

PRESENTERS

Greg Kelly, Gillespie Young Watson, Lower Hutt

Greg has 29 years of experience in the wills, trusts and estate area. He is a member of the Wills and Trusts Committee of the NZLS Property Law Section, and a member of STEP. Greg is a contributor to *Butterworth's Law of Trusts*, probate and administration author for *McGechan on Procedure*, a co-author of Garrow and Kelly *Law of Trusts and Trustees* (6th ed) and of *Dobbie's Probate and Administration Practice* (5th ed). He has acted as counsel for the subject person for many years and presented the NZLS submissions on the Amendment Act to the Select Committee.

Neil Williamson, Ministry of Social Development, Wellington

Neil is currently Principal Legislative Counsel at the Ministry of Social Development. Admitted in 1975, he had his own general practice for 10 years until he joined the Department of Social Welfare as District Solicitor, Auckland in 1986. From 1988, he held the positions of Office Solicitor and Chief Legal Adviser of the Department of Social Welfare and Chief Legal Adviser (Legislation) in the Ministry. In these positions and in his current position, he has been responsible for advising policy staff in relation to policy and legislation matters, and issuing drafting instructions for and assisting in the passage of numerous Acts and regulations, including the Protection of Personal and Property Rights Amendment Act 2007.

CONTENTS

1. BACKGROUND	1
2. SETTING UP AN EPA.....	5
FORMS	5
FURTHER REQUIREMENTS	5
WITNESSING	6
CERTIFICATES.....	7
EPA FORM – CARE AND WELFARE	8
<i>Conditions of, and restrictions on, the attorney's powers to act.....</i>	8
<i>Appointment of a successor attorney</i>	9
<i>Person(s) the attorney must consult when acting and what matters must be consulted on</i>	9
<i>Persons to whom the attorney must give information on request, and the kind of information that must be provided.....</i>	9
<i>Who can assess the mental incapacity of the donor in order to trigger the full effect of the EPA.....</i>	9
<i>Notes to the new EPA care and welfare form</i>	10
EPA FORM – PROPERTY	10
<i>Appointment of a successor attorney</i>	10
<i>If joint attorneys are appointed, must they act jointly or can they act severally?</i>	11
<i>Conditions and restrictions (financial or otherwise) on the attorney's power to act.....</i>	11
<i>Persons the attorney must consult when acting</i>	11
<i>Can the attorney execute a will for the donor?</i>	11
<i>Can the attorney benefit him or herself or others? (There are two statements)</i>	12
<i>Persons to whom information must be given if they request it.....</i>	13
<i>Whether assessment of mental capacity must be carried out by a specialist.....</i>	14
<i>Practical issues</i>	14
<i>Delegation.....</i>	15
3. ATTORNEY'S OBLIGATIONS	17
CURRENT POSITION	17
CHANGES MADE BY AMENDMENT ACT	17
EPA AS TO PROPERTY	17
<i>Act in best interests</i>	17
<i>Duty to consult</i>	18
<i>Options in regard to advice</i>	18
<i>Mutual duty to consult personal care and welfare attorney</i>	18
<i>Consequences of not consulting</i>	19
<i>Consequences for persons dealing with attorney.....</i>	19
<i>Financially support personal care and welfare attorney.....</i>	19
<i>Keep financial records</i>	19
<i>Consequences of not complying with duty to keep financial records</i>	20
<i>Provide information on exercise of powers</i>	20
<i>Consequences of not complying with duty to provide information:.....</i>	20
<i>Duties on disclaimer</i>	21
EPA FOR PERSONAL CARE AND WELFARE	21
<i>Act in best interests</i>	21
<i>Consider financial implications of decisions</i>	22
<i>Duty to consult</i>	22
<i>Options in regard to advice</i>	22
<i>Mutual duty to consult property attorney</i>	23
<i>Consequences of not consulting</i>	23
<i>Consequences for persons dealing with attorney.....</i>	23
<i>Regard for advance directives</i>	23
<i>Not to act on certain matters.....</i>	24
<i>Provide information on exercise of powers</i>	25

<i>Consequences of not complying with duty to provide information</i>	25
<i>Duties on disclaimer</i>	25
4. WHEN CAN AN ATTORNEY ACT	27
CURRENT POSITION.....	27
CHANGES MADE BY THE AMENDMENT ACT.....	27
EPA IN RELATION TO PROPERTY	27
<i>When can an attorney act</i>	27
<i>Mentally incapable defined.....</i>	28
<i>Presumption of competence</i>	28
<i>Transitional matters.....</i>	28
EPA IN RELATION TO PERSONAL CARE AND WELFARE	28
<i>When can attorney act</i>	28
<i>Significant matters</i>	29
<i>Other matters</i>	29
<i>When mental capacity is determined</i>	29
<i>Incapacity because of indefinite health condition.....</i>	29
<i>Incapacity because of temporary health condition.....</i>	30
<i>Mentally incapable defined.....</i>	30
<i>Presumption of competence</i>	31
<i>Transitional matters.....</i>	31
<i>Medical certification of mental incapacity by relevant health practitioner.....</i>	31
<i>Donor's options as to assessment</i>	32
<i>Form of certificate</i>	32
<i>Cost of medical assessments and examinations</i>	32
<i>When an attorney under an EPA cannot act.....</i>	33
<i>Suspension of attorney's power to act</i>	33
<i>Court may revoke appointment of attorney.....</i>	34
<i>Court to revoke attorney's appointment</i>	34
<i>When EPA ceases to have effect</i>	34
<i>Position where successive attorneys</i>	34
5. POWERS OF THE FAMILY COURT.....	37
6. COURT APPROVED WILLS	41
7. ATTORNEY'S POWER TO BENEFIT SELF OR OTHERS.....	45
CURRENT POSITION.....	45
CHANGES MADE BY AMENDMENT ACT.....	45
<i>General prohibition on acting to benefit of attorney or other person unless authorised by EPA or court</i>	45
8. TRANSITIONAL PROVISIONS AND REVIEW.....	47
TRANSITIONAL PROVISIONS	47
<i>EPAs not yet in effect</i>	47
<i>EPAs in effect.....</i>	47
<i>Review of Amendment Act.....</i>	49
9. GUIDELINES FOR COUNSEL FOR THE SUBJECT PERSON.....	51