



Précis Paper

Preventing Abuse of Powers of Attorney

This is an interesting discussion about current issues regarding powers of attorneys, and the role of solicitors in preventing their abuse.

Discussion Includes

- Legal policy reform in NSW and Australia
- Overview of recent case law
- The extent of the authority granted under power of attorneys
- Role of solicitors in preventing abuse by attorneys
- Conditions precedent on the appointment of attorneys

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Preventing Abuse of Powers of Attorney

1. In this edition of BenchTV, Darryl Browne (Principal, Browne Linkenbagh, Sydney) and Jenny McMillan (Legal Risk Manager, LawCover Sydney) discuss recent developments in the law of powers of attorney.

Recent Developments in Powers of Attorney

2. Properly used powers of attorney can be a protection against financial abuse. However, powers of attorney can also be instruments of financial abuse if the attorney misuses its powers.
3. Recent law reform efforts in NSW and Australia have focused attention on the role of powers of attorney in elder abuse. In NSW, the Legislative Council General Purpose Standing Committee released their report *Elder abuse in New South Wales* (Report 44) in June 2016, and the Australian Law Reform Committee also launched their Issues Paper on Elder Abuse in June 2016. The NSW government has delayed its response to the Legislative Council's report until the ALRC has concluded their inquiry, and it is hoped that there will be national approach on this issue.
4. In the recent case of *Cohen v Cohen* [2016] NSWSC 336, a mother, who owned a unit, appointed her son as her attorney. After a period of time, the fees for the mother's nursing home were not being paid, and as a result the NSW Trustee & Guardian was appointed as financial manager. When the NSW Trustee & Guardian inquired as to why the fees were not being paid, it was revealed that the son had transferred his mother's property into his own name for \$1, using the power of attorney.
5. The NSW Trustee & Guardian applied for and were granted the re-transfer of the unit which was still in the son's name. The court determined that the son had misused his position as attorney and had breached his fiduciary obligations by using his position as attorney to benefit himself. Hallen J stated:

66. In this case, I am satisfied that by transferring the Lane Cove property to himself, a transfer which does not appear to have been disclosed to the Plaintiff, and which had the effect of depriving the Plaintiff of her only substantial asset, the Defendant acted in breach of his fiduciary obligations to the Plaintiff.

6. Mr Browne and Ms McMillan noted that the power of attorney in this case was drafted pursuant to a previous version of the power of attorney form suggested under the

Conveyancing Act 1919 (NSW). That document contained a clause pursuant to which the attorney was given authority "to execute any assurance or other document, or do any other act, whereby a benefit is conferred on him". Because of the nature of this clause, the son in *Cohen v Cohen* was in fact transacting in a manner authorised under the power of attorney. This power of attorney document was therefore open to abuse because of the standard clause which allowed the attorney to use the principal's assets for his or her own benefit.

7. In contrast, under the new powers of attorney forms, any benefit for the attorney is likely to be confined to reasonable medical and living expenses. Mr Browne and Ms McMillan suggested that lawyers who hold powers of attorney in the old form should discuss with their clients whether they are comfortable with the scope of the power granted in that document.
8. Even though the son in *Cohen v Cohen* had the power as attorney to enter into the disputed transaction, Hallen J emphasised that although the son may have possessed that power, that did not prevent a finding that he had breached his fiduciary duties.

The Role of Solicitors in Preventing Abuse by Attorneys

9. Mr Browne and Ms McMillan advised that solicitors need to probe why a transaction is being carried out and test whether it is in the interests of the principal. Solicitors may come under increased scrutiny in relation to transactions of this nature.
10. Solicitors should also exercise caution at the point in time at which attorneys are appointed. In *Szozda v Szozda* [2010] NSWSC 804, Barrett J noted that the appointment of an attorney was an important step and attention should be drawn to whether the proposed attorney is wise, prudent, responsible and trustworthy.
11. When a solicitor is involved in a transaction involving an attorney, Young J in *Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078 noted that there should be a red flag where the principal will obtain no benefit under a transaction, but the attorney will. A prudent solicitor should make inquiries in this regard, even where it is a family transaction. Solicitors should also explain to their clients that if the transaction does not comply with fiduciary obligations, there may be difficulties that arise.
12. If a solicitor is aware that informal transactions are being carried out, they should suggest that the arrangement be formalized. In some cases, the person who is abusing their position may be oblivious to their responsibilities (see, e.g., *Woodward v Woodward* [2015] NSWSC 1793 and *Lindsay v Arnison* [2017] NSWSC 41), and a solicitor can play an important role in pointing out what their obligations are and should suggest a formal power of attorney.

Conditions Precedent on the Appointment of Attorneys

13. In *Anderson v Anderson* [2016] NSWSC 1204, a property was registered in the name of an ex-husband and wife as joint tenants. Under the terms of the property settlement, the wife was entitled to live in the property during her lifetime.
14. The ex-husband made a power of attorney appointing his second wife to act as attorney or, if she was unwilling or unable, appointing his daughter from his second marriage as a substitute attorney. The daughter signed documents to sever the joint tenancy held with her father's first wife, with the effect that when her father died, his share of the property passed to his estate, rather than to his ex-wife by survivorship. Proceedings were brought to set aside the severing of the joint tenancy.
15. The proceedings were brought on the basis that the condition precedent of the daughter being appointed as attorney had not been met, because the first appointed attorney (her mother) was still able to act in that role. Hallen J was not satisfied that the condition precedent to the appointment of the daughter as attorney had been met, as the mother was still able and willing to act under the power of attorney.
16. However, because the transfer was registered under the *Real Property Act 1900* (NSW) and there was no evidence of fraud, indefeasibility of title was a bar to setting aside the transaction. This meant that even though it was an unauthorised transaction, the ultimate outcome was that the severance held. The property therefore did not pass to the ex-wife by survivorship.
17. This case is an important lesson that anyone appointed as an attorney needs to make sure that any conditions on their appointment have been met before they act. Solicitors should look closely at the document that gives the attorney authority and make sure that any conditions precedent have been met. There may be exposure to personal liability for people who act without proper authority as attorneys.

BIOGRAPHY

Darryl Browne

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Darryl is an Accredited Specialist in Wills and Estates and advises clients on commercial law, conveyancing law issues, and related real estate transactions. Darryl is a member of a wide range of professional committees and bodies, and his professional achievements include Director (Councillor) of the Law Society of NSW, Chair of the Ethics Committee, Member of the Specialist Accreditation Board and the Legal Aid Commission Board, and Director of LawCover Insurance Limited.

Jenny McMillan

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Jenny McMillan is a Law Society of NSW accredited specialist in wills and estates. She is a member of the NSW Law Society Elder Law and Succession Committee, and a member of the Society of Trust and Estate Practitioners. Jenny lectures and is the Practice Leader – Wills and Estates in the College of Law's LLM (Applied Law) program, and is also a part-time Senior Member (Legal) in the Guardianship Division of NCAT.

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Cases

Cohen v Cohen [2016] NSWSC 336
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Legislation

Conveyancing Act 1919 (NSW)
Real Property Act 1900 (NSW)

Reports

Legislative Council General Purpose Standing Committee No 2, *Elder abuse in New South Wales* (Report 44 - June 2016)
Australian Law Reform Commission, *Elder Abuse Issues Paper No 47* (June 2016)