

Customer Information Bulletin

Bulletin No. 129
June 2003

SUBSTITUTE PROVISIONS FOR ENDURING POWER OF ATTORNEYS

Following the amendments to sections 102 and 104 of the Guardianship and Administration Act 1990 ("the Act") operative from December 2000 and the insertion of section 104B to allow the appointment of substitute donees, enduring powers of attorney (EPAs) containing vague provisions have been lodged for noting at the Department of Land Administration (DOLA).

Many legal practitioners and other persons preparing EPAs have sought clarification from DOLA on its policy in regard to what is required in an EPA with substitute provisions.

For your assistance, the following comments are provided to set out some issues that need to be considered when preparing such EPAs.

1. SUBSTITUTES FOR JOINT AND SOLE DONEES

Prior to the amendments to the Act enabling substitute donees to be appointed, where an EPA appointed two donees jointly the death or legal incapacity of either of those attorneys brought the EPA to an end. Similarly where only one donee was appointed the subsequent death or legal incapacity of that donee brought the EPA to an end.

Section 102 of the Act defines "donee" to include a joint donee and a substitute donee. Section 104B authorises the appointment of a person to be a substitute donee.

If the legislation did not allow the survivor of joint donees to be appointed as the substitute and did not allow a substitute to be named for a sole donee, it would then follow that substitutes were unable to be appointed in any situation except where the original donees were appointed as joint and several. This would be a severe restriction on the ability to provide for substitute donees to the point of rendering the amended legislation pointless.

Until a Court decides on the issue DOLA accepts that a substitute can be appointed for both joint and sole donees and that it is possible to appoint the survivor of joint donees as a sole substitute donee or as a joint or joint and several donee with an additional substitute donee.

It should be noted that while this is a simple concept on death or legal incapacity of one of the original donees, it could cause considerable problems if substitution is to take place for any other reason.

2. STANDARD REQUIREMENTS

Form

It is recommended that the format of the prescribed Form 1 set out in Schedule 3 of the Act be used and that legal practitioners not attempt to draft their own different documents.

Note also that it is not a requirement of the Act that substitute donees be appointed. Some donors may not require a substitute especially where original donees have been appointed as joint and several.

Substitute

In each case where an EPA with a substitute provision has been lodged and noted and the substitute power has been activated, a statutory declaration by the substitute donee who has the authority to act under the power at that time and who executed documents being lodged and/or performed any prerequisite actions, is to be lodged at DOLA each time registration of such a document is sought.

That declaration will need to:

- (i) state that the substitution provision has taken effect; and
- (ii) detail the circumstances and dates when substitution commenced and/or stopped, covering all periods relevant to the document being lodged.

Original and Substitute

Once the substitute power has been activated evidence must be provided to the Registrar of Titles every time a document executed by a donee, whether original or substitute, is lodged for registration.

That evidence must consist of:

- (a) a statutory declaration by the donee executing the document; and
- (b) other supporting evidence (which will depend on the circumstances) sufficient to satisfy the Registrar of Titles that the executing donee had the requisite power at the time of execution.

The statutory declaration must confirm that the donee, whether original or substitute, executing the document, had the requisite power at the time of execution and must provide details of the circumstances and dates when substitution commenced and ceased, covering all periods relevant to the document being lodged.

It is incumbent on the donee exercising the power to provide sufficient information in a statutory declaration and to produce sufficient supporting written evidence to satisfy the Registrar of Titles that the event or circumstance stated in the EPA on which substitution or its cessation is to take effect, has occurred.

3. CLEAR UNAMBIGUOUS CONDITIONS

It is recommended that, where possible, the events or circumstances referred to in section 104B specified as those on or during which the substitution provisions of an EPA will operate and a substitute donee becomes the donee, should fall within those listed below.

- (a) Death of original donee;
- (b) Incapacity of the original donee, either:
 - (i) legal; or
 - (ii) physical;
- (c) Bankruptcy of the original donee.

If any other event or circumstance is requested by a donor to be inserted, then that event or circumstance should be capable of objective assessment and must be specified in unambiguous terms such as “absent from the jurisdiction”, or “absent from the jurisdiction for more than week(s)/months”.

For the substitution provisions to take effect in respect of:

(a) Death

- A statutory declaration from the substitute donee; and
- A certified copy of the death certificate of the original donee

must be produced at DOLA with the first document executed by the substitute donee lodged for registration. A copy of the death certificate will be retained by DOLA and the change in donee noted.

(b) (i) Legal Incapacity

- A statutory declaration from the substitute donee; and
- A doctor’s certificate setting out details of the incapacity, confirming that the incapacity precludes the original donee from acting as an attorney and whether, in the doctor’s opinion, the incapacity is permanent or temporary; or
- An order of the Guardianship and Administration Board (“the Board”) confirming the original donee’s incapacity

is to be lodged with the first document executed by the substitute donee lodged for registration.

- A statutory declaration from the substitute donee; and
- A new doctor’s certificate in terms similar to that of the original one

is to be lodged with each document lodged for registration confirming that the incapacity continues.

If the original statutory declaration of the substitute donee was accompanied by an order of the Board, any subsequent statutory declaration must confirm that the order of the Board has not been altered or revoked.

(ii) Physical Incapacity

- A statutory declaration from the substitute donee; and
- Supporting written corroborative evidence, including a statutory declaration/certificate by a doctor or other appropriate person (in the same terms as that for a legal incapacity), setting out the physical incapacity in terms sufficient to satisfy the Registrar of Titles

is to be lodged on each occasion that a document executed by the substitute donee is lodged for registration.

(c) Bankruptcy

- A statutory declaration from the substitute donee; and
- A current certificate of bankruptcy

is to be lodged on each occasion that a document executed by the substitute donee is lodged for registration.

4. UNCLEAR AMBIGUOUS CONDITIONS

4.1 Court or Board Ruling

If it is unclear whether the terms used in the substitution clause apply to the circumstances on which it is claimed that the substitution or its cessation has occurred, an order of the Board, or a court, that the person executing the relevant document was authorised to do so at the time of execution may need to be lodged in support of the lodged document.

4.1.1 Unavailable, Unwilling and Unable

Introduction

A number of EPAs containing one or more of the above terms have been lodged with the Registrar of Titles. These terms are probably the most usual type of ambiguous term, in the context of substitute powers of attorney. As such, they illustrate some of the problems that could arise by the use of vague terms.

4.1.2 Contrast Between Wills and Substitute Powers

Although such terms can reasonably be used in a will for appointment of alternative executors, there are difficulties in using them in the appointment of temporary substitute attorneys.

The use of the terms in wills removes the legal representative either permanently or for a finite or determinable period and is effected by a Court order. In contrast, an EPA can contemplate the original donee and the substitute donee sometimes having power and sometimes not.

The Court does not make immediate determinations. It makes determinations based on evidence presented. Those determinations are usually based on an examination of a permanent condition or one where there is likely to only be one change back if the original donee recovers, returns, etc. The extent of the absence, recovery, etc, is clearly defined – for example, out of the jurisdiction, recovers from mental illness, etc.

In contrast, an EPA is acted on at settlement, the time frame is shorter, decisions may need to be made by settling parties, without the benefit of a court ruling. It is suggested many settling parties may not be prepared to settle on that basis.

4.1.3 Areas of Uncertainty

Does an original donee saying in response to a request to execute a document “I am in a meeting and therefore unable, unwilling, unavailable to sign a document” fit within the intent of the Act and within the intent of a donor?

What if there is conflict/disagreement between the original donee and the substitute donee? Does “unwilling” enable the substitute donee to sell the donor’s property when the original donee is not willing to sell? Does that entitle the substitute donee to exercise the power?

As the concepts are so broad and subject to such variation and subjective interpretation, it is highly likely that original and substitute donees and sometimes lawyers, settlement agents, banks and financiers will attempt to interpret the provisions in all sorts of ways and situations that none of us can imagine and that certainly would not be within the intent of the Act or of the donor.

4.1.4 Reliance on a Vague Condition

Unable, unwilling and unavailable are vague concepts in the context of an EPA that can stop and start its operation in relation to an original donee and as a result, in relation to a substitute donee.

If one of those terms is used, it should be qualified by a statement as to the situation that will constitute the inability, unwillingness or unavailability for the purposes of the EPA.

If a donor wishes to use one of those terms as events or circumstances without qualification, legal advice should be obtained so that a solicitor can explain the legal implication and evidentiary problems for a substitute or original donee acting on the power.

It is recommended that donors should specify in clear terms those situations in which it is envisaged that the substitute donee’s powers would come into or cease operation.

Considerable care and judgment will be needed by those relying on the validity of an exercise of power by a substitute attorney or by a recommencing original donee that they are satisfied that the power has been properly exercised and that they have all necessary evidence to support their assessment of the position.

As it is not the role of the Registrar of Titles to advise his or her position on a particular case before lodgment of documents, it places a heavy onus and risk on lodging parties. A risk that they may seek to overcome by requiring a court or Board ruling before executing documents.

A statutory declaration will always be required from a substitute donee (except where satisfactory evidence has previously been provided of the permanent removal of the original donee/s) and from an original donee whose power has been reactivated

The type of supporting evidence that should be considered would be:

- Are detailed statutory declarations as to relevant circumstances from the original and/or substitute donee sufficient?
- Is a suitably detailed medical certificate from an appropriately qualified medical practitioner addressed to the Registrar of Titles and to whom it may concern appropriate?
- Are supporting statutory declarations from other persons appropriate?
- Is a legal submission with reference to case law or texts appropriate?
- When did the state of “inability, unwillingness, unavailability,” commence, when did it stop or when is it anticipated that it will stop?
- Is an order from a Court or the Board appropriate?

It is recommended that practitioners stop using general terms in the enduring power of attorney context. It is suggested that they specify with more precision the circumstances in which the substitute attorney can act so that original and substitute donees and people dealing with them can act with certainty and a minimum of fuss and inconvenience.

Where very general or vague terms have been used in EPAs and the donors still have full capacity, it is recommended that legal practitioners inform their clients of the evidentiary problems which may be encountered when the EPA power is to be used by a substitute donee or by an original donee whose power has recommenced. The practitioners should, where possible, encourage such donors to prepare new EPAs worded in more specific terms.

Failure to advise clients of potential evidentiary problems could lead to a negligence claim against the practitioner at a later time.

4.1.5 DOLA's Approach to Documents Executed by a Donee of an EPA with Vague Conditions

Before acting on the exercise of power by the substitute donee, DOLA will require clear, well corroborated evidence of either:

- a permanent intention of the original donee not to act or a permanent lack of capacity of the original donee to act; or
- where the original donee is temporarily unable to act, evidence similar to that required in the situation where a court would grant probate, for instance subject to a limitation in case of coming of age, return of mental capacity, return to the jurisdiction, etc.

Whenever an original donee intends to withdraw permanently that is taken to be a renunciation and if the donor has lost capacity the original donee must first obtain the leave of the Board under section 107(1) of the Act.

Before acting on the exercise of a power by an original donee whose power has been reactivated, DOLA will require a statutory declaration from that donee setting out the circumstances of the cessation and reactivation of the power and possibly, depending on circumstances, other supporting written evidence.

The evidence required will vary in each case and will include a statutory declaration and probably a legal submission in support and may, depending on other evidence provided, require a court or Board ruling as to whether the exercise of the power can safely be relied on by the Registrar of Titles.

Until a body of precedent has developed, it will be necessary to deal with each case and, later, each unusual or temporary operation of the substitute provision, on a case by case basis.

**BARRY CRIBB
A/MANAGER
REGISTRATION SERVICES BRANCH**

26 June 2003