

# **Powers of Attorney - Fiduciary Duty**

Powers of attorney are legal documents that let you appoint someone to make certain decisions for you or support you in making and giving effect to your decisions. The giver of the authority is known as the donor, while the receiver is referred to as the attorney.

The attorney has a legal duty to the donor. The attorney must:

- act honestly, diligently and in good faith;
- exercise reasonable skill and care;
- not use their position for profit;
- not disclose confidential information (unless authorised by the enduring power of attorney or by law);
- keep accurate records and accounts of all dealings and transactions; and
- keep any property owned by the donor separate from the principal's property.

## **Fiduciary duty**

Perhaps the most important duty that the attorney has is the fiduciary duty to the donor. This is a common law concept. A fiduciary duty means that a person appointed to manage, for example, another person's money must act in the donor's best interests rather than serving their own interest.

## **Case example**

A recent case that was considered a breach of the attorney's fiduciary duty was *Ash v Ash* [2017] VSC 577. The donor, an older man in his mid 70s, appointed his daughter as attorney in 2012. By 2014 the donor had lost capacity as he suffered from Parkinson's disease and numerous other ailments. When the attorney took control of the donor's wealth, which was substantial, the attorney became a signatory on the donor's bank accounts and a director of the trustee company of the donor's SMSF and trust.

The attorney proceeded to close all existing donor bank accounts and transferred the funds to entities associated with the attorney, where the attorney directly benefited. Further, all blue chip shares in the SMSF and the trust were sold, and the cash derived moved to entities associated with the attorney.

In early 2014, the attorney and her family moved into the donor's home. At first, the attorney resided there rent free and then paid a nominal rent. The attorney alleged that her father had asked her to move into the property so he could visit his home whenever he wanted to.

The donor's other daughter became concerned about the management of the donor's affairs and brought proceedings at the Victorian Civil and Administrative Tribunal (VCAT) to have the attorney removed. It was alleged that the attorney had breached the attorney's fiduciary duty to the donor by profiting from her position and placing herself in a conflict position.

The attorney sought to explain the transaction as flowing from previous instructions given by the donor, which permitted the conflict of interest and profit. The Court dismissed the attorney's suggestions as there was no evidence that the donor could have supplied

informed consent on any issues, as he was not presented with all of the relevant facts about each specific decision.

It is important to note that the Court did not suggest that an attorney can never enter into a transaction creating conflict between the interests of the donor and the attorney. Instead, the Court recognised that fully informed consent of the donor would justify an attorney entering into such a conflict transaction. However, the attorney failed to discharge the onus of proving that the donor had given such consent.

The donor successfully sought judgment against the attorney for all losses from the attorney's breach of fiduciary duty and also judgment against entities associated with the attorney who had been knowing assistance in this breach.

## **Contact details**

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