



**seirbhís tacaíochta
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Procedures and Specifications for the appointment of Trust Corporations as Attorneys under Part 7 of the Assisted Decision-Making (Capacity) Act 2015

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24 April 2023



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1. Introduction

Section 58A of the Assisted Decision-Making (Capacity) Act 2015, as amended, (the "2015 Act"), provides that the Director of the Decision Support Service (the "DSS") shall, with the consent of the Minister for Children, Equality, Disability, Integration and Youth (the "Minister"), specify certain procedural requirements that a Trust Corporation is required to fulfil in order for the Director to be satisfied of their suitability to act as an attorney under an Enduring Power of Attorney. These procedural requirements must be fulfilled by the Trust Corporation upon application for registration of an instrument creating an Enduring Power of Attorney, **and** on a notification by an attorney under Section 71A of the 2015 Act.

In addition, Section 58A provides that the Director may, with the consent of the Minister, specify certain information and documents which a Trust Corporation is required to provide in order to satisfy the Director of their suitability for appointment as an attorney under an Enduring Power of Attorney.

The purpose of this document is to outline these procedural requirements and provide a list of information and documents which the Director will require upon (a) an application for registration; and (b) a notification under Section 71A.

This document is for the information of trustees, directors and authorised officers of Trust Corporations, and of any person who is considering appointing a Trust Corporation as an attorney under an Enduring Power of Attorney.

2. Definitions

The following are key definitions governing the operation of this document under the 2015 Act.

Affidavit – An affidavit is a written and sworn statement. A person making an affidavit swears that the contents are true and correct to the best of their knowledge, information and belief, either by way of swearing an oath on a sacred text, or by way of affirmation (if the person is non-religious).

Attorney – a person over the age of 18 years, or a Trust Corporation, who is appointed under an Enduring Power of Attorney, by a donor, to either act on the donor's behalf, or do specified things on the donor's behalf, in relation to the donor's personal welfare or property and affairs, or both. A Trust Corporation may only be appointed in relation to a donor's property and affairs.

Authorised Officer – Any officer authorised for the purpose by a Trust Corporation or the directors or governing body thereof who may, on behalf of the corporation, swear affidavits, give security and do any other act or thing which the Director or an Enduring Power of Attorney may require. The acts

of an authorised officer shall be binding on the Trust Corporation.

Decision supporter – A term used by the DSS to mean one of the five supporters named in the 2015 Act, i.e., a decision-making assistant, co-decision-maker, decision-making representative, attorney appointed under an Enduring Power of Attorney or designated healthcare representative.

Decision support arrangement – A term used by the DSS to mean one of the legally recognised arrangements under the 2015 Act, i.e., a decision-making assistance agreement, co-decision-making agreement, decision-making representation order, enduring power of attorney or advance healthcare directive.

Donor – A person who makes an Enduring Power of Attorney as per section 59(1) of the 2015 Act.

Enduring Power of Attorney – A power which is created by a person who has capacity (a donor), appointing a person or Trust Corporation (an attorney) to take decisions in respect of their personal welfare and/or property and affairs, in the event that they no longer have the capacity to take these decisions.

Guiding Principles – the principles set out in Sections 8(2) to 8(10) of the 2015 Act, which must be considered by an attorney when taking any action in respect of a donor.

Instrument – for the purposes of these Procedures and Specifications, the document which creates an Enduring Power of Attorney. The instrument must contain certain statements and details as set out under Section 60 of the 2015 Act. The instrument must be signed by both the donor and the attorney and must be appropriately witnessed.

Statement of Truth – a statement made by a person in which they declare that they have an honest belief that the facts stated therein are true. It is an offence to make a Statement of Truth without this honest belief. A Statement of Truth must be made in accordance with section 21 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

Trust Corporation – a corporation empowered by its constitution to undertake trust business, and having a place of business in the State or Northern Ireland, and being –

- (i) a company established by Act or charter, or
- (ii) an Associated Bank under the Central Bank Act, 1942, or

- (iii) a company (whether registered with or without limited liability) within the definition contained in the Companies Act 2014 or within the meaning of the corresponding law of Northern Ireland, having a capital (in stock or shares) for the time being issued of not less than €320,000, of which not less than €130,000 has been paid up in cash¹, or
- (iv) a company (registered without limited liability) within the definition contained in the said Companies Act or within the meaning of the said law of Northern Ireland, one of the members of which is a corporation within any of the previous provisions of this paragraph; or
- (v) a building society authorised under the Building Societies Act, 1989.

Undertaking – an undertaking is a commitment to do something.

3. Responsibilities of the Director

- 3.1 The Director is responsible for specifying the procedural requirements which a Trust Corporation is required to fulfil on (a) an application for registration of an instrument creating an enduring power of attorney and (b) a notification under Section 71A. These procedural requirements may change over time, and the Director has the right, under Section 58A of the 2015 Act, to amend these requirements as necessary.
- 3.2 The Director may also specify the information and documents which a Trust Corporation is required to submit to the Director on (a) an application for registration of an instrument creating an Enduring Power of Attorney and (b) a notification under Section 71A. These specifications are non-exhaustive.
- 3.3 It should be noted that, on receipt of an application to register an instrument creating an Enduring Power of Attorney, and furthermore on receipt of a notification under Section 71A, the Director shall carry out reasonable enquiries to ensure that an attorney has complied with the procedural requirements and specifications set out within this document. Where the Director forms a view that one or more of these requirements and/or specifications has not been met, the Director will notify the attorney and donor in writing, give reasons for this view, and allow a reasonable time for response.

- 3.4 The Director has the power to refuse to register an instrument creating an Enduring Power of Attorney where the Director remains of the view that the attorney has not satisfied one or more of the procedural requirements and/or specifications as set out in this document.

4. Responsibilities of the Trust Corporation, its Directors and Authorised Officers

- 4.1 Where a Trust Corporation has been appointed as an attorney under an Enduring Power of Attorney, its directors and authorised officers assume the responsibilities and obligations of an attorney under the 2015 Act.
- 4.2 Directors and authorised officers should note that they, as well as the Trust Corporation itself, can be held liable for offences committed under the 2015 Act.
- 4.3 Under Section 80, it is an offence for a person to make a statement which he or she knows to be false in an instrument creating an Enduring Power of Attorney, in an application for registration of an enduring power of attorney (or in connection with such an application) or in a notification to the Director under section 71A (or in connection with such a notification). A person who commits such an offence is liable –
 - (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months, or both, or
 - (b) on conviction on indictment, to a fine not exceeding €15,000 or imprisonment for a term not exceeding 2 years, or both.
- 4.4 Under Section 145, it is an offence for an attorney to ill-treat or wilfully neglect a donor. An attorney who commits such an offence is liable –
 - (c) on summary conviction, to a class A fine and imprisonment for a term not exceeding 12 months, or both, or
 - (d) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

¹ Whereas the 2015 Act refers to the Succession Act 1963 for the "meaning" of a trust corporation, the Director has modified this definition to take into account the Companies Act 2014, and the euro equivalent of the capital and paid-up requirements.

4.5 In the case of a Trust Corporation, where any director, manager, chief executive officer, secretary, or other similar officer of the Trust Corporation, or a person who purports to act in any such capacity, has authorised or consented to or connived in any acts which constitute an offence under Section 80 or Section 145, that person as well as the Trust Corporation shall be guilty of an offence and shall be liable to be proceeded against and punished.

5. Procedural Requirements including Information and Documents to be Provided to the Director

5.1 On Registration of an instrument creating an Enduring Power of Attorney

On an application for registration of an instrument creating an Enduring Power of Attorney in which a Trust Corporation is named as attorney, the Director must be satisfied of the suitability of the Trust Corporation as attorney. As part of the application process, the donor, or the Trust Corporation as attorney, must provide the Director with the following information and documents before the Director will be so satisfied to proceed with registration of the instrument:

- (a) The original executed Enduring Power of Attorney;
- (b) Copies of the Notices given to the persons specified in section 68(3) of the 2015 Act;
- (c) Details of any existing decision support arrangement;
- (d) The prescribed fee;
- (e) The original sworn or affirmed Affidavit or Statement of Truth of an authorised officer of the Trust Corporation which includes averments as follows:
 - (i) that the deponent is authorised by the Trust Corporation to swear or affirm the affidavit or statement of truth with documentary proof thereof;
 - (ii) that the Trust Corporation is a corporation empowered by its constitution to undertake trust business and having a place of business in the State or Northern Ireland;
 - (iii) that the Trust Corporation is either:
 - a company established by Act or charter, or
 - an Associated Bank under the Central Bank Act, 1942, or

- a company (whether registered with or without limited liability) within the definition contained in the Companies Act, 2014, or within the meaning of the corresponding law of Northern Ireland, having a capital (in stock or shares) for the time being issued of not less than €320,000, of which not less than €130,000 has been paid up in cash, or
 - a company (registered without limited liability) within the definition contained in the said Companies Act or within the meaning of the said law of Northern Ireland, one of the members of which is a corporation within any of the previous provisions of this paragraph; or
 - a building society authorised under the Building Societies Act, 1989.
- (iv) confirmation, supported by a Companies Registration Office report or similar document (which is to be exhibited to the Affidavit or Statement of Truth and dated not more than 14 days prior to the date of registration of the Enduring Power of Attorney), that the Trust Corporation satisfies the definition of a trust corporation, as defined under the 2015 Act and as explicitly set out at 5.1.1(e)(ii) and (iii) above.
 - (v) that no director or authorised officer of the Trust Corporation is ineligible from acting as such within the meaning of section 65(1) of the 2015 Act;
 - (vi) that no director or authorised officer of the Trust Corporation is disqualified from acting as such within the meaning of section 66 of the 2015 Act, and undertake to notify the Director of the DSS under Section 66(6) if a director or authorised officer becomes disqualified;
 - (vii) that the Trust Corporation is not disqualified by virtue of section 66 (4)(i) of the 2015 Act, and undertakes to notify the Director of such dissolution as soon as reasonably practicable in advance thereof;
 - (viii) the specific provisions of the Trust Corporation's constitution which permit it to carry out trust business;

- (ix) depending on the specific circumstances arising under the Enduring Power of Attorney being registered, the Affidavit or Statement of Truth must specify the Trust Corporation's power or authorities under the specific trust created for the Enduring Power of Attorney to:
- hold the trust fund as trustees in trust for the donor absolutely,
 - accumulate the income of the trust for the benefit of the donor,
 - exercise all powers, rights and privileges in connection with the trust requisite or proper to enable the trust corporation to carry out all or any transactions, acts, deeds or things arising under or in connection with the Enduring Power of Attorney and the trust,
 - make such arrangements generally for the administration of the Enduring Power of Attorney and the trust as the Trust Corporation may think fit,
 - open and operate bank accounts,
 - invest all or any part of the monies coming into their hands on account of the Enduring Power of Attorney and to transpose and vary any such investments into any form of investment which the trust corporation could make if they were absolutely and beneficially entitled thereto whether involving liability or not or where or not specifically authorised by law for the investment of the trust monies,
 - lend and give guarantees,
 - invest in land or property either directly or indirectly including, without limitation, the grant or surrender of leases, grant or reservation of easements or any other restrictions over land or property, or in the acquisition or development of any such land or property either themselves or jointly with another party or parties (notwithstanding that the interest of the trust corporation may be a minority interest) and whether as partners or trustees, to hold the same upon trust for sale or otherwise,
 - appoint one or more investment managers or custodial agents,
 - occupy property and enjoy chattels,
 - borrow and/or provide security,
 - give indemnities,
 - deal with insurance policies,
 - vary administrative provisions,
 - delegate management of investments,
 - insure the trust and/or the property,
 - receive remuneration and payment of expenses,
 - permit self-dealing,
 - delegate management of investments,
 - vote and employ nominees and custodians,
 - trade,
 - sell, lease, hire, deposit, store or otherwise deal with chattels upon such terms as the Trust Corporation may think fit,
 - receive and pay rental income,
 - ensure proper data and financial records are kept,
 - manage and administer the trust in accordance with the provisions of the trust and or the Constitution of the Trust Corporation,
 - institute proceedings,
 - to apply the benefits under the trust and make arrangements for the payment of benefits under the trust as they become due,
- (x) an undertaking that the Trust Corporation will maintain adequate insurance cover that covers the work of the Trust Corporation, and that covers the Trust Corporation in respect of loss (through dishonesty, breach of duty, negligence, or any other cause) to the assets and funds.
- (xi) an undertaking that the Trust Corporation will inform the Director immediately if there is any reduction in the terms or level of insurance cover;
- (xii) an undertaking that the Trust Corporation will keep accounts of dealings and transactions taken on behalf of the donor and will comply with all reporting requirements as set out under Section 75 of the 2015 Act;

- (xiii) an undertaking that the Trust Corporation will comply with all reasonable requests of the Director and will co-operate with any representative of the Director including special visitors or general visitors;
 - (xiv) an undertaking that the Trust Corporation will, where applicable, and upon the coming into effect of the Enduring Power of Attorney, keep the money and property of the donor separate from that of other parties; will take reasonable steps to maintain, sell or let the property of the donor; and will ensure, so far as is reasonable, that the donor receives all benefits and other income to which they are entitled, that their bills are paid, and their taxes are kept in order;
 - (xv) an undertaking that the Trust Corporation will provide the name(s) of the officers of the Trust Corporation who will be responsible for making the notification under Section 71A where there is reason to believe that the donor has lost capacity in relation to one or more relevant decisions that are the subject of the enduring power of attorney, and will update the Director as to any changes to responsible authorised officers in the course of appointment, providing documentary evidence as appropriate;
 - (xvi) an undertaking that, once appointed as attorney, the Trust Corporation will act in accordance with the responsibilities and obligations of an attorney under the 2015 Act and will comply with the guiding principles in any intervention arising in respect of a donor.
- (f) The trust deed specific to the Enduring Power of Attorney being registered, which must include provisions:
- (xvii) To allow for the Trust Corporation to meet for the despatch of business and otherwise regulate its meetings in accordance with its Constitution;
 - (xviii) To allow the Trust Corporation to exercise its powers and execute its duties by its directors for the time being or by the act of any officers appointed under the trust for the purpose;
 - (xix) confirming the specific powers referred to in paragraph 5.1.1(e)(ix) above.
- (g) A copy of the constitution of the Trust Corporation as filed in the Companies Registration Office;
- (h) Certified copy identity documents (passport, driver's licence) and proof of address of authorised officers;
- (i) The following certified copy searches, dated not more than 14 days prior to the date of registration of the Enduring Power of Attorney:
- (i) High Court Central Office searches;
 - (ii) Companies Registration Office searches;
 - (iii) Judgment searches;
 - (iv) Register of Petitions Search; and
 - (v) Sheriffs/Revenue Office Search.
- ## 5.2 On Notification under Section 71A of the 2015 Act
- 5.2.1 Pursuant to Section 71A of the 2015 Act, once an attorney has reason to believe that a donor lacks capacity in relation to one or more than one relevant decision which are the subject of the Enduring Power of Attorney, the attorney shall notify the Director as soon as practicable.
- 5.2.2 It is the responsibility of the Trust Corporation, in accordance with the undertakings provided at paragraph 5.1.1(e) above, to ensure that, upon notification under Section 71A, the Director is provided with the most up-to-date versions of the documents referred to at paragraph 5.1.1 above, and that the Director is informed of any changes to the identity of the persons authorised to carry out any or all of the actions necessary under the Enduring Power of Attorney.
- 5.2.3 The Trust Corporation should therefore provide the following information and documents to the Director upon notification under Section 71A:
- (j) The prescribed fee;
 - (k) A statement by each of two persons, each being either –
 - (i) a registered medical practitioner, or
 - (ii) such other healthcare professional of a class that shall be prescribed by the Minister under section 79 of the 2015 Act, that in his or her opinion the donor lacks capacity in relation to one or more relevant decisions which are the subject of the Enduring Power of Attorney;
 - (l) Copies of the Notices given to the persons specified in section 71A(3) of the 2015 Act;
 - (m) An updated original Affidavit or Statement of Truth containing:

- (i) all of the averments referred to at paragraph 5.1.1(e) above;
 - (ii) an undertaking that the Trust Corporation will immediately inform the Director if there is any reason to believe that the donor no longer lacks capacity and may be able to manage his or her own affairs.
- (n) The trust deed specific to the Enduring Power of Attorney the subject of the notification which must include provisions:
- (i) for the Trust Corporation to meet for the dispatch of business and otherwise regulate its meetings in accordance with its Constitution;
 - (ii) as to how it must exercise its powers and execute its duties by its directors for the time being or by the act of any officers appointed under the trust for the purpose;
 - (iii) confirming the specific powers referred to in paragraph 5.1.1(e)(ix) above.
- (o) The most up-to-date copy of the constitution of the Trust Corporation as filed in the Companies Registration Office to include the specific powers referred to in paragraph 5.1.1(e)(ix) above;
- (p) Updated certified copy identity documents (passport, driver's licence) and proof of address of authorised officers;
- (q) Updated certified copy searches dated not more than 14 days prior to the date of notification:
- (i) High Court Central Office searches;
 - (ii) Companies Registration Office searches;
 - (iii) Judgment searches;
 - (iv) Register of Petitions Search; and
 - (v) Sheriffs/Revenue Office Search.

6. Coming into Force of an Enduring Power of Attorney – Continuing Responsibilities of the Trust Corporation

- 6.1 The Director maintains a supervisory role over all decision supporters appointed under the 2015 Act, including Trust Corporations where they are appointed as attorneys. Once appointed as an attorney, a Trust Corporation must always act in accordance with the provisions of the 2015 Act and within the scope of the powers conferred on it by way of the Enduring Power of Attorney. Furthermore, a Trust Corporation must comply with all undertakings and averments contained within any Affidavit or Statement of Truth submitted to the Director.
- 6.2 A Trust Corporation is subject to the complaints processes arising under section 76 of the 2015 Act. If a well-founded view is arrived at by the Director following an investigation, this may result in an application to court for a determination regarding the complaint.
- 6.3 Furthermore, where the Director is not satisfied as to a Trust Corporation's continuing suitability to act on behalf of a donor, or where a Trust Corporation is found to be acting in breach of the 2015 Act, or outside the scope of the powers conferred upon it, it is open to the Director to apply to the Circuit Court for a determination that the Trust Corporation should no longer act as attorney in relation to the donor.
- 6.4 It is therefore vitally important that Trust Corporations are aware of their obligations and responsibilities as attorneys under the 2015 Act, and that they comply with all undertakings given upon registration and notification of an Enduring Power of Attorney, throughout their appointment.



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