



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCSC/PLC:CBns241123

24 November 2023

Ms Danusia Cameron
Chair ARNECC
C/- PO Box 2222
Midland WA 6936

By email: chair@arnecc.gov.au

Dear Ms Cameron,

Identification of property sold under power of attorney

I am writing to raise an issue on behalf of our solicitor members that may be of concern to ARNECC's stakeholders nationally. The Law Society's Elder Law, Capacity and Succession, and Property Law Committees have contributed to this letter.

Under the current e-conveyancing arrangements, it is not possible to identify whether a property has been sold under a power of attorney (POA), as no notation to this effect is recorded on an electronic transfer, and it is not searchable in any information held by NSW Land Registry Services. Presently, the solicitor, as an e-conveyancing subscriber, simply signs the transfer document on behalf of the transferor.

We note that this is a departure from what was the established practice in paper-based conveyancing transactions, whereby an attorney, in signing the transfer document, would need to specify that it was executed under a POA.

The current system raises a number of significant challenges from an estates perspective. In New South Wales, it is necessary to identify property sold under an enduring POA in order to determine whether an exception to an ademption under section 22 of the *Powers of Attorney Act 2003* (NSW) applies, which may have significant consequences for the distribution of an estate. We note that there are broadly four ways in which a property might be sold by a natural person in an e-conveyancing transaction:

- a transfer where the registered proprietor signs the client authorisation (as commonly occurs);
- a transfer where an attorney of the registered proprietor signs the client authorisation, as an agent, not as an enduring attorney;
- a transfer where an enduring attorney of the registered proprietor signs the client authorisation; or
- a transfer where a financial manager signs the client authorisation.

In the first two situations, if there is a specific gift of that property in the will of the registered proprietor, the gift will fail (adeems), and the named beneficiary will lose their interest.

In relation to the second two situations, by statute,¹ if there is a specific gift of that property in the will of the registered proprietor, the proceeds of sale or so much of them as remain (as they may be used to meet proper expenses for the benefit of the former registered proprietor) are held for the beneficiary who otherwise would have received the specific gift. This is an exception to the ademption of the gift, that is, the failure of the intended gift because of its sale in the testator's lifetime.

We note that several other Australian jurisdictions have equivalent or substantially similar provisions to section 22,² although there is no nationally consistent approach. The issue is therefore broader than New South Wales alone and, in our view, requires a national solution. We also understand that this is an emerging issue in Queensland.

We are concerned that a lack of clear evidence as to whether a sale was made under a POA undermines the legal protections against the wrongful sale of property, and has the potential to exacerbate elder abuse, as sales under POAs are no longer matters of public record. In the context of litigation involving the wrongful sale of property under an enduring POA, it may be difficult and costly to obtain evidence establishing whether a transfer was made by a principal or an attorney. This is particularly so where a considerable amount of time has passed since the sale took place, or where there has been possible elder abuse. There will also likely be difficulties in obtaining details from the subscriber who conducted the conveyancing transaction about whether an enduring POA was used, as providing such information may breach the subscriber's obligations of confidentiality. The fact the enduring POA is registered is not helpful in these circumstances, as it does not establish whether the enduring POA was operative or used in the relevant property transaction.

Accordingly, we suggest that consideration be given to updating the e-conveyancing system, to require subscribers digitally signing on behalf of transferors to specify when a property is being transferred under a POA. Whether this would require a change to the electronic transfer, or could be achieved by other means, is an issue that will require further consideration. This update would increase transparency in property transactions and enhance access to justice, by providing a reliable, searchable public record of transactions effected under POAs. We realise that the change we are seeking will likely present some complexities in terms of timing and achieving a national solution, but in our view this unintended consequence of the way in which transfers are signed in an e-conveyancing transaction should be addressed.

We gratefully acknowledge that the NSW Office of the Registrar General has already raised this issue at the Australian Registrars Working Group, and we seek your further assistance in seeking to raise the importance of this matter at a national level. We are also discussing this issue with the Law Council of Australia, given its national implications.

Please contact Nathan Saad, Policy Lawyer on (02) 9926 0174 or by email: nathan.saad@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Cassandra Banks
President

¹ In addition to s 22 of the *Powers of Attorney Act 2003* (NSW), an exception to ademption also applies where a financial management order has been made by a court or tribunal in New South Wales under the *NSW Trustee and Guardian Act 2009* s 83.

² *Powers of Attorney Act 1998* (Qld) s 61B; *Powers of Attorney Act 2014* (Vic) s 83A; *Powers of Attorney Act 2000* (Tas) s 32AH.