



**ACT MINISTERIAL ADVISORY COUNCIL ON AGEING
And
Aged Care Advisory Council**

PO Box 158 CANBERRA CITY ACT 2601: Ph (02) 6207 6131 Fax: (02) 6207 5862

**Wednesday 20 June 2007
Canberra Seniors' Centre
10 Watson St, Turner**

Presentation By Public Trustee for the ACT

My name is Andrew Taylor

I have been asked to speak to you for 20 minutes about:

- the Public Trustee's role in relation to the new Enduring Power of Attorney provisions,
- the relationship between EPA and prevention of elder abuse and
- any public education programs that your Office is involved with.

PUBLIC TRUSTEE'S ROLE

The Public Trustee has no role in the administration of the Act.

The Public Trustee can be chosen as attorney.

The Public Trustee is often chosen as attorney when an independent professional with the necessary expertise continuing availability, willingness, time and no conflict of interest is required.

The Public Trustee may now only accept appointment as attorney for financial/property matters.

Under the new legislation, the main issues of concern to us are:

- Immediate or delayed commencement
- Competence – upon making the EPA and upon activation.
- Execution
- Registration – for registrable property transaction

ENDURING POWER OF ATTORNEY

An **Enduring Power of Attorney (EPA)** continues to be effective after the principal has lost mental capacity. An EPA may empower your attorney to make financial, property, lifestyle and health decisions. An EPA may be activated when required or upon loss of legal capacity. It allows your attorney to

commence or to continue to manage your affairs even though you have become unable to give lawful instructions.

CESSATION OF ORDINARY AND ENDURING POWERS OF ATTORNEY

Both ordinary and enduring powers of attorney cease to have effect once the principal has died.

ROLE OF AN ATTORNEY

The common law imposes strict obligations on attorneys to always act in the best interest of their principals.

In preparing EPAs we are concerned that that the parties are aware

- that the attorney cannot take the property of the principal.
- an attorney cannot take advantage of opportunities that arise, as an attorney.
- the courts have held that the attorney must hand over that benefit to the principal.

ISSUES TO CONSIDER

However, in practice, the law is not always followed. There have been cases where attorneys have taken benefits for themselves in circumstances where the principals had lost mental capacity and could not therefore monitor their attorneys' actions. In some cases, the acts were done without full regard for the principal but in most cases, the attorney was simply misguided or believed that the action somehow benefited the principal.

In some other cases, the attorney has been aware that he or she, or members of the family, are to benefit under the terms of their principal's Will. The attorney saw no problem in what amounted to a distribution of the estate prior to the principal's death by using the principal's money to pay for such matters as the attorney's medical accounts, household expenses, and the attorney's children's school fees.

The consequence of an attorney taking or distributing the principal's assets is that the principal can be left with insufficient money to pay for his or her living expenses or medical care.

The attorneys' actions in the cases described above have often been taken in accordance with a provision in the power of attorney, which allows the attorney to take a benefit.

Difficulties arise where this right is expressed in general terms, so that there are no clear limits to the nature of the benefit, which the attorney can take. In such circumstances, the relationship between an authority for an attorney to take a benefit and the attorney's fiduciary duties are not clear. The confusion on this

point has led to action, which is, irrespective of its legality, inconsistent with the purpose of a power of attorney and detrimental to the principal's interests.

For reasons such as these, and also for reasons of existing or potential disfunctionality within the principal's family, the Public Trustee is often chosen as attorney. The Public Trustee is often chosen as attorney when an independent professional with the necessary expertise continuing availability, willingness, time and no conflict of interest is required.

LIMITATIONS

S.89 gives recognition in the ACT 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 ACT.

An attorney can not, unless specifically authorised in the EPA:

- delegate his/her attorneyship to another
- sign a document under a EPA that confers a benefit on the attorney

An EPA can not authorise the attorney to exercise power in relation to special personal matters eg making a Will or a Power of Attorney, voting, consenting to adoption of consenting to marry.

An EPA can not authorise the attorney to exercise power in relation to a special health care matter eg consent to organ donation, sterilisation, termination or psychiatric therapy

RELATIONSHIP BETWEEN EPA AND PREVENTION OF ELDER ABUSE

There is a common belief that EPA's are a significant and principle tool in the prevention of elder abuse.

A Power of Attorney is a deed based upon trust...the trust that a person puts in a family member, a friend or a public official to make their most personal of decisions when they are no longer able to do so themselves.

It is also commonly accepted belief that family can be trusted. It may not surprise you that a significant amount of elder abuse is committed by close and trusted family members.

The EPA is not a guaranteed form of preventing elder abuse. It can not do this because we live in a world where we can choose, and because greed is a human trait and because we are all subject to misfortune whether by being affected by a drug habit, or being declared bankrupt or being influenced by others.

'Elder abuse' is a new term given to an old problem. The only thing that has changed is that people are living longer (79.9 yrs - Males) and (84.0 yrs - Females) and the incidence of dementia is rising significantly.

It stands to reason that the opportunity for elder abuse may also rise. People are now also more likely to have accumulated greater assets in their lives.

Elder abuse takes many forms including physical, psychological and financial and an EPA has no hope of eliminating it. A carefully prepared EPA may however help to prevent or mitigate elder abuse.

On the one hand, an EPA is required to be **prepared and registered** (if you wish your attorney to act on your behalf for property matters). As much as this creates some structure around the appointment of your attorney, it can also act as a facilitator to elder abuse.

This is because irrespective as to whether an EPA is registered or not, the world at large is expected to accept the validity of an EPA or an act done under an EPA.

An EPA can be prepared in respect to a person who is only mildly intellectually incapacitated but not fully able to appreciate the nature of the document. There is no formal certificate of competence required to prepare an EPA. So an EPA can be fraudulently prepared, or the principal might be coerced into giving wider powers than they might normally give.

After the EPA has been made there is then opportunity for it to be abused, either by acting under the EPA before the principle loses capacity, or in abuse of the trust placed in the attorney.

An EPA can't eliminate elder abuse because elder abuse comes in so many shapes and forms:

- Petty Fraud:
 - an elderly person has an informal arrangement with a neighbour, friend or family member involving an ATM on pension day, withdraw cash using a known P.I.N. and purchase essential groceries.
 - unqualified trades-people making cold-calls on elderly people's homes offering to undertake some task at wildly inflated prices and at grossly sub-standard.
- Undue pressure from relatives or strangers who will suddenly befriend them after the onset of dementia to make new wills or gifts.
- The "granny flat" – an elderly person starts to become dependent and makes arrangements to build a 'granny flat' on the property of a son or daughter move them to a nursing home with no compensation for the value of the improvement to that property.
- Some charity groups benefit enormously from the loneliness of elderly people, particularly with telemarketing. Older people desperate for company enjoy the regular callers and agree to donate money when at times they are unable to afford the donation.

- Some religious groups also sign up vulnerable members of their congregation to regular donations (generally linked to a promise of salvation) via direct debit arrangements, limiting their available income.

A study recently undertaken by the University of Queensland showed that elderly people with EPA's are equally susceptible to financial abuse as elderly people without EPA's. Where an EPA is abused, recovery of lost assets or income is extremely difficult. The production of evidence for stealing under an EPA is often impeded by the perception that it is a 'civil' and not a Police matter.

Notwithstanding, the EPA process:

- establishes some level of rigour around the process of formalising the relationship you have with trusted family and friends.
- heightens awareness of the problems and pitfall that may be faced by older persons
- establishes some statutory boundaries outside of which an attorney may not act
- establishes some definitions of what is not incapacity
- automatic revocation by reason of bankruptcy etc
- establishes some structure around the signing of EPA's before qualified witnesses
- seeks to prevent conflicts of interest between the attorney's and the principles interests
- requires records to be kept

WHO SHOULD HAVE AN EPA?

It is the advice of government that every person over 18 years who has capacity, should make an EPA.

In delivering that message, it is the Public Trustee's advice that you should consider an EPA with the same care that you would accord to your Will.

You should not wait until you need an EPA to make one....it is an important form of insurance that your wishes will be undertaken even if you lose capacity.

WHO SHOULD BE AN ATTORNEY?

You should choose an attorney that is skilled, trusted, available (not older than you), enduring and has the time. Often families appoint the most capable of their children to be their attorney. It is also a fact that the most capable child may also be the more influential and may seek to coerce others according to their wishes. Additionally, a normally trustworthy child as attorney may marry and be influenced by their spouse, or become affected by other circumstances.

Under the new provisions, the Public Trustee may now only be appointed as attorney for financial and property matters. As Public Trustee, and in my previous position as Registrar-General, I have experienced many instances of

fraud involving abuse of elders, sadly most of which remain unresolved and often due to lack of finances to fight it and because of the destruction it causes within families.

PUBLIC TRUSTEE EDUCATION PROGRAMS

The Public Trustee conducts a range of public education programs to community groups as follows:

- Public Trustee free annual seminar on Wills, EPA's and Estate Planning as part of Seniors Week
- Community Groups such as Probus, Rotary, Independent Association of Retirees

REPRESENTATION

The Public Trustee is also represented on:

- Ministerial Advisory Council on Ageing
- Australian Guardianship and Administration Committee (AGAC)
- Trustee Corporations of Australia Inc