

## ADEPTION TRAPS FOR CONVEYANCERS



**Felicity Wardhaugh** is special counsel at Mullane & Lindsay in Newcastle – a Lawcover panel firm.

By Felicity Wardhaugh

**A**n issue can arise from routine conveyancing transactions that is best avoided. If your client is using an enduring power of attorney to sell real estate and you have a choice, make sure you use a power of attorney executed after 16 February 2004. It is also worthwhile encouraging clients who have granted enduring powers of attorney before 16 February 2004 to grant new ones (if they remain capable of doing so) and to revoke earlier grants.

An example of what can go wrong is as follows: a testator, Mary, consults a lawyer and executes a will. The will is executed on 14 January 2002 and leaves a specific gift of her home (or any house in which she is residing at her death) to her son, James. She leaves the residue of her estate, which is substantial, to her

### Snapshot

- Ensure your conveyancing staff are alert to the issue of ademption of specific gifts.
- If your client is using an enduring power of attorney to sell real estate, and you have a choice, make sure you use a power of attorney executed after 16 February 2004.
- Encourage clients to revoke enduring powers of attorney made before 16 February 2004 and grant new ones.

other son, Simon. On the same date, Mary makes James her attorney under an enduring power of attorney and James accepts the appointment.

Five years later, in 2007, Mary makes a new will. Only a few minor changes are made. The specific gift to James remains, as does the gift of the residue. The old will is revoked by specific reference in the new will. At the same time, Mary grants a new enduring power of attorney. This time she appoints James and his brother Simon as her attorneys and they accept their appointments. The former power of attorney is not revoked and remains in James' hands.

Mary falls ill and is taken to hospital. The social worker at the hospital talks to James and tells him that Mary is too frail to return to her home. Simon is overseas

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on an extended business trip. James is left to make arrangements to move Mary into a nursing home.

Mary has lost legal capacity to make decisions. James instructs lawyers to carry out the conveyancing to sell the home.

He provides the law firm with the enduring power of attorney dated 14 January 2002 so he can sign the transfer without the need for Simon's signature. The house is sold and the sale proceeds help finance the nursing home deposit bond.

Shortly afterwards, Mary dies. James expects to inherit the refund of the deposit bond given that he is the named beneficiary of the specific gift of the home in the will. He learns, however, that the deposit bond has fallen into residue and will go to Simon. The specific gift has failed – it has been 'adeemed' at common law.

For a detailed exposition of the law relating to ademption see Campbell J's judgment in *RL v NSW Trustee and Guardian* [2012] NSWCA 39 and, in particular, Appendix B to the judgment in which Campbell J undertakes a careful and fascinating analysis of the development of the common law. Before the enactment of the *Powers of Attorney*

*Act 2003*, the law relating to the granting of powers of attorney could be found in the *Conveyancing Act 1919*.

There were, however, no statutory provisions to ameliorate the harshness of the common law relating to ademption. In the second reading speech for the Powers of Attorney Bill, this harshness was recognised in the following passage: 'The ademption rule can operate particularly harshly where a testator, who has made a gift of a specific item in a will, loses mental capacity and his or her attorney sells the item under an enduring power of attorney. In this case the testator has no chance to alter the will after losing mental capacity. To overcome this situation and prevent injustice to the beneficiary, the bill introduces a provision which will entitle the beneficiary to any surplus left from the proceeds of the sale of the item sold by an attorney under an enduring power of attorney'. In Mary's case, if the later power of attorney had been used, then the gift would not have failed.

Section 22(1) of the *Powers of Attorney Act 2003* stipulates that: 'Any person who is named as a beneficiary under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other

property arising from any sale, of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale or dealing, if no sale or dealing had been made'. Section 22 applies from 16 February 2004 onwards when this section of the Act came into force.

James might be able to rely upon the goodwill of his brother to regain his inheritance or might be able to litigate to recover. He is, however, likely to be extremely disgruntled and blame you for the problem. Simple questions such as asking him whether the 2002 power of attorney is Mary's latest power of attorney and whether he is aware of the terms of his mother's will could avoid a disappointed client. In some cases, there may be alternatives to selling the real estate, which clients such as James could explore.

Overall, therefore, it pays to consider the date of the power of attorney to be used for the transfer of real estate. Conveyancing staff should also be advised to consult their supervising partner or director if they anticipate a possible ademption so the client can be alerted to the risk and, if necessary, in James' case, told to obtain independent legal advice. **LSJ**



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