Bankstown & District Law Society
Continuing Legal Education Seminar
19 March 2014

POWERS OF ATTORNEY
NEW FORMS
AND CAPACITY ISSUES

Powers of Attorney – the 2013 amendments

The *Powers of Attorney Act 2003* has been amended: *Powers of Attorney Amendment Act 2013*.

The *Powers of Attorney Regulation 2011* has also been amended: *Powers of Attorney Amendment Regulation 2013*.

The new forms

The amendments introduce new prescribed forms for both General Powers of Attorney and for Enduring Powers of Attorney.

The transition/grace period up to 28 February 2014 has now ended. The new forms must now be used.

Enduring Powers of Attorney signed from 1 March 2014 using the old forms will no longer be accepted by LPI.

There is no prescribed form for revoking a power of attorney, but LPI has a suggested Revocation of Power of Attorney form.

Legislative changes

There are a number of noteworthy changes to the Act.

Section 33 now gives the Tribunal (NCAT) power to review the revocation of a power of attorney.

The new section 45A specifically provides for one or more substitute attorneys on terms which may be set out in the instrument creating the power of attorney. A substitute attorney appointed under an enduring power of attorney does not take effect until the substitute attorney accepts the appointment by signing.

The provisions in section 46 dealing with joint attorneys have been amended. Previously, if a power of attorney appoints 2 or more persons as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant. The amendments now clarify that the power of attorney is not terminated if:

(a) the power of attorney provides otherwise, and
(b) at least one of the attorneys or a substitute attorney remains in office.

Capacity Issues

The Law Society has published *Client Capacity Guidelines*. The Guidelines note the fundamental proposition that as legal practitioners we are creatures of instructions:

> The basis of the solicitor-client relationship is that the former act on the instructions of the latter. It is in the nature of professional advice that the solicitor will explain the options and their likely outcomes and advise which is best. Nevertheless, the ultimate decision as to what to do rests with the client as an autonomous citizen.

An incompetent client cannot instruct a solicitor (or enter into a contract such as a costs agreement), and a solicitor should not follow such purported instructions.

Some authorities on capacity

In *Scott v Scott* [2012] NSWSC 1541 Lindsay J said at [173]:

> First, the instrument at the heart of the controversy is and was at all material times governed, largely but not exclusively, by a statute; specifically, the Powers of Attorney Act 2003. Secondly, as confirmed by s 7, that Act "does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that [the Act] provides otherwise, whether expressly or by necessary intention". Thirdly, there is no statutory definition of the expression "mental capacity to make a valid power of attorney" found in the provisions of the Act (including s 36) governing a challenge to the validity of a power of attorney. Fourthly, the concept of "mental capacity" in the context of the Act is informed by the concept of "mental capacity" under the general law: *Szozda v Szozda* [2010] NSWSC 804

at [12]-[19] and [27]-[42]. Fifthly, the question of "mental capacity to make a valid power of attorney" must, in each case, be directed to the terms, and process of execution, of the particular instrument under review: *Gibbons v Wright* (1954) 91 CLR 423 at 437-438.

Barrett J (as he then was) said in *Szozda v Szozda* [2010] NSWSC 804:

> 32 It seems to me that different considerations attend a decision to grant a general power of attorney without reference to any foreshadowed transaction and as a means of catering for the possibility that the donor might be unavailable or unable to act at some undefined future time when action is needed. The donor is prescribing no dispositions. He or she has no need to appreciate the extent and nature of moral claims and the extent and nature of the property available to meet them. Because no particular transaction is in contemplation, there is no specific dealing to be assessed as an indispensable concomitant of the giving of the power of attorney. The only matter that can sensibly become the subject of assessment is the creation of the power of attorney itself, for use as and when the need may arise in the future. It is the nature of that act (by which I mean to include its ramifications and consequences) that the donor must sufficiently understand. That, as I apprehend matters, is what is required by what was said by Dixon CJ, Kitto J and Taylor J in *Gibbons v Wright* (above) at 437-438:
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> > “[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.”

Campbell JA (with whom Basten JA and Handley A-JA agreed) said in *Guthrie v Spence* [2009] NSWCA 369 at [174]:

> "Under the general law there is no single test for capacity to perform legally valid acts – rather, capacity is decided, in relation to each particular piece of business transacted, by reference to whether the person has sufficient mental ability *'to be capable of understanding the general nature of what he is doing by his participation'*, and concerning any legal instrument *'is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained*': *Gibbons v Wright* (1954) 91 CLR 423 at 437–8 per Dixon CJ, Kitto and Taylor JJ. Thus, capacity of both children and adults to give evidence is dependent, in broad terms, on being able to understand the nature and significance of the task that is involved in giving evidence: Heydon, *Cross on Evidence*, 7th Australian edition, (2004), para [13050]-[13065], pp 376-83. Capacity to consent to medical treatment depends on the ability of the person in question to understand fully what is proposed: *Secretary, Department of Health and Community services v JWB (Marion's Case)* (1992) 175 CLR 218 at 237-8. The familiar test of testamentary capacity laid down in *Banks v Goodfellow* (1870) LR 5 QB 549 and *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 is dependent on being able to carry out the particular tasks involved in understanding and evaluating the matters that need to be taken into account in deciding what one's testamentary dispositions will be. Capacity to marry is dependent on being able to understand the nature of the relationship of marriage: *In the Estate of Park; Park v Park* [1954] P 89; *Sheffield City Council v E* [2004] EWHC 2808 (Fam); [2005] Fam 326."

In *Ranclaud v Cabban* (1988) NSW Conv R 55-385 at 57,548, Young J noted:

> "A solicitor is not the alter ego of a litigant. Generally speaking, however, a person retains a solicitor to advise one and one reserves to oneself the

> ultimate power of making decisions after receiving the solicitor's advice ... Further so far as Powers of Attorney are concerned whilst it may be one thing to be aware that a person under a Power of Attorney may act on one's behalf, where the Power, as in the present case, is a general Power under sec. 163B and Sch. VII of the Conveyancing Act 1919. Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her. "

In the English case of *Re K* (1988) 1 Ch 310 at 316, the Court referred to the understanding which a person should have to be capable of making a power of attorney as follows:

> "Firstly, (If such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (If such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

At law, there is a "presumption of sanity" in the sense that the onus falls on the party seeking to establish that a person lacked capacity and that a particular transaction should be set aside: see *Szozda v Szozda* [2010] NSWSC 804 at [20]-[26].

Dealing with Powers of Attorney and capacity issues in practice

Legal practitioners should be careful not to *presume* incapacity because of a client's disability, age, illness or other presenting factor. There is a presumption that a person of full age is capable of managing his or her affairs: *Murphy v Doman* [2003] NSWCA 249; (2003) 58 NSWLR 51 at [36] per Handley JA.

Legal practitioners routinely make judgments that a client has capacity to give them instructions.

But it can be crucial to satisfy yourself that the person does have the requisite capacity.

If a real question develops, the question whether or not the person had capacity to make a particular decision will be decided by a court or tribunal. The evidence which might be considered in such a case may come a variety of sources, including a legal practitioner.

A decision that a person did not have capacity may have professional and other consequences for a solicitor who witnessed that person sign a document.

Beware the nodding client. Question whether you can be satisfied by reading or explaining a document to a client and then asking "*Do you understand*?" to which the client responds "*Yes I do*".

Did the client understand the nature of the power of attorney and the ramifications and consequences of appointing an attorney? This might be better judged after having a client explain back to you in the client's own words what their understanding is.

And make detailed file notes. You might be a witness.

If capacity, in the relevant sense, is absent when a power of attorney is granted, the general law position is that the power of attorney is void: *McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* [1904] HCA 51; (1904) 1 CLR 243.

Section 17 of the Powers of Attorney Act states (inter alia) that a power of attorney is not ineffective only because any act within the scope of the power is of such a nature that it was beyond the understanding of the principal through mental incapacity at the time the power is given.

Divisions 3 and 4 of Part 5 contain provisions that enable the Supreme Court to confirm the operation of a power of attorney despite the mental incapacity of the principal at the time the power is given. The Court must be satisfied that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal. And the power is discretionary.

The Law Society has a practice guideline *When a client's capacity is in doubt. A Practical Guide for Solicitors* 2009. It is said that it is currently under review. It contains further information for practitioners confronted with concerns about a client's capacity in various situations as well as tips, including where to refer for a formal assessment of a client's capacity.

The Law Society has also published *Guidelines for solicitors preparing an enduring power of attorney*. Note it is dated December 2003 and may be a little dated.

A solicitor may be asked by a client to prepare an enduring power of attorney and/or to complete the certificate attached to the enduring power of attorney.

In both cases, the solicitor has an obligation under the Act to explain the nature and effect of the enduring power of attorney to the donor and to be satisfied that the donor has the mental capacity to make the enduring power

of attorney. The *Powers of Attorney Act* requires that an enduring power of attorney must have endorsed or attached to it a certificate completed by a prescribed witness, including a solicitor (or barrister), in which the prescribed witness states that they:

1. Explained the effect of the instrument to the donor before it was signed; and
2. The donor appeared to understand the effect of the power of attorney.

A solicitor should only complete this certificate if the solicitor has explained the effect of the power of attorney to the donor directly. The explanation should be made directly to the donor and not to third parties purporting to act on the donor's behalf.

It is not sufficient for the solicitor to simply explain the effect of the power of attorney to the donor. The solicitor must also be satisfied that the donor appeared to understand the explanation about the effect of the power of attorney before the solicitor can sign the required certificate.

The guidelines suggest the types of matters which a solicitor should canvass with a client in explaining the effect of a power of attorney together with the steps which a solicitor should take to be satisfied that the donor appeared to understand this explanation, especially where this may be in doubt.

- *Who is the client?*

Where a solicitor is instructed to prepare an enduring power of attorney the donor is the client. In carrying out the terms of the power, the client's interests are paramount and remain so after the client has become mentally incapable.

- *Taking instructions*

The solicitor should personally attend the client to obtain instructions for the granting of the power of attorney. This is particularly so in any of the following cases where:

(i) instructions are communicated by a third party, whether or not related to the client,

(ii) there is no written instruction or confirmation of instructions signed by the client,

(iii) the client is of advanced age, or is hospitalized or resides in a nursing home,

(iv) the client is suffering any physical disability, or a condition raising the question of mental capacity.

The solicitor should seek instructions directly from the donor and advise the donor in the absence of the proposed attorney.

If the solicitor suspects that instructions may have been given under duress or undue influence, further enquiries must be made and these suspicions allayed before accepting instructions.

The guidelines stipulate that solicitor **must not** accept instructions where the solicitor is aware that the donor does not have capacity to grant the enduring power of attorney.

If you think a capacity assessment is desirable, this should be raised with the client and explained in terms of protecting the client's best interests to ensure that the power of attorney is validly made.

- *Giving advice to the donor*

The extent of advice given to a client about a power of attorney will vary according to the needs of the client and the circumstances of each particular case. However, there are certain fundamental matters which should be explained to the client and which the client must understand in order to competently grant an enduring power of attorney.

In view of the powers and responsibilities conferred on the attorney, the matters to be explained and understood are:

(i) the donor may, in the document, specify or restrict the power to be given to the attorney and may instruct the attorney about the exercise of the powers;

(ii) the power begins when authorized by the donor and accepted by the attorney or when the donor loses their mental capacity if this is specified, or at such other time as provided in the instrument;

(iii) subject to any directions contained in the power, the attorney will be able to do anything with the donor's property which the donor could have done;

(iv) the types of actions or things the attorney will be authorised to do by the power of attorney without further reference to the donor;

(v) the donor may revoke the enduring power of attorney at any time when they have the mental capacity to do so;

(vi) the power the donor has given continues even if the donor subsequently loses their mental capacity;

(vii) the donor is unable to oversee the use of the power if they subsequently lose mental capacity.

- *Informing the attorney of his or her power and duties*

Solicitors may be in a position to also inform the attorney of the powers and duties that arise when the attorney accepts that role under an enduring power of attorney. It will be of benefit to the donor if the attorney is aware of his or her responsibilities. Such responsibilities include:

(i) obeying the donor's instructions. These instructions may be given in contemplation of granting the enduring power of attorney, at the time of granting the enduring power of attorney or after granting the power of attorney provided the donor still has capacity. Such instructions should be in writing if possible and preferably separate from the power of attorney itself.

(ii) protecting the interests of the donor and acting in their best interests keeping the donor's and the attorney's funds separate.

(iii) not giving gifts or conferring a benefit on themselves or a third party unless expressly authorised to do so by the power of attorney. The power of attorney may authorise the attorney to give particular types of gifts or benefits by the inclusion of one of the statutory "prescribed expressions" set out in Schedule 3 of the *Powers of Attorney Act* 2003. If the 'prescribed expression' is used, the attorney is only authorised to give the kinds of gifts or benefits which are listed in that Schedule. Such gifts or benefits must be reasonable in the circumstances, taking into account the donor's finances and the size of the donor's estate.

(iv) keeping any property received on behalf of the donor in safe-keeping.

(v) keeping an adequate accounting of any dealings with the donor's assets.

(vi) avoiding abusing his or her position as attorney to make a profit or causing a conflict between their duty to the donor and their own interests.

- *Where the solicitor is to be appointed the attorney*

If a solicitor is to be appointed attorney, Solicitors Rules, rule 12.4, which relates to wills, provides a useful model to assist in avoiding a conflict of interest:

> 12.4 A solicitor will not have breached this Rule merely by:
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> 12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:
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> (i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;
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> (ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and
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> (iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.
>
> 12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and

proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family; or

(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

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