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Fiduciary Relationship – Supporter & Supported Person

As to the need for fiduciary type obligations to be imposed between a supported person and their supporter, there is an uneasy tension between the law in relationship to fiduciary relationships and the newly proposed relationship of supporter and supported.

The proposed new relationship is created by statute and appears on one view, to involve a supporter doing no more than communicate a decision, or assist a supported person to communicate a decision, in a manner whereby the decision itself remains the making of the supported person [see 2.8(1)(a)].

Accounted for in these terms, it is questionable whether such a relationship could ever be fiduciary. As recognised in Hospital Products Ltd v United States Surgical Corp (1984) CLR 41, a fiduciary undertakes or agrees to act for on or behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interest of the other person in a legal or practical sense. Inherent to the notion of a fiduciary relationship is the exercise of a discretion and yet, by definition it appears the role of a supporter is no more than a "mouthpiece", falling short of the role of an enduring representative who would exercise decision making powers.

Whilst the need for the imposition of fiduciary duties seems relevant in particular given the considerable risk of financial abuse, it remains unclear how a relationship which on one view does not meet the definition of fiduciary might be treated as a fiduciary relationship.

How is the law relevant to a relationship where a person exercises a discretion or power on behalf of another intended to operate with respect to a relationship where "the principal" is considered to exercise discretion to the exclusion of a supporter, whose role is only to assist without exercising any power of discretion? Can the relationship be labelled "fiduciary" when on one view it falls outside the scope of the recognised tenets of a fiduciary relationship? How are things to work when applying concepts of fiduciary duty to a relationship which arguably lacks one essential ingredient of a fiduciary relationship, being the exercise of a power or discretion? Much of the law applicable to fiduciary relationships is directed to how that discretion or power is used. It remains to be seen how that law might apply in circumstances where no power or discretion is being exercised.

Communication of Decisions

Proposed Section 2.8(1)(a) expressly affords a supporter the power to communicate a decision on behalf of a supported person.

Absent investigation of the events behind the communication of a decision by a supporter (that is, investigation into the dealings between supported person and supporter) the reality of such a power is that in practical terms, a supporter will be in a position similar to that of an enduring representative. If a supporter can hold up a *Support Agreement* as evidence of their appointment

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and rely on Section 2.8(1)(a) to assert power to notify a decision of the supported person, any third party (bank or other financial institution, medical treatment provider, superannuation provider etc) would on the face of the document, be entitled to accept the supporter's notification as to the supported person's decision (for example to open a new bank account, transfer monies or similar).

Under the current regime in which an enduring attorney is appointed, any person engaging in such conduct is squarely acting in a fiduciary capacity and as such, the principal has remedies against them. The position would be less clear under a regime in which on one view, the supporter is not a fiduciary. It must be remembered in this context that if the relationship is not fiduciary, the considerations applied may be markedly different. It is the fiduciary nature of the attorney relationship that imports notions of placing the interests of the principal first, avoiding conflicts and similar.

If the relationship is not fiduciary, the question must arise whether the assisted person will in fact enjoy in respect of a supporter any of the protections they would if represented by an enduring attorney, in terms of the right to sue for breach of fiduciary duty in the event that the attorney fails to act in their best interests.

Removal of *Enduring Powers of Attorney*

Removing *Enduring Powers of Attorney* from the 'playing field' raises considerable questions about how things are to work in practical terms.

As it stands, a person may today execute an *Enduring Powers of Attorney* defining when the attorney's powers will commence and hence, may appoint an attorney who may exercise their powers forthwith, but continue to exercise those powers if the principal loses capacity.

If a person cannot execute an *Enduring Power of Attorney*, it seems the only means by which they could achieve the same position would be to execute an *Ordinary Power of Attorney* to operate forthwith and then execute an *Enduring Representative Agreement*, appointing an enduring representative to act on their behalf if and when they lose capacity.

This approach presents inherent difficulties. For example, a bank might be presented with both instruments, perhaps in different terms (containing different powers, limitations, directions etc). Whilst under the *Enduring Powers of Attorney* system the bank need not trouble itself to consider the question of capacity and can simply act on the instructions of the attorney confident that if capacity has been lost they are duly authorised, a bank may be reluctant to act if the proposed transaction is within the power afforded under one of the instruments and outside the power afforded under the other instrument, because the bank would need to form a view as to capacity to determine which instrument is applicable.

The same comment equally applies for any other financial institution or financial related entities, such as real estate agents, insurance brokers, stockbrokers and the myriad of other financial intermediaries.

It is possible that such intermediaries may refuse to act on any "instructions" from a potentially validly appointed ordinary attorney, supporter or enduring representative, if they are aware of any concern as to capacity, unless the instructions they are receiving are consistent with the powers afforded to all three officeholders (ordinary attorney, supporter or enduring representative) which may well not be the case.

The need for an instrument that operates during the term of a person's capacity and continues thereafter should be maintained, so as to ensure that people are able to put appoint a person with continuity throughout the term of their capacity or incapacity. This avoids the risk that the management of their affairs are frustrated for example, by the refusal of financial intermediaries to act in circumstances where no instrument can be provided to them which they can rely upon without need to consider the capacity of the individual, for example to know whether the instrument is in fact in operation.

At least at the present time, a person concerned that a financial institution or intermediary may refuse to act on such grounds can create an *Enduring Power of Attorney* that commences today and continues to operate, irrelevant to their capacity and so for example if the bank is put on notice of an issue as to capacity, they may rely on such an instrument to follow the instructions of the attorney, without needing to consider the issue of capacity.

Indeed there are other reasons to permit the continued operation of *Enduring Powers of Attorney.* It should be remembered that the law with regard to powers of attorney has been developed over hundreds of years and as such, it is established. It imposes clear fiduciary obligations, manages concepts such as the power to confer benefits on an attorney or third party, contains provisions dealing with ademption and various other important considerations relevant to the role of a person charged with the task of managing another person's finances. This regime comes with all of the history and benefit of decided cases dealing with these issues, all of which have a natural tendency towards certainty.

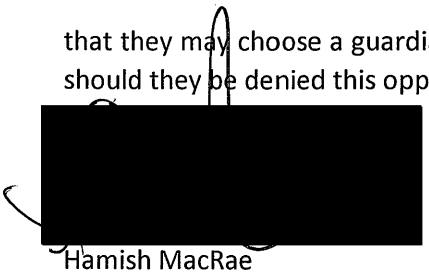
To give but one example, annexed hereto is a brief summary of authorities dealing with the need to construe powers of attorney strictly such that if a power is not expressly contained in the document, it does exist.

The important principle that unless the attorney's power is found in the appointing instrument it does not exist is of considerable utility. It denies the right of a person to assert for example, that although a particular appointing instrument does not expressly afford them a power (for example to confer a benefit on themselves or another person, in effect giving away a protected person's assets), they for example received oral instruction from the protected person to perform the relevant transaction. I have seen this very issue unfold in a litigated dispute and this line of authority was of considerable assistance in removing potentially arguable ground that where for example, capacity is unclear – an attorney cannot rely on oral instructions to overcome the need for the power to gift away the principal' assets, if the instrument appointing them does not expressly give them that power.

It is unclear why if the new roles of supporter and enduring representative are to be created, it is necessary to do away with all of the experience and confidence society has achieved with regard to powers of attorney. If persons are to be given the option to enter a Support Agreement or Enduring Representative Agreement, why should they be denied the right to continue to enter *an Enduring Power of Attorney*, if they wish to do so, with the benefit of all the established law relating to same, much of which may well need to be re-travelled over the years to come as New South Wales comes to terms with the real effect of these new documents?

A similar comment applies in respect of *Appointments of Enduring Guardian*. For persons who wish to take advantage of the existing related law and for example, separate their guardianship and attorney arrangements, perhaps for reasons including maintaining privacy in relation to same such

that they may choose a guardian to whom is not disclosed their attorney affairs and vice versa, why should they be denied this opportunity?



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Four Corners Rule

The common law in relation to powers of attorney was largely determined when powers or attorney were mostly used for business purposes and often gave detailed authorities to the attorney to act as agent for the maker and before enduring powers of attorney were legislated for. In 1893 the Privy Council noted in an appeal from Canada that:-

"[It was not] disputed that powers of attorney are to be construed strictly – that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms of by necessary implication": Bryant v La Banque du Peuple [1893] AC 170.

In a 1947 decision of the High Court, Dixon J pointed out that:

"Prima facie a power [of attorney], however widely its general words may be expressed, should not be construed as authorising the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation. "The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power to do so, make presents to himself or to others of his principal's property": Tobin v Broadbent (1947) 75 CLR 378.

Consequently, following the common law in New South Wales, the *Powers of Attorney Act*, 2003 (NSW) precludes an attorney from conferring a benefit on themselves or others unless the enduring power of attorney document itself authorises the conferral of the benefit[1].

In determining whether any relevant power might be found within the four corners of each document consideration must be given to the *"long line of authority [that] has held that powers of attorney are construed strictly in favour of the principal*: Attwood v Munnings (1827) 7 B & C 278; Withington v Herring (1829) 5 Bing 442 and Spina v Permanent Custodians Limited [2009] NSWSC 561.

[1] Section 12 and 13, POA Act