

FINANCIAL ELDER ABUSE

The concept of elder abuse

1. The concept of “elder abuse” is not a recent one but it is a somewhat amorphous one which has no defined juridical meaning in any Australian jurisdiction.
2. The term “elder abuse” is commonly used in non-legal circles and is likely to invoke different ideas as to what constitutes elder abuse, depending on the person using the term and the context in which it is used.
3. However, the fact that elder abuse is a problem in Australian society is well-recognised. In May 2017, the ALRC published a report titled “Elder Abuse – A National Legal Response” (**ALRC Report**).
4. The ALRC Report adopts the definition of elder abuse which the World Health Organisation propounds:

Elder abuse, as described by the WHO, is ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.’¹

5. The ALRC Report then goes on to note that elder abuse “*can take various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect.*”²
6. This paper is concerned mainly with the financial abuse aspect of elder abuse in a family context, that is, financial abuse which adult children perpetrate on their parents or which much younger spouses perpetrate on their more senior beloved.

Forms of financial elder abuse

7. There are various forms which financial elder abuse can take, for example:
 - (a) coercing the victim (whether through violence or psychological abuse) to give money to the perpetrator, whether by gift or unsecured loan;
 - (b) the perpetrator coercing the victim to guarantee obligations of the perpetrator;

¹ *Elder Abuse – A National Legal Response*, ALRC May 2017, p.19.

² *Ibid*, p. 19.

- (c) the perpetrator, being in a position of trust and having access to credit/debit cards or online banking passwords, steals money from the victim;
- (d) the perpetrator, being named as an attorney for the victim, using the power of attorney for the perpetrators' benefit;
- (e) coercing the victim into making a new will or binding death nomination (**BDN**) that benefits the perpetrator or procuring the victim to make a new will or BDN in circumstances where the victim does not have capacity to make a will or BDN.

Circumstances in which financial elder abuse can occur

- 8. In most cases of financial elder abuse a relationship of trust and sometimes dependency will usually exist.
- 9. Where only one adult child is placed in a position of trust (for example, sole power of attorney), this creates a situation where the ability for the child to commit financial elder abuse has a greater chance of going undetected.
- 10. An elder who is isolated and reliant on a professional for the management of the elder's affairs is also at risk. There have been a number of cases reported over the years concerning accountants and lawyers defrauding elderly clients.
- 11. Situations where an elder is in an intimate relationship with a much younger person, particularly where the elder is isolated from other family or social networks, can also create opportunity for financial elder abuse.

Methods for identifying financial elder abuse

- 12. The best method of identifying financial abuse is obtaining access to the victim's bank account statements and conducting a review to determine whether there are any suspicious transactions on the account that warrant further investigation.

Obtaining bank statements

- 13. If the victim still has capacity, then the first step should be to ask the victim for access to his or her bank statements. This does however present difficulties in that it may leave the person who is attempting to investigate a situation of financial elder abuse open to an allegation that in fact he or she is attempting to perpetuate elder abuse on the victim.
- 14. Because of these issues, an approach to the victim needs to be handled with care and may not be practical in some circumstances.

Summons to produce/subpoenas

15. It may be that the only way to obtain copies of the victim's bank statements is to commence proceedings in the NSW Civil and Administrative Tribunal (**NCAT**) and apply for a summons to produce for production of the bank statements, or, if proceedings are commenced in the Supreme Court, to apply for a subpoena.
16. There must of course be proper grounds for commencing proceedings and a summons to produce or subpoena can only be issued in aid of a substantive claim, for example, in proceedings commenced for:
 - (a) financial management orders;
 - (b) review of a power of attorney or appointment of enduring guardian.

Requests for receipts

17. If the person suspected of committing financial elder abuse is operating under an enduring power of attorney, then a request should be made to that person to produce receipts for any purchases which the attorney has made on behalf of the principal.
18. As with bank statements, if the attorney does not provide these then an "interested person" can apply for a review of the power of attorney under section 36 of the *Powers of Attorney Act 2003* (NSW) and once those proceedings have been commenced (typically in NCAT), a summons to produce can be issued.

Legal remedies for financial elder abuse

19. There are various potential remedies for different issues which may fall under the umbrella of the term "financial elder abuse", but because it is not a claim or cause of action recognised at law, one must identify what category of existing cause of action the financial elder abuse conduct fits into and look at what remedies are available in that context.

Misuse of power of attorney

20. If the financial elder abuse involves misuse of a power of attorney, then an "interested person" can apply for a review of the power of attorney under section 36 of the *Powers of Attorney Act 2003* (NSW). An interested person can include close family members³ so section 36 provides an accessible avenue for family members who have reasonable suspicions about an attorney's use of a power of attorney.

³ See s 35(1)(d) of the *Powers of Attorney Act 2003* (NSW), which provides for "any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal" to be considered an "interested person."

Financial management orders

21. Part 3A of the *Guardianship Act 1987* (NSW) allows NCAT to make financial management orders in respect of a person who is not capable of managing their own affairs.
22. A financial management order enables the applicant for the order to exercise all powers of financial management over the managed person's affairs, subject to the supervision and direction of the NSW Trustee and Guardian.
23. Accordingly, if a person suspects financial elder abuse, an application to NCAT is likely to bring to light any financial elder abuse issues (through issuing summonses to produce) and the granting of a financial management order should sever the perpetrator's access to the victim's financial resources.
24. In certain circumstances, it may be appropriate for the NSW Trustee and Guardian to be appointed as an elderly person's financial manager, if there is no one else with sufficient independence and experience to perform the role.

Undue influence

25. The law of undue influence can be used to set aside transactions where a person has used their psychological ascendancy over another to procure that other person to enter into a transaction, with the result being that the person has not entered into the transaction of their own free will.
26. As Dixon J explains in *Johnson v Buttress* (1956) 56 CLR 113 at 134:

“The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter.”
27. Certain relationships will create a presumption of undue influence. The main relationships which will create the presumption are:
 - (a) parent and (young and dependent) child;
 - (b) guardian and ward;
 - (c) religious adviser and devotee;
 - (d) solicitor and client; and

(e) doctor and patient.⁴

28. If a person is the recipient of a gift or benefits from a transaction in one of the above relationships, that person will need to establish that the person giving the gift did so with a free mind and a full understanding of the consequences of the transaction.⁵
29. Importantly, a relationship between adult child and parent does not automatically create a deemed relationship of undue influence.⁶ Neither does a spousal or intimate relationship of dependency.⁷ For those types of relationships, the onus will be on the plaintiff to establish undue influence.

Unconscionable conduct

30. The law of unconscionable conduct allows a person to set aside a transaction in circumstances where:
- (a) a person entered into the transaction labouring under a “special disability”⁸; and
 - (b) the other party to the transaction knew of the special disability and took unconscientious advantage of it.
31. Those principles are set out in the well-known High Court decision of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
32. In a recent case of what could be classified as financial elder abuse, see the decision of the Supreme Court of QLD in *Campbell v T.L. Clacher No. 2 Pty Ltd* [2019] QSC 218, in which the Court held that a daughter and her husband had engaged in unconscionable conduct in encouraging her father’s irrational fears and suspicions regarding his other two daughters which contributed to the father essentially disinheriting the other two daughters through dispositions of property in a family trust.⁹

Probate proceedings

33. If the financial elder abuse involves the making of a will, then there are two principal bases upon which a will could be set aside, including:
- (a) undue influence;

⁴ Burns, F.R., “Undue Influence Intervivos and the Elderly” (2002) 26 MULR 499 at 506.

⁵ *Johnson v Buttress* (1956) 56 CLR 113 at 134 per Dixon J.

⁶ Burns, F.R., “Undue Influence Intervivos and the Elderly” (2002) 26 MULR 499 at 511.

⁷ *Thorne v Kennedy* [2017] HCA 49, [36], per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

⁸ As to what constitutes a “special disability”, it can be “poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.”: per Fullagar J, *Blomley v Ryan* (1956) 99 CLR 362 at 405.

⁹ *Campbell v T.L. Clacher No. 2 Pty Ltd* [2019] QSC 218 at [55].

- (b) lack of testamentary capacity.
34. To make a valid will, the testator must possess the requisite testamentary capacity; that is, the testator must be of sound mind, memory and understanding.¹⁰
35. The decision of the Queen's Bench Division in *Banks v Goodfellow* (1870) LR 5 QB 549 is the leading authority for the test of testamentary capacity.
36. The Supreme Court of New South Wales in *Grynberg v Muller*¹¹ offers a modern formulation of the Goodfellow Test. The testator or testatrix must:
- (a) be aware, and appreciate the significance, of the act in the law which he or she is about to embark upon;
 - (b) be aware, at least in general terms, of the nature, and extent, and value, of the estate over which he or she has a disposing power;
 - (c) be aware of those or may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons;
 - (d) have the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.
37. If the requisite elements of the test are not satisfied at the time the will was made then the testator or testatrix lacks testamentary capacity and the will is invalid.
38. In such a case, an application for a grant of probate may be opposed on grounds that the testator or testatrix lacked testamentary capacity. If probate has already been granted then a party with sufficient standing may apply for a revocation of the grant.

Intervention by financial institution

39. Although not strictly a legal remedy, there is at least one reported instance of a bank acting to prevent what it suspected were unusual transactions by a person who was a signatory to an elderly person's account.¹²
40. Accordingly it may be possible to have the elder's bank intervene to prevent instances of financial elder abuse.

Financial elder abuse prevention

41. There is an ever-increasing expectation on the legal profession to be the "front line" in financial elder abuse prevention.
42. This is because legal assistance will often be required to facilitate transfers of property or the making of new wills.

¹⁰ *Bailey v Bailey* (1924) 34 CLR 558 at 559.

¹¹ [2001] NSWSC 532 at [18] citing Powell JA in *Read v Carmody* [1998] NSWCA 182

¹² Darryl Browne, "Elder Law & Succession", *Law Society Journal*, Issue 66, May 2020, pp.99-100.

43. Kunc J made the following observations in *Ryan v Dalton* [2017] NSWSC 1007, a case in which his Honour found that the will propounded by the defendant was not the last will of the testator as a “free and capable testator”:

“It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

(1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

(2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

(3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.

(4) In case of anyone:

(a)over 70;

(b)being cared for by someone;

(c)who resides in a nursing home or similar facility; or

(d)about whom for any other reason the solicitor might have concern about capacity,

the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.”

Does a retirement village operator owe a duty of care to prevent financial elder abuse?

44. There answer to that question depends upon the context and the facts, and to whom the duty is owed.
45. The author has not been able to locate any cases which have directly considered whether a retirement village owes a duty of care to prevent elder abuse. However, given the position of vulnerability of retirement village residents, it would not be difficult to prove that a retirement village owes a duty of care to its residents to ensure that its staff do not mistreat or take advantage of any of the residents.

46. There is also a statutory obligation on retirement villages to prevent elder abuse. Rule 10 of the Rules of Conduct for Operators of Retirement Villages (found in schedule 3A of the *Retirement Villages Regulation 2017* (NSW)) provides as follows:

10 Operators must prepare strategy for preventing elder abuse

(1) An operator must—

(a) prepare and give effect to a strategy for the identification and prevention of any elder abuse in the retirement village, and

(b) ensure that a copy of the strategy is posted on the notice board of the retirement village, and

(c) ensure that all of the operator's staff are familiar with the strategy.

(2) Without limiting any other matter that may be included, the strategy must include all of the following information—

(a) examples of common forms of elder abuse as well as specific examples in relation to retirement villages,

(b) information on how to identify elder abuse including signs of elder abuse, and how to prevent elder abuse,

(c) information on ways to respond to elder abuse or concerns about suspected elder abuse (including procedures for reporting abuse and escalating matters to appropriate organisations and authorities, and response times),

(d) an explanation of the roles and responsibilities of the operator and of the operator's staff in relation to elder abuse in the retirement village,

(e) guidance for accessing the services and resources of the NSW Elder Abuse Helpline and Resource Unit, the Ageing and Disability Commissioner and other relevant local services and support agencies.

(3) An operator must review the strategy every 2 years.

47. It is critical to note the language used in subparagraph (1) of Rule 10, that is, the operator has an obligation to identify and prevent "any" elder abuse, "in the retirement village". This appears to extend to not only elder abuse perpetrated by the operator's staff, but elder abuse which could be perpetrated by family members or a person in a close personal relationship with a resident, but it is limited to elder abuse that occurs in the retirement village.

48. Based on that, and public policy considerations, the author considers the law would be reluctant to impose a general duty of care on retirement village operators to prevent financial elder abuse by family members etc in respect of residents, particularly considering the operator's lack of standing to bring any legal action if it did suspect financial elder abuse, and general lack of ability to intervene in a resident's private affairs.

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