



## Short Minutes Episode 65 - Transcript

### Intra-family transactions

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There is a minefield of issues for solicitors asked to act in intra-family transactions, particularly where the transaction involves a gift from an older person to a family member.

In *Wardle v Wardle* a solicitor was asked to act for a mother in relation to the sale of her home and for a daughter in relation to the acquisition of a property using the proceeds of sale of the mother's home.

Following the mother's death her son sought a declaration that his sister held the acquired property on trust for the mother's estate on the basis of undue influence and/or unconscionable conduct exploiting the mother's position of special disadvantage.

The son was unable to establish that there was undue influence, but succeeded on the issue of unconscionable conduct. It was significant that the one solicitor had acted for both the mother on the sale and the daughter on the acquisition, with Slattery J noting that the solicitor was '*somewhat blinded to [the unconscionability] by the apparent consensus between mother and daughter. But this superficial, yet misleading, consensus was the very reason that the deceased needed to be independently advised. [The daughter] was aware that the issue of her mother's future, potentially expensive, medical care was not the subject of a clear arrangement for the benefit of her mother and ultimately took the benefit of the transaction with that knowledge.*'

Criticism was levelled at the solicitor for acting for both the mother and the daughter without the mother's informed consent, and for apparently failing to have regard to Conduct Rule 11 which requires a solicitor to avoid conflicts between the duties owed to two or more current clients.

When approached to act in an intra-family transaction, there are a number of things to consider:

- the capacity of the older person to enter into the transaction;
- the potential for undue influence or unconscionability;
- if the transaction is to be effected under a power of attorney, the need for the power of attorney instrument to explicitly authorise a gift of the type envisaged;
- the duty to avoid conflicts between the duties owed to two or more clients; and
- the importance of independent legal advice.

I'm Jen McMillan

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### Additional Resources

[Wardle v Wardle \[2021\] NSWSC 1529](#)