Enduring Powers of Attorney: Why You'd be Mad Not to Have One!

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An Enduring Power of Attorney, or EPA, is an instrument by which you can provide for who is to manage your life and finances in the unfortunate event of subsequent mental incapacity. Unlike an ordinary Power of Attorney, it is of no effect unless you become mentally incapable. The main advantages of executing an EPA include avoiding the possibility of being made a Ward of Court and allowing a personal decision to be made, at a time when you are mentally capable, as to who should be in charge of your personal and financial affairs in the event of future mental incapacity.

Proposed changes to the law on mental capacity, provided for under the Mental Capacity and Guardianship Bill 2007, mean that EPAs may become yet more relevant and be of even greater benefit in this difficult situation.

What are the Proposed Changes?

The proposed changes under the new Bill include:

- Provision for informal decision-making on behalf of adults who lack capacity;
- The establishment of a Guardianship Board, which may appoint Personal Guardians to deal with the property, financial matters and welfare of adults who lack capacity; and
- The establishment of the Office of Public Guardian.

Informal Decision-Making

While the Bill provides for informal decision-making on behalf of persons whose decision-making capacity is in doubt, it appears that the new powers will not extend to decisions regarding business and financial affairs, except in so far as those decisions relate to "personal care, health care or treatment". Moreover, as failure to act in compliance with the legislation could potentially involve a person in both civil and criminal liability, a person wishing to make personal care decisions in your best interests might feel constrained from doing so. Both of these difficulties are avoided where the relevant individual's authority is clearly set out in an EPA.

There is also a danger that an individual whom you don't trust might feel empowered by the informal procedures to make decisions on your behalf. Again, this possibility can be avoided by having in place an appropriately drafted EPA since section 9 (2) of the Bill specifically provides that the informal procedures do not authorise an individual to do any act that conflicts with a decision made by an attorney lawfully operating under an EPA.

The Guardianship Board

This new body can appoint guardians for adults who lack capacity. However, even if an application to the Guardianship Board were to prove relatively straightforward in practice - which is far from certain - this process would obviously involve an external body deciding who should control your life and finances. This can be avoided by having an EPA in place, which effectively allows you to make this important decision for yourself.

The Office of the Public Guardian

The main possible disadvantage of executing an EPA has always been the potential for abuse, as the powers bestowed on an attorney acting under an EPA can be very broad. However, Part 5 of the Bill provides for new safeguards in relation to potential abuse by attorneys operating under an EPA. The Bill provides for the establishment of the Office of Public Guardian and details its ambit to include:

- the supervision of attorneys operating under an EPA;
- dealing with representations (including complaints) about the way in which an attorney operating under an EPA is exercising his or her powers; and
- issuing codes of practice for the guidance of attorneys operating under EPAs.

In summary, in view of the changes proposed under the Bill, not only is it still advisable to execute an EPA but the advantages of doing so are potentially all the greater.

Please note: the Mental Capacity and Guardianship Bill 2007 was introduced in the Seanad on 12 February, 2007 and this article is based on the text of the Bill as initiated.