

# Power of attorney - when red lights flash

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A power of attorney, by its very nature, is a prime tool in dishonest transactions and it is not surprising that solicitors find themselves a party to claims arising from fraudulent use of them.

Many claims could be avoided if solicitors took more care to appreciate the interests of the donor under the power of attorney both at the time of preparation of the power of attorney and at the time the attorney seeks to exercise it.

It is important to remember that a solicitor preparing the power of attorney acts for the donor and not the attorney.

Further, in carrying out the terms of the power, the donor's interests are paramount and remain so after the donor has become mentally incapable.

## Family members

In many cases, however, a power of attorney is sought by a family member to ensure they can transact on behalf of a sick or elderly family member, who may not now or in time have the capacity to attend to their business themselves.

A solicitor who has acted for the family or has a relationship of trust with the family member seeking to be appointed as attorney can often inadvertently find themselves acting on the instructions of the proposed attorney rather than ensuring the interests of the donor (their client) are properly

protected.

This can be illustrated by a case in which a brother and sister attended a solicitor who had acted for the family for a number of years. The brother suffered from a mental illness and had done so for years. The sister was his primary carer. The brother had inherited their mother's house and it was proposed that the house would be mortgaged to fund the construction of a granny flat at the sister's home to accommodate the brother and also to fund the expansion of the sister's business.

The solicitor was asked to prepare a power of attorney to enable the sister to attend to the transaction on the brother's behalf. The power of attorney was prepared and included a clause entitling the sister, as attorney, to confer a benefit upon herself.

The solicitor also acted on the subsequent mortgage transaction and witnessed the sister signing the mortgage under the power of attorney. The money was transferred directly into the sister's account and was subsequently lost.

## Protecting client's interests

The brother alleged that the solicitor failed to protect his interests in both preparing the power of attorney and in the mortgage transaction. It was alleged in particular, that the brother did not have legal capacity to provide the power of attorney.

The solicitor, not surprisingly and perhaps understandably, believed that he was acting in the joint interests of the brother and sister, which is easy to do when acting for

family members.

While the solicitor maintained that he provided advice to the brother about the effect of the power of attorney, including that the power of attorney authorised the sister to sign anything on his behalf (and had a signed certificate - then under s.16f(2) of the *Conveyancing Act 1919* and now s.19 of the *Powers of Attorney Act 2003*), he had not provided that advice to the brother on his own, nor taken steps to satisfy himself of the brother's capacity. Further, the advice was not recorded in a file note or letter of confirmation.

The solicitor, being aware that the brother suffered from a mental illness and was susceptible to influence, should have advised him separately about the effect of the power of attorney (and recorded that advice), and taken and recorded the steps which he took to verify the brother's capacity. The preferable and safer course would have been to recommend that the brother be advised separately by an independent solicitor.

Further, the solicitor did not take separate instructions from the brother in relation to the mortgage transaction and, in fact, did not give the brother any advice about the mortgage transaction at all. In *< Victoria Trustees Perpetual v > [2004] NWSC 1078* Young CJ said: "For solicitors, red lights should flash when certain factors exhibit themselves, one red light flashes when one can see that the donor of the power of attorney is to receive no benefit at all from a transaction yet the donee is to receive a considerable benefit. One can rationalise that this is

because it is a family dealing, but a prudent solicitor when he or she sees the red light, makes enquiries.

"Furthermore, a prudent solicitor is extremely careful about documents to which he or she puts his or her signature and professional reputation and takes precautions against misleading anyone else."

## Guidelines

The Law Society of NSW has prepared guidelines for solicitors preparing an enduring power of attorney. These set out matters solicitors should consider when acting in relation to the preparation of an enduring power of attorney, including how to assess whether a donor has the capacity to give the power of attorney. The guidelines can be found on the Law Society's website at [www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026516.pdf](http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026516.pdf).