



Department of the
Attorney General



Office of the
Public Advocate

A Guide to Enduring Power of Attorney in Western Australia

Preface

This Guide is produced by the Public Advocate, the independent statutory officer appointed by the Western Australian Government to protect and promote the rights of Western Australians with a decision-making disability.

The Guide updates *The Practical Guide to Enduring Powers of Attorney* (1999) to incorporate:

- amendments to the *Guardianship and Administration Act 1990* enabling donors of Enduring Powers of Attorney to nominate substitute attorneys;
- the establishment of the State Administrative Tribunal (SAT) by the Western Australian Parliament in 2005. The SAT is now responsible for the majority of the functions previously undertaken by the Guardianship and Administration Board; and
- the enactment of the *Oaths, Affidavits and Statutory Declarations Act 2005* which resulted in changes to authorised witnesses to Enduring Powers of Attorney.

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1 INTRODUCTION

1.1 Glossary of terms

| | |
|-----------------|---|
| Act | <i>Guardianship and Administration Act (1990)</i> (Western Australia) |
| Administrator | A person appointed by the State Administrative Tribunal to make property and financial decisions on behalf of a person with a decision-making disability |
| Attorney | A person or body accepting an appointment under an Enduring Power of Attorney (also known as ‘donee’) |
| Capacity | A person’s capacity to make reasonable judgements in respect of matters relating to all or any part of his or her estate (also referred to as ‘legal capacity’) |
| Donor | A person who appoints another person or body under an Enduring Power of Attorney to make property and financial decisions on his or her behalf |
| Landgate | Former Department of Land Information |
| EPA | Enduring Power of Attorney |
| Estate | All financial and property interests of a person |
| Guardian | A person appointed by the State Administrative Tribunal to make personal and lifestyle decisions on behalf of a person with a decision-making disability |
| Guide | <i>A Guide to Enduring Powers of Attorney in WA</i> |
| OPA | Office of the Public Advocate |
| Public Advocate | The person appointed as Public Advocate pursuant to Part 8 of the <i>Guardianship and Administration Act (1990)</i> |
| SAT or Tribunal | State Administrative Tribunal |

1.2 Aims of the Guide

This Guide provides information to assist people seeking to understand and complete an EPA. The EPA form provided in this Guide can be completed independently, or with the assistance of a lawyer or trustee company.

Copies of this Guide can also be downloaded from the Public Advocate’s website at www.publicadvocate.wa.gov.au

1.3 Key benefits of an EPA

Most decision-making disabilities are caused by illness, accidents or trauma. A donor cannot prevent the onset of a decision-making disability but can complete an EPA to ensure that a trusted person or agency will manage his or her property and financial affairs in the event that this occurs.

An EPA enables an adult donor who has legal capacity to provide a legal authority to another person or agency (attorney) to make property and financial decisions on his or her behalf. The rules governing EPAs are prescribed in Part 9 of the *Guardianship and Administration Act 1990*.

An EPA permits the donor to decide whether the attorney is to act on his or her behalf immediately and to continue to act notwithstanding the donor's subsequent legal incapacity or to act only in the event that SAT declares that the donor does not have legal capacity.

An EPA differs significantly from an ordinary power of attorney in that it also operates when the donor loses legal capacity. An EPA does not permit an attorney to make personal and lifestyle decisions, including decisions about medical treatment. It is confined to making decisions about the donor's financial affairs and property.

1.4 Capacity to complete an EPA

An EPA can only be made by an adult who has the capacity to make informed decisions and to understand their implications. It is a formal agreement that the donor enters into by choice. An EPA cannot be made by another person on behalf of a donor whose capacity might be in doubt due to mental illness, acquired brain injury, cognitive impairment or dementia.

If there is any doubt about capacity to execute an EPA, the Public Advocate recommends that the donor should be encouraged to seek the opinion of at least one doctor qualified to assess capacity prior to completing an EPA. The doctor should be advised of the donor's intention to execute an EPA and requested to provide a report in writing.

Where English is not the donor's first language, the Public Advocate recommends the use of an accredited interpreter during the assessment of capacity.

It is further recommended that at least one of the witnesses to the execution of the EPA be the doctor who has assessed the donor as capable of making reasoned decisions and aware of the implications of giving an EPA to the attorney.

Lack of capacity of the donor at the time of executing an EPA renders the EPA void.

1.5 Where there is no EPA

Where a person has not executed an EPA and there is concern as to his or her decision-making ability in respect of property and financial management, any person may lodge an application for an administration order to the SAT.

The Telephone Advisory Service of the Office of the Public Advocate may be contacted for information and advice about whether an application for the appointment of an administrator might be needed and how to apply for such an order. Alternatively, an application may be made directly to the SAT.

Following receipt of the application, the SAT will conduct a hearing to determine whether the person who is the subject of the application has lost capacity, and, if so, whether an administrator is required to manage his or her property and financial matters. If the SAT determines there is such a need it will then decide the scope of the authority required and appoint a suitable person, the Public Trustee or a corporate trustee as administrator.

The administrator must submit to the Public Trustee, on a regular basis records of all transactions for auditing purposes unless exempted from doing so by the Public Trustee. The Public Trustee has a private administrator's support team that can provide information about its reporting requirements where an administrator has been appointed.

1.6 Western Australian residents with assets outside WA

The Public Advocate recommends that WA residents with assets outside the State should seek legal advice as to whether a Western Australian EPA is recognised in the jurisdiction where the assets are held and if not, whether they are entitled to execute an EPA under the laws of that jurisdiction. It should be noted that there is some variation in witnessing requirements between jurisdictions (Also refer to Section 3.12 of this Guide).

1.7 People residing outside Western Australia with assets in WA

Similarly, for people living outside WA but with assets in this State, the Public Advocate recommends that a Western Australian EPA is executed (Refer to Section 5.5 of this Guide).

1.8 Seek legal advice

The Public Advocate recommends that legal advice be sought for anything other than the completion of a simple EPA, and in particular if the donor seeks to:

- appoint two attorneys in substitution of joint or joint and several attorneys;
- impose special conditions or restrictions on the decision-making authority of appointed attorney(s);
- nominate unusual or complex events or circumstances upon which substitute attorneys are to be appointed;
- complete an EPA outside Western Australia;
- protect assets outside Western Australia;
- appoint a body corporate as attorney; or
- insert a marksman or readover clause where the donor has language or writing difficulties (Refer to Section 3.9 and Appendix A of this Guide).

2 ENDURING POWER OF ATTORNEY FORMS

2.1 Legal requirements

To be legally enforceable an EPA must be in the form or substantially in the form specified in Schedule 3 of the Act (Refer to Section 104(1)(a) of the Act).

This Guide contains two EPA forms for the donor, attorney and witnesses to complete. If additional forms are required you may copy the attached forms or download more from the OPA website.

2.2 Need for two originals

As there is no register for EPAs in Western Australia, it is vital that the donor and attorney(s) each retain an original or copy EPA in a safe place for future reference.

The nature of the estate and the requirements of particular institutions who may wish to retain an original EPA will dictate the number of original EPAs required (Refer to Section 3.15 of this Guide).

3 FOR THE DONOR: COMPLETING AN EPA

3.1 Each donor must complete his or her own EPA

An EPA is a document which can be completed only by one donor.

The donor inserts, in the spaces provided in the EPA form, his or her full name and address and the date, month and year on which the EPA form is being signed.

Should the donor relocate to another State he or she might wish to consider whether there is any need to execute an EPA applicable to that jurisdiction.

3.2 Choice of attorney

Clause 1 of the EPA records the full name(s) and address(es) of whom the donor is appointing as his or her attorney(s).

The making of an EPA is a significant decision. The decision as to who is to be appointed as attorney under an EPA should therefore not be made lightly. Making the right choice of attorney can be compared with the choice of an executor of a will. While a will provides for a person's beneficiaries after that person's death, an EPA governs the financial security of a person while living, possibly having a significant influence on their lifestyle until death.

It is usual for an attorney to be over 18 years of age and in a position of absolute trust. An attorney may be a spouse, partner, family member, friend, or a professional person such as an accountant, lawyer or the Public Trustee or a private trustee company.

When choosing an attorney, the Public Advocate recommends that the donor give careful consideration to the following questions:

- Is the person trustworthy and likely to always act in the donor's best interests?
- Is the person willing to take on the responsibilities?
- Is the person competent to deal with all financial and property matters relating to the donor's estate?
- Is the person competent to take on the task of keeping and preserving accurate records and accounts of all dealings and transactions made under the EPA?
- Does the person live close enough to the donor to be able to discharge his or her responsibilities under the EPA?
- Could the choice of attorney create conflict within the family?
- Should the donor place conditions or restrictions upon the attorney?

The Public Advocate recommends that a donor seek legal advice when considering the appointment of a body corporate such as the Board of Management of a nursing home where the donor is a resident and the potential for conflict of interest may arise.

3.3 Who can be appointed attorney?

A donor may appoint:

- A single person or agency as sole attorney; or
- Two people as joint attorneys who must agree on any decisions that are made; or
- Two people as joint and several attorneys who can make decisions independently or together.

When completing an EPA, if more than one attorney is appointed, the donor should indicate whether he or she is appointing two persons to act as joint attorneys or as joint and several attorneys, by striking out whichever does **NOT** apply.

There are practical implications involved in choosing joint attorneys. While joint and several attorneys may act together or separately, joint attorneys must act together. That is, they must both participate in and agree to each decision about the management of the donor's financial and property affairs and be available to sign documents. While a joint appointment may seem a safeguard, in cases of dispute it could result in delays to the management of the estate and ultimately an application to the SAT for directions (Refer to Section 5 of this Guide).

Should the donor appoint joint attorneys and one attorney dies, in the absence of a substitute appointment, the EPA will no longer be valid.

3.4 Substitute attorneys

Clause 1a of the EPA (Refer to Schedule 3 of the Act) enables the donor to appoint a substitute attorney or attorneys, in the event that the originally appointed attorney(s) is no longer suitable (e.g. as a result of the attorney's death, legal incapacity or bankruptcy), capable or available to make financial and property decisions or to act on the donor's behalf.

There is no requirement to appoint substitute attorney(s) but if the donor wishes, he or she may appoint:

- A single person or agency as a sole substitute attorney; or
- Two people as joint substitute attorneys who must agree on any decisions that are made; or
- Two people as joint and several substitute attorneys who can make decisions independently or together.

If more than one substitute attorney is being appointed to replace one original attorney, the donor should indicate whether he or she is appointing two people to act as joint substitute attorneys or as joint and several substitute attorneys by striking out whichever does NOT apply.

If the donor is appointing one substitute attorney where there are two original attorneys, the donor will need to indicate whether the substitute appointment applies to either of the joint, or joint and several attorneys that were previously appointed (by striking out "and") OR to BOTH attorneys (by striking out "or"). The full name and addresses of all appointed substitute attorneys should be listed.

If the donor wishes to appoint two attorneys in substitution of joint, or joint and several original attorneys, it is strongly recommended by the Public Advocate that legal advice be sought. The incorrect completion of clause 1a could result in more than two attorneys being appointed to act at one time and in such circumstance the EPA would be invalid.

3.5 Confirmation of authority

Clause 2 of the EPA (Refer to Schedule 3 of the Act) authorises the attorney to do anything that the donor may lawfully do in relation to the management of the donor's property and finances.

3.6 Conditions and restrictions

Clause 3 of the EPA (Refer to Schedule 3 of the Act) enables the donor to impose conditions and restrictions on the authority of the attorney(s) but this should be approached with caution. The Public Advocate recommends that legal advice should be sought as to the drafting of the conditions and restrictions. Landgate should be consulted where property transactions are involved.

The conditions or restrictions imposed, if any, will be dictated by the donor's individual circumstances. It is the Public Advocate's view that an EPA cannot contain detailed directions from a donor. However, examples of conditions or restrictions may include:

- that the attorney provides copies of all records and accounts to the donor's family members or specified members of the family during the period of legal incapacity;
- that records and accounts be audited professionally on an annual basis;
- that gifts, if any, be made to specified persons only;
- that an annual limit be placed on the value of the gifts; or
- that assets be sold in a specific order in accordance with the demonstrated need of the donor.

Clause 3 may **not** be used to:

- make provision for the appointment of substitute or conditional attorneys (Clause 1a has this function);
- specify the powers which the attorney is authorised to exercise;
- elect the time at which the EPA comes into operation (Clause 4 has this function); or
- authorise payment of fees and expenses to the attorney.

3.7 Deciding when the EPA will come into effect

Clause 4 of the EPA (Refer to Schedule 3 of the Act) requires the donor to choose when the EPA comes into effect.

The donor may authorise the EPA to come into effect:

- immediately and continue in force if the donor loses legal capacity (concurrent authority); or
- only during any period when the SAT declares that the donor does not have legal capacity (Refer to Sections 104(1)(b), 106(1) and 2(a), Schedule 3 of the Act).

Concurrent Authority (Clause 4(a))

If clause 4(a) is chosen, the donor and the attorney will have concurrent authority to act so that the attorney will have immediate legal authority to act for the donor even when the donor has legal capacity. While the donor has legal capacity, the attorney must act in accordance with the donor's directions and it will be the donor's responsibility to ensure that the attorney is exercising his or her authority appropriately.

The advantage of concurrent authority is that the attorney can assist the donor in circumstances where there is a gradual decline in capacity, or episodic illness, without the attorney taking full control of the management of the estate. Concurrent authority to act may, however, give rise to difficulties when the donor has lost capacity in that, in the absence of proof of legal incapacity, the attorney would not have the right to prevent the donor from dealing with the estate, for example operating a bank account.

If this section is not completed, by striking out (a) or (b) in clause 4, the EPA will not be valid.

Declaration required by SAT for Attorney to Act (Clause 4(b))

Clause 4(b) requires the attorney to make an application to SAT for a declaration that the donor does not have legal capacity and that the EPA is in force.

3.8 Signing the EPA

The donor of the EPA should sign the form using his or her normal signature in the space provided. It should not be a concern if the donor's signature has changed over the years due to illness or frailty.

3.9 Marksman, readover and directional clauses

There are times when the use of specific execution clauses for the EPA document might be required. These relate to a donor's ability to read, understand English or write their name. More information about marksman and readover and directional clauses can be found in Appendix A.

The Public Advocate recommends that legal advice is sought where marksman, read over or directional clauses are applied.

3.10 Witnessing

Section 104(2) of the Act requires that, in order for an EPA to be effective:

- there are two attesting witnesses to the EPA, both of whom are authorised by law to take declarations; and
- the EPA has endorsed on it, or annexed to it, a statement of acceptance executed by the person or persons appointed to be the attorney(s) (Refer to Form 2, Schedule 3 of the Act and Section 3.14 of this Guide).

Schedule 2 of the *Oaths, Affidavits and Statutory Declarations Act 2005* lists the people who are authorised to witness declarations in Western Australia. A list of authorised witnesses is provided in Appendix B.

Witnesses should not be in a position of potential conflict of interest with the donor. The inclusion of the occupation of the witness is not essential but may be of assistance should there be any question as to whether the witnesses are persons authorised by law to take declarations. If the EPA is to be lodged with Landgate, Landgate requires the witnesses to state their occupation on the EPA form.

3.11 Role of witnesses

The role of the witnesses is to verify that the donor signed the document on the date specified. If the donor is not known to the witnesses it is desirable to ask the donor to provide some proof of identity.

The donor and the witnesses should initial any amendments made to the EPA.

3.12 Witnessing when donor overseas or interstate with property in Western Australia

There are situations where people who are overseas or interstate have property in Western Australia and wish to complete a Western Australian EPA. Selecting people qualified to witness an EPA overseas and interstate is affected by the location where the EPA is to be signed. If the EPA is to be signed outside WA you should seek legal advice.

3.13 Witnessing and doubt about capacity

The Public Advocate recommends that witnesses should decline to witness the EPA if there is any doubt as to the donor's capacity to understand what is being signed or if the donor appears to be signing the EPA under duress or influence.

3.14 Acceptance of EPA by the attorney

For an EPA to have effect the attorney(s) must sign a statement of acceptance (Refer to Form 2, Schedule 3 of the Act). The EPA form available on the OPA website incorporates an acceptance for the attorney to complete. It is recommended by the Public Advocate that the acceptance occur as soon as practicable after the donor has signed the EPA form.

3.15 Lodgement of EPA with Landgate

Landgate will accept an EPA regardless of the donor having an existing interest in a property at the time of the execution of an EPA. If the EPA is to be lodged with Landgate, two completed EPA forms are required, including an original document, which is retained. Landgate also requires that the acceptance of the EPA is on the reverse of the EPA itself, not on a separate form.

If the EPA is lodged at Landgate more than three months after it is signed a Statutory Declaration may be required from the attorney stating that the EPA has not been revoked.

A fee is charged for lodging or revoking an EPA with Landgate (Refer to Section 8 of this Guide for contact details of Landgate Offices).

3.16 Stamp Duty

Although the EPA is structured as a deed, the *Stamp Act 1921* has been amended to exempt Powers of Attorney from stamp duty. This includes EPA documents.

4 FOR THE ATTORNEY: OPERATING AN EPA

4.1 Consultation with the donor

It is important that, wherever possible, the donor is consulted as to all decisions made. While the donor may need assistance in making decisions on certain issues, it is the Public Advocate's view that he or she may still be able to contribute to the decision-making process.

It is also recommended by the Public Advocate that attorneys devise a method of day to day financial management which allows the donor the greatest degree of autonomy possible in their particular circumstances.

4.2 Attorney's obligations and powers

An attorney is entrusted by the donor, under the Act, to manage and protect his or her property and financial interests. This power has significant implications for the donor's financial well-being.

The attorney is legally obliged to act in the best interests of the donor and is accountable for his or her actions. The attorney must manage the donor's estate responsibly while also ensuring that the donor enjoys as good a standard of living as his or her estate can provide.

Section 107(1) of the Act provides that the attorney:

- shall exercise his or her powers with reasonable diligence to protect the interests of the donor (the attorney may be liable for any loss caused by the failure);
- shall keep and preserve accurate records and accounts of all dealings and transactions made under the power (there is a \$2,000 penalty for breaching this requirement);
- subject to Section 109(2) (Refer to Section 7.2 of this Guide) may not renounce the power during any legal incapacity of the donor without the approval of the SAT; and
- shall, if the attorney becomes bankrupt, report that bankruptcy to the SAT.

4.3 Gifting from the estate of the donor

The Act does not make provision for an attorney to make gifts from the estate of the donor. However, in a recent decision the SAT stated that an attorney is not precluded from making a gift on behalf of the donor (unless the EPA prohibits gifting). The attorney must be directed by his or her duties and obligations to the donor and, in particular, must consider whether the giving of the gift is in the interests of the donor.

Some factors that the attorney may wish to consider when making this decision are:

- the relationship between the donor and the beneficiary of the gift;
- the purpose of the gift;
- the extent of the donor's estate;
- the needs of the donor and any other person dependent on the donor;
- the likelihood of the donor making the gift if he or she had capacity;
- the attitude of those likely to benefit from the donor's estate on his or her death;
- any conflict of interest between the donor's interests and those of the donee.

The attorney must also comply with any conditions or restrictions in the EPA (Refer to Section 3.6 of this Guide).

It would not be usual for an attorney to gift to himself or herself on behalf of the donor. If in doubt about gifting from the estate of the donor, the attorney may apply for directions from the SAT (Refer to Section 109(2)(b) of the Act and Section 5 of this Guide).

4.4 Limits on the authority of an attorney

An attorney's authority does not extend to:

- doing any act requiring the donor's personal skill or discretion, for example: swearing an affidavit, making a will, or, where the donor is a trustee or executor, exercising his or her powers as trustee or executor;
- making guardianship or lifestyle decisions such as medical treatment decisions on behalf of the donor;
- doing any act which is illegal or which has an unlawful purpose;
- dealing with any property held on trust by the donor;
- performing the functions of a director or secretary of a company on behalf of the donor unless authorised by the constitution of the company; or
- appointing a substitute attorney.

4.5 Doubt about decision-making authority

If in doubt about authority to make a decision on the donor's behalf, the attorney may apply for directions from the SAT (Refer to Section 109(2)(b) of the Act and Section 5 of this Guide).

4.6 When the attorney's authority to act commences

If clause 4(a) of the EPA applies – i.e. the donor has struck out 4(b) – the attorney has immediate authority to make property and financial decisions on behalf of the donor, subject to any conditions and restrictions which may have been specified in clause 3 of the EPA and subject to the directions of the donor while he or she retains capacity.

If clause 4(b) applies – i.e. the donor has struck out 4(a) – the attorney only has authority to act upon the loss of the donor's decision-making capacity. In order to assume the authority to make financial and property decisions on behalf of the donor, the Act provides (Refer to Section 106(1) and (2)) that an application must be made to the SAT for a determination as to:

- whether the donor has lost his or her capacity to make reasonable judgements in respect of matters relating to all or any part of his or her estate; and
- whether the EPA is in force.

4.7 Management of the donor's estate

The Public Advocate recommends that an attorney ascertain the nature and extent of the donor's estate when the EPA comes into operation.

Subject to any conditions or restrictions in clause 3 of the EPA, the attorney may be required to make decisions in the best interests of the donor as to:

- general expenditure of the donor's funds;
- purchase, sale, lease, maintenance or improvement of property;
- payment of debts;
- investments;
- arrangement and payment of insurance;
- operation of bank accounts;
- receipt of income;
- management of the donor's business interests;
- share voting rights;
- entering into, completing or terminating contracts;
- taxation;
- Centrelink entitlements.

The Public Advocate has identified a number of factors that may affect decision-making by the attorney including:

- recommendations made by a guardian appointed under the Act;
- the donor's immediate and longer term needs;
- the views of the donor, family members and other interested parties;
- the current financial situation of the donor;
- arrangements made by the donor prior to the loss of capacity, for example, the terms of the donor's will;
- lifestyle choices made by the donor, for example, religious, cultural;
- the donor's family commitments; and
- the need for specialist advice, for example, from a lawyer, accountant or stockbroker.

This list is not exhaustive and attorneys need to take into account each individual donor's circumstances.

An attorney may apply to the SAT for directions as to matters connected with the exercise of the power or the construction of its terms (Refer to Section 109(2) of the Act and Section 5.3 of this Guide), for example whether the attorney has the authority to sell the donor's property or how a condition or restriction in the EPA is to be interpreted. However, it is not the role of SAT to make decisions so that, for example, SAT cannot order an attorney to sell the donor's property. This is a decision for the attorney alone.

4.8 Operating bank accounts

The Public Advocate recommends that, in the interests of good accounting practice and to protect the attorney from allegations of exploitation, funds belonging solely to an attorney should not be mixed with those of the donor and vice versa. However, it is acknowledged that in cases where existing bank accounts are held jointly by the donor and attorney, for example as husband and wife, this may be impractical.

4.9 Legal proceedings

The Public Advocate recommends that if the donor is involved in any legal proceedings, legal advice should be sought as to the appropriate person to be appointed to conduct the proceedings on behalf of the donor. An application for an administration order from the SAT may be required for this purpose.

4.10 Attorney's fees and expenses

The Act is silent as to the payment of fees and expenses for attorneys of an EPA. However, the fees and charges payable to the Public Trustee and to trustee companies who act as attorneys are governed by statute, namely Sections 38 and 39 of the *Public Trustee Act 1941* (and regulations made thereunder) and Section 18 of the *Trustee Companies Act 1987*.

Otherwise, the payment of fees and expenses is governed by the common law. At common law, an agent, such as an attorney under an EPA, is only entitled to receive remuneration from his principal for his services as agent where there is a contract, express or implied, to this effect. Consequently, if there is a contract between a donor and attorney whereby the attorney agrees to perform the duties entrusted to him under an EPA in return for the payment of fees for his services, the attorney is entitled to such payment. Where the fees are not specified, the attorney will be entitled to reasonable remuneration in accordance with the circumstances of the case.

Where there is no express agreement as to the payment of remuneration, the appointment of a professional person as attorney of an EPA raises a presumption that the attorney will be paid for his services if those services are performed in his professional capacity to fulfil the obligations imposed on him by the power of attorney. While each relationship of donor and attorney will depend on individual circumstance it would be unusual for a friend or relative of the donor to receive remuneration.

An attorney of an EPA is entitled to reimbursement in respect of expenses incurred by him or her provided that he or she acts within the scope of his or her authority. This entitlement exists whether or not the attorney is acting in a professional capacity or gratuitously out of friendship.

Form 1 in Schedule 3 makes no provision for the inclusion of an agreement between the donor and the attorney as to the payment of fees and expenses. Such an agreement should be made the subject of a separate written authority.

Donors should be advised of the impact which charges may have on their estate.

4.11 Signing documents

When the attorney exercises authority on behalf of the donor, the attorney should sign his or her name as "Attorney for (insert *the donor's name*)".

5 INTERVENTION BY THE STATE ADMINISTRATIVE TRIBUNAL

5.1 Concerns about an EPA

Where the donor has lost capacity, concerns about an EPA or any other concerns should be directed to the SAT. This should be by way of an application by the attorney or other person with a proper interest in the matter, as provided for in Section 109 of the Act.

5.2 Concerns about attorney's actions

There is no register for EPAs in Western Australia and no person or body supervises the operation of EPAs as a matter of course.

Where there is a concern that an attorney is not meeting his or her obligations or acting in the best interests of the donor and the donor is no longer able to make reasonable judgements, the Act (Refer to Section 109(1)(a)(b)(c)) provides that a person who has, in the opinion of the SAT, a proper interest in the matter, may apply to the SAT for an order:

- requiring the attorney to file with the Tribunal and serve on the applicant a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney in connection with the power;
- requiring such records and accounts to be audited by an auditor appointed by the Tribunal and to provide a copy of the report of the auditor to the Tribunal and the applicant; or
- revoking or varying the terms of an EPA, appointing a substitute attorney of the power or confirming that a person appointed to be substitute attorney of the power has become the attorney.

If circumstances indicate there might be a need for the appointment of an administrator it may be appropriate to lodge an application for an administration order together with or in addition to the application under Section 109. The SAT can provide advice regarding the application that may need to be made.

The Public Advocate recommends that for the immediate protection of the donor with a decision-making disability, it may also be necessary to take steps to inform relevant persons or bodies of any concerns held, for example a bank manager or real estate agent.

5.3 Applications by attorney to the SAT

Section 109(2)(a)(b) of the Act provides that the attorney may apply to the SAT:

- for an order revoking or varying the terms of an EPA, appointing a substitute attorney of the power or confirming that a person appointed to be substitute attorney of the power has become the attorney; or
- for directions as to matters connected with the exercise of the power or the construction of its terms.

5.4 Conflict between attorney and interested parties

At times, conflict may arise between the attorney and other interested parties (e.g. guardians, carers, friends or relatives) in relation to the management of the donor's estate. In these circumstances, it is suggested that all efforts be made to resolve the issues in the best interests of the donor and with as little disruption as possible to his or her lifestyle.

Advice on individual matters can be sought from the Office of the Public Advocate's Telephone Advisory Service. An application may also be made directly to the SAT by the attorney for directions under Section 109(2) of the Act or by a person with a proper interest in the matter under Section 109(1) of the Act.

5.5 Acceptance of EPAs created in other jurisdictions

Section 104A of the Act provides that an attorney operating under a power of attorney created under the laws of another State, Territory or country may apply to SAT for an order recognising that power of attorney in WA. The requirements for making an application are dealt with in Section 104A(3) of the Act.

The SAT must be satisfied that the power of attorney corresponds sufficiently, in form and effect, to an EPA created under Section 104 of the Act and that it is appropriate to make an order. If the SAT makes such an order then all relevant persons and bodies including financial institutions and Landgate should be contacted to seek advice as to their specific requirements.

6 INVESTIGATIVE ROLE OF THE PUBLIC ADVOCATE

6.1 Authority of the Public Advocate to investigate

The Act (Refer to Section 97(1)(c)) authorises the Public Advocate to investigate any complaint or allegation that a person is in need of a guardian or administrator.

Any member of the public with a concern that an attorney is not acting in the best interests of a donor, or that he or she may be abusing the donor may contact the Office of the Public Advocate's Telephone Advisory Service. Should the complaint be deemed worthy of further examination, the Public Advocate will conduct an investigation and/or refer the matter to the Western Australian Police.

7 REVOKING/RENOUNCING AN EPA

7.1 Donor revokes

The Act does not refer to revocation of an EPA by a donor. Revocation is governed by the common law. A donor may revoke an EPA while he or she has legal capacity. Revocation in writing is not always necessary. However, the Public Advocate recommends that a donor provide written notification of any revocation to the attorney and to all relevant persons and organisations. The revocation must be in writing if the EPA has been lodged with Landgate. Landgate requires a revocation to be registered pursuant to Section 143(1) of the *Transfer of Land Act 1893* and should be contacted as to its requirements for the drafting of the revocation.

7.2 Attorney renounces

Where the attorney is no longer able or willing to act on the donor's behalf and the donor has capacity, the attorney may renounce the authority given to him or her under the EPA. The Public Advocate recommends that the attorney advise the donor of his or her decision to renounce the EPA in writing.

Where the donor has lost capacity:

- the attorney may not renounce the power but must apply to the SAT for an order revoking the terms of the EPA (Refer to Sections 107(1)(c) and 109(2) of the Act); or
- a person with a proper interest in the matter may apply to the SAT for an order revoking the terms of the EPA (Refer to Section 109(1)(c) of the Act); or
- where the attorney dies or loses capacity, an application may be made to the SAT by a person with a proper interest in the matter for the appointment of a substitute attorney (Refer to Section 109(1)(c) of the Act) or administrator (Refer to Sections 64 and 108(1) of the Act).

7.3 Bankruptcy

The Public Advocate's view is that an Enduring Power of Attorney will effectively terminate on the bankruptcy of the donor, as the donor's estate will vest in the trustee in bankruptcy.

Where an attorney becomes bankrupt, the attorney must report this to SAT (Refer to Section 107(1)(d) of the Act). Upon receiving a report of the attorney's bankruptcy, SAT may make orders concerning the exercise of the attorney's powers, including an order revoking the EPA (Refer to Section 109(3) of the Act). If the donor has legal capacity, the Public Advocate considers that it would be prudent for the donor to revoke the EPA.

7.4 Revocation by Tribunal or Court

In the event that an EPA is revoked by a Tribunal or Court, it is recommended that relevant persons and bodies including financial institutions and Landgate should be informed.

7.5 Divorce

Divorce does not automatically revoke an EPA. In the event of separation a donor may wish to consider whether to retain an arrangement where his or her partner acts as attorney.

7.6 Subsequent EPA

It is the Public Advocate's view that an existing EPA may not be revoked automatically by the execution of a subsequent EPA. This is certainly the case where the existing EPA has been lodged with Landgate (Refer to Section 7.1 of this Guide). The Public Advocate strongly recommends that where a new EPA is made and is intended to replace an existing EPA, the existing EPA should be revoked in writing (Refer to Section 7.1 of this Guide).

7.7 Death of donor

The death of the donor automatically terminates the EPA.

8 FURTHER INFORMATION

Office of the Public Advocate

Level 1/30 Terrace Road
EAST PERTH WA 6004
Telephone Advisory Service: 1300 858 455
Facsimile: 08 9278 7333
TTY: 1300 859 955
Email: opa@justice.wa.gov.au
Internet: www.publicadvocate.wa.gov.au

State Administrative Tribunal

Level 4
12 St Georges Terrace, PERTH WA 6000
Telephone (08) 9219 3111
Toll Free: 1300 306 017
Email: info@sat.justice.wa.gov.au
Internet: www.sat.justice.wa.gov.au

Public Trustee

Public Trust Building
565 Hay Street, PERTH WA 6000
Wills, Executor and Deceased Estate services: 1300 746 116
Trusts and Represented Persons: 1300 746 212
Email: PTOCustomerServices@justice.wa.gov.au

Landgate

Landgate Midland
1 Midland Square
Morrison Road (cnr Gt Northern Highway)
MIDLAND WA 6056

Landgate Perth
Ground Floor
200 St Georges Terrace
PERTH WA 6000

Landgate Bunbury
9th Floor Bunbury Tower
61 Victoria Street
BUNBURY WA 6230
Email: Irc@landgate.wa.gov.au
Internet: www.landgate.wa.gov.au
Telephone: (08) 9273 7373 or 1300 556 224

9 APPENDICES

- A Marksman, readover and directional clauses
- B List of persons authorised to witness EPA
- C EPA forms

APPENDIX A Marksman, readover and directional clauses

Samples of these clauses are included below for guidance.

All witnesses should meet the requirements of any particular clause. Where necessary, an interpreter should sign the document as witness if qualified to do so or if not so qualified, sign in addition to the two qualified witnesses.

1. A person who understands English but cannot write

| | | |
|---|---|------------------------|
| Signed by (Name of Marksman) by making |) | (His or Her) |
| (his or her) mark, (he or she) being incapable |) | (Name of) + (Marksman) |
| of signing (his or her) name in the presence of |) | Mark |

Witness
(Address and Occupation)

2. A person who understands English but cannot read or write

| | | |
|---|---|----------------------|
| Signed by (Name of Marksman) by making |) | |
| (his or her) mark, (he or she) being unable to read |) | |
| or write, after this instrument had been read and |) | (His or Her) |
| explained to (him or her) and (he or she) then |) | (Name of)+(Marksman) |
| appearing to understand fully its nature and effect |) | Mark |
| in the presence of |) | |

Witness
(Address and Occupation)

3. A person who does not understand English and cannot write

Signed by the said (Name of Marksman) by)
making (his or her) mark, (he or she) being)
unable to read in the English language after)
this instrument had been read and explained to) (His or Her)
(him or her) in (Name of second language) by) (Name of)+(Marksman)
(Name of Interpreter), a person understanding) Mark
both languages, (he or she) then appearing to)
understand fully its nature and effect in the)
presence of)

Signature of Interpreter
(Address and Occupation)

4. Execution by a person who does not understand English but who can write

Signed by the said (Name of person) (he or she))
being unable to read in the English language)
after the same had been read and explained to)
(him or her) in (Name of second language) by)
(Name of Interpreter), a person understanding) (Signature of Person)
both languages, (he or she) then appearing to)
understand fully its nature and effect in the)
presence of)

Signature of Interpreter
(Address and Occupation)

APPENDIX B List of persons authorised to witness

Schedule 2 of the *Oaths, Affidavits and Statutory Declarations Act 2005* lists the people who are authorised to witness declarations in Western Australia. These are:

- Academics (post-secondary institution)
- Accountants
- Architects
- Australian Consular Officers
- Australian Diplomatic Officers
- Bailiffs
- Bank managers
- Chartered secretaries
- Chemists
- Chiropractors
- Company auditors or liquidators
- Court officers
- Defence force officers
- Dentists
- Doctors
- Electorate officers of a Member of the WA State Parliament
- Engineers
- Industrial organisation secretaries
- Insurance brokers
- Justices of the Peace
- Landgate officers
- Lawyers
- Local Government CEOs or deputy CEOs
- Local government councillors
- Loss adjusters
- Marriage celebrants
- Members of Parliament
- Ministers of religion
- Nurses
- Optometrists
- Patent attorneys
- Physiotherapists
- Podiatrists
- Police officers
- Post office managers
- Psychologists
- Public notaries
- State & Commonwealth public servants
- Real estate agents
- Settlement agents
- Sheriffs or Deputy Sheriffs
- Surveyors
- Teachers
- Tribunal officers
- Veterinary surgeons

And anyone authorised under the *Commonwealth Statutory Declarations Act 1959* to take a statutory declaration.

APPENDIX C EPA forms

ENDURING POWER OF ATTORNEY

Under Section 104 of the *Guardianship and Administration Act 1990*

THIS ENDURING POWER OF ATTORNEY IS MADE ON the.....day of.....20.....
 BY.....
 OF.....

1 I APPOINT to be my sole Attorney
 OF.....
OR I APPOINT
 OF.....
AND
 OF..... JOINTLY to be my Attorneys*
 JOINTLY **AND SEVERALLY** to be my Attorneys*
**one of these must be struck out*

1a I APPOINT to be my sole substitute Attorney
 OF.....
AND
 OF..... JOINTLY to be my substitute Attorneys**
 JOINTLY **AND SEVERALLY** to be my substitute Attorneys**
***one of these must be struck out*

IN SUBSTITUTION OF
OR IN SUBSTITUTION OF **AND/OR*****
****one of these must be struck out*
 on (or during) the occurrence of the following events or circumstances

2 I AUTHORISE my Attorney (s) to do on my behalf anything that I can lawfully do by an Attorney.

3 The authority of my Attorney (s) is **subject to the following CONDITIONS or RESTRICTIONS**

4 I DECLARE that this POWER of ATTORNEY

*(a) will continue in force notwithstanding my subsequent legal incapacity; **OR**

*(b) will be in force **ONLY** during any period when a declaration by the State Administrative Tribunal that I do not have legal capacity is in force under Section 106 of the *Guardianship and Administration Act 1990*.

**one of these sub-paragraphs must be struck out*

SIGNED AS A DEED BY

WITNESSED BY

| | | |
|----------------|---|---|
| | <i>(Signature of Witness 1)</i> | <i>(Signature of Witness 2)</i> |
| Must be | <i>(Full Name of Witness 1)</i> | <i>(Full Name of Witness 2)</i> |
| witnessed at | | |
| the same time | <i>(Address of Witness 1)</i> | <i>(Address of Witness 2)</i> |
| by two persons | | |
| authorised to | | |
| witness | <i>(Occupation of Witness 1)</i> | <i>(Occupation of Witness 2)</i> |
| Declarations. | | |

APPENDIX C EPA forms (cont.)

ACCEPTANCE OF AN ENDURING POWER OF ATTORNEY

The person(s) or agency nominated as Attorney(s) is/are required to indicate their willingness to accept the power vested in them under this EPA and the legal obligations which go with that power. The Attorney(s) must sign the Statement of Acceptance in the space provided as soon as possible after the document conferring the authority has been completed.

1 I/WE.....

 the person(s) appointed to be the Attorney(s) under paragraph 1 of the instrument on which this acceptance is endorsed [or to which this acceptance is annexed]

1a I/WE.....

 the person(s) appointed to be the substitute Attorney(s) under paragraph 1a of the instrument on which this acceptance is endorsed [or to which this acceptance is annexed]

ACCEPT THE APPOINTMENT AND ACKNOWLEDGE:

- that the power of Attorney is an Enduring Power of Attorney and
 - * (a) will continue in force notwithstanding the subsequent legal incapacity of the Donor;
 - * (b) will be in force only during any period when a declaration by the State Administrative Tribunal that the Donor does not have legal capacity is in force under Section 106 of the *Guardianship and Administration Act 1990*.
- *one of these sub-paragraphs must be struck out
- that I/we will, by accepting this Power of Attorney, be subject to the provisions of Part 9 of the *Guardianship and Administration Act 1990*.

SIGNED

| | | |
|----------|---|---|
| 1 | <i>Attorney appointed under clause 1 of the Enduring Power of Attorney</i> | <i>Attorney appointed under clause 1 of the Enduring Power of Attorney</i> |
| | <i>(Date)</i> | <i>(Date)</i> |

| | | |
|-----------|--|--|
| 1a | <i>Attorney appointed under clause 1a of the Enduring Power of Attorney</i> | <i>Attorney appointed under clause 1a of the Enduring Power of Attorney</i> |
| | <i>(Date)</i> | <i>(Date)</i> |

APPENDIX C EPA forms (cont.)

ENDURING POWER OF ATTORNEY

Under Section 104 of the *Guardianship and Administration Act 1990*

THIS ENDURING POWER OF ATTORNEY IS MADE ON the..... day of.....20.....

BY.....

OF.....

1 I APPOINT.....

OF..... to be my sole Attorney

OR I APPOINT.....

OF.....

AND.....

OF..... JOINTLY to be my Attorneys*

JOINTLY AND SEVERALLY to be my Attorneys*

**one of these must be struck out*

1a I APPOINT.....

OF..... to be my substitute Attorney

AND.....

OF..... JOINTLY to be my substitute Attorneys**

JOINTLY AND SEVERALLY to be my substitute Attorneys**

***one of these must be struck out*

IN SUBSTITUTION OF.....

OR IN SUBSTITUTION OF..... AND/OR***.....

****one of these must be struck out*

on (or during) the occurrence of the following events or circumstances.....

.....

.....

2 I AUTHORISE my Attorney (s) to do on my behalf anything that I can lawfully do by an Attorney.

3 The authority of my Attorney (s) is **subject to the following CONDITIONS or RESTRICTIONS**.....

.....

.....

4 I DECLARE that this **POWER of ATTORNEY**

*(a) will continue in force notwithstanding my subsequent legal incapacity; **OR**

*(b) will be in force **ONLY** during any period when a declaration by the State Administrative Tribunal that I do not have legal capacity is in force under Section 106 of the *Guardianship and Administration Act 1990*.

**one of these sub-paragraphs must be struck out*

SIGNED AS A DEED BY.....

WITNESSED BY

(Signature of Witness 1)

(Signature of Witness 2)

Must be
witnessed at
the same time
by two persons
authorised to
witness
Declarations.

(Full Name of Witness 1)

(Full Name of Witness 2)

(Address of Witness 1)

(Address of Witness 2)

(Occupation of Witness 1)

(Occupation of Witness 2)

APPENDIX C EPA forms (cont.)

ACCEPTANCE OF AN ENDURING POWER OF ATTORNEY

The person(s) or agency nominated as Attorney(s) is/are required to indicate their willingness to accept the power vested in them under this EPA and the legal obligations which go with that power. The Attorney(s) must sign the Statement of Acceptance in the space provided as soon as possible after the document conferring the authority has been completed.

1 I/WE

.....

the person(s) appointed to be the Attorney(s) under paragraph 1 of the instrument on which this acceptance is endorsed [or to which this acceptance is annexed]

1a I/WE

.....

the person(s) appointed to be the substitute Attorney(s) under paragraph 1a of the instrument on which this acceptance is endorsed [or to which this acceptance is annexed]

ACCEPT THE APPOINTMENT AND ACKNOWLEDGE:

- that the power of Attorney is an Enduring Power of Attorney and
 - * (a) will continue in force notwithstanding the subsequent legal incapacity of the Donor;
 - * (b) will be in force only during any period when a declaration by the State Administrative Tribunal that the Donor does not have legal capacity is in force under Section 106 of the *Guardianship and Administration Act 1990*.
- *one of these sub-paragraphs must be struck out*
- that I/we will, by accepting this Power of Attorney, be subject to the provisions of Part 9 of the *Guardianship and Administration Act 1990*.

SIGNED

| | | |
|----------|---|---|
| 1 | Attorney appointed under clause 1 of the Enduring Power of Attorney | Attorney appointed under clause 1 of the Enduring Power of Attorney |
| | (Date) | (Date) |

| | | |
|-----------|--|--|
| 1a | Attorney appointed under clause 1a of the Enduring Power of Attorney | Attorney appointed under clause 1a of the Enduring Power of Attorney |
| | (Date) | (Date) |



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