

Guidance Statement No. 5 – Witnessing Enduring Powers of Attorney (Published 2 November 2015)

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2. What is the issue?

Challenges frequently arise for solicitors who receive instructions to witness an Enduring Power of Attorney ('EPA') in circumstances where there are doubts or questions about the person's capacity. The considerations relevant to the witnessing of an EPA are different to those relevant to witnessing a will. This Guidance Statement identifies those considerations and suggests steps that a solicitor should prudently take to avoid disciplinary and other consequences and which are consistent with the solicitor's professional and ethical obligations.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society ('QLS') Ethics and Practice Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the note and following the guidance it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement is endorsed by the QLS Ethics Committee as representing a standard of good practice.

2. Relevant principles

The considerations relevant to the execution of EPAs arise in a statutory context. Section 44(4) of the *Powers of Attorney Act 1998* (Qld) ('POA Act') requires a witness to an EPA to certify that the principal signed the EPA in the presence of the witness and that, at the time, appeared to the witness to have the capacity necessary to make the EPA.

Section 41 of the POA Act provides:

'41 Principal's capacity to make an enduring power of attorney

- (1) *A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.*
- (2) *Understanding the nature and effect of the enduring power of attorney includes understanding the following matters –*
 - (a) *the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;*
 - (b) *when the power begins;*
 - (c) *once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;*
 - (d) *the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;*
 - (e) *the power the principal has given continues even if the principal becomes a person who has impaired capacity;*
 - (f) *at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.'*

'Capacity' is defined in the schedule 3 dictionary as follows:

'capacity, for a person for a matter, means the person is capable of –

- (a) *understanding the nature and effect of decisions about the matter; and*
- (b) *freely and voluntarily making decisions about the matter; and*
- (c) *communicating the decisions in some way.'*

Thus, a solicitor witnessing an EPA must certify that it appeared to the solicitor that the principal had the requisite capacity to make the EPA. That certification must, self-evidently, be made having regard to s 41 of the POA Act and the definition of capacity in sch 3. No such certification is required of a solicitor witnessing or taking instructions for a will.

3. Issues Arising and Recommendations

In 2005, the Office of the Adult Guardian published 'Capacity Guidelines for Witnesses of Enduring Powers of Attorney' which, in summary:

- (a) identified indicators of impaired capacity;

- (b) recommended that the witness ask a series of 'open-ended' questions (that is, questions requiring more than 'yes/no' answers);
- (c) recommended that the witness take notes recording the questions asked and the principal's responses; and
- (d) recommended that if the witness had doubts about the principal's cognitive ability, the witness refer the principal to a health care professional to make an assessment of capacity.

A number of practitioners have faced disciplinary proceedings and sanctions for not following those guidelines when witnessing an EPA and because they did not make and keep proper records of the circumstances in which the execution occurred:

- *Legal Services Commissioner v Ford* [2008] LPT 12;
- *Legal Services Commissioner v de Brenni* [2011] QCAT 340;
- *Legal Services Commissioner v Comino* [2011] QCAT 387;
- *Legal Services Commissioner v Penny* [2015] QCAT 108; and
- *Legal Services Commissioner v Given* [2015] QCAT 225.

The Office of the Public Guardian has published 'Guidelines for Witnessing Enduring Documents' ('OPG Guidelines') which supersede, but are materially the same as, the 2005 Guidelines. The OPG Guidelines are appended to this Guidance Statement and marked as Appendix A.

Although, as Thomas J observed in *Legal Services Commission v Penny* [2015] QCAT 108, the steps which should be taken by a solicitor witnessing an EPA so as to be satisfied that the principal has the requisite capacity will vary depending upon the particular circumstances, it is suggested that solicitors will place themselves at considerable risk of disciplinary sanction if they do not follow the OPG Guidelines where there is any apparently real question about the principal's capacity. In that circumstance, and having regard to the certification required by s 44(4) of the POA Act, good, prudent practice would be to follow the OPG Guidelines.

In the ordinary case, a solicitor witnessing an EPA will also have taken instructions for a will. The *Queensland Handbook for Practitioners on Legal Capacity* contains detailed guidance relevant to the solicitor's duties in that connection.

4. More Information

Solicitors are referred to *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society, June 2014.

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or ethics@qls.com.au