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How many attorneys does it take to create authority?

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

To avoid confusion and potential litigation in regards to an Enduring Power of Attorney, multiple EPoAs should be produced for the different jurisdictions a person may live or have assets in, says an SMSF legal expert.

Matthew Burgess, director of View Legal, said the issue of what EPoA documentation is required when someone has assets or spends time in more than one state has been ongoing for many years.

“The question is particularly prevalent in communities near State borders. However, it can potentially arise in any situation even across international borders,” he said.

“In general, the EPoA legislation is frustratingly inconsistent, with completely different rules applying in each Australian jurisdiction and even within states there seems to be a desire by the regulatory authorities to constantly 'tinker' with EPoA legislation and approved forms.”

He added the inconsistencies between what documentation is required if there is a jurisdiction issue are supposed to be addressed by legislation that requires the recognition of documentation prepared in each state, but in practice, it’s difficult to convince third parties that an EPoA document that looks completely different to what they normally expect to see is legally binding.

“There have been a number of proposals made historically, as part of having uniform succession legislation across Australia, for the EPoA laws to be made consistent but the timeline for achieving this is difficult to predict given the number of vested interests involved,” he said.

Mr Burgess said there is a solution and although it is not very efficient, it can help to head-off possible litigation.
“You can implement a separate EPoA prepared under each jurisdiction where a person is likely to spend significant periods of time and although it’s not a perfect remedy, this approach can provide significant practical benefits and is often the most cost-effective strategy,” he said.

“And although each State has legislation in operation to acknowledge EPoA documents from other States, the issue of acknowledgement appears to be a practical one.”

He noted that in NSW, EPoAs are generally only a few pages long, while those in Queensland can be up to 20-pages, which can create confusion.

“This means the conservative approach is likely to remain having EPoAs in more than one jurisdiction where there is a realistic possibility that a person may need to be having things implemented in two or more jurisdictions regularly,” he said.

If a client decides to adopt this strategy, there is some wording within the document that should be included, Mr Burgess said, especially the fact that there is “duplication acknowledgement”.

He added there are a number of other inconsistencies in EPoA documentation that would potentially be solved if there was a nationwide unification of the current legislations, such as witnessing requirements.

“Witnessing requirements are inconsistent in every state. At one end of the spectrum NSW essentially mandates that lawyers must witness EPoAs, whereas in WA there are dozens of categories of eligible witnesses, including virtually all professions,” he said.
“And in WA many specialist advisers recommend two versions of an EPoA be crafted by each person to broaden the powers available to appointed attorneys – a ‘tailored’ version that includes provisions that ensure the EPoA is

structured to achieve several key elements not included in the template state government form and is crafted so as to not revoke the 'standard' version - and vice versa.”