

LAW SOCIETY SUBMISSION



ASSISTED DECISION-MAKING (CAPACITY) ACT 2015

DEPARTMENT OF JUSTICE AND EQUALITY

FEBRUARY 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

- 1.1. The Law Society wishes to make a further submission to the Minister for Justice & Equality in relation to the Assisted Decision-Making (Capacity) Act 2015 (2015 Act). The Law Society is aware that a number of amendments are due to be made to the 2015 Act and wishes to ensure that these important suggested amendments are considered and included.
- 1.2. The submission relates to the protection of a purchaser when acquiring property from a relevant person as defined in the 2015 Act within the scope of a Co-Decision-Making Agreement (CDMA), within the scope of an Enduring Power of Attorney (EPA) or entering into a transaction with a Decision-Making Representative whose authority is contained in a Decision-Making Representative Order. Conversely, it will also relate to the transfer of property to a relevant person who may not necessarily be a purchaser.
- 1.3. In the interests of certainty and to avoid confusion, delay and possible court applications in relation to conveyancing transactions, the Law Society recommends that the 2015 Act directly provides for protection to a purchaser who is a purchaser for valuable consideration in relation to such transactions and also provides for protection to a relevant person if a transfer of property to them is within the scope of authorisations under the provisions of the 2015 Act.

2. Maintenance of Register and implications for transactions

- 2.1. Section 13 of the Powers of Attorney Act 1996 (1996 Act) does provide protection to a third party where a registered power was invalid or not in force. It is acknowledged that although the 1996 Act does provide for the registration of an enduring power there is no provision in that Act for a Register. The 2015 Act does require the Director of the Decision Support Service to establish and maintain a Register and to make the Register available for inspection by a person who satisfies the Director that he or she has a legitimate interest in inspecting the Register and the Director may also issue an authenticated copy or part thereof under similar circumstances.
- 2.2. It would also be important that any Regulations provide that those who may have a legitimate interest in inspecting the Register include a solicitor acting in a relevant transaction.
- 2.3. The Law Society would welcome consultation in respect of Regulations being drafted with regard to Enduring Powers of Attorney and the other instruments mentioned at 1.2 above.
- 2.4. There are a number of issues that could arise as to the validity of the CDMA and an EPA – disqualification, ineligibility, revocation or determination of function by the court. The Law Society also notes the provisions of Sections 23, 70 (effect and proof of registration), 29 and 78 revocation and removal from the Register which ensures up to date information is contained on the Register and can be made available by the Director to those who have a legitimate interest in relation to the matter. However, there is no direct confirmation in the 2015 Act that the purchaser will be protected if acting on foot of a registered CDMA and EPA.
- 2.5. It is acknowledged that, in relation to any transaction with a Decision-Making Representative, the Decision-Making Representative will be acting on the authority given to him or her by the court as contained in a Decision-Making Representation Order as originally made or as varied or discharged. It would be important that a third party is protected having checked the Register to be able to rely on it at any point in time.
- 2.6. Regulations should provide that the Director is required, in addition to entering a note of the original Decision-Making Representation Order made, to record the details of any variation, discharge or any appeal under the provisions of Section 141 (on a point of law).
- 2.7. In the interests of certainty and to avoid confusion, delay and possible court applications in relation to conveyancing transactions, the Law Society recommends that the 2015 Act directly provides for protection to a purchaser who is a purchaser for valuable consideration in relation to such transactions and also provides for protection to a relevant person if a transfer of property to them is within the scope of authorisations under the provisions of the 2015 Act.

3. Law Society Recommendations

- 3.1. The Law Society recommends that the Assisted Decision-Making (Capacity) Act 2015 be amended as follows:

Section 2 be amended by the insertion of the definition of ‘purchaser’ as follows:

“purchaser” means a grantee, lessee, assignee, mortgagee, chargeant or other person who acquires an estate or interest in property for valuable consideration;

Section 23 be amended by the addition of:

23(4)(a): A transfer of property to a purchaser within the scope of a registered co-decision-making agreement shall not be challenged on the grounds that the appointer did not have capacity to enter into the transaction or that any issue arose as to the nullity of the co-decision-making agreement at the time of the transaction.

23(4)(b): A transfer of property to a relevant person within the scope of a registered co-decision-making agreement shall not be challenged on the grounds that the appointer did not have capacity to enter into the transaction or that any issue arose as to the nullity of the co-decision-making agreement at the time of the transaction.

Section 45 to be amended by the addition of:

Section 45(5): Any person dealing with a Decision-Making Representative shall be entitled to rely on the Register as showing the authority of the Decision-Making Representative at any time.

Section 70 be amended by the addition of:

Section 70(2)(a): A transfer of property to a purchaser within the scope of a registered enduring power of attorney shall not be challenged on the grounds that the donor did not have capacity to enter into the transaction or that any issue arose as to the validity of the enduring power of attorney at the time of the transaction.

Section 70(2)(b): A transfer of property to a relevant person within the scope of a registered enduring power of attorney shall not be challenged on the grounds that the donor did not have capacity to enter into the transaction or that any issue arose as to the validity of the enduring power of attorney at the time of the transaction.

- 3.2. As noted within, the Law Society welcomes the opportunity to engage with the Department on the drafting and design of necessary Regulations and amendments. The Society remains available to meet with officials to advance the issues highlighted here and in our related submissions on the Act.

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