



Enduring Power of Attorney and providing gifts to your attorney

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Enduring [Powers of Attorney](#) allow you to appoint a person (“**Enduring Attorney**”) to act on your behalf should you be unable to do so. Any transactions with your Enduring Attorney (whether actively acting as your Attorney or not at the time) or a relation, business associate or close friend of the attorney including gifts, raises a presumption of undue influence.

What is a presumption of influence?

This means that it is presumed that a transaction by either the Enduring Attorney or a relation, business associate or close friend of the Enduring Attorney was brought about by the undue influence of the Enduring Attorney.

Unless it can be proved to the contrary, that transaction is liable to be set aside by a court.

An example of where the presumption is raised is where a person appoints one or more of their children as their Enduring Attorney and makes a gift to the child. It is presumed that the child exercised undue influence on their parent so that the gift was made. It is a matter for the Enduring Attorney to discharge the presumption.

To rebut the presumption, the Enduring Attorney must produce evidence to show that the donor of the Enduring Power of Attorney entered into the transaction as a consequence of his or her own “full, free and informed thought”; otherwise the transaction could be set aside.

Interestingly, the presumption applies to a transaction even where an Enduring Attorney is not a party to the transaction and may have had no knowledge that the transactions was happening between a relation, business associate or close friend of the Enduring Attorney. The appointment of the Enduring Attorney is sufficient to raise the presumption.

What elements are considered to rebut the presumption of undue influence

A recent case authority has considered practical concerns of transactions between a Principal and Enduring Attorney.

The matter of [Birch v Birch Ors](#), dealt with a transaction between a Principal and an Enduring Attorney. In this case, the relevance of a parent/child relationship was considered by the Queensland Court of Appeal, where a son (who was Attorney to his mother) successfully rebutted the presumption of undue influence.

The mother had transferred her interest in a farming property to her son, who was also the mother's Enduring Attorney.

Whilst the son did not act as Enduring Attorney when the transfer of the property was completed (i.e. the mother signed the transfer herself), the presumption of undue influence was raised by another son as the transferee was the mother's Enduring Attorney.

Appeal court decision

The Court of Appeal found that whilst there is a presumption of influence, there was nothing about this transaction, of which the son as Enduring Attorney had knowledge, which was not shared with the mother. She was able to decide whether it was in her interest to transfer the share interest to the son or not.

The court additionally found that although there was a relationship of Principal and Enduring Attorney, their relationship of mother and son was relevant, and the gift could be explained by gratitude and affection by a mother for her son.

The court also found that the Principal and her husband intended that their son inherit their shares in the family farm and that the Principal gifting her share prior to her death was consistent with their intention.

Whilst a relationship of mother and son will not always displace the presumption of undue influence, it can be relevant and, in some cases critical, to a specific case.

However, rebutting the presumption will almost always require independent legal, and generally, financial advice to the Principal, which was the case here.

Although the son was successful in this appeal, it should be noted that the simple existence of a familial relationship between Attorney and Principal does not automatically rebut the presumption of undue influence. It is always prudent for separate legal and financial advice to be obtained by the donor.

Do you need legal advice?

Caution needs to be taken when there are any dealings where an Attorney gains, or may be perceived to gain, a financial benefit from the Principal.

If you are planning to give a financial benefit to your Attorney, or you are the recipient of a financial benefit, it is important you seek legal advice as soon as possible.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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