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## Enduring Powers of Attorney—The New Law

By Paul Whitmarsh



As explained in Volume 22 2008 of our newsletter by Amy Haste (nee McLennan), an enduring Power of Attorney (“EPA”) can be a very useful document to have in place, especially if you are travelling overseas.

As from late last year the law changed in relation to an EPA through the introduction of the Protection of Personal and Property Rights Amendment Act 2007 (“the Act”).

The Act improves the protection for vulnerable people in relation to the preparation of EPA’s.

EPA’s now require an independent witness to the signature of a donor and attorney, along with independent legal advice for the creation of a valid EPA.

The donor’s signature must be witnessed by either a lawyer, an officer or employee of a trustee corporation or a legal executive independent of the attorney. The witness is obliged to explain the effects and implications of the EPA to the donor, and specifically advise the donor of:

1. The notes to the prescribed form EPA;
2. The donor’s rights to suspend or revoke the EPA; and
3. In property EPA situations, the donor’s rights to appoint more than one attorney, and to stipulate how the attorney’s dealings are to be monitored.

The attorney’s signature must be witnessed by someone other than the donor or the donor’s witness.

By introducing the independent legal advice requirements, it is clearly Parliament’s intention

that the donor be fully advised before entering into an EPA.

The attorneys are also required to act in a way that promotes and protects the best interests of the donor and also requires the attorney, as far as practicable, to consult the donor and any person specified by the donor in the EPA. The attorney is also required to encourage the donor to act for him or herself and otherwise to involve the donor in decision-making to the maximum extent of the donor’s capability.

Where an attorney is acting on behalf of the donor, they are required to provide information on the exercise of their powers to any person or persons specified in the EPA. This is an important measure, not just for maintaining the integrity of the decision-making by attorneys, but also for reducing the opportunity for the management of an EPA to become a matter of discord among other family members. By requiring property attorneys to keep records of the financial transactions they have made on behalf of the donor, transparency of the attorney’s actions will be provided.

The Act also allows the donor to suspend an attorney’s power to act and thus recognises situations where the person might have recovered their capacity to act on their own behalf, for example, when they have recovered from a severe head injury.

The Act strengthens the Court’s ability to regulate and review attorney’s powers and to revoke the

EPA itself. The list of persons who can apply to review the attorney’s decisions is greatly expanded, maximising the opportunity for donors to be protected.

The attorney’s power to act is suspended when the donor is no longer mentally incapable of giving written notice to the attorney. The suspension doesn’t revoke the EPA and the attorney may not act again under the EPA unless the donor is again certified mentally incapable. The donor has the freedom to revoke the power of attorney while mentally capable.

Under the Act, the attorney, while the donor is mentally incapable, must not act for the benefit of the attorney or a person other than a donor, or act to recover any expenses from the donor’s property unless, and to the extent that the donor has specified the power in the EPA, or the Court authorises it.

In addition, the Court can revoke the appointment of an attorney if it is satisfied the attorney is not acting or proposing not to act in the best interests of the donor, or has failed or is failing to comply with the attorney’s obligations under the duty to consult and provide information on the exercise of powers or the keeping of records.

In summary, the new regime provides much greater protection to those granting EPA’s. If you require any further information or would like to enter into an EPA in relation to either your property or personal care and welfare, do not hesitate to contact us.

In the next newsletter, Lloyd Collins will discuss relationships of short duration.