



AN BILLE UM CHUMHACHTAÍ ATURNAE, 1995
POWERS OF ATTORNEY BILL, 1995

EXPLANATORY AND FINANCIAL MEMORANDUM

Objects of Bill

The Bill proposes to enable individuals to grant powers of attorney over their property ("enduring powers of attorney") which will take effect if they become mentally incapable. (At common law a power of attorney is revoked automatically in that event.) The persons granted enduring powers of attorney may then manage the property and affairs of those individuals subject to any conditions or restrictions contained in the instruments creating the powers and to the provisions of the Bill.

An enduring power of attorney must be in the prescribed form or a form to the like effect. A number of safeguards are provided. There must be a statement by a doctor in the document creating the enduring power that the donor had the mental capacity, at the time the document was executed, to understand the effect of creating the power. A solicitor (or a member of some other prescribed class of persons) must be satisfied that the donor had, in fact, this understanding and that the document was not being executed as a result of any undue influence. Specified persons must be given notice of the execution of the power, which will come into operation only when the donor is or is becoming mentally incapable and when the power has been registered in the Office of Wards of Court, in the absence of valid objections by those persons. The registration may be cancelled in certain circumstances.

The Bill also proposes to amend the general law governing powers of attorney in a number of respects, including the provision of a simple form of general power of attorney.

PART I

PRELIMINARY AND GENERAL

This Part contains standard provisions relating to short title, commencement and interpretation generally (*sections 1 and 2*). A power of attorney is defined as an instrument signed by or by direction of a person (the donor) and by the donee (and by each of them, if more than one) giving the donee or donees the power to act on behalf of the donor in accordance with the terms of the instrument. *Section 3* is a technical provision regarding the making of a statutory declaration under *section 18 or 19* by a company. It enables the declaration to be made by the person authorised or appointed to act for the company in the transaction concerned or in the execution of the power of attorney.

ENDURING POWERS OF ATTORNEY

Section 4 contains the definitions relevant to this Part of the Bill. "Attorney" is the term used in it for the donee of an enduring power, the characteristics of which are set out in *section 5*. "Mental incapacity" is defined as incapacity by reason of a mental condition to manage and administer an individual's own property and affairs and covers both a mental incapacity associated with advancing age and brain damage resulting from an injury. *Subsection (2)* provides that if any question arises as to what a donor might at any time be expected to do, e.g. what provision a donor might be expected to make for the needs of the attorney or any other person (see *section 6(4)*), it will be assumed for this purpose, unless the contrary is shown, that the donor had the mental capacity to do so.

Section 5 (1) defines an enduring power as a power of attorney which contains a statement by the donor that the donor intends the power to be effective notwithstanding any supervening mental incapacity and which complies with the provisions of this section and regulations made under it. *Subsection (2)* provides for regulations to be made by the Minister for Equality and Law Reform on various matters concerning enduring powers. The regulations will make provision for a number of safeguards in this regard, including a statement by a solicitor (or a member of some other prescribed class of persons) that he or she, after interviewing the donor and obtaining any necessary reports, is satisfied that the donor understood the effect of creating the power and also that he or she has no reason to believe that the document is being executed by the donor as a result of any undue influence. In addition, the regulations may require a statement in the document by a doctor that at the time the document was executed the donor had the mental capacity, with the assistance of such explanations as may have been given to him or her, to understand the effect of creating the power and may also require that notice be given to specified persons when the power is executed.

Subsection (3) of the section provides that an attorney under an enduring power must have attained 18 years and must not be a bankrupt or be the owner of a nursing home in which the donor of the power resides, or a person residing with or in the employment of the owner, unless, in that case, the person is a spouse, parent, child or sibling of the donor. Also eligible are trust corporations within the meaning of *section 30* of the Succession Act 1965, e.g. companies empowered by their constitution to undertake trust business or approved non-profit bodies administering charitable, ecclesiastical or public trusts without remuneration. A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power (*subsection (4)*). An enduring power lapses on the bankruptcy of the attorney (*subsection (5)*). If the attorney is the donor's spouse, the enduring power will lapse, unless provided otherwise in the power, if the marriage is subsequently annulled or a decree of judicial separation is granted or the marriage is dissolved outside the State and the divorce is recognised here (*subsection (6)*). It will also lapse if the High Court so directs when exercising any of its powers under the Lunacy Regulation (Ireland) Act 1871 (*subsection (7)*). An attorney may not validly disclaim an enduring power until he or she gives notice of the disclaimer to the donor (*subsection (8)*). After the power is registered the consent of the court is also required (*section 11 (1) (6)*).

Section 6 provides that an enduring power may give general authority to the attorney, in which case he or she may do anything that

the donor may lawfully do by attorney, or it may merely give authority to do specified things on the donor's behalf. Subject to any conditions or restrictions in the enduring power, the attorney can exercise any of the donor's powers or discretions as a tenant for life (*subsection (2)*). Again, subject to those conditions or restrictions the attorney may act under the power for his or her own benefit or that of any other person but only to the extent that the donor might be expected to provide for his or her or that person's needs (*subsection (4)*). *Subsection (5)* provides that the attorney may not make gifts of the donor's property unless there is specific provision to that effect in the enduring power. If there is, the gifts must be limited to (a) gifts either of a seasonal nature or on birthdays or marriage anniversaries of persons (including the attorney) who are related to or connected with the donor and (b) gifts to any charity to which the donor made or might be expected to make gifts. In either case the value of the gift must not be unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

Section 7 makes it clear that an enduring power will not come into operation until it has been registered in the Office of Wards of Court under *section 10* and also that it will not be revoked by the donor's subsequent mental incapacity. However, under *subsection (2)*, once an attorney has applied for registration he or she may take action under the power to maintain the donor or prevent loss to the donor's estate and to maintain himself or herself and other persons to the extent permitted by the enduring power and *section 5 (4)*. The court may also take action under the power prior to registration (*section 8*). A transaction between a person and an attorney who purports to be, but is not, acting under *subsection (2)* will be valid unless that person knows that the attorney is not so acting (*subsection (3)*).

Section 8 enables the court to exercise, before registration of an enduring power, any powers it could exercise on registration if it has reason to believe that the donor may be, or may be becoming, mentally incapable. Application to the court under this section may be made by any interested party whether or not the attorney under the power has applied for registration.

Section 9 and the *First Schedule* set out the procedure to be followed by an attorney when he or she has reason to believe that the donor of an enduring power is or is becoming mentally incapable. Before applying to register the power, the attorney must give notice to the donor and specified persons and at the same time inform the Registrar of Wards of Court that it is intended to apply for registration. The specified persons are those who may be required by regulations under *section 5(2)(g)* to be given notice by the donor of the execution of the power. If there is no such requirement or if giving such notice is not practicable, not more than three relatives (from groups comprising the donor's spouse, children, parents and siblings — in that order) may be given notice. However, if there is more than one person in any of the groups and at least one of them would be entitled to be given notice, then all the persons in that particular group will have to be notified. The form of notice will be prescribed and will tell the person to whom it is given that he or she may object to the proposed registration within five weeks and will also specify the grounds on which objection may be made.

Section 10 deals with the court's power to register, or refuse to register, an enduring power. If a valid notice of objection has been duly received or if no one has been given notice of the application by the attorney or if there is reason to believe that grounds of objection can be established, the court will first make whatever enquiries

are appropriate. The court may refuse the application on any of the following grounds:

- that the enduring power was not, or is no longer, valid
- that the donor is not or is not becoming mentally incapable
- that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney
- that fraud or undue pressure was used to induce the donor to create the power.

If a committee of the estate of the donor is in existence at the time of the application for registration the court may make whatever order appears to it to be proper in the circumstances (*subsection (6)*).

Section 11 sets out the effect of registering an enduring power. Once registered, the donor cannot revoke the power unless and until the court confirms the revocation; the attorney cannot disclaim without the court's consent; and the donor cannot extend or restrict its scope or give any valid consent or instruction (*subsection (1)*). These provisions apply for so long as the power is registered whether or not the donor is for the time being mentally capable (*subsection (2)*). The remaining subsections deal with the supply of attested copies of the power to the donor and others who were given notice of the application for registration, free inspection of the register by members of the public and proof of registration.

Section 12 details the functions the court may exercise after registration of an enduring power. They include giving directions about the management or disposal by the attorney of the property and affairs of the donor; rendering of accounts and production of records; remuneration and expenses of the attorney including the repayment of excessive, or payment of additional, remuneration (*subsection (2)*). The court may confirm a revocation of the registered power if satisfied that the donor was then mentally capable of revoking it (*subsection (3)*). Cancellation of the registration is provided for where the court is satisfied on a number of grounds, e.g. that the donor is mentally capable and likely to remain so, that the attorney is unsuitable or that fraud or undue pressure was used to induce the donor to create the power. On cancellation on either of the last two grounds the court will revoke the power. On any cancellation (other than on the ground of the donor being mentally capable) the power must be delivered up to be cancelled unless the court directs otherwise (*subsections (4) to (6)*).

Section 13 provides protection for acts done by an attorney and transactions between an attorney and a third party in cases where either a registered enduring power did not, in fact, create a valid enduring power or the power has ceased to be in force and where neither the attorney nor the third party were aware of either circumstance at the time of those acts or transactions (*subsections (1) to (3)*). *Subsection (4)* deals with a subsequent transaction between the third party and a purchaser. It creates a presumption, as in the case of an ordinary power of attorney (see *section 18(4)*), that the original transaction between the attorney and the third party was valid if it was completed within 12 months of the registration or if the third party makes a statutory declaration before or within three months of the completion of the purchase that he or she had no reason to doubt the attorney's authority to dispose of the property in question. Knowledge that the court has confirmed a revocation of an enduring power by the donor will constitute knowledge of the revocation for the purposes of determining under *section 18* whether acts or transactions of an attorney or third parties are protected, but knowledge

of an unconfirmed revocation will not constitute knowledge for those purposes (*subsection (5)*).

Section 14 and the *Second Schedule* contain the provisions necessary to make this Part applicable to cases where joint attorneys or joint and several attorneys are appointed under the enduring power. (If attorneys are appointed jointly, one cannot act without the other or others; if appointed jointly and severally, any one of them can do so.)

PART III

POWERS OF ATTORNEY GENERALLY

Section 15 defines a power of attorney and amends the law as to the execution of such a power in three respects: if the donor is physically incapable of signing, it enables the power to be signed by some other person in the donor's presence and by the donor's direction (in such a case the signature must be witnessed by another person); it requires the power to be signed by the donee; and the instrument creating the power need not be under seal. *Subsection (4)* contains a saver for any other statutory requirements for witnessing powers of attorney and for the rules governing the execution of instruments by bodies corporate.

Section 16(1) is designed to enable donors to grant a general power of attorney by executing the simple form of instrument specified in the *Third Schedule*. A power in this form will operate to enable the donee to do anything the donor can lawfully do by attorney. A general power may be in a form to the like effect as the specified form provided it contains a specific reference to this section. *Subsection (2)* makes it clear that this general form of power of attorney cannot be used to delegate the functions of a trustee, personal representative or tenant for life under the Settled Land Acts.

Section 17(1) re-enacts section 46 of the Conveyancing Act 1881, which authorised a donee of a power of attorney to execute or do any assurance, instrument or thing in and with his or her own name, signature and seal (where sealing is required) by the authority of the donor. *Subsection (2)* concerns the conveyance of an interest in property by a person authorised under a power of attorney given by a body corporate. In such a case the person may execute the conveyance either as provided in *subsection (1)* or by signing his or her name in the presence of at least one witness as acting on behalf of the body corporate and, in the case of a deed, by affixing his or her own seal. *Subsection (3)* authorises corporations aggregate, when donees of powers of attorney, to appoint persons to convey property on their behalf.

Section 18 replaces sections 8 and 9 of the Conveyancing Act 1882 and relates to the protection of the donee of a power of attorney and third parties where a power of attorney is revoked. *Subsection (1)* deals with the protection of the donee. If a donee does not know that the power has been revoked, he or she will incur no liability by reason of the revocation either to the donor or any third party. *Subsection (2)* confers similar protection on a third party who has dealings with a donee of a power. *Subsection (3)* protects a third party where a power is expressed to be irrevocable and to be given by way of security. In those cases the third party, unless he or she knows that it was not in fact given by way of security, is entitled to assume that the power can be revoked only with the concurrence of

the donee and is protected unless he or she knows that it has been so revoked. *Subsection (4)* protects a purchaser deriving title from a third party who had dealings with the donee. If the title of the purchaser depends on whether the third party knew that the power had been revoked, there will be a rebuttable presumption that the third party did not know of the revocation in two cases, ie. if the transaction was completed within 12 months after the power came into operation or if the third party, before or within 3 months after completion of the purchase, makes a statutory declaration that he or she did not, at the material time, know of the revocation.

Subsection (5) makes it clear that, for the purposes of this section, knowledge of a revocation includes knowledge of an event causing the power to be revoked, whether or not the person concerned knew that it had that effect. This, however, is without prejudice to *subsection (3)* under which a third party may assume that a power, if expressed to be irrevocable and to be given by way of security, can be revoked only with the concurrence of the donee. *Subsection (6)* defines "purchaser" for the purposes of this section and *subsection (7)* extends the provisions of this section to transactions occurring after the commencement of the Act, irrespective of the date of the power of attorney.

Section 19 gives specific protection to a person to whom a donee of a power of attorney transfers registered securities for the purposes of a stock exchange transaction. In such a case if the donee, on or within three months after the date of the transaction, makes a statutory declaration that the power had not been revoked at that date, there will be a presumption in favour of the transferee that the power had not then been revoked.

Section 20 applies to a power of attorney expressed to be irrevocable and to be given by way of security, whether the interest secured is a proprietary interest of the donee or an obligation owed to him or her. In such cases the power is irrevocable without the consent of the donee, thereby protecting the donee and any third party having dealings with the donee (*subsection (1)*). *Subsection (2)* provides that a power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and also to the successors in title of that person. Those successors in title will become duly constituted donees of the power, without prejudice to any right to appoint substitutes given by it. This section applies to powers of attorney whenever created (*subsection (3)*).

Section 21 provides for proving a power of attorney by production of the original instrument or a certified copy. The copy must be certified by a solicitor or stockbroker or in such other manner as the court approves. If the power has been deposited in the Central Office of the High Court, an attested copy will suffice (*subsection (1)*). It is immaterial how many removes there are between the copy and the original or by what means (including faxing) the copy was produced (*subsection (2)*).

Section 22 re-enacts section 48 of the Conveyancing Act 1881, which authorised the deposit of powers of attorney in the Central Office of the High Court. Any person may inspect the file of such powers and obtain an attested copy of a power.

Section 23 provides that any purchaser of an interest in land is entitled to be furnished by the vendor with any power of attorney which affects the purchaser's title, or a certified copy thereof, free of expense.

PART IV

MISCELLANEOUS

This Part contains standard provisions relating to the laying of orders and regulations under the Bill before each House of the Oireachtas and to the repeals, which are listed in the *Fourth Schedule*.

Financial and Staffing Implications

The Bill has no financial or staffing implications. It will not involve any additional charge on the Exchequer.

*An Roinn Comhionannais agus Athchóirithe Dlí,
Meitheamh, 1995.*

Section 18 provides that any purchaser of an interest in land is entitled to be furnished by the vendor with any power of attorney which affects the purchase, title, or a certified copy thereof, free of charge, if the purchaser can show that the third party knew the power had been revoked, there will be a rebuttable presumption that the third party did not know of the revocation in two cases: (a) if the power was completed within 12 months after the power was given; (b) if the third party acted in good faith and for value.

PART IV

MISCELLANEOUS

This Part contains standard provisions relating to the laying of orders and regulations under the Bill before each House of the Commons and to the repeal of provisions which are listed in the Fourth Schedule. It also contains provisions relating to the laying of orders and regulations under the Bill before each House of the Commons and to the repeal of provisions which are listed in the Fourth Schedule. It also contains provisions relating to the laying of orders and regulations under the Bill before each House of the Commons and to the repeal of provisions which are listed in the Fourth Schedule.

Section 19 gives specific protection to a person to whom a donee of a power of attorney transfers registered securities for the purposes of a stock exchange transaction. In such a case if the donee, on or within three months after the date of the transaction, makes a statutory declaration that the power had not been revoked at that date, there will be a presumption in favour of the transferee that the power had not then been revoked.

Section 20 applies to a power of attorney expressed to be irrevocable and to be given by way of security, whether the interest secured is a proprietary interest of the donee or an obligation owed to him or her. In such cases the power is irrevocable without the consent of the donee, thereby protecting the donee and any third party having dealings with the donee (subsection (1)). Subsection (2) provides that a power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and also to the successor in title of that person. Those successors in title will become duly constituted donees of the power, without prejudice to any right to appoint substitutes given by it. This section applies to powers of attorney whenever created (subsection (3)).

Section 21 provides for proving a power of attorney by production of the original instrument or a certified copy. The copy must be certified by a solicitor or stockbroker or in such other manner as the court approves. If the power has been deposited in the Central Office of the High Court, an attested copy will suffice (subsection (1)). It is immaterial how many removes there are between the copy and the original or by what means (including faxing) the copy was produced (subsection (2)).

Section 22 re-enacts section 48 of the Conveyancing Act 1881, which authorised the deposit of powers of attorney in the Central Office of the High Court. Any person may deposit the title of such powers and obtain an attested copy of a power.