
How did we get Here and Where do we go Now?



Practitioners are all too aware of the issues that have arisen in practice since the new system for Enduring Powers of Attorney (“EPA”) was introduced on the 26 April 2023 on the commencement of the Assisted Decision-Making (Capacity) Act (“the 2015” Act”). Áine Hynes SC analyses the issues faced and what can be done

The 2015 Act, as originally drafted, was broadly similar to the Powers of Attorney Act 1996. The EPA instrument was to have been specified/drafted by the relevant Minister by way of regulation and registered with the Decision Support Service (“DSS”) when the donor lost capacity.

Two-stage Registration Process

The Assisted Decision-Making (Capacity) (Amendment) Act 2022 altered the situation greatly. The changes included a two-part registration system which means firstly that the EPA instrument must be registered with the DSS on creation and secondly, when the donor loses capacity, it must be notified to the DSS by way of a further registration process. The Law Society made submissions on the proposed changes which outlined its serious concerns regarding the new two-step registration process and recommended that this should not be adopted. The submissions can be accessed here:-

<https://www.lawsociety.ie/globalassets/documents/submissions/2022-submission---adma-2015.pdf>

The Law Society’s submission and recommendation is reflected in the report of the Joint Committee on Children, Equality, Disability, Integration and Youth Report on the pre-legislative scrutiny of the General Scheme at recommendation 53 which called for the “Removal of the two-step process for registering an EPA. Alternative approaches should be developed in conjunction with DPOs and other stakeholders, including those who made submissions to the Committee on this matter.”

Significant stakeholders such as the solicitor’s profession were not consulted further on foot of that recommendation. The new DSS system does not serve donors who need to create EPA instruments on an urgent basis; donors who are not digitally skilled; and those donors who do wish to instruct their solicitors in the creation of their EPA instruments.



The Devil is in the digital

The Amendment Act also shifted responsibility for the specification/drafting of the EPA instrument from the Minister to the Director of the DSS. With a further late amendment to the 2015 Act, in May 2022 (insertion of a new s95B), the DSS can specify that the instrument is in electronic form. The application is to be made via the DSS Portal System. This is called MyDSS.

The following is necessary in order to access the digital MyDSS portal:-

1. The donor and attorneys must be computer literate
2. The donor and all attorneys must create a MyDSS account online
3. In order to create a MyDSS account, the donor and all attorneys must have their own email address and a PPS number
4. To verify a MyDSS account, the user must have a verified MyGovID account
5. To create a MyGovID account, the user must have a mobile phone and a Public Services Card (PSC)

6. To obtain a PSC card, the user must make an appointment and present in person at their PSC Centre with sufficient identification.

There is no doubt but that the donor must be digitally literate just to access the MyDSS Portal. Whilst the laudable intention of government is that donors should create EPAs at an early stage, the reality is that many people wishing to create an EPA do so in circumstances where they are concerned about losing capacity, following on from a diagnosis of dementia or Alzheimer's disease. These are conditions which, in the main, affect an older cohort of the population. That cohort are quite likely to be excluded from creating an EPA on the MyDSS system unless they are assisted in doing so.

But What about Solicitors?

Crucially, there is no solicitor portal, so solicitors cannot access the portal system directly on behalf of their clients. The Revenue's online ROS system allows a tax adviser to prepare and file returns for a



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taxpayer, solicitors have their own portals to access *Tailte Eireann*, the Companies Registration Office and the Injuries Resolution Board's web-portal. The requirement for solicitors to have access to the DSS portal system should have been a key consideration at the initial design stage of the system. It has become clear that the DSS digital system was not designed for donors to have their solicitors involved in the EPA application process.

It also became evident on commencement that the only way for solicitors to act for their clients on the creation of an EPA instrument was for solicitors to log onto their client's MyDSS Portal. The position is that many solicitors do not wish to use their client's MyDSS portal as there is an entirely reasonable apprehension that it may increase risk for the solicitor concerned. In addition, solicitors report that many of their clients do not have an email account - it would not be appropriate that a solicitor create an email account for a client.

The DSBA and the Law Society met with the DSS shortly after commencement and made the following requests:-

- That the DSS make properly available a specified EPA Instrument as was the case for the freely available specified instrument under the 1996 Act (this is a requirement under the 2015 Act)
- That a Solicitor Portal be provided
- That there would be a web-based form to use with clients or a paper-based workaround for solicitors and their clients.

In June 2023, following communications and meetings with the DSS, the DSBA and the Law Society, an arrangement was reached that solicitors could complete a paper-based application for their clients. This has proven very time consuming, however, many solicitors wish to use this manual process for the reason stated above.

Removal by the DSS of the Paper-based Option where a Solicitor is Acting for a Donor

In March of 2024, the DSS published a new Accessibility Policy. This states that where a person

has accessibility issues, they may complete a manual paper-based application. However, if they are being assisted by a professional, they will not be considered as having accessibility issues. This means that where a solicitor is acting for a donor, they can only do so via their client's MyDSS portal. On learning of the proposed changes to the accessibility policy in April 2024, the DSBA and the Law Society met with the DSS to outline the grave concerns about the impact of this for clients and solicitors. The Law Society also met with Minister Rabbitte and the department of Children, Equality, Disability, Integration and Youth. The Law Society again called for a Solicitor Portal, and in the meantime, submitted that a paper-based option must remain in place where a solicitor does not wish to use their client's MyDSS. However, despite negotiations, the DSS is commencing the Accessibility Policy from the 8th of July 2024.

I am aware that many solicitors are not prepared to use their clients' MyDSS portal and it is entirely the prerogative of those solicitors not to do so. I am also acutely aware of deep disappointment within the profession that many solicitors can no longer provide their clients with the reassurance that they have left their solicitor with their affairs in order. The new Accessibility Policy means that donors assisted by professionals, including solicitors, are denied from having access to the paper-based process and in effect there is now a "digital only" policy in respect of those donors. As such the Policy serves to exclude a significant number of donors who do wish to use the services of their trusted family solicitor.

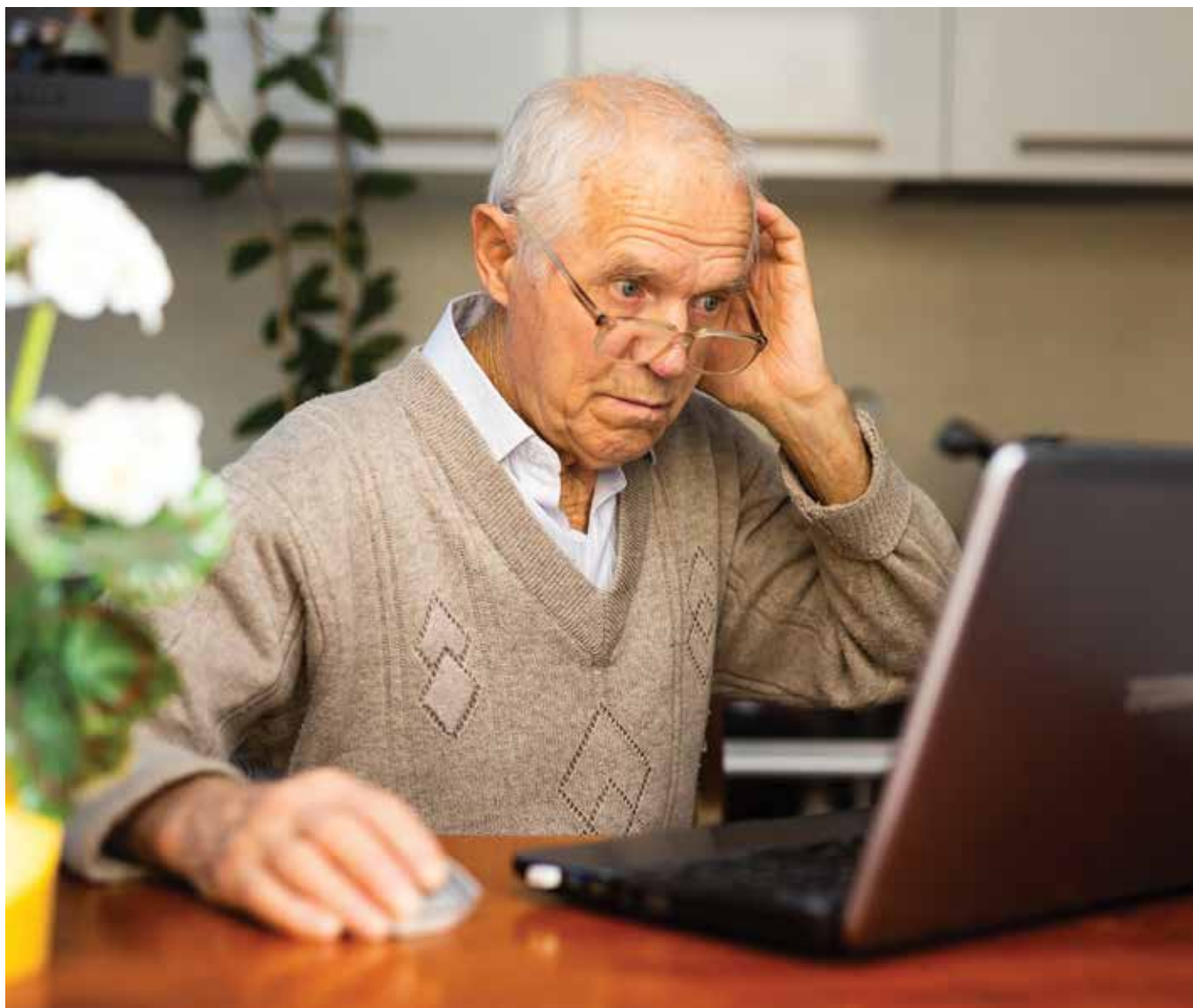
Where do we go now?

The DSS has advised that a solicitor's portal will not be available in the short term – the DSS have advised that it will cost in excess of €1.5 million and take at least 18 months to set up. There has been no commitment to the creation of a solicitor's portal and the reality is that despite great efforts by many solicitors, the DSBA and the Law Society, that this solution to the current difficulties will not be made available.

Clearly, solicitors cannot be compelled by any agency to act for clients where they have concerns about using their client's MyDSS portal. Nor can solicitors be compelled to complete the Legal Practitioner statement required to validate an EPA instrument as prescribed by virtue of s60 of the 2015 Act. Indeed, it is difficult for a solicitor to certify that they have no reason to believe that the instrument is being executed by the donor as a result of fraud, coercion or undue pressure unless they have been involved in the process from the outset. It is likely that consideration will be given to the removal of the requirement for a Legal Practitioner's statement. However, the indemnity provided by solicitors as to the integrity of the process, which serves to avoid complaints and future litigation, will likely need to be carefully considered by the Oireachtas, prior to any such removal.

Further consideration must also be given to the validity of the DSS system as currently operated. The legislation does not envisage an initial submission of an application form, after which, the Director provides the donor with the specified form for the instrument and documentation to be completed. The DSS website notes that on making an application, the donor "will be





provided with forms that are unique to you as part of that application.” It further states that “the unique forms are the only forms that will be accepted by the Decision Support Service”. This does not appear to be in line with the legislation which provides that an application for registration will take place *after* the execution of the EPA instrument and after the completion of supporting documentation (s68(1)).

It is easily foreseeable that a client may wish to make an EPA in urgent circumstances prior to going through the application process currently being employed. If that EPA is materially in line with the requirements of the statute, it would appear by virtue of s69(1A) that it should be accepted for registration.

How to Assist Clients in Supporting their will and Preference

The current system has not responded to the needs of donors – only 167 EPA instruments were registered in the first 12 months of operation of the DSS system. It is inevitable that solicitors will continue to have concerns about their role in the EPA process for all

the reasons described above. There does not appear to be any simple or short-term resolution to the problems which have been well-rehearsed within the profession. Whilst such resolutions are actively being pursued by the DSBA and the Law Society, solicitors may wish to consider alternative means of ensuring a client’s will and preference are respected in the event they lose capacity.

Affidavit of Wishes in the Event a Person Loses Capacity

Richard Hammond S.C., speaking at the Solicitors Growth Seminar on Enduring Powers of Attorney, on the 30th of May 2023, discussed the creation of an Affidavit of wishes. He noted that in view of the difficulties being faced in the creation of an EPA, a client may wish to complete an Affidavit of wishes in the event that client loses capacity, and an application is made to the Circuit Court. The Affidavit might usefully set out who the client wants to appoint as a Decision-Making Representative and what matters the Decision-Making Representative will deal with. ☐