ARTICLE

Should you hand over a copy of a will to an attorney under power?

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Consider the following common ethical dilemma: You have a long standing elderly client whose adult son telephones to say that he's moving his mother into a nursing home and would like to come in to a collect a copy of her will from your office this afternoon. You know the adult son and you are aware of the fact that he is the sole attorney under power for his mother as well as the sole executor of her estate. He tells you that his mother has recently lost capacity and is not capable of managing her affairs. Should you hand over a *copy* of the will to him when he arrives this afternoon?

'A power of attorney will not give automatic access to the principal's will'[1]

The solicitor owes a duty of confidentiality to the principal regarding the principal's affairs, including a duty to maintain confidentiality over the contents of the principal's will.[2] The solicitor also holds the physical will document as baliee.[3] The principal-attorney relationship (in common law jurisdictions) has its roots in agency, which is a fiduciary relationship created by equity.[4] Whether or not the attorney (as agent for the principal) is exercising a valid power which is within the scope of the original instrument is the subject of this ethical dilemma.

'The role of a representative is not an unregulated one nor is the representative's power unfettered. Many jurisdictions have codified legal and ethical responsibilities such as obligations to act honestly and with reasonably diligence; to exercise powers according to the terms of the instrument and the ascertainable wishes of the principal; to avoid conflict transactions; to keep records; and to keep property separate.'[5]

The Powers of Attorney Act 2014 (Vic) provides that a person *'may authorise an eligible attorney to do anything on behalf of the person that the person can lawfully do by an attorney.'*[6] There are limitations on this however, for instance, an attorney cannot vote in an election on behalf of a principle, or consent to the marriage of a principal, or make/revoke a will. [7] Given the previously mentioned fiduciary duty of confidentiality owed by the solicitor to the principal regarding the principal's will, the logical conclusion is then that the attorney is not entitled to see or deal with the principal's will unless the principal has authorised it, or it is *relevant to the management of the principal's affairs.*[8]

The *Powers of Attorney Act 2014 (Vic) relevantly states that –*

s.21(2) If an attorney under an enduring power of attorney is making a decision about a matter on behalf of a principal who does not have decision making capacity in relation to that matter, the attorney must –

(a) give all practicable and appropriate effect to the principal's wishes; and

…

(c) act in a way that promotes the personal and social wellbeing of the principal, including by –

…

(iii) respecting the confidentiality of confidential information relating to the principal.

In the above scenario, the request for a *copy* of the will appears to be to ensure the attorney gives effect to the principal's (testamentary) wishes by not selling an asset which may be specifically gifted in order to fund her nursing home stay.[9]

Some solicitors may accept the explanation of the attorney and hand over the *copy* will without making further enquiries. This is not recommended. (A move by a client into a nursing home does not of itself indicate incapacity.)

Making further enquiries is particularly important when there is a suspicion that an attorney could be seeking to abuse their power in some way.[10]

As Ken Aitken states in his classic article *'Enduring Powers and Wills'*:

'The purpose for which a general or an enduring power of attorney is given is to enable the attorney to manage the principal's affairs. Any exercise of the power not directed to that end, although it may fall within the language of the instrument, is nevertheless, ultra vires and ineffective.

The principal's will does not normally have relevance to the management of the principal's affairs. The attorney cannot alter or revoke the will or make a new will.[11]

The request is [for production of the original will] *on the face of it, beyond the power conferred on the attorney. It should be declined unless the attorney can justify the request by satisfying the practitioner that production or inspection of the will, or providing information about its contents, is required for the purpose for which the power of attorney has been granted, namely management of the principal's affairs.*

Inspection of the will or giving information about its contents may be justified where an attorney contemplates the sale of the principal's assets and wishes to know whether any of the assets is the subject of a specific devise or bequest… The practitioner should judge whether the attorney's requirements can be met by providing a copy of the will, permitting an inspection of it or providing information about its contents… Unjustified handing over of the will or disclosure of its contents may be a breach of the duty owed by the practitioner to the principal.'[12]

This leaves the attorney with the following options:

- To hunt around his mother's house for a copy of the most recent will;

- To make an application to VCAT for an order for production of a *copy* of the will[13] (or its original) whereupon VCAT will likely require the attorney to produce a satisfactory reason for wanting it.

It may seem rather 'over the top' to require an attorney who appears to have the best interests of the principal at heart, to trot off to VCAT to obtain an order for production of a *copy* of the will. In some circumstances, a solicitor may be satisfied that there is no intended abuse of the power and may be satisfied that the request is a legitimate one made by the attorney. Queensland Law Society have suggested that a solicitor may in some circumstances, provide verbal advice to the attorney as to whether an asset is subject to a specific gift in the will, but notes that this may create more problems than it solves.[14]

The Victorian Law Reform Commission in 2013 in its Succession Laws Report stated '*the Commission believes an application to VCAT is more appropriate than giving the holder of the will a power to inform substitute decision makers about the content of a person's will. A legal practitioner who holds a person's will is doing so on a strictly confidential basis.'* [15]

The guidance provided by Ken Aitken in his article back in 1999 is still considered good advice now, in that the request by the attorney *'should be declined unless the attorney can justify the request by satisfying the practitioner that production or inspection of the will, or providing information about its contents,* ***is required for the purpose for which the power of attorney has been granted, namely management of the principal's affairs.'*** [Emphasis added.]

More recently, the Law Institute of Victoria's Ethics Committee considered this issue in an Ethics Committee Ruling R4839 published in 2015:

'A law firm acted for an elderly lady in various matters. Over time, the client conveyed very sensitive and confidential information about her fractured family to her lawyers. She subsequently lost capacity. One of her sons held an Enduring Power of Attorney (Financial) and demanded that the lawyers release his mother's "titles, documents, papers and files". Initially this included her will, but the request for the will was withdrawn. The certificate of title to her house was released to the attorney's solicitors to ensure that it was not sold without his knowledge. However, the demand by the attorney to release all of the other papers and files relating to his mother, including the will file, appeared to be beyond power. The lawyers were of the opinion that their elderly client would never authorise them to directly release any information to any members of her family, given the sensitivity of the family relationships. The attorney appeared to consider that his role as representative of his mother permitted him to stand entirely in the shoes of the mother and that he was entitled to instruct the lawyers to do anything that his mother might have instructed.

Ruling

In the opinion of the Ethics Committee and on the information presented

- *The lawyers' fiduciary duty is to their former client, the donor. An attorney may represent the donor client, but the attorney does not replace the donor client in the client's relationship with the lawyer.*

- *The lawyers retain residual duties to ensure the protection of its former client's confidential information.*

- *The lawyers are entitled to refuse to release the papers, documents and files it holds on behalf of the donor as requested by her Attorney. (This includes the will and the will file.)'*[16]

In 2013, the Law Institute of Victoria Council approved *Powers of Attorney Guidelines* (which currently require updating post the

introduction of the *Powers of Attorney Act 2014 (Vic))* but which relevantly state regarding this particular issue:

'Practitioners who have been requested by the donor to hold his or her will for safe custody are sometimes requested by an attorney to hand over the original will to the attorney. Upon receiving such a request, the practitioner should confirm that it is the wish of the donor to hand over the will to the attorney. If the donor lacks capacity to instruct the practitioner, then, as a general principle, the practitioner should not hand over the original will to the attorney. However, where the practitioner considers that an attorney has made a bona fide request for a certified copy of the will, the practitioner should provide the attorney with either a certified copy of the will or relevant part of the will, or advice as to the content of the relevant part of the will.

For example: the sale by an attorney of a donor's property which has been specifically devised under a will raises the question of whether or not ademption applies should the property be sold during the lifetime of the donor. For this reason, a request by an attorney for a copy of the donor's will may be legitimate.'[17]

In our view, a solicitor should review the executed power to see if it is valid and unrevoked (and ensure that there are no contrary conditions contained in the power) and whether it expressly allows the attorney to obtain a *copy* of the will. If so, then a *copy* may be provided. If not, then the solicitor should not simply hand over the copy without further verification from the principal-client herself. [18]

If the solicitor determines (through his/her own personal enquiries) that the principal has in fact lost capacity, [19] then this poses an ethical problem for the practitioner. In these circumstances, the duty of confidence over the client's documents (as set out in Rule 9 of the Australian Solicitors Conduct Rules ('ASCRs')), including safeguarding the contents of the will, is the primary fiduciary duty of the solicitor, and must be balanced against the solicitor's other fundamental ethical duties, namely the requirement to *act in the best interests of the client* as set out in rule 4.1.1.[20]

If the attorney is not able to satisfy the solicitor that his request for a copy of the will is for a purpose for which the power of attorney has been granted, in our opinion, the solicitor should decline to provide it.[21] However, if the detail requested by the attorney is obviously in the best interests of the principal (ie the client) then giving the required detail may be justified under rule 4.1.1.

There may also be some merit for a solicitor to suggest to a will maker, at the time of making a will, that the will maker provide a written direction to the solicitor that, in the event of losing capacity, a copy of the will could be made available to the named executor(s) upon his/her/their written request.

This can be a tricky area to navigate, and the proper action in any given case will turn on its facts. We recommend obtaining some advice before taking any steps.

Other useful resources:

Seniors' Rights Victoria, *Assets for Care: A guide for lawyers to assist older clients at risk of financial abuse* (2012.)

https://assetsforcare.seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf

Tip Box

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[1] Ken Aitken, 'Enduring Powers and Wills', (Law Institute Journal, 1999.) See here: http://www.austlii.edu.au/au/journals/LawIJV/1999/464.pdf

[2] Rule 9 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

[3] David Bowles, *Is an Attorney entitled to collect a Principal's original documents you're your safe custody or to obtain a copy?* (Queensland Law Society Ethics Centre, 2014) states *'As bailee of a Will or other documents, we are obliged to protect our client's confidentiality and the physical security of such bailed property. We must balance this obligation against lawful requests for access.'*

[4] Ryan, Arnold & Bonython, *Protecting the Rights of Those With Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis* (Adel. L. Rev. 355, 2015).

[5] Ryan, Arnold & Bonython, above n4, 361.

[6] *Powers of Attorney Act (Vic) 2014,* s 22(1).

[7] *Powers of Attorney Act (Vic) 2014, s26.*

[8] Ken Aitken, above n1.

[9] This is otherwise known as 'ademption'. The issue of ademption and the recent changes to the *Administration and Probate Act* 1958 (Vic) have not been considered in this article. Given the changes which came into effect on 1 November 2017 regarding ademption, you may wish to refer directly to section 50 of the *Administration and Probate Act 1958 (Vic)* and sections 83A and 83B of the *Powers of Attorney Act 2014 (Vic).*

[10] Seniors Rights Victoria describes the term 'Elder Abuse' on its website as *'Elder abuse is any act which causes harm to an older person and is carried out by someone they know and trust such as a family member or friend. The abuse may be physical, social, financial, psychological or sexual and can include mistreatment and neglect.'* See website here: https://elderabuseawarenessday.org.au/

[11] See Powers of Attorney Act 2014 (Vic) at section 26 (a) which provides *'To avoid doubt, despite section 22, a principal under an enduring power of attorney is not able to authorise an attorney under that power to (a) make or revoke a will for the principal'*

[12] Ken Aitken, above n1.

[13] Sections 134A – 134C of the *Powers of Attorney Act 2014 (Vic)* empower VCAT to make orders with respect to the production of the will of a principal of an enduring power of attorney who does not have testamentary capacity.

[14] David Bowles, above n3, states: *'It may be sufficient for the attorney's purpose that the solicitor advise whether the disposal of a particular asset will raise issues with relation to the Will. However in giving such information, bear in mind that the risk of ademption of a specific gift is not the only issue. Overall preservation of the Principal's testamentary intention, including (among other considerations) the balance between specific bequests and residual beneficiaries should be attempted if circumstances permit. This may require a nuanced decision making process managing competing objectives. The appointed attorney is clearly the appropriate party to undertake this exercise. Access to the full contents of the Will, and (if available) any solicitor's file from which an understanding of the Principal's testamentary objectives could be derived may assist them greatly in those considerations. Access to the full text of the Will may in many cases be essential to properly undertake the administration of assets overall.'*

[15] *The Succession Laws Report,* (Victorian Law Reform Commission, 2013) states at chapter 4 regarding 'ademption': '*4.103 the Commission believes an application to VCAT is more appropriate than giving the holder of the will a power to inform substitute decision makers about the content of a person's will. A legal practitioner who holds a person's will is doing so on a strictly confidential basis.'* The VLRC went on to make the following recommendation: '*10 Guardianship legislation should provide for a person acting under an enduring power of attorney (financial) to apply to the Victorian Civil and Administrative Tribunal for a full or redacted copy of a will made by the donor of the power. The Tribunal would be able to grant access only where the donor does not have testamentary capacity.'* Since publication of the VLRC report, sections 134A – 134C of the *Powers of Attorney Act 2014 (Vic)* have been introduced.

[16] LIV Ethics Committee Ruling R4839 published here: https://www.liv.asn.au/LIV-Home/For-Lawyers/Ethics/Ethics-Committee-Rulings

[17] LIV Powers of Attorney Guidelines, 2013 here: https://www.liv.asn.au/PDF/For-Lawyers/Ethics/2013-Powers-of-Attorney-Guidelines-July.aspx

[18] Note that different requirements apply to a 'supportive attorney' pursuant to Part 7 of the Powers of Attorney Act 2014 (Vic.)

[19] Note that the meaning of 'decision making capacity' is set out in sections 4 and 5 of the *Powers of Attorney Act 2014 (Vic);* A useful resource to use when assessing client capacity is the Law Society of New South Wales guide published in 2016 named '*When A Client's Mental Capacity Is In Doubt – A Practical Guide for Solicitors'* *https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf*

[20] Rule 4.1.1 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*

[21] Note that the practitioner should also make sufficient enquiries to satisfy him/herself that any intended transaction will not amount to a prohibited 'conflict transaction' per s.64 of the *Powers of Attorney Act Vic 2014 : http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/poaa2014240/s64.html*