

## Legal Practitioners' Liability Committee

### ENDURING POWERS OF ATTORNEY: WITNESSING AND CERTIFICATION ISSUES

#### Introduction

The *Instruments (Enduring Powers of Attorney) Act 2003* inserted Part XIA relating to enduring powers of attorney into the *Instruments Act 1958* ("the Act"). It came into operation on 1 April 2004.

The requirements for witnessing enduring powers of attorney have changed considerably as a result of the amendments. Set out below is a summary of those changes and a discussion on how you can best manage the risks that the new requirements bring. A checklist is also provided.

The LPLC has also produced a separate bulletin to highlight some of the **other** areas where risks may lie for solicitors preparing enduring powers of attorney on behalf of their clients.

#### The changes

Two adult witnesses are now required to witness an enduring power of attorney. Only one of those witnesses may be a relative of the donor or attorney and one of those witnesses **must** be a person authorised by law to witness the signing of a statutory declaration (section 125).

Both witnesses must **certify** that-

- the donor signed the enduring power of attorney freely and voluntarily in the presence of the witness; and
- at the time, the donor appeared to the witness to have the **capacity** necessary to make the enduring power of attorney (section 125A).

"Capacity" is not defined in the Act.

Section 118 of the Act is entitled "*When does a donor have capacity to make an enduring power of attorney?*" The section goes on to provide that a donor may only make an enduring power of attorney if the donor understands the **nature and effect** of the enduring power of attorney. Understanding the "nature and effect" of the enduring power of attorney **includes**, but is not limited to, understanding six items listed in that section, namely -

1. That the donor may, in the power of attorney, specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney.
2. When the power is exercisable.
3. That once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney.

4. That the donor may revoke the enduring power of attorney at any time the donor is capable of making an enduring power of attorney.
5. That the power the attorney is given continues even if the donor subsequently ceases to have legal capacity.
6. That at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.

A note at the end of that section states: “It is advisable for the witness to make a *written record* of the evidence *as a result of which* the witness considers that the donor understands these matters” (emphasis added).

### **What does this mean?**

Section 36(2A) of the *Interpretation of Legislation Act* 1984 provides that headings to sections form part of an Act if that Act is passed on or after 1 January 2001. Section 36(3A) states that a note (being a note at the foot of a provision and not a marginal note, footnote or endnote) forms part of an Act if that Act was passed on or after 1 January 2001.

It appears, therefore, that when you are witnessing an enduring power of attorney and certifying as to the donor’s capacity, you must satisfy yourself that, **at the very least**, the donor understands the matters set out in 1 to 6 above. Furthermore, you need to keep a written record of the evidence that led you to that conclusion.

The information brochure prepared by the Department of Justice in relation to enduring powers of attorney attempts to define capacity as follows:

*Capacity is a legal term that means:*

- *you understand the main consequences of a decision;*
- *you are able to take responsibility for making a choice; and*
- *you are able to make a choice based on the risks and benefits important to you.*

The brochure also states that if the witness is **in any doubt** about the donor’s capacity he or she should make appropriate enquiries with the consent of the donor, for example, of the donor’s doctor. The brochure also states that where it is possible that **there may be some doubt in the future** as to the donor’s capacity at the time of signing the document, then a medical certificate confirming capacity should be obtained by the donor and attached to the document.

### **How to manage the risk**

The LPLC recommends that in all cases where an enduring power of attorney is witnessed by a solicitor, a written record be kept of the matters discussed in relation to determining if the donor had capacity. This discussion should occur at the time the power is executed so that it is clear that the donor understood what he or she was doing at that time. Discussing these issues only when taking initial instructions may not be sufficient to fulfil the certification

requirement that the donor have capacity at the time of signing, particularly if there is risk of dementia.

Attached is a checklist which may serve as a reminder of the issues raised by section 118 as well as double as a file note of the issues discussed with the donor. It is provided by the LPLC merely as a tool to assist solicitors in keeping a written record.

In order to satisfy yourself that your client has understood your explanation of the nature and effect of the enduring power of attorney, it is useful to ask the client to say in his or her **own words** what he or she understood the explanation to mean.

For this reason, space has been provided in the checklist for the client's response (or a summary of it) to be recorded. A response from the client may be in simple terms such as, "I understand that my son may now take money out of my bank account or sell or mortgage my house". However, it is probably not sufficient for the client just to say "yes" to the question "do you understand?" Without testing the client's understanding, it may be more difficult to later show that the client did actually understand what was explained to him or her.

You are encouraged to include in the final section of the checklist any of the usual questions (including responses) or comments you make when considering the issue of capacity. The completed checklist should be kept on your file.

Of course, your file should not be automatically destroyed after the expiration of a set number of years but kept indefinitely, or until it is at least clear that the power is no longer operative.

**Legal Practitioners' Liability Committee  
May 2005**

**Legal Practitioners' Liability Committee**

**CHECKLIST FOR WITNESSING AN ENDURING POWER OF ATTORNEY**

**Date**                    \_\_\_/\_\_\_/\_\_\_

**Time Commenced**    \_\_\_\_\_

**Time Finished**        \_\_\_\_\_

**Location**                \_\_\_\_\_  
\_\_\_\_\_

**In Attendance**        **Donor:**                    \_\_\_\_\_

**Solicitor:**                \_\_\_\_\_

**Other Witness:**        \_\_\_\_\_

Photo identification of donor.

\_\_\_\_\_  
*(Specify form of identification produced e.g. driver's licence, passport)*

Donor over 18 years of age.

Donor has read pages 1-7 of the information brochure from the Department of Justice.

Current medical certificate produced to me (if applicable).

\_\_\_\_\_  
*(Specify medical practitioner's name and address.)  
Attach copy of medical certificate to these notes.*

Donor stated to me that they were signing the power of attorney freely and voluntarily.

Interpreter used (if applicable) and certificate signed by interpreter obtained  
*Attach interpreter's certificate to these notes*

***The following concepts were discussed with the donor:***

I explained to the donor that an enduring power of attorney allows the person he/she has nominated (the attorney) to make financial and legal decisions for him/her subject to any limitations or conditions or instructions he/she has included in the enduring power of attorney. I also discussed any limitations or conditions or instructions included in the subject enduring power of attorney.

I asked the donor to tell me what he/she understood my explanation to mean.  
*(Record what the donor's response was)*

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I told the donor that he/she can specify a time or event when the enduring power of attorney starts to operate and/or finishes. I discussed when the subject enduring power of attorney will start and end.

I asked the donor to tell me what he/she understood my explanation to mean.  
*(Record the donor's response)*

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I explained to the donor that once the enduring power of attorney commences the attorney can stand in the donor's place and do anything the donor could do (eg. withdraw money from the donor's bank account, mortgage the donor's property, sell the donor's property), subject to any limitations in the power.

I asked the donor to tell me what he/she understood my explanation to mean.  
*(Record the donor's response)*

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I explained that the donor may revoke or cancel the power of attorney as long as he/she had the legal capacity to do so. I explained that if the donor lost legal capacity he/she could not revoke a power or appoint a new attorney.

I asked the donor to tell me what he/she understood my explanation to mean.  
*(Record the donor's response)*

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I explained that an attorney can continue to deal with the donor's affairs and act in his/her name after the donor has lost legal capacity.

I asked the donor to tell me what they understood my explanation to mean.  
*(Record what the donor's response was)*

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Any other comments on capacity

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