

29 June 2009

Mr Robert C Bolch JP

Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Sir/Madam,

Inquiry into Powers of Attorney

My name is Robert Charles Bolch JP; I have handled a considerable number of these types of documents and am interested in the items to be discussed and will be most interested in your deliberations.

I am a Justice of the Peace for and on behalf of the State of Victoria and also a Justice of the Peace (Qualified) for and on behalf of the State of Queensland, I have witnessed these types of documents in both States and have noticed there seems to be more information available to witnesses on the subject of testing for capacity in Queensland.

When my wife and I moved back to Victoria in 2004 I became a Justice of the Peace in Victoria, I had retired and so I volunteered to take part on the roster of JP's at the Dandenong Police Station Document Signing Station.

This Signing Station was processing thousands of documents annually and I found myself processing all sorts of documentation, EPA's included.

As I live at Langwarrin in the City of Frankston, I joined the Mornington Branch of the Royal Victorian Association of Honorary Justices and reasoned that there may be a need for a similar operation at the Frankston Police Station.

I approached Sergeant Martin Caddy, who informed me we would be most welcome and an area in the Station was set up to accommodate a Signing Station, after a trial period the Frankston Document Signing Station commenced operation in August 2005.

I was and still am, the Roster Coordinator and considering the success of the Frankston operation have now established Document Signing Stations in the Hastings, Mornington and Rosebud Police Stations.

In setting up these Document Signing Stations I provided them with two Manuals, the first was a Log which is used to record documents signed and contains instructions and guidelines for JP's.

The second Manual deals only with the four types of Power of Attorney, it also contains that section of the “**Instruments Act 1958**” covering “**Powers of Attorney**” in case JP’s may be unsure of something, or are confronted by a “**Bush Lawyer**”.

I have intimated in the accompanying recommendations that I believe the list of persons able to witness the signing of EPA’s should be revised and a special certificated course be implemented, due to the fact that each State have their own “**Act**” covering Powers of Attorney.

My reasons for suggesting this is the emergence in some states of Document Signing Stations, mostly manned by Justices of the Peace, and the widening gulf beginning to appear between States in relation to certain forms of documentation, who is authorised to witness them and how they are to be processed.

I am cognizant of the fact that Law Reform should take place as a natural progression towards a more ordered and safer society, but not to the extent of throwing the baby out with the bathwater.

On Tuesday 30 June 2009 I was on duty at the Frankston Police Station Document Signing Station when a woman presented some documents she wished to have witnessed and have certified copies produced.

The documents were Enduring Power of Attorney for her parents who live in South Australia, she and her brother were named as Attorneys for their parents, her brother lives in South Australia but she currently lives in Victoria.

The form she required to be witnessed was her acceptance as Attorney for her parents EPA, she also had in her possession, the original copy of The Enduring Power of Attorney appointing her and her brother as Attorneys, together with the form duly witnessed of her brother’s acceptance as an Attorney.

The reasons she had all of these documents was twofold, one to show her what her parents had decided as she was not going to South Australia in the near future, and secondly for her to take a copy of them for her records purposes for future use.

In the realisation that the wording on these types of documents is important, I had to tell her that if she wanted an authentic Certified Copy of the Documentation which she may be required to execute at some time in the future, she should send the documents back to South Australia to be certified so that the standard words for certification required under their legislation could be affixed.

I was not being flippant when I suggested that she do this knowing that there are differences in this area, my observations about the certification leaves me more than a little confused.

I have since been able to ascertain that the West Australian Department of the Attorney General has issued a document via the website www.justice.wa.gov.au stating “*There is no legislation in Western Australia that stipulates either how to certify a copy of a document or who can do it.*”

Further investigations on other State's EPA criteria reveals a quagmire of diversification, surely this area does not require rocket science to unravel the mess and establish uniformity, just a little liaison and consensus for the good of the Australian people.

I do not know whether you may be aware of this situation, but in the interests of uniformity, this needs to be an agenda item at the next meeting of Law Reform Committees. (I am assuming that you do hold discussions with the other States).

The Standing Committee of Attorneys-General (SCAG) may even see the need to include this issue in the agenda at the next Council of Australian Governments (COAG) during discussion about the introduction of a Single National Regulator.

In the accompanying pages I have put forward my thoughts on problems I have perceived with the system together with possible solutions, should you require clarification on any of the points I have put forward I can be contacted on my home phone at _____ or my Mobile which is _____

Yours Sincerely



Robert C Bolch JP

Enc. Terms of reference submissions

ITEM 1

STREAMLINING OF POWER OF ATTORNEY DOCUMENTS

I have been involved in witnessing the three forms of Enduring Power of Attorney namely Financial, Medical and Guardianship for a single donor at one sitting on several occasions.

Recommendation

I am of the opinion that the **Financial** and **Medical** Power of Attorney forms could be linked so that they may be either or both as required.

In linking **Financial/ Medical** the donor, who could be elderly would experience many benefits gained for them in respect to medication expenses.

Similarly, there are many good reasons for the linking of **Medical** and **Guardianship** Power of Attorney forms.

In the case of **Medical/Guardianship**, what often transpires is that the donor could be in failing health, or even in need of palliative care and their affairs could be administered better under these circumstances.

There is also merit in linking the three together in a **Financial/Lifestyle** type of Power of Attorney; which whilst it may tend to be a little cumbersome, would be quite feasible and extremely useful in many cases.

Donors could elect to fill out that part of the document that they believe covers their particular circumstances at a given time, which could at some time in the future, be altered or added to as circumstances change.

Submitted by: Mr Robert C. Bolch JP

ITEM 2

DONOR'S CAPACITY

“**Capacity**” is a word that has a tendency to cause some people such a degree of concern that they are reluctant to act as a second witness when I have asked them to assist me in witnessing the signing of an Enduring Power of Attorney.

As a Justice of the Peace, I worked at the Dandenong Police Station Document Signing Station.

Living in the Frankston area, I decided to set up Document Signing Stations on the Mornington Peninsula; firstly at the Frankston Police Station, then Hastings, Mornington and Rosebud Police Stations.

At varying times during the week, these Stations serve the people on the Peninsula, staffed by volunteer JP's from the local community.

I have found that usually the Donor; who wishes to have an EPA witnessed, comes in with the person whom he/she wishes to be his/her Attorney, as there is usually only one JP on duty, we rely on asking a member of the Police Force to act as the second witness.

Most Officers are willing to assist, however, some of the Junior Constables approach the task with some trepidation; stating that they are not medically qualified to assess a person's “**Capacity**”.

I tend to take this with a grain of salt, as most of them are very astute when it comes to measuring a person's capacity, especially if they are not telling the truth.

Recommendation

There needs to be more training given to the people who are able to act as a witness to the signing of these EPA's.

I would make it mandatory that a checklist similar to that drawn up by the State Trustees and the Royal Victorian Association of Honorary Justices be used, they each have a list that must be signed off before witnessing the EPA.

The RVAHJ uses a standard “**File Note & Checklist**,” which includes the Date of signing, the Witnesses Names and the Donor’s Name.

The first requirement is to find out if the Donor is making out the EPA voluntarily and without pressure from any person.

Then the Donor is asked if they know what an EPA is, and could they explain in their own words what they think it is for.

They are asked if they understand the nature and effect of the EPA, in particular do they understand each of the following:-

- a. That he/she may, in the EPA, specify conditions or limitations on, or instructions about, in the exercise of the power to be given to the attorney;
- b. When the power is exercisable;
- c. That once the power is exercisable, the attorney has the same powers as he/she had (when not under legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the EPA;
- d. That he/she may revoke the EPA at any time he/she is capable of making an EPA;
- e. That the power of attorney is given continues even if he/she subsequently ceases to have legal capacity;
- f. That any time that he/she is not capable of revoking the EPA, he/she is unable to effectively oversee the use of the power.

If both witnesses are of the opinion that the donor appears to have capacity necessary to make the EPA a box is marked accordingly.

Upon confirmation that these issues were covered and answered to the satisfaction of both witnesses, they agree to the issue of the certificate by signing the **File Note and Checklist**.

Both witnesses can then make a copy of the **File Note & Checklist** to keep for their records purposes should there be future disputation.

If either of the witnesses has any doubt or misgivings about the capacity of the donor it is suggested that a doctors certificate be sought in respect to **“Capacity”**.

Submitted by: Mr Robert C. Bolch JP

ITEM 3

DETERMINING DONOR'S CAPACITY

The “**Capacity**” or otherwise of an individual is sometimes difficult to define, for instance during the early stages of **Dementia** or the onset of **Alzheimer's** a person may have good days and bad days.

There are a series of questions which can be asked to gauge a person's capacity, however, this type of test should only be applied by a person who is to be a witness when the donor is about to sign the Enduring Power of Attorney.

If there is any doubt as to the donor's capacity, the witness should tactfully suggest to the person who is accompanying the donor, (usually the proposed attorney) that they seek the opinion of a medical practitioner.

I am concerned about the expertise of persons able to be witnesses at the signing of an EPA as it is only through experience that one is able to discern whether a person who is suffering from a **Neuromuscular Ailment** has “**Capacity**”.

Many prospective witnesses under the current system would judge that because the donor has lost a major part of their control over muscles due to **Motor Neurone** related causes, they are unable to make decisions about their future.

Because a donor is unable to control a pen to sign a document does not relate to their reasoning processes, a case in point is the one of the most influential thinkers of our time, *Stephen Hawking*.

Unquestionably regarded as one of the most brilliant theoretical physicists since Albert Einstein, although confined to a wheelchair, unable to write he produced the book “*A Brief History of Time.*”

This book was on the London “*Sunday Times*” bestseller list for over four years, longer than any other book has been, and remarkable for a book on science that was not easy going.

Recommendation

I do not believe that it is necessary for a doctor to be asked to assess every donor who wishes to make an Enduring Power of Attorney.

It should be mandatory however, that a Doctor is required to assess a donor's loss of capacity if his/her Attorney has sufficient concern, there may be a need to give or increase some type of medication that the donor may have been prescribed, which could be affecting their capacity.

The examining Doctor should sign a suitably worded form attesting to the donor's capacity or the lack thereof.

If in the future EPA's are registered, then an automatic electronic link between the doctor and an agency capable of holding the document for a prescribed period in case of appeal should be set up.

If after the prescribed period there is no appeal, the holding agency should notify the donor's attorney and any other bodies such as the Land Titles Office etc.

Submitted by: Mr Robert C. Bolch JP

ITEM 4

DETERMINING THE POWERS OF AN ATTORNEY

Currently there would seem to be sufficient legislation to protect both the donor and attorney's interests enshrined in the "*Instruments Act 1958*".

If some of the Attorneys really understood the ramifications of the legislation, I wonder if they would volunteer to take on the responsibility.

At face value there appears to be ample information available by accessing the Net or through the Office of the Public Advocate for this purpose.

Recommendation

Taking the role of the Devil's Advocate I would like to see a clause inserted in any Enduring Power of Attorney to the effect that the donor has in their possession, and fully understands the application of the following forms:-

- **Consent to the disclosure of medical and personal information**
- **Revocation of Enduring Power of Attorney**
- **Certificate of Witnesses**
- **Statement of Acceptance for Attorneys**
- **Form 1 Application to Guardianship List**

I have included the last item so that the donor may know that they can ask someone else to act on their behalf if they think their attorney is abusing his/her powers.

Submitted by: Mr Robert C. Bolch JP

ITEM 5

ABUSE OF POWER OF ATTORNEY

When asked to witness the signing of any Power of Attorney, more especially Enduring Power of Attorney documents, I try to isolate the Donor from anyone who may be accompanying them so that I can try to gauge whether they are cognizant of the ramifications of the document.

In the first instance, I want to be sure that they are not under any duress and have capacity to understand why they are signing the document.

Secondly, I try to find out whether they realize the document gives certain rights to someone else to administer their finances/medical affairs and in some instances their lifestyle.

I ask why they want to give someone their Power of Attorney and whether they have any restrictions or limitations they wish to have inserted in the conditions of the EPA.

If the EPA is to take effect immediately, I explain that they are still able to revoke the EPA whilst they still have capacity and issue them with the appropriate **“Revocation of Power of Attorney”** Forms.

The answers to all the aforementioned questions are recorded on a prepared form should there be any future disputation.

I become concerned when I am asked to witness an EPA and find that the donor has not been told that they may revoke the EPA and the person who has driven the donor to my house (usually the Attorney) is also not aware of its existence.

The worst-case scenario being that the Attorney knows of the existence of this form and chooses to suppress this information from the donor.

Recommendation

Perhaps the greatest problem is that people leave the drafting and signing of an EPA until the last moment, when the Son or Daughter suddenly realize that their parents; or in some cases the sole surviving parent, can no longer look after their affairs or they need constant care, found only in a nursing home or similar institution.

I believe there needs to be a series of advertisements in the Newspapers and on TV; something along the lines of suggesting that newlyweds seriously consider drafting out reciprocal Power of Attorney documents covering their Financial and Medical affairs in the event of an unforeseen accident.

These documents may need adjustments; as and when circumstances change, say every two or five years.

In the interests of safeguarding the rights of the donor and ensuring transparency in dealings carried out by attorney's I would agree that all Power of Attorney Documents be registered and linked electronically to any other agency affected by their implied conditions, such as the Land Titles Office.

Submitted by: Mr Robert C. Bolch JP