Queensland Law Society

ethicscentre

Is an Attorney entitled to collect a Principal's original documents from your safe custody or to obtain a copy?

Summary:

Original will – No. Making or revoking a Will is a "Special personal matter" as defined in the *Powers of Attorney* Act (Qld) 1998 ("POA Act") and no part of an Attorney's role.[1]

Copy of a will or originals of other documents – Probably, depending upon the scope of the Attorney's administration. The POA Act allows access to the Principal's information sufficient to discharge the Attorney's responsibilities.

The Attorney may need access to the Principal's testamentary documents to ensure that their administration interferes with testamentary arrangements as little as possible.

Answering reasonable questions about the contents of the Will without releasing a copy of all of it may be sufficient in some instances, however this solution may create more problems than it solves. "Is this asset specifically gifted ?" is **not** the only issue to consider. If you do answer questions, ensure that a full brief of all the circumstances and context is obtained.

Analysis:

As bailee of a Will or other documents, we are obliged to protect our client's confidentiality[2] and the physical security of such bailed property. We must balance this obligation against lawful requests for access.

S. 81 of the POA Act provides:

> **81 Right of attorney to information**
>
> (1) An attorney has a right to all the information that the principal would have been entitled to if the principal had capacity ***and that is necessary to make, for the principal, informed decisions about anything the attorney is authorised to do***.
>
> (2) A person who has custody or control of the information must disclose the information to the attorney on request.
>
> (3) This section overrides--
>
> > (a) any restriction, in an Act or the common law, about the disclosure or confidentiality of information; and

[1] *Powers of Attorney Act* (Qld), Schedule 2, part 2, para 3(a).

[2] Rule 9 of the Australian Solicitors Conduct Rules.

(b) for an attorney under an enduring power of attorney--any claim of confidentiality or privilege, including a claim based on legal professional privilege; and

(c) for another attorney--any claim of confidentiality or privilege, excluding a claim based on legal professional privilege.

(*Emphasis added*)

Similarly, s. 69 of the POA Act authorizes;

69 Execution of instrument etc.

(1) If necessary ***or convenient*** for the exercise of power given to an attorney, the attorney may—

(a) execute an instrument with the attorney's own signature and, despite the fact that the power of attorney was given under hand, if sealing is required or used, with the attorney's own seal; and

(b) **do any other thing in the attorney's own name;**

…….

(Emphasis added)

An attorney is not entitled to make, revoke or amend a Principal's will[3]. Access to the original is therefore likely to be outside the scope of the Attorney's remit and right of access arising under s.81. Arguably, s. 69 provides for a wider right of access, but again it is difficult to see why withdrawal of an original will is within the Attorney's appointment.

Most other classes of documents would fall within s. 69 or 81.

If administering the affairs of a Principal generally, the Attorney will need to consider the Principal's testamentary intentions to avoid restructuring their affairs in a way that is inconsistent with the scheme of the will.

In *CA* [2010] QCAT 196, the bailee solicitor was ordered to release a copy of the Principal's will for this purpose. There was nothing extraordinary about CA's affairs, so it is likely that this case is an indication of the position that the Tribunal would adopt more generally.

It may be sufficient for the Attorney's purpose that the solicitor advise whether the disposal of a particular asset will raise issues with relation to the Will.[4] However, in giving such information, bear in mind that the risk of

[3] See *Powers of Attorney Act 1998 (Qld)*, Schedule 2, part 2, para 3(a) (actions with testamentary effect are a "Special personal matter"); S. 32 (1) (a) an enduring power of attorney may only exercise powers in relation to personal matters (including health matters) or financial matters.

[4] This approach, rather than the release of a copy is the preferred position of the New South Wales Law Society; Guidelines for solicitors preparing an enduring power of attorney – see 4 (e). These guidelines also recommend that access to the Will is an issue which ought to be ventilated with the Principal when the will is deposited. Provided such instructions are informed by an understanding of the Attorney's role and the complications that can arise if they do not know what is in the Will, we endorse the suggestion that the Principal's attitude be gauged, although this will be persuasive rather than determinative.

ademption of a specific gift is not the only issue. Overall preservation of the Principal's testamentary intention, including (among other considerations) the balance between specific bequests and residual beneficiaries should be attempted if circumstances permit.[5] This may require a nuanced decision making process managing competing objectives. The appointed Attorney is clearly the appropriate party to undertake this exercise. Access to the full contents of the Will, and (if available) any solicitor's file from which an understanding of the Principal's testamentary objectives could be derived may assist them greatly in those considerations.

Access to the full text of the Will may in many cases be essential to properly undertake the administration of assets overall.

OK, so an attorney wants material in safe custody. What next?

The first step is to inspect the packet and the file if available to refresh our recollection of the matter. Requests should always be assessed by a practitioner, if not a partner or principal, and not regarded as a purely administrative issue.

In most circumstances it is appropriate to contact the client for instructions. An unexplained refusal to put you in contact with the client should raise warning flags, but even an explanation ("they are overseas", "they are sick") does not absolve us altogether. How much effort we should devote to checking asserted facts is a difficult line to draw – especially if the power is expressed to apply "immediately" – but some effort to contact the client or their last known address is appropriate.

Inherently valuable documents such as certificates of title may require more stringent measures. Certainly the risk to the practitioner of becoming involved in litigation is higher.

Where access is required in an emergency, getting some written evidence of the circumstances and keeping this on file may assist the practitioner if there is a subsequent dispute.

If the client has capacity to authorise access to the document or a copy we may of course act accordingly. If they instruct you not to allow access but capacity is in dispute, some form of expert assessment or a declaration may be required. You would be entitled to decline access pending this being obtained.

You are entitled to reach your own conclusions about disputed capacity if enough evidence is available, but in anything other than a clear case a professional assessment (applying the appropriate legal test) is always preferable.

You may offer to provide a briefing letter to an appropriate medical practitioner setting out the correct functional capacity test. A general opinion that someone has "capacity" may not be especially useful unless it is clear which test has been applied. "Capacity" can be approached quite differently by legal and medical professionals, and it should not be assumed that the doctor has the requisite test in mind when conducting an assessment.

[5] In *Neuendorf & anor v the Public Trustee of Qld as executor of the estate of J R Dickfos (deceased*) [2013] QSC 156 the Court used the powers conferred by s. 107 of the POA Act to restore this balance after the Attorney had (inadvertently) altered the Principal's holdings. See also *Ensor & Ors v Frisby & Anor* [2009] QSC 268; *Allingham v Fuller & Anor* [2013] QSC 81.

A practitioner should ensure that any briefing letter makes it quite clear that they are not undertaking financial responsibility for the report costs arising.[6] You are not necessarily acting "for" anyone in this issue, indeed, you may be precluded from doing so by the ASCR conflict rules.[7]

It is probably better not to charge for professional time involved in briefing the expert even if your bailment agreement clearly allows for this as it would be hard to avoid the appearance of, if not an actual, conflict of interest.

All parties involved should be warned in writing that you are not acting for them, but attempting to assemble evidence to guide your decision making.

If the Principal refuses to cooperate with any assessment process then the Attorney may have to apply for a declaration[8]. It would not be appropriate for the Principal's former solicitor to act for the Attorney in relation to such an application.

If there is no dispute about the Principal's capacity, assess whether the Attorney's appointment is valid and has come into effect:

- Is the Power correctly made and witnessed?
- If more than one Attorney is appointed, are they to act severally or by some other combination?
- Have you been given an original or a copy of the Attorney document and any authorization to release safe custody material? Is a copy certified?
- Do you have evidence that any conditions in the appointment have been satisfied?
- Have you been given sufficient original or certified evidence of identity?
- If the request was received by post or email, have you contacted the requesting party to make reasonable enquiries about these issues? How do you know an email is from the purported author?
- Has the attorney deposed to the fact that the instrument has not been revoked?

If appropriate, explain that, in general terms, an Attorney is not entitled to access to a copy of the Will unless need can be demonstrated. Work through their requirements, making it clear that your objective is cooperation with their role within the ambit of your duty to your client.

Unless authorized by your document storage agreement or an express provision in your retainer, the bailee solicitor may not charge for this work.[9]

David Bowles
Ethics Solicitor

[6] See Rule 35 of the *Australian Solicitors Conduct Rules* – contracting with third parties.
[7] See Rules 10 & 11 of the *Australian Solicitors Conduct Rules* – past & current client conflicts.
[8] See s 111 & 115 of the POA Act.
[9] See Rule 16 of the *Australian Solicitors Conduct Rules*.