Sale of a property gifted under a will by an attorney acting under an enduring power of attorney: Does the gift adeem and what is the attorney's duty?

By Barbara Hamilton and Tina Cockburn[1]

Introduction

The Supreme Court of Queensland has recently considered the consequences of a sale of property gifted under a will by an attorney acting under an enduring power of attorney in *Moylan v Rickard*[2] *(Moylan).* The decision makes clear that attorneys acting under enduring powers of attorney (EPAs) must exercise their powers for the benefit of the principal (ie their duties are fiduciary). Where the powers have not been properly exercised the compensation provisions of the *Powers of Attorney Act* (Qld) 1998 *(POAA* Qld*)* can provide effective relief. Whether a willed gift adeems depends on a true construction of the gift, but again the *POAA* (Qld) can assist in protecting the proceeds of a property sold under an EPA for the beneficiary under the principal's will. *Moylan* raises many current issues, but particularly illustrates that the *POAA* (Qld) can provide effective remedies, even when other possible avenues of redress (for example by way of family provision application) are unavailable (for example because the estate has already been distributed).

The facts

Mrs Sybil Moylan (the deceased) and the applicant married in 1979. They lived together in a a home at Wilston owned by Mrs Moylan. In 1996 Mrs Moylan made a will and an EPA in favour of her two children from her previous marriage. By 2000 Mrs Moylan was suffering from the effects of Alzheimer's disease. She was eventually admitted to an aged care facility in 2005. In late 2004 her husband suffered a heart attack and was hospitalised for six months. Following his discharge from hospital he went to live with his son Donald.

In early 2005 the deceased's children, Robyn Rickard and Christopher Allen (the respondents) formed the view that they did not have sufficient funds to maintain the Wilson home and pay for their mother's care. A decision was made to sell the home and it was sold for $885,000 in January 2006. It was common ground that the deceased would not have been capable of understanding the house was sold at this time. From the proceeds of sale $600,000 was invested to provide an income for the costs of the deceased's care and $115,000 was given to each of Ms Rickard and Mr Allen by way of gift.

Mrs Moylan's 1996 will contained the following material terms relevant to the litigation:[3]

> "4. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind and nature and wheresoever situate UNTO

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[2] [2010] QSC 327.
[3] *Moylan* at [21].

> and to the use of my trustees ... TO HOLD the balance then remaining (hereinafter called 'my residuary trust estate') UPON TRUST as follows:-
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> ... (c) as to the land and improvements constituting my principal place of residence at the date of my death ('house property') but not including any of the contents, to be dealt with as follows:
> (i) my trustees are to obtain a valuation of the market value of the house property as soon as practicable after the date of my death;
> (ii) if the house property has neither been sold nor contracted to be sold within three (3) months of the date of my death, then my trustees are to pay a legacy equal to fifteen (15) per cent of the market value of the house property (from which market value, however, is to be deducted sales commission at the rate of five per cent on the first EIGHTEEN THOUSAND DOLLARS ($18,000.00) and two and half per cent on the balance, as if the house property had been sold) and to pay such legacy to my husband LESLIE PATRICK MOYLAN if he outlives me for thirty (30) days;
> (iii) if the house property is sold within such three (3) month period, then my trustees are to pay to the said Leslie Patrick Moylan (if he outlives me for thirty (30) days) a legacy equal to fifteen (15) per cent of the proceeds of sale net of sales commission;
> (iv) once the legacy for the said Leslie Patrick Moylan has been quantified pursuant to (ii) or (iii), no later event is to be the basis for any alteration in the amount of such legacy;
> (v) the legacy for my said husband, whether it is payable pursuant to (ii) or (iii), is not payable to him any earlier than three (3) months from the date of my death;
> (vi) as to the house property, or what remains of the proceeds of sale of same, to be distributed as part of my net residuary trust estate;
> (d) as to my net residuary trust estate for such of the said Robyn Shirley Rickard absolutely and Christopher William Allan absolutely (and in both cases, in addition to other benefits derived hereunder) who outlive me and if both then equally as tenants in common but subject to what follows...

Mrs Moylan died in April 2008. Probate of the will was granted in October 2008 and approximately $250,000 each was distributed to her children by December 2008. In August 2009 an enquiry was made to the respondents' solicitors on behalf of the applicant to obtain a copy of the will. The enquirer also asked why the applicant had not been contacted about the will. The response given as to why he had not been contacted was that as the house had been sold prior to the deceased's death he was not entitled to anything from the estate.

The applicant's claims

The applicant's primary claims were:

a) an order that the gift pursuant to clause 4(c) (of 15% of the value of the Wilston home) was not adeemed by the sale of the property;
b) that the moneys paid the attorneys by way of gift to themselves subsequent to the sale of the Wilston house be restored to the estate under s106 and that compensation was payable to the applicant under s107 *POOA* (Qld);

c) that the respondents pay damages for alleged breach of s33Z *Succession Act* (Qld) (for failing to provide a copy of the deceased's will to the applicant); and
d) that he should be entitled to further and better provision from the estate under s41 *Succession Act (Qld)* (family provision claim) and that the nine month time limitation period should be extended in the circumstances.[4]

The court's decision

On the first claim as to whether the gift of 15% of the value of the deceased's home was adeemed by the sale prior to death of the home, the court held the doctrine of ademption did not apply. The court examined the basic principles of construction of a will and in particular the first principle of construction that the court is to give effect to the intention of the testator as expressed in the words of the will.[5] The court concluded that the gift in clause 4(c) to the applicant was not a gift of a specific property, but rather a pecuniary legacy quantified by reference to the value of a specific property, the Wilston home which had been sold, but which sale did not adeem the general legacy.[6] The court drew analogy to *Re Viertel*[7], in which case the attorneys under an EPA sold the testator's house after she had moved into a nursing home and lost capacity.[8] Her earlier will (the contents of which the attorneys were unaware despite making enquiries) had gifted the house property to the attorneys. The court held that as the testator was unaware (that is, incapable of knowledge) of the sale the circumstances indicated that the testator would not have intended ademption of the gift. An order was made that the attorneys were entitled to the fund representing the proceeds of sale, which were invested in the deceased's name. Following this authority, the Court ordered that the applicant was entitled to receive 15% of the net proceeds of sale of the Wilston house.[9]

On the second claim the court held that the gifts the attorneys paid to themselves ($115,000 each) from the proceeds of the sale of the Wilston house were in breach of s66 *POAA* (Qld) which requires an attorney to exercise the power conferred by the principal "honestly and with reasonable diligence to protect the principal's interests".[10] This was because there appeared no evidence of any benefit to the principal by these payments, though the attorneys argued it was done to increase the deceased's pension eligibility and had been cleared with a previous solicitor.[11] The payments were also in breach of s73 *POAA* (Qld) which requires an attorney not to enter into a conflict transaction (in favour of an attorney or attorney's associate) without authorisation of the principal[12] and s88 *POAA* (Qld) which limits the

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[4] The applicant also claimed relief under *POAA* sections 76 (application of the principle of substituted decision making), 85 (keeping and preserving accounts) and 86 (keeping attorney's property separate from principal's property), however it was held that these sections did not provide relief in the circumstances: ibid [85] - [87].
[5] I bid [34].
[6] Ibid [46].
[7] [1997] 1 Qld R 110.
[8] Ibid [58].
[9] Ibid [59].
[10] Ibid [74].
[11] Ibid [73].
[12] Ibid [76].

occasions on which gifts might be made.[13] In this case the gifts were not gifts the principal might reasonably be expected to make and the gifts could not be said to be no more than reasonable in the principal's financial circumstances.[14]

It was argued that the attorneys should be excused from liability for the breach under s105 *POAA* (Qld) on the grounds the attorneys had "acted honestly and reasonably and ought fairly to be excused for the breach". As to whether the respondents had acted honestly, the Court referred to *Ede v Ede*[15] noting that Muir J "considered that acting in conscious disregard of the interests of a person to whom fiduciary duties were owed would normally constitute dishonesty; but also stated that consciousness of wrongdoing was not a necessary prerequisite to a finding of dishonesty."[16] The court was satisfied the respondents (attorneys) could not have honestly considered the distributions made to themselves to have been in the interests of their mother.[17] Nor were their actions reasonable, because although it was submitted that the distributions were made on the advice of a solicitor, this confused the concept of reasonableness with whether the respondents were acting lawfully. In the absence of relevant material to demonstrate reasonableness, His Honour concluded that they were not acting reasonably.[18] The respondents also argued they should be excused under s105 on the grounds of hardship. While the Court noted that hardship may be relevant in some cases to the question whether an attorney ought to be fairly excused for the breach, hardship would usually not carry much weight in cases where the attorney has personally benefited from the breach as happened in this case.[19] Notwithstanding evidence that the respondents were of limited means, and that in particular Ms Rickard had dependent children and had used the funds from the deceased's estate to pay out a home loan credit card debts, home improvements and living expenses with only approximately $40,000 remaining, it was held that considerations of hardship were not of such significance as to warrant relief under s105, even if the other conditions specified in the section had been met.[20] In any event, the Court pointed out that if relief was granted under s105, there would be hardship to the applicant, an elderly man of limited means.[21]

The Court then considered whether compensation should also be payable under s107 *POAA* on account of a loss of the applicant's benefit under the deceased's estate because of the sale of the Wilston house by the attorney. As there was evidence that the median value of houses in Wilston had increased markedly since the sale in 2006, Peter Lyons J held that the applicant was entitled to compensation, subject to the restrictions found in ss41 and 42 of the *Succession Act.*[22]

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[13] Ibid [81].
[14] Ibid.
[15] [2007] 2 Qld R 323.
[16] *Moylan* at [77] referring to *Ede v Ede* [2007] 2 Qd R 323 at [28].
[17] Ibid [91].
[18] Ibid [92].
[19] Ibid [95].
[20] Ibid [98].
[21] Ibid [99].
[22] Ibid [100].

Relief still available under the *Powers of Attorney Act* (Qld) although the applications were made outside the time limitation periods and the principal's 'estate' had been distributed under her will

It was argued that the claims under ss106 and 107 *POAA* were subject to time limitations - for s106 *POAA* (Qld): six months from the date of death with power to extend time; and for s107 *POAA* (Qld): the family provision limitation periods in s41*Succession Act* (Qld) – nine months from death with power to extend time - and s44 *Succession Act* (Qld) are specifically applicable, s107(4) *POAA* (Act).[23]

The applicant brought his claim almost two years after his wife's death. Section 44 *Succession Act* (Qld) allows an executor to distribute an estate not less than six months after death in the absence of notice of any family provision claim. Such lawful distribution prevents a family provision claim because there is no estate to which to attach an order.[24] Here the estate had been distributed more than a year previous to the applicant's claim. However, the family provision limitation provisions do not apply to s106 *POAA* (Qld), and do not preclude an extension of time. Peter Lyons J was prepared to grant the extension of time, because the applicant did not have access to the will prior to August 2009[25] (with some evidence that the respondents prevented his access prior to this[26]) and therefore had no basis to believe he had any entitlement under the will. Further he was not aware that the respondents had gifted part of the sale proceeds to themselves until September 2009 when he made a FOI application to Centrelink[27]. He then made the application about four and a half months later, which Peter Lyons J considered was not "undue delay in making enquiries and ultimately in instituting proceedings"[28] In response to a submission that the respondents would suffer prejudice by the granting of an extension, it was found that as the respondents had been "careful to ensure that the applicant had no information which might enable him to get his own legal advice" little weight ought to be given to submissions that they distributed the estate in good faith and changed their positions in good faith, believing that the estate had been properly administered.[29]

His Honour also granted an extension of time under s107 *POAA* (Qld), drawing analogy with principles relating to family provision extensions of time as identified in *Enoch v Public Trustees of Queensland*[30] by Margaret Wilson J, namely:

a) whether there is any adequate explanation for the delay;
b) whether there would be any prejudice to the beneficiaries;
c) whether there has been any unconscionable conduct by the applicant; and
d) the strength of the applicants case.

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[23] Ibid [106]-[107].
[24] *Re Donkin* [1966] Qd R 96; *In the Will of McPherson* [1987] 2 Qd R 394.
[25] Ibid [115]
[26] Ibid [113]-[114
[27] Ibid [115].
[28] Ibid [115].
[29] Ibid [121].
[30] [2006] 1 QD R 144, Margaret Wilson J,

Applying these principles in the circumstances of the case he concluded that the extension of time to commence proceedings for an application under s107 should be granted.[31]

Accordingly, the attorneys were required to compensate the principal's estate for the loss sustained through their breaches of the *POAA* (Qld), that is the moneys gifted to themselves following the sale of the Wilston property. Such estate would fund compensation to the applicant of 15% of the proceeds of sale of the Wilston property plus a sum which took into account the increased value of the property if it had been sold on death.[32]

Concluding Comments

In respect of the claims for family provision and for damages for breach of a duty to provide a copy of the will, Peter Lyons J noted that the respondents had submitted that if there was a finding in the applicant's favour on the first ground His Honour should not deal with the balance of the claims.[33] Nevertheless, Peter Lyons J said that he was prepared to hear further submissions on the third and fourth claims.[34] Given the outcome of the application for extension of time in relation to the s107 claim, which was decided by applying principles relevant to extending time in family provision applications,[35] an order extending time in the family provision claim would be likely to be awarded, subject to an assessment of the strength of the applicant's case. In this regard, a threshold consideration is likely to be consideration of the issues as to whether a family provision claim can be made given that the estate had been fully distributed prior to the applicant's claims, which will preclude a successful claim as there is no estate to which an order can apply.[36] It is arguable that an estate has not been fully distributed when because of successful claims under *POOA* (Qld) a subsequent fund has come into being. For example Hart J said in *Re Lowe:*[37]

> "In my view when an estate has been distributed there has ceased to be any estate of the testator out of which provision can be made..... It may not, however be true to say that there is no longer any jurisdiction to make an order because there is always the possibility that further property will fall into the estate."

Accordingly, it may be that the family provision application may remain viable.

The third claim, had the issue been decided, would have also raised some new ground for consideration, that is whether damages can be claimed for breach of the duty under s33Z *Succession Act* (Qld) to provide the applicant a copy of the will.[38]

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[31] *Moylan* ibid [127]
[32] Ibid [129]-[130].
[33] Ibid [128].
[34] Ibid [130].
[35] *Moylan* ibid [127]
[36] *Re Donkin* [1966] Qd R 96
[37] [1964] QWN 37; quoted in Preece 'Lee's Manual of Queensland Succession Law' (2007) LawBook Co at [13.180]
[38] Any determination of this issue would necessarily involve consideration of *Hawkins v Clayton* (1988) 164 CLR 539 by analogy, which considered similar issues from the perspective of the liability of a solicitor

Moylan clearly illustrates that the *Powers of Attorney Act* (Qld) is a potent sword to enable compensation to be recovered for loss sustained by attorneys who have misused their fiduciary powers or have not acted honestly and with reasonable diligence in protecting their principal's interests under an EPA. The case raises a number of current issues; principally, is there any duty to protect gifts designated in the principal's will when exercising power as an attorney under an enduring power of attorney? As there is a long-standing common law rule that generally an attorney has no right of access to a principal's will, consequently there could be no duty where the attorney has no knowledge of the contents of the will as in *Re Viertel*,[39] but where the contents of a will are known the situation may be different. However the decision in *Moylan* protected the will beneficiary's interests by application of general principles applicable to fiduciaries enshrined in the *POAA* (Qld) rather than through any specific duty or legislative requirement. This issue is of current interest to law reform bodies such as the Victorian Parliament Law Reform Committee, *An Enquiry into Powers of Attorney*, which recommended that the Victorian government conduct further investigation into whether the Powers of Attorney Act (Vic) should protect the interests of beneficiaries under a principal's will.[40]

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for loss (including the property falling into disrepair and loss of rent) arising out of failure to notify an executor of the death of the deceased and the contents of the will,

[39] [1997] 1 Qld R 110.

[40] Victorian Parliament Law Reform Committee, *An Enquiry into Powers of Attorney*, August 2010, recommendation 59.