STATUTORY INSTRUMENTS

1987 No. 1627 (N.I. 16)

The Enduring Powers of Attorney (Northern Ireland) Order 1987

- - - - - - *15th September 1987*

Modifications etc. (not altering text)

C1 Order applied (2.12.2019) by Mental Capacity Act (Northern Ireland) 2016 (c. 18), **ss. 276(6)(c)**, 307(2) (with ss. 285-287); S.R. 2019/163, art. 2(2), Sch. Pt. 2 (with art. 3) (as amended by S.R. 2019/190, art. 2)

Introductory

Title and commencement

1.—(1) This Order may be cited as the Enduring Powers of Attorney (Northern Ireland) Order 1987.

(2) This Order shall come into operation on such day as the Head of the Department of Finance and Personnel may by order appoint[F1].

F1 fully exercised by SR 1989/63

Interpretation

2.—(1) The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

(2) In this Order—

"the court" means the High Court;

"enduring power" is to be construed in accordance with Article 4;

"mentally incapable" or "mental incapacity", except where it refers to revocation at common law, means, in relation to any person , that he is incapable by reason of mental disorder of managing and administering his property and affairs and "mentally capable" and "mental capacity" shall be construed accordingly;

"mental disorder" has the same meaning as it has in the Mental Health (Northern Ireland) Order 1986;

"notice" means notice in writing;

"trust corporation" has the meaning given in Article 9(4) of the Administration of Estates (Northern Ireland) Order 1979.

(3) Any question arising under or for the purposes of this Order as to what the donor of the power might at any time be expected to do shall be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

Enduring powers of attorney

Enduring power of attorney to survive mental incapacity of donor

3.—(1) Where an individual creates a power of attorney which is an enduring power within the meaning of this Order then—

(a) the power shall not be revoked by any subsequent mental incapacity of his; but

(b) upon such incapacity supervening the donee of the power may not do anything under the authority of the power except as provided by paragraph (2) or as directed or authorised by the court under Article 7 unless or, as the case may be, until the instrument creating the power is registered by the court under Article 8; and

(c) section 4 of the Powers of Attorney Act (Northern Ireland) 1971 (protection of donee and third persons) so far as applicable shall apply if and so long as sub-paragraph (b) operates to suspend the donee's authority to act under the power as if the power had been revoked by the donor's mental incapacity.

(2) Notwithstanding paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until the application has been initially determined, the attorney may take action under the power—

(a) to maintain the donor or prevent loss to his estate; or

(b) to maintain himself or other persons in so far as Article 5(4) permits him to do so.

(3) Where the attorney purports to act as provided by paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (a) or (b) of that paragraph, the transaction between them shall be as valid as if the attorney were acting in accordance with sub-paragraph (a) or (b).

Characteristics of an enduring power

4.—(1) Subject to paragraphs (6) to (8) and Article 13, a power of attorney is an enduring power within the meaning of this Order if the instrument which creates the power—

(a) is in the prescribed form; and

(b) was executed in the prescribed manner by the donor and the attorney; and

(c) incorporated at the time of execution by the donor the prescribed explanatory information.

(2) The Department of Finance and Personnel shall make regulations as to the form and execution of instruments creating enduring powers and the regulations shall contain such provisions as appear to that Department to be appropriate for securing—

(a) that no document is used to create an enduring power which does not incorporate such information explaining the general effect of creating or accepting the power as may be prescribed; and

(b) that such instruments include statements to the following effect—

(i) by the donor, that he intends the power to continue in spite of any supervening mental incapacity of his;

(ii) by the donor, that he read or had read to him the information explaining the effect of creating the power;

(iii) by the attorney, that he understands the duty of registration imposed by this Order.

(3) Without prejudice to the generality of section 17(3) to (5) of the Interpretation Act (Northern Ireland) 1954, regulations under paragraph (2)—

(a) may include different provision for cases where more than one attorney is to be appointed by the instrument than for cases where only one attorney is to be appointed; and

(b) may, if they amend or revoke any regulations previously made under that paragraph, include saving and transitional provisions.

(4) Regulations made under paragraph (2) shall be subject to negative resolution.

(5) An instrument in the prescribed form purporting to have been executed in the prescribed manner shall be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.

(6) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is—

(a) an individual who has attained eighteen years and is not bankrupt **[**F2or subject to a bankruptcy restrictions order**][**F3or a person in relation to whom a moratorium period under a debt relief order applies or who is subject to a debt relief restrictions order**]** ; or

(b) a trust corporation.

(7) A power of attorney under section 26 of the Trustee Act (Northern Ireland) 1958 (power to delegate trusts etc. by power of attorney) cannot be an enduring power.

(8) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.

(9) An enduring power shall be revoked by the bankruptcy of the attorney whatever the circumstances of the bankruptcy.

(10) An enduring power shall be revoked on the exercise by the court of any of its powers under part VIII of the Mental Health (Northern Ireland) Order 1986 if, but only if, the court so directs.

(11) No disclaimer of an enduring power, whether by deed or otherwise, shall be valid unless and until the attorney gives notice of it to the donor or, where Article 6(6) or 9(1) applies, to the court.

(12) In this Article "prescribed" means prescribed under paragraph (2).

F2 Words in art. 4(6)(a) inserted (21.4.2015) by The Insolvency (Northern Ireland) Order 2005 (Consequential Amendments) Order (Northern Ireland) 2015 (S.R. 2015/159), art. 1, **Sch. para. 8**

F3 Words in art. 4(6)(a) inserted (7.3.2016) by The Debt Relief Act (Northern Ireland) 2010 (Consequential Amendments) Order (Northern Ireland) 2016 (S.R. 2016/108), art. 1, **Sch. para. 11**

Scope of authority etc. of attorney under enduring power

5.—(1) An enduring power may confer general authority (as defined in paragraph (2)) on the attorney to act on the donor's behalf in relation to all or a specified part of the property and affairs of the donor or may confer on him authority to do specified things on the donor's behalf and the authority may, in either case, be conferred subject to conditions and restrictions.

(2) Where an instrument is expressed to confer general authority on the attorney it operates to confer, subject to the restriction imposed by paragraph (5) and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by an attorney.

(3) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may execute or exercise any of the powers or discretions vested in the donor as a tenant for life within the meaning of the Settled Land Act 1882.

(4) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say—

(a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively; and

(b) he may do whatever the donor might be expected to do to meet those needs.

(5) Without prejudice to paragraph (4) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further, that is to say—

(a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth**[**F4 marriage or the formation of a civil partnership**]**, to persons (including himself) who are related to or connected with the donor, and

(b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

F4 2004 c.33

Action on actual or impending incapacity of donor

Duties of attorney in event of actual or impending incapacity of donor

6.—(1) If the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable paragraphs (2) to (6) shall apply.

(2) The attorney shall, as soon as practicable, make an application to the court for the registration of the instrument creating the power.

(3) Before making an application for registration the attorney shall comply with the provisions as to notice set out in Schedule 1.

(4) An application for registration shall be made in the prescribed form and shall contain such statements as may be prescribed.

(5) The attorney may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power and he shall comply with any direction given to him by the court on that determination.

(6) No disclaimer of the power shall be valid unless and until the attorney gives notice of it to the court.

(7) Any person who, in an application for registration, makes a statement which he knows to be false in a material particular shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both; and

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or both.

(8) In this Article and Schedule 1 "prescribed" means prescribed by rules of court.

Functions of court prior to registration

7. Where the court has reason to believe that the donor of an enduring power may be, or may be becoming, mentally incapable and the court is of the opinion that it is necessary, before the instrument creating the power is registered, to exercise any power with respect to the power of attorney or the attorney appointed to act under it which would become exercisable under Article 10(2) on its registration, the court may exercise that power under this Article and may do so whether the attorney has or has not made an application to the court for the registration of the instrument.

Functions of court on application for registration

8.—(1) In any case where—

(a) an application for registration is made in accordance with Article 6(3) and (4), and

(b) neither paragraph (2) nor paragraph (4) applies,

the court shall register the instrument to which the application relates.

(2) Where it appears to the court that there is in force under part VIII of the Mental Health (Northern Ireland) Order 1986 an order appointing a controller for the donor but the power has not also been revoked then, unless it directs otherwise, the court shall not exercise or further exercise its functions under this Article but shall refuse the application for registration.

(3) Where it appears from an application for registration that notice of it has not been given under Schedule 1 to some person entitled to receive it (other than a person in respect of whom the attorney has been dispensed or is otherwise exempt from the requirement to give notice) the court shall direct that the application be treated for the purposes of this Order as having been made in accordance with Article 6(3), if the court is satisfied that, as regards each such person—

(a) it was undesirable or impracticable for the attorney to give him notice; or

(b) no useful purpose is likely to be served by giving him notice.

(4) If, in the case of an application for registration—

(a) a valid notice of objection to the registration is received by the court before the expiry of the period of five weeks beginning with the date or, as the case may be, the latest date on which the attorney gave notice to any person under Schedule 1, or

(b) it appears from the application that there is no one to whom notice has been given under paragraph 1 of that Schedule, or

(c) the court has reason to believe that appropriate inquiries might bring to light evidence on which the court could be satisfied that one of the grounds of objection set out in paragraph (5) was established,

the court shall neither register the instrument nor refuse the application until it has made or caused to be made such inquiries (if any) as it thinks appropriate in the circumstances of the case.

(5) For the purposes of this Order a notice of objection to the registration of an instrument is valid if the objection is made on one or more of the following grounds, namely—

(a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney;

(b) that the power created by the instrument no longer subsists;

(c) that the application is premature because the donor is not yet becoming mentally incapable;

(d) that fraud or undue pressure was used to induce the donor to create the power;