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Kerstin Glomb is the estate planning specialist at KJB Law in Canberra. In more than 18 years of practice, Kerstin has assisted a great variety of clients, in particular those with blended families, with their Wills, enduring powers of attorney and other estate planning documents to achieve financial peace of mind and to minimise as much as possible the risk of claims against their estates.

ENDURING POWERS OF ATTORNEY

The dos and don'ts of EPAs

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What is an EPA?

Most people have come across enduring powers of attorney (EPA), but there is still uncertainty around what an attorney can and cannot do.

An EPA is a legal document that allows a person (which may be referred to as principal, appointor, donor) to appoint a person or persons to deal with the principal's affairs. The word 'enduring' means that the appointment remains operative even if the principal loses decision-making capacity *after* signing the document.

An EPA is the most common type of power of attorney. Other types are a general power of attorney which ceases if the principal loses decision-making capacity, and a corporate power of attorney which allows companies to nominate an attorney.

EPAs are subject to state law. The forms and how an EPA must be signed and who can witness differ between the states and territories.

In some states and territories, an EPA only refers to the principal's property/financial matters (for example, NSW). In other states, an EPA may refer to property matters, personal care matters and health care matters (for example, Queensland and the ACT).

A personal care/health care EPA might have a different name in some states and territories. For example, in NSW the document is known as 'appointment of enduring guardian' and in Western Australia as 'enduring power of guardianship'.

In Victoria, a principal can make an EPA which addresses financial and personal care matters, but there is a separate document for medical affairs, being an appointment of medical decision maker.

When do powers of an attorney commence?

In relation to personal care and health care/medical matters, an attorney's powers only commence if the principal no longer has decision-making capacity. The attorney must provide sufficient evidence in this regard, which may include a medical certificate of the principal's treating doctor or of a specialist in this area of medicine, or more of than one medical practitioner.

In relation to financial matters, the principal can allow the attorney to act immediately upon both the principal and the attorney signing the document, or may also only allow the attorney to act should the principal no longer have decision-making capacity.

There is no right or wrong decision in this regard, but it is simply for the principal to answer when they wish the powers to commence.

To allow an attorney to act immediately may be useful if the principal spends a lot of time overseas or while mentally capable, may be unwell physically.

When does an EPA cease?

An EPA ceases upon the death of the principal.

Further, an appointment of an attorney ceases when:

- the EPA is revoked, which can be done by the principal at any time as long as they have decision-making capacity
- the attorney resigns
- the attorney loses decision-making capacity
- the attorney becomes bankrupt
- the attorney dies.

In some jurisdictions, an EPA also ceases upon marriage of the principal, unless the contrary intention is expressed.

For example, section 52 of the *Powers of Attorney Act 1998* (Qld) provides that if the principal marries after making an EPA, the EPA is revoked to the extent that it gives powers to another person other than the principal's husband or wife. Another example is section 58 of the *Powers of Attorney Act 2006* (ACT).

Divorce is a further event which may cause an EPA to be revoked to the extent that the EPA gives power to the divorced spouse.

Note: If the principal and their spouse have nominated each other as attorney and then separate after the EPA has been signed, the separation has no effect but the EPA continues to be operative.

An attorney's obligations

As a general rule, an attorney must always act in the best interests and for the benefit of the principal. Further, an attorney has to act honestly in all matters concerning the principal's affairs.

Other obligations include that the attorney must keep their own money and property separate from the principal's money and property, and to keep reasonable accounts and records of the principal's money and property.

This all sounds good, but unless someone makes an application to the relevant tribunal or court to check whether the attorney has, in fact, acted in the best interests of the principal, an attorney is not required to file accounts with or to report to a tribunal or court, or to a government department. This means if the principal has lost decision-making capacity and the attorney is not doing the right thing, this may never to discovered, in particular if the sole attorney is also the sole executor/administrator of the principal's estate.

Further, there is currently no overarching framework to address (financial) elder abuse at a national level.

Additional powers of an attorney

The principal may include additional powers of the attorney in the EPA.

Delegation of powers

The purpose of an EPA is that the principal chooses the persons who are authorised to deal with the principal's affairs. Therefore, an attorney is generally not allowed to delegate their powers to another person. However, a delegation power (if allowed under the relevant Powers of Attorney Act) can be useful if properly addressed in the EPA. For example, the principal may allow their initial attorney(s) to delegate their powers to any or all of the persons nominated as substitute attorneys, should the initial attorney(s) be *temporarily* unable to act.

Confer benefits on the attorney

An EPA does not allow attorneys to receive any benefit, unless the principal expressly allows them to do so. It is useful to include such a power in an EPA where spouses appoint each other as attorneys, so that the spouses' 'overall' funds can be used to pay living and medical expenses of any of the spouses.

Confer benefits on third parties

An EPA does not allow attorneys to confer benefits on third parties, unless authorised in the EPA. Such power may be included if the principal has minor children or there are other persons who depend financially on the principal.

Power to make gifts

An EPA does not allow an attorney to make gifts, unless authorised in the EPA. If an attorney is authorised to make reasonable gifts, the relevant legislation may include guidance as to what is covered under such authority (for example, Schedule 3 to the *Powers of Attorney Act 2003* (NSW), section 39 of the *Powers of Attorney Act 2006* (ACT)), section 67 of the *Powers of Attorney Act 2014* (Vic), section 88 of the *Powers of Attorney Act 1998* (Qld)).

Can an attorney make a binding death benefit nomination?

Whether an attorney can make a binding superannuation death benefit nomination on behalf of the principal depends on:

- the terms of the superannuation fund deed
- the provisions of the relevant Powers of Attorney Act, and
- any additional powers of the attorney under the EPA.

The provisions of the Powers of Attorney Acts generally provide that an attorney can exercise any right conferred on the principal that can be delegated. The rights that cannot be delegated are referred to as 'special personal matters' which include making and revoking a Will, making and revoking an EPA, rights to vote, marriage, adoption and the like.

Until recently it was argued that an attorney cannot exercise the right of the principal to make a binding nomination because such right was considered to be 'Will-like' and therefore a testamentary act.

However, in the case of Re *Narumon Pty Ltd* [2018] QSC 185 *(Narumon)*, the Supreme Court of Queensland held that superannuation forms part of a person's property and, even though superannuation is not included in the listed items of financial and legal matters, superan-

The quote

An attorney must always act in the best interests and for the benefit of the principal.

nuation is nevertheless in the general scope of financial and legal matters. The court also pointed out that the list of financial and legal matters included in the Queensland Powers of Attorney Act is not exhaustive. This is also expressly stated, for example, in the ACT Powers of Attorney Act.

Can an attorney make a binding nomination for their own benefit?

As mentioned, an attorney cannot confer a benefit on themselves or enter into a conflict transaction unless the principal has given the attorney express power to do so under the EPA. As long as such a power is not included, an attorney does not have the right to make a binding nomination for their own benefit.

What about if the attorney is only updating/confirming an existing binding nomination (to prevent it from lapsing) under which the attorney is the nominated beneficiary or one of them?

In the *Narumon* case, the court held that the initial binding nomination was created by the principal and it accepted that a confirmation of such an initial binding nomination was simply to ensure continuity of the principal's estate planning arrangements. Therefore, if an attorney is making a binding nomination that extends an existing binding nomination under which the attorney is one of the beneficiaries, the attorney is authorised to do so, even though the EPA does not expressly authorise the attorney to confer benefits on themselves or enter into a conflict transaction. This is, of course, subject to the terms of the superannuation fund which must allow an attorney to exercise the member's right to make a binding nomination.

Can an attorney act as director in the principal's stead?

An EPA authorises an attorney to deal with the principal's personal financial and legal matters. When acting in the role of director of a company, the principal is not dealing with their personal financial or legal matters but with the company's financial and legal matters.

Therefore, an EPA does not authorise an attorney to act as director in the principal's stead.

However, if the principal also owns shares in such a company, the attorney is authorised to exercise the principal's rights as a shareholder; one of which is to appoint directors of the company. If the principal is the sole director and shareholder of the company, the attorney could, for example, resolve that the principal is removed as sole director and the attorney appointed as sole director in the principal's stead.

What if a person has assets in different jurisdictions?

Other Australian states and territories

Powers of Attorney legislation within all Australian states and territories now include provisions which recognise an EPA put into place in accordance with the law of another Australian state and territory. For example, if a person made an EPA in accordance with NSW law, the document also authorises the attorney to deal with the principal's assets located Queensland.

While this may work well in theory, banks, share registries, land titles offices and the like may not be familiar with the format of an EPA of other Australian jurisdictions. Therefore, it might be better to put an EPA in accordance with the law of each state and territory into place where one has assets.

Outside Australia

An EPA made under the law of any Australian state and territory is not accepted when the attorney must deal with financial and non-financial matters outside Australia. Rather, it is necessary to put documents under the relevant jurisdiction in place which are equivalent to an EPA (financially and/or personal care and health matters).

Trips and traps: some case examples

As a general rule, an EPA should be practical but also provide for some checks and balances. Further it not sufficient just to have a 'Plan A'.

Example 1: the pitfalls of nominating one attorney

John and Joan are married. They have nominated each other as their attorney. While this is a good start, it is not sufficient for someone to nominate just one person as their attorney, in particular if they and their attorney spend a lot of time together, driving in the same car or going on trips together.

Should both of John and Joan become injured in a car accident and are unable to make decisions, their EPA would no longer be useful.

Example 2: autonomy and financial affairs

Mary, who lives in a retirement village in NSW, has nominated her two daughters and her son as her attorneys. Each of her attorneys can act severally/separately. Because the daughters live in Queensland, the children arrange that Mary's son, who also lives in NSW, shall attend to payment of Mary's bills and look after her bank accounts.

After some time, the son starts to withdraw funds from Mary's bank account and uses these funds for himself and his family.

The daughters only become aware of such withdrawals because the retirement village informs them that Mary seems to run out of funds. The daughters then check Mary's bank account statements.

There is no doubt that the son's withdrawals are in breach of his attorney's duties and he would be obligated to repay the withdrawn funds into Mary's account. However, he does not have any money, and the daughters feel uncomfortable about taking their brother to court.

Because each of Mary's children were allowed to deal with her financial affairs without the involvement of the others, it was possible for the son to use Mary's funds for himself over such a long period. It is likely that a certain level of checks and balances in Mary's EPA would have prevented the situation.

Example 3: the practicalities of joint appointments

This time Mary has appointed her three children to act jointly as her medical attorneys. Unfortunately, Mary no longer has decision-making capacity and is no longer able to remain in her home but needs nursing home care urgently. One of her children is overseas and cannot be contacted.

Appointing attorneys jointly means that they have to act by consent. For Mary, this means that all of her children have to sign documents required for Mary to enter nursing home care. As one of them cannot be contacted, documents signed by two of the three attorneys will not be sufficient.

While the joint appointments definitely provide for checks and balances, they are not very practical.

Conclusion

An EPA is a powerful document and it is unlikely that all possible misuses of an attorney's powers can be addressed by the law. Nevertheless, everyone should take charge and appoint persons of their choice to look after their affairs should it become necessary and a properly drafted EPA can assist that the person is well cared for. **FS**