*Robin Creyke**

PRIVATISING GUARDIANSHIP - THE EPA ALTERNATIVE

> The introduction of EPA legislation would also promote the underlying philosophy of [guardianship legislation], namely, that ... guardianship should be viewed as a last resort and should not be imposed if there exists a less restrictive alternative ... EPA legislation represents such an alternative.[1]

THIS paper explores the need to develop protective management services other than formal guardianship and management of property for those who are mentally incompetent. It does so against a background of increased demand for such services. It is not easy to estimate the size of that demand. In 1988 there were some 304,500 people in Australia suffering some form of mental handicap,[2] 111,100 of a severe variety.[3] Disabled people living in households who needed help with personal affairs, which included financial management and writing letters, numbered 341,000.[4] Nearly half that number (156,500 people) were over 60.[5] Not all these people need formal or informal help with decision-making but a sizeable and growing proportion, particularly among the elderly, do so.

An indicator of the size of the need for substitute decision-making is the increasing number of people who are making use of guardianship and property management services,[6] and the legislative attention given in the

---

* Senior Lecturer, Faculty of Law, Australian National University. The author wishes to acknowledge with thanks the assistance in the preparation of this paper of Graeme Hill, Damien Coleman and Natalie Sheard.

1 Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion No 7, February 1991) p23.

2 Australian Bureau of Statistics, *Disability and Handicap: Australia, 1988* (AGPS, Canberra 1988) Catalogue No 4120.0, Table 10.

3 Catalogue No 4120.0, Table 12.

4 Catalogue No 4120.0, Table 35 and Glossary 41.

5 Australian Bureau of Statistics, *Domestic Care of the Aged: Australia, 1988* (AGPS, Canberra 1988) Catalogue No 4121.0, Table 13.

6 For example, in 1991/92 in Victoria there were 3,382 applications to the Guardianship and Administration Board and in New South Wales there were

last ten to fifteen years to upgrading formal guardianship and management of property legislation in Australasia.[7] That upgrading has now been accomplished in all but two Australian jurisdictions, Queensland and Tasmania. The Queensland Law Reform Commission has recommended that a guardianship tribunal be set up for that State,[8] and the Tasmanian Bill is expected to be introduced into Parliament in the second half of 1993, hopefully to commence on 1 January 1994. Tasmania was the first State in Australia to introduce a guardianship board.

There are a variety of mechanisms for formal assistance with legal decision-making for incompetent adults. Guardianship and management of property remain at the formal end of the range. Other, less formal, alternatives include "living wills", substitute payee schemes for welfare benefits and the enduring power of attorney (EPA). It is the EPA which will be the focus of this article. This statutory device has been introduced in each Australian jurisdiction, the first scheme appearing in the Northern Territory in 1980,[9] and the final one, in Western Australia, commenced on 1 July 1992.[10]

AGENCY AS A SURROGATE DECISION-MAKING TOOL

Agency is the basis for all surrogate decision-making mechanisms, including EPA schemes, other than guardianship and management of property, and trusteeship.[11] Agency is a well-established doctrine of

---

4,315 applications (advice from the Victorian and New South Wales Guardianship Boards).

7 ACT: *Guardianship and Management of Property Act* 1991; NSW: *Protected Estates Act* 1983, *Disability Services and Guardianship Act* 1987; NT: *Adult Guardianship Act* 1988; Qld: *Intellectually Disabled Citizens Act* 1985; SA: *Mental Health Act* 1977, *Guardianship and Administration Act* 1993; Tas: *Mental Health Act* 1963 (new guardianship legislation is being drafted in Tasmania); Vic: *Guardianship and Administration Board Act* 1986; WA: *Guardianship and Administration Act* 1990 (the guardianship provisions came into force on 20 October 1992); NZ: *Protection of Personal and Property Rights Act* 1988.

8 Queensland Law Reform Commission, *Assisted and Substituted Decisions - Decision-making for People Who Need Assistance Because of Mental or Intellectual Disability: A New Approach* (Discussion Paper No 38, 1992) pp37-39.

9 *Powers of Attorney Act* 1980 (NT). There was an abortive attempt the previous year (*Powers of Attorney Act* 1979 (NT)) which was found not to have been properly passed.

10 *Guardianship and Administration Act* 1990 (WA) Part 9.

11 That is, of the nominee scheme for social security beneficiaries and the veterans' trustee scheme, for "living wills" or "health care directives" and of schemes in

English law. There is dispute about its origin[12] but none about its current function. Any person who has legal capacity can appoint someone, commonly called an agent or attorney, to act on their behalf. The appointment may be oral or in writing. A common written form is the power of attorney. The legal authority conferred by the person creating the relationship (the principal) is the power to affect the legal relations of the principal,[13] for example, to buy or sell property on the principal's behalf, to contract for the principal or to pledge the principal's credit.

In acting on behalf of the principal the agent becomes the *alter ego* or the "facsimile"[14] of the principal and has all the authority of the person making the appointment. This has been expressed in the maxim *qui facit per alium qui facit per se*. The fictional nature of this maxim is illustrated by the fact that it is the legal, not the actual, capacity of the principal which is replicated in the agent. The level of understanding of the principal need not, at law, match that of the agent. Indeed agents such as accountants or stockbrokers are frequently chosen because the principal does not possess their level of skill and training. Pollock's analysis of the legal relationship, "by agency the individual's legal personality is multiplied in space",[15] could be redrafted as "by agency the individual's legal personality is multiplied *and expanded* in space".

An essential pre-requisite to establishing an agency relationship is that the principal has legal capacity. Once a person has formally been found to be incompetent, that person loses the ability to manage their affairs, even during a lucid interval, and this includes the ability to confer power to act on an agent.[16] This rule applies to all forms of agency including those established by powers of attorney. Hence it follows that, with limited

---

financial institutions for substitute operatives of accounts, as well as powers of attorney including enduring powers.

12 Stoljar, *The Law of Agency* (Sweet & Maxwell, London 1961) p14 (origin traced through three sources: action of debt and assumpsit; action concerning deeds; and the action of account); Fridman, *The Law of Agency* (Butterworths, London, 6th ed 1990) pp3-8 (traced agency to the English doctrine of uses, the action for debt and certain doctrines of mercantile law).

13 Fridman, *The Law of Agency* pp9-10.

14 Dowrick, "The Relationship of Principal and Agent" (1954) 17 *MLR* 24 at 37.

15 Winfield, *Pollock's Principles of Contract* (Stevens & Sons Ltd, London, 13th ed 1950) p45; quoted in a seminal article on agency, Dowrick, "The Relationship of Principal and Agent" (1954) 17 *MLR* 24 at 37.

16 *In re Walker (A Lunatic So Found)* [1905] 1 Ch 160; *Gibbons v Wright* (1954) 91 CLR 423; *In re Marshall* [1920] 1 Ch 284.

statutory exceptions,[17] an agent cannot represent the principal after that person has lost capacity. This is a major deficiency of agency, at least for its use by people who are mentally incompetent. The achievement of EPA legislation has been to extend an agent's authority so that the agent continues to represent the principal after incompetence and this is the central feature of EPA statutes. The authority of an EPA attorney continues either for a fixed period, if so specified in the EPA document, or until the principal dies.

Another legislative initiative which has been taken in some jurisdictions has been to enlarge the agent's authority beyond business and financial matters - its traditional field - to decisions of a personal nature, including medical matters. To date these developments have only occurred in the Australian Capital Territory, South Australia, Victoria and New Zealand,[18] but are proposed for others.[19] Without this expansion of an agent's function the EPA could not become an alternative to guardianship and EPAs could not become a comprehensive legal mechanism for surrogate decision-making, a matter discussed later in this article.[20]

Australia, like Canada[21] and the United States of America[22] now has enduring powers of attorney (EPA)[23] legislation in every jurisdiction.[24]

---

17 The limited statutory exceptions apply in cases of registration, when the power is expressed to be irrevocable and when the attorney has acted in good faith without notice of revocation. See ACT: *Powers of Attorney Act* 1956 ss5, 6, 7, 8, 11, *Real Property Act* 1925 s131; NSW: *Conveyancing Act* 1919 ss160, 161, 162, 162A, 162B, 163, 163E; NT: *Real Property Act* 1886 ss157, 160, *Powers of Attorney Act* 1980 ss19, 20, 21, *Statute Law Revision (Registration of Instruments) Act* 1991; Qld: *Property Law Act* 1974 ss171, 173, 174, *Real Property Act* 1861 ss104, 108, 109, Real Property Regulations 1986, Sch 1, Forms 37, 38; SA: *Real Property Act* 1886, ss157, 160, *Registration of Deeds Act* 1935 s35, *Powers of Attorney and Agency Act* 1984 s12; Tas: *Powers of Attorney Act* 1934 ss7, 10, 11, 12, 13; Vic: *Instruments Act* 1958 ss105(2), 109, 110, 118; WA: *Transfer of Land Act* 1893 s143, *Property Law Act* 1969 ss85, 86, 87; NZ: *Deeds Registration Act* 1908.

18 ACT: *Powers of Attorney Act* 1956 s13, Sch, Form 2, Parts B and C; SA: *Consent to Medical Treatment and Palliative Care Bill* 1993 cl 7; Vic: *Medical Treatment Act* 1988 s5A (but see *Instruments Act* 1958 s117(5) which prevents agents under an ordinary enduring power of attorney from making decisions about medical treatment); NZ: *Protection of Personal and Property Rights Act* 1988 s98.

19 For example, Queensland Law Reform Commission, *Assisted and Substituted Decisions* p96.

20 See below at pp98-101.

21 As above. Since the discussion paper was published Newfoundland, Quebec and Alberta have all passed enduring powers legislation which is now in force;

However, although designed to perform the same function - to enable an agent or attorney to continue to represent the principal despite the principal's legal incompetence - there is little uniformity between the various schemes; no reciprocal recognition of EPAs between Australian jurisdictions, much less those created in New Zealand; and scant attention has been given to the relationship of EPAs with other protective management mechanisms, in particular, guardianship and management of property. This article will consider whether any of these steps are needed or desirable but first it will examine the question of whether EPAs could become an alternative to both guardianship and management of property.

GUARDIANSHIP AND MANAGEMENT OF PROPERTY

The reform of guardianship laws has taken longer to achieve than reform of EPA law and is not yet complete.[25] Guardianship and management of property schemes, less formal in nature than the former court-based

---

Alberta: *Powers of Attorney Act* SA 1991, c P-13.5; Newfoundland - *Enduring Powers of Attorney Act* SN 1990, c 15; Quebec - SQ 1989, c 54, s111 (enacting articles 1731.1 - 1731.11 of the *Civil Code*).

22 Alberta Law Reform Institute, *Enduring Powers of Attorney* (Discussion Report No 7, 1991) p23.

23 In New South Wales an enduring power is known as a "protected power of attorney" (*Conveyancing Act* 1919 (NSW) s163D). The Victorian Law Reform Commission in its 1990 report on EPAs recommended a change of name to "enduring powers of management"; Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990) p1.

24 ACT: *Powers of Attorney Act* 1956 (as amended by the *Powers of Attorney (Amendment) Act* 1989; *Guardianship and Management of Property (Consequential Provisions) Act* 1991; *Powers of Attorney (Amendment) Act* 1992); NSW: *Conveyancing Act* 1919 (as amended by the *Conveyancing (Powers of Attorney) Amendment Act* 1983); NT: *Powers of Attorney Act* 1980; Qld: *Property Law Act* 1974 (as amended by the *Property Law Amendment Act* 1990); SA: *Powers of Attorney and Agency Act* 1984; Tas: *Powers of Attorney Act* 1934 (as amended by the *Powers of Attorney Amendment Act* 1987); Vic: *Instruments Act* 1958 (as amended by the *Instruments (Enduring Powers of Attorney) Act* 1981, *Guardianship and Administration Board Act* 1986 and the *Medical Treatment (Enduring Power of Attorney) Act* 1990); WA: *Guardianship and Administration Act* 1990 Pt 9 (which came into force on 1 July 1992).

25 In two jurisdictions major changes are being proposed: Tasmania, in which amendments to its guardianship laws are to be introduced into Parliament and Queensland, where the Queensland Law Reform Commission published a discussion paper in July 1992 which recommended that an independent tribunal be set up to determine protective management matters; Queensland Law Reform Commission, *Assisted and Substituted Decisions* pp37-39.

schemes, now exist in every Australian State and Territory.[26] The delay is not surprising since guardianship law touches on important rights of individuals, a matter recognised internationally,[27] and traditionally it has been the province of the courts. A new approach to guardianship law therefore required that there be adequate safeguards in the legislation and in those cases - the majority in Australasia - in which the guardianship jurisdiction was granted to a quasi-judicial tribunal, procedural technical rules were required in the legislation in substitution for rules governing the exercise of the inherent jurisdiction of the superior courts.[28]

In those jurisdictions where modernisation of guardianship law has taken place, the result has been to provide guardianship schemes which are readily accessible. Costs are non-existent or minimal,[29] and formalities of hearings have been significantly reduced to make the process less cumbersome and intimidating for users.[30] These laudable attempts have been - it could be argued - embarrassingly successful.[31] When guardianship was solely a matter for the courts it could usually only be

---

26 ACT: *Guardianship and Management of Property Act* 1991; NSW: *Disability Services and Guardianship Act* 1987; NT: *Adult Guardianship Act* 1988; Qld: *Intellectually Disabled Citizens Act* 1985; SA: *Guardianship and Administration Act* 1993; Tas: *Mental Health Act* 1963; Vic: *Guardianship and Administration Board Act* 1986; WA: *Guardianship and Administration Act* 1990; NZ: *Protection of Personal and Property Rights Act* 1988.

27 *United Nations Declaration on the Rights of Mentally Retarded Persons* 20 December 1971, UN General Assembly Resolution 2856 (XXVI) art 1 & 5; *United Nations Declaration on the Rights of Disabled Persons* 9 December 1975, UN General Assembly Resolution 3447 (XXX) art 3, 4, 5.

28 Carney & Tait, "Guardianship Dilemmas and Care of the Aged" (1991) 13 *Syd LR* 61 at 73.

29 Vic: *Guardianship and Administration Board Act* 1986 s10. The only jurisdiction which charges a filing fee for guardianship is the Australian Capital Territory where the fee is currently $20.00. The fee is not payable by the Community Advocate nor the Public Trustee and can be waived for individuals who are legally assisted or for whom the fee would cause hardship; Guardianship and Management of Property Tribunal Regulations 1992 rr 5, 7.

30 ACT: *Guardianship and Management of Property Act* 1991 s38(1); NSW: *Disability Services and Guardianship Act* 1987 s55; NT: *Adult Guardianship Act* 1988 s12(2); Qld: *Intellectually Disabled Citizens Act* 1985 s30(4); SA: *Guardianship and Administration Act* 1993 s14; Tas: *Mental Health Act* 1963 s8, Sch 3; Vic: *Guardianship and Administration Board Act* 1986 s10; WA: *Guardianship and Administration Act* 1990 s15; NZ: *Protection of Personal and Property Rights Act* 1988 Pt VI (procedure of Family Court).

31 For example, in Victoria in 1987/88 there were 1,941 applications and 1,772 appointments; and in 1991/92, 3,382 applications and 2,763 appointments. In NSW in the six months to December 1989 there were 671 applications; and in 1991/92, 4,315 applications and 1,396 appointments.

afforded by those with considerable property. The removal of guardianship determinations to state run tribunals has made guardianship generally accessible and guardianship has become a high volume jurisdiction.

The pressure created by this, to an extent, unexpected development has brought its own cost. In his first *Annual Report* the President of the Victorian Guardianship and Administration Board, Mr Tony Lawson, commented that "1987-88 saw the Board receive more than three times the number of applications than was originally predicted".[32] In his second such report Mr Lawson noted that "during 1988-89 the Board conducted 3,100 hearings. This was a 50.6% increase over the previous year."[33] The larger than expected numbers of applications in Victoria was replicated when the New South Wales Guardianship Board opened its doors. From these experiences it is apparent that pent-up demand, which may have explained the early figures, cannot account for the continuing increase in numbers of people seeking the appointment of formal decision-makers.

The burgeoning case load necessitates the development of strategies to prevent the hearings lists creating an impossible workload for tribunal members.[34] In these times of fiscal stringency it is unlikely that governments will look kindly on continual requests for increases in staff to service the demand for guardianship services. Governments welcome alternative systems which they will not be required to fund. Indeed, in time, use of alternatives such as EPAs could even be revenue raisers for public agencies.[35] It is against this background that examination of the EPA alternative will take place.

EPA SCHEMES IN AUSTRALIA

The impetus for this special, enduring power of attorney arose principally because of community misunderstanding of the law. Widespread belief that the appointment of an agent under an ordinary power of attorney represented prudent planning for incapacity led Law Reform agencies in

---

32 Victoria, Guardianship and Administration Board, *Annual Report 1987-88* p1.

33 Victoria, Guardianship and Administration Board, *Annual Report 1988-89* p9.

34 Carney & Tait, "Guardianship Dilemmas and Care of the Aged" (1991) 13 *Syd LR* 61 at 68-70.

35 The Public Trustee in South Australia noted that their officers, when making a will, recommend as a matter of routine that clients make an EPA at the same time. The Public Trustee estimates that, in time, the modest management fee of 4% of the value of the property could return a profit.

Australia, as elsewhere in the common law world, to recommend that the law be amended to reflect these expectations.[36]

The result is that individuals, while competent, are now capable of appointing in advance agents who will continue to manage their affairs after they have lost capacity to do so. The choice of agent is their own and can be changed at will, at least while the principal remains competent. The arrangement is private; it may be effected by filling in a standard form or, at most, use of a solicitor to draft an appropriate document. Costs such as they are,[37] are borne by the individual, not the state. The arrangement can be timed to commence immediately, or at some future time when a need

---

36 Australia: New South Wales Law Reform Commission, *Working Paper on Powers of Attorney* (1973); New South Wales Law Reform Commission, *Report on Powers of Attorney* (LRC 18, 1974); New South Wales Law Reform Commission, *Report on Powers of Attorney and Unsoundness of Body or Mind* (LRC 20, 1975); Law Reform Committee of South Australia, *Report Relating to Powers of Attorney* (Report No 47, 1981); Law Reform Commission of Tasmania, *Report on Powers of Attorney* (Report No 39, 1984); Queensland Law Reform Commission, *Report on a Bill to Amend the Property Law Act 1974-1986* (1987); Queensland Law Reform Commission, *Assisted and Substituted Decisions*; Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No 47, 1988); Law Reform Commission of Victoria, *Enduring Powers of Attorney* (Discussion Paper No 18, 1990); Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990).

Canada: Ontario Law Reform Commission, *Report on Powers of Attorney* (Report No 34, 1972); Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney* (Report No 14, 1974); Manitoba Law Reform Commission, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (Report No 74, 1991); Law Reform Commission of British Columbia, *Report on The Law of Agency Part II - Powers of Attorney and Mental Incapacity* (LRC 22, 1975); Law Reform Commission of British Columbia, *Report on The Enduring Power of Attorney: Fine-Tuning the Concept* (LRC 110, 1990); Alberta Law Reform Institute, *Enduring Powers of Attorney* (Discussion Report No 7, 1990); Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Discussion Paper No 11, 1991); Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report No 59, 1990) pp12-13.

England and Wales: The Law Commission, *The Incapacitated Principal* (Report No 122, 1983).

This is not a comprehensive list.

37 ACT: cost of form is $20.00; NT: cost of form is $10.00 but the cost of registration at the Land Titles Office is $90.00; SA: the fee was abolished in the last budget in recognition of the need to encourage use of EPAs; Tas: Cost of EPA is $70.00, although the recommendation has been made that this fee be abolished; WA: there is no fee for an EPA, and no stamp duty. However the cost of registration if the EPA concerns land is $62.00.

for substitute decision-making has materialised. There is no consequential loss of rights.[38]

Common elements of the schemes in Australasia are that the document must contain a statement that the person making the EPA understands it is to continue to operate after the maker loses competence[39] and that it must be witnessed by an independent person or persons - this is to discourage coercion in the execution of the document.[40] There are also mechanisms for termination of the arrangement in the case of fraudulent or careless administration.[41] Beyond these core provisions there is no uniformity.

The question posed in this paper is whether it is feasible for EPA schemes to become genuine alternatives to guardianship. The answer depends on whether EPAs comply with essential minimum requirements of modern protective management schemes, and whether the EPA alternative provides adequate safeguards for the principal once that person has become incompetent.

EPAs AS AN ALTERNATIVE TO GUARDIANSHIP AND PROPERTY MANAGEMENT

The recognition that EPAs may be capable of fulfilling many of the functions of guardianship and property management is of recent origin. As the Law Reform Commission of British Columbia noted:

---

38 Starke, "Current Topics - Victorian Law Reform Commission's Report on Enduring Powers of Management" (1991) 65 *ALJ* 188 at 189-190.

39 ACT: *Powers of Attorney Act* 1956 s12(1)(a), Sch, Form 2; NSW: *Conveyancing Act* 1919 s163F(2)(a); NT: *Powers of Attorney Act* 1980 s13(a); Qld: *Property Law Act* 1974 s175A(a)(i); SA: *Powers of Attorney and Agency Act* 1984 s6(1)(b); Tas: *Powers of Attorney Act* 1934 s11A(1); Vic: *Instruments Act* 1958 s114, Sch 13; WA: *Guardianship and Administration Act* 1990 s104(1), Sch 3, Form 1.

40 ACT: *Powers of Attorney Act* 1956 s12(1)(b), Sch, Form 2; NSW: *Conveyancing Act* 1919 s163F(2)(b); NT: *Powers of Attorney Act* 1980 s14; Qld: *Property Law Act* 1974 s175A(a)(ii), Second Sch, Form 16A (amendments to Queensland forms are awaiting Gazettal: *Statute Law (Miscellaneous Provisions) Act (No 2)* 1992); SA: *Powers of Attorney and Agency Act* 1984 s6(2)(a); Tas: *Powers of Attorney Act* 1934 s11A(2)(a); Vic: *Instruments Act* 1958 s115; WA: *Guardianship and Administration Act* 1990 s104(2)(a).

41 ACT: *Powers of Attorney Act* 1956 s17(1)(c); NSW: *Conveyancing Act* 1919 s163G(2); NT: *Powers of Attorney Act* 1980 s15(2)(c), (3), (4); Qld: *Property Law Act* 1974 s175C(2)(e); SA: *Powers of Attorney and Agency Act* 1984 s11(1)(c); Tas: *Powers of Attorney Act* 1934 s11E(1)(c); Vic: *Instruments Act* 1958 s118; WA: *Guardianship and Administration Act* 1990 s109(1)(c).

> It is important to realize that the enduring power of attorney is only one legal niche in the larger structure of legal tools and institutions, often compendiously referred to as "guardianship," which serve the needs of the disabled.[42]

The Law Reform Commission of Australia, in its reports, in 1988 on enduring powers of attorney and in 1989 on guardianship law, consciously sought to align the two avenues for managing incapable people's affairs.[43] The Australian Capital Territory EPA and guardianship legislation which followed, implemented those recommendation, a step which has also been taken across the Tasman.[44] The Queensland Law Reform Commission has similarly sought to rationalise surrogate decision-making for mentally incompetent adults,[45] and the Victorian Law Reform Commission, in its 1990 report on EPAs, adverted to various Law Reform Commission reports which acknowledged the connection between attorneys under an EPA and protective managers.[46] Quebec has legislated to permit EPAs to be used for general personal decision-making[47] and Ontario is planning to do so also.[48]

CORE ELEMENTS OF GUARDIANSHIP

The Australian Law Reform Commission, in its report on guardianship and management of property, noted that there are two broad themes underlying guardianship and management of property law:

> The first is providing appropriate protection for those unable to look after themselves. This may entail either the care and protection of the person from neglect or abuse, or protection of the individual's property from dissipation or

---

42 Law Reform Commission of British Columbia, *Report on The Enduring Powers of Attorney: Fine-tuning The Concept* (Report No 110, 1990) p2.

43 Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No 47, 1988) para 6, Chs 3, 4 and *Guardianship and Management of Property* (Report No 52, 1989) paras 1.9, 4.74 - 4.79.

44 ACT: *Powers of Attorney (Amendment) Act* 1989; *Guardianship and Management of Property Tribunal Act* 1991; NZ: *Protection of Personal and Property Rights Act* 1988.

45 Queensland Law Reform Commission, *Assisted and Substituted Decisions* - pp22-23, 35-36.

46 See, for example, Law Reform Commission of Tasmania, *Report on Powers of Attorney* (Report No 39, 1984) p13; New South Wales Law Reform Commission, *Report on Powers of Attorney* (Report No 18, 1974) p82.

47 *Quebec Civil Code* art 2118 (en Bill 125, 190). See also arts 2154-2162.

48 *Substitute Decisions Bill* 1991 (Ontario).

> exploitation. The other theme is preserving and, where possible, enhancing the personal autonomy of such persons.[49]

This tension between paternalism and encouraging personal autonomy permeates guardianship law and is reflected in the criteria which have been identified as the hallmarks of the best guardianship and protective management laws.

Specific elements of a modern guardianship regime are: externally determined orders for substitute management of business and personal affairs; monitoring of protective management orders; criteria to determine whether orders are needed; criteria to guide decision-making; identification of the kinds of decision which need formal authority; and establishment of a public authority to act as guardian or manager when no suitable private individual is available.

WHICH OF THESE ELEMENTS ARE PRESENT IN EPA SCHEMES?

Instituting Management

Guardianship tribunals or boards operate in every Australian State and Territory, although the determination is actually made by the Local Court in the Northern Territory and by the Family Court in New Zealand, and in Queensland only people with intellectual disability enjoy this less formal determining process.[50] A central element of guardianship schemes is that the decision to appoint a guardian or property manager is made by a state agency following a formal hearing to determine levels of competence. If there is a finding of incompetence the individual loses all or some of their civil rights. Few, if any, individuals apply for formal management. The usual applicants are family members, social workers or staff in residential institutions. Although modern guardianship proceedings are undoubtedly more informal than the former court processes,[51] inevitably they maintain

---

49 Australian Law Reform Commission, *Guardianship and the Management of Property* (Report No 52, 1989) para 2.1.

50 The Queensland Law Reform Commission has recommended that a tribunal be set up for people with other forms of mentally disabling conditions; Queensland Law Reform Commission, *Assisted and Substituted Decisions.*

51 A matter of considerable regret to those imbued with notions of a "proper" legal culture for quasi-judicial processes; Tracey, "Administrative Tribunals - Some Emerging Issues" (1990) 74 *Vic Bar News* 34.

a certain level of formality given the seriousness of the issues and the involvement of the state in the determination process.[52]

By contrast the initiation of an EPA arrangement is not one organised by others but by the individual. The only parties may be the person appointing the agent, the agent and one or more witnesses to its execution. The private nature of the EPA arrangement means that it avoids the stigma, the inconvenience and, in some cases, the cost of a formal hearing. This is one of its greatest advantages, both for the individuals concerned and their families and, in financial terms, for the state.

The absence of a formal hearing to institute the EPA arrangement and the formal imprimatur that gives to the process can be compensated for by other means. For example, explanatory notes appended to or written on the EPA document ensure that the attorney is aware of the responsibilities and duties of the position and the penalties for breach. Execution formalities can and should include a formal declaration by the agent that the agent has read the instructions and understands the nature and extent of the obligations being undertaken.[53] The document should also contain information about where to go to seek help or advice, a requirement so far only implemented in three Australian jurisdictions and in New Zealand.[54] The importance of the arrangement should further be underlined by presenting standard form EPA documents in formal dress, namely, stiff paper, perhaps even a state seal (akin to those found commonly on ordinary powers of attorney documents). Similar formalities are considered sufficient for other mass use appointments such as wills and would strike an appropriate balance between encouraging use of EPAs while at the same time alerting those involved to the seriousness of the undertaking.

---

52 *Moore v Guardianship and Administration Board* [1990] VR 902.

53 ACT: *Powers of Attorney Act* 1956 s12(1)(c); NT: *Powers of Attorney Act* 1980 s13(b), Sch 1; Qld: *Property Law Act* 1974 s175A(a)(iii); SA: *Powers of Attorney and Agency Act* 1984 s6(2)(b), Second Sch; Tas: *Powers of Attorney Act* 1934 s11A(2)(b), Sch 1; WA: *Guardianship and Administration Act* 1990 s104(2)(b), Sch 3, Form 2.

54 ACT: *Powers of Attorney Act* 1956 s12, Sch, Form 2; Qld: *Property Law Act* 1974 s175A, Second Sch, Form 16A; Tas: *Powers of Attorney Act* 1934 s18(2) and *Powers of Attorney Regulations*; NZ: *Protection of Personal and Property Rights Act* 1988 s95(1)(a), Third Sch.

Monitoring Mechanism

Guardianship legislation provides for regular reviews of orders either at statutorily fixed intervals or as laid down in guardianship and management of property orders.[55] Reviews may also be undertaken on request at any time.[56] In addition there are rights of appeal and, in some jurisdictions, a mechanism to permit rulings on questions of law by the courts.[57]

Reviews are provided for in EPA statutes. Mechanisms take two forms: liberal standing rules for complainants,[58] and a right of review by either courts,[59] or the guardianship tribunal.[60] In addition, in most jurisdictions,

---

55 ACT: *Guardianship and Management of Property Act* 1991 s19; NSW: *Disability Services and Guardianship Act* 1987 ss24, 25; NT: *Adult Guardianship Act* 1988 ss11(1), 23; Qld: *Intellectually Disabled Citizens Act* 1985 s27; SA: *Guardianship and Administration Act* 1993 ss56(1), Part 6 Div 1; Tas: *Mental Health Act* 1963 ss9, 23(4), 25(3), 26(5), 32, 33; Vic: *Guardianship and Administration Board Act* 1986 s61; WA: *Guardianship and Administration Act* 1990 Part 7; NZ: *Protection of Personal and Property Rights Act* 1988 ss86(7), (8), 87(9).

56 ACT: *Guardianship and Management of Property Act* 1991 s19; NSW: *Disability Services and Guardianship Act* 1987 s25; NT: *Adult Guardianship Act* 1988 s11(1), 23; Qld: *Intellectually Disabled Citizens Act* 1985 s27; SA: *Guardianship and Administration Act* 1993 ss56(1), Part 6 Div 1; Tas: *Mental Health Act* 1963 Part V ; Vic: *Guardianship and Administration Board Act* 1986 s61; WA: *Guardianship and Administration Act* 1990 Pt 7; NZ: *Protection of Personal and Property Rights Act* 1988 ss86(1)-(6), 87(1)-(8), 89.

57 ACT: *Guardianship and Management of Property Act* 1991 s56; NSW: *Disability Services and Guardianship Act* 1987 s67; NT: *Adult Guardianship Act* 1988 s24; Qld: *Intellectually Disabled Citizens Act* 1985 s43; SA: *Guardianship and Administration Act* 1993 Part 6 Divs 2, 3; Tas: *Mental Health Act* 1963 s43, Pt V; Vic: *Guardianship and Administration Board Act* 1986 ss 64, 67; WA: *Guardianship and Administration Act* 1990 Part 3, Divs 3, 4; NZ: *Protection of Personal and Property Rights Act* 1988 ss82-85.

58 ACT: *Powers of Attorney Act* 1956 s15(1), (2); NSW: *Conveyancing Act* 1919 s163H(1); NT: *Powers of Attorney Act* 1980 ss15(2), 17(2)(c); Qld: *Property Law Act* 1974 s175G(1), (2); SA: *Powers of Attorney and Agency Act* 1984 s11(1); Tas: *Powers of Attorney Act* 1934 s11E(1); Vic: *Instruments Act* 1958 s118; WA: *Guardianship and Administration Act* 1990 s109(1); NZ: *Protection of Personal and Property Rights Act* 1988 s103.

59 ACT: *Powers of Attorney Act* 1956 s15; NSW: *Conveyancing Act* 1919 s163G; NT: *Powers of Attorney Act* 1980 s15; Qld: *Property Law Act* 1974 s175G; SA: *Powers of Attorney and Agency Act* 1984 s11; Tas: *Powers of Attorney Act* 1934 s11E; NZ: *Protection of Personal and Property Rights Act* 1988 ss99(2), 101, 102, 103, 105.

60 SA: *Consent to Medical Treatment and Palliative Care Bill* 1993 cl 7A; Vic: *Instruments Act* 1958 s118; WA: *Guardianship and Administration Act* 1990 s109.

there are welcome advice-giving and directions provisions,[61] akin to those in guardianship statutes,[62] provisions for calling for accounts,[63] and for appointment of a substitute attorney[64] if the attorney has failed to meet their obligations. Unlike guardianship legislation, however, EPA laws contain no requirement for filing of accounts nor for reviews at periodical intervals. The less formal nature of EPAs and the appointment as attorney of a trusted friend or associate of the incompetent principal may make this an appropriate omission from the monitoring regime. However, that satisfaction with the *status quo* may be questioned. Already there have been complaints of abuse of EPAs.[65] If these continue to increase consideration should be given to providing for more regular monitoring of EPAs.

Criteria to Determine Whether an EPA is Necessary

Guardianship and EPAs start from a polar philosophical base. A pre-requisite to setting up an EPA arrangement is that the principal is competent. Criteria, therefore, are to test competence, not incompetence. The reverse is generally the case in guardianship where the absence of, or

---

61 ACT: *Powers of Attorney Act* 1956 s17(1)(a), (d); NSW: *Conveyancing Act* 1919 s163G(2)(c); NT: Powers of Attorney Act 1980 s15(2)(c), (5); Qld: *Property Law Act* 1974 s175G(3), (4); SA: *Powers of Attorney and Agency Act* 1984 s11(2), (3); Tas: *Powers of Attorney Act* 1934 s11E(3), (4); WA: *Guardianship and Administration Act* 1990 s109(3), (4); NZ: *Protection of Personal and Property Rights Act* 1988 ss101, 102(2).

62 See, for example, *Guardianship and Administration Act* 1990 (WA) ss47, 74.

63 ACT: *Powers of Attorney Act* 1956 ss16, 17(1)(b); NSW: *Conveyancing Act* 1919 s163G(2)(d); NT: *Powers of Attorney Act* 1980 ss15(2)(a), (b); Qld: *Property Law Act* 1974 s175G(1)(a), (b); SA: *Powers of Attorney and Agency Act* 1984 s11(1)(a), (b); Tas: *Powers of Attorney Act* 1934 s11E(1)(a), (b); WA: *Guardianship and Administration Act* 1990 s109(1)(a), (b); NZ: *Protection of Personal and Property Rights Act* 1988 s102(c)(ii).

64 ACT: *Powers of Attorney Act* 1956 s17(2); NSW: *Conveyancing Act* 1919 s163G(2)(a), (b), (3); NT: *Powers of Attorney Act* 1980 ss15(2)(c), (4); Qld: *Property Law Act* 1974 s175G(1)(c), (2)(a), (3)(a), (b); SA: *Powers of Attorney and Agency Act* 1984 s11(1)(c), (2)(a); Tas: *Powers of Attorney Act* 1934 s11E(1)(c); WA: *Guardianship and Administration Act* 1990 s109(1)(c), (2)(a); NZ: *Protection of Personal and Property Rights Act* 1988 s105 but this section only says the court may revoke the appointment of an attorney; substitution is not mentioned.

65 See, for example, "'Granny battering' a hidden problem", *The Canberra Times*, 5 August 1991; "More Old People Exploited", *The Sydney Morning Herald*, 5 March 1987. In Victoria in 1990-1991 there were 90 applications for revocation of EPAs, 153 in 1991-1992 and in one month (July) in 1992-1993 there were 19 applications.

decline in, mental faculties is the trigger for formal hearings. The statutory test is, therefore, to determine whether the person is incapable. The only common ground occurs in those jurisdictions in which an EPA may not commence until the principal is legally incompetent,[66] usually when the EPA extends to personal affairs, and in the practice which applies in all jurisdictions[67] that the EPA may contain a condition that it does not come into force until the principal is no longer capable of managing affairs. In those circumstances, commencement of the arrangement, like commencement of guardianship or management of property, is dependent on a finding of incompetency. What are the respective tests for competency and incompetency?

Except possibly in New South Wales and the Northern Territory[68] the different functions performed by the tests has resulted in different standards for EPAs and guardianship. In order to be sufficiently competent to create an EPA, the person need only understand, in broad terms, the nature and effect of an EPA, not the nature and effect of potential decisions made under the EPA.[69] In other words the test is not

---

66 ACT: *Powers of Attorney Act* 1956 s13(2) (applies to EPAs for personal powers including consent to medical treatment); SA: *Consent to Medical Treatment and Palliative Care Bill* 1993 cl 7(6)(a); Vic: *Medical Treatment Act* 1988 s5A(2)(b); NZ: *Protection of Personal and Property Rights Act* 1988 s98(3) (for personal powers only).

67 There is specific statutory provision to this effect in: SA: *Powers of Attorney and Agency Act* 1984 s6(1)(b)(ii) (powers may be expressed only to come into force on incapacity); Tas: *Powers of Attorney Act* 1934 s11A(1) (an optional alternative as in South Australia); WA: *Guardianship and Administration Act* 1990 s104(1)(a), Sch 3, Form 1, s104(1)(b)(ii), s104(1)(2)(b), Sch 3, Form 2, s106.

68 NSW: *Conveyancing Act* 1919 ss163D, 163E(5)(a), 163G, 163H (the common law meaning of "unsoundness of mind" is extended to those who are "incommunicate", thereby enlarging the class of those who can benefit by using protected powers); NT: *Powers of Attorney Act* 1980 s5.

69 To resolve doubts about the test created by the decision of the New South Wales Court of Appeal in *Ranclaud v Cabban* (1988) NSW Conv R ¶55-385, 57,548, per Young J. See also Munday, "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?" (1989) 13 *NZULR* 253. Three jurisdictions have legislated in favour of the general "nature and consequence test" (upheld in *Re K* [1988] 1 All ER 358); ACT: *Powers of Attorney Act* 1956 s3A; NSW: *Conveyancing Act* 1919 s163F(2); Qld: *Property Law Act* 1974 s175A(a)(ii) and Victoria has recommended it be adopted in amendments to its EPA legislation; Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990) para 4.

inability to manage some or all the person's affairs,[70] as it is in guardianship law.[71] The effect of the less stringent EPA test is that more people, for example, those who are borderline dementia cases or mildly intellectually disabled, can appoint EPA agents. For a self-help mechanism like the EPA this is an advantage since it relieves the state of the need to make other, formal, management arrangements and is an easily understood measure for those in the community who must witness and sometimes make a declaration as to the level of competence of the principal at the time of execution of the EPA.

The EPA test is consistent with the test for competency in other areas of the law. Capacity, "which is a functional, task-specific concept",[72] is generally measured against the level of understanding required for the particular transaction.[73] For example, competency to enter into a marriage requires that the person broadly understand the nature and effect of the ceremony,[74] and the ability to enter into a partnership or make a will is determined according to whether the potential partner or the testator understands, in broad terms, the nature of partnership or the extent of the person's property. The level of understanding depends on the complexity of the arrangement in contemplation.

Since the principal, when making an EPA, is merely clothing someone else with authority to act as agent, the details of future transactions which will be undertaken by the agent and which, almost invariably, are unknown at the time of execution, need not be appreciated by the principal. The degree of understanding is simply tested against the person's awareness of the broad general nature and effect of creating an EPA.

The arguments for and against the current test for capacity to create an EPA were put by the Queensland Law Reform Commission:

---

70 *PY v RJS* [1982] 2 NSWLR 700 at 702.

71 Frequently other criteria such as need for a guardian or manager must also be met. However, the incompetency barrier is an essential prerequisite to any appointment.

72 Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Report for Discussion No 11, 1991) p51.

73 *Gore v Gibson* (1845) 13 M & W 623; 153 ER 260; *Gibbons v Wright* (1954) 91 CLR 423.

74 *Marriage Act* 1961 (Cth) ss23(1)(d)(iii), 23B(1)(d)(iii); *Dunne v Brown* (1982) 60 FLR 212.

> Because of the extended nature of an enduring power, the donor's level of understanding at the time the power is granted is of vital importance. The donor may not have considered the possibility of an enduring power until his or her mental faculties begin to deteriorate. He or she may be easily persuaded that granting a power is in his or her best interests, yet may not fully appreciate what is involved. It is therefore necessary to have a test of capacity stringent enough to protect the vulnerable. However, requiring too high a level of capacity would reduce the availability of an enduring power of attorney and thus detract from its value as a simple, efficient, inexpensive method of enabling people to provide for the time when they may be unable to make their own decisions.[75]

The second point at which competency becomes an issue in relation to EPAs is when the agent's authority does not commence until the principal is no longer capable. In these circumstances the test performs the same function as the test in guardianship, namely, it provides the trigger for the commencement of the substitute decision-making mechanism. It can be argued, therefore, that the test in these circumstances should be the same as in guardianship.

New Zealand is the only jurisdiction which has specifically addressed this issue.[76] It has defined mental incapacity for the purposes of determining when an EPA for personal powers is to come into operation in accordance with the ordinary common law test for creation of an EPA.[77] The Australian Capital Territory has defined the capacity needed to create an EPA,[78] but not the test for incompetency which marks the commencement of operation of Parts B and C, the personal powers and medical powers segment of its standard EPA form. The inability to manage affairs test which appears to apply to EPAs in the Northern Territory and New South Wales meet the higher, guardianship, standard. In other jurisdictions the matter is not covered by statute and presumably the standard must be determined by the common law.

---

75 Queensland Law Reform Commission, *Assisted and Substituted Decisions* p92.

76 *Protection of Personal and Property Rights Act* 1988 (NZ) ss94(1), 98(3).

77 Section 94(2).

78 *Powers of Attorney Act* 1956 (ACT) s3A. In the ACT a medical certificate as to the capacity of the donor is evidence of that fact (*Powers of Attorney Act* 1956 (ACT) s13A).

The lack of statutory guidance is unsatisfactory and highlights the advantages of permitting EPAs to operate from the time of their execution rather than at the point of incompetence. That solution is generally appropriate for powers dealing with business affairs. However, the more idiosyncratic nature of decision-making in the personal area, especially in relation to consent to medical treatment, and the understandable reluctance of people to relinquish control over their affairs when they are in good health and capable of functioning independently, warrants the continued use of legal incompetency as the point from which substitute personal decision-making should commence.

A solution to the problem of determining when incompetency has occurred is to follow the suggested practice in Canadian jurisdictions and use a "springing" power of attorney - that is, a device which enables principals, when making an EPA, to nominate a person whose declaration would determine a date from which incompetency is said to be present and the commencement of the EPA can occur.[79] Alternatively, the approach adopted in Western Australia, where the attorney may apply to the Guardianship and Administration Board for a declaration that the principal is no longer competent, or New Zealand where the application is to the Family Court,[80] might also be adopted.[81] Another approach and a practical one may be to follow the practice in the Australian Capital Territory of making a doctor's certificate evidence of incapacity.[82] Given the difficulties of determining this issue it may also be appropriate to provide a mechanism to enable principals to challenge a finding of incapacity. That function should be undertaken by the usual monitoring body, generally the guardianship board or tribunal.

For those jurisdictions which may choose, in the future, to expand the range of operation of EPAs to personal matters, and for the Australian Capital Territory which has already done so, these are matters which should receive legislative attention.

---

79 Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report No 59, 1990) pp12-13; Law Reform Commission of British Columbia, *Report on The Enduring Power of Attorney: Fine-Tuning the Concept* (LRC 110, 1990) pp11-18.

80 *Protection of Personal and Property Rights Act* 1988 (NZ) s102(1)(b).

81 *Guardianship and Administration Act* 1990 (WA) s106.

82 *Powers of Attorney Act* 1956 (ACT) s13A. However there is still a deficiency in that arrangement since the doctor has no guidance as to what test for incapacity should apply.

Criteria to Guide Decision-Making

The Australian Law Reform Commission categorised the decision-making principles which would enhance autonomy and protect against unnecessary loss of rights as the presumption of competence; least restrictive intervention; encouragement of self-management; community integration and substituted judgement.[83] This by now well-known litany finds little place in EPA legislation. Substituted judgement, or at least a modified version of it, is found in the EPA legislation of the Australian Capital Territory alone.[84] In other jurisdictions the traditional "best interests" standard has been retained.[85] The presumption of legal competence has received specific statutory recognition in New Zealand and Western Australia.[86] There is no allusion to any of the other cardinal principles of guardianship legislation. In their absence it is apparent that encouragement of autonomy comes a distant second to protective notions and paternalism.

Attorneys are, as a matter of agency principle, under fiduciary obligations when acting under an EPA.[87] That means the power "may not be abused or misused, so as to benefit the agent to the detriment of the principal".[88] However, this essentially negative obligation, is no substitute for the more enlightened and individual-centred guardianship principles which should be adopted in EPA legislation.

In each jurisdiction the EPA and guardianship legislation should contain the same principles. This step should be taken whether EPAs become a complete or only a partial substitute for guardianship and property management. The move is essential for practical reasons. Managers and attorneys may be operating in relation to the same property or at least to

---

83 Australian Law Reform Commission, *Guardianship and Management of Property* (Report No 52, 1989) paras 2.3-2.7. See also *Re J* [1990] 3 All ER 930 (CA).

84 *Powers of Attorney Act* 1956 (ACT) s14(1). A similar approach has been recommended in Alberta; Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Report for Discussion No 11, 1991) p46.

85 Qld: *Property Law Act* 1974 s175H(1); Tas: *Powers of Attorney Act* 1934 s11C(1)(b); WA: *Guardianship and Administration Act* 1990 s107(a).

86 WA: *Guardianship and Administration Act* 1990 s4(2)(b); NZ: *Protection of Personal and Property Rights Act* 1988 s4.

87 Fridman, *The Law of Agency* pp156-168; Stoljar, *The Law of Agency* Ch13.

88 Fridman, *The Law of Agency* p16.

parts of the property belonging to the same person.[89] The attorney may be appointed as manager. Such a choice is likely given that determining bodies choose as managers people who are responsible and close to the person subject to an order. In some jurisdictions, if a guardianship or management of property order is made in relation to the affairs of someone who has granted an EPA, the agent is answerable to the manager.[90] The manager is likely to insist that the attorney adhere to the same management standards as apply to managers. If that individual is subject to different standards or duties, depending on whether the person is acting as attorney or manager, the position would become untenable. For these reasons it is impracticable to have different decision-making standards for each.

These arguments have been accepted in New Zealand where the attorney for personal affairs is given the same powers and made subject to the same duties as a guardian and any personal or property orders are binding on the attorney.[91] It is recommended that a similar approach, in relation to both guardianship and management of property powers, apply to attorneys in each Australian jurisdiction and that the relevant legislation be amended accordingly.

Decisions which need Formal Authority

Perhaps the most striking difference between the two devices is in relation to the matters over which surrogate decision-making may be instituted. Guardianship and management of property together cover every kind of decision for which legal authorisation is required; except for the Australian Capital Territory and New Zealand, and to a lesser extent, South Australia and Victoria,[92] EPAs only provide for an attorney to make decisions about business matters. This deficiency is the major hurdle to making EPAs an effective alternative to guardianship and management of property. Unless EPAs authorise the agent to make decisions in relation to

---

89 It is common for EPAs to continue and for a property order to be made only in relation to property not covered by the EPA. See, for example; Tas: *Powers of Attorney Act* 1934 s11D(1); Vic: *Instruments Act* 1958 s117(1), (3).

90 See, for example, SA: *Powers of Attorney and Agency Act* 1984 s10; WA: *Guardianship and Administration Act* 1990 s108(2)(a).

91 *Protection of Personal and Property Rights Act* 1988 (NZ) ss18, 98(4), 100.

92 Agents in South Australia when appointed under a medical power of attorney may give or refuse consent to most medical treatments and in Victoria when appointed under a special EPA for medical treatment may refuse consent to medical treatment; SA: *Consent to Medical Treatment and Palliative Care Bill* 1993 cl 7(1); Vic: *Medical Treatment Act* 1988 s5B.

personal affairs, the one mechanism will never be a complete substitute for the other.

Use of EPAs for personal decision-making is receiving the most attention in other common law jurisdictions.[93] The principal focus of attention abroad has been on consent to health care. Proposals include the "living will", or health care directive, an EPA for health care, and a statutory list of relatives, ranked in order of choice or familial closeness to the person. The statutory list can be in place in case an individual does not make a directive or an EPA for health care.

Use of an agent to make health care decisions has the advantage that it enables decision to be made at the time consent is required by someone who knows the individual and is better able to gauge the person's preferences in the circumstances. The absence of surrogate decision-making in the personal decision-making area creates particularly acute problems in relation to health care. Doctors are "faced with the dilemma of either performing treatment without consent (thereby risking liability for battery) or not performing the treatment at all (thereby risking liability for negligence)".[94]

Victoria has already made provision for a limited form of EPA for health care, but the agent arguably only has authority to refuse, not to give, consent to treatment.[95] South Australia has legislated to permit agents

---

93 Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Report for Discussion No 11, 1991); Manitoba Law Reform Commission, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (Report No 74, 1991); Queensland Law Reform Commission, *Assisted and Substituted Decisions* pp93-96, 136-139, 142-149. See, also, the *Civil Code* (Quebec) art 2118 and the *Substitute Decisions Bill* 1991 (Ontario).

94 Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Report for Discussion No 11, 1991) p15.

95 This is not the view which is accepted amongst some bodies such as the Guardianship and Administration Board in that State and see Collier & Lindsay *Powers of Attorney in Australia and New Zealand* (Federation Press, Sydney, 1992) p155. The views of the author are that it was clear that the *Medical Treatment (Enduring Power of Attorney) Act* 1990 (Vic) only covered refusal of consent. The position following the passage of the *Medical Treatment (Agents) Act* 1992 (Vic) is equivocal. Examination of the debates shows members referring on the one hand to the purposes of the Bill being solely to enable agents to refuse consent and often in the same speech, referring also, in general terms to their ability to "consent to medical treatment" (see also, the reference to consent generally in the *Explanatory Memorandum* to the *Medical Treatment (Agents) Bill* 1991 (Vic) (p1) but compare the Second Reading Speech of the

appointed under a medical power of attorney to both give and refuse consent to treatment.[96] Only South Australia, Victoria and the Northern Territory have a form of "living will".[97] No other Australian jurisdiction has taken steps to legislate for use of EPAs for health care alone.

Even if legislation is contemplated, experience in the United States suggests that only about 15% of the population protect themselves by making advance directives and the same figure could presumably apply to appointment of EPA attorneys for health care.[98] The low percentage figure is apparently due to people's reluctance to contemplate, and hence provide for, their incompetence.[99] In these circumstances the Alberta Law Reform Institute has recommended that the statutory list of individuals who can provide substitute consent should be implemented. That is a development which has not occurred in Australia, although in New South Wales minor medical or dental decisions may be made by primary carers.[100]

The simplest and most logical solution is to adopt the approach in the Australian Capital Territory and New Zealand and permit complete decision-making powers to EPA attorneys. The artificiality of separating personal and financial functions was well illustrated by a submission of the Victorian Public Advocate to the Australian Law Reform

---

Minister for Community Services (Vic, Parl, *Debates* (10 June 1992) at 2083) with the Second Reading Speech, motion of Minister for Health (Vic, Parl, *Debates* (20 November 1991) at 1430; (8 April 1992) at 299). Perhaps the strongest arguments against the legislation being interpreted as permitting consent by agents generally is that the operative provisions about appointment of agents and their powers and functions are all found in a Part headed "Refusal of Treatment", the decisions about medical treatment are expressed to be made "in accordance with this Act" (s5A(1)), and neither of the forms for making decisions contained in the Schedules to the *Medical Treatment Act* 1988 (Vic) are for giving consent to treatment; they both authorise only refusal of consent. The author favours the wider powers being available to agents. In the uncertain state of the law it would seem sensible if the Victorian parliament legislated to clarify the matter.

96 *Consent to Medical Treatment and Palliative Care Bill* 1993 (SA) cl 3, 7.

97 NT: *Natural Death Act* 1988; SA: Consent to Medical Treatment and Palliative Care Bill 1993 cl 6A; Vic: *Medical Treatment Act* 1988 s5, Sch 1.

98 Alberta Law Reform Institute, *Advance Directives and Substitute Decision-Making in Personal Health Care* (Report for Discussion No 11, 1991) pp32, 36.

99 Lanham & Fehlberg, "Living Wills and the Right to Die with Dignity" (1991) 18 *MULR* 329.

100 *Disability Services and Guardianship Act* 1987 (NSW) ss38 & 39.

Commission.[101] The same argument applies in relation to the separation of medical, personal, and other personal, decisions. Enough has been said in the earlier parts of this paper and elsewhere[102] for it to be apparent that the author favours this step. The absence of anecdotal evidence in the two jurisdictions of abuse of personal powers, and indeed the greater likelihood that inappropriate use of EPAs will occur in relation to property and financial, rather than personal, matters is an argument in favour of the proposed extension of EPAs.

The extension of EPA agents' authority to personal affairs, including health care, raises the same issues in relation to highly sensitive forms of medical treatment as have already been faced in guardianship laws. There is no reason that the same principles should not be adopted to consent to such treatments by guardians and agents. That has been the approach which has been adopted in the Australian Capital Territory and in New Zealand.[103] The cross-Tasman legislation has gone further and spelt out the non-medical decisions, such as marriage and adoption, which are too personal to be made by an agent. These decisions are, in any event, generally precluded from surrogate decision-making in accordance with ordinary common law doctrines.[104]

State Agencies as Surrogates

In most Australian jurisdictions there is a state agency which is available to act as personal guardian[105] and in all jurisdictions the public trustee

---

101 Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No 47, 1989) para 45.

102 Creyke, "Enduring Powers of Attorney: Cinderella Story of the 80s" (1991) 21 *UWAL Rev* 122 at 142-145.

103 ACT: *Powers of Attorney Act* 1956 s13 (the provision is not identical to s69 of the *Guardianship and Management of Property Act* 1991 but it was intended to cover the same matters (Australian Law Reform Commission *Enduring Powers of Attorney* (Report No 47, 1989) para 51)); NZ: *Protection of Personal and Property Rights Act* 1988 ss18, 98(4). In both jurisdictions personal powers, like consent to medical treatment, may only be exercised after the principal has become incompetent (ACT: s13(1)(b); NZ: s98(3)).

104 Reynolds, *Bowstead on Agency* (Sweet & Maxwell, London, 15th ed 1985) Ch 3; Josling, *Powers of Attorney* (Oyez Publishing, London, 4th ed 1976) pp12-13. See also *Re Great Mysore Gold Mining Co* (1882) 48 LT 11; *Ingram v Ingram* (1740) 2 Atk 88; 26 ER 455; *Hawkins v Kemp* (1803) 3 East 411; 102 ER 655.

105 ACT: *Guardianship and Management of Property Act* 1991 Pt II; NSW: *Disability Services and Guardianship Act* 1987 Pt 7; NT: *Adult Guardianship Act* 1988 s5; Qld: *Intellectually Disabled CitizensAct* 1985 s31A(4)(b); SA: *Guardianship and Administration Act* 1993 Part 2, Div 3; Tas: *Mental Health*

manages property matters on behalf of incapable individuals. The function of these state agencies is to act as guardian and manager of last resort. There is no need to establish separate state agencies for EPA agents. In cases when an attorney dies, becomes mentally incompetent, resigns or is removed from office there is legislative provision in each jurisdiction for appointment of these public agencies either as agent or as public guardian or manager. No special provision needs to be made in EPA legislation.

CONCLUSION

On balance it would be relatively simple to amend all EPA legislation to enable EPAs to become complete substitute management tools. The most dramatic change would be to permit agents to make decisions about personal affairs. That would require a considerable change in perception by those most familiar with EPAs. However, the fact that models exist both in this country and across the Tasman Sea suggest that the move is achievable. Appropriate safeguards would need to be written into the legislation to prevent decision-making on at least the more sensitive forms of medical treatment. The principal could specify other restrictions in the document. Statutory default provisions, that is, a list of relatives who can consent, should be included for those who do not make an EPA.

Other changes to the legislation, such as making statutory provision for notes on the document; defining capacity both to make a power and for the purposes of activating the EPA if the delayed commencement is the wish of the principal or the EPA authorises medical or personal decision-making, are matters of detail. If there is more widespread evidence of abuse, consideration should be given to introducing mechanisms for regular reviews either by the guardianship boards, tribunals or another agency, such as public trustees. The principles governing decision-making by agents should be synchronised with those found in the guardianship laws in each jurisdiction. In general, notions of autonomy require that substituted judgement should be adopted as the prime decision-making standard, at least in the first instance. Given these changes it is both achievable and, given the financial exigencies of governments, timely to consider privatising protective management laws via the EPA.

Act 1963 (the Guardianship Board itself acts as public guardian); Vic: *Guardianship and Administration Board Act* 1986 Pt 3; WA: *Guardianship and Administration Act* 1990 Pt 8.

Final Thoughts

The lack of commonality between the provisions of EPAs made in the various Australasian jurisdictions creates barriers to their use. There are, at present few provisions for reciprocal recognition, although Victoria has proposed that one be introduced[106] and South Australia has provided a simple model in its *Consent to Medical Treatment and Palliative Care Bill* 1993 (SA).[107] Portability in this region of ours, with its increasingly mobile population is essential to avoid confusion and disappointment for principals. There are several approaches which could be adopted. All EPAs could be recognised in other jurisdictions. Alternatively each jurisdiction could require common core provisions as a condition of recognition.[108] There is an urgent need for attention to this issue.

Finally, thought could be given in jurisdictions other than Victoria to changing the designation of the EPA. It is unnecessarily confusing that its current acronym is, today, so closely associated with environmental protection authorities. "Continuing Power of Attorney" (CPA) is probably more acceptable than "Durable Power of Attorney" (DPA) which has its home in the North American continent. It would be appropriate if an indigenous label could be developed and adopted universally in Australia and New Zealand.

EPAs will never be a perfect substitute for guardianship and property management since they will never be available to those who lack the capacity to create a power of attorney. However, they can become much more widely used. To that end there should be a national campaign to promote their use. In that way individuals, while capable, can be encouraged to take responsibility for their long term care and management. Guardianship and management of property should be left for the congenitally incompetent and for those who really need it.

---

106 Law Reform Commission of Victoria, *Enduring Powers of Management* (Report No 35, 1990) p6.

107 Clauses 4 & 7A.

108 Creyke, "Enduring Powers of Attorney: Cinderella Story of the 80s" (1991) 21 *UWAL Rev* 122 at 146-147.