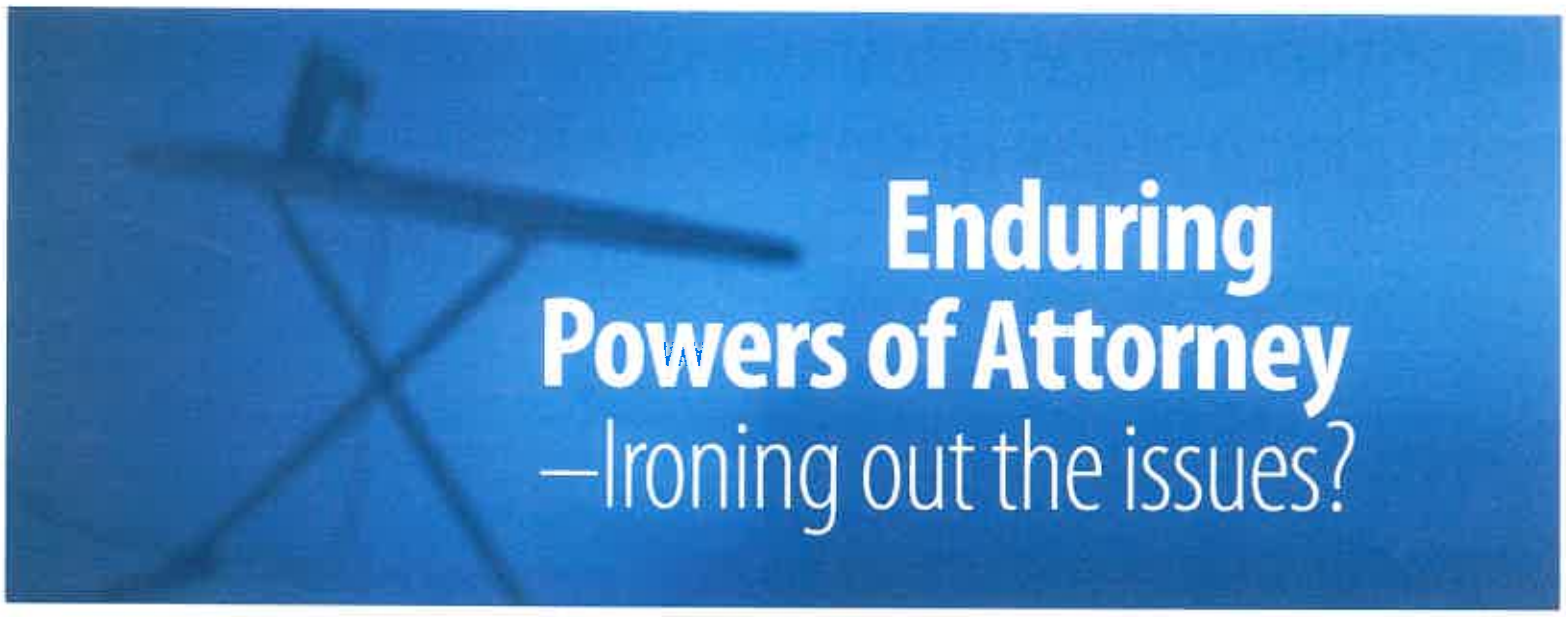

Enduring Powers of Attorney —Ironing out the issues?

By Maria Kazmierow, Barrister and Mediator

The 2008 law reform of Part 9 of the *Protection of Personal and Property Rights Act* 1988 (Act), affecting Enduring Powers of Attorney (EPOA), has been in place for nearly a year. A review of the impact of that reform is in order. In terms of case law development, the most recent cases of note are profiled. Of real significance for practitioners and clients alike is an update on progress with reforming the problematic donor protective provision, section 94A (independent certification).

Suitability of candidate attorneys

In the 2009 ADLS Inc seminar on the EPOA Law Reform, Tony Fortune and I recommended donor advisers would be prudent to discuss the suitability of candidates for attorneyship, due to statutory and common law considerations. In reference to the current reformed part 9, the Act provides the following jurisdiction under section 102:

"Court's jurisdiction in respect of an enduring power of attorney

(1) A Court shall have jurisdiction to determine—
  (a) whether or not any instrument is an enduring power of attorney; or
  (b) whether or not the donor of an enduring power of attorney is mentally incapable.

(2) A Court shall have jurisdiction to do all or any of the following things in respect of an enduring power of attorney where the donor has become mentally incapable:

...

  (i) determine whether, having regard to all the circumstances and, in particular, the attorney's relationship with the donor, the attorney is suitable to be the donor's attorney."

While this specific provision was not significantly amended, the aspect of attorney suitability has been the subject of recent case law for EPOAs.

Treneary v Treneary

In *Treaneary v Treanery* [2009] NZFLR 208, Judge Murfitt considered the qualities for a suitable attorney by reviewing what would make an attorney unsuitable under section 102(2)(i) of the Act. His Honour noted at [16] (emphasis added):

> "I interpret that 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 any confidence the Court might have that the attorney could responsibly exercise those powers. Thus, for example, *the attorney's own mental or physical incapacity* might be relevant, or *criminal behaviour* of a kind which demonstrates an inability to exercise good judgment, 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 Enduring Power of Attorney – property (*Treneary v Treneary* [2009] NZFLR 1062). The factors noted by his Honour in the Family Court remain relevant for donors and their advisers.

In this instance, on the facts, the attorney intermingled funds of the donors of a number of EPOA she was responsible for (with her own), had no system of recording or accounting for those funds, and benefitted herself from the donor's funds, treating the donor's money like her own. The attorney exhausted the capital in the donor's estate over a relatively short period of time. The estate exceeded $212,000. The attorney was not suitable, and unsurprisingly, her appointment as property attorney was revoked.

Jurisdiction to determine the validity of EPOA

The High Court has recently given consideration as to whether the Family Court, District Court, or High Court has jurisdiction to determine the validity of EPOAs.

In *Waldron v Public Trust* (High Court, Auckland CIV-2009-404-485, 19 January 2010), Justice Potter considered the following facts. The donor, Mr Scanlan, executed three sets of EPOA in a decade. The first in 1996 (revoked in 2003) and the second in 2002. He appointed the appellant his attorney in property and personal care and welfare matters. In August 2006, he executed a third lot of EPOA with the Public Trust and another friend. He gave written notice to Ms Waldron that her appointment as his attorney was cancelled. Waldron challenged that cancellation on the basis that the donor was mentally incapable at the time he purported to cancel the EPOA.

Before the substantive issue could be dealt with, an intervening issue became the cause of the appeal. The issue is jurisdictional:

- Does the Family Court have jurisdiction under the Act to determine the validity of the EPOA?
- If not, which Court has jurisdiction: District Court or High Court?"

In particular, the issue is whether section 102(1)(b) provides a specific power for the Court to determine mental capacity *at the time an enduring power of attorney is entered into*. As noted above, section 102(1) provides (emphasis added):

> "A Court *shall have jurisdiction* to determine–
> (a) whether or not any instrument is an enduring power of attorney; or
> (b) *whether or not the donor of an enduring power of attorney* ***is*** *mentally incapable*."

Justice Potter interpreted section 102 as not being an impediment to determining validity of an EPOA at the time it was executed.

Her Honour referred specifically to section 102(1)(a). In her view, the Family Court had this jurisdiction. Section 102(1)(a) "confers … jurisdiction to determine whether or not any instrument is an enduring power of attorney," she said at [46]. She went on to say at [46] – [47]:

> "I conclude that this includes jurisdiction to determine whether an enduring power of attorney has come into effect, including whether the donor had mental capacity at the time the enduring power of attorney was entered into and executed.
>
> "I consider this interpretation is supported by:
> (a) The structure of [section] 102(1):
> (i) Under [section] 102(1)(a) the Family Court has jurisdiction to determine whether there *is* any instrument which is a valid enduring power of attorney;
> (i) Under [section] 102(1)(b) the Family Court has jurisdiction to determine when the enduring power of attorney comes into effect, that is when the donor is mentally incapable;

> the "edge of the problem" of certification is dealt with, but the substantive issues with independent certification remain untouched

(i) Under [section] 101(2) the Family Court is empowered to give directions and make determinations on all kinds of issues arising in relation to the enduring power of attorney including the suitability of the appointment and whether the instrument has ceased to have effect;

(b) The interpretation is consistent with the expressed intent of the Act to vest jurisdiction in the Family Court, except in relation to Part 9A.

(c) It would be anomalous if [section] 102(1) were interpreted to give the Family Court power to determine mental capacity at any time after the execution of an enduring power of attorney under [section] 102(1)(b) but not to determine mental capacity at the time the instrument was executed.

(d) Given that the Family Court has jurisdiction under [section] 102(2)(b) to determine whether or not any enduring power of attorney has ceased to have effect, it is logical and consistent that the provisions of [section] 102 should be interpreted to include jurisdiction to determine whether an enduring power of attorney has come into effect."

Independent certification and law reform

Given the overwhelming concerns expressed by the profession during the ADLS Road Show on EPOA in 2009, and subsequently, it is heartening to report on progress with respect to amending section 94A(4) of the Act. Clause 119 of the Statutes Amendment Bill 2009 (Bill) is the amending provision, and provides:

"Section 94A is amended by inserting the following subsection after subsection (4):

"(4A) If 2 people appoint each other as attorney, a witness to the signature of one person as donor (**witness A**) does not fail to be independent for the purposes of subsection (4) by reason only that the witness of the other person as donor (witness B)—

"(a) is a lawyer or legal executive in the same firm as witness A; or

"(b) is an officer or employee of the same trustee corporation as witness A."

Brookers commentary notes that clause 119 amends section 94A to enable witnesses from the same law firm or the same trustee corporation to separately advise and witness the signatures of people who are appointing each other mutually as attorneys, although each witness must otherwise be independent of the attorney under section 94A(4).

The Bill has received submissions from the New Zealand Law Society (NZLS), amongst a number of others. The NZLS submission is critical of the amending clause, suggesting that "this provision will do little to reduce the inconvenience and expense arising from the necessity to engage two or more law firms in order to create reciprocal enduring powers of attorney".

The thrust of the NZLS submissions is to retain the safeguard of independence of advice that is represented by the Act, while ensuring there is no compromise to the "cost-inconvenience" factors.

In particular, the NZLS is concerned that:

- The provision is limited to situations where mutual powers of attorney are given solely in favour of the two parties concerned. For example:
  - -Spouses or partners wishing to give an EPOA to each other with a child (or with a child as a successor attorney);
  - -Spouses or partners wishing to give an EPOA to their partner, without a reciprocal EPOA;
  - -Parents wishing to give an EPOA in favour of a child/ children;
  - -Persons wishing to give an EPOA in favour of a friend.
- The provision addresses a possible conflict only to the extent that it might arise by reason of lawyers in the same firm witnessing donors' signatures in a reciprocal EPOA situation. Conflict is much more likely to arise for other reasons – eg if the other lawyer has acted as attorney previously and/or witnessed the attorney's signature;
- "Firm" is inappropriate, as there is doubt as to whether this would include a lawyer in a sole practice.

On this basis, the NZLS submission puts the position that "the proposed provision will do no more than touch the edge of the problem. It will not enable most people to avoid the inconvenience and expense of engaging two or more law firms in the process of creating an [EPOA]" (at para 19).

The Government Administration Committee was the responsible select committee giving consideration to these submissions. Its report rejected these submissions, and recommended that "no change be made to clause 119, as [section] 108AAB of the Act provides for a review in 2013 of the effectiveness of the amendments (including [section] 94A) and whether further amendments are desirable. We recommend that this review address any remaining concerns about [section] 94A." The Bill has undergone its second reading in the House on 25 May 2010. The select committee's recommendations were endorsed.

There things stand until 2013 – the "edge of the problem" of certification is dealt with, but the substantive issues with independent certification remain untouched.

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This article has been extracted and updated from the paper presented by Maria at the recent ADLS *Cradle to Grave* conference, "Capacity & Law Update".