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Dear Ms De Crescenzo

Enduring Powers of Attorney – amendments to Regulations – draft forms

Thank you for your email of 21 June, inviting comments from the New Zealand Law Society on proposed draft Enduring Power of Attorney (EPA) forms.

The legislative amendments to the Protection of Personal and Property Rights Act 1988 (the Act) currently before the House¹ will require coordinated amendments to the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms) Regulations 2008 (the Regulations). As noted in the briefing note attached to your email, the main amendments to the EPA regime are to:

- a) redesign the EPA forms in Regulations in plain English,
- b) allow a standard explanation to be set out in Regulations for witnesses to share with people on the effects and implications of entering into an EPA,
- c) for mutual appointments, allowing both people to have their signatures witnessed by the same authorised witness provided there is no more than negligible conflict of interest,
- d) allow EPAs to default to a successor attorney if a person revokes the current attorney's appointment,
- e) require the authorised witness of an EPA to certify that the person signing an EPA understands the nature of the documents and is not acting under duress,
- f) give people the option of a standard clause (as per Wills) to revoke all earlier EPAs, and
- g) remove provisions that require the medical certificate of incapacity to be in a prescribed form.

¹ Statutes Amendment Bill 71-2 (Part 21 amendments to the Protection of Personal and Property Rights Act 1988), reported back by the Government Administration select committee on 21 June 2016.

The Law Society's Property Law Section and Family Law Section have considered the draft forms in relation to Property (Property EPA) and Personal Care and Welfare (PCW EPA), and make the following comments.

Witnessing mutual appointments

As noted in paragraph (c) above, the Statutes Amendment Bill (as reported back from select committee) proposes to amend section 94A of the Act to allow the same lawyer or legal executive (or officer or employee of a trustee corporation) to witness the donors' signatures to mutual powers of attorney, so long as witnessing both signatures does not constitute more than a negligible risk of a conflict of interest. The Law Society welcomes this change, for the reasons set out in its submission to the select committee on the Statutes Amendment Bill,² and considers that this amendment should help to reduce the cost and complexity of establishing EPAs.

You have advised that this amendment will require amendments to the form of witness certificate (form 3) in the Protection of Personal and Property Rights (Enduring Powers of Attorney) Forms Regulations 2008, and that new statements are proposed in item 3 of the form to correspond to the wording of the proposed new section 94A(4A) and the amendment to subsection (7)(c). You have indicated that the current suggested wording of these will be as follows:

Statement D

(Where 2 people appoint each other as attorney) I am a lawyer/legal executive* in the same firm as the lawyer/legal executive* who witnessed the signature of [name of other person] as donor.

*Select one.

Statement E

(Where 2 people appoint each other as attorney) I am an officer/employee* of [name of trustee corporation], the same trustee corporation as the officer/employee* who witnessed the signature of [name of other person] as donor, and I am authorised by [name of trustee corporation] to witness the donor's signature.

*Select one.

Statement F

(Where 2 people appoint each other as attorney) I am the same person as the person who witnessed the signature of [name of other person] as donor and I am satisfied that witnessing both donors' signatures does not constitute more than a negligible risk of a conflict of interest arising.

Joint/several/majority authority to act

The forms have been redesigned and written in plain English to make them more accessible, which is commendable. However, in some respects the forms are overly simplified and do not make adequate provision for the sometimes complex arrangements required in practice. For example, donors for property EPAs will sometimes want to appoint three attorneys to act jointly, but if one of

² Statutes Amendment Bill, 29 January 2016, at paragraphs 2.8 – 2.10
http://www.lawsociety.org.nz/data/assets/pdf_file/0008/98207/Statutes-Amendment-Bill,-Part-21-29-1-16.pdf

them dies, the two remaining should be the successor attorneys, again with joint authority, and if there is only one, then that person alone. There needs to be provision for that scenario in the form.

On a related point: the proposed new Property EPA form provides for a joint appointment, a joint by majority appointment (where more than two attorneys) and a several appointment, but a donor can only tick one of these, thereby precluding a “joint and several appointment”. To avoid this ambiguity, section F of the form should also include an option for a “joint and several appointment” with an associated explanation.

Miscellaneous points

The “setting up” part of the forms says that the EPA “*should* be filled in, signed and witnessed in the presence of your lawyer or another authorised witness”. This would be better worded as “*must*”.

Donors often want their attorney to consult or provide information to their children. The draft forms need to allow for donors who have more than two children and want them all to be kept informed and consulted. The PCW EPA provides for Consultation in section F (“this form allows for two names but you can name as many people as you like”) and Providing Information in section G (“you have an option to name one or more people to keep an eye on your attorney’s actions”) but provides space only for ‘Person one’ and ‘Person two’. A simple tick box for “continued on another page” would cover situations where the donor has more than two children. The same comment applies to the Property EPA (section H, Consultation).

In section G of the Property EPA and section E of the PCW EPA, there is the option of inserting “conditions”. The current form permits “restrictions and conditions” and this is a better option as it directs donors’ minds to the possibility that they could “restrict” an attorney, as opposed to imposing a condition.

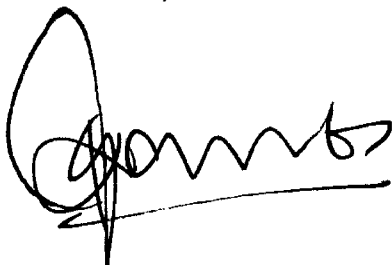
The parties should be directed to strike through any boxes not completed (to prevent additions being made, subsequent to signing).

Some minor errors in the forms have also been identified: see **attached**.

Conclusion

These comments have been provided by the Law Society’s Property Law Section and Family Law Section, and we hope you find them helpful. If further information or discussion would assist, please do not hesitate to contact the Law Society’s Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tim Jones', with a large, stylized initial 'T' and 'J'.

Tim Jones
Vice President

Encl (1)