LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Enduring Powers of Attorney:

A New Risk Profile

Introduction

The Instruments (Enduring Power of Attorney) Act 2003 came into operation on 1 April 2004. It amended the Instruments Act 1958 (the Act) by adding Part XIA. The amendments set out new requirements for preparing, executing, witnessing and revoking enduring powers of attorney.

The requirements for witnessing enduring powers of attorney have changed considerably as a result of the amendments and the LPLC has produced separate materials to assist solicitors in relation to this issue.

This bulletin is designed to highlight some of the other areas where risks may lie for solicitors preparing enduring powers of attorney on behalf of their clients.

Enduring powers of attorney may now be specific.

Section 115 of the Act (as amended) provides that a donor may provide conditions and limitations upon, and instructions about the exercise of the power. Section 117 provides that a donor may specify in an enduring power of attorney a time from which, circumstances in which, or occasions on which a power is exercisable. Having the ability to limit the power given to the attorney leaves the way open for criticism later that a power was too wide or too narrow. You will therefore need to clarify and document the donor's requirements as part of your instruction taking procedure.

In the past, when it was not possible to limit an enduring power of attorney, it appears some solicitors prepared powers of attorney on instructions from the proposed attorney. This practice is now completely unacceptable. Remember, when drawing a power of attorney you should be acting for the donor. The variety of options now available when preparing an enduring power of attorney means that you should speak directly with the donor about what the donor wants in the instrument, preferably without the attorney present.

When drawing an enduring power of attorney, you need to –

- explain to your client that he or she can limit the powers given to an attorney and limit the duration of the power;
- ask your client what he or she really wants to do and why;
- once you have drafted the instrument, explain the content of the document and scope of the power to your client;
- throughout the matter, keep written records of your advice and explanations and your client's responses and instructions.

Some examples of the types of conditions, limitations or instructions clients might require are –

- A limit on the power so that it is only operative once the donor loses capacity and a medical certificate to that effect is produced. (The donor will need to provide a signed consent to disclose medical information to the attorney – see the form on the Office of the Public Advocate website at www.publicadvocate.vic.gov.au). (A word of caution should be given when contemplating using this clause. Sometimes, it may take some time for a medical certificate to be signed where the donor suffers the onset of dementia but still has periods of lucidity.)

- Specifying in the power which assets or in what order the attorney is to deal with or sell, in the event that such action becomes necessary. This may be particularly important where the donor's will specifies certain assets are to go to specific people.

- A limit on the type of investments the attorney can make.

- A limit on the attorney's power so that, for example, real property cannot be mortgaged or a limit on the power of sale of real property while, for example, a certain relative is still living there.

- Setting out that certain charitable donations, or gifts to certain people, be continued on a regular basis.

- Setting out agreed fees when a professional person or trustee company is appointed as attorney.

The above are only suggestions or examples and will clearly not be relevant or recommended in all cases.

The attorney – statement of acceptance

Unlike under the old system, the new provisions state that the enduring power of attorney is only effective if the attorney accepts the appointment by signing and dating a statement of acceptance (section 125B). The statement of acceptance is included in the forms produced by the Department of Justice. It must be attached to the enduring power of attorney once signed. It must include an undertaking to –

- exercise the powers conferred with reasonable diligence to protect the interests of the donor;
- avoid acting where there is any conflict of interest between the interests of the donor and the interests of the attorney; and
- exercise power in accordance with the Act.

When you are preparing an enduring power of attorney, you will need to inform the donor of these requirements to ensure the donor does not "disappear into the mist" with the drafted enduring power of attorney and does not ever get the attorney to accept it.

While the instrument comes into existence at the time the donor signs it, the attorney is not entitled to use the power until he or she signs the statement of acceptance. The attorney does not have to sign at the same time as the donor and does not have to sign in front of witnesses.

The attorney – accurate records

Section 125D requires that the attorney keep accurate records of all dealings. This provision applies to attorneys appointed by instruments created before 1 April 2004 as well.

Multiple attorneys

Many solicitors are unsure whether the new provisions allow for the appointment of, say, three of the donor's children as attorneys with any two to act jointly (ie by majority rule). There is considerable doubt that the current legislation allows this permutation and, in fact, there is also doubt about whether the earlier legislation allowed this arrangement. It appears that there may be quite a few powers in existence purporting to provide this arrangement. The LPLC recommends that, where possible, those powers be revisited. Where you have a client who is adamant that he or she wishes to arrange a new power in this way, you may consider seeking an advisory opinion from VCAT (see section 125ZA).

Alternative attorneys

There is now provision to appoint an "alternative attorney", that is, someone who can act "in the event of the death, period of absence or legal incapacity of the attorney" (section 120). The shortcoming is that only one alternative attorney can be appointed for each principal attorney.

This is a problem in the common scenario where the donor wishes to appoint his or her spouse as principal attorney and then two or more children as alternative attorneys. A possible solution here is to create two limited powers. In one power, your client can name the spouse as attorney unless incapacitated or absent and then, in the second power, your client can name the children as attorneys only when the spouse is incapacitated or absent. However, if your client instructs you to adopt this type of arrangement, make sure that "incapacity" and "absent" are clearly defined in both instruments. We note that "legal incapacity" and "absence" in relation to the principal attorney in section 120 are not defined.

You will also need to give the alternative attorneys some way of determining the principal attorney's incapacity. A consent form to disclose medical information to the alternative attorney is one way to do this.

Revocation of the power

When drawing an enduring power of attorney, you should explain to your donor client how the power can be revoked. Section 125H says that Division 4 does not limit "the events by which or the circumstances in which an enduring power of attorney –

(a) is revoked whether orally or in writing or in another way; or

(b) is terminated by implication or operation of law".

The explanatory memorandum notes that this means a power can be revoked, for

example, by –

- telling the attorney that his or her power is withdrawn; or
- destroying the power of attorney document and copies.

Other methods specifically listed in the Act are –

- in writing by an approved form (section 125I); or
- by inconsistent later appointment of an attorney (section 125J); or
- by the death of the donor (section 125K); or
- as set out in the instrument (section 125L); or
- by the attorney's resignation, incapacity, insolvency or death (sections 125M, N, O, P); or
- by VCAT (section 125Q).

You should counsel your client against revoking the power orally. Once revoked, even orally, a new power will need to be executed.

Inconsistent later power

Section 125J provides -

> "*A donor's enduring power of attorney is revoked, to the extent of any inconsistency, by a later enduring power of attorney of the donor.*"

There is no definition of "inconsistency" in the Act. The explanatory memorandum gives the example "where the donor appoints a later attorney to have exclusively the same powers as an earlier attorney". What is not clear is whether appointing a later attorney with the same powers as an earlier attorney is sufficient to revoke the earlier power or whether there has to be some express exclusivity referred to on the face of the document. That is, are concurrent powers impliedly inconsistent?

A recent Queensland case1 found that an earlier power was inconsistent with a later power where the earlier power appointed person A by themselves to act but the later power appointed person A along with persons B and C to act. Clause 6 of the approved form states -

> *"I declare that all previous enduring powers of attorney signed by me are hereby revoked*".

Small v Small [2003] QSC 51. Similar wording in Queensland legislation for inconsistent later appointment provision.

You may wish to consider whether this clause is included, amended or deleted each time you prepare a power of attorney.

The wide range of revocation methods also raises the questions -

- How do you know when presented with a power of attorney whether it is current or valid?
- How do you know that the donor did not tell the attorney yesterday that his or her power was revoked?
- How do you know that the donor had capacity at the time that he or she spoke to the attorney?
- How do you know that there has not been another enduring power of attorney created that is inconsistent with the earlier one shown to you?
- Do you have to accept a power of attorney on face value when it is presented to you?

The answers to these questions are not easy. The LPLC believes it is prudent to make some enquiries as to why an enduring power of attorney is being used and, if suspicion is raised, continue to make further enquiries. A telephone call may be all it takes to clarify the matter. Some firms obtain a statutory declaration from the attorney that the attorney knows of no basis on which the instrument has been revoked. Others telephone the solicitor who prepared the power to check with him or her.

Where the power is not being used for the benefit of the donor, there is cause for automatic scepticism and further investigations should be undertaken.

Legal Practitioners' Liability Committee

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