

# Enduring powers of attorney – conflicts of interest and elder abuse

The 2016 Victorian Supreme Court case of *Ash v Ash* [2016] VSC 577 gives a clear example of conflicts of interest that can arise when granting a person an enduring power of attorney (EPOA). It also raises the issue of elder abuse.

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## **Facts**

- > Mr Ash was diagnosed with Parkinson's disease in 2007.
- > His wife died in 2008.
- > In 2012, he appointed his daughter as his enduring attorney.
- > Mr Ash had both an SMSF and a family trust, which had both been established in 1978. Both used the same trustee company.
- > In July 2013, Mr Ash appointed his daughter as a director of the trustee company and a member of the SMSF.
- > In September 2013, Mr Ash had a serious fall, which resulted in acute brain injury. He was no longer able to manage his affairs. He moved out of his home and into an aged care facility.
- > Shortly after Mr Ash's fall, the daughter appointed her husband as a director of the trustee company and member of the SMSF.
- > In January 2014, the daughter, her husband and children moved into Mr Ash's home paying considerably less than the market rent.

## **Victorian Civil and Administrative Tribunal (VCAT) action**

- > In March 2014, Mr Ash's other daughter applied to VCAT for the EPOA to be revoked and for an independent administrator to be appointed.
- > In the lead up to the VCAT hearing, terms of a draft settlement were negotiated with the daughter on how she could be supervised and monitored as Mr Ash's attorney. The final version was given to her on 17 December 2014.
- > On 24 December 2014, the daughter signed the following documents:
  - Five year lease for the father's property;
  - A deed removing Mr Ash as settlor of the family trust and appointing herself in his place; and
  - Issuing four additional shares in the trustee company to herself, giving her control over the SMSF and family trust.
- > The daughter claimed that she planned to resign as attorney in mid January 2015 and resigned at the VCAT hearing on 23 January 2015. Her appointment was formally suspended and an independent administrator was appointed at the hearing,
- > The daughter did not disclose the three abovementioned transactions at the VCAT hearing and the administrator did not become aware of them until late 2015.
- > In August 2015, the administrator established a new SMSF and requested Mr Ash's benefit be rolled over to the new fund. They also served the daughter and husband with a notice to vacate Mr Ash's home. They declined to comply with both requests.

### **Supreme Court of Victoria action**

The administrator took action on behalf of Mr Ash against the daughter and her husband claiming that Mr Ash had suffered loss as a result of the daughter's breach of her fiduciary duty and that her husband's actions also contributed to the loss.

In their defence, the daughter and her husband claimed that:

- > Mr Ash had intended for them to become more directly involved in the management of his financial affairs. This was supported by Mr Ash appointing his daughter as his enduring attorney and appointing her a director of the corporate trustee; and
- > prior to his accident, Mr Ash expressed a desire for the daughter and her family to live in his home with him.

The Supreme Court did not accept the defence due to lack of evidence. While it may have been possible to accept 'informed consent' for the 'conflicted' transactions, Mr Ash did not have the capacity to give informed consent at the time the transactions were entered into nor was there any evidence of consent being given prior to the accident.

### **Enduring powers of attorney – important considerations**

An enduring power of attorney (EPOA) can play an important role in managing an individual's affairs, particularly as they age. If an individual loses the capacity to make financial and/or lifestyle decisions and has not put an EPOA and/or enduring guardianship in place, it is necessary to apply to the relevant state based tribunal for a financial management and/or guardianship order. This can be both a complex and stressful process for all parties involved. In NSW application would be made to the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT). In Victoria the relevant tribunal is VCAT.

It is important that the person or persons to whom an EPOA is granted is:

- > completely trustworthy; and
- > is able to exercise the power when needed.

An EPOA allows the holder to enter into any financial transaction that the grantor could have entered into. While the attorney has a fiduciary duty to act in the grantor's interests and not their own, any abuse of the power may not be discovered until some time after the event.

It is also important that the person or persons to whom to power is granted is able to exercise the power when needed. It is common for husband and wife to grant EPOAs to each other, however, as they both age, they may reach a stage where neither is able to act for the other when needed.

### **Placing limits on an enduring power of attorney**

When granting a power of attorney, it is possible to set limits and conditions on the exercise of the power. It is also possible to appoint two or more persons as enduring attorneys, under which they may act:

- > Jointly – this requires all attorneys to approve a transaction; or
- > Severally – each attorney may act independently.

It is also possible to set up the EPOA so that certain transactions allow the attorneys to act independently, while more complex or higher value transactions require them to act jointly.

These measures may reduce or eliminate potential conflicts of interest between the grantor and holder of an EPOA.

## Elder abuse

This case also highlights the issue of elder abuse which, which is currently the subject of an inquiry by the Australian Law Reform Commission (ALRC). The Commission's discussion paper (DP83) describes elder abuse as follows:

“Elder abuse may be broadly defined as causing harm to an older person. It usually refers to deliberate harm, such as assaulting an older person or stealing their money, but it may also be harm caused by neglect, such as failing to feed or provide prescribed medications to an older person. Elder abuse usually refers to abuse by family, friends, carers and other people the older person may trust, rather than abuse by strangers. Most elder abuse therefore has ‘similar features’ to family violence.”

Significantly, the perpetrators of elder abuse are normally people well known to the victim and who are in a position of trust; not strangers.

In this case, Mr Ash granted an EPOA to one of his daughters, who was a solicitor. The daughter's husband worked in financial services and had been Mr Ash's adviser in relation to some of his investments. It was Mr Ash's other daughter who applied to VCAT for the EPOA to be revoked and for an independent administrator to be appointed, following concerns about some of the transactions her sister had entered into under the power of attorney.

While elder abuse is not uncommon, it should be noted that in the vast majority of cases, relatives, friends and carers do the right thing by those who rely on them. Thus setting up measures to prevent elder abuse is more a case of being ‘alert’ rather than being ‘alarmed’.

When considering who to involve in managing an individual's affairs, when they are no longer able to do so themselves, there is a trade-off between protection and practicality. Involving more people in management may offer a greater level of protection but it also makes the management process more complex. It is also possible to involve a state government body such as NSW Trustee and Guardian to oversee the process but this can make the process more costly and complex.

### Example

John Smith has four children; Charlotte, Jack, Olivia and William. He is considering who to appoint as his enduring attorneys for when he is no longer able to manage his affairs. While appointing all four children as joint attorneys could be seen as providing maximum protection, it could make the arrangement unworkable. After discussion with his children, John decides to appoint Jack and Olivia, who have the highest level of financial experience of his children. For some transactions they will be able to act independently; for more complex transactions they will be required to act jointly.

[Read the judgement](#)

[Read the ALRC discussion paper](#)



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