



Review of the *Real Property Act 1886 (SA)*

Fact Sheet 10 – Interaction with Powers of Attorney and Family Law

Powers of Attorney and Real Estate Transactions

There are increasing concerns at the scope for fraud in transactions involving land, such as involving elder financial abuse¹ and/or acting under an Enduring Power of Attorney ('EPA').² Any system needs to be effective and practicable, but also have in place suitable safeguards to address the risk of misuse or fraud.

An EPA authorises a person (the '**Attorney**'), who is typically a trusted family member, to make decisions regarding property on behalf of another (the '**Principal**') usually when they are deemed to lack the capacity to do so. Whilst there is a requirement for all such transactions to be registered in South Australia, there remains a vulnerability to exploitation, particularly for dealings in real estate.

For example, an Attorney may, contrary to their obligations and duties, decide to sell the Principal's real property for their own personal gain. This could lead to the sale of the property at an undervalued price, or even the transfer of ownership to the Attorney themselves. This abuse of the EPA could strip the Principal of their main asset and security.

Electronic conveyancing complicates this issue. In a digital environment, such actions can go undetected due to the lack of face-to-face interactions and the ease of digital signatures.

The interaction between EPAs and real estate dealings also goes further than illegal acts. There can sometimes be a fine line between 'gifts' to the Attorney and 'joint endeavours' between the Attorney and Principal. The latter is legally permissible whilst the former is viewed as a breach of the Attorney's duties.

Issues can also arise when individuals misuse General Powers of Attorney ('GPAs'), which authorise the Attorney to make decisions regarding property even when the Principal retains capacity. An example of this would be a former spouse using the GPA of the other party to transfer or sell jointly owned property without their knowledge or consent in an attempt to frustrate a claim under the *Family Law Act 1975*.

Family Law and Real Estate Transactions

Under the *Family Law Act 1975* (Cth) ('**FLA**') the Federal Circuit and Family Court of Australia ('**FCFCOA**') is tasked with making Orders which impact the parties' interests in real property. This can include the right to caveat a property, the transfer of legal interests between parties or forcing the sale of a property and distributing the sale proceeds.

Throughout Australia the transfer of property under an FCFCOA Order is free from stamp duty. However, there are differences among jurisdictions as to the waiver of other government charges such as:

1. Registration fee on the transfer of title application; and
2. Registration fee on the discharge of mortgage (where the Order provides for such a discharge) with or without a related transfer of the property.

¹ See generally David Plater, Divya Narayan, Anita Brunacci, Holly Nicholls, Jemma Holt, Michaela Okninski, Olga Pandos, Taylor Portelli, Rachel Tan, Kim Tran, Sylvia Villios and John Williams, '*Autonomy and Safeguarding are not Mutually Inconsistent*': A Review of the Operation of the *Ageing and Adult Safeguarding Act 1995* (SA) (South Australian Law Reform Institute, 2022).

² See Sylvia Villios, David Plater, Gabrielle Golding, Olga Pandos, Bernadette Richards, Anita Brunacci, Natalie Ayoub and Holly Nicholls, *Valuable Instrument or the Single Most Abused Legal Document in our Judicial System? A Review of the Role and Operation of Enduring Powers of Attorney in South Australia* (South Australian Law Reform Institute, 2020).



There is also a discrepancy across jurisdictions about whether a right to bring an application in the FCFCOA arising from a relationship breakdown and resultant equitable interest in a property is a caveatable interest under the *RPA*, or at which point it becomes, or ceases to be, a caveatable interest. Currently in South Australia, such an interest is not caveatable outside of proceedings.

The importance of the ability to lodge a caveat and the process required for this to be accepted is becoming increasingly important. This is due to an increase in reported fraudulent transfers taking place under the current electronic conveyancing system, whereby one landowner is removing the other from the title without their knowledge and consent, or they are misleading the other as to their rights or the nature of documents to be signed to obtain their signature for the transaction.

Sometimes such a fraud is inadvertently supported by an individual undertaking a conveyancing transaction being instructed to undertake the transaction by use of remote verification of identity processes, Statutory Declarations in lieu of valid Court Orders, or prescribed Agreements under the *FLA*. The individual undertaking the conveyancing transaction may also treat the transfer as a sale of interest, consequently having their client pay significant sums in Stamp Duty from which they would otherwise be exempt.

Consultation Questions

1. What safeguards should be in place to protect people, such as Principals under a Power of Attorney or parties to family law matters, from fraudulent transactions? Is it appropriate for the *Real Property Act 1886 (SA)* to be the source of these safeguards?
2. What obligations should there be on those acting in conveyancing and family law matters to advise clients of their potential entitlements and the risks associated with a transaction? To what extent should those obligations extend to another party where such party is known to be self-represented?
3. Should a right to bring an application in the FCFCOA for property settlement or enforcement of a debt be a caveatable interest under the *Real Property Act 1886 (SA)*? If yes, at what point should this interest become and cease being caveatable?

SALRI's consultation process will open on 8 July 2024 and close on 4 October 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

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