New EPAs: effective protections, emerging problems?

By Maria Kazmierow, barrister

Six months into the new regime, practitioners are still coming to grips with the new model enduring powers of attorney (EPAs), which came into force on 26 September 2008 under the *Protection of Personal and Property Rights Amendment Act* 2007.

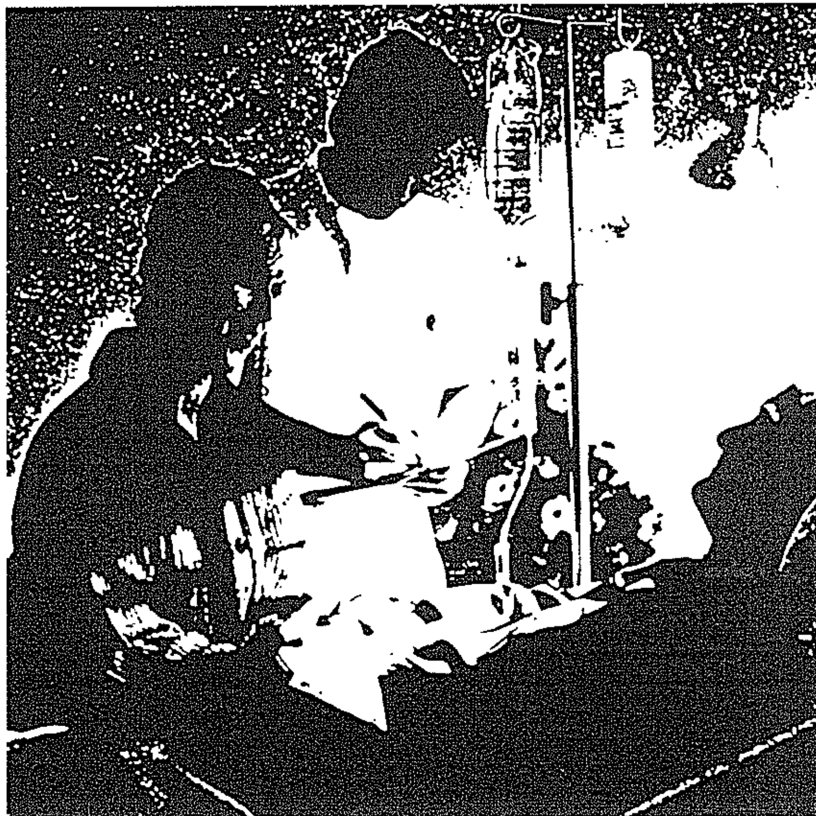
There is no doubt that the reformed EPAs have real potential to enhance the protection of donors from abuse, to emphasise donor rights, and to raise the bar for attorney performance and accountability. But there is growing concern that the pre-law reform benefits of EPAs as low cost and 'user friendly' accessible risk management tools to deal with situations of unexpected mental incapacity are compromised.

Changes – donor rights

Expansive presumption of competence
Previously, no presumption of donor competence was included in Part 9 of the *Protection of Personal and Property Rights Act* 1988 (Act). Section 93B is broader than that in section 5 of the Act.

The presumption of competence establishes the *starting point* in assessing mental incapacity. Donors are presumed competent – even if subject to orders under the *Mental Health (Compulsory Assessment and Treatment) Act* 1992, until proven otherwise. Generally, the proof for displacing the presumption of competence is medical certification by a relevant medical practitioner. This is the case for property EPAs, and for care and welfare EPAs in *significant care and welfare matters*.

This brings EPAs into line with the rest of the Act, as orders under the Act (personal, property, and welfare guardian) are subject to this presumption.



Redefining mental incapacity – personal care and welfare – section 94(2)
For a care and welfare EPA to be activated, the new test 'raises the bar'. A welfare attorney's power to make decisions for the donor is triggered in narrower circumstances. Gone is "partial" incapacity. In is "lacking capacity" which "equates to *wholly* lacking capacity" (Kelly and Williamson, "Enduring Powers of Attorney – A New Regime", NZLS Seminar, September 2008, page 30). The test now also covers the making of health and welfare decisions, and the failure to make any such decision.

This reflects the test for orders under the Act for appointing welfare guardians, which refers to the subject person needing to "*wholly lack* the capacity to *make or communicate decisions*" (section 12).

For property EPAs, donors can authorise the EPAs to have effect when they are mentally capable and to continue if they become incapable. The test for mental incapacity does not apply here. Where the donor of a property EPA chooses the attorney's powers to be activated by mental incapacity, the test remains the same as previously. Donors are mentally incapable if they are *wholly incompetent to manage their own affairs in relation to their property*.

This strengthens donor rights by 'raising the bar' for when personal care and welfare EPAs are triggered, preserving the donor's right to make their own decisions, and brings it into line with the rest of the Act.

Mental incapacity – who decides, when, and who pays?
Previously, the attorney or Court decided. There was no statutory obligation on the attorney to obtain expert medical opinion on the donor's mental incapacity. Now, the decision maker is usually an expert medical opinion recorded on Forms 4 (property) and 5 (personal care and welfare), or the Court decides.

The medical expert opinion is provided by a relevant health practitioner, whose scope of practice includes assessment of a person's mental capacity. The decision is made at the time when the mental capacity is at issue. The attorney pays the costs of obtaining the medical opinion, and the costs are a debt recoverable from the donor's property.

Additionally, some requirements are specific to care and welfare EPAs. For these, there is a two-tier approach to deciding the donor is mentally incapacitated, which relates to "significant matters" or "other matters". This protects the donor's rights by largely ensuring an objective and medically qualified expert determines the issue of mental incapacity.

Witnessing
Previously, EPAs could be signed by the donor, or some other person in the presence of the donor and by the direction of the donor, whose signature was attested by a third party witness. It was signed by the attorney, and witnessed by a third party. There was no obligation that lawyers witness the signature.

Now, the *donor's signature* must be witnessed by either a lawyer, an authorised officer of a Trustee corporation, or a legal executive meeting the requirements of the Act. Where the attorney is a trustee corporation, an officer or employee of that corporation so authorised may witness the donor's signature. If an attorney is appointed in his or her capacity as a lawyer, another lawyer or legal executive in the attorney's firm may witness the donor's signature.

The attorney's signature must be witnessed by a person other than the donor or the donor's witness (section 94A(5)), and the witness to the donor's signature must be "independent" of the attorney (section 94A(7)(c)).

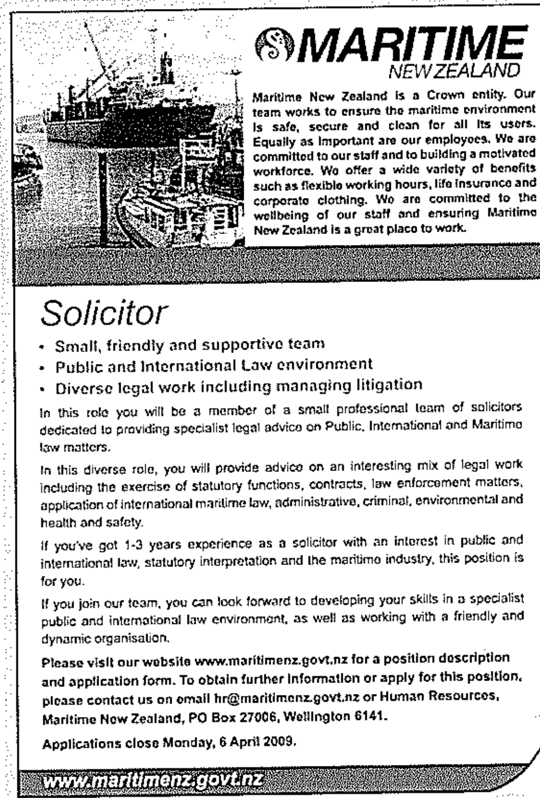
Independent legal advice for donors and certification
This was not applicable previously. Now, it is mandated. At the time the EPA is created, the witness must complete a certificate (in the regulations) confirming that certain matters were explained to the donor before he or she signed the EPA, that the witness was independent of the attorneys (with certain exceptions), and that the witness had no reason to suspect the donor was mentally incapable.

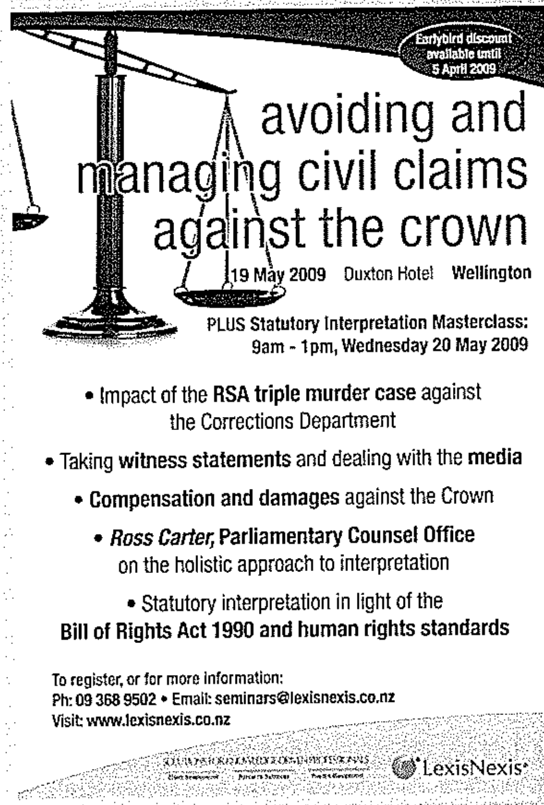
The only statutory exception to independence is when the donor instructs a law firm or trustee corporation to advise them and states that they want the attorney to be the firm's lawyer, legal executive, or officer of the corporation. Then, another officer of the same corporation, or a lawyer or legal executive from the same law firm can act as the donor's witness/certifier (section 94A(8)).

The certificate of independent legal advice must be attached to the EPA, and there is no scope for the use of a different or changed form.

The obligation to clearly explain donor rights and attorney obligations, as well as the various options for protection and accountability to a

continued on page 16





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continued from page 15

competent donor, ensures fully informed consent from the donor.

There is no obligation for the independent legal advice of attorneys. The only requirements for witnessing an attorney's signature under section 94A are that the witness is not the donor or the donor's witness.

Attorney performance and accountability

Attorney qualifications and suitability
The EPA will not have effect unless the attorney, when signing the EPA is:

1. Not less than 20 years;
2. Not bankrupt; and
3. Not subject to a property or personal order under the Act.

The attorney can be a Trustee corporation for property EPAs, but not for care and welfare EPAs.

In addition, there is a newly expressed statutory and common law layer to this, emphasising attorney suitability for the role. Identifying the suitability of the potential attorney *skills wise* as well as his or her basic competence and ability to exercise good judgement is crucial.

For property attorneys unable to manage and organise finances and property, the consequence of failing in their duty to keep financial records (without reasonable excuse), is an offence punishable by a *fine not exceeding $1000 with respect of each transaction.*

Attorney suitability has been the subject of recent case law. In *Treanory & Anor v Treanery* [2008] 27 FRNZ 78, Judge Murfitt considered the qualities for a suitable attorney by reviewing what would make a property attorney unsuitable under section 102(2)(i) of the Act. Her Honour noted:

> "I interpret the section to require an unsuitability of a kind which undermines the ability of the attorney to exercise his/her responsibility, or misconduct of such a profound nature that it completely undermines the confidence the Court might have that the attorney could responsibly exercise those powers. Thus, for example, *the attorney's own mental and physical incapacity might be relevant, or criminal behaviour* of a kind which demonstrates an inability to exercise good judgement, or by reason of imprisonment, an inability to carry out the fundamental tasks of the attorneyship."

Upon appeal to the High Court, the issues traversed under section 102(2)(i) were not the subject of appeal in respect of the revocation of the property EPA (*Treneary v Treneary & Ors* (18 December 2008, High Court, New Plymouth CIV 2008-443-000386, Justice Andrews)). Therefore, the factors noted by Judge Murfitt remain relevant for donors and their advisers.

Attorney duties: act in best interests, duty to consult, and provide information
Once the donor is mentally incapable, the attorney is obliged to act in the best interests of the donor, while encouraging the donor to develop their competence to manage their own affairs in property and care and welfare decision making (section 97A(2)). The Court can revoke the appointment of the attorney for failing to act in the best interests of the donor (section 105).

Previously, there was no obligation to consult. Now attorneys must consult the donor as far as practicable, any person specified in the EPA, and the other attorneys (if there are different attorneys appointed for care and welfare and property). Property attorneys must give the care and welfare attorney any financial support required to carry out duties in relation to the donor's need for personal care and welfare. Care and welfare attorneys should consider the financial implications of decisions. A failure to consult is a ground for the Court to revoke the appointment of the attorney. The duty to consult keeps attorneys monitored and the donor as fully informed and involved as their mental incapacity allows.

Previously, a duty to provide information was not applicable and there was no statutory obligation to keep records. Now, the donor can specify to whom an attorney must provide information, and can specify the kind of information to be provided. The attorney is obliged to provide this. This allows the donor to nominate a 'monitor' for the attorney's exercise of power, and bolsters the duty to consult with a duty to provide information. This is an early warning system for donor abuse. The consequences of non-provision of information can result in the Court revoking the attorney's appointment.

Regulation of attorney powers
There is a general prohibition on an attorney acting to benefit him or herself or other persons, unless authorised by the EPA (section 107(1)(a)) or by the Court (section 102(2)(ga)). This has now been extended.

When donor advisers obtain their client's instructions, the property EPA form has two statements dealing with the attorney's ability to benefit him or herself which the donor needs to consider. The donor adviser must select one. The express exceptions to prohibition against acting to benefit self allow donors to decide in advance to what extent they want this rule to be breached, and the safety of their funds to potentially be exploited.

Other controls on attorney powers
The Family Court has a wide jurisdiction under section 103 with EPAs when the donor has become mentally incapable, which includes reviewing the attorney's decisions. A wider group can now request a review, including the donor, a relative or another attorney of the donor, social workers, medical practitioners, a trustee corporation, the principal manager of any hospital or rest home in which the donor resides, the donor's welfare guardian, an elder abuse and neglect prevention service representative, and any other person with the Court's leave.

Should the donor of an EPA regain mental capacity, he or she may suspend the attorney's authority by written notice (section 100A(1)).

The Court has the power to revoke the appointment of an attorney, where the attorney has not acted, is not acting, or proposes not to act in the best interests of the donor, or fails in his or her duty to consult or provide information. Revocation can also happen under section 102(2)(h) and (i). That is, if the attorney is not suitable, or if the donor was induced by undue influence or fraud to create the power. The EPA will then cease to have effect. Donors can revoke the EPA by notice in writing to the attorney.

Issue – low cost and accessibility compromised?

Practitioner issues are crystalised by families seeking EPAs from law firms that have often represented their interests over many years. The classic situation is the married/de facto/civil union couple who are a firm's clients. Should they instruct they want EPAs with each other as the attorney, the firm would not be able to act as adviser for them as it could not provide independent legal advice to either donor due to the obvious conflict of interest. This is a 'brief out' situation, or "discuss attorney options" with the clients.

Who can act impacts on the upfront costs for clients. Cost may be a factor in deciding whether to get an EPA or not. Practitioners anticipate the cost for advice and drafting of EPAs would be "in excess of $1,000 for the involvement of at least three legal firms plus time frame of four to six weeks" (Peter Atkin, *Law News*, 26 September 2008). Many regard this as an underestimate. In rural areas, the impact may be even greater.

The price of reforms appears to be increased cost for compliance with the statutory regime and the inevitable impact that has on accessibility.

Issue – professional peril for donor advisers

For donor legal advisers, compliance with obligations under the Act impact on risk management under the *Lawyers and Conveyancers Act* 2006. Legal advisers need to be clear about what they must do to comply with the requirement for independent legal advice and certification under the statutory regime or potentially face disciplinary consequences.

Maria Kazmierow acknowledges ADLS Inc for use of her seminar paper in the writing of this column.
She can be contacted on maria@oconnellchambers.co.nz.