

STEP GLOBAL REPRESENTATIVE POWER FOR PROPERTY AND FINANCIAL AFFAIRS

GUIDING PRINCIPLES

Overview

STEP is a global professional body, comprising lawyers, accountants, trustees and estate practitioners that help families plan for their futures.

Over the last year, our experts have developed the STEP Global Representative Power (GRP) as a 'gold standard' model power of representation.

The STEP GRP aims to bring uniformity, coherence and simplicity to the protection of adults and their property when they are not in a position to protect their interests by reason of an 'impairment or insufficiency of their personal faculties'.¹

Legislation on capacity representation varies in jurisdictions across the world. Although some have implemented robust legislation, many have yet to adopt a power of attorney framework.

STEP is calling on jurisdictions globally to implement robust legal frameworks for safeguarding incapable clients through powers of representation.

STEP has produced this GRP, which, along with the Guiding Principles, is aimed to provoke greater international discussion around the themes of loss of capacity, while promoting legislation that is consistent in the cross-border context.

These Guiding Principles:

- Affirm respect for the dignity and autonomy of adults as priorities captured in the preamble of the *UN Convention on the Rights of Persons with Disabilities*.
- Serve as a template for legislators seeking to establish a framework of protection to support the global ratification of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (the Hague Convention).

The STEP GRP allows the grantor of the power, while they have the necessary capacity to do so, to appoint their own representative and confer powers on that representative to make and execute financial decisions on the grantor's behalf. This can either be immediately or at a future time when the grantor does not have the ability to make or implement their own decisions by reason of an impairment or insufficiency of their personal faculties.

The scope of these Guiding Principles is limited to the appointment of decision-makers for financial and property related matters. They do not extend to personal matters such as a person's health, medical or lifestyle matters; although STEP acknowledges and recognises that some jurisdictions enable the appointment of substitute decision-makers for both financial and personal matters within one document.

¹ As defined by article 1(1) of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (the Hague Convention).

Guiding Principles

The STEP GRP has regard to the following Guiding Principles:

- **Accessibility:** enhancing opportunities for individuals to understand the use and benefits of a GRP and encouraging individuals to make them.
- **Flexibility:** recognising that individuals making a GRP may wish to include directions, wishes or limits on a power, which should be facilitated within any document template.
- **Abuse prevention:** minimising the risk of undue influence, misuse of a GRP and abuse of vulnerable people.
- **Universality:** ensuring effective operation of a GRP in a cross-border context.

Essential features of the STEP GRP

Language

STEP seeks to promote consistency in language that can be applied in cross-border situations. Jurisdictions will use differing names and legal terminology for GRP equivalents. Ensuring easy translation of the GRP is critical for ensuring its effective use in multiple jurisdictions.

There are many terms used to describe representative power equivalents globally, including 'lasting power of attorney', 'enduring power of attorney', 'durable power of attorney' and 'power of representation'. For the benefit of consistency and the portability of powers, STEP recommends that jurisdictions consider use of the term global representative power (GRP) where there is opportunity to reform existing laws and/or introduce new legislation in those jurisdictions where powers of representation are not presently available or recognised.

Requirements

STEP recognises that some jurisdictions require a prescribed form to be used to create a power of representation. We recommend that jurisdictions provide flexibility for the manner in which a valid global power of representation may be created.

Jurisdictions without representative power legislation or a standard form are encouraged to adopt the STEP GRP Model Application Form template.³ This model form has incorporated the following principles:

- A GRP must be made in writing.
- A GRP must be signed by the grantor or on their behalf and at their direction.
- The grantor's execution of the GRP must be witnessed by at least one person who is at least 18-years-old,² with such witness also being required to sign the GRP to confirm their witnessing of the document.
- Limits should be in place on who is authorised to witness a grantor's execution of a GRP (for example, to mitigate the risk of undue influence).

² Or the grantor must be at the legal age of majority as defined by the relevant jurisdiction.

³ The STEP GRP Model Application Form template is available at www.step.org/grp

- The powers of the GRP should commence upon the grantor no longer having mental capacity to make decisions in relation to their finances and property, with flexibility for the grantor to determine an earlier date for commencement of the GRP (before loss of decision-making ability).
- The appointed representative should be given full powers to make financial decisions on behalf of the grantor, with flexibility for the grantor to limit the scope of those powers.
- Flexibility to enable the grantor to confer powers upon their representative, subject to conditions such as consultation or reporting requirements.
- Flexibility to enable the grantor to authorise a particular transaction or class of transactions that might otherwise be limited (for example, conflict-of-interest transactions).

Consistent standards

Differing standards between jurisdictions can be a cause for confusion. In order to streamline the recognition of the GRP in the cross-border context, STEP advocates the adoption of a global framework for decision making on behalf of incapacitated adults.

STEP endorses a legislative framework that is focused on protecting the interests of adults who are not in a position to protect their own interests by reason of an impairment or insufficiency of their personal faculties (as defined by the Hague Convention). We further recognise and emphasise that an adult's decision-making ability is:

- context-specific with a focus on their ability to understand, retain and weigh-up information relevant to a decision, and to then make and communicate a decision;
- time-specific and may be subject to fluctuation; and
- rights-based.

In the context of making a GRP, this involves focus on the adult's ability to understand:

- what a GRP is;
- what powers are conferred by the GRP;
- when the powers commence;
- their ability to amend or revoke an appointment; and
- that if they lose decision-making ability and the representative's powers are triggered, their representative will be making decisions on their behalf during the period of their incapacity.

Consistent legislation

Process

One of the barriers to the universal operation of a GRP is the variation in processes in a cross-border context. Such variations can occur at both the state and administrative level, with financial institutions and other stakeholders having a range of internal policies and procedures in place for the operation of a GRP. It is acknowledged that those processes are often directed towards mitigating the risk of potential misuse and abuse of a power of representation and that such safeguards are an important part of instilling community trust and confidence in the GRP.

STEP seeks to promote uniform processes to facilitate the use of the GRP, and recommends that jurisdictions establish online registers once domestic legal frameworks are in place. This could assist in preventing misuse and abuse of GRPs.

Validity

Although it is recognised that some jurisdictions will have differing requirements for determining the formal and material validity of a GRP, STEP promotes an outcome whereby a GRP that is valid in the jurisdiction in which it was executed will be deemed valid in the jurisdiction in which it is proposed to be used.

Awareness

Through the promotion of the GRP, STEP seeks to increase understanding and awareness of its role and use. It is noted that there may be future opportunities beyond these Guiding Principles to consolidate information about specific jurisdictional requirements to increase awareness and universality of application.

Use in a cross-border context

A core objective of these Guiding Principles is to promote the worldwide ratification of the Hague Convention and the work of regional bodies, such as the European Commission, which is working to introduce a streamlined set of mental capacity cross-border rules that will apply within the European Union following the work of STEP members and the European Law Institute.⁴ States are strongly encouraged to consider ratification of the Hague Convention and to use the resources available through the Hague Conference on Private International Law at www.hcch.net to advance these aims.

Acceptance

The private international law rules of the jurisdiction where the GRP is to be used will determine questions of acceptance, recognition and enforcement of the GRP.

The Hague Convention sets out the private international law rules that apply between signatory states. Article 38 of the Hague Convention makes it possible for a representative to obtain a certificate confirming their authority to act on behalf of the grantor if they have lost capacity, and can be used to enable the representative to act in any other jurisdiction that has ratified the Convention without any other formal steps being taken.

Where the Hague Convention does not apply, it will be necessary to consider the private international law rules of the receiving jurisdiction in particular, which may require formal steps to be taken with the relevant authorities or courts.⁵

⁴ ELL_Protection_of_Adults_in_International_Situations.pdf (europeanlawinstitute.eu)

⁵ It should be noted that a power of representation will be accepted in some jurisdictions such as Canadian provinces and territories (except Quebec), without any formal post-execution validation steps.

Safeguards against the misuse of GRPs

STEP notes the potential for misuse and abuse of GRPs and the importance of safeguarding the rights and interests of vulnerable people.

STEP endorses a legislative framework that includes the following safeguards to prevent and respond to misuse:

- Restrictions on who is able to make a GRP, including that the person making a GRP must be an adult.⁶
- The requirement that the person has the mental capacity to create a GRP.
- Restrictions on who is able to witness a GRP, with a requirement that the witness be independent of the grantor and representative(s).
- Restrictions on who may be appointed as a representative (for example, restrictions on paid care-providers being a representative).
- Recognising the ability of the grantor to create a GRP that gives full powers; powers that are limited or restricted and powers that are subject to specified conditions.
- Ensuring clarity around the decision-making of matters that fall outside of the powers of a representative.
- Providing that the grantor's property and money may only be applied to or for the grantor's benefit, subject to the terms of the GRP.
- Preventing or restricting conflict-of-interest transactions.
- Requiring that the grantor's assets be kept separate from the representatives' assets.
- Record-keeping and disclosure requirements.
- Enabling the grantor to revoke the GRP while they have decision-making ability to do so.
- Ensuring there is a court, tribunal or administrative body within the jurisdiction to oversee the validity and operation of GRPs, including the ability to revoke or amend a GRP and make other orders regarding their use.
- Restricting gifting of the grantor's assets to *de minimis* gifting, subject to the express wishes of the grantor in the GRP or prior pattern of gifting, recognising that court or tribunal approval may be required for other gifting.
- Requiring the representative to support and represent the will, preferences and rights⁷ of the grantor, subject to public policy requirements in the relevant jurisdiction.
- Evidencing a loss of decision-making capacity where this is required for the representative to exercise their authority under the GRP.
- Ensure that the representative seeks legal advice in jurisdictions in which the GRP is to be used with reference to their duties and responsibilities.

⁶ The age of majority for these purposes varies across jurisdictions.

⁷ As specified by article 12 of the *UN Convention of the Rights of Persons with Disabilities*.

ABOUT **STEP**

STEP is a global professional body, comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures.

Our mission is to inspire confidence in families planning their assets across generations by setting and upholding high professional standards, informing public policy, promoting education, and connecting practitioners globally to share knowledge and best practice.

Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

STEP Global Representative Power

This document forms part of the STEP Global Representative Power toolkit, which comprises:

- *Guiding Principles*
- *Model Application Form*
- *Making a GRP – Application Form Guidance*
- *Registered GRP Template Certificate*

The full toolkit can be found at www.step.org/grp

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