NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Statutes Amendment Bill

29/01/2016

Statutes Amendment Bill: Part 21 (Enduring Powers of Attorney)

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Statutes Amendment Bill (Bill). The Law Society only wishes to comment on Part 21 of the Bill.

2 Part 21 – Amendments to the Protection of Personal and Property Rights Act 1988

Background

2.1 The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides the legal machinery to allow decisions to be made on behalf of those unable to manage their own affairs. Part 9 of the PPPR Act deals with enduring powers of attorney (EPAs). That Part allows a person (called the 'donor'), while they still have the necessary mental capacity, to appoint another person (called the 'attorney') as agent to act in relation to their care and welfare, property, or both in the event that the donor becomes mental incapable.

2.2 Part 9 of the PPPR Act was considered by the Law Commission in its report, *Misuse of Enduring Powers of Attorney*.[1] The Law Commission noted that an overwhelming majority of submissions it received from those with relevant expertise said that there was a need for additional safeguards to curb abuse associated with EPAs.[2] However, the Law Commission concluded that any changes should interfere as little as possible with the virtues of EPAs, which the Commission characterised as "their cheapness and the fact that they enable the donor to make his or her own decision as to who should be the donor's substituted decision-maker".[3]

2.3 In response to the Law Commission's report, the PPPR Act was amended by the Protection of Personal and Property Rights Amendment Act 2007. The 2007 amendments were intended to provide better protections for people setting up EPAs and to provide clearer guidelines regarding how an attorney can act under an EPA. One of the key amendments was to change the witnessing requirements by requiring an independent lawyer (where a lawyer is used) to witness the signature of the donor.

2.4 However, the changes to the procedures for creating and implementing EPAs made by those amendments have created problems. Those problems were acknowledged in a 2014 review of the 2007 amendments, undertaken by the Minister for Senior Citizens.[4] In that review the Minister acknowledged that many submitters "felt that the 2007 amendments had gone too far in some areas, creating barriers for some people to set up EPAs and thereby undermining the purpose of the reforms".[5]

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1 Law Commission *Misuse of Enduring Powers of Attorney*, NZLC R71, 2001.

2 Footnote 1, at [11].

3 Footnote 1, at [12].

4 Hon Jo Goodhew *Report of the Minister for Senior Citizens on the review of the amendments to the Protection of Personal and Propety Rights Act 1988 made by the Protection of Personal and Property Rights Amendment Act 2007* (13 June 2014) ["Report of the Minister for Senior Citizens"].

5 Footnote 4, at 3.

2.5 The Law Society shares that concern. It considers that the 2007 amendments have increased the cost and complexity of establishing EPAs. One of the effects of the new witnessing requirements is that, in practice, two lawyers are often engaged now where one lawyer would have acted in the past.

2.6 In this regard, the Law Society notes that:

(a) By its estimate, the costs of establishing an EPA may in some circumstances have risen by a factor of 2.5. Whereas it may previously have cost clients $100 per power of attorney document, it is estimated that this figure is now closer to $250 per document. Often a couple will complete four documents (a welfare document and a property document per individual), making a total bill for advice and drafting of at least $1,000. This has undermined the utility and availability of the EPA regime.

(b) As a result, the number of people completing EPAs has decreased. The Public Trust has reported that there has been a one-third drop in the number of EPAs it sets up annually since the 2007 amendments have come into force.[6] It is not possible to provide equivalent statistics from lawyers in private practice but most lawyers note that they now complete fewer EPAs for clients than they did prior to the 2007 amendments as a result of the increased costs.

(c) The effect of this is that there are an increasing number of people who do not have EPAs in place. In other words, there are an increasing number of people who, for reasons of cost, have not made their own decision about who should be their substituted decision-maker if they lose their mental capacity.

2.7 The Law Society understands that Part 21 of the Bill is intended to make amendments to the PPPR Act to address these problems by simplifying key parts of the EPA regime. The Law Society supports that intention. As explained below, however, it considers that some of the amendments will not achieve that objective.

Amendments to section 94A – witnessing requirements (clause 75 of the Bill)

2.8 Section 94A of the PPPR Act was inserted as part of the 2007 amendments. Section 94A(4) requires the person witnessing the signature of the donor to be a lawyer, an officer or employee of a trustee corporation, or a legal executive, who is "independent of the attorney". The independence required has added cost because it is common (a) for a donor to appoint a family member as their attorney and (b) for lawyers to act for multiple members of a family in various matters. If the witnessing lawyer acts for the attorney (e.g. by preparing an EPA for them), they are not independent and are unable to witness the EPA. As a result, if a couple want to create EPAs each appointing the other as attorney, it is necessary for *two* lawyers to be instructed to complete the EPA for each spouse (one acting for the donor to prepare it and one independent lawyer to witness it).

2.9 Clause 75(1) of the Bill attempts to address this problem by introducing a new section 94A(4A). When two people appoint each other as attorney, that section allows a lawyer to act for both people as a witness "if, having regard to the matters listed in subsection 7(a) to (b), the witness is satisfied that witnessing both signatures does not constitute a conflict of

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6 Footnote 4, at 11.

interest". If a lawyer relies on this provision, section 94A(7)(c) (as amended by the Bill) requires the lawyer to certify that they are "satisfied that no conflict of interest arises".

2.10 Where two people appoint each other as attorney, the Law Society **supports** allowing the same lawyer to witness the signing of both EPAs. However, the Law Society **opposes** the proposal that such lawyers be required to certify that no conflict of interest arises. The Law Society considers that this requirement is both unnecessary and may be counterproductive by undermining the object of the proposed amendments:

(a) *Unnecessary*: Certifying that no conflict of interest arises is unnecessary because lawyers are subject to the rules in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Conduct and Client Care Rules). The obligations lawyers owe to clients are set out in the Rules and include the obligation to protect and promote the client's interests and to act for the client free from compromising influences or loyalties. Rule 6.1 prevents a lawyer acting for more than one client on a matter "in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients". Lawyers are familiar with the obligation to act independently, which makes certification unnecessary.

(b) *Certification may undermine the object of the proposed amendment:* Under the Conduct and Client Care Rules lawyers may not act for more than one client if there is "a more than negligible risk" associated with acting for multiple clients. Under the amendments proposed to section 94A(7)(c), the lawyer must certify that they are "satisfied that no conflict of interest arises". This is expressed in absolute terms ("no conflict of interest") and appears to set a new and higher standard than the "negligible risk" standard under the Conduct and Client Care Rules. This may be taken to imply that a lawyer cannot witness EPAs for two clients who are appointing each other as their attorney even if there is only a "negligible risk" of a conflict of interest. For this reason, some practitioners may refuse to witness EPAs for clients appointing each other as attorneys and may continue to require another lawyer to act as a witness. If that happens the cost of preparing EPAs will remain higher than it was before the passage of the 2007 amendments.

Amendments to section 99D – certification of incapacity (clause 78 of the Bill)

2.11 Clause 78 of the Bill proposes to amend section 99D to replace the requirement that a certificate of a donor's mental incapacity must be "in the prescribed form" with a requirement that a certificate of the donor's mental incapacity must "contain the prescribed information". The Law Society assumes that the intention is to allow some flexibility to the form of medical certification that is required to establish that a person is incapable for the purposes of activating an EPA.

2.12 The Law Society **opposes** this change for two reasons.

2.13 First, regulations should not be left to define "prescribed information" unless the relevant test for mental incapacity is clearly defined in the PPPR Act. In this regard the Law Society notes that the question of what constitutes mental incapacity is an area of difficulty under the PPPR Act that is in need of legislative clarification. The PPPR Act currently contains four

separate threshold tests for incapacity – two of which apply to EPAs. The four threshold tests are:

(a) "lacks wholly or partly the competence to manage his or her own affairs" (this test applies in relation to property orders, see section 25);

(b) "wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person" (this test applies in relation to the appointment of a welfare guardian, see section 12(2)(a));

(c) "not wholly competent to manage his or her own affairs" (this test applies in relation to property EPAs, see section 94(1)); and

(d) "lacks the capacity" to make a decision, understand the nature of a decision, or foresee the consequences of a decision (this test applies in relation to care and welfare EPAs, see section 94(2)(a)).

2.14 The practical differences between the different threshold tests are unclear and this creates difficulties for health practitioners who are required to undertake assessments of capacity. The Law Society considers that their task will be made even more difficult if the prescribed form relating to EPAs is abolished and the regulations only list prescribed information to be included in a certificate of mental incapacity.

2.15 Second, it is unknown what the "prescribed information" will contain. Particularly in light of the different threshold tests for incapacity, the content of the "prescribed information" may effectively change or elucidate the meaning of incapacity by formulating a series of standardised questions used to assess capacity. For this reason, it is important that the content of any "prescribed information" should be specified in statute rather than being left to regulations.

Amendments to section 106 – circumstances in which EPAs cease to have effect (clause 79 of the Bill)

2.16 Section 106 of the PPPR Act sets out the circumstances when an EPA ceases to have effect. Clause 79 of the Bill amends the section by inserting additional circumstances when an EPA ceases to have effect. The Law Society **recommends that an additional circumstance be added** to the list of circumstances when an EPA ceases to have effect: an EPA should also cease to have effect where the Court has made an order for the appointment of a welfare guardian (section 12) or the appointment of a property manager (section 25).

2.17 The reason for this additional amendment is to make sure that there is no uncertainty as to the status of EPAs when a welfare guardian or property manager is appointed. Recent litigation in the Family Court provides an example of a situation where uncertainty arose, following the appointment of a welfare guardian, as to the status of an earlier EPA.[7]

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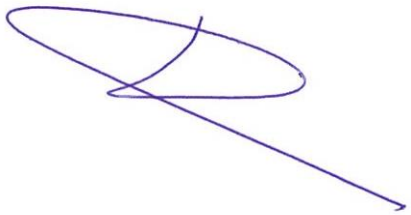
[7] See *JDEB, TB and LAB v JB and RHB* [2013] NZFC 4231 at [59]–[64]. In this case one of the parties sought to reinstate a care and welfare EPA on the grounds that the Court had not previously made an order that the EPA ceased to have effect under s 102(2)(b) of the PPPR Act when the donee was appointed welfare guardian. The welfare guardian's appointment was subsequently revoked in favour of another sibling and the aggrieved party sought to reinstate the original EPA.

Changes to regulations

2.18 Finally, as a result of the amendments proposed by the Bill some existing regulations will need to be redrafted and other regulations may be required. The content of those regulations will be an important part of the law and may raise significant issues. The Law Society asks that any new regulations or amendments to existing regulations be publicly released in draft for consultation before being made.

Conclusion

2.19 The Law Society wishes to be heard in support of this submission.



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