The Law Reform Commission

IS THERE A NEED FOR ENDURING POWERS OF ATTORNEY IN THE CAYMAN ISLANDS?

Preliminary Discussion Paper

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INTRODUCTION

1. On 14th February 2007 the Chairman of the Society of Trust and Estate Practitioners, ("STEP") Mr. Andrew Miller, wrote the Hon. Attorney-General and requested that the Government consider the enactment of an Enduring Powers of Attorney legislation. According to Mr. Miller, such legislation was needed as the present lack of such legislation causes difficulties in proper estate planning for both residents and non-residents who have assets in the Islands. He felt that the Cayman Islands could better promote itself as an ideal jurisdiction through which to conduct estate and trust planning by having such legislation. A draft Bill was provided.

2. The Hon. Attorney-General referred this matter to the Commission on 15th February 2007 and the Commission agreed to the referral pursuant to its legislative function to develop new areas in the law to respond to the changing needs of the society.

3. The Commission has carried out research in this matter and the purpose of this preliminary discussion paper is to seek the input of the public as to whether the Cayman Islands need enduring powers of attorney.

ORDINARY POWERS OF ATTORNEY AND ENDURING POWERS OF ATTORNEY

4. The Powers of Attorney Law (1996 Revision) of the Cayman Islands currently only provides for the making of ordinary powers of attorney. Such powers are usually created for a set period of time in cases where the donor is going abroad or is unable to act for some other reason and wishes someone else to have the authority to act on his or her behalf. The authority granted can be general or limited to specific affairs. Powers of attorney are most commonly used to sell a house, to deal with bank accounts and benefits under pension plans etc. and they are particularly useful during long absences from a jurisdiction or during short periods of illness. An ordinary power of attorney will usually end at death, at a specified time or upon the request of the donor at any time and may automatically be revoked if the donor loses mental capacity.[1]

5. The essential difference between an ordinary power of attorney and an enduring power of attorney ("EPA") is that an EPA will continue *after a person loses mental capacity*. An EPA can be made at any time in preparation for the future. It must however be made before the donor becomes mentally incapable, otherwise the power will be invalid. Basically an EPA is a variation on the ordinary power of attorney. It is a creature of legislation and permits a donor to grant a power of attorney that *continues* in force

[1] Some powers of attorney may be irrevocable.

despite the donor's later mental incapacity, or that *springs* into force on the donor's mental incapacity.[2]

6. The advantages of an EPA include the following-

a) it allows an individual to choose the person or persons who will look after the individual's affairs if the individual becomes incapable of doing so;
b) it avoids expensive and embarrassing court proceedings for the appointment of a trustee to look after the individual's affairs; and
c) it provides an efficient and cost-effective way of administering the individual's property.[3]

7. Many countries have recognised the need for EPAs including the U.S.A., UK, Canada, Australia, Hong Kong and New Zealand.

8. For example, in New Zealand, the **Protection of Personal and Property Rights Act** has, since 1988, provided for two types of enduring powers of attorney- one is in respect of property and the other is in respect of personal care and welfare. Under the Act an enduring power of attorney in respect of property gives another person the power to act on another's behalf in respect of property owned by the donor. A donor can give an attorney a general authority to act on his behalf or the power can be limited to specific circumstances or specific property. A donor can also limit the power given by setting certain conditions and restrictions on the exercise of the power. The power can take effect only if the donor becomes mentally incapable or can have immediate effect and continue to operate if the donor becomes mentally incapable. An EPA relating to personal care and welfare enables the attorney to make legal decisions about the donor's personal care in the event of mental incapacity. An attorney would have the power to determine if the donor needs to go into care, what home or hospital would be suitable and the sort of medical treatment that the donor should receive. An attorney under this power cannot however make the following types of decisions-

a) any decision relating to the entering into marriage or civil union by the person for whom the attorney is acting, or to the dissolution of that person's marriage or civil union;
b) any decision relating to the adoption of any child of that person;
c) refusing consent to the administering to that person of any standard medical treatment or procedure intended to save that person's life or to prevent serious damage to that person's health;
d) consenting to the administering to that person of electroconvulsive treatment;
e) consenting to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person's behaviour;
f) consenting to that person's taking part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to that person's health.

[2] "Enduring Powers of Attorney: Areas for Reform"-Western Canadian Law Reform Agencies, Final Report 2008

[3] Ante

9. In the UK the **Enduring Power of Attorney Act 1985** which introduced the EPA to the UK was repealed by the **Mental Capacity Act 2005** (MCA 2005). The provisions relating to powers of attorney came into force on 1st October 2007[4]. From that date the EPA was replaced by the "Lasting Power of Attorney" (LPA).

10. Under the Enduring Power of Attorney Act 1985 there was only one type of power of attorney i.e. one relating to property and financial affairs. The MCA 2005 however provides for two types of lasting powers of attorney- a property and affairs LPA which, like the EPA, provides for the attorney to handle the property and financial affairs of the donor and a personal welfare LPA appoints an attorney to make decisions about the health and welfare of the donor.

11. The only states in Australia to provide both types of EPAs are the Australian Capital Territory and Queensland. Usually, a medical power of attorney or anticipatory directive is required to deal with non-financial matters. In the Australian Capital Territory a donor can use an EPA to appoint someone to run his everyday affairs (other than property and money) and consent to medical treatment and medical donation while he is incapacitated. Under the **Powers of Attorney Act 2006** of the Capital Territory an attorney can, for example, deal with personal care matters which include-

a) where the donor lives;
b) who the donor lives with;
c) whether the donor works and, if the donor works, where and how the donor works
d) what education or training the donor gets;
e) whether the donor applies for a licence or permit;
f) the donor's daily dress and diet;
g) whether to consent to a forensic examination of the donor; and
h) whether the donor will go on holiday and where.

ISSUES ARISING UNDER ENDURING POWERS OF ATTORNEY LEGISLATION

12. In preparing this preliminary discussion paper the Commission considered the issues relating to enduring powers of attorney which have arisen in the jurisdictions examined.[5] Notwithstanding the benefits mentioned earlier, in most of the said jurisdictions the Commission has noted that there have been many complaints relating to the use of EPAs. In the USA, UK, New Zealand, the Canadian provinces of Alberta, Saskatchewan, Manitoba and British Columbia there either have been recent legislative reforms or proposals for reform of relevant legislation. The common issue was complaints of abuse of the EPAs by attorneys either because of their wilful action or because of ignorance of the extent of their powers.

[4] The Act and the operations thereunder are currently under review- "Reviewing the Mental Capacity Act 2005- forms, supervision and fees" , Consultation Paper by the Ministry of Justice, October 23 2008

[5] Jurisdictions examined were -Australian Capital Territory; New South Wales; Queensland; South Australia; Victoria; Bermuda; Alberta; British Columbia; Manitoba; Saskatchewan; Hong Kong; New Zealand; U.S.A.

13. The Western Canada Law Reform Agencies ('WCLRA") commenced the Harmonized Powers of Attorney Project in 2004 in order to simplify and clarify laws and practices in the abovementioned provinces regarding powers of attorney. According to some commentators,[6] "one of the central reasons for that law reform work was the pervasive nature of power of attorney abuse in those provinces and across jurisdictional boundaries".[7]

14. In the literature examined[8] the following problems were noted-

a) abuses in relation to the initial granting of the power, including failures to explain and explore options alternative to a grant of general and unqualified powers to a single attorney;
b) abuses in the procuring of execution of powers of attorney in situations where the donor is unduly influenced by the attorney or where the donor lacks capacity;
c) high-handedness, bullying and failure to consult (selling the home of an institutionalised donor, for example, without the donor's knowledge) by attorneys;
d) embezzlement of moneys and theft of goods by attorneys;
e) neglect of the donor by the attorney (failure, for example, to institutionalise the donor where this is warranted because of the anxiety of the attorney as an ultimate beneficiary of the donor's estate not to see the estate whittled away);
f) failure by a donor to obtain legal advice prior to signing the EPA;
g) ineffective monitoring of whether, on signing, the donor had the capacity to understand what is being signed;
h) no machinery to ensure that a donor is informed of the donor's right of revocation;
i) ineffective monitoring of attorneys;
j) ineffective monitoring of the decision that a donor is mentally incapable which triggers personal and welfare powers;
k) attorneys failing to account to donor or his family members;
l) the powers of a court to intervene are largely ineffectual because nothing happens unless someone sets proceedings in train;
m) reluctance by donors to take court proceedings against children or family members who have misused powers;
n) donor being prevented from involving court assistance by ignorance, lack of funds or social isolation;
o) lack of recognition by third parties of the instrument creating the power of attorney;
p) relevant legislation sometimes make the use of EPAs cumbersome and expensive; and
q) legislative difficulty in defining "mental incapacity".

[6] Laura Watts and Kevin Zakreski: CBA Canadian Legal Conference August 2006 - "Powers of Attorney: Moving Towards Best Practices in Canada", 2006

[7] The final report entitled "*Enduring Powers of Attorney: Areas for Reform"* was published in 2008 and has been a very useful source for the purposes of our paper.[7]

[8] For Example "Misuse of Enduring Powers of Attorney"; New Zealand Law Commission discussion paper May 2000

15. The remedies suggested or used by some jurisdictions to combat the above problems include the following-

a) providing for standard form EPAs;
b) providing strict execution safeguards;
c) codifying the nature of the duty owed by the attorney;
d) providing for oversight by a public body such as a Public Guardian or tribunal; and
e) creating a public office for registration of instruments.

QUESTIONS FOR CONSULTATION

16. In order to proceed with this project the Commission is seeking views on the following issues.

A. Do many people use powers of attorney in the Cayman Islands and would it be helpful to widen the types of powers of attorney which are available?

B. If EPAS are introduced-

a) would there be any need to change the definition of "mentally disordered" as set out in the Mental Health Law (1997 Revision)?
b) should the determination of mental incapacity under the Mental Health Law (1997 Revision) be changed for the purposes of an EPA Law?

One of the essential features of an EPA is that it is meant to protect those who, because of mental incapacity are unable to take care of their affairs. A donor must however be mentally competent when he makes an EPA. It is therefore essential to determine what mental incapacity means and how it is to be ascertained.

The **Mental Health Law (1997 Revision)** of the Cayman Islands provides, in section 2, that "mentally disordered" includes "mentally ill" and "mentally defective". The definition of mentally defective is as follows-

> " "mentally defective" is descriptive of a person who-
> (a) before reaching the age of eighteen years suffered from a condition of incomplete or arrested development of mind whether arising from inherent causes or induced by disease or injury;
> (b) by reason of mental defect is unable to guard himself from common physical dangers;
> (c) by reason of mental defect is incapable of managing his own affairs;
> (d) by reason of mental defect requires care supervision and control for his own protection and that of others;
> (e) by reason of mental defect is of vicious or criminal propensities and requires to be kept under control for the physical protection of others.

STEP has suggested that the definition is not wide enough and has submitted the alternative definitions-

> "mentally incapable" or "mental incapacity", except where it refers to revocation at common law, means, in relation to any person, that he is incapable by reason of

> mental disorder of [managing and administering his property and affairs] and "mentally capable" and "mental capacity" shall be construed accordingly;
>
> "mental disorder" has the same meaning as it has in the Mental Health Law (1997 Revision).

This is a definition similar to that set out in the repealed **Enduring Powers of Attorney Act 1985** of the UK but it does not appear to go much further than our current definition. However whilst that definition may be interpreted to cover any mental incapacity short or long term caused by any medical or traumatic event, it perhaps is not in the best context for a modern EPA Act. The more modern approach is to give guidance on what constitutes mental incapacity and to what degree the incapacity affects property and affairs decisions. Mental incapacity may be brought about for a whole range of temporary circumstances unrelated to "mental illness".

The definition of mental incapacity and when it occurs has caused concern in a number of jurisdictions and has led to amendments in jurisdictions such as the UK and New Zealand. In New Zealand the **Protection of Personal and Property Rights Act** was amended in 2007 to provide that[9] the donor of an enduring power of attorney is mentally incapable in relation to property if the donor is not **wholly competent** to manage his or her own affairs in relation to his or her property. Further the donor of an enduring power of attorney is mentally incapable in relation to personal care and welfare if the donor-

> "(a) lacks the capacity-
>
> > "(i) to make a decision about a matter relating to his or her personal care and welfare; or
> >
> > "(ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or
> >
> > "(iii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or
>
> "(b) lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.

The **MCA 2005** emphasises the presumption of capacity- a person must be assumed to have capacity until it is proved otherwise. A person lacks capacity in relation to a matter if, at the material time, he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary. A lack of capacity cannot be established merely by reference to a person's age or appearance, a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity. For the purposes of the Act, a person is unable to make a decision for himself if he is unable-

a) to understand the information relevant to the decision,

b) to retain that information,

c) to use or weigh that information as part of the process of making the decision, or

[9] Section 94 Protection of Personal and Property Rights (Amendment) Act, 2007

d) to communicate his decision (whether by talking, using sign language or any other means).

A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means). The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision. The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision.

Under the draft **Uniform Power of Attorney Act U.S.A.** "incapacity" includes the inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.

C. If EPAs are introduced, should the duties of an attorney be codified and what are the duties which should be included? Should a donor be able to modify any or all of the attorney's duties if they are codified?

One of the areas of abuse highlighted in the research material is "innocent" abuse of power where the attorney does not fully understand his role under the power of attorney. The WCLRA noted in its report that the absence of legislative guidance causes confusion and uncertainty about the nature and scope of an attorney's duties. According to the report, including a list of duties in the EPA legislation would go a long way toward ensuring that both donors and attorneys are aware of the duties that arise under EPAs. The following duties should be considered-

a) a positive duty to act;
b) a duty to act honestly, in good faith, and in the best interests of the donor;
c) a duty to account;
d) a duty to act with the standard of care of a prudent person with the attorney's experience and expertise;
e) a duty to take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent;
f) a duty to use assets for the benefit of the donor;
g) a duty to keep the donor's property and funds separate, except as permitted by statute;
h) a duty to keep records of financial transactions;
i) a duty to provide details of financial transactions upon request; and
j) a duty to make full disclosure to the donor of any interests that may conflict with the attorney's responsibilities under the power of attorney.

D. If EPAs are introduced would there be a need for a public body such as Public Guardian to monitor attorneys or should this be left to the court?

Under section 14 of the Grand Court Law (2006 Revision) the Court has supervisory powers over persons who manage the affairs of persons who are ill or of unsound mind. However, it has been argued in other jurisdictions that having the court as the supervisory body is not always the best route as the court is not required to be proactive in monitoring

the powers of attorney. A person must approach the court for assistance and the cost and formality of a court may prevent them from doing so.

British Columbia, Saskatchewan and the UK are jurisdictions which have a Public Guardian and Trustee which have oversight in these matters. Under the **Public Guardian and Trustee Act** of British Columbia[10] the Public Guardian and Trustee is empowered, among other things, to investigate and audit the affairs, dealings and accounts of an attorney under a power of attorney if the Public Guardian and Trustee has reason to believe that the person who granted the power of attorney is incapable of managing his or her financial affairs, business or assets. The Public Guardian and Trustee may also exercise such powers if he has reason to believe that the assets of an adult may be at risk, or that the attorney, representative or decision maker or guardian has failed to comply with his or her duties. In addition, the Public Guardian and Trustee may investigate the personal care and health care decisions made by a representative under a representation agreement or by a decision maker or guardian if the Public Guardian and Trustee has reason to believe the representative, decision maker or guardian has failed to comply with his or her duties.

In the UK there is both a Court of Protection as well as a Public Guardian. The Public Guardian supported by the Office of the Public Guardian (OPG), helps protect people who lack capacity. The Public Guardian's functions include-

a) setting up and managing a register of Lasting Powers of Attorney (LPA);
b) setting up and managing a register of Enduring Powers of Attorney (EPA);
c) working with relevant organisations (for example, social services, if the person who lacks capacity is receiving social care);
d) receiving reports from attorneys acting under LPAs; and
e) providing reports to the Court of Protection as requested, and dealing with cases where there are concerns raised about the way in which about the way in which attorneys are carrying out their duties.

E. If EPAs are introduced should there be mandatory registration of EPAs?

The registration of EPAs is another safeguard which has been used by some jurisdictions. Under the **MCA 2005** an LPA can only be used if all parts of it have been correctly completed, signed and witnessed and the LPA has been registered with the OPG. An LPA can be registered and take effect immediately it is completed or registration can be left until the donor becomes incapable. However there have been many complaints relating to the need to register an LPA and it has been suggested that registration not only delays the operation of an LPA but also adds substantial costs.[11] The delays in operation, it is alleged, stems from the inability of the OPG to deal with registrations in a timely manner. Previously an EPA under the Enduring Powers of Attorney Act could be used in certain circumstances without being registered.

In most of the jurisdictions examined registration was not a requirement. The Alberta Law Reform Institute considered this matter and rejected mandatory registration on the

[10] R.S.B.C. 1996, c. 383

[11] "Elderly's cash caught in red tape trap"- Liz Phillips, Daily Mail 4 June 2008

ground that it did not think that the benefits to be obtained from a registration requirement justifies the cost which would be added (i.e. by the imposition of registration fees) and the derogation from privacy that it would impose. The institute felt that it would have an inhibiting effect on the use of EPAs. The New Zealand Law Commission also rejected registration on the ground of expense and loss of privacy.

F. If EPAs are introduced should an EPA deal with both property and personal welfare matters?

Note the types of powers which may be exercised under a personal welfare EPA in paragraph 11.

G. If EPAs are introduced should the legislation provide for recognition of EPAs made in other jurisdictions? How far should the scope of inter-jurisdictional recognition extend? Should there be a limited list of international jurisdictions?

It has been argued that the failure to have such provisions could possibly impinge on the mobility of persons who rely on EPAs. The WCLRA noted that because the formalities and content of EPAs are not uniform across the Canadian provinces reviewed by them, an attorney may encounter difficulties dealing with the donor's affairs when the donor owns property in, or moves to, a province other than the province where the EPA was made. Unlike an ordinary power of attorney the donor may not, due to incapacity, be able to make another EPA.

Conclusion

17. While an enduring power of attorney may be a useful tool in planning it can, if not properly used, have devastating effects on a person's property and personal welfare. The Commission would therefore be grateful for your feedback in determining whether it should be provided for under our laws. Submission should be sent no later than **20th February 2009** and written responses should be posted to the Director, Law Reform Commission c/o Government Administration Building, George Town or hand delivered to the Law Reform Commission, 3rd Floor Anderson Square, George Town.

Monday, January 12, 2009