

# An update on EPA and assisted decision-making

**Sile O'Dowd provides a guide for GPs who are helping people avail of their rights under the new decision support system**

**THE COMMENCEMENT** of certain sections of the Assisted Decision-Making and Capacity Act 2015 (the ADMA) in April 2023 introduced changes to the Enduring Power of Attorney (EPA) process. GPs continue to play an important role in helping people avail of their rights under the new system for decision support services provided for by the ADMA, including but not limited to the creation of EPAs.

## Enduring Power of Attorney (EPA) – What is an EPA?

An EPA is a legal document allowing a person (known as the donor), with full capacity the opportunity to plan for their future. The donor nominates a person (known as the attorney) to take control of the donor's personal welfare and/or financial assets in the event that the donor loses capacity. The nominated attorney does not need to be a lawyer and is typically a family member or trusted friend of the donor. The donor may appoint more than one attorney specifying how decisions are to be made between the two attorneys. In summary, the EPA is activated when capacity is lost and can be varied and/or revoked at any stage while a donor has capacity. It can also be rescinded following activation if the donor regains capacity.

## What decisions may be included in an EPA?

An EPA, depending on its content, may allow the attorney to make decisions regarding a donor's personal care, for example: the people the donor sees, their day-to-day diet, where the donor lives and may also include decisions regarding property and financial affairs such as housing, business affairs and social welfare benefits.

For example, property and affairs would include: Managing finances; buying and selling property; applying for benefits; carrying on a business; paying debt and liabilities; providing for other persons; court proceedings.

Personal welfare would include: accommodation, education and training, social services; healthcare; participation in healthcare/social care research, not including clinical trials; and "...other matters relating to the relevant person's wellbeing".

While there had been speculation prior to the commencement of the ADMA about the scope of EPAs potentially being extended to encompass healthcare or end of life decisions, this has not been the case.

Section 59(5B) has clarified that a donor may not purport to give power to the attorney to consent to or refuse treatment. An advance healthcare directive is the correct instrument to set out wishes in relation to healthcare treatment.

## The new EPA process under the ADMA

Previously, the execution and registration of an EPA was governed by the EPA 1996 Act. The EPA was executed (cre-

ated) while the person still had capacity and was registered (activated) with the High Court when the person was found to have lost capacity. An EPA made under the Powers of Attorney Act 1996 prior to the introduction of the ADMA is still valid.

There is no new process required to register a 1996 Act EPA and they remain registered in the Court and the DSS is not involved. The only impact on 1996 Act EPAs is that the DSS may receive and investigate complaints against an attorney appointed under the 1996 Act.

Since April 26, 2023, the process for making an EPA is now governed by the ADMA. It remains a two-stage process with use of slightly different terminology, registration (which is now the same as execution/creation) and notification (which means it is activated):

- Registration with the DSS – Section 68
- Notification to DSS – Section 71A.

The steps to making an EPA under the ADMA can be found on the Decision Support Service's (DSS) website<sup>1</sup> and are summarised below.

## Stage 1: Registration with the DSS when the EPA is created – Section 68 ADMA

### Creation of EPA document

The EPA document sets out the details of donor, attorney, authority and details in relation to personal welfare decisions, property and affairs. The donor or the person signing on his behalf and the attorney shall sign the instrument creating the EPA in the presence of each other and in the presence of two witnesses.

### Legal practitioner statement

This is a statement completed by a legal practitioner that, after interviewing the donor and making necessary enquiries to ensure he/she:

- Is satisfied that the donor understands the implications of creating the power
- Is satisfied that the donor is aware that he or she may vary or revoke
- Has no reason to believe that the instrument is being executed as a result of fraud, coercion or undue pressure.

### Statement of capacity

This is a statement of capacity by a medical practitioner or healthcare professional (see further below) confirming the donor has capacity. This is where a GP is likely to be asked to be involved in the first stage of the process.

### Notification to notice parties

Notice parties must be nominated and notified of the making of the EPA as a safeguard measure. One of the notice parties has to be a spouse or civil partner or a child. If none, then a relative must be notified such as a parent, sibling,

grandchild, niece or nephew, etc. The notice party cannot be the attorney.

#### Donor statement

The donor themselves must confirm that they understand the effect and consequences of the EPA.

#### Attorney statement

The attorney(s) must confirm acceptance of their appointment and of the reporting, registration and notification requirements. They must also declare they are not the owner or registered provider of a designated centre or mental health facility in which the person who intends to appoint them as attorney resides.

There are also signing and witnessing requirements that must be met for the creation of the above documents. Once these documents are created and the notice requirements and time periods are met, the EPA is uploaded to the DSS portal for review. This should be done within three months of its creation. The DSS conducts a review prior to registration to ensure that criteria are met, including compliance with notice requirements to specified notice parties and considering the eligibility and suitability of the attorney.

#### Stage 2: Notification of enduring power of attorney

##### Notification to DSS

If the donor loses capacity in relation to one/more decision(s), the attorney must notify the DSS.

##### Capacity assessment

The attorney or solicitor should request two capacity assessments be carried out in respect of the donor.

##### Notice is sent to notice parties (including donor)

This is a safeguarding measure which provides an opportunity to the notice parties to object to the activation of the EPA within a period of five weeks.

##### Activation

Once notification is accepted by the DSS, the EPA is activated and the attorney(s) has legal authority to make relevant decisions on behalf of the donor. The attorney's reporting obligations also commence on this date. The notified EPA is included on the DSS Register of Decision Support Arrangements. The DSS has a role in monitoring and supervising attorneys and will maintain a register of EPAs which doctors can search with regard to their patients.

##### Role of the registered medical practitioner

The doctor has a role to certify capacity at two stages in the EPA process. There are template statements and guidance documents available on the DSS website.

##### Doctor's role at registration stage

While the donor's solicitor is required to discuss the EPA and its consequences with the donor at the time of creation, a doctor should explain the consequences of the transfer of the donor's personal care and financial decisions and confirm that the donor understands the implications of creating the EPA. The donor should present a copy of the EPA to the doctor at the assessment.

##### Assessing capacity

The ADMA defines capacity as the "ability to understand, at the time that a decision has to be made, the nature and consequences of the decision to be made by him or her in the context of available choices at the time". It is a decision-specific and time-specific assessment.

The key consideration is that the person must understand

the effect of creating the EPA and that he or she will be effectively passing over control of their personal care and/or assets to their attorney when he or she becomes incapacitated. The DSS has produced a Code of Practice (COP) on supporting decision making and assessing capacity which is available on its website.<sup>2</sup>

The COP provides that there are four basic criteria that need to be considered when understanding whether an individual has capacity:

- **Understanding:** can the patient comprehend the information provided?
- **Retention:** can the patient retain the information long enough to make a decision?
- **Reasoning:** can the patient use the information to weigh up a decision by comparing various options open to them?
- **Expression:** can the patient adequately express and communicate their decision?

If satisfied that the donor does have capacity to understand the consequences of the EPA, the first statement of capacity<sup>3</sup> should be completed. This statement requires you to include the date the EPA was executed.

##### Doctor's role at notification stage


At the notification stage, two statements regarding the donor's capacity must be obtained and submitted to the DSS. Again, a copy of the EPA should be provided to the medical practitioner or healthcare professional prior to each assessment being undertaken. Each assessor must independently assess the donor's capacity and confirm that the donor lacks capacity in relation to one or more decisions contained in the enduring power of attorney. The DSS has a second template statement for this available on its website.<sup>4</sup>

##### Healthcare professionals

In addition to registered medical practitioners, the prescribed classes of healthcare professionals who can perform a capacity assessment are registered<sup>5</sup>: occupational therapists; nurses; social workers; speech and language therapists; and midwives.

##### Record keeping

As with all assessments, it is important to maintain careful record keeping. The COP<sup>6</sup> also provides specific guidance regarding the level of record-keeping required and advises that the assessor (ie. doctor) should document the assessment process and the evidence used to reach any decisions regarding capacity.

It is advisable to carefully document in the patient's records the decision reached and any assessment tools. If you require any further information, please contact your indemnifier for advice. 

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##### References

1. <https://decisionsupportservice.ie/services/enduring-power-attorney-epa/making-enduring-power-attorney>
2. 1. COP\_on\_supporting\_decision-making\_and\_assessing\_capacity\_0.pdf (decisionsupportservice.ie)
3. Enduring Power of Attorney - Statement regarding donor capacity - First Statement 1.pdf (decisionsupportservice.ie)
4. Enduring Power of Attorney - Statement regarding donor capacity - Second Statement 1.pdf (decisionsupportservice.ie)
5. Assisted Decision-Making (Capacity) Act 2015, Section 60 (irishstatutebook.ie)
6. See section 7.5 1. COP\_on\_supporting\_decision-making\_and\_assessing\_capacity\_0.pdf (decisionsupportservice.ie)