

ENDURING POWERS OF ATTORNEY

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What is an enduring power of attorney?

An enduring power of attorney ("EPA") is a formal document that a donor signs to appoint another person to act for the donor where the donor is no longer able to do so. There are two types of EPAs; one for property (for example decisions about the donor's property and financial affairs) and one for personal care and welfare (for example, decisions about the donor's care).

The donor can choose whether an EPA for property comes into effect straight away or only when the donor becomes mentally incapable. An EPA for personal care and welfare can only come into effect once the donor becomes mentally incapable.

What is the need for EPAs in villages?

Many operators see it as very important to ensure that each of their residents has signed an EPA in respect of both property and personal care and welfare. The reason for this is that if the resident's health deteriorates to such an extent that they cannot make decisions for themselves, the operator should know who to deal with.

For example, if a resident becomes ill and there is no EPA, there could be some argument between family members as to whether they should go into care or whether to terminate the occupation right agreement. If family members have differing views as to what should happen, and the resident cannot tell you what they really want, whose side do you take?

Requirement on entry?

Rather than waiting for a deterioration in health, some operators require that EPAs are provided when the resident enters the village. This can be done by including a clause to this effect in the occupation right agreement. The clause can also require that the resident keeps the operator informed of their attorneys' contact details. To make sure that this clause is enforced, it is a good idea to set out the requirement in your settlement procedures.

What changes have there been to the EPA regime?

Concerns over elder abuse and attorneys misusing their powers led to a recent law change to the required form and content of an EPA. Stricter witnessing requirements have also been put in place and the way that mental capacity is determined has changed, and there are now obligations on the attorney to consult with the donor and any other attorneys, and to keep records and provide information to whoever the donor has specified in the EPA.

All EPAs dated after 26 September 2008 must now comply with the new law. No changes are required to be made to EPAs put in place prior to the new law, which will continue to be effective.

Under the new regime, the donor's signature on the EPA must be witnessed by either a lawyer, an

authorised officer of a Trustee Corporation or certain legal executives. The witness must also be independent of the attorney. The witness must explain the effect and implications of the EPA to the donor and certify that they have done so.

To see the practical effect of these new requirements, consider a common situation where a husband and wife visit their local solicitor, who they have been using for a number of years, and want to put in place EPAs where each spouse appoints the other to be their attorney.

Due to the requirement that the witness to the donor's signature be independent of the attorney, the local solicitor could not act for either spouse as the local solicitor would not be independent. In this case, the local solicitor could prepare the EPA documents, however each spouse would then need to see a different solicitor to witness each spouse's signature and explain the effect and implications of the EPA. This process would increase the costs of putting an EPA in place.

What are the costs of an EPA?

Practitioners are concerned that these stricter requirements and the resulting increase in costs will

become a barrier to clients choosing to put EPAs in place, with one solicitor commenting that costs for preparing EPAs would be "in excess of \$1,000 for the involvement of at least three legal firms" (Peter Atkin, Law News 26 September 2008).

However, the Public Trust can prepare and witness EPAs at a cost of \$110 each and offers discounts in certain circumstances. At this price, there should be no reason for a new resident to not sign EPAs.

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