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Estate Tornya, Deceased [2020] NSW SC 1230. Lindsay J. 10.9.20.
Where the plaintiff estate beneficiary sought from the first defendant donee of an enduring power of attorney preliminary discovery over dealings of value of about $6 million between the grant of the power in 2010 and the testator's death in 2019.

The first defendant donee the power held up *Taheri v Vitek* [2014] NSWCA 209. Lindsay J said: *"Taheri v Vitek* is said to stand for a general proposition (applicable to the deceased's power of attorney in favour of the first defendant) that, as a matter of construction of the *Conveyancing Act 1919* and a power of attorney executed in the form of Schedule 7 to that Act with a "**benefits clause**", the principal must be taken to have empowered the attorney to do anything that the principal might lawfully have authorised an attorney to do, even if there was benefit to the attorney and no benefit to the principal."

The first defendant proved an agreement by deed in 2007 with the deceased whereby the first defendant, the second wife, promised to provide services and care for the deceased for the remainder of his life in consideration of will promise of life estate and other real estate. His Honour noted transactions effected pursuant to the power of attorney from late 2009 until the gentleman's death on Anzac Day 2019, being undenied dealings to the benefit of the first defendant of value about $6 million.

Then, [91] "The following observations of Dixon J in *Tobin v Broadbent* [1947] HCA 46; (1947) 75 CLR 378 at 401 are commonly taken as a starting point for analysis of the nature and effect of a power of attorney even where (as in this case) the power of attorney is a creature of statute:
Dixon J "If a transaction is ostensibly on the principal's behalf and is of a description that falls within the authority [conferred by a power of attorney], it is nothing to the point [as between the principal and a third party] that the agent's purpose was to act for his own benefit and to defraud the principal, that is, unless the opposite party to the transaction had notice. ... a power 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 so to do, make presents to himself or to others of his principal's property': per Russell J, *Reckitt v Barnett Pembroke and Slater Ltd* (1928) 2 KB 244 at 268, a judgment approved in the House of Lords, [1929] AC 176 at 183 and 195...".

Lindsay J [161] "In my opinion, whether or not armed with a benefits clause in his or her favour, an enduring attorney who deals with the property of an incapacitated principal in total disregard of the interests of the principal commits **a fraud on the power** conferred upon him or her and is, accordingly, in breach of his or her fiduciary obligations to the principal: *Vatcher v Paull* [1915] AC 372 at 378; *McFee v Riley* [2018] NSWCA 322 at [26] - [27] and [56]-[65]. *Cf, Spina v Conran Associates Pty Ltd* [2008] NSWSC 326, [89]."

"An **enduring attorney may be held liable as a fiduciary** to account for his or her dealings with property of an incapacitated principal if a benefit obtained by the attorney from self-dealing:

(a) is so substantial, or so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act; or

(b) flows from an unconscientious taking of advantage of the special disadvantage to which the incapacitated person is subject vis a vis the attorney," Lindsay J said.

Shephard v Tuanie Paul Galea executor of the estate of the late Joseph Galea [2020] WASCA 152. The Court (Quinland CJ, Murphy & Mitchell JJA). 11.9.20.

The Court of Appeal dismissed appeal against Kenneth Martin J dismissing with costs the appellant's case - [2019] WASC 164, an assertion of undue influence and unconscionable conduct in the parties' late father's inter vivos transfer of substantial realty to the defendant siblings.

At [101] the appellate Justices "An overview of the relevant principles was provided in *Permanent Mortgages Pty Ltd v Vandenbergh* [2010] WASC 10 (Murphy J) approved in *Mercanti v Mercanti* [2016] WASCA 206.

[**Murphy J**] "The basis of the equitable jurisdiction to set aside an alienation of property on the grounds of undue influence is the prevention of the unconscientious use of any special capacity in or opportunity for the disponee to affect the disponor's will or freedom of judgment in reference to the transaction: *Johnson v Buttress* [1936] HCA 41.

"The jurisdiction to set aside a transaction procured by undue influence is exercised on two bases. The first is where undue influence is proved as a fact. The second is where undue influence is presumed by reason of the antecedent relationship between the parties, and the presumption has not been rebutted: *Johnson v Buttress* (119); The former is 'actual' undue influence and the latter is 'presumed' undue influence: *Powell v Powell* [2002] WASC 105 [120] - [121]

"Actual undue influence requires proof that the transaction was the outcome of such an actual influence over the mind of the disponor that it cannot be considered to be the free act of the disponor: *Johnson v Buttress* (134). The source of power to practise such influence or domination over the disponor may not arise from an antecedent relationship, but may arise in the particular situation, or by the deliberate contrivance of the disponee: *Johnson v Buttress* (134)

"Presumed undue influence arises in two ways. One is where there exists a class of relationship historically recognised by the law as raising a presumption of undue influence. The recognised classes include parent and child, guardian and ward, solicitor and client, doctor and patient, religious adviser and adherent ...

"Dispositions from the latter to the former fall within the presumption.

"The other is where, outside of those recognised categories, the plaintiff positively proves that there in fact existed an antecedent relationship between the parties, the nature of which was that the defendant was in a position to exercise dominion, power, or ascendancy over the plaintiff: Meagher, Heydon & Leeming, *Equity: Doctrines & Remedies* [15-105]. he recognised categories of relationship are marked by the characteristic that it is not natural to expect that 'one party would give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account without suspicion of confidence abused': *Yerkey v Jones* [1939] HCA 3.

"Parents' dispositions to children can be explicable as being the consequence of parental love and affection without any suspicion of confidence abused. Accordingly, the parent/child relationship, insofar as it concerns dispositions from parent to child, is not a presumed relationship of influence. At [131.6] the Justices noted "The gift of the Bassendean property to Carmen and Tony was not inexplicable. It was made for the ordinary motive of benefitting two of his children. Moreover, the gift was made deliberately to the exclusion of two other children at a time when (without seeking to explore the rights or wrongs on either side) those two children had ceased enjoying a good relationship, or indeed any meaningful relationship, with their father." Appeals to substance and costs dismissed.

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Barber v Barber (2020) TASSC 4. Holt AsJ. 16.9.20.

Associate Justice Holt made family provision order substituting the plaintiff's mother for the defendant daughter as the sole beneficiary and constrained the daughter as executrix to deal with the estate without the consent of the plaintiff.

Mrs Barber and her husband, the testator, had been married for 62 years before his death in mid 2018, their principal asset their home at Rose Bay, a suburb across the Derwent at Hobart, which they had bought in 1978 and was now valued at $975,000.

The couple made their first wills in early 2018, appointing each other as executors and their whole beneficiaries with each devising over to their daughter, here the defendant.

But after those wills were executed, the daughter took her father to another solicitor and had prepared a new will giving the daughter the whole benefit of his estate as well as executing an instrument to sever the joint tenancy of the family home, this will executed in the cardiac ward of Royal Hobart Hospital only days before the late Mr Barber died in mid 2018. The preparation of these documents was not revealed to the plaintiff Mrs Barber until after her husband had died.

Associate Justice Holt said "An affidavit from Mr Barber's new solicitor was read in the proceeding. It contains detail as to the circumstances in which instructions for the new will issued. The detail runs to five pages comprising 23 paragraphs. It contains no mention of any advice being given in relation to the possibility of Mrs Barber bringing a claim for family provision. ... He gave evidence that he did recall that Mr Barber was insistent on following through with the proposed bequest to his daughter. Even on a consideration of testamentary capacity, apparently, this did not raise any concern on the part of the solicitor that Mr Barber may not have been capable of understanding his responsibilities or the consequence for Mrs Barber of what was proposed.

"Of course, the solicitor, in the circumstances of the case, was under a duty to advise about the possibility of a family provision claim being made by Mrs Barber. ... As to **the solicitor's duty**, see *Badenach v Calvert* [2016] HCA 18; 257 CLR 440 at [27]- [30]. "

In submissions the daughter complained that her mother had not chosen to give evidence of her position. Associate Justice Holt found the jurisdiction enlivened.

"In considering what provision ought to be made, I have concluded that Mrs Barber should be left with the chance of remaining in the family home for so long as she is able to do so and wishes to do so. I consider that if and when the time comes for her to move out, she should be left with sufficient proceeds to allow her to purchase a suitable new residence and have sufficient funds left over to enable her to live without continuing financial anxiety. I have considered provision by way of a life interest in the estate share of the home but have concluded that this is not appropriate as it would entail the appointment of an independent trustee, with the associated expense, and it would deprive Mrs Barber of the degree of financial autonomy which she should have.

"I make the following orders: 1.The estate is to be distributed as if in cl 4.1 of the will the words, "to my daughter, Joy Elizabeth Barber" were substituted with the words, "to my wife, Judith Rose Barber", and the power of the executrix to sell, as contained in cl 3 of the will, is absent any Court direction to the contrary conditioned upon the consent of Judith Rose Barber or her attorney or representative; 2.The respondent is to bring into Court the grant of probate and a certified copy of these orders is to be made on the probate of the will.

Costs for submissions.

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Grant v Grant [2020] NSWSC 1288. Slattery J. 24.9.20.

In respect of the family provision suit of Nerez Grant against her mother's estate, Slattery J noted a net estate of $361,104 after heavy legal costs incurred in the protective jurisdiction against the daughter.

At [281] Slattery J "The central issue in this case concerns the quality of the relationship between Nerez and her mother. Authorities that relate to **estrangement** between applicants for provision and deceased persons are relevant. These authorities have been recently and comprehensively summarised by Hallen J in *Keaton v Gumulak* [2020] NSWSC 943 at [230] – [234]. "

At [296] "Nerez fails in her claim for provision out of her mother's estate on two principal grounds: her **ill treatment of her parents**, particularly her mother, over a long period disentitles her to any further relief by way of family provision under *Succession Act*, Chapter 3; and, she has already received very substantial benefits from her mother throughout her lifetime.

"Mrs Grant was afraid of her daughter Nerez with good reason. Nerez behaved with **callous brutality towards both of her parents over decades**. She had seen Nerez's physical violence towards Dr Grant. She had personally been the object of Nerez's constant hectoring and harassment for money. She had seen Nerez sequester Dr Grant, dominate Dr Grant, and use his willingness to give her money as her treasury. Mrs Grant was so fearful of Nerez that she had taken up Seth and Marguerite Grant's offer of seeking respite at Cambridge in the first few months of 2011, during one of the worst periods of Nerez's harassment," Slattery J said.

"Nerez's conduct over decades was calculated to make Mrs Grant fearful and compliant with her demands and it had that effect. Nerez treated her mother as a creature to be frightened and then coerced into doing what she wanted. Any vestiges of mother-daughter affection had long disappeared between Nerez and Mrs Grant. Stung by the constant pain of Nerez's drug taking, thefts, aggression, unpredictability and the shame she brought upon the family, Mrs Grant's decision to keep her daughter at arm's length was entirely understandable."

"For Nerez to be omitted from Mrs Grant's will does not offend community standards of what would be expected of a testator in her position. Children with difficult relationships with or estrangement from parents not uncommonly obtain family provision relief. But this case is in a category of its own and involves decades of actual aggression by Nerez towards her mother, who was afraid of her daughter."

"And Nerez's case is missing another potentially mitigating factor. The Court has immense difficulty in finding in Nerez's conduct any reliable evidence pointing to the altruistic or selfless conferring of benefits upon her mother.

"But Nerez seeks to excuse this gap in her case. She says that Seth and Tansin hid Mrs Grant away from her from 2011 and she could not provide a daughter's support to her. In one sense this is true. Mrs Grant was kept away from Nerez between 2011 and 2017. But this was at Mrs Grant's own request and was both a necessary and well justified decision taken for Mrs Grant's own protection from Nerez.

"And looking at Nerez's conduct before 2011, the Court does not accept that Nerez provided any services, support, affection or security to her mother. Nerez is underserving of Mrs Grant's testamentary bounty and her *Succession Act*, Chapter 3 claim for family provision fails. Her Summons will be dismissed with costs," Slattery J said [302].

Please see further extracts from this judgment under heading Enduring power of attorney, fraud, estate recovery. Wills Estates Australia at Goldball.com.au.

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