

The Use and Abuse of Enduring Powers of Attorney

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Abstract

An Enduring Power of Attorney ('EPA') enables an individual to appoint an attorney to make financial and/or property decisions on their behalf. This legal agreement can begin immediately or once the donor has lost legal capacity. When an EPA is misused it can lead to financial and/or property losses, and under current practices EPA lack accountability, transparency, and are vulnerable to abuse. The following project seeks to unpack elder abuse in the context of the misuse of EPAs, and to suggest potential legislative reforms and recommendations.

1. Introduction

An Enduring Power of Attorney ('EPA') enables an individual (the donor) to appoint an attorney (the donee) to make financial and property decisions on their behalf (*Enduring power of Attorney* 2016). The donee owes fiduciary obligations to the donor (*Breen v Williams* (1996) 186 CLR 71), which arises from the vulnerability of the donor to the donee, and their need of protection (*Re OAC* [2008] QGAAT 72). An EPA can begin immediately or once the donor has lost legal capacity. When an EPA is misused it can lead to abuse in the form of financial and/or property losses. The *Alliance for the Prevention of Elder Abuse (WA)* defines elder abuse as any act which causes harm to an older person and occurs within an informal relationship of trust (APEA:WA 2013). Using this definition, it is clear that the intentional misuse of an EPA comes within the definition of elder abuse. The State Administrative Tribunal in Western Australia ('SAT') in the 2005/06 period held three hearings involving revoking an EPA or varying the terms of an existing EPA; in 2008/09 there were forty hearings. Johnson (2010) believes this increase in hearings is due to a combination of a rise in elder abuse and an increasing awareness of elder abuse leading to individuals seeking assistance. Thus, action needs to be taken to protect the vulnerable members in our community.

2. Background

An EPA is usually administered because of diminished or lost capacity. The SAT describe capacity as: understanding relevant circumstances and information needed to measure the options, risks and benefits of potential decisions; to hold and retain information to make a decision and weigh that information; and an ability to communicate the decision (eCourts Portal, Resource sheet of Capacity). It is important to note that capacity does not refer to an ability to make good or bad decisions, nor does it require a person to be able to make

decisions about all aspects of their life (for example one may enact an EPA for financial decisions but retain an ability to make decisions on lifestyle choices).

The misuse of an EPA was the most frequently mentioned form of financial elder abuse in the 2011 Crime Research Centre study into elder abuse in Western Australia (Clare, Blundell, and Clare 2011). With Johnson (2010) adding that elder abuse from misusing an EPA is due to its lack of accountability, transparency, and its vulnerability to abuse. However, this is not a strictly Western Australian issue, with Cannon (2013) asserting that 32% of recent cases in the Queensland Civil and Administrative Tribunal were relating to financial abuse under EPAs. In Western Australia an EPA is legislated under the *Guardianship and Administration Act 1990* (WA) ('The Act') and it mentions the 'obligations' of the donee, including: exercising powers with reasonable diligence; keeping records of accounts, dealings, and transactions; and reporting bankruptcy to the SAT. However, the increase in elder abuse from EPAs suggests the legislation is not enough.

3. Discussion

An EPA can provide individuals with an opportunity to decide how their assets and property will be dealt with, and by whom, when they have capacity, for when they are no longer capable. However, the *Older People and the Law Report* (House of Representatives Standing Committee on Legal and Constitutional Affairs 2007) found that in the EPA there is potential for elder abuse, such as an elderly person being pressured into signing an EPA. Common improper dealings include: the donee withdrawing money from the donor's bank account and spending it inappropriately; selling the donor's house without their knowledge or providing alternative accommodation; giving away or selling the donor's possessions inappropriately; choosing accommodation or care which is unsafe or inappropriate; engaging in illegal activity, such as defrauding or physically harming the donor; and transferring the title of the donor's house into the donee's name without their knowledge or consent (Cannon 2013). The SAT can appoint a person as an attorney when the individual is deemed not to have capacity. This means the individual has a limited voice in how their assets and finances will be dealt with, and any further decisions made may not take their wants into consideration (Cartwright 2011). It is advantageous to create an EPA to allow individuals to make decisions for themselves, rather than rely on the SAT to make the correct decision and appoint who they believe is the best person.

An EPA provides an individual an opportunity for future planning for their property and financial assets, however Brown (1997) found that few people had created an EPA. In 1999, researchers found that 40% of older adults in the community and 50% of older adults in aged care had organised an EPA (Setterlund, Tilse, and Wilson 1999) and their 2002 results showed a decrease of community use with 34% and increase of aged care use to 73% (Setterlund, Tilse, and Wilson 2002). Fowler and Fisher's (2009) research suggests the poor engagement with EPA was due to individuals creating an EPA when a sense of urgency occurs. There are dangers with urgency driving the creation of an EPA, such as: determining the best donee; a poorly drafted EPA; and it not being a well thought out decision-making process. Brechling and Schneider (1993) suggest that a reason for the lack of implementation of future planning, such as an EPA, was the lack of knowledge, with the most influential future planning forces coming from health professionals (Hirschman, Kapo and Karlawish 2008) and friends and family (Rosnick and Reynolds 2003). Findings have determined key barriers to creating an EPA are the fear of abuse (Brown 1997, and Setterlund, Tilse, and

Wilson 1999) and the difficulty in selecting an appropriate EPA (Wilson et al. 2013). Furthermore, individuals who believe they have family members who will informally care for their future do not create an EPA (High 1990) and some individuals with limited economic means believe an EPA is not necessary (Samsi and Manthorpe 2010). Thus, awareness of the benefits of EPA is lacking within our community and the author believes this is a reason why EPA engagement is lacking.

The key issue remains that many elder abuse victims do not report their abuse, and if they do, they do not seek criminal charges because the abuser, the attorney, is often a family member, a close friend, or a trusted and in confidence professional. Engaging in a community discussion of abuse will make it more likely for victims to come forward and seek a remedy, and also provide a platform for change. There should not be an assumption that the individuals seek criminal charges laid or they want all the money returned- the individual may simply want their voice heard, and an acknowledgment and an apology made. This could be achieved through mediation and alternative dispute resolution means, rather than costly, and public, court proceedings, for victims of EPA abuse. If the individual does choose legal proceedings, there are common law remedies available, such as breach of a fiduciary relationship, unconscionable conduct, and undue influence. For example, undue influence looks at the quality of the agreement from the perspective of the weaker party. This means a transaction can be set aside if the agreement was made from a weak and vulnerable position and inappropriate influence by the other party (*Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474 per Deane J). Section 87 of the *Queensland Powers of Attorney Act 1998* (Qld) has a statutory presumption of undue influence in their EPA Act, unlike the Western Australian Act. In the case of *Janson v Janson* [2007] NSWSC 1344, the donor signed the EPA forms whilst he was hospitalised, then later signed the transfer papers but did not understand the nature of the documents and was given no independent legal advice. The Court held that the donor had not signed the transfer of his own free will, despite stating he wanted his nephew to have the property. The Court held this was presumed undue influence because the donor had trust and confidence in the donee, and the donee was in a position of influence. The transaction was set aside.

4. Policy & Practive Recommendations

There needs to be more community engagement and education about EPAs. This includes a suggestion that individuals must seek independent legal advice before entering an EPA. The lack of awareness and education about the misuse of EPAs within the community actually contributes to elder abuse because of its hidden nature (Johnson 2010). EPAs should not become synonymous with abuse. They are a mechanism to enable individuals to future plan and determine how their financial assets and property will be dealt with when they are no longer able to do so.

4.1 Legislative Amendments

The Act needs to be reviewed and amended. There needs to be a uniform legislative framework that would include a mutual recognition provision allowing EPA to be recognized across the nation. There should also be a definition of the notions of capacity and ‘incapacity’, which is referenced within the Act but not defined. Current research suggests the following amendments: explicitly stating the duties of the donee in the legislation; the imposition of penalties for breaches of obligations similar to the Queensland *Guardian and Administrative*

Act 2000, s 35, which makes it an offence for a decision maker to fail to perform their fiduciary duties; SAT remedial powers; and a presumption that transactions arose through the undue influence of the donee (*Powers of Attorney Act 1990* (Qld) s 87).

4.2 Registration System

A donee can withdraw all of the donor's savings and sell their property without ever needing to formally register the EPA, aside from the registration at Landgate that allows for property dealings. If an individual, or their representative, believes the EPA has been misused, and they no longer have capacity, they must seek orders from the SAT to revoke the EPA (*Guardianship and Administration Act 1990* (WA) s109). An individual with capacity can revoke the EPA verbally or in writing, and must destroy all copies of the EPA. A registration system would provide for a centralised database where all EPAs registered are considered current and in force, and are the only proof of EPA. The Office of the Public Advocate and Freilich et. Al (2014) have stated that they believe the lack of registration systems for EPAs in Western Australia creates uncertainty. The House of Representatives in their *Committee Report* argue that a 'national register' would be able to effectively monitor donees and their actions (Standing Committee on Legal and Constitutional Affairs 2007). The Government responded to this recommendation as "Partially Accepted" but argued, "in developing the national register, a review should be undertaken" (Standing Committee on Legal and Constitutional Affairs, Government Response 2007). The author notes that there has not been a review yet. However, if an individual has lost physical capacity they may be unable to revoke the EPA, thereby the registered EPA would still remain current even if it was no longer the wish of the individual.

Intuitively and through this research, it is evident that an individual who has lost capacity cannot be responsible for assuming or monitoring the donee's actions. As suggested by an Advocate Incorporated Advocate, who is guarding the attorney guardians? Clearly assuming that abuse will not occur because the donee's of EPAs are family or close friends or trusted professionals is no longer enough.

5. Conclusions and Future Work

The work completed thus far suggests that there is a desperate need within our community for stronger legislation and protection measures for the vulnerable members of our community. The project will continue to unpack the misuse of EPAs using the data from agencies, such as Advocate Incorporated, to understand the lived experiences of victims. Further, the project will seek to open discussions with stakeholders involved in this discourse for their understanding of what could be changed to protect vulnerable people. Finally, the project will look into remedial options, such as mediation for resolving EPA disputes and discuss the importance of community education and awareness.

6. References

Alliance for the Prevention of Elder Abuse 2013, *Elder Abuse Protocol: Guidelines for Action*. Available from: http://www.advocare.org.au/uploaded/files/client_added/SO103%20Elder%20Abuse%20Protocol%20v2.pdf. [16 June 2016].

Brechling, B.G. and Schneider, C.A 1993, 'Preserving autonomy in early stage dementia', *Journal of Gerontological Social Work*, vol. 20, no. 1-2, pp. 17–33. Available from: Taylor & Francis online. [16 June 2016].

Breen v Williams (1996) 186 CLR 71.

Brown, NM, 1997. 'Who would you choose? Appointing an agent with a medical power of attorney', *Australian Journal on Ageing*, vol. 16, no. 4. pp. 147-150. Available from: Wiley Online Library. [16 June 2016].

Cannon, B 2013, Victim of abuse of an Enduring Power of Attorney? What to do, who to tell and who can help, 14 November 2013, Australian Estate Law Today. Available from: <http://www.australianestatelawtoday.com.au/powers-of-attorney/victim-of-abuse-enduring-power-of-attorney/>. [16 June 2016].

Cartwright, C 2011. 'Planning for the End of Life for People with Dementia', *BMJ Supportive & Palliative Care*, vol. 3, no. 2, 251. Available from: ProQuest. [16 June 2016].

Clare, M., Blundell, B. and Clare, J 2011, *Examination of the Extent of Elder Abuse in Western Australia (Research Report)*. Available from: http://www.advocare.org.au/uploaded/files/client_added/Examination%20of%20the%20Extent%20of%20Elder%20Abuse%20in%20Western%20Australia.pdf. [16 June 2016].

Commercial Bank of Australia v Amadio (1983) 151 CLR 447.

Department of the Attorney General, Office of the Public Advocate, Government of Western Australia 2013, *A Guide to Enduring Power of Attorney in Western Australia*. Available from: http://www.publicadvocate.wa.gov.au/E/enduring_power_of_attorney.aspx. [16 June 2016].

eCourts Portal of Western Australia, n.d. *Resource Sheet: What is meant by 'Capacity' and the ability to make 'Reasonable Decision*. Available from: <https://ecourts.justice.wa.gov.au/eCourtsPortal/OnlineResolution/Run/Page?stateId=ceefa76c-f843-401f-8935-ddade1769f95&pageId=6791f4b9-97a1-4a15-8a3a-bead082393eb> [16 June 2016].

Enduring power of attorney 2016. Available from: http://www.publicadvocate.wa.gov.au/E/enduring_power_of_attorney.aspx. [16 June 2016].

Fowler, C. and Fisher, C.L 2009, 'Attitudes toward decision making and aging, and preparation for future care needs', *Health Communication*, vol. 24, no. 7, pp. 619–630. Available from: Taylor & Francis Online. [16 June 2016].

Freilich, A., Levine, P., Travia, B. and Webb, E 2014. *Housing for Older People Summary*. Available from: <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>. [16 June 2016].

Guardianship and Administration Act 1990 (WA).

High, D.M 1990. 'Who will make health care decisions for me when I can't?' *Journal of Aging and Health*, vol. 2, no. 3, pp. 291–301. Available from: Sage Journals. [16 June 2016].

Hirschman KB, Kapo JM, Karlawish JHT 2008. 'Identifying factors that facilitate or hinder advance planning by persons with dementia'. *Alzheimer Disease and Associated Disorders*, vol. 22, pp. 293–298. Available from: Lippincott Williams and Wilkins Custom. [16 June 2016].

House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia 2007. *Older People and the Law*. Available from: http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm. [16 June 2016].

House of Representatives Standing Committee on Legal and Constitutional Affairs 2007. *Older People and the Law: Government Response*. Available from: <http://www.aphref.aph.gov.au/house-committee-laca-olderpeople-report-front>. [16 June 2016].

Janson v Janson [2007] NSWSC 1344.

Johnson, S. 2010. *Elder Abuse: Need for Law Report*. Available at: http://www.nsclegal.org.au/documents/EPOA_Report_2010_%20April.pdf. [16 June 2016].

Mitchell, L.K., Pachana, N.A., Wilson, J., Vearncombe, K., Massavelli, B., Byrne, G.J. and Cheryl Tilse 2013. 'Promoting the use of enduring powers of attorney in older adults: A literature review', *Australasian Journal on Aging*, vol. 33 no. 1, pp. 2-7. Available from: Wiley Online Library. [16 June 2016].

Powers of Attorney Act 1990 (Qld).

Re OAC [2008] QGAAT 72 [14 October 2008].

Robin Creyke 1991, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) *University of Western Australia Law Review*, vol. 21, no. 122, pp. 121–5. Available from: HeinOnline. [16 June 2016].

Rosnick CB, Reynolds SL 2003, 'Thinking ahead: Factors associated with executing advance directives', *Journal of Aging and Health*, vol. 15, pp. 409–429. Available from Sage Journals. [16 June 2016].

Samsi, K. and Manthorpe, J 2010, "'I live for today": A qualitative study investigating older people's attitudes to advance planning', *Health & Social Care in the Community*, vol. 19, no. 1, pp. 52–59. Available from: Wiley Online Library. [16 June 2016].

Setterlund, D., Tilse, C. and Wilson, J 1999, 'Substitute Decision Making and Older People', *Australian Institute of Criminology: Trends & Issues*, vol. 139, pp. 1-6. Available from: AGIS. [16 June 2016].

Setterlund, D., Tilse, C. and Wilson, J 2002, 'Older people and substitute decision making legislation: Limits to informed choice', *Australasian Journal on Ageing*, vol. 21, no. 3, pp. 128–134. Available from: AGIS. [16 June 2016].

Tilse, C 2013, 'Promoting the use of enduring powers of attorney in older adults: A literature review', *Australasian Journal on Ageing*, vol. 33, no. 1, pp. 2–7. Available from: AGIS. [16 June 2016].