

Transactions involving enduring powers of attorney

By Jen McMillan



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The 2017 report of the Australian Law Reform Commission on Elder Abuse highlights the important role that solicitors play in safeguarding against elder abuse when instructed to make wills and powers of attorney. Examining some of the traps when instructed in transactions to be executed under power of attorney, can help solicitors put in place some practical steps for managing the professional risks and protecting vulnerable clients.

Tip 1: Who is your client?

Even though the instructions are likely to have been received from the attorney, it is important to remember that the client is the principal. The retainer agreement, while it may be signed by the attorney under the power, should be with the principal.

It is a fundamental ethical duty to act in the best interests of the client. The attorney should also be acting in the best interests of the principal, and ordinarily no conflict should arise. Great care needs to be taken, however, if it is unclear whether the proposed transaction is authorised under the power of attorney or if the attorney may have a personal interest in the transaction. In these circumstances solicitors should consider whether to refer the attorney for separate legal advice, and whether it is appropriate to continue to act in the transaction.

Tip 2: Check the power of attorney

Read through the power of attorney instrument. Verify the identity of the appointed attorney and confirm that the formal requirements for an enduring power of attorney have been satisfied. In particular, has the enduring power of attorney been properly executed by the principal and witnessed by a prescribed witness as defined in s 19 of the *Powers of Attorney Act 2003*? Has the witness completed the certificate required under that section? Has the attorney signed to accept his or her appointment?

Tip 3: Is the power of attorney operative?

The instrument should specify when it commences. Check whether the conditions for the power of attorney to become operative have been satisfied. Conditions and limitations on a power of attorney require strict compliance. In *Power v Power* [2011] NSWSC 288 the power of attorney contained the following provision: 'This Power of Attorney shall only be used upon my treating Medical Practitioner certifying that I am no longer physically or mentally able to sign documents or look after my own affairs'.

Snapshot

- Solicitors play an important role in safeguarding against elder abuse.
- It is important to remember that the client is the principal.
- Conditions and limitations on a power of attorney require strict compliance.

The attorney obtained a letter from the principal's medical practitioner which stated: 'Over the last twelve months, we have noticed significant deterioration in her mental state and recent testing show [sic] that she is suffering from significant dementia. She has reached the stage which I feel that she may not be capable of looking after her own affairs.'

The Court held that the requirement for a certificate from the principal's medical practitioner was not satisfied by the letter,

which merely expressed an opinion, and that the attorney had no authority to act under the power of attorney to sell a property belonging to the principal.

Tip 4: Has the power of attorney been revoked?

Ask the attorney whether he or she has any reason to believe that the power of attorney may have been revoked. If possible, confirm with the client that the power of attorney has not been revoked.

Tip 5: Is the proposed transaction authorised under the power of attorney?

The power of attorney may contain express limitations that result in the proposed transaction being outside the scope of the power of attorney. The authority of the attorney is also subject to limitations set out in the *Powers of Attorney Act 2003*.

For example, s 10 provides that no authority is conferred to exercise any function the principal may exercise as trustee. Section 11 provides that there is no authority to give gifts to other persons unless the power of attorney expressly authorises the gift. Sections 12 and 13 provide that there is no authority to confer benefits on the attorney or others unless the power of attorney expressly authorises the conferral of the benefit. Be aware that if the form of authority to give gifts and/or confer benefits set out in the prescribed form has been included, the extent of that authority is limited to the kinds of gifts and benefits set out in Schedule 3 to the Act. In particular, benefits conferred must be reasonable having regard to the principal's circumstances and resources, and must be for the reasonable living or medical expenses of the attorney or third party.

Tip 6: Remind the attorney of obligations to keep records and keep principal's property separate

Finally, it is consistent with a solicitors obligation to act in the best interests of the principal client to remind the attorney of his or her obligation to keep full and accurate records of all transactions involving the principal's property. And of course the principal's property should be kept separate from the attorney's own property. **LSJ**