow the donor to restrict the attorney's authority so as to only take effect on loss of capacity. There is some concern amongst solicitors working in this area as to how this will work in practice. The attorney would need to be able to satisfy third parties he is dealing with that the donor lacks the mental capacity to make the particular decision at the particular time (given the time and issue specific approach to capacity under the MCA) which may be difficult to do if the donor's capacity tends to fluctuate or is less than absolute.
- 6.9 The prescribed forms allows for the donor to give guidance to the attorney which the attorney is not bound to follow. It is probably more useful for donors to set out any guidance he wishes to give his attorney in a separate letter which may be easily updated.
- 6.10 Consideration should be given to including in any LPA specific authority to allow the attorney to appoint someone as a discretionary manager for the donor's funds (as strictly speaking the appointment of a discretionary fund manager is otherwise an infringement of the general principle that the attorney cannot

delegate his or her authority). Investment houses tend to be prepared in practice to accept instructions from attorneys to manage investments on a discretionary management basis notwithstanding the absence of an express power in the LPA to delegate investment decisions.

- 6.11 The recent case of *Re Buckley* (2013 WTLR 385), contains useful guidance about attorneys taking appropriate financial advice from a suitably qualified and regulated adviser when deciding how best to invest money belonging to the person who lacks capacity. The case also highlights the need for specific Court of Protection approval for transactions involving an element of self-dealing (the attorney had, in this case, invested £72,000 of the funds she looked after for her aunt to establish her own reptile breeding business).
- 6.12 The prescribed form pre 1st July 2015 included an option for the donor to specify that an attorney may charge for undertaking the role and so that someone agreeing to take on the role of attorney in a professional capacity will want to know that a suitable charging clause is included in the appropriate section of the LPA. The prescribed form introduced on 1st July 2015 does not include any specific section about charging and if the donor wishes the attorney to be able to charge, a charging clause will need to be included in the general instruction section.
- 6.13 Both types of LPA come in three parts, Parts A, B and C. Part B is the certificate of the donor's capacity to enter into the document given by a prescribed person. Each part must be executed in the prescribed manner in that sequential order.
- 6.14 The instruments conferring the power to deal with the property and financial affairs of the donor and their health and personal welfare are separate (there are different prescribed forms which must be used to create the power). A prescribed person, someone known personally to the donor and chosen by the donor or a professional chosen by the donor must sign a certificate stating that the donor understands the purpose and scope of the document and no fraud has induced the donor into signing it and there is nothing else preventing an LPA being created from the instrument. There is a list of individuals who cannot act as the 'certificate provider' including by way of example family members of the donor, the attorney under that power (or any other power given by the donor), someone who is an employee of the attorney, a family member of the attorney being appointed by that power, This means that where the power of attorney is being drawn up by a professional such as a solicitor on the instructions of his client and the client wishes to appoint the solicitor as his attorney, another certificate provider from outside of the firm will be needed.

## REGISTRATION OF LPAS

- 6.15 Unlike EPAs, LPAs are capable of being registered as soon as the documents in the prescribed form have been duly completed and executed in the appropriate way and so that registration does not signify loss of capacity.
- 6.16 An LPA is only capable of being used by an attorney after it has been registered.
- 6.17 There is a prescribed process for registration of LPAs either by the donor or by the attorneys including notification to up to five people chosen by the donor who then have the opportunity to raise objections.
- 6.18 A registration fee is payable upon registration (subject to any exemption or remission for which the donor may be eligible).
- 6.19 The process of registration generally takes at least six weeks assuming no objections are raised by those who are nominated to be notified or by any of the parties but can take longer depending on the volume of applications being dealt with by the OPG. There is a minimum waiting period of 4 weeks from receipt by the OPG of the application for registration before registration can take place to allow for any objections.
- 6.20 Most donors are choosing to register their LPAs as soon as the prescribed documents have been duly completed. This is mainly to avoid a hiatus whilst registration takes place which could cause great difficulty if

the donor suffers a sudden loss of capacity and there are time critical decisions to be made. Registering the documents straight away also means that any errors in the completion of the LPAs that may affect validity can be picked up whilst the donor still has capacity to rectify them. Where an individual needs to appoint someone to deal with his property and financial affairs straight away, for example, someone who is ill in hospital, he might choose to make an ordinary power of attorney with immediate effect and also a Lasting Power of Attorney by way of long term provision which would survive any loss of capacity and which can be relied upon once registration is complete.

- 6.21 Financial institutions will usually only accept the original, a solicitor-certified or OPG official office copy of an LPA as evidence of the authority of an attorney under an LPA for property and financial affairs.
- 6.22 The OPG keeps a record of registered LPAs against which it is possible to make a search and has wide powers to oversee attorneys acting under registered LPAs.

## ATTORNEYS UNDER AN LPA AND THEIR AUTHORITY

- 6.23 Attorneys appointed under an LPA must be over 18 at the time of the appointment. A Trust Corporation may be appointed as attorney for property and financial affairs but not for health and welfare matters. A bankrupt may act as health and welfare attorney but not as attorney for property and financial affairs.

Note that as set out in section 2.11 generally an attorney is not obliged to exercise the power unless there is some contractual obligation to do so. However, an attorney under an LPA (or EPA) who is not acting under a contract does have a duty to act when the donor has become or is becoming mentally incapable and to follow the principles set out in the MCA and the related code of practice. It is possible for the attorney to disclaim his duties under an LPA (or EPA) for which he does not need the consent of the CoP. Where duties are disclaimed under an LPA (or EPA) it is necessary for the attorney to inform the donor and where the LPA (or EPA) are registered the OPG must also be advised

- 6.24 A donor may appoint more than one attorney and/or more than one replacement attorney. In that case the donor should specify when making the LPA whether multiple attorneys or replacement attorneys are to act:
- jointly making all decisions together;
  - jointly and severally so that they make decisions independently of each other; or
  - jointly for some matters and jointly and severally for others (this type of appointment needs to be carefully framed to avoid practical difficulties or even problems with the validity of the LPA on registration).

The appointment of replacement attorneys must also be carefully framed to ensure the replacement(s) will step in in the way that the donor envisages – see guidance at [http://www.laserform.co.uk/library/OnlinePages-Forms/LP12.pdf#nameddest=part\\_a4](http://www.laserform.co.uk/library/OnlinePages-Forms/LP12.pdf#nameddest=part_a4)

- 6.25 In the case of a Health & Welfare Power of Attorney the LPA can only be acted upon if the donor lacks capacity to make health and welfare decisions (or the attorney reasonably believes that to be the case).
- 6.26 An attorney under a health and welfare LPA can only make decisions to refuse life sustaining treatment on behalf of the donor if the donor has specifically opted to give the attorney the power to make such decisions when drawing up the LPA in the prescribed form. The authority of attorneys acting under a health and welfare LPA is subject to MCA 2005 sections 24 to 26 (in particular, if a donor of a health and welfare LPA subsequently makes his own advance decision to refuse life sustaining treatment which complies with the requirements of the MCA 2005 so as to be a valid and enforceable advance decision that would then override any authority granted in the LPA with regard to such decisions).

- 6.27 An attorney under a Property & Financial Affairs LPA can act for the donor when the donor has mental capacity (unless the donor has included a specific restriction to the contrary) but can only take decisions for the donor that the donor lacks the capacity to make.
- 6.28 In relation to an LPA, whether the donor lacks capacity to make decisions so that the attorney takes responsibility for the decision in question is time and issue specific under sections 2 and 3 of the MCA 2005. The donor may be able to deal with simple personal finances but not make more complicated financial decisions or the donor may have 'good days' and 'bad days' in terms of capacity to make relevant decisions. The attorney only has authority to make decisions on behalf of the donor which the donor lacks the capacity to make at the relevant time.
- 6.29 The authority of attorneys acting under an LPA are governed and restricted by the MCA 2005. In particular, sections 1 and 4 setting out in what circumstances attorneys can make decisions for the donor and the overriding requirement to act in the donor's best interests. This is in addition to any specific restrictions included by the donor in the LPA. The MCA 2005 Code of Practice<sup>6</sup> provides guidance for attorneys acting under an LPA.
- 6.30 There is a specific statutory restriction contained in MCA section 12 relating to the making of gifts on behalf of a donor of an LPA otherwise than with the express authority of the Court of Protection. The donor of an LPA cannot confer wider authority on the attorney than that specified in section 12. Any gifts must be within the limited scope of the statutory authority (essentially being limited to reasonably sized gifts on occasions such as birthdays and weddings) or expressly authorised by the Court of Protection. In particular, gifts made by attorneys for inheritance tax planning purposes require the express approval of the court subject to a de minimis exception which was outlined by the court in the recent case of Re GM: (2013) MHLO 44.
- 6.31 An attorney cannot make a Will on behalf of a donor who lacks testamentary capacity. If the donor's testamentary capacity is open to question, it is possible to seek a declaration from the Court of Protection in relation to the same on production of supporting medical evidence. It is also possible to ask the Court to consider authorising the making of a statutory will for a person who is established as lacking testamentary capacity. This may be appropriate if it can be demonstrated that a change to any existing Will, or a move away from the rules of intestacy in the absence of any Will, would be in the best interests of the person who lacks testamentary capacity (for example, if someone who is not close to the person, such as an estranged relative, stands to benefit under the intestacy rules or if there is someone who now plays an important part in the life of the person lacking capacity but for whom provision is not included in any existing Will).
- 6.32 Ideally, attorneys should know what is in the Will of the person who lacks capacity. This is to avoid inadvertently skewing the provision made in the Will by selling assets specifically intended for a particular beneficiary (or, if it becomes necessary to do so, to consider steps it may be relevant to take to redress the situation, for example, via an application for a statutory will if that is an appropriate and proportionate step in the best interests of the person who lacks capacity).

## BRINGING AN LPA TO AN END

- 6.33 A donor may revoke an LPA at any time when he has capacity to do so and must notify the attorneys and the OPG of the revocation.
- 6.34 An LPA for property and financial affairs is automatically revoked by the bankruptcy of the donor or the attorney (or suspended in the case of an interim bankruptcy restrictions order).
- 6.35 The appointment of an attorney may be ended by his death, loss of capacity, bankruptcy, or divorce from the

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<sup>6</sup> [The MCA 2005 Code of practice](#)

donor or by the attorney disclaiming his appointment. This will only serve to revoke the LPA altogether if there is no other attorney who may continue to act. For example, disclaimer by an attorney appointed jointly and severally would not necessarily bring the LPA to an end whereas disclaimer by a jointly appointed attorney would do so unless a replacement attorney is named in the LPA.

6.36 The authority conferred by an LPA ends with the death of the donor.

## ACTING ON RELIANCE ON LPAS

6.37 It is, of course, prudent for those dealing with an attorney purporting to act on behalf of someone who lacks capacity to satisfy themselves, in so far as possible, that the attorney is duly authorised to act under a validly created and registered power (and to ask for sight of the original, a solicitor certified or OPG office copy of the LPA). The register maintained by the OPG can be searched to check that the power remains in force.

6.38 An attorney acting in good faith under a registered LPA is protected from liability to third parties and to the donor if it subsequently becomes apparent that the LPA is invalid for some reason. There is similar protection for third parties who deal in good faith with the attorney in such circumstances. The position is governed by MCA 2005 section 14.

## 7. POWERS OF ATTORNEY UNDER TRUSTEE ACT 1925 SECTION 25 ('TRUSTEE ACT POWERS OF ATTORNEY')

- 7.1 Acceptance of a trustee role is voluntary and as such, the general rule is that a trustee cannot delegate the exercise of his powers and duties. There are, however, two exceptions to this general rule. Delegation is permitted, if:
- a) it is specifically authorised by the trust document; or
  - b) the trustee grants a power of attorney under Trustee Act 1925 Section 25(1) (provided that this is not contrary to any provisions contained in the trust instrument).
- 7.2 Under a Trustee Act power of attorney, a trustee may delegate the execution or exercise of all or any of the powers and functions vested in him as trustee either solely or jointly with another/others for a period not exceeding twelve months.
- 7.3 The twelve month delegation period may commence either on the date of execution of the Trustee Act power of attorney, or on a date specified in the power. This means that a number of powers can be granted at the same time, each specifying a different twelve month period, so that these periods can run consecutively.
- 7.4 Where a trustee delegates his powers and functions under Section 25 Trustee Act 1925, he must notify his co-trustees along with anyone else who has the power to appoint new trustees (as identified in the trust instrument or pursuant to a statutory right) either prior to or within 7 days of granting the Trustee Act power of attorney.
- 7.5 The notice must contain the following information:
- a) The date on which the power comes into operation;
  - b) For how long it will last;
  - c) The attorney's name;
  - d) The reason for the delegation.
- 7.6 If the delegation is not in respect of all trusts, powers and functions, details of those which are delegated.
- 7.7 If the trustee fails to comply with the requirement to notify, the Trustee Act power of attorney will be invalid, although the acts of the attorney in relation to third parties will not automatically be invalidated.
- 7.8 The donor of a Trustee Act power of attorney remains liable for the acts and defaults of the attorney.
- 7.9 The prescribed form of the power of attorney is set out in the Trustee Act 1925. Since the Trustee Delegation Act 1999 (S25(5)) it is no longer possible to delegate trusts, powers and discretions in relation to more than one trust in a single power of attorney. Instead, one prescribed form is needed for each trust in relation to which a trustee is delegating his powers and functions (for example, in the case of a solicitor who is taking an extended leave of absence and needs to make arrangements for a colleague to act in his place in relation to a number of trusts of which he is trustee).
- 7.10 Delegation of power by trustees of land should not be done by means of a Trustee Act power of attorney. Instead, an ordinary power of attorney or a lasting power of attorney must be used. The relevant provisions are contained in the Trustee Delegation Act 1999. The use of an ordinary power of attorney rather than a Trustee Act power of attorney means that the 12 month delegation time limit will not apply in these circumstances.

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- 7.11 It is important to note that capital monies arising from land must be paid to at least two trustees. A receipt from a sole trustee will not be valid. This means that a person cannot act as a trustee in his own right and as another trustee's attorney. There must be two separate individuals acting. In practice, this is very relevant where a husband and wife jointly own the house in which they live. In these circumstances, it will be necessary for an additional trustee to be appointed to give a valid receipt for the proceeds of sale.
- 7.12 As with any form of power of attorney, it is advisable to take specialist legal advice so as to ensure that the correct authority is conferred on the attorney and that the attorney acts pursuant to such authority. Where trustee duties and responsibilities are also involved, specialist legal advice is even more important.

## 8. POWERS OF ATTORNEY IN SCOTLAND

- 8.1 In Scotland there are also three main types of power of attorney: (i) general powers of attorney (these are broadly similar to general powers of attorney in England and Wales), (ii) continuing powers of attorney (or financial powers of attorney) and (iii) welfare powers of attorney. It is possible to have combined powers of attorney that include both welfare and financial powers.
- 8.2 In Scotland, a general power of attorney does not need to be registered with the Office of the Public Guardian ("OPG") unless the granter (the donor in England and Wales) wants the power to continue if they later lose capacity.

### CONTINUING POWERS OF ATTORNEY

- 8.3 A continuing power (sometimes referred to as a financial power) of attorney gives power over the granter's property and finances. This power may start immediately, and will continue in the event of the granter's incapacity, or it may begin at a later date (for example when the granter becomes incapable). All continuing powers of attorney must be registered with the OPG before they can be used. An individual or a firm (for example, of solicitors) can act as an attorney under a continuing power of attorney.

### WELFARE POWERS OF ATTORNEY

- 8.4 A welfare power of attorney gives the attorney power over decisions that need to be taken about the granter's welfare and health care. This power will only take effect if the granter becomes incapable. Accordingly, under this power an attorney cannot intervene where the granter has capacity. Incapacity is often determined by a doctor but it is good practice for the granter to specify in the deed how they would like their incapacity to be determined and who should do that (see under 8.10). Like continuing powers of attorney, welfare powers of attorney also need to be registered with the OPG before they can be used.
- 8.5 In Scotland, only an individual can be a welfare power of attorney.
- 8.6 In Scotland, the granter can revoke a continuing or welfare power of attorney once it has been registered with the OPG provided they still have capacity at that time. The granter must give notice of the revocation in writing to the OPG. If a granter wishes to revoke either some or all of the powers in the power of attorney, a certificate completed by the prescribed person (a registered and licensed medical practitioner, practising solicitor or advocate) must be attached to the letter of revocation. A sheriff can revoke any of the powers granted by the power of attorney; or the appointment of an attorney.
- 8.7 In Scotland there is no provision at law for the reimbursement of an attorney acting under a welfare power of attorney or a continuing power of attorney. To allow an attorney to claim fees and/or out of pocket expenses incurred in the performance of functions in their role as an attorney, provision is required in the power of attorney document. In the case of a professional attorney appointed under a continuing power of attorney (for example, a solicitor) the power of attorney is likely to make provision for the deduction of fees and expenses.
- 8.8 A continuing or welfare attorney is not obliged to do anything which would otherwise be within the powers of the attorney if doing it would, in relation to its value or utility, be unduly burdensome or expensive.

### CREATION OF POWERS OF ATTORNEY IN SCOTLAND

- 8.9 In Scotland there are three documents required to create a power of attorney: (i) a written document containing the power, (ii) a certificate of capacity and (iii) a registration form.

- 8.10 The written document should set out the precise powers granted to the attorney. A welfare power of attorney must also include a statement which shows that the granter has considered how incapacity is to be determined. Such a statement is also required in a continuing power of attorney, where the powers are only exercisable once the granter has lost capacity.
- 8.11 The document must also include a certificate of capacity. This is a statutory certificate (pursuant to Adults with Incapacity(Scotland) Act 2000 section 16A) signed by a solicitor registered to practise in Scotland, a practising member of the Scottish Faculty of Advocates or a registered or licensed medical practitioner, which confirms that:
- a) they have interviewed the granter immediately before he/she signed the power of attorney document;
  - b) they are satisfied either through their own knowledge or by consulting another person that the granter fully understands what he/she is doing and the nature and extent of the powers he/she is giving; and
  - c) they have no reason to believe that the granter is acting under any undue influence
- 8.12 The attorney being appointed cannot also sign the certificate of capacity. However, if the prospective attorney is a solicitor in a firm, another solicitor in the same firm may sign. Where the firm itself is being appointed it is good practice for the certifier to be someone independent of the firm. The certifier could be a solicitor in the firm but a Partner in the firm would not be able to act as certifier in these circumstances.
- 8.13 Registration of powers of attorney can be dealt with by post or electronically and an OPG registration form should also be completed. For further details refer to the OPG website: <http://www.publicguardian-scotland.gov.uk/power-of-attorney/epoar/submitting-a-power-of-attorney>. As at 1st April 2016, registration dues are £74 per deed.

## 9. ENDURING POWERS OF ATTORNEY IN NORTHERN IRELAND

- 9.1 Northern Ireland has both general and enduring powers of attorney ("EPAs"). There is no provision for lasting powers of attorney at present in Northern Ireland.
- 9.2 General powers of attorney and EPAs in Northern Ireland operate in the same way as in England and Wales (although it has not been possible to grant new EPAs in England and Wales since October 2007).
- 9.3 As in England, unless specific restrictions are included, an EPA in Northern Ireland is effective immediately upon execution and before the donor loses capacity. Once the attorney believes the donor has lost or is losing their mental capacity, they are under a duty to register the EPA with the High Court, Office of Care and Protection ("OCP") in Northern Ireland.
- 9.4 An EPA can be tailored in terms of the powers granted to and restrictions placed upon the attorney. The EPA can apply to all of the donor's property or restricted to certain assets (for example bank accounts only with property excluded). The attorney's powers can be restricted, for example, to prevent the sale of property whilst allowing the attorney to otherwise manage the property (such as organising home insurance, paying bills, accepting rental income, etc). As in England and Wales, a common restriction included in EPAs is to state that the EPA only becomes effective at such time as it is believed the donor is losing capacity. As noted above, it is at this stage that the attorney is duty-bound to register the EPA with the OCP and so, in practice, many EPAs do not take effect in Northern Ireland until they are registered due to the restrictions that are incorporated within the document and the onus upon attorneys to register once mental capacity is being lost.
- 9.5 A useful explanatory note issued by the Northern Ireland Courts and Tribunal Services about EPAs in Northern Ireland is available at: <https://www.courtsni.gov.uk/SiteCollectionDocuments/Northern%20Ireland%20Courts%20Gallery/Business%20Area%20Docs%20-%20RCJ/EPA-Notes-For-Guidance.pdf>

If you have any queries in relation to this document please email [jmellor@ciot.org.uk](mailto:jmellor@ciot.org.uk).