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DUTIES OF ATTORNEY

General limits on the use and abuse of powers of attorney –

Breaches of Fiduciary Duty

An attorney appointed by Power of Attorney has, in law, significant financial responsibilities to the principal which must be complied with. The appointment of an attorney under a Power of Attorney is really the appointment of an agent to attend to matters of business or personal financial management, such as dealing with third parties, on behalf of the person appointing the agent, otherwise known as the principal or donor of the power.

Below are several case law examples to assist you to ascertain what a Power of Attorney cannot be used to achieve:-

The case of Watson: father, son and fiduciary duty

In a case involving the grant of a power of attorney by a father to his son, one of four children, the son withdrew \$55,000 from the bank account and transferred to himself the title to the family home. The power was given five days before the father had made his will dividing his property between all of his children, subject to a right to occupy the family home in favour of the (defendant) son.

In the judgment, the Court referred to the financial obligations which were involved:-

“Pursuant to the grant of the enduring power of attorney, the defendant had vested in him the powers given to an attorney pursuant to [s 163B](#) of the Conveyancing Act 1919. The granting of the power of attorney places the defendant in a fiduciary duty in relation to the deceased, and he is required to accord priority to the interests of the deceased where there is a conflict between the interests of the two.

The use of the power of attorney by the donee contrary of the known wishes and directions of a donor is a breach of trust ... The powers of attorney are specifically directed at the management of the principal's affairs: “it is not open to attorneys to either obtain an advantage for themselves or to act in a way which is contrary to the interests of their principals.”

The case of K: father, daughter and conflict of interest

The South Australian Supreme Court made some observations on the duty of attorneys and restated the importance of those obligations:-

It is well established that an agent owes his principal a fiduciary duty: (see the case of *Hospital Products Ltd v United States Surgical Corp*) ... in this case the defendants were subject to fiduciary duty given that their father was elderly and prone to periods when he was not competent to manage his affairs. Thus, as attorneys for their father, the defendants had a duty as fiduciaries to him and his estate.

As fiduciaries, the defendants had an obligation not to profit from their father's estate and, if they do profit, they are liable to account for the profit:

As fiduciaries, the defendants had the burden of proving that money expended by them on fees for their father's accommodation at rest homes were properly incurred:

The defendants, and in particular Mrs N, had a conflict of duty and interest. Mrs N and her husband had been paid \$40,000 in order to provide accommodation for Mr K. That payment enabled them to create an asset which they could use and enjoy when he no longer lived at the house... Mrs N had a clear duty to permit her father, Mr K to reside in the extensions and not to do anything to prevent his quiet and peaceful occupation. Mrs N and her brother incurred fees payable from their father's estate for accommodation at rest homes ... In the absence of any explanation, the defendants must account for the profit.

Abuse of delegated powers – compliance with instructions

General limits on power always include the instructions of the principal. In the case of *Dynayski v Grant* the principal directed that the proceeds of sale of his house be divided equally between his son and daughter. The attorney was married to the daughter. A dispute arose about the division and whether the attorney had followed the principal's instructions.

These were the background facts described by the NSW Supreme Court:

- This was a dispute between family members all of whom are related by blood or marriage (son claiming against sister and brother-in-law in relation to father's property);
- The defendants were Mr & Mrs G and Mr G prior to the date of death of the father was appointed his attorney;
- The father had made a will in which he left his estate to the son and daughter in equal shares;
- Some time prior to the father's death it was agreed that his house would be sold and the proceeds, less whatever was necessary to maintain him, would be divided between the son and daughter in accordance with their entitlements under the will;
- Mr G as the father's attorney sold the house;
- The dispute concerns the application of the proceeds from that sale.

The Court, in dealing with the relevant principles, reviewed the case precedents on directions conveyed by principal to attorney (which includes limitations and instructions written and verbal) thus:-

(It has been) held that the use of a power of attorney by the donee, contrary to the known wishes and directions of the donor is a breach of trust. This principle was approved by the Victorian Supreme Court(in this way):

“It is not the law that an attorney given power by instrument under seal may, so long as the instrument remains unrevoked, exercise the power it confers in disregard of any subsequent orders of his principal conveyed to him... Subject to any contrary sense of the instrument there

always resides in the donor the right later to instruct the donee not to act on the power, or to act only in a stated way”.

That the effect of a power of attorney, even if given under seal, may be modified (verbally) is made clear by the decision of *The Margaret Mitchell* ... There, a power of attorney was given under seal by the owner of a ship to her (captain) ... who purported to sell her under authority conferred by the power of attorney. The (English) High Court of Admiralty, found as a fact that:

'... though the power of attorney was not formally revoked, yet that Captain Stiles, long before the sale, received letters informing him that he was to be dismissed, and of the owner's intention to dispose of the ship; the whole contents of those letters show that the owner did not desire that Stiles should sell this ship under this power of attorney, and Captain Stiles's letter shows that he was about to sell the ship not in accordance with the wishes and directions of the owner, but in despite of them ...'.

'...as a general rule, the grantee of a power of attorney is bound to follow the directions and wishes of the grantor; as, for instance, with respect to a power of attorney to sell stock, the grantee must exercise that power according to the orders of the grantor. I conceive, that to use a power of attorney contrary to the known wishes and directions of the grantor is a breach of trust.'

So here is found an important statement of the relevant law. There were two parcels of money which the attorney was found to be liable to repay, with interest, in the case.

Acting in the best interests of the principal

The prescribed form of Power of Attorney in New South Wales has attached to it notes which include this –

4. An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney.

An appointment of an agent gives rise to a fiduciary relationship. There are duties to avoid a conflict of interest and to account to the principal for any profit or gain.

The case of *Re R* assists us to understand what 'acting in the best interests of the principal' means was an appeal from the Guardianship Tribunal (the "Tribunal") in respect of its decision to make a financial management order under the [Guardianship Act 1987](#) subjecting the estate of the first defendant to management under the [Protected Estates Act 1983](#) and committing the management to the Protective Commissioner of New South Wales. In the course of its judgment the Tribunal said:

"The issue for the Tribunal was whether the Power of Attorney executed by the first defendant ... should remain in place with the plaintiff continuing to act as his father's attorney in relation to the management of the first defendant's finances or whether the circumstances relating to the plaintiff's conflict of interest warrants suspending the Power of Attorney and putting in place a management order."

The tribunal came to its conclusion as follows:

"It is not in dispute that the first defendant is incapable of managing his financial affairs.

On the available evidence the Tribunal was satisfied that it is in the best interests of the first defendant that the Power of Attorney executed by him on 17 November 1997 naming his son, the plaintiff, as his attorney, should be suspended and that the first defendant's affairs be placed under a formal management order.

It was in this context that His Honour Justice Young came to look at what is meant by 'best interests'.

... On 17 November 1997 the (principal) executed a general power of attorney in favour of the (his son). The power of attorney would, unless the Court made an order, continue after any loss of capacity. The power of attorney included a provision referred to in section 163B(2)(b) of the [Conveyancing Act 1919](#), authorising the donee to execute an assurance, as a result of which a benefit could be conferred on the donee appointed by the power of attorney.

The actions of the Agent/ attorney came under legal challenge. The Judge addressed the issue of best interests in a full discussion of the meaning of that phrase and with relevance to powers of attorney:

"...One then turns to the words "best interests". Here there was quite a debate as to what the words meant. ...I (have) said (in a previous judgment) that "It is hard to find a good definition of the words 'best interests' ...I would agree, ...that the "best interests" must include the welfare, health and well-being of the person in a wider sense than is suggested by protection from neglect, abuse or exploitation (Re Mc (1989) 3 VAR 87).

"...in the recent English case of Re W [2000] 1 All ER 175. ...a power of attorney was given to Mrs X. Mrs X took advice and she found that it would be very tax effective if the estate of the donor of the power of attorney (her mother) was reduced below a certain figure. She then gave gifts to each of her brothers and sisters and herself of 20,000 pounds. The English Chancery Division said that although Mrs X did not portray a picture of greed or sought to do anything that was not within the best interests of the family, she acted misguidedly and not in the interests of her mother. So, there is a case right in point where a person with the best will in the world, who shares things equally between herself and her brothers and sisters, and acts in what she thinks are the interests of her mother, yet the Court says she is not acting in the best interests of her mother. Indeed, cases like Re W show that there is a good argument that a person who is given a power of attorney cannot give money away, and in particular cannot give money to themselves.

...It was not at all relevant that the (son) had power under the power of attorney to make gifts to himself. He may have had that power, he may not have had that power, it does not matter. The question was whether it was in the best interests of the incapable person that that situation be permitted to continue.

... the English Court of Appeal (in a 1928 case- ed.) points out that a power of attorney may give a person authority to rob the donor, but that does not make robbing the donor something that he should not be accountable for. (One of the judges) said, "It is a fraud if the attorney uses his power to rob his principal, but if he does rob him by doing the very thing he is empowered to do, it is immaterial".

I want you to have my house

If attorneys are bound to act on the directions of the principal, what then should an attorney do when faced with an instructions like this:

"When I am mentally incapable I want my three girls, Sharyn, Gayle, Antoinette, to have my house, 64 John Street, Yeppoon."

In this case Mr C. had appointed two of his daughters to be his attorneys just eight days before writing the letter. It was addressed to one of them.

In a second letter written just a day before, he wrote to his other daughter and attorney –

"PS I have given Gayle, Sharyn, Antoinette my house at 64 John Street, Yeppoon as they are my loving daughters. Gayle, take this to a solicitor as I give you three girls my house."

Three months later Mr C. was certified as mentally ill and incapable of managing his estate under the mental Health Act 1974 (Qld). Shortly beforehand, the attorney daughters executed a transfer of the title to the house to themselves and their sister which they subsequently registered.

The Public Trustee, appointed to manage the estate, sought to set aside the transfer because of the breach of s 175E(1)(a) of the Property Law Act. That section provides –

"Without affecting any other obligation imposed by law in exercising powers under an enduring power of attorney the donee must not, unless the power of attorney expressly authorises it, enter into a transaction if the donee's interests and duty in relation to the transaction could conflict with the donor's interests and duty in relation to the transaction."

S175E(1) also requires the donee to keep the donee's property and money separate from the donor's.

The attorneys argued they were complying with their father's wishes which were contained in the two letters. They accepted however, that the letters did not complete the gift which was otherwise unenforceable. They claimed to have the right and the power to do what their father had not done to perfect the gift.

The trial Judge disagreed.

This, then, is a power which is the creature of statute and consequently its exercise is determined by that statute. The words of s175E(1)(a) are clear. What the attorneys have attempted to do here is to act in a way which is in conflict with the donor's interests because they have transferred his property out of his hands into their own. Such a transfer cannot be sustained because it is beyond the powers that the attorneys have.

In the circumstances, it seems to me that the matter should pass fully into the control of the Public Trustee. The material placed before me shows that there is conflict within the family, and in those circumstances the power of attorney should be revoked and the Registrar should be directed to transfer the property back to Mr Campbell.

You are my only daughter – fiduciary duty modified

Although the evidence in *Smith v Glegg* was that the plaintiff mother had three adult daughters, at the time she gave away her house, she would describe the defendant as her 'only' daughter. That was the outcome not only of the affection which she had for the defendant (at the time) but also for the animosity she had for her other daughter.

This case involved claims of undue influence and evidence that at the time of the relevant transactions, documented by a contract for sale at \$150,000, a transfer and a deed of gift, the plaintiff was also blind. In this discussion paper reference is made only to the use of a power of

attorney which the defendant held from her son as principal, and to whom the title to the house in questions had been transferred.

It was the evidence that there was no consideration for the transfer to the son. About twelve months after that transfer, the defendant daughter sold the house and applied the proceeds for her own benefit. Here is how the Court approached the problem:-

The statement of claim alleges that the defendant owed the plaintiff a fiduciary duty not to obtain a profit for herself or a related party in conflict with the interests of the plaintiff. By the Defence, the defendant admits that "the Defendant owed the Plaintiff fiduciary duties but the extent of those duties were identified and modified by the contents of the Enduring Power of Attorney and in particular cl 3 thereof".

Clause 3 provided as follows:

I expressly allow and authorise my attorney to enter into transactions on my behalf where my interests and duty could conflict with my attorney's interests and duty in relation to the transaction even though my attorney might derive a direct or indirect benefit therefrom.

The transactions to which cl 3 applied were those entered into by "my attorney ... on my behalf". By the terms of cl 3, the content of any fiduciary duty was affected only in that context. It was not in terms which affected a transaction such as this one. The effect of cl 3 was to widen the circumstances in which the attorney could enter into a transaction on the principal's behalf. It did not affect the content of any fiduciary duty in circumstances which do not involve such a transaction.

Apart from her argument based upon cl 3, the defendant correctly concedes that she owed to the plaintiff fiduciary duties. The plaintiff was totally dependent upon her assistance, and specifically upon her exercise in good faith of her very extensive powers under the power of attorney. That required the defendant to avoid any dealing or transaction by which her own interest could conflict with her duty to the plaintiff. A critical part of her responsibilities as an attorney was her management of the plaintiff's money and property. If the defendant was to be free to accept a gift of the plaintiff's only substantial asset, then her interest in maximising the value of what she would receive would conflict with her duty to manage and apply the plaintiff's property only for the support, health and comfort of the plaintiff, even if that involved some substantial expenditure. The existence of such a conflict between duty and interest was not challenged in the defendant's case.

On the breach of fiduciary duty the Court found that "the defendant profited in the amount which she received when she sold the house (\$180,000)". The judge also found for the plaintiff on the claim for undue influence.

So you can see that the responsibility of the person given Power of Attorney is to act AT ALL TIMES in the best interests of the donor. The Attorney cannot use the money or other property of the donor for his or her own purposes nor to assist others even if it is believed that the donor would wish to do so.



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