



Précis Paper

Elder Law

Esteemed solicitor Pam discusses common issues for solicitors relating to powers of attorney and wills and elder law.

Discussion Includes

- Private International Law in Modern Wills and Estates
- Powers of Attorney
- Vulnerable Clients
- Ethical Duties of Solicitors
- Applications to the Guardianship Tribunal
- Wills and the Inheritance System

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Elder Law

1. In this edition of BenchTV, Pam Suttor (Solicitor) and Julian Kenda (Solicitor) present on the common issues that solicitors face when dealing with elder law and powers of attorney.

Wills and Estates Across Jurisdictions

2. The nature of globalisation and the constant movement of people has resulted in a complex legal environment for wills and estate lawyers. Ms Suttor notes situations where individuals have left to work overseas and acquired assets in another jurisdiction, left assets overseas after migrating to Australia, or are bequeathed assets from family in other jurisdictions. It is therefore important for modern practitioners to be familiar with the principles of private international law such as renvoi and establishing domicile.
3. In a situation where there is a conflict of laws, the doctrine of renvoi or "send back" is used by a court to adopt the governing laws of another jurisdiction.
4. An individual's domicile is the place considered by law to be their permanent home. Ms Suttor provides an example whereby a client, despite having the bulk of his estate in Australia, also maintained a substantial amount of assets in Croatia. He had returned to Croatia when he fell ill, and had married and divorced his last wife in Croatia. The relevant question was the location of the client's domicile at the time of death.
5. A person's domicile governs the inheritance laws to which they may be subject to. Ascertaining a person's domicile is particularly important where an extensive, world-wide estate may be subject to one country's death duty and taxes. For example, where an individual has assets in the United Kingdom and Australia, avoiding the UK's death duty tax will be contingent on finding that they are domiciled in Australia.
6. In preparing a will, a practitioner must be prudent in checking where the client's assets are. Where some countries have a prescribed form of inheritance, Ms Suttor recommends drafting a second will for the other jurisdiction.

Registration of Powers of Attorney

7. In NSW, there is no general requirement to register a power of attorney. However, under s 52 *Powers of Attorney Act 2003* (NSW), where an attorney intends to engage in a transaction affecting real property, the power of attorney must be registered. Notably, registration is not required to operate shares or bank accounts.

8. Ms Suttor notes that there would be privacy and cost concerns if registration is to be enforced as many individuals grant enduring powers of attorney as a preventative measure to cover a situation where they lose capacity.
9. Where a power of attorney is improperly used, a donor can make an application to the Guardianship Division of the NSW Civil and Administrative Tribunal to seek appointment of a financial manager and suspend the power of attorney.
10. Ms Suttor notes that whilst there should strictly be registration of revocation of powers of attorney, this is generally not observed. A revocation need not be registered to be effective, however the donor must notify the attorney of such revocation otherwise the attorney who does an act is entitled, under s 47 *Powers of Attorney Act 2003* (NSW), to rely on the power of attorney if they are unaware of the termination.

Ethical Issues

11. Ms Suttor advises that solicitors should decline to represent a client attempting to improperly use a power of attorney. In such a situation, a solicitor may be able to make an application to the Guardianship Division of the NSW Civil and Administrative Tribunal to seek a financial manager, however this is not an often occurrence.
12. Notably, the attorney owes a fiduciary duty to the donor to act in their best interests and cannot better their own financial position through this power. Where an attorney is a beneficiary under a will, or the donor intends for the attorney to gain a benefit or gift, provision should be made in the power of attorney to avoid the appearance of impropriety.
13. Ms Suttor recommends that when drafting a will, individuals should gift percentage amounts of the estate, rather than gifting specific items. This is to ensure that a beneficiary still retains a benefit where specific assets are sold off to pay costs or are otherwise disposed of. Section 22 *Powers of Attorney Act 2003* (NSW) attempts to traverse this issue by specifying that where a bequeathed asset under the will is sold by the attorney, proceeds of the sale can pass to the person who would have otherwise received the gift. Importantly, vigilance in drafting wills is key to prevent complex legal issues arising when they are administered.

BIOGRAPHY

Pam Suttor

Pam has been a solicitor since 1963 and an accredited specialist in Wills and Estates since 1995. She is a current Councillor of the Law Society of NSW, and was Chair of the Elder Law and Succession Committee from 2006 to 2013. She is also Section Editor of the Elder Law Section of the Australian Law Journal.

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BIBLIOGRAPHY

Legislation

Powers of Attorney Act 2003 (NSW)