

# Practical tips for executors where there has been an active enduring power of attorney

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Executors and the solicitors who advise them need to be aware of their obligations and responsibilities to properly administer a deceased estate. If the deceased's affairs were being managed under an enduring power of attorney ('EPOA') before death, the administration of the estate can be significantly more complicated, and there are traps to be avoided.

## Check the power of attorney

The power of attorney instrument should be examined to check whether:

- it was an enduring power of attorney, made under the *Powers of Attorney Act 2003 ('PoA Act')* or, if made prior to 16 February 2004, under Part 16 of the *Conveyancing Act 1919*;
- it was properly executed;
- conditions were to be fulfilled before it became operative; and
- the attorney had authority to give gifts or confer benefits on the attorney or others and, if so, to what extent.

## Ask for the attorney's accounts

In *Bird v Bird* [2013] NSWCA 262, the executors were held liable for failing to enquire into what had happened to (and take steps to recover) proceeds of the sale under power of attorney of the deceased's property. The executor should require the attorney to provide accounts. Like an agent or trustee, an attorney has a duty to maintain and produce accounts. An order that accounts be furnished can be sought from the Supreme Court if circumstances warrant it and the attorney has failed to comply with the executor's requests. It may also be possible for the executor to construct accounts from primary records to which the executor should have access.

## Check whether attorney disposed of specific gifts

If the enduring power of attorney was made on or after 16 February 2004, and if the attorney has disposed of or otherwise dealt with an asset that was the subject of a specific gift in the deceased's will, then s 22 of the *PoA Act* will have an impact on beneficiary entitlements. Essentially, the beneficiary is entitled to any surplus money or other property arising from the disposal. The Supreme Court has power under s 23 of the same Act to

## Snapshot

- Examine the power of attorney instrument and the attorney's accounts.
- Consider whether section 22 of the *Powers of Attorney Act 2003* affects beneficiary entitlements.
- Consider whether the estate has a cause of action against the attorney.

confirm or vary the effect of s 22.

If the EPOA was made before 16 February 2004, s 22 will not apply, and if an asset the subject of a specific gift was sold by an attorney then that gift will fail by ademption. Since *RL v NSW Trustee and Guardian* [2012] NSWCA 39, it is clear that disposal of an asset by a duly authorised attorney does not give rise to a general law exception to the doctrine of ademption. However, if, as in *Power v Power* [2011] NSWSC 288, the disposal was unauthorised, then a general law exception will prevent ademption.

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## Consider whether the estate has a cause of action against the attorney

According to the Australian Law Reform Commission's 2017 Report on Elder Abuse, evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of an EPOA. In this context, the usual relevant misuse will involve the conferral of unauthorised benefits on the attorney or third parties. It is important to check the power of attorney instrument to see whether and to what extent the conferral of benefits was authorised.

The old prescribed form of EPOA under the *Conveyancing Act 1919* contained an optional provision authorising the conferral of benefits on the attorney. In *Taheri v Vitek* [2014] NSWCA 209, the Court of Appeal considered the extent of the authority conferred. For more recent EPOAs made under the *PoA Act 2003*, the prescribed form does not contain an optional provision that authorises the conferral of benefits generally. The optional provisions in the current prescribed form of EPOA authorise the giving of reasonable gifts or transactions to meet the reasonable living and medical expenses of the attorney or specified third parties. Where the authority in the *Conveyancing Act 1919* prescribed form was broad and general, the optional authorities in the current prescribed form are specific and limited.

If the attorney has misused the EPOA then the estate will have a cause of action. It is the responsibility of the executor to call in and collect the assets of the deceased and, in some instances, that will require the instigation of proceedings against the attorney. **LSJ**