

Session 2

Planning ahead to preserve your will and preferences:

Enduring Power of Attorney

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Director of the Decision Support Service

Assisted Decision-Making (Capacity) Act 2015
Reflections, Challenges and Opportunities
Cork, 2-3 December 2024



Why Plan Ahead?

'Next of Kin': what does it really mean?

Incorrect belief that the next of kin already has a legally recognised role as decision-maker

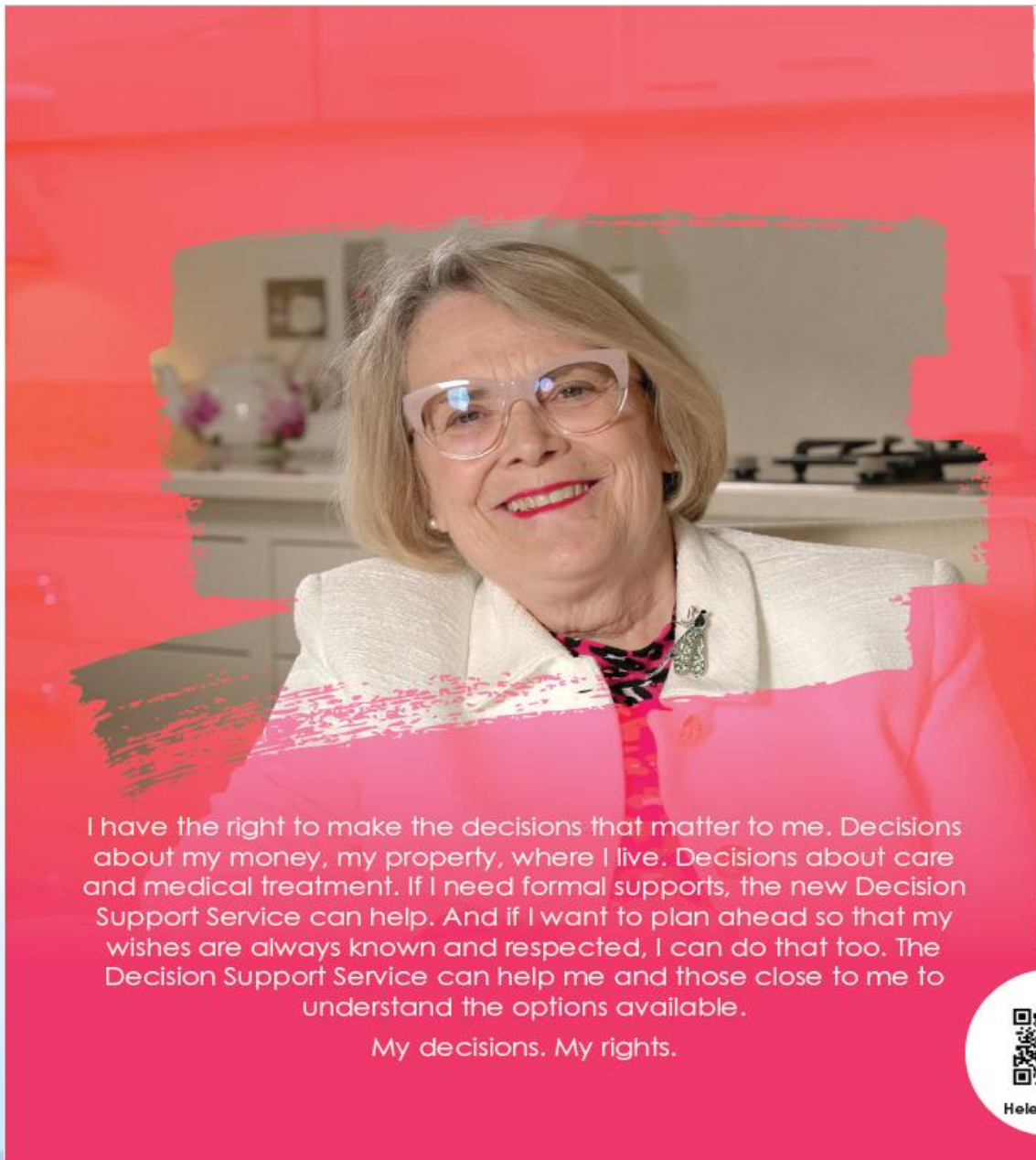
An adult has never been authorised to decide for another adult outside of a legal arrangement. This is not new.

57% of survey respondents believed that next of kin can make healthcare decisions and consent to treatment

32% believed that next of kin can access bank accounts and manage assets



- Sage Advocacy, Next of Kin Survey, 2018



I have the right to make the decisions that matter to me. Decisions about my money, my property, where I live. Decisions about care and medical treatment. If I need formal supports, the new Decision Support Service can help. And if I want to plan ahead so that my wishes are always known and respected, I can do that too. The Decision Support Service can help me and those close to me to understand the options available.

My decisions. My rights.

My decisions. My rights.



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Helen's story.



Enduring power of attorney (EPA): statutory changes

- An EPA made under the Powers of Attorney Act 1996 before 26 April 2023 is still valid;
- No new process is required to register a 1996 Act EPA; the DSS is not involved
- Court continues to hold the register of EPAs under the 1996 Act.
 - Section 81(1A) providing for registration of 1996 Act EPAs by the DSS **not commenced**
- Section 76 (2): the DSS may receive and investigate complaints against an attorney appointed under the 1996 Act
- 2015 Act introduces two-step process
 - Step 1: EPA is submitted to the DSS for review and registration
 - Step 2: notification to DSS when the donor lacks capacity in relation to relevant decisions
- Capacity statement by a medical **or** other healthcare professional
- New supervision and reporting requirements for an attorney
- Attorney must apply the guiding principles

An EPA may not grant authority in respect of treatment decisions

DSS 'digital first' approach

- To help promote
 - efficient delivery of service across all functions
 - data security
 - reduction in rate of error
 - sustainability
- In compliance with government policy
- Engagement with DPC/ Data Protection Impact Assessment
- Section 95B: Director may specify that
 - relevant document may be in electronic format and
 - circumstances in which this specification shall or shall not apply
 - Director may certify an electronic copy as a true copy



... not digital only

- An alternative manual process has been available since commencement
 - Accessibility policy adopted July 2024 [Accessibility Policy](#)
 - to assist those who are not able to use the online portal with access to appropriate supports, or alternative format
 - to ensure that resources are targeted to provide individualised support
 - to promote the efficient operation of the service for all its users
 - where a person is unable to use the portal, due to digital literacy/connectivity problems, or another issue, and cannot reasonably be supported to do so by the DSS, by a professional or by another person, they can be facilitated with the alternative manual process
-
- Total access requests submitted for decision: 38*
 - manual forms issued: 19
 - decision pending: 10
- *as of 2 December 2024

Getting on the MyDSS portal - telling us who you are

- Why? We create an account for every person using DSS services, so we can be sure who is interacting with the system
 - When? Identity verification is the first step of the process for all DSS services
 - Where? Identity verification is completed on the MyDSS portal – access is via our website
 - How? Most accounts are opened with a fully verified MyGovID account- alternative is available
-
- A secure MyDSS portal account allows an applicant to create unique forms, access supporting documents prefilled with their information, upload and submit for registration
 - Over 19,000 verified MyDSS accounts have been opened

MyGovID and alternatives



- MyGovID is a single login for many government services in Ireland
- 2.3 (approx.) million adults have verified MyGovID, including 38% of those over 70
- Public Services Card (including free travel card) holders are ‘MyGov ready’
- 13, 654 (over 71%) of fully verified MyDSS accounts have been opened with MyGovID
- 8,973 MyDSS account holders are aged over 70; over 57% have opened their accounts with MyGovID

- **Do I have to have a MyGovID?**
- **No, an alternative process for ID verification is available**
- **A form is available on the DSS website**



- Once the manual ID verification process is completed, an applicant has full access to the MyDSS portal in the same way as with MyGovID

Solicitor instructed by donor to create EPA

- If a donor instructs a solicitor to make and register your EPA, the solicitor may be recorded as an authorised contact for the application
- *There is no prohibition in the ADM(C)A or in DSS processes on the practitioner assisting clients in navigating the DSS portal for the creation of EPAs. Where such are being inputted by the practitioner providing assistance and advice to the client, clear authority for the solicitor's receipt and use of username / password / personal data should be obtained and retained on the file*
 - Law Society Practice Note 15 February 2024
- Legal Aid is available for EPA applications

Application process

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Welcome to the Decision Support Service portal

- Your details**
Manage your personal information and keep it up to date
- Invoices and payments**
View invoices and submit payments
- Applications**
Start or edit an arrangement application
- Arrangements**
View and manage your decision support arrangements
- Fee waivers**
Apply to waive a fee
- Objections**
Make an objection to a decision support arrangement

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Home > My account > Applications

Applications

Start or edit an arrangement application. For more information please [visit our Help & support guidelines](#).

Created on	Arrangement reference	Type of arrangement	Role type	Status
There are no records to display.				

+ Start new application

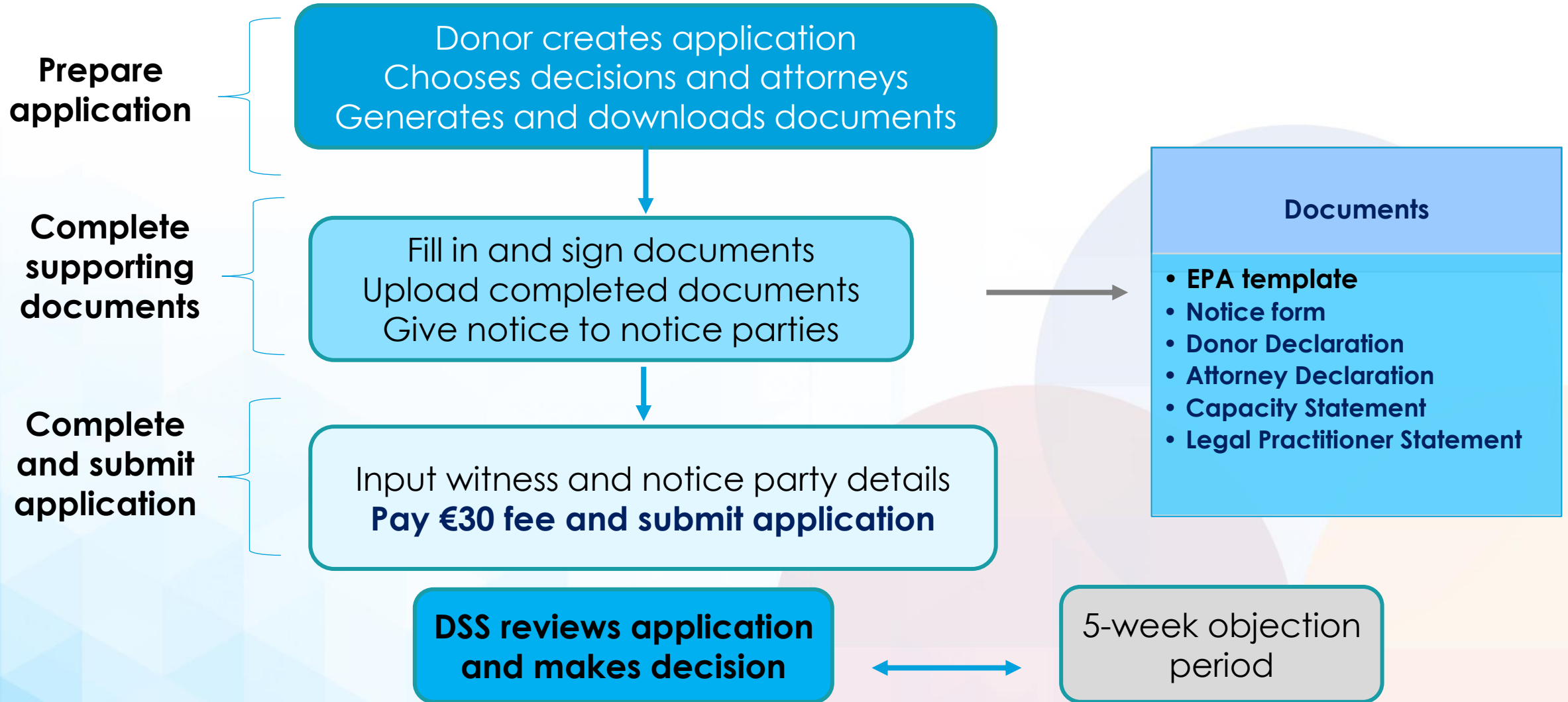
Fields marked with (*) are mandatory.

Type of arrangement *

- Please Select
- Please Select
- Co-decision-making agreement
- Decision-making assistance agreement
- Enduring power of attorney

Start application

EPA Registration Application Stages



Signing and witnessing requirements under the 2015 Act

- Section 60(4)(a) and (b)
 - The donor or the person signing on his behalf and the attorney shall sign the instrument creating the EPA **in the presence of each other and in the presence of two witnesses**
- 'In the presence of' has been interpreted to mean 'in the actual presence of'
- Witnesses:
 - over 18
 - at least one is not an immediate family member of donor or attorney
 - neither is an employee or agent of the attorney – the instructed solicitor should not be a witness if on record for the attorney



Statement by legal practitioner*

Section 60(1)(b): Content of instrument creating an EPA shall include:

- statement by a legal practitioner that, after interviewing the donor and making necessary enquiries, he or she :
 - **is satisfied that** the donor understands the implications of creating the power
 - **is satisfied that** the donor is aware that he or she may vary or revoke
 - **has no reason to believe that** the instrument is being executed as a result of fraud, coercion or undue pressure
- Compare section 5(d)(ii) Powers of Attorney Act 1996/ 'Part D' statement
- See Law Society Practice Note on Enduring Powers of Attorney 15 February 2024
 - [Practice Note on Enduring Powers of Attorney \(lawsociety.ie\)](https://www.lawsociety.ie/practice-note-on-enduring-powers-of-attorney)

* Section 2: a person who is a practising barrister or practising solicitor

Statement of capacity by medical or other healthcare professional : completed after execution



Statement of capacity

Note: The notes in this form are provided by way of guidance only and do not constitute a statement of the law or the provisions under the Assisted Decision-Making (Capacity) Act 2015 (as amended) or any ancillary or related legislation.

Name of donor:	Joan Smith
Name of attorney(s):	Tom Smith
Name of replacement attorney(s), if applicable:	
Arrangement type:	Enduring power of attorney
Pursuant to:	Section 60(1)(c) of the Assisted Decision-Making (Capacity) Act 2015
Category of decision types within the enduring power of attorney:	Personal welfare decisions and property and affairs decisions
Unique reference number:	EPA-2023-000001-001

I undertook an assessment of capacity of Joan Smith, in accordance with section 3 of the Assisted Decision-Making (Capacity) Act 2015 (as amended) (the Act), for the purpose of making a statement of capacity as required by the Act.

I have discussed the implications of creating the enduring power of attorney with the donor. I am of the opinion that at the time the power was executed, the donor had the capacity to understand the implications of creating the power.

Name:	Michael Johnson		
Profession:	General Practitioner		
Registration number:	87654321		
Contact number:	081 112 1222		
Email address:	michaeljohnson@generalmedical.ie		
Date of execution of enduring power of attorney:	14/04/2023		
Date of assessment:	21/04/2023		
Any other comments:			
Signed:	<i>Michael Johnson</i>	Date:	21/04/2023

Note: It is an offence to knowingly provide a false or misleading statement.

DSS Review and Registration

- EPA application must be submitted within 3 months of execution
- DSS reviews application to ensure compliance and to consider any objections
- Section 69 sets out detailed criteria for review

Objection Grounds

- EPA does not meet legal requirements
- Notice requirements not followed
- Donor lacks capacity to make the EPA
- Fraud, coercion or undue influence used to make the donor enter into the EPA
- EPA contains a false statement
- Attorney not a suitable person

If criteria met, arrangement registered and added to Register

**If criteria not met, DSS engages with applicants to resolve
If unresolved, refusal to register – right to appeal**

Director's Discretion

○ Notice requirements

- section 69(1B)
 - if the notice requirements under section 68(3) have not been complied with, the Director may, **if satisfied that all reasonable efforts have been made, treat criteria as having been met**

○ Variation of EPA

- section 73(4B)
 - a variation to the EPA may be made 6 months after registration or at intervals of 12 months **unless earlier or frequent variation is agreed by the Director**

New supervision and reporting requirements



Section 75: after acceptance of notification, attorney must :

- Submit- within 12 months and annually- a report to the DSS on performance of functions to include details of expenses and remuneration
- Additionally, if authorised in respect of property and affairs:
 - submit within 3 months a schedule of assets and liabilities, and projections of income and expenditure
 - keep accounts and financial records and make these available for inspection by the DSS
- If reporting is incomplete, Director may determine that the attorney should no longer act and remove from the register
 - determination may be appealed to the Circuit Court
- Section 76: DSS may investigate a complaint against an attorney on specified grounds and refer a 'well founded' complaint to the Circuit Court for determination

EPAs in numbers

As of 2 December 2024

- 1,287 EPAs fully registered
- 1,403 EPAs submitted, pending review and registration
- 4,857 active applications
- 9,698 draft applications
- 28 notified EPAs

- solicitors are instructed in 27% (approx.) of applications
- 98% of EPAs submitted grant a general authority to the attorney(s)



Resources

- ▶ [Specimen completed forms](#)
- ▶ [Code of Practice - Supporting decision making and Assessing capacity](#)
- ▶ [Code of Practice for Legal Practitioners](#)
- ▶ [Code of Practice for Attorneys](#)
- ▶ [MyDSS online portal Help](#) – Videos
- ▶ [MyDSS online portal help](#) – written guides

- ▶ EPA Helpdesk established September 2024
- ▶ **Telephone: 01 2119750**

EPA Helpdesk In-Person Event Galway, November 2024



Current Advance Planning Campaign

Make a decision your future self will thank you for.



Join thousands in setting up your Enduring Power of Attorney and Advance Healthcare Directive with help from the Decision Support Service.

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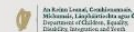


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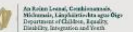


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Thank You



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This presentation is intended as an overview of aspects of the Assisted Decision-Making (Capacity) Act 2015 and related matters and should not be relied on as legal advice or opinion



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