

A Guide to Enduring Powers of Attorney & Wardship



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INTRODUCTION

At present under Irish law there are limited options available to deal with the affairs of a family member or loved one who is or has become mentally incapacitated. This guide has been prepared to look at the options and remedies under the current legal regime.

Wide ranging changes will be introduced by the enactment of the new Assisted Decision Making (Capacity) Bill 2013 and we will ensure to forward an updated Guide to all persons on our mailing list once this new legislation has been enacted.

WHAT IS WARDSHIP?

The Wardship procedure is the primary and default method of dealing with the affairs of a person who has declared to be of unsound mind and incapable of managing their affairs. One or more persons are appointed by the court (known as a 'Committee') to manage the affairs of the said person (known as the 'Ward') under the supervision and control of the court.

The purpose of the Wardship system in Ireland is to look after the welfare and to protect the property of a person suffering from a mental capacity or a minor. Within this guide we will focus on the system in place to protect adults who are unable to manage their affairs by reason of mental capacity.

WHAT ARE THE TYPICAL STEPS IN A WARDSHIP APPLICATION?

There are number of types of Wardship applications which depending on the circumstances of the case can be made. However in the majority of cases where a person is alleged to be of unsound mind an application will be made by their next of kin to the High Court. This application will be based on the Affidavits of two medical doctors.

The person making the application, usually the next of kin of the person who has lost capacity, must include the following information within their petition;

- Details/Description of the person alleged to be of unsound mind (name, address, religion, age, description and marital status)
- Details/Description of the next of kin and/or any person residing with the person alleged to be of unsound mind
- Details/Description of the person making the application
- Details of the assets & liabilities of the person alleged to be of unsound mind
- A detailed statement of facts.

If satisfied the Court will then allow the application to proceed and will request an up to date medical examination & report.

Notice of the application must be served on the person alleged to be of unsound mind and they will be given an opportunity to lodge a notice of objection.

If there is no objection from the respondent or a family member the Court will make an Order declaring that the person who the application has been made in relation to of unsound mind and order that they be taken under the Wardship of the court. The person is then known as a Ward.

A number of other Orders will also be made the most important being the appointment of a one or more persons ('the Committee') to manage the Ward's affairs and take responsibility for the care of the Ward and directing the lodgement in court of all of the deceased's liquid assets. A committee of both the person and or the estate of the Ward is required and in practice the same person/s will usually be appointed as both. The committee of the person looks after the physical welfare and personal care of the Ward while the committee of the estate is responsible for the person's property and investments.

In the event that there is no one willing to act as committee or there is a dispute in relation to whom should act the General Solicitor for Minors and Wards of Court will act.

Although the Committee is usually entitled to receive in income on behalf of the Ward together with any funds invested in court for expenditure on the Ward a separate bank account must be opened for the Ward and annual accounts must be filed with the court.

The Committee are unable to sell the Ward's property without leave of the court and only in certain circumstances (inability to let a property or insufficient funds in estate).

Given the complexity of this type of application it is advisable to seek the assistance of a Solicitor.

HOW LONG DOES THE WARDSHIP PROCESS TAKE?

Although the time taken can vary in the majority of cases the process will take three to six weeks from the date the relevant documentation has been lodged in the Office of Wards of Court.

CAN A PERSON BE DISCHARGED FROM WARSHIP?

Yes. If the court is satisfied that the ward is of sound mind and capable of managing his affairs it can discharge the Ward from Warship.

WHAT HAPPENS ON THE DEATH OF THE WARD?

On the death of a Ward it is necessary for an application to be made to conclude the Wardship proceedings. Once this has been done the Ward's estate is administered as normal. Once a Grant of Representation has been extracted the estate is distributed amongst the persons entitled either in accordance with the terms of the ward's will or under the rules of intestacy.

WHAT IS AN ENDURING POWER OF ATTORNEY ('EPA')?

An Enduring Power of Attorney ('EPA') is a power of attorney put in place by a person (known as a 'Donor') whereby one or more persons are appointed (known as an 'Attorney/s') to manage their affairs in the event that the Donor becomes mentally incapable.

It is important to note that a Donor cannot put in place an EPA after they have lost capacity and if this has happened the only option will be for an application to be made under the Wardship procedure as described above.

Under an EPA the Attorney will usually have full authority to manage the Donor's financial affairs and/or deal with any personal care decisions on their behalf. Such powers can be limited or curtailed in the body of the EPA however any such functions omitted from the scope of the EPA will then be dealt with via the Wardship procedure.

Although an EPA can be an attractive option for a Donor given its flexibility and cost effectiveness vs. Wardship, serious consideration should be given as to whether there is a suitable and trustworthy candidate to take on the role of Attorney. It is important to note that the Donor will have wide ranging powers over the affairs of the Attorney and will not be supervised by the court or any other person.

Once an EPA has been executed by the Donor it does not have any force or effect until such time as it can be shown that the Donor is incapable of managing their property/affairs because of a mental incapacity.

HOW DO I PUT AN ENDURING POWER OF ATTORNEY IN PLACE?

The form of an EPA is set out under the regulations issued pursuant to the Powers of Attorney Act 1996. If the format or content of the EPA does not adhere to the said regulations it will be defective and invalid.

The person appointing the Attorney, the Donor, must execute the EPA in the presence of a solicitor. The solicitor must be satisfied that the Donor understands the nature and effect of the EPA and that no undue influence is being exerted on the Donor by any person.

A certificate must also be obtained from the Donor's doctor confirming that the Donor has the requisite mental capacity to execute the EPA. The Attorney must sign the document after the Donor in the presence of a witness. By signing the EPA the Attorney confirms that they understand the obligations/duties they must adhere to, the primary one being that if the Donor's mental health deteriorates to such an extent that the donor is or is becoming mentally incapable of managing his affairs the Attorney must register the EPA.

In order to offer additional protection to the Donor, 2 people (who cannot be attorneys) must be notified of the execution of the EPA. At least one of the notice parties must be a relative and the said person will also be notified in the event an application is brought to register the EPA.

As discussed above an EPA has no force and effect when executed, to be acted upon it must be registered.

WHEN MUST AN ENDURING POWER OF ATTORNEY BE REGISTERED?

In order for a duty to arise to register the EPA, it is necessary to prove the following;

- That the donor is suffering from a mental disorder and
- That because of the mental disorder and mental incapacity, the person is incapable of managing and administering their property/affairs.

A medical certificate from a doctor is required to prove the Donor is or is becoming incapable of managing and administering their property/affairs.

The Attorney will then apply to register the EPA in the High Court. Before doing so notice of the said application must be served on the Donor, the Notice parties and the Registrar of the Wards of Court.

If no objections are received the EPA will be registered and the Attorney will have full control over the financial and personal affairs of the Donor subject to any restrictions set out by the Donor within the EPA.

ARE THERE ANY OTHER OPTIONS ARE THERE IN THIS JURISDICTION?

Unfortunately at the time of writing there are no other options in relation to dealing with the affairs of persons suffering from a mental disorder and/or mental incapacity. There is at the time of writing no formal legal recognition of a living will or advanced care directive in relation to healthcare decisions in Ireland at present.

The Assisted Decision-Making (Capacity) Bill 2013 is currently going through the Oireachtas and when enacted will introduce wide ranging and welcome changes in this area. The Bill when enacted will replace the antiquated legislation which current system of Wardship is governed by (Lunacy Regulations Act 1871).

Under the new legislation adults with diminished mental capacity will no longer be wards of court; instead a decision-making assistant, a co-decision-maker or an attorney will be appointed based on the capacity of the person.

The provisions of the new legislation will facilitate advance planning in two ways, enduring powers of attorney and advance healthcare directives. These options allow a person to plan for a situation of impaired capacity and to appoint someone that he or she trusts to take care of his or her affairs if that situation arises.

A new Office of the Public Guardian (OPG) will be established in the Courts Service which will have the role of monitoring the way in which the various decision-making supports are implemented. Decision-making assistants, co-decision-makers and decision-making representatives will all be supervised by the new office.

If you require any assistance in relation to any of the issues or topics dealt with within this guide please feel free to contact us at [01-6684366](tel:01-6684366) or info@johnconnorsolicitors.ie.



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