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## ENDURING POWERS OF ATTORNEY

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### WHY ENDURING POWERS OF ATTORNEY ARE NECESSARY

An Enduring Power of Attorney is one which gives an authority which commences when the Donor becomes mentally incapable. Until the 1996 Act, which came into force on August 1<sup>st</sup> 1996, an ordinary power was no longer exercisable if the Donor became mentally incapable.

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An Enduring Power of Attorney must be granted in a prescribed form which makes clear to the Donor that the Power will only be effective if the Donor becomes mentally incapable. It also requires to be executed by the Attorney.

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### Scope of Authority of an Attorney under an Enduring Power:

In the absence of Special Provisions in the Enduring Power, it does not confer any power on the Attorney, as distinct from giving him authority to manage the Donors affairs. In this, it is the same as an ordinary Power.

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### SECTION 4 OF THE ACT STATES:

"personal care decisions" in relation to a Donor of an Enduring Power, means a decision on any one or more of the following matters:-

- a) where the Donor should live
- b) with whom the Donor should live
- c) whom the Donor should see or not see
- d) what training or rehabilitation the Donor should get

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### SECTION 4 OF THE ACT STATES (contd.):

- e) the Donors diet and dress
- f) inspection of the Donors personal papers
- g) housing, social welfare and other benefits for the Donor

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**SECTION 6.(2) STATES:**

"where an instrument is expressed to confer general authority on the Attorney, it operates to confer, subject to the restriction imposed by Sub-section 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 Attorney".

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**CONDITIONS AND RESTRICTIONS:- A NOTE OF CAUTION**

An Enduring Power is potentially extremely flexible and the Power to impose restrictions and conditions may be very valuable. However, the fact remains that the less authority that is given to the Attorney, by the Donor, in the E.P.A., the greater is the risk that the Attorney would be unable to manage all of the property and affairs of the Donor.

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**CONDITIONS AND RESTRICTIONS:- A NOTE OF CAUTION (contd.)**

In this situation, it is possible that the Donor may have to be made a Ward of Court because of unduly restrictive conditions contained in the E.P.A.

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**SCOPE OF ATTORNEY'S POWERS**

Agents – the Maxim Delegatus Non Potest Delegare, means that an Attorney cannot further delegate his authority by appointing an Attorney to carry out those functions in his place unless the terms of the appointment permit it. An Enduring Power of Attorney cannot give the Attorney the right to appoint a substitute or successor

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**PROVISION FOR NEEDS OF THE ATTORNEY AND OTHERS:**

Section 6.(4) of the 1996 Act provides:

"subject to any conditions or restrictions contained in the instrument, an Attorney under an Enduring Power whether general or limited, may act under the Power for the Attorney's benefit or that of other persons to the following extent, but not further, that is to say, the Attorney

(a) may so act in relation to himself or herself or in relation to any other person if the Donor might be expected to provide for his or her or that persons needs respectively; and

(b) may do whatever the Donor might be expected to do to meet those needs"

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**THE POWER TO MAKE GIFTS:-**

In addition to the Power to provide for needs, Section 6(5) of the Act contains specific provision conferring a limited Power for the Donor to make gifts:

"Without prejudice to Sub-Section (4) but subject to any conditions or restrictions contained in the instrument, an Attorney under an Enduring Power whether general or limited, may, if specific provision for that effect is made in the instrument, dispose of the property by way of gift to the following extent, but no further that is to say, by making:-

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- a) gifts of a seasonal nature, or at a time of a birth or marriage or on an anniversary of a birth or marriage, to persons (including the Attorney) who are related to or who are connected to the Donor and
- b) Gifts to any charity to which 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 extent of the donors assets."

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**PERSONAL CARE DECISIONS:-**

Section 6(6) of the Act provides as follows:-

"An Enduring Power may also confer authority on the Attorney to make any specified personal care decision or decisions on the Donors behalf."

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**KEEPING OF ACCOUNTS:-**

Regulation 5 states:

"An Attorney who is appointed to act on the Donor's behalf in relation to property and affairs of the Donor shall keep adequate accounts of the management thereof and, in particular, of any expenditure to meet the needs of persons other than the Donor or to make any gifts authorised by the Enduring Power."

