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**ENDURING POWERS OF ATTORNEY FOR PERSONAL CARE AND
WELFARE IN NEW ZEALAND: AN UNCERTAIN PROPOSAL**

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Table of Contents

I	INTRODUCTION	4
II	OVERVIEW OF THE ACT	5
	A 2008 amendments	5
	B 2013 review	6
	C Statutes Amendment Bill	6
	D PPPRA relevance to Elder Law	6
III	FACTORS TO CONSIDER IN RELATION TO CREATING AN EPA	7
	A Potential implication of not having an EPA	8
	B Personal Choice	9
	C No one to appoint?	10
	D Cost	11
	1 Legal Aid	11
	2 Special Needs Grant Programme	12
	E No crystal ball	12
	F Culture/Family	13
	G Choice of Attorney	15
IV	CREATION OF EPA	15
V	ACTIVATION OF EPA	17
	A Capacity	17
	B Capacity Assessment	18
VI	POWERS OF EPA	20
	A Accountability	21
	B Registration	23
VII	THE COURT’S JURISDICTION	24
VIII	CESSATION OF EPA	25
IX	CONCLUSION	26
X	BIBLIOGRAPHY	28
	A Cases	28
	B Legislations	28
	1 New Zealand	28
	2 United Kingdom	29
	3 Bills	29
	C Books and chapters in books	29
	D Journal Articles	30
	E Reports	30
	F Internet Resources	31
	G Other Resources	33

Abstract

This paper looks at the Enduring Powers of Attorney for Personal Care and Welfare sections of the Protection of Personal and Property Rights Act 1988. It examines the factors involved when considering to whether to appoint an EPA, and critically evaluates the legislation in regards to creation of an EPA, activation of an EPA, powers of an EPA and the cessation of an EPA. It includes recommendations to make the legislation more accessible to all and more relevant for the 21st century.

Word length

The text of this paper comprises approximately 7445 words.

I Introduction

In health, personal care and welfare enduring powers of attorney (EPAs) are encouraged and seen as a way to ensure there is a decision maker in cases that involve a lack of capacity where significant decisions need to be made. There are two types of EPAs; property, and personal care and welfare. This paper will focus on the latter in relation to the elderly person.

As a health social worker I am very interested in Enduring Powers of Attorney [EPA] and doing this research allowed me the opportunity to understand more about the legislation that govern them.

Part of my role on an acute hospital ward involves frequent conversations with patients, their families and other staff members about EPAs. These range from explaining and providing information about EPAs to patients and their families, to ensuring all involved in a patient's care are clear as to when and how an EPA takes effect. Inevitably, social workers are involved where there are staff concerns or family issues and disagreements about how an EPA is acting or intends to act and the law provides an instrument for intervention where these are validated.

In situations where there is no EPA in place, social workers are available to provide support with Court applications if they are required. The biggest regret people have when having to go through that process is that an EPA was never created. There are many barriers to this which will be discussed further. A lot of the areas explored in this paper are drawn from personal experience in practice.

This research paper will loosely follow the structure of the Protection of Personal and Property Rights Act 1988 (PPPRA or 'the Act') which is the legislation that enables EPAs. It seeks to examine its usefulness and success at achieving its desired outcome of protection for the individual in relation to Elder Law. It will incorporate throughout, discussion about the Act's history, including amendments, review, recommendations and a Bill currently at Select Committee stage. It will also provide critique and suggestions to improve the relevance of EPAs in the 21st century.

II Overview of the Act

The PPPRA is legislation that provides for guardianship appointments and Orders to be made for adults who are not capable of looking after themselves. The EPA section of the legislation¹ allows a person with capacity (donor) to appoint another person to become their attorney and to make legal decisions on their behalf if they become mentally incapable².

While PPPRA was primarily developed to protect and create rights for those with intellectual disability³ it is the only legislation that allows for adult guardianship, giving the terms and conditions which apply when surrogate decision making is required.

Unlike the Care of Children Act 2004⁴ and Children, Young Persons and Their Families Act 1989⁵ there are no specified principles in the legislation that must be applied. Instead, for the purposes of the PPPRA the presumption of competence and capacity to manage one's own affairs stands "until the contrary is shown"⁶.

A 2008 amendments

A report by the Law Commission to the Minister of Justice in 2001, *Misuse of Enduring Powers of Attorney in 2001*, recommended that amendments be made to the legislation following public submissions.

When introducing the proposed amendments, the Minister for Senior Citizens spoke of elder abuse and neglect being a critical priority issue.⁷ The Law Commission report referred to the EPA provisions in the legislation as an "afterthought" that was inserted at Select Committee stage⁸. It raised a number of concerns about the lack of safeguards for

¹ Protection of Personal and Property Rights Act 1988, Part 9 ss 93A – 108AAB

² Sylvia Bell *Protection of Protection and Property Rights Act and Analysis* (Brookers, Wellington 2012) at 36

³ Bill Atkin "The Protection of Personal and Property Rights Act 1988 – Update and Reflections" (2013) 44 VUWLR 439 at 441

⁴ Care of Children Act 2004 s1(5)

⁵ Children, Young Persons and Their Families Act 1989 s5

⁶ PPPRA, s93B

⁷ Sylvia Bell and Professor Warren Brookbanks "Decision Making and the Protection of Personal and Property Rights Act 1988" in Kate Diesfield and Ian McIntosh (ed) *Elder Law in New Zealand* (Thomson Reuters, Wellington 2014) 96 at 96

⁸ Law Commission *Misuse of Enduring Powers of Attorney Report 71* (April 2001 Wellington) at 1

the donor. Consequently, amendments were made to the Act and they came into effect in 2008 with a requirement that they be reviewed after 5 years to see how effective they are⁹.

The main areas of change were that the donor must receive independent legal advice about the implications of appointing an attorney, the legal witness must certify they have no concerns about the donors capacity, and that they are independent of the attorney¹⁰.

B 2013 review

The review of the amendments was undertaken in 2013 by the Minister for Senior Citizens and after extensive public consultation the Minister released a report in 2014 containing recommendations to improve the Act¹¹. The key criticisms were that the amendments had increased cost and complexity of creating an EPA and there was a need for greater public understanding and awareness of EPAs, the need for them, and how they operate.

C Statutes Amendment Bill

The Statutes Amendment Bill was introduced to Parliament in December 2015 containing amendments to several Acts with Part 21 proposing amendments to the EPA sections of the PPPRA. It only focuses on some of the recommendations made by the Minister for Senior Citizens and it will be discussed further in relevant sections of this paper. Part 21 is currently with the Government Administration Select Committee and its report is due 9 June 2016.

D PPPRA relevance to Elder Law

Defining who is “elderly” is beyond this paper’s scope. The reality that we have a population consisting of elderly members cannot be disputed and elderly people are

⁹ PPPRA s108AAB(1)(a)

¹⁰ Age Concern *Planning Your Future* <https://www.ageconcern.org.nz/files/PlanningYourFuture.pdf> retrieved 8 June 2016

¹¹ Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Property Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (June 2014)

recognized by the New Zealand Government in that we have a Minister for Seniors Citizens and a Positive Ageing Strategy¹².

The need for specific elder law is to ensure older people are treated fairly and to protect them from potential disadvantages resulting from ageism and the vulnerability that may be experienced with ageing.¹³

The Crimes Act 1961 defines a vulnerable adult, as “a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw himself or herself from the care or charge of another person.”¹⁴ Having been determined as lacking capacity would logically make a person vulnerable. Interestingly the PPPRA does not include a definition of vulnerable and neither does the Vulnerable Children Act 2014 or the Children, Young Persons, and Their Families Act 1989 both of which relate to protection of a vulnerable sector of the population.

Age Concern and the Minister for Senior Citizens actively promote EPAs to ensure elderly have legal protection in relation to their personal rights should they lose capacity. A growing ageing population will result in an increase of age related disease with an estimated 70% lacking capacity in the final period before passing away¹⁵.

III Factors to consider in relation to creating an EPA

The Minister for Senior’s 2014 recommendations included development of an information campaign to increase the public’s understanding of the importance of creating an EPA¹⁶. Following the review, a year long campaign “Protect Your Future” was launched with the brochures opening paragraph stating:¹⁷

¹² Office for Senior Citizens *2014 Report on the Positive Ageing Strategy Summary Version* (April 2015)

¹³ Jonathan Herring *Older People in Law and Society* (Oxford University Press, Oxford, 2009) at 7

¹⁴ Crimes Act 1961 S2(1)

¹⁵ Helen Mason *Harkness Health Care Policy and Practice Fellowship 2016 Report-Back Seminar* Old Government Building 12 May 2016

¹⁶ Jo Goodhew above n 10 at 3

¹⁷ Ministry of Social Development “Protect your future with an EPA <https://www.msd.govt.nz/documents/what-we-can-do/seniorcitizens/your-rights/protect-your-future-with-an-epa.pdf> retrieved 3 June 2016

Because life can be fragile, it's important for everyone to think about protecting their future with an EPA. When you set up an EPA you choose someone you trust to make decisions about you if you can no longer decide for yourself. Your EPA will save your family the cost and stress of getting a court order to make decisions about you, should that be needed.

While creating an EPA is encouraged by those professionals involved in legislating and caring for elderly people as a way of ensuring someone is able to make decisions in the event of incapacity, this is not always an easy decision. It involves putting explicit trust in another individual to act on your behalf in an unforeseen situation where one is extremely vulnerable. Only 17% of the population are estimated to have an EPA¹⁸ and this section will explore some of the possible reasons or barriers that people may face in relation to making the decision to create an EPA.

A Potential implication of not having an EPA

If there is no EPA in place for a person lacking capacity, applications may be required to the Court under other sections of PPPRA for either a Personal Order for a specific decision¹⁹, or a Welfare Guardian²⁰. The time and stress involved in making these applications can be considerable and may involve some cost to the applicant if they are needing legal assistance or specialist medical reports to support their affidavits.

Once an application has been filed at the Court it can take up to 3 weeks for a lawyer to be appointed for the subject person (the person lacking capacity), then up to 4 weeks for the lawyer to provide a report to the Family Court Judge, then, depending on how often the Judge does their box work, up to two more weeks before a decision is made about the Order and the paperwork is completed. This is for straightforward applications, where there are complexities it will take longer.²¹

This lengthy process can delay discharges from hospital resulting in cost to the individual with increased likelihood of hospital acquired infections, a prolonged stay in an unsettled environment, and impact on choices with regards to a person's discharge destination if

¹⁸ Jo Goodhew "Opinion: Protecting your future with an enduring power of attorney" <http://www.insitemagazine.co.nz/newsfeed/may-to-july-2014/opinion-protecting-your-future-with-an-enduring-power-of-attorney/#.V1DcGY9OLIU> retrieved 2 June 2016

¹⁹ PPPRA s10

²⁰ PPPRA s12

²¹ From authors own experience and conversations had with Court staff

requiring court permission to confirm options. This also has a cost to the community as an expensive acute hospital bed is being used unnecessarily. This presents another cost in the form of pressure applied by hospital management for PPPRA process to commence as quickly as possible. In some cases, time is needed for potential applicants to understand and decide to take this role on. For some culture, or unwillingness to engage with Court processes is something that requires time to carefully work through.²²

Another implication is that an EPA does not expire unless issues arise whereas Welfare Guardians and Personal Orders do, so Court involvement in the form of review is ongoing.²³

B Personal Choice

Part 1 of the PPPRA which deals with Personal Rights states that until the contrary is proved, it is presumed that people have the capacity to make decisions in matters relating to their personal care and welfare. This includes whether or not to create an EPA.

Appointing an EPA is a choice. Some people may not want legal involvement in their personal life, or may not believe in the concept of appointing another individual in a position of such responsibility. Others may prefer for the Court to make that decision in the form of Welfare Guardian should the time come as there is greater scrutiny, legal representation, accountability and the effort made to apply shows commitment to being chosen for that role²⁴.

Some residential facilities will not admit people without an EPA²⁵. The right to refuse to admit someone who has been assessed as meeting the need for residential care at a certain level based purely on them not having an EPA is not outlined in the Aged [Related Residential Care Services Agreement 2015](#)²⁶. This also would appear contradictory to the Health and Disability Commissioner's Code of Rights which states that services take into account values and beliefs of the consumer²⁷.

²² Author's own experience in practice

²³ Family Court Rules 2002 Schedule 9, Form PPPR 21

²⁴ Author's own experience in practice

²⁵ Information received on 1/6/16 from a colleague following refusal from a facility to accept someone without EPA

²⁶ Central TAS National Agreements <http://www.centaltas.co.nz/health-of-older-people/national-agreements/> retrieved 3 June 2016

²⁷ Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, s2 Right 1(3)

The Human Rights Act's exception for discrimination in relation to a disability, which gives a facility provider the right of refusal, in this case admission, should the demand on their service be more onerous for the individual concerned than another. This would not be an issue as the Needs Assessment would give the level of care required by the individual.²⁸ As there must be disability of some kind present to meet the criteria for residential care, to refuse someone entry because they do not have or choose not to have an EPA breaches the human right to enjoy freedom, choose where they live and be treated with equity²⁹.

C No one to appoint?

Some older people have no one they can appoint to the role of attorney due to loneliness and isolation. Age Concern refers to a study surveying loneliness in elderly with 8% of the sample being severely lonely and 44% moderately lonely. As loneliness is linked to poor health outcomes in this study it is concluded that the lonely elderly would be more in need of having an EPA³⁰.

There are several factors contributing to isolation in elderly: estrangement from family, outliving family members, childlessness, driving cessation, low income, urban living³¹, introverted personality or a lifestyle choice to be reclusive³².

The author is aware of an instance where a lawyer was appointed as an attorney for an older person who had no one else to appoint. Welfare Guardian Trusts operate in some areas and provide approved volunteers for those with no one to apply to the Court for Welfare Guardianship if it is required³³. The recommendation here is that this avenue be further explored in relation to volunteer appointment of EPA. Having an objective person has the potential advantage of providing greater protection as they have no vested interest or emotional connection to decisions that may need to be made. It is acknowledged that this is a large responsibility to take on and carries risk with it so

²⁸ Human Rights Act 1993 s52(b)(ii)

²⁹ Human Rights Commission, Rights for the Disabled <https://www.hrc.co.nz/your-rights/people-disabilities/your-rights/> retrieved 7 June 2016

³⁰ Age Concern Loneliness and Social Isolation Research https://www.ageconcern.org.nz/ACNZ_Public/Loneliness_and_Social_Isolation_Research.aspx

³¹ British Columbia Ministry of Health, Social Isolation among seniors http://www.health.gov.bc.ca/library/publications/year/2004/Social_Isolation_Among_Seniors.pdf retrieved 7 June 2016

³² Age Concern above n 29

³³ Welfare Guardian Trusts NZ <http://welfareguardians.nz/> retrieved 4 June 2016

volunteers will need some support and accountability if required to act and this may be too much of an ask without remuneration of some sort.

This is an area that does need to be addressed as our ageing population and lowering birth rates will also see a reduction in the number of family members that may be available to be an attorney³⁴.

D Cost

Cost is a significant deterrent to elderly creating an EPA. Prior to the 2008 amendments to the Act legal involvement was not necessarily required. Jo Goodhew recommends that this is addressed in her report, with Public Trust finding a decrease of one third of the number of EPAs following the amendments because of the need for legal involvement and increased time taken with forms/processes³⁵. No specified action to address this issue was suggested, but there are two legislative assistance schemes that could be amended to assist with this.

1 Legal Aid

Legal aid provides for financial assistance in cases that could go to Court³⁶.

Where there has been an identified cognitive decline or progressive dementia diagnosis, no EPA in place, and concerns about the person's ability to manage it is important for their autonomy that they appoint an EPA while they can. Their doctor should recommend this and if they are not able to afford the cost of creating one legal aid should be available for them to prevent a Court process. Legal aid's purpose is "to assist people who have insufficient means to pay for legal services to nonetheless have access to them"³⁷,³⁸

If a person without capacity does not have an EPA application must be made to the Court for a guardian under the Protection of Personal Property and Rights Act (PPP&R) 1988. This can take time so it is a good idea for doctors to encourage their patients, particularly older ones, to obtain an EPOA.

³⁴ Nicole Adamson *New Zealand birthrate slowly declining* Whitireira New Zealand 2014 <http://www.newswire.co.nz/2014/05/new-zealand-birthrate-slowly-declining/> retrieved 7 June 2016

³⁵ Jo Goodhew above n 10 at 11

³⁶ Ministry of Justice, *Legal Aid Eligibility* <http://www.justice.govt.nz/services/legal-help/legal-aid/family1/eligibility> accessed 1 June 2016

³⁷ Legal Services Act 2000 s 3

³⁸ Sainsbury R 2013. *End of life issues*. Chapter 11 in St George IM (ed.). Cole's medical practice in New Zealand, 12th edition. Medical Council of New Zealand, Wellington at 108

With regards to legal aid the Ministry of Justice says this in relation to family legal aid: “For many family proceedings ... other factors that can also be considered. These factors include personal protection issues”³⁹. Legal aid in the matter of funding an EPA for persons deemed by a medical practitioner to need one to negate the need for court involvement at a later stage would be a preventative measure allowing for least restriction and protection under PPPRA. The PPPRA is part of family law legislation with the Court of jurisdiction being the Family Court so use of legal aid to assist with payment for an EPA in some instances should be covered by the above statement.

The recommendation here is that The Legal Services Act 2000 definition of civil proceedings s4(1) be amended to include PPPRA with new sections to be created as to the use of Legal Aid for EPAs in specified instances.

2 Special Needs Grant Programme

The Social Security Act 1964 allows for the Minister of Social Development to appropriate money from the Crown to provide special assistance under an approved welfare programme⁴⁰.

This programme is currently the Special Needs Grants Programme which is administered by Work and Income New Zealand and gives recoverable and non-recoverable assistance to those who have an immediate and essential need.⁴¹ Clause 11 lists medical reasons that people may apply for assistance, these range from wigs to bedding and contraception.

EPAs could be added to this list to enable those who cannot afford to appoint an attorney to do so thereby removing any notion of privileged rights for those with financial means and ensure equality of protection.

E No crystal ball

When deciding who to appoint as an attorney it can be difficult to anticipate the context in which decision making by an EPA may be required. There is evidence that individual preferences change over time in relation to treatment⁴². Personal relationships also change over time.

³⁹ Ministry of Justice above n 35

⁴⁰ The Social Security Act 1964 S124 (1)(d)

⁴¹ Work and Income New Zealand *Special Needs Grants Programme* <http://www.workandincome.govt.nz/map/legislation/welfare-programmes/special-needs-grants-programme/clause-10-need-to-be-both-immediate-and-essential.html> Part 3 clause 10 retrieved 7 June 2013

⁴² Rachel Prachno and Michael Smyer *Introduction: The Science and Ethics of Aging Well* Introductory chapter in “Challenges of an aging society” John Hopkins University Press, Maryland 2007 at 4

Jo Goodhew's review of the 2008 amendments proposed that there be more education to the public on the importance of the need for periodic review of an EPA⁴³. No mention of this can be currently found in the "Protect your future" literature. More research is required into whether there is a mechanism in place in relation to reviewing of wills and if the review of an EPA can be included with this.

It is an uncertain proposal in that you are asking a person to act on your behalf in a mostly unknown context. To accept such a proposal is a commitment from another to follow through as best as they can in relation to preferences that may or may not have been predicted or discussed with the risk of Court action if tensions arise. As such it is important that ongoing conversations are had between the donor and attorney and documented to protect decision making, if required, at a later stage.

F Culture/Family

There is no mention of culture or family in the PPPRA legislation⁴⁴. Other legislation dealing with vulnerable populations include both as principles⁴⁵. The Treaty of Waitangi and its guiding principles of protection, partnership and participation are also not included anywhere in the PPPRA which is significant given the era in which the Act was created:⁴⁶

The State-Owned Enterprises Act [1986] was a key piece of legislation to incorporate a reference to the Treaty of Waitangi. Since then, more than 40 statutes have referred to the principles of the Treaty in relation to the purpose of the legislation. From this, the courts have been able to determine whether the principles are being appropriately applied. This has given the Treaty far-reaching recognition in national and local government.

For personal care and welfare, a donor is only able to appoint one attorney. The notion of appointing one person to act on another's behalf is a foreign and westernised notion to

⁴³ Jo Goodhew above n 10 at 10

⁴⁴ Bill Atkin above n 3 at 442

⁴⁵ Vulnerable Children's Act 6(b)(d), Mental Health (Compulsory Assessment and Treatment) Act 1992 Section 5(2), Children, Young Persons and Their Family Act 1989 S 5, Care of Children's Act 2004 s5

⁴⁶ New Zealand History *Treaty Events* <http://www.nzhistory.net.nz/politics/treaty/treaty-timeline/treaty-events-1950> retrieved 1 June 2016

some cultures. The number of EPAs in place when required is markedly lower for Māori, Pacific and Asian families⁴⁷. There will be many and varied reasons for this.

The New Zealand Government recognise that for Māori, whānau have a duty of care to each other and individual and whānau protection are interdependent⁴⁸. A study looking at Samoan perspectives on Mental Health describes self as only having meaning in relationship to others, not as an individual⁴⁹. In China family care is the main support mechanism for guardianship of the older person, and Confucian values such as preference for collectivism over individualism and family paternalism prevail⁵⁰.

With New Zealand's Pacific and Asian populations expected to grow faster than other groups by 2026⁵¹ it is important that the PPPRA legislation gives consideration to culture to enable protection for all older persons without the need for a Court process.⁵²

“The [Family Court's] adversarial approach focuses on individual rights and is seen as alienating for Māori, Pacific families, and families from other cultures who prefer holistic and wider family approaches.”

It will be interesting to observe how case law develops in relation to culture and family. One example is *MJF and NIF*⁵³, a case involving EPAs where an application was dismissed by Judge Savage in regards to transfer of shares in Māori freehold land for several reasons, one of which being no family meeting had occurred and conflicting information as to whether other children were aware of proceedings.

Part of Jo Goodhew's information campaign involved translation of information about EPA's into languages other than English. One of the 10 aspirational goals for The

⁴⁷ Authors own experience in relation to need for Welfare Guardian applications where no EPA is in place

⁴⁸ Statistics New Zealand *Kei te pēwhea tō whānau? Exploring whānau using the Māori Social Survey* http://www.stats.govt.nz/browse_for_stats/people_and_communities/maori/kei-te-pewhea-to-whanau-2012/ki-ta-te-whakaaro-maori.aspx 25 Oct 2012

⁴⁹ [Tamasese K¹](#), [Peteru C](#), [Waldegrave C](#), [Bush A](#) *Ole Taea Afua, the new morning: a qualitative investigation into Samoan perspectives on mental health and culturally appropriate services*. Australia NZ Journal of Psychiatry 2005 39 (4) 300

⁵⁰ Rebecca Lee *Guardianship of the Elderly with Diminished Capacity: The Chinese Challenge* International Journal of Law, Policy and The Family, 11 February 2015 at 2

⁵¹ Human Rights Commission above n 28

⁵² Ministry of Justice *Reviewing the Family Court: A summary September 2011* at 3 (retrieved from [file:///C:/Users/User/Downloads/FCR%20SUMMARY%20FINAL_1%20\(1\).pdf](file:///C:/Users/User/Downloads/FCR%20SUMMARY%20FINAL_1%20(1).pdf) on 6 June 2016)

⁵³ *MJF v NIF* [2010] FC FAM-2008-063-000759

Positive Ageing Strategy is “Cultural Diversity” where culturally appropriate services allow for choice for older people⁵⁴.

The PPPRA provides for the donor to specify persons that the attorney must consult with⁵⁵. Equivalent legislation in England and Northern Ireland allows for the appointment of an individual or several others to be an attorney⁵⁶. Further consultation with cultural populations about how PPPRA legislation will best work for them is required to achieve the Minister for Senior Citizens goal of making EPAs accessible to everyone⁵⁷.

G Choice of Attorney

From experience the vast majority of attorneys appointed are family members. To choose one family member over another has the potential for conflict and division amongst the family. There may also be expectations from some members that they will be chosen as an EPA which may result in an attorney being appointed as a result of status, rather than how they will actually act in the attorney role i.e. spouse. Pressure can be put on the older person to influence an appointment. There is the risk for elderly people who appoint a spouse (if they are of similar age) that if or when the attorney is required to act they may also have age related health concerns or issues of their own affecting them in that role.

IV Creation of EPA

Creating an EPA gives legal decision making power to another individual and as such has responsibilities that sit with it.

An EPA document is created using prescribed forms that are signed by the donor, attorney and witnessed by someone independent of the attorney, either lawyer, officer or employee of a trustee corporation, or a legal executive.⁵⁸ The attorney must be over 20⁵⁹ and while only one person can be appointed for personal care and welfare the donor is able to appoint a successor.

⁵⁴ Office for Senior Citizens, above n 11 at 5

⁵⁵ PPPRA s 99A (1)(b)

⁵⁶ England and Wales Mental Capacity Act 2005 s10(3) and Mental Capacity Act (Northern Ireland) 2016 s5(102)

⁵⁷ Jo Goodhew above n 10 at 2

⁵⁸ PPPRA s94A, s95

⁵⁹ PPPRA ss12(4), 95(3)

The donor may place conditions or restrictions on the attorney's power and may specify who is to assess their mental capacity should that become an issue⁶⁰. They may also specify in the document persons they wish their attorney to consult with in relation to specific or general matters⁶¹.

Some of the safeguards introduced in the 2008 amendments require care to be taken by the legal independent witness/advisor that the donor understands⁶² what they are doing and is mentally capable at the time of signing⁶³. Kent raises some serious concerns about the ability of lawyers to assess competence⁶⁴. In *MJF and NIF* Judge O'Dwyer ordered for an EPA to be revoked as the lawyer and witness decision about capacity of a person to create an EPA was in contradiction to the later gathered medical evidence⁶⁵ with the comment being "it is surprising that [the lawyer] did not require a medical examination sufficient to determine beyond any doubt that Mrs F had the requisite capacity"⁶⁶. Where there is any doubt a medical certificate to establish competence should be obtained.⁶⁷ Arguably this is contradictory to one of the key principles of the PPPRA that was also inserted following the 2008 review, the presumption of competence.

Jo Goodhew's 2013 review of the 2008 amendments found there where a lot of gaps in the public's understanding of EPAs⁶⁸. She recommended increased education and information be given to donors and attorneys alike. The Statutes Amendment Bill proposes to prescribe a form of explanation that the witness must give to the donor⁶⁹.

As discussed above the cost of appointing an EPA has increased since the 2008 amendments. This is not only because of legal involvement in creation of one. The amendments also saw the need for independent advice for each person if two people decided to appoint each other as EPAs, thereby potentially doubling the cost. The Statutes Amendment Bill proposes to address this by allowing the same lawyer to witness

⁶⁰ Mary Simpson *Elder Law Intensive*, New Zealand Law Society (May 2014) 39 at 51

⁶¹ PPPRA s99A(1)

⁶² Mary Simpson above n 59 at 40

⁶³ Kate Diesfield and Ian McIntosh above n 7 at 97

⁶⁴ Rachel Kent "Misuse of Enduring Powers of Attorney" (2003) 34 VUWLR 497 at 508

⁶⁵ *MJF v NIF* above n 52 at 36

⁶⁶ *MJF v NIF* above n 52 at 31

⁶⁷ Leslie Grant *Elder Law Intensive New Zealand* New Zealand Law Society (May 2014) 27 at 30

⁶⁸ Jo Goodhew above n 10 at 9

⁶⁹ Statutes Amendment Bill Part 21 cl75(2)

the signing providing there is no conflict of interest⁷⁰. The Law Society supports allowing the same legal witness but opposes certification that there is no conflict of interest as considers this to be unnecessary and may undermine the amendments objective⁷¹.

V Activation of EPA

An EPA for personal care and welfare may act in relation to general or specific matters. The legislation states that they may not act in respect of significant matter unless a medical certificate from a health practitioner or the Court has determined that the donor is mentally incapable. The legislation specifies significant matters as “a matter that has, or is likely to have, a significant effect on the health, wellbeing, or enjoyment of life of the donor”.⁷²

A Capacity

Capacity is central to the PPPRA, not only the presumption of capacity but also with regards to the jurisdiction of the Family Court as orders can only be made if the subject lacks capacity⁷³.

A donor is determined as mentally incapable if they lack capacity to made a decision, lack capacity to understand the nature of decisions, or cannot foresee consequences of decisions or failure to make a decision⁷⁴. A determination about capacity would occur at a time there was specific decision needing to be made and the certificate may only relate to that specific matter or more generally should incapacity be seen to be irreversible e.g. progressive dementia⁷⁵.

An Official Information Act (OIA) request to the Capital and Coast District Health Board (CCDHB) in relation to the purpose of activation of an EPA for personal care and welfare saw 69 certificates activated over the previous 3 years 30 for specific purpose relating to living arrangements and 39 blanket in nature⁷⁶.

⁷⁰ Statutes Amendment Bill Part 21 c175(5)

⁷¹ Mark Wilton *NZ Law Society Statutes Amendment Bill comment* (January 2016) s2.10 at 4

⁷² PPPRA s98(3B)(6)

⁷³ Sylvia Bell above n2 at 4

⁷⁴ PPPRA s94(2)

⁷⁵ PPPRA s98(3A)(a)

⁷⁶ OIA response from Capital Coast District Health Board to request dated 17 April 2016

Of note is that different definitions of capacity are used in the PPPRA legislation. Section 6 of the PPPRA refers jurisdiction under the Act being for persons either “wholly or partly lacking capacity”.⁷⁷ Varying degrees of capacity, or lack of, are not used in the EPA section, rather the express wording “lacks capacity”⁷⁸. Section 6 was used in *Jackson v Jackson* in relation to a request to the Court from a donor in relation to capacity and revoking of an EPA⁷⁹ setting precedent for the wholly/partly lacking capacity as thresholds that can be used in relation to EPAs. Dr Greg Young when interviewed by Kent about what ‘wholly meant’ stated “competency is not an all or nothing phenomenon and it is difficult to know what the meaning of "wholly lacking competence" is” and Dr Crawford Duncan, Psychogeriatrician, said “of course the problem ... is that we are all relative and there is no "wholly" loss unless you are dead or unconscious ... absolutes don't exist in real life so the problem is how you define wholly”.⁸⁰

The Law Society advocates for the need of further legislative clarification in the PPPRA as to what constitutes mental incapacity in relation to EPAs⁸¹.

B Capacity Assessment

Currently the medical assessment of capacity can be done by any registered medical practitioner, or one specified by the donor, and requires use of a prescribed form.

Kent when evaluating the Law Commission’s 2001 report recommended that medical practitioners conducting assessments have formal training in the area with three of the six interviewees working with elderly people supporting specialist input into such assessments⁸². The Minister’s 2013 recommendations would remove the option the donor has to specify who does the capacity assessment as the Medical Council indicated that all doctors should be able to assess this. It was acknowledged that GPs may need more support undertaking these assessments⁸³.

⁷⁷ PPPRA s6(1)

⁷⁸ PPPRA s94

⁷⁹ *Jackson v Jackson* [2007] FC FAM 2006-009-000974

⁸⁰ Rachel Kent above n 63 at 506

⁸¹ Mark Wilton above n 70 at s2.13

⁸² Rachel Kent above n 63 at 511

⁸³ Jo Goodhew above n 10 at 14

The author's own experience has seen attorneys, driven by ulterior motives, present strong cases to GPs or hospital doctors who do not know the donor well with the intent of getting the EPA activated. The author supports mandated use of standardised assessment tools in addition to the prescribed form as too many forms contain a bare minimum of information which is seen as the "assessment" and with no accountability other than to the attorney, or the Court should it be brought to its attention, this is a concern. There has been research conducted which shows the value of having capacity standards, standardised instruments and formal training in competency assessments⁸⁴.

In *Mitchell and Ivers v Millard* a GP's ability to do a capacity assessment was questioned as to whether it was in their scope of practice with Judge Burns deciding that the Court was to enquire further as to the mental capacity of the person.⁸⁵

The Statutes Amendment Bill proposes to replace the need for a prescribed form with a need for prescribed information⁸⁶. The Law Society makes the point that this will make the task more difficult for the health practitioner. The Bill does not specify what the prescribed information is and if this is left to be defined under regulations at a later stage it may change the meaning of incapacity and the Law Society says it is important that this information be specified in the statute⁸⁷.

It is unclear who actually activates the EPA. The logical assumption could be that this is done by the medical practitioner who completes the certificate of incapacity or the Court once lack of capacity has been determined. In two cases the attorney is stated to be the one activating it⁸⁸. Bell states the person alleging lack of competence is the one responsible for the legal proof which could be seen as initiating the activation process⁸⁹. The notes that accompany Form 5⁹⁰ state that the certificate may be requested by either

⁸⁴ Daniel Marson *Assessing Competence to Make Medical Decisions at the End of Life: Clinician and Patient Issues* Chapter 2 in "Challenges of an aging society" John Hopkins University Press, Maryland 2007 35 at 45

⁸⁵ *Mitchell and Ivers v Millard* FC [2014] NZFC 2805 at 12 (iv). Albeit in relation to capacity at a time where an EPA is revoked this is still relevant in relation to GP's ability to assess capacity.

⁸⁶ Statutes Amendment Bill cl78

⁸⁷ Mark Wilton above n 70 ss2.14, 2.15

⁸⁸ Rachel Marr *Re ACT (Deceased)* FC 2013 NZFC 1790 NZFLR 891 at 893 and *Gardiner and Gardiner* Te Awamutu Family Court 2015

⁸⁹ Sylvia Bell above n2 at 4

⁹⁰ PPPRA, Form 5 Health Practitioner's certificate of mental incapacity for enduring power of attorney in relation to personal care and welfare

the attorney or any other person who is requesting authority for the attorney to act.⁹¹ So it could be understood that the person requesting the assessment is the person activating and the health professional or Court are providing proof on their behalf.

VI Powers of EPA

The attorney must act for the promotion and protection of welfare and best interests of donor⁹² and at all times seek to enable the donor to develop and exercise ability their capacity. They are also responsible for integrating the donor into the community as much as possible⁹³.

The restrictions the legislation places on the ability for the EPA to act are those specified for welfare guardian:⁹⁴

- Not to enter the donor into marriage or civil union.
- Not to make decisions on adoption of the attorney's children.
- Not to refuse consent for any medical procedure intended to save life or prevent serious health damage.
- Not to consent to brain surgery with the purpose of changing the donor's behavior and not to consent to participation in medical experiences other than life saving or preventing damage to health.
- In addition, they are also not able to override any advance directive (with the exception of the above restrictions⁹⁵) or appoint a successor attorney⁹⁶.

Further consideration should be given to these restrictions as for a capable person an Advanced Directive would in some circumstances take precedence over lifesaving procedures e.g. a not to resuscitate order, or a blood transfusion for a Jehovah's Witness⁹⁷.

⁹¹ Sylvia Bell above n2 at 232

⁹² PPPRA s98A(1)

⁹³ PPPRA s98A

⁹⁴ PPPRA s18(1)

⁹⁵ Jo Goodhew above n10 at 14

⁹⁶ PPPRA s95(5)

⁹⁷ Seminar Presentation discussion on this subject facilitated by author for Elder Laws 543, Victoria University on 5 May 2016 for this paper.

One area that the author believes is a significant omission is there is no safeguard for the donor in relation to voting. Given the changing nature of political parties and candidates running for election the author would argue that it would be very difficult to act as the donor would in the matter of the vote and referendums may be on topics that the donor and attorney have not discussed or foreseen as issues that may arise.

While it is acknowledged that participating in the vote is a form of integration into the community, for some elderly people with advanced dementia having a meaningful discussion about this will not be possible. Again, the definition of capacity is important here, as “wholly” lacking would suggest understanding and decision making in the voting process would not be possible.

In the Electoral Act 1993 people under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 are disqualified from voting but there is no mention of persons who have been certified as lacking in capacity under PPPRA⁹⁸. England and Wales, Mental Capacity Act 2005 does not permit voting for persons under the Act.⁹⁹ The recommendation here is the matter of the vote needs to be considered with some urgency to protect democracy.

A Accountability

For those elderly with little family or others involved in their life there is very little accountability in relation to the attorney’s actions. In cases involving elder abuse, the donor lacking in capacity is by definition unlikely to raise concerns. If a third party is aware of concerns they can bring these to the Court’s attention if they are aware of and are willing and able to escalate concerns, “the powers of the Family Court to intervene are in practice largely ineffectual because nothing happens unless someone sets proceedings in train”¹⁰⁰.

Personal experience has seen situations where an attorney was keeping a donor in a restrained situation and trusting explicitly in a facility manager that was neglectful. The author has on several occasions encountered families keeping people at home to protect their inheritance and in doing so neglecting to provide them with the care they require.

⁹⁸ Electoral Act 1993 s80

⁹⁹ England and Wales Mental Capacity Act 2005 Part 1 s29

¹⁰⁰ Law Commission above n 8 at 4

In some cases, there has been difficulty with attorneys being unavailable or avoiding contact when needed for decision making purposes. In one case following a discharge from hospital the donor was moved out of the region and it is highly likely this was in the hope of avoiding accountability to an agreed care plan¹⁰¹.

Age Concern Elder Abuse and Neglect Service and the Family Court are the two avenues of support for issues of alleged or actual elder abuse or in extreme cases involving criminal matters the police. However, “older adults worldwide suffering from abuse and abandonment, often by those closest to them. The majority of victims remain hidden from public view. Only rarely do extreme cases command attention”¹⁰²

Pauline Fallon’s literature review for the Ministry of Social Development wrote this in relation to the under reporting of elder abuse:¹⁰³

It is generally accepted that official agencies are more likely to be informed about the most visible and obvious types of abuse and/or neglect, but that many other incidents remain unidentified and unreported... Combined with the reluctance of older people to report abuse, there is a general resistance within the community, including among professionals, to report suspected cases.

Due to the silent nature of abuse it is impossible to estimate the amount of abuse occurring by attorneys however in the Law Commission’s 2001 report “An examination of 130 case studies of elder abuse, compiled by Age Concern Auckland in respect of a two-year period, showed 40 attributable to misuse of an enduring power of attorney”¹⁰⁴.

To help counter the risk of abuse it is important that other parties are aware of who has been appointed. Accountability increases when other parties to be consulted with are included in the document, along with a successor attorney. There should be a requirement in the Act that when an attorney is activated, notice is given to all parties named in the document along with GP and the legal witness.

¹⁰¹ From authors own experience

¹⁰² Michelle Feng *Silent Crimes – Elder Abuse and Peru’s demographic transition* John Hopkins Public Health Spring 2015 Magazine <http://magazine.jhsph.edu/2015/spring/features/silent-crimes/> retrieved 10 April 2016

¹⁰³ Ministry of Social Development “Elder abuse and/or neglect Literature review” Pauline Fallon Centre for Social Research and Evaluation Te Pokapū Rangahau Arotaki Hapori January 2006 at 12

¹⁰⁴ Law Commission above n 8 at 6

B Registration

If the 2008 amendments were to provide greater safeguards from the unknown amount of EPAs and potential for abuse because of the quiet nature of such documents, why was not greater emphasis put on a public record of such. “No one knows how many enduring powers of attorney exist and how the powers they confer are being exercised”¹⁰⁵

Respondents to both the Law Commission paper and the 2013 review raised the need for a national register. This would assist in identifying whether an EPA has been appointed in situations where the EPA may be too unwell to give this information. It could resolve issues where several people claim to be the EPA or the documents themselves have gone missing.

If Births, Deaths and Marriages are required to be recorded¹⁰⁶ why would not a document that gives guardianship and significant powers in the event of incapacity be seen as equally important? In England and Wales registration is required¹⁰⁷.

The author is aware of occasions where Court applications have been filed only to discover that an EPA in actual fact existed and other situations where a person claims to be an activated attorney which was relied on verbally by treating staff only to later discover the attorney was only appointed in relation to property, not welfare.

The Law Society considered this in its 2001 report but did not recommend a register due to cost and loss of privacy¹⁰⁸. The 2013 review did not recommend for similar reasons. It instead recommended that existing patient recording systems be used.¹⁰⁹ If this were possible this would only apply to someone known within the health system and would not account for sudden incapacitation e.g. stroke, head injury. The OIA request to CCDHB in relation to how many EPAs had been activated in the last 3 years was not able to be answered as “it is not possible to undertake a search across medical records to identify to existence of Certificates”. They did include in their response that an electronic records

¹⁰⁵ Law Commission above n 8 at 4

¹⁰⁶ Births, Deaths, Marriages and Relationships Registration Act 1995

¹⁰⁷ Mental Capacity Act 2005 Schedule 1 Part 2

¹⁰⁸ Law Commission above n8 at 18

¹⁰⁹ Jo Goodhew above n 10 at 16 - 17

system was set up in the latter part of 2015 so this information may be more readily retrieved in the future.

Jo Goodhew's concerns about a register being a deterrent can be addressed by restricting access to it. Proposed reforms in Victoria, Australia in relation to registration saw broad support for use of a PIN number for an online register¹¹⁰. From the authors experience both District Health Boards and the Family Court support use of a register. There are many factors to be considered in relation to the creation and use of a register and these should be further explored.

Other ways to increase accountability for the donor are to include persons to be consulted with along with an Advanced Care Plan or Advance Directives into the EPA document and ensure copies are given to relevant health professionals and other named parties.

VII *The Court's Jurisdiction*

The PPPRA gives jurisdiction to the Family Court¹¹¹.

An appeal made to the High Court with regards to jurisdiction of the Family Court to determine capacity at time EPA document created was not held. The Family Court acknowledged this may need legislative remedy under s 102.¹¹² However both FC and HC argued that jurisdiction remained with the FC with Potter J stating it made no "logical sense" that parliament would have intended for a different court to have jurisdiction in this area¹¹³. *Carrington v Carrington* concludes that Family Court retains jurisdiction as "court of first instance"¹¹⁴ in matters relating to PPPRA with the High Court being an appellate once the Family Court's statutory processes are exhausted.¹¹⁵

¹¹⁰ Law Reform Commission, Victoria *A new registration scheme*, Chapter 16[16.63] retrieved from http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Ch%2016_A%20new%20registration%20scheme.pdf at 359

¹¹¹ PPPRA s2

¹¹² *CJW v Public Trust and JPS* [2008] FC FAM 2006-092-001915 at [17]

¹¹³ *Waldron v Public Trust* [2009 & 2010] HC CIV 2009-404-485

¹¹⁴ Lindsay Breach *Case note: Carrington v Carrington* (2014) 8 NZFLJ 55, viewed via Lexis Nexis at 5 - 6

¹¹⁵ Lindsay Breach above n 112 at 6

The Court can monitor attorney's actions, modify the scope in which they can act, review decisions upon application¹¹⁶ and suspend or revoke the attorney if they consider that the attorney is not acting in the donor's best interests upon application.¹¹⁷

In *Treney v Treney* an EPA for personal care and welfare was revoked in the Family Court secondary to poor financial management skills and the intent to move donor viewed as irresponsible¹¹⁸.

The Court can also determine whether or not an EPA is valid and whether the donor is mentally capable¹¹⁹. The attorney can seek directions or advice from the Court¹²⁰.

VIII Cessation of EPA

The PPPRA gives circumstances in which an EPA ceases to have effect¹²¹. It ceases to have effect when either the donor or attorney dies, or the attorney is bankrupt, committed under the Mental Health Act or is incapable¹²². The Act allows for an EPA to be suspended or revoked.

An EPA may be suspended if a donor regains capacity by doing so in writing to the attorney. Unless a health practitioner or the Court has determined that the donor is mentally incapable, the attorney is no longer able to act¹²³.

The donor is able to revoke the EPA while mentally capable by giving written notice to the attorney. The requirement that it is in writing was made in the 2008 amendments to allow for authorisation of a new EPA¹²⁴.

¹¹⁶ PPPRA s103

¹¹⁷ Kate Diesfield and Ian McIntosh above n 7 at 100 - 101

¹¹⁸ *Treney v Treney* [2008] FC FAM 2006-043-000773 [86]. This case however was successfully appealed at the High Court due to the blurring between property and welfare in the decision and lack of independent consideration to the personal care and welfare responsibilities *Treney v Treney* [2009] NZFLR 1062 (HC)

¹¹⁹ PPPRA s102

¹²⁰ PPPRA ss99A(4), 101

¹²¹ PPPRA s106

¹²² Sylvia Bell above n 2 at 175

¹²³ PPPRA s100A

¹²⁴ Sylvia Bell above n 2 at 175

Recommendations by the Minister following the 2013 review were that the Act should be amended so it is clear that an earlier EPA ceases to have effect when a later one is granted¹²⁵. The Statutes Amendment Bill proposes inserting a new section about revoking an EPA. This would allow for inclusion in the EPA document that it revokes an earlier EPA of the same kind and notice revoking the former EPA is given when a copy of the later document is given to the attorney appointed in the earlier document with recommendation this also be given to another person i.e. the donors lawyer¹²⁶

It is unclear as to what is required for a successor to act. The legislation says “the appointment of one being conditional upon the cessation of another” 95(5). The notes accompanying Form 2, creation of EPA personal care/welfare gives instructions about the right to revoke the document and the prescribed form 8 is to be used. This form, “notice of revocation of enduring power of attorney”, does not include an option for the EPA to default to a successor.

Jo Goodhew’s report¹²⁷ raised concerns from submitters that if an appointment is revoked a new EPA needs to be created even when a successor is named and the Minister recommended automatic default to a successor on revocation. Would it not make sense for this to happen when capacity is lost also by the first attorney giving written notice to the successor and the legal witness without need for Court involvement as stands currently?

This is not addressed in the Statutes Amendment Bill and further amendments should be considered so that either revoking of the first attorney or their inability to act when required can allow for the successor to act as intended by the donor when naming them in the document.

IX Conclusion

Having an EPA in place is desirable in that it prevents the need for Court intervention in the majority of cases where a person is lacking in capacity needs decisions to be made on their behalf. Creating an EPA is a choice, and while encouragement and education will

¹²⁵ Jo Goodhew above n 10 at 14

¹²⁶ Statutes Amendment Bill Part 21 cl 76

¹²⁷ Jo Goodhew above n 10 at 14

help promote use of this tool, those who do not create one should not be discriminated against.

This paper has raised a few areas in the legislation that need addressing. The legislation needs to ensure it is inclusive and relevant for individuals of all cultures. Given the PPPRA is family law, consideration should be given to aligning the legislation with other Acts that enable protection and guardianship, such as care of children, and including in the Act principles relating to family and culture.

New Zealand's increasing ageing population and current trends will see a growing group of people who will not have anyone they can appoint. This needs further exploration and remedies as in many cases these people will be more vulnerable than other groups.

Greater protection is required for donors, lawyers and medical professionals in relation to clearer definitions of capacity and assessments of such. It will be interesting to see the outcome of the Statutes Amendment Bill Part 21 in relation to proposed changes regarding prescribed information for capacity certificates. Increased accountability is needed and persons to be consulted with, persons to be informed when an EPA is activated and registration of EPAs is recommended to ensure transparency should an attorney be required to act.

The barrier that cost presents when creating an EPA can be reconciled by working with other Acts to enable funding under already existing schemes.

Further clarity is required in relation to when and how a successor is able to act and as proposed in the current Bill the position of an older attorney in relation to a new attorney needs to be legislated for.

To make this document work as it is intended both the donor and attorney should have ongoing discussions about preferences and the inclusion of Advanced Directives and Advanced Care Plans will assist with this. The suitability of the attorney should be periodically reviewed to ensure they are still in a relational position to act. The uncertain proposal is the decision to appoint an attorney and the acceptance of this by the attorney when both parties are unsure as to when, and what the actual scenario will be should they be required to act.

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