

## Is an Attorney entitled to collect a Principal's original will from your safe custody or to take a copy?

As bailee of a Will, we are obliged to protect our client's confidentiality<sup>1</sup> 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

(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;**

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*(Emphasis added)*

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<sup>1</sup> Rule 9 of the *Australian Solicitors Conduct Rules 2012*.

An attorney is not entitled to make, revoke or amend a Principal's will<sup>2</sup>. 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.

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.<sup>3</sup> However, in giving such information, bear in mind that the risk of 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.<sup>4</sup> 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 text of the Will may in many cases be essential to consider the administration of assets overall.

#### **Practical steps when a request is received:**

If access to a Will is requested by an Attorney, the first step is to inspect the packet and the file if available to refresh our recollection of the matter. We should also attempt to contact the client for instructions.

If they have capacity to authorise access to the document 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.

If no instructions are possible, 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? Is the 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?
- Has the attorney deposed to the fact that the instrument has not been revoked?

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

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.<sup>5</sup>

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<sup>5</sup> See **Rule 16** of the *Australian Solicitors Conduct Rules 2012*.