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When a power of attorney abuses their position

High Court decides that money taken from an elderly father by his son should be set aside because of undue influence

You will see in this article how the court will step in to ensure a member of the family will be held accountable when they take advantage of another family member.

This is a sad case of an elderly man who appointed his son to act for him under an enduring power of attorney. Before his father died, the son spent nearly all his father's money on himself and his wife. The son knew he was only going to inherit one half of his father's estate. The other half was to go to the grandson. The Court ordered the son to repay the money back into his father's estate.

Those who hold a power of attorney must always act in the best interests of the donor. If they don't then the Court has made it clear there will be consequences.

If you are worried about being in a similar position to this man please call us for a strictly confidential discussion.

***Public Trust v Vernon* [2015] NZHC 1928**

Background

In his decision dated 13 August 2015 Kós J held that Ashley and Beverley Vernon exercised undue influence against Kenneth Vernon (their father and father-in-law). Ashley's actions also amounted to a breach of fiduciary duty owed to Kenneth and to unconscionable conduct. As a result of the undue influence the Vernons received \$340,354 from Kenneth's accounts to which they were not entitled.

Kós J ordered the Vernons to repay the administrator of Kenneth's estate that amount less a credit he allowed of \$60,000.

Facts

Kenneth and Naomi were married after Kenneth returned from the Second World War. They had two sons, Ashley and Chris. Chris died in late 2005 aged 51 leaving his nine year old son, Dante.

Naomi passed away in March 2006. On the day she died Kenneth moved in with Ashley and Beverley. Following both the death of his son and then his wife Kenneth was grief stricken. By mid-2006 Kenneth was reported to be a frail man with depressive tendencies. He had hearing and eyesight impairment and some intellectual impairment. He was vulnerable.

On the day Kenneth moved in with Ashley and Beverley he had assets of \$47,545 in savings. Shortly after that time he had the net proceeds of the sale of his house of \$282,071.

Kenneth moved into a rest home in September 2008. His assets then amounted to \$11,500. When Kenneth died in September 2011 he had \$1,400.

Ashley told the Court that he spent Kenneth's money with his father's blessing. The administrator of Kenneth's estate said that the expenditure was tainted with undue influence and should be repaid.

Kenneth and Naomi had mirror wills which they made in 2005 after Chris's death. The wills recorded that the whole estate was given by one spouse to the surviving spouse. If the other spouse did not survive then the residual estate was to be divided equally between Ashley and Dante. Ashley and Naomi's brother, John Rayner were appointed as executors.

In addition to making their wills, Kenneth and Naomi also executed mirror enduring powers of attorney. These appointed each other, together with Ashley as an attorney with general authority to act. The attorneys could act jointly or severally.

In August 2006, using the power of attorney, Ashley gave himself signing authority for two accounts held by Kenneth at the ANZ Bank.

In May 2006, Ashley wrote out and forged Kenneth's signature on four cheques. Two cheques were signed so that Ashley could buy a car and pay for its insurance. One forged cheque was made payable to Ashley and Beverley in the amount of \$46,500 and the other cheque was made payable to Global Plus Card for \$5,000.

The Court noted that up to the date of Naomi's death withdrawals from Kenneth's 00 bank account were generally by cheque with just two eftpos withdrawals. Four days after Naomi's death the eftpos transactions started to appear. They were either at the Woolworths Tawa (where the Vernons lived) or at a Mill liquor outlet. The eftpos card was continuing to be used to pay for groceries, liquor and petrol. The money was therefore, being used to meet the living expenses of all three Vernons.

Deposits into Kenneth's 00 account were from his superannuation and war pension payments. There was also the repayment of a term deposit into that account. The Judge noted that at this time the withdrawals from that account mainly by eftpos substantially exceeded the deposits.

In August 2006 the proceeds of sale of Kenneth's house was received \$100,000 was deposited into Kenneth's 00 account and the balance of \$182,071 was deposited into his 30 account. Following these deposits there were a number of inexplicable transfers with the accounts.

Kós J did not accept (as Ashley contended) that Kenneth sat beside Ashley at the computer and approved the internet bank transfers. The Judge considered it to be unlikely that Kenneth understood what Ashley was doing and noted that Kenneth had poor eyesight. The Judge also said that he did not accept that "Kenneth, for all his generosity, approved his own conversion to pauperdom when his length of life and future needs were uncertain".

Ashley and Beverley took \$340,354 from Kenneth's account which they spent on general living expenses, travel, including to Australia and two cruises, wedding expenses and a loan to their daughter and expenses maintaining Kenneth in their home (for which a credit was given).

Kós J's decision

Undue influence

It was clear to the Court that a relationship of influence existed in this case. This was demonstrated by firstly the entry into the enduring power of attorney by Kenneth in favour of Ashley and secondly by the trust and confidence which Kenneth gave Ashley by handing over the daily control of his banking affairs.

The Vernon's could not explain the cheque forgeries committed by Ashley or his false dealings with WINZ when he applied on his father's behalf for a rest home subsidy, nor could he explain the bank transfers or the exhausting of Kenneth's estate in their interest.

Consequently Kenneth's assets were depleted as a result of undue influence.

Ashley was aware that on Kenneth's death the estate would be split two ways and that he would only get one half. Beverley was aware of what was happening, (virtually the whole of the estate was being transferred in life to Ashley). Beverley appreciated the need for independent advice and documentation. She was therefore, fixed with the knowledge of Ashley's actions.

As a result the fund transfers effected by Ashley from Kenneth's accounts to the Vernon's were set aside on the basis of undue influence.

Breach of Fiduciary duty

There was a breach of fiduciary duty. The donee under a power of attorney owes fiduciary duties to the donor. An attorney must act with reasonable prudence in managing the donor's financial affairs, keep personal and fiduciary property separate and avoid conflict of interest and duty. Ashley's actions were to extract Kenneth's estate in life to the disadvantage of both Kenneth and Dante. These actions were neither fair nor prudent. Personal and fiduciary property were not kept apart and Ashley allowed his interests to conflict with his duty for his fiduciary. Ashley's fiduciary duties were breached.

The payments were unconscionable

Kenneth was at a special disadvantage as a result of his circumstances and Ashley and Beverley knowingly and unconscionably took advantage of the disadvantage under which Kenneth laboured.

For more about the powers of an attorney, including an Enduring Power of Attorney (EPA), read our article: [Power of Attorney](#)

Are you concerned about someone who is acting for you under a power of attorney or who is acting on your behalf generally? For a completely confidential discussion please call Graeme Withers and Julie Withers of Graeme Withers Law. We are experienced solicitors who can help you. Telephone: (04) 478 4889; (027) 715 5421 (Graeme) or (027) 478 4888 (Julie) or by email us info@witherslaw.co.nz

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