



## 1. Ordinary powers of attorney

### 1.1 Consents

The Conveyancing Committee receives many queries as to whether it is safe to accept the execution of a prior consent under the Family Home Protection Act, 1976 (“the 1976 Act”) by the donee of a power of attorney. The Committee is satisfied that a donee can execute any document on foot of an appropriate power of attorney as fully and effectively as the donor could personally execute it. This includes the execution of all consents including a prior consent under the 1976 Act. Ideally, the power of attorney should be specifically drafted to empower the donee to execute a consent, including prior consent, to a specific transaction, although a properly drafted general power of attorney, including one provided for in Section 16 of the Powers of Attorney Act, 1996 (“the 1996 Act”), would be adequate.

Solicitors should give careful consideration before agreeing to accept an appointment under a power of attorney to give a consent under the 1976 Act, and ensure they have the clearest possible written instructions. Solicitors should also ensure that they advise the donor to consider the general wisdom of appointing the donee in question, and the importance of obtaining, or waiving, independent legal advice. It is really no different from appointing any agent to execute a deed under a power of attorney, but it is obviously a particular type of agency that should not be given lightly.

### 1.2 Declarations

It is sometimes believed that a donee acting under a power of attorney which clearly empowers the giving of consent under the 1976 Act can also, as such attorney, complete a statutory declaration verifying the relevant facts of the marriage and compliance with current family legislation (“a family home declaration”). Such a declaration would be evidentially worthless, being hearsay. An agent cannot give evidence on behalf of another either in court or by statutory declaration. A donee can only complete a statutory declaration of his or her own knowledge, and in this event is not doing so as donee on foot of the power of attorney. This type of declaration could be acceptable where the underlying circumstances are made clear, and there is no more proximate evidence available.

## 2. Enduring powers of attorney

### 2.1 Consents

The position stated above is little different where the donee has been appointed under an enduring power of attorney (“EPA”) which has been registered. An EPA does not come into force until it has been registered under section 10 of the 1996 Act, in circumstances where the donor is, or is becoming, mentally incapable. Section 6 (2) of the 1996 Act provides that “where an instrument is expressed to confer general authority on the attorney, it operates to confer, subject to the

## FHPA, 1976

### AS AMENDED

## POWERS OF ATTORNEY ACT, 1996

## CONSENTS AND DECLARATIONS



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AS AMENDED  
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**CONSENTS AND  
DECLARATIONS**

(Contd.)

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". Accordingly, the donee of a registered EPA which complies with section 6 (2) may execute a consent, including a prior consent, under the 1976 Act.

2.2 *Declarations*

Once an EPA has been registered, the donor will be, or will be becoming, mentally incapable, and any family home declaration made by the donor will be unacceptable. Therefore, in the absence of any other person who can swear a family home declaration in relation to the donor's marriage, the donee would be an appropriate person to make the family home declaration, but it would be made of his or her own personal knowledge, and not as donee. This raises the importance of the donee under an EPA taking steps to ensure that he or she is fully conversant with all the donor's affairs, both personal and financial.