POWERS OF ATTORNEY

By Keith Bradley

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Powers of attorney represent an important area of elder law. This article addresses relevant practical considerations for legal practitioners preparing powers of attorney, including the importance of legislative controls on attorneys to reduce the chance that they will abuse their position – an issue of particular concern for elder Australians. Discussion is set against the backdrop of the complications that arise from differing legislation across the states and territories, and the desire for a nationally consistent approach to the law in this area.

WHAT IS A POWER OF ATTORNEY?

A power of attorney is a formal instrument by which one party, the principal, grants authority to one or more others, the attorney, to act on their behalf. Such a power creates an agency relationship, giving rise to obligations on the part of the attorney/s. Powers of attorney can either be 'general' or enduring'. A 'general' power is for a particular period or a particular purpose, and ceases when the principal loses capacity. Conversely, the grant of control under an 'enduring power of attorney' (EPA) continues after the principal loses capacity. Both types cease upon the death of the principal. While everyone is encouraged to execute an enduring power of attorney, the need is especially relevant for elder Australians, as issues of capacity become a central concern.

Abuse of powers of attorney is another worrying issue, particularly in the case of elderly people. Such abuse can be broadly defined as the illegal or improper use of a person's finances, and occurs largely in the context of enduring powers of attorney. Discussion of enduring powers of attorney will thus provide the focus for this article. Financial matters, rather than personal and health issues, will also be the focus.

WHAT TO BE AWARE OF WHEN PREPARING POWERS OF ATTORNEY

An attorney under an EPA can make decisions and take action in relation to the financial, legal and personal affairs of the principal. This represents a significant grant of power. In relation to financial matters, the attorney may – on the principal's behalf – engage in (among other things): the payment of debts; performance of contracts; the discharge of a mortgage; investment in authorised investments; real estate transactions; and the withdrawal or depositing of money into the principal's bank account. It follows that solicitors must exercise great care in preparing powers of attorney, especially when the client is of advanced age, or where mental capacity may be an issue.

As witnesses to EPAs, solicitors are effectively certifying that the principal understands the nature and effect of the power of attorney, and has capacity to execute the document. Solicitors thereby have a duty of care to ensure that this is the case. Section 41(2) of the Queensland *Powers of Attorney Act* 1998 outlines matters that must be considered when satisfying this requirement. These include that the principal understands when the power comes into effect; that they may limit the power and how this can be done; the full control that the attorney will be granted over the principal's affairs; and that the power will continue after they lose capacity. Essentially, the practitioner must be confident that the principal understands the powerful nature of this instrument and its potential future implications.

Under ACT,[1] NSW,[2] Queensland[3] and Victorian[4] legislation, witnesses must sign certificates broadly stating that in addition to appearing to understand the nature and effect of making the power of attorney, the principal voluntarily signed the deed. It follows that solicitors should

> Practitioners must ensure that principals fully understand the power and potential implications of EPAs.

be alert to the possibility of influence or pressure being placed on principals by any other party, and should ensure that instructions are coming directly from the principal.

Each state and territory has its own prescribed form for powers of attorney. In NSW, for example, this is found in Schedule 2 of the Act,[5] and applies both to general and enduring powers of attorney. For the power of attorney to be enduring, the principal must sign an additional provision stating that the power will continue to have effect after loss of capacity, and the document must be accompanied by a certificate from the legal practitioner (or other prescribed witness) that satisfies the s19 requirements addressed above. >>

The NSW form also allows the principal to authorise the attorney to confer benefits on themselves or others and give reasonable gifts on the principal's behalf. Legal practitioners must bring this to the attention of the principal because, among other considerations, it can help to address the issue of financial abuse by the attorney (see below).

As a general rule, in most jurisdictions, the power of attorney document need not be registered, but *may* be registered. Registration is mandatory only where the power involves dealings in relation to land. Only the Tasmanian legislation[6] requires that an EPA must be registered in order to be activated.

Legal practitioners should be aware of the interstate recognition provisions that apply across the states and territories, and advise clients that their EPA will not automatically be recognised in these jurisdictions. This is a complicated area of law (see below).

It is generally considered unwise for legal practitioners to act as enduring attorneys for their clients, and as a rule practitioners are advised to refuse such requests.

A practitioner should advise the principal when the power of attorney document begins. An EPA is not effective until the attorney accepts the appointment by signing the power of attorney document itself. Section 20 of the NSW Act[7] provides an example of this provision. It is interesting to note, however, that NSW introduced this provision only in 2004, when changes were made to the Act to add extra protection for people suffering from incapacity. Previously, the EPA came into effect upon signature by the *principal*. This amendment is important because it ensures that the attorney is aware of their position and consents to the appointment before incurring the onerous obligations that accompany such a role. It also creates an opportunity to provide information to the attorney on their duties and rights.

The same commencement provision applies in the other states and territories. No witness is required to the attorney's signature. It is possible to specify other commencement times, such as loss of capacity, but this can be very hard to define. For example, under s106 of the *Guardianship and Administration Act* 1990 (WA), the attorney must apply to the Guardianship and Administration Board for a declaration that the principal does not have legal capacity, so as to allow the power to come into operation.[8]

The NSW Law Society has produced a document called *Guidelines for Solicitors Preparing An Enduring Power of Attorney*, which provides a useful reference for legal practitioners.

EPAs ARE EMPOWERING, BUT HOW TO ADDRESS THE POTENTIAL FOR ABUSE?

In allowing the principal to choose a person to make important decisions on their behalf, an EPA allows the principal's wishes to be reflected in decision-making after their loss of capacity. The principal thus gains a sense that they are retaining control of the conduct of their affairs. Further, EPAs avoid the possible need for a Guardianship Tribunal to make declarations regarding a person's affairs (which can be a costly exercise) and can prevent disputes between family members. The main advantages of EPAs are therefore 'convenience and self-determination'.[9]

Despite their advantages, particularly for elderly people, EPAs are frequently abused. A significant amount of evidence suggests that the misuse of EPAs is the most common form of financial abuse of elders.[10] Further, and more alarmingly, adult children have been identified as the main perpetrators.[11] Such abuse has a devastating effect on older people.

Given the potential for such abuse, it becomes crucial that legal practitioners comply with the legislative requirements, particularly ensuring both the full understanding and capacity of the principal. Cockburn and Cheek, in their paper 'Elder Abuse and How to Prevent It',[12] stressed the very important role that lawyers can play in identifying and preventing abuse arising from EPAs.

Abuse of EPAs can take a variety of forms, including exerting undue pressure on the principal to sign the document; ignoring obligations under the EPA; making

unauthorised transactions; and engaging in conduct that gives rise to a conflict of interest.

Recent amendments to powers of attorney legislation across the legislative regimes focus on preventing such elder financial abuse. The legislative controls seeking to limit the potential for abuse place an onerous level of responsibility on attorneys. The nature of the principal-attorney relationship gives rise to a fiduciary duty on the part of the attorney which, in s66 of the Queensland legislation,[13] is defined as requiring attorneys to exercise their power honestly and with reasonable diligence. Failure to do so constitutes an offence, and the court can order attorneys to compensate principals for any loss.

Conflict transactions present a big issue with regard to the abuse of EPAs. These are defined in the ACT legislation as transactions that result, or may result, in conflict between the duty of the attorney towards the principal and either the interests of the attorney or another duty of the attorney.[14] Provisions that restrict such transactions are another means of seeking to prevent financial abuse by the attorney. For example, s73 of the *Powers of Attorney Act* 1998 (Qld) states that an attorney may enter into a conflict transaction only if the principal authorises that transaction or transactions like it, or generally authorises them.

A waiver of conflict clause, or authority to enter into conflict transactions, should be included in the EPA if the principal wishes to authorise the attorney to engage in conflict transactions, or transactions that would result in a benefit being given to the attorney.

To minimise the risk of intra-family conflict, a further clause could be inserted requiring adult children appointed as attorneys to advise other siblings of any documents they sign as attorney, which may be conflict transactions.

EPAs are construed strictly in this regard. In the case of *Sweeney v Howard*,[15] which dealt with the actions of an attorney under an EPA, Windeyer J held that 'unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal'. Further judicial observation in *Tobin v Broadbent*[16] stressed the need for 'specific and quite unambiguous words' if transactions not benefitting the principal are to be allowed. These requirements, while still allowing the principal to consent to such transactions, help to ensure that the principal has fully intended to grant this power, rather than merely failed to turn his or her mind to the issue.

Another control that seeks to limit the abuse of EPAs is the legislative requirements dealing with gift-giving by the attorney on the principal's behalf. As mentioned above, NSW-prescribed forms make specific reference to the conferral of this power. Section 88 of the Queensland *Powers of Attorney Act* 1998 states that, unless there is a contrary intention in the EPA, the attorney can give gifts only to a relative or close friend of the principal, and the value of the gift must be reasonable in the circumstances.

Under s38 of the ACT Act, the standard enduring power of attorney form does not authorise the attorney to make a gift of all or any of the principal's property unless the principal expressly authorises the making of the gift. If the enduring power of attorney contains a general authorisation to make gifts, s39 authorises gifts to a relative or close friend only for the celebration of a special event, and the amount and kind of any donation must be reasonable.

In Queensland, NSW and the ACT, information for the principal and the attorney is included on the prescribed EPA form. Such information attempts to clarify both the nature of the grant of power, as well as the obligations on the attorney. This aims to give the both the principal and the attorney a full appreciation of the implications of the document.

DIFFERENCES IN POWERS OF ATTORNEY LEGISLATION ACROSS AUSTRALIA

Each state and territory has its own powers of attorney legislation. Inevitably, this gives rise to peculiarities, and has resulted in an overall lack of consistency across jurisdictions. While a detailed examination of the different legislative provisions is beyond the scope of this article, it is instructive to draw attention to some of the differences. Indeed, such a comparative analysis may explain why a Commonwealth House of Representatives Standing Committee Report on 'Older People and the Law'[17] recently recommended uniform legislation in this area, almost as a matter of urgency.

Witnessing requirements

Legislative requirements regarding the witnessing of EPAs are central to the execution of the document, as well as to the >>

The lack of nationally consistent legislation hinders the effective functioning of EPAs.

prevention of abuse. These requirements are currently not uniform across state and territory legislation.

In the ACT, two people are required to witness the signing of an EPA.[18] One must be a person authorised to witness statutory declarations, and one is allowed to be a relative of the principal or the attorney. This raises questions regarding abuse given that, if the legal practitioner is the relative, there is no guarantee of *independent* legal advice.

In NSW, the EPA must be witnessed by a 'prescribed witness',[19] which is defined as including solicitors and barristers, registrars of a local court, licensed conveyancers or an employee of the Public Trustee. Similarly, s31 of the Queensland Act[20] requires that an EPA must be witnessed by one 'eligible witness', including lawyers and notary publics, but must not be a relative of the principal or the attorney. Tasmania also excludes relatives from witnessing, and requires two attesting witnesses, each of whom must witness in the presence of the principal and each other.[21] Western Australia requires two attesting witnesses, who are both persons authorised by law to take declarations.[22] South Australian legislation requires that one person witness the document, and that this person be authorised by law to take affidavits.[23] In the Northern Territory, two witnesses are required, and these witnesses must not be near relatives of the attorney.[24]

Legislative provisions are clearly inconsistent in this regard, and a uniform approach to witnessing requirements is needed to bring all witness testimonies up to the same standard, and assist with the recognition of powers of attorney across Australia.[25]

Interstate or 'mutual' recognition

The issue of interstate recognition of EPAs represents another area of inconsistency. At present, the interstate implementation of powers of attorney is complicated. Evidence submitted to the House of Representatives Standing Committee[26] indicated that mutual recognition of powers of attorney was, at best, limited. There is no automatic acceptance of powers of attorney made interstate, with each individual document requiring interpretation.

Section 25 of the *Powers of Attorney Act* 2002 (NSW) gives recognition in NSW to enduring powers of attorney executed in accordance with the legal requirements of another state or territory, but limited to any power that could be conferred in NSW, and subject to any limitation on the power imposed by law in the state of execution. This is echoed in provisions in ACT,[27] Queensland[28] and Victorian[29] legislation.

In the Northern Territory, an EPA that has been *registered* in another state or territory may be registered under Northern Territory legislation. In Western Australia, the attorney must apply to the Guardianship and Administration Board for an order recognising the validity of the EPA under Western Australian legislation.[30] South Australian legislation has no specific provision addressing the recognition of powers of attorney made in other jurisdictions.

In 2007, the House of Representatives Standing Committee[31] recommended that uniform legislation should be worked towards, but that, prior to this, the states and territories should work together within their individual legislative schemes to maximise the portability of powers of attorney.

Clearly the inconsistency of the laws in this area creates difficulty in the effective functioning of EPAs, and nationally consistent legislation is needed to ensure the smooth and transparent implementation of powers of attorney across Australia.

The EPA is a potentially complex document, even for the routine client, and can have enormous future implications. When advising their clients, lawyers should not understate either the complexity of an EPA or its value, and should always be aware of the potential for EPAs to be abused. ■

Notes: **1** *Powers of Attorney Act* 2006 (ACT), s22. **2** *Powers of Attorney Act* 2003 (NSW), s19. **3** *Powers of Attorney Act* 1998 (QLD), s44. **4** *Instruments Act* 1958 (VIC) s125A. **5** *Powers of Attorney Act* 2003 (NSW). **6** *Powers of Attorney Act* 2000 (TAS). **7** Powers of Attorney Act 2003 (NSW). **8** Peter Whitehead, 'Power of Attorney Law Reform in NSW', presentation from February 2004, p13. **9** Tina Cockburn and Catherine Cheek, 'Elder Financial Abuse and How to Prevent It', paper presented at the Australian Lawyers Alliance's National Conference, 13 October 2007. **10** *Ibid.* **11** *Ibid.* **12** *Ibid.* **13** *Powers of Attorney Act* 1998 (QLD). **14** *Powers of Attorney Act* 2006 ACT, s42(1). **15** [2007] NSWSC 852. **16** (1947) 75 CLR 378. **17** House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law', September 2007. **18** *Powers of Attorney Act* 2006 (ACT), s19. **19** *Powers of Attorney Act* 2003 (NSW), s19(2). **20** *Powers of Attorney Act* 1998 (QLD). **21** *Powers of Attorney Act* 2000 (TAS), s30(2)(b). **22** *Guardianship and Administration Act* 1990 (WA), s104(2)(a). **23** *Powers of Attorney and Agency Act* 1984 (SA) s6(2)(a). **24** *Powers of Attorney Act* 1980 (NT). **25** Above note 17,at 93. **26** Above note 17. **27** *Powers of Attorney Act* 2006 (ACT), s89(2). **28** *Powers of Attorney Act* 1998 (QLD), s34. **29** *Instruments Act* 1958 (VIC), s116. **30** *Guardianship and Administration Act* 1990 (WA), s104A. **31** Above note 17.

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