



# New Law Bulletin

## Caution to Those Acting as Attorney under an EPA

Most of us would be familiar with a right of a person to appoint another person to act as their Attorney pursuant to a document called an Enduring Power of Attorney (EPA).

However, many of us may not be fully aware of the obligations that attach to this appointment. It is a very serious appointment and is regarded as such by our laws.

This is particularly the case if whilst the EPA is current, even if the EPA document is not used, the person transfers property of any kind to the Attorney. Pursuant to Section 87 of the Powers of Attorney Act there is a presumption of undue influence in favour of the person.

There are certain relationships at law which are regarded to the highest of degrees, for example doctor/patient, lawyer/client, and as has now been made clear in the recent decision of Baker & Others V Affoo & Others [2014] QSC46U (a decision where RB Lawyers acted for the aggrieved applicants) so is the position of the **Donor** (the person) and the **Donee** (the attorney).

In this case the applicant's elderly father appointed his neighbours as his Attorney pursuant to an EPA.

This was not the problem however.

The problem occurred when the father transferred by way of a gift his substantial property to his neighbours.

Upon his death, 3 of his children took issue with this transfer to the Affoo's and brought proceedings in the Supreme Court seeking that the property be returned to his estate due to the presumption of undue influence.

If there is undue influence, a property can be transferred back from whence it came.

The argument in this decision centered around whether the deceased did what was necessary to rebut the presumption of undue influence (i.e. that he was not under the influence of his neighbours) but the neighbours failed.

The Court found that for the neighbour to take such a large amount from the deceased was on its face "unconscientious" because the neighbour was in a position where great confidence was reposed in him by the deceased.

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Importantly, the deceased never obtained any independent legal advice.

Although the case answers a number of questions that beforehand were somewhat unclear, it possibly raises some more questions.

What if, for example, a husband and wife appoint each other as Attorneys and the husband in the usual course makes a substantial gift to his wife and then passes away. Could disgruntled step children seek to have that transfer overturned by the Court? What about if a lone parent appoints their children as their Attorneys and then gives them a gift before they pass away? Could a second spouse, arguably dependant on the deceased, seek to have this gift set aside as well?

### **Moral and conclusion**

The moral and conclusion of this article is for Attorneys to be aware in circumstances where gifts are made to them by the donors. Proper records should be kept. If a substantial gift is to be made, it could be that a simple visit to your solicitor for the purposes of obtaining independent legal advice about the nature of the gift could be sufficient to rebut the presumption of undue influence as outlined above.

In our decision of *Baker v Affoo*, if the deceased had taken the trouble of seeing a solicitor for advice about the transaction that he was embarking upon, this case might well have been decided completely differently.

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