ELDER LAW: REFORM AND RECENT CASES

The Hon Justice P L G Brereton AM RFD*

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Introduction

1. In Australia, over the last twenty years, the population aged 85 years and over has increased by 110%, compared with the total population growth of 35%.[1] Life expectancy continues to increase, with a boy born today expected to live to 81.2 years and a girl to 85.3 years.[2] Australia has the sixth-highest male and female combined life expectancy in the world.

2. Recent years have seen a growing recognition of the prevalence of elder abuse and the need for elderly people to be protected from exploitation. Elder abuse can take a variety of forms, including physical abuse, sexual abuse, and neglect; psychological or emotional abuse; and financial abuse.[3] The World Health Organization (**WHO**) has estimated that in high or middle-income countries, the incidence of elder abuse ranges from 2% to 14%.[4] This is becoming a significant area of interest for lawmakers. The Australian Law Reform Commission's 2017 report "*Elder Abuse - A National Legal Response"*,[5] contains 43 recommendations for legal frameworks for the prevention of elder abuse. Elder abuse has recently been criminalised in the ACT.[6]

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* Judge of the Court of Appeal of the Supreme Court of New South Wales; Deputy Chair of the New South Wales Law Reform Commission. The author acknowledges the considerable assistance of Ms Kirralee Young, Barrister-at-law, in the research for and preparation of this paper.

[1] Australian Bureau of Statistics, "*Australian Demographics Statistics*", released on 17 December 2021.

[2] ABS, Life Tables for 2018 to 2020,

[3] Elder abuse is defined as '*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*': see World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

[4] ALRC Elder Abuse 2017 Report at [1.1].

[5] ALRC 131, published May 2017 ("**ALRC Elder Abuse 2017 Report"**).

[6] See the *Crimes (Offences Against Vulnerable People) Legislation Amendment Act* 2020 (ACT), which introduced new criminal offences for the abuse of vulnerable people. The Act becomes

3. Concurrently, there has been an increasing focus on the rights of older people and of those with disabilities. Consistent with Australia's obligations under the *UN Convention on the Rights of Persons with Disabilities* (**CRPD**), law reform proposals in recent years have considered reforming laws concerning legal capacity to incorporate assisted or supported decision-making in preference to the substitute decision-making models historically provided by the law. The objects of these law reform proposals include enabling the elderly to have a greater say in decisions which affect their lives.

4. In this paper, I first address the proposals for law reform in this territory, including the proposed supported decision-making model recommended by the NSW Law Reform Commission (**NSWLRC**), which has been proposed as an alternative to the current '*substitute decision-making model'* under the *Guardianship Act 1987* (NSW) ("***Guardianship Act***"). Then I examine some typical circumstances in which cases of elder abuse of one form or another arise in a legal setting, focusing on recent cases in the NSW Court of Appeal, which provide examples of conduct that may be regarded as '*elder abuse'* – in particular, the abuse of powers of attorney, informal land and living arrangements, and predatory marriages – and touch on some of the issues and challenges which arise in such cases.

Law reform - the advent of supported decision-making

5. In 2008, Australia was among the first countries to ratify the CRPD, acceding to its Optional Protocol in 2009. However, under Australian law, international treaty obligations do not become law until the treaty is enacted explicitly into domestic law.[7]

6. In 2013, the Australian Government requested the Australian Law Reform Commission (**ALRC**) to conduct a comprehensive inquiry regarding the CRPD into: "*The laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons*

effective on 20 April 2021 and creates three new crimes: 1. Abuse of a vulnerable person; 2. Failure to protect a vulnerable person and 3. Neglect of a vulnerable person by a person responsible for the vulnerable person's care.

[7] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

before the law and their ability to exercise legal capacity…."[8]

7. The ALRC report, '*Equality, Capacity and Disability Report'* (2014),[9] proposed a new set of *National Supported Decision-Making Principles,* supported by guidelines, to inform reform of Commonwealth, State and Territory laws relating to decision-making for persons whose capacity is compromised.

8. The National Supported Decision-Making Principles are:[10]

   a. **Equal rights**: All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

   b. **Support**: Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

   c. **Will, preferences and rights**: The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

   d. **Safeguards**: Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

9. The ALRC report also recommended that the government should adopt a new model for decision-making, to encourage the adoption of *supported decision-making* at a Commonwealth level, based on the concepts of '*supporters*' and '*representatives*' (rather than '*guardians'*).[11] This model, which represents a significant departure from the existing framework of substituted decision-making, under which it is the guardian who makes the decisions, seeks to

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[8] See terms of reference, dated 23 July 2013: *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124 (2014), pp 4-7.

[9] *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124 (2014), pp 66-86.

[10] *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124 (2014), pp 63.

[11] The ALRC recommendations follow the National Decision-Making Principles as follows. These principles reflect the paradigm shift signalled in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves.

implement the principles of the CRPD. To that end, the proposed model prioritises the notion of supported decision-making in order to preserve, so far as possible, the primacy of an individual's right to make decisions, with appropriate support or assistance where necessary. A '*supporter*' is an individual or organisation that provides an individual with the necessary support or assistance to make a relevant decision. [12] A '*supporter'* does not make decisions for an individual who needs decision-making support; the decision remains that of the individual. A '*representative*' does make decisions on behalf of a person and is a 'substitute' decision-maker. Examples of substitute decision-makers under extant state and territory laws are donees of powers of attorney, guardians, and financial administrators.[13]

10. At the state and territory level, it is in Victoria and NSW that the most significant reforms to laws concerning adult guardianship and administration of finances and property for those who lack decision-making capacity have been implemented or contemplated.

11. In September 2015, Victoria made legislative provision for a '*supportive attorney*' in several ways. The *Powers of Attorney Act 2014* (Vic) introduced the concept of a 'supportive attorney' by permitting an individual formally to appoint someone to assist in making and implementing decisions. Supportive attorneys are authorised to collect information, communicate information, and affect decisions in certain areas, but not make the decision. Subsequently, the *Medical Treatment Planning and Decisions Act 2016* (Vic), provided for the appointment by an individual of a support person, to support the individual to make, communicate and give effect to the individual's treatment decisions, and to represent the interests of the individual in respect of medical treatment, including when the individual does not have decision-making capacity; but a support person does not have power to make an individual's medical treatment decisions.[14]

12. In NSW, the NSWLRC was tasked to review and report on the desirability of

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[12] *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124 (2014), Ch 2 at [4.38].
[13] *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124 (2014), Ch 2 at [4.36]–[4.37].
[14] *Medical Treatment Planning and Decisions Act 2016* (Vic), s 32.

changes to the *Guardianship Act*, having regard to the relationship between that Act and the *NSW Trustee and Guardian Act 2009*; the *Powers of Attorney Act 2003* and the *Mental Health Act 2007* in the context of developments in law, policy and practice by the Commonwealth, other states, and territories of Australia and other governments overseas.[15] In its 2018 report "*Review of the Guardianship Act 1987*",[16] the NSWLRC Commission took a similar view of the concept of supported decision-making and has offered what has been described as "*Australia's most advanced law reform blueprint*".[17] After widespread consultation, the NSWLRC concluded that a new approach was required, and recommended a new framework for assisted decision-making laws that departs significantly from the existing framework, which offers only substitute decision-making. Drawing upon contemporary understandings of decision-making, the recommendations envisage a new framework for assisted decision-making laws that reflects the CRPD.

13. The key policies informing the Commission's recommendations include that:[18]

- the law should recognise a wide range of decision-making assistance options;
- a person's autonomy should be restricted as little as possible;
- people should participate, as much as possible, in decisions that affect them;
- the law should reflect a more realistic view of decision-making ability;
- people should be encouraged to appoint their own supporters and representatives;
- tribunal orders should be a last resort;

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15 NSW Law Reform Commission's report "*Review of the Guardianship Act 1987"* (NSWLRC 145 (2018), at p xii.
16 NSWLRC 145.
17 Gooding, Piers Michael and Carney AO, Terry, Australia: Lessons from a Reformist Path to Supported Decision-Making (September 22, 2021).
18 Executive Summary, NSWLRC Report, (2014), pp xiii.

- there should be enhanced support for fair and effective informal arrangements;
- accountability mechanisms and safeguards should be improved;
- the new Act should interact smoothly with other relevant laws;
- there should be uniformity with provisions elsewhere in Australia where possible and desirable; and
- the law should include specific consideration of the circumstances of Aboriginal and Torres Strait Islander People and the systemic disadvantage they experience.

14. Key recommendations include:

- NSW should have a new Assisted Decision-Making Act (**the new Act**) that provides a formal framework for both supported decision-making and (as a last resort) substitute decision-making. It would replace the *Guardianship Act* and the enduring power of attorney provisions in the *Powers of Attorney Act 2003* (NSW) (**Powers of Attorney Act**) (Recommendation 4.1);
- the new Act should be internally consistent and be drafted using simple and accessible language and structure (Recommendation 4.2);
- the new Act should adopt terminology that reflects contemporary understanding of decision-making ability and move away from the paternalistic language of "*guardian*" and "*guardianship*". The term "*representative*" should, therefore, be used when the Tribunal appoints a substitute decision-maker instead of "*guardian*" and "*financial manager*". The term "*enduring representative*" should be used when a person chooses their representative instead of "*enduring guardian*" and "*attorney*" under a power of attorney. The term "*supporter*" should be used for one who assists a person in making their own decisions (Recommendation 4.3);

- the types of decisions covered by the new Act should be "*personal decisions*", "*financial decisions*", "*healthcare decisions*", and "*restrictive practices decisions*" (Recommendations 4.4-4.7);

- the new Act should include statutory objects, one of which is to implement the purposes and principles of the CRPD (Recommendations 4.4-4.7);

- the new Act should also contain a list of general principles that everyone exercising functions under it should observe with respect to people in need of decision-making assistance (Recommendation 5.2). They should be:

  - their will and preferences should be given effect wherever possible;

  - they have an inherent right to respect for their worth and dignity as individuals;

  - their personal and social wellbeing should be promoted;

  - they have the right to participate in and contribute to social and economic life;

  - they have the right to make decisions that affect their lives (including decisions involving risk) to the full extent of their ability to do so and to be assisted in making those decisions if they want or require assistance;

  - they have the right to respect for their age, sex, gender, sexual orientation, cultural and linguistic circumstances, and religious beliefs;

  - they should be supported to develop and enhance their skills and experience;

  - they have the right to privacy and confidentiality;

  - they have the right to live free from neglect, abuse, and exploitation;

- their relationships with their families, carers and other significant people should be recognised;
- their existing informal supportive relationships should be recognised; and
- their rights and autonomy should be restricted as little as possible.

- These recommended general principles are in line with contemporary human rights and disability rights principles. One of the most important changes is to remove the current requirement that people give "paramount consideration" to a person's "welfare and interests", and instead require that a person's "will and preferences" be given effect to wherever possible (Recommendation 5.4). In giving effect to a person's will and preferences, anyone exercising functions under the new Act should:

  - first, be guided by the person's expressed will and preferences (including those in a valid advance care directive) wherever possible;
  - if these cannot be determined, be guided by the person's likely will and preferences (determined by previously expressed will and preferences or by consulting people with a knowledge of the person's will and preferences);
  - if the person's likely will and preferences cannot be determined, make decisions that promote the person's personal and social wellbeing; and
  - if giving effect to a person's will and preferences creates an unacceptable risk to the person, make decisions that promote the person's personal and social wellbeing.

  Requiring someone to be guided by a person's will and preferences and, if these are not knowable, then their personal and social wellbeing, departs from the current "best interests" test, which is widely seen as paternalistic.

- the new Act should provide that a person has "*decision-making ability*" for a particular decision if they can, when the decision needs to be made: (i) understand the relevant information; (ii) understand the nature of the decision and the consequences of making or failing to make that decision; (iii) retain the information to the extent necessary to make the decision; (iv) use the information or weigh it as part of the decision-making process, and (v) communicate the decision in some way. (Recommendation 6.1). This definition of "*decision-making ability*" should be framed in terms of ability, as part of a move away from the language of disability and other discriminatory aspects of the Guardianship Act. Specifically, referring to decision-making ability "*for a particular decision*" acknowledges the reality that a person's decision-making ability can vary depending on the circumstances;

- while the presumption of decision-making ability exists at common law, there is no statutory presumption in NSW. This should be introduced (Recommendation 6.2);

- the new Act should provide for formal supported decision-making as a new part of the assisted decision-making framework. A "supporter" helps a person make decisions about various areas of their life. Under a supported decision-making arrangement, the supported person retains their legal capacity and makes their own decisions. Formal supported decision-making can take place under a personal support agreement or a Tribunal support order;

- the new Act will recognise that supported decision-making arrangements would be a part of a suite of different assisted decision-making options; they will not suit every circumstance;

- the new Act should have provisions that enable a person to appoint a "supporter" through a support agreement and procedures dealing with the implementation and making of such an agreement and the making of support orders; and

- the new Act should preserve the Supreme Court's inherent protective jurisdiction (Recommendation 15.1).

15. The report remains under consideration by Government.

Enduring Powers of Attorney

16. Enduring powers of attorney and enduring guardianship are important legal constructs that allow people to decide who will make decisions when they lose decision-making ability.[19] These decision-makers can play a critical role in protecting people with impaired decision-making ability from abuse. However, financial abuse is a common form of elder abuse, and enduring powers of attorney and enduring guardianship themselves may facilitate such abuse.[20]

17. The ALRC Elder Abuse 2017 report made three key recommendations for reform to enduring powers of attorney and enduring guardianship to improve protections for elders in this area.[21]

18. ***Recommendation 5–1*** is that s*afeguards against the misuse of an enduring document in state and territory legislation should (a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances; (b) require the appointed decision-maker to support and represent the will, preferences and rights of the principal; (c) enhance witnessing requirements; (d) restrict conflict transactions; (e) restrict who may be an attorney; (f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and (g) mandate basic requirements for record keeping.* Recommendation 5-1 is partially in response to the ALRC's 2014 *Equality, Capacity and Disability Report*,[22] where the ALRC recommended that the appointment and conduct

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[19] Australian Law Reform Commission's report "*Elder Abuse - A National Legal Response"* (ALRC Report 131), published May 2017 (**ALRC Elder Abuse Report**) at pp 159-160.

[20] ALRC Elder Abuse Report at 160 and the references cited at Footnote (1): National Ageing Research Institute and Seniors Rights Victoria, Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria (2015) 5; Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) at 11.

[21] ALRC Elder Abuse Report at pp 12-13.

[22] ALRC 124 (2014) 114; ALRC Elder Abuse 2017 report, at pp 164.

of substitute decision-makers be subject to appropriate and effective safeguards.[23]

19. **Recommendation 5–2** is that state and territory civil and administrative tribunals should have *(a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and (b) the power to order any remedy available to the Supreme Court.* Recommendation 5-2 recognises that state and territory tribunals are typically responsible for supervising enduring arrangements, with the power to revoke or amend those arrangements on the application of an interested party. The recommendation if adopted would extend that power to enable the tribunal to order an enduring attorney/guardian to pay compensation where they have breached their obligations under an enduring document causing the principal loss.[24]

20. ***Recommendation 5–3*** is that *a national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after: (a) agreement on nationally consistent laws governing: (i) enduring powers of attorney (including financial, medical and personal); (ii) enduring guardianship; and (iii) other personally appointed substitute decision makers; and (b) the development of a national model enduring document.* Recommendation 5-3 reflects thinking that a compulsory online national register has the potential to be an important safeguard against abuse and would reduce abuse. The ALRC also acknowledged that, in the absence of a completed prevalence study, the exact incidence of elder abuse involving an enduring document cannot be quantified. This lack of quantification necessarily complicates any assessment of the benefits and costs of introducing a national register of enduring documents.[25]

21. Cases involving the misuse or alleged misuse of an enduring power of

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[23] ALRC Elder Abuse 2017 report, at pp 164.
[24] ALRC Elder Abuse 2017 report, at pp 177-179.
[25] ALRC Elder Abuse 2017 report, at p181-182.

attorney and the recovery of assets said to be wrongfully taken from an elderly person are regularly before the Courts. Three recent appellate cases illustrate some of the pitfalls and remedies.

McFee v Reilly [2018] NSWCA 322

22. Frank Reilly (**Frank**) was a farmer who conducted grazing activities on two properties near Forbes in central-western New South Wales: "*Malaya*" and "*Boronga*". With his wife Peg, he had five adult children: four daughters and a son, Joseph. In 2000, Frank had given an enduring power of attorney exercisable jointly and severally by Peg and Joseph. In 2003, Frank engaged a solicitor (**Mr Buckley**) to prepare a will. The will gave all his real and personal property, save for Boronga, to his four daughters as joint tenants. A separate clause purported to devise Boronga, but it failed to nominate a devisee; it would become apparent that Frank's intention was to leave it to Joseph, who was in possession of it.

23. In about 2008, Frank became incapable of managing his own affairs. In 2009, acting pursuant to the power of attorney, Peg caused Boronga, then worth $815,000, to be transferred to her four daughters as joint tenants for a stated consideration of $1. With the assistance of a solicitor instructed by Peg, the daughters obtained title by registration. No separate lawyer was engaged to act for Frank.

24. Frank died in December 2012. Joseph lodged caveats affecting Boronga, and commenced proceedings against his mother, his sisters and the solicitor who had acted for them. He sought orders:

    a. rectifying Frank's will, such that he was the devisee of Boronga;

    b. for equitable compensation for breach of fiduciary duty against Peg, and his sisters and the solicitor as participants; and

    c. damages in negligence against the employer of the solicitor.[26]

[26] *McFee v Reilly* [2018] NSWCA 322 at [6].

25. By their cross-summons, his sisters sought possession of Boronga, and a family provision order.

26. For our purposes, the important ultimate conclusions were: [27]

a. Frank's will was rectified to make Joseph the devisee of Boronga (found to be a clerical error);

b. Peg's transfer of Boronga to her daughters was clearly in breach of her fiduciary duty to Frank;

c. the solicitor, who acted for both Peg and her daughters on the transfer, had knowledge of Peg's breach of duty, which knowledge was to be imputed to the daughters;

d. the solicitor owed a duty at common law to Joseph as a beneficiary under Frank's will. The solicitor had been engaged for the purpose of estate planning and had obtained a copy of Frank's will. He knew that it was defective as it failed to deal with Boronga and that Frank had lost capacity, and he was involved in helping Peg to transfer Boronga to Joseph's sisters. In those circumstances, he owed a duty at common law to Joseph to take reasonable care to protect Frank's and Joseph's interests and to see that Frank's testamentary intentions were carried out and that his attorney did not breach her obligations to him; and

e. finally, the solicitor breached the duty he owed to Joseph by not drawing to Peg's attention the fact that what she was proposing to do was contrary to Frank's intentions and interests and involved a breach of fiduciary duty on her part.

f. Section 42 of the *Real Property Act 1900* prevented an order for restoration of Boronga being made against the daughters, their title being indefeasible, but they were liable to account to the estate for the value of the property.[28]

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[27] *McFee v Reilly* [2018] NSWCA 322 at [13].
[28] *McFee v Reilly* [2018] NSWCA 322 at [5].

***Turner v O'Bryan-Turner* [2022] NSWCA 23**

27. Owen John Turner (**John**) had two children of his first marriage, Nick and Sara. He remarried, to Wendy O'Bryan-Turner (**Wendy**), and they had two further children David and Karl Turner. Relations between Wendy and Nick were poor.

28. John owned multiple rural properties in New South Wales. John gave Wendy an enduring power of attorney on 10 June 2015. The power of attorney was a prescribed power of attorney for the purposes of the *Powers of Attorney Act 2003*. John had dementia and had lost capacity by no later than June 2016. On or about 11 November 2016, Wendy signed memoranda of transfer of the six properties owned by John purportedly in exercise of her power as John's attorney, transferring the properties to herself and the two sons she shared with John: David and Karl. The transfers of three of the properties (Woolharinga, Nellyvale and Sunrise) were made to Wendy and David as tenants in common in equal shares. Wendy made a will dated 9 March 2017, leaving her share in those three properties to Karl. The transfers of the other three properties (Gardenvale, Allawah and Sunnycroft) were made to Wendy, David and Karl as joint tenants, and David and Karl succeeded to Wendy's interest in those three properties on her death in 2018.

29. John, by his tutor Nick, sued to set aside the transactions. Wendy died after the commencement of the proceedings and the first respondent was her sister and executrix.

30. Again, for our purposes, the important ultimate conclusions were:

    a. the Enduring Power of Attorney did not grant Wendy the power to give a gift of John's property, save that Wendy (as John's attorney) could give "reasonable gifts" as provided by s 11(2) of the *Powers of Attorney Act 2003*.[29] Although Wendy did not act fraudulently or dishonestly in

[29] Section 11(2) provided: "Prescribed power of attorney does not generally confer authority to give gifts (1) A prescribed power of attorney does not authorise an attorney to give a gift of all or any property of the principal to any other person unless the instrument creating the power expressly authorises the giving of the gift. (2) Without limiting subsection (1), a prescribed power of attorney that includes the prescribed expression for the purposes of this subsection set out in Schedule 3 authorises an attorney to give the kinds of gifts that are specified by that Schedule for that

transferring the properties – she acted in reliance on the legal advice that she received to the effect that she was authorised to 'effect John's Will' before his death by conferring the gifts in the way that she did, and "…*may have acted in the honest belief that what she was doing was in the interests of John and their family as a whole and that he would be adequately provided for by David and Karl*"[30] – her conduct was in breach of the fiduciary duty she owed to John;[31]

b. the interests of Wendy's estate in the three properties, known as Woolharinga, Nellyvale and Sunrise, were held on trust for John and the executrix should be ordered to transfer her interests in those properties to John;[32]

c. claims against David and Karl failed, essentially because it was not established that Wendy had a "dishonest and fraudulent design" in stripping John of all his assets,[33] and even if she did, David and Karl did not have the requisite degree of knowledge to incur liability under either limb of *Barnes v Addy.*[34]

Mentink v Olsen [2020] NSWCA 182

31. Another recent "*gift case*" which was considered by the Court of Appeal is that of *Mentink v Olsen* [2020] NSWCA 182.

32. A woman died of a terminal illness at the age of 75, survived by her husband and her daughter from a previous marriage. A few days after the deceased found out that her illness was terminal, she gave approximately $2,203,328 to her daughter. That money was withdrawn from a term deposit account solely in the name of the deceased. The day before the gift was given, the deceased had a draft will prepared, leaving her daughter a $2.2 million legacy. This draft will significantly departed from her earlier testamentary intentions; she had

expression.

30 *Turner v O'Bryan-Turner* [2021] NSWSC 5 at [513]-[515].

31 Court of Appeal at [27].

32 [2022] NSWCA 23 at [151].

33 [2022] NSWCA 23 at [1], [133], [158].

34 [2022] NSWCA 23 at [1], [135], [149], [158].

written a letter to her solicitors one month earlier stating her intention to leave her daughter a considerably smaller amount. Another will was executed days later, which no longer included the $2.2 million legacy. The deceased was accepted to have been anxious, exhausted, and reliant on her daughter to help her run the household and deal with her medical affairs.

33. The deceased's husband claimed to have the money repaid to her estate, alleging that it was obtained by undue influence and unconscionable conduct. In the alternative, he argued that the deceased lacked the capacity to transfer the funds.

34. The primary judge found that there was undue influence, that the deceased was at a special disadvantage due to her terminal illness and was both physically and psychologically frail, and that the daughter was aware of her condition and actively involved herself in her mother's care and affairs.[35] The Court of Appeal upheld the primary judge's conclusion that the deceased's decision to make a gift of $2.2 million was the result of unconscionable conduct, based on contemporaneous documents, oral evidence and probabilities.[36] The Court of Appeal also found that the primary judge did not err in concluding that the transaction by way of the gift was not fair, just and reasonable.[37]

Observation

35. These cases highlight:

    a. the fiduciary obligations of an enduring attorney;

    b. the risks associated with self-dealing; and

    c. the responsibilities of a solicitor acting for an attorney to be alert to these matters.

Informal Family Arrangements – "Granny flat" agreements

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[35] *Olsen v Mentink* [2019] NSWSC 1299 at [340].
[36] Meagher and Payne JJA at [32]–[43]; Emmett AJA [155]–[189].
[37] Meagher and Payne JJA at [44]–[45]; Emmett AJA at [190]–[197].

36. One domain for financial abuse of older people is found in the context of informal family arrangements.[38] These come in various forms but are commonly made between an older person and a family member or trusted carer. They can offer significant practical benefits to the elder and are not inherently abusive. The kind of arrangement that typically generates disputes and litigation is where an older person transfers title to their real property, or provides the proceeds of the sale of their home or other assets, to another person in exchange for the promise of ongoing care and accommodation. They are sometimes known as '*assets for care*' agreements or arrangements.[39]

37. Such agreements are widespread in Australia for many reasons, including aversion to the 'institutional' care of aged care facilities.[40] They are often made without legal advice, not reduced to writing, and rarely address what is to happen if the personal relationship between the parties breaks down, or the nature and level of care provided is not as anticipated.[41] They often involve an elderly person giving up the certainty and security of registered title in one property, for uncertain rights in a new property and/or expectations of care.[42] There can be dire consequences for the older person if the relationship breaks down. The main remedy has been provided by the intervention of equity, by way of constructive trust or proprietary estoppel. In *Morris v Morris* [1982] 1 NSWLR 61, a widowed father gave $28,000 towards an extension to a home jointly owned by his son and daughter in law. The relationship broke down, and McLelland J held that it was unconscionable and inequitable "*in the particular circumstances*" for the defendants to retain the benefit of the father's expenditure on their property free from obligation or recoupment. However, litigation in these cases can be costly, lengthy, and stressful.[43] Many people in such circumstances are unable to afford a lawyer.

38. The ALRC Elder Abuse 2017 Report makes two key recommendations about

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38 ALRC Elder Abuse Report 2017, at pp 203-222.
39 ALRC Elder Abuse Report 2017, pp 203-204.
40 ALRC Elder Abuse Report 2017, p 205; Brian Herd, 'The Family Agreement: A Collision Between Love and the Law?' (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 25.
41 ALRC Elder Abuse Report 2017, p 206.
42 ALRC Elder Abuse report, p 210.
43 ALRC Elder Abuse Report, p 207.

these types of family agreements.

39. *Recommendation 6–1* is that *state and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an 'assets for care' arrangement.* Recommendation 6-1 is in response to the obvious issue that to litigate the existing legal and equitable remedies through the Courts is prohibitively expensive and not quick. It is thought that access to a tribunal provides a low cost and less formal forum for dispute resolution that could work in addition to the existing avenues of seeking legal and equitable remedies through the courts.[44]

40. *Recommendation 6–2* is that *the Social Security Act 1991 (Cth) should be amended to require that a 'granny flat interest' is expressed in writing for the purposes of calculating entitlement to the Age Pension.* Recommendation 6-2 originates because social security laws and Centrelink processes relating to eligibility for the Age Pension may be driving entry into family agreements in ways that are disadvantageous to the older person if the agreement fails.[45]

41. We will look at three cases involving failed granny flat arrangements, which have come to the NSW Court of Appeal in the last two years.

Richardson v Lindsay [2019] NSWCA 148

42. In *Richardson v Lindsay* [2019] NSWCA 148, the plaintiff, Ms Lurline Richardson (**Faith**), a woman who was around 77 at the time, conditionally gave $220,000 to one of her daughters (**Fiona**) and Fiona's Husband (**John**) to assist them in purchasing a property in Orange, New South Wales. Somewhat remarkably, the arrangements were associated with a Deed of Family Arrangement, by which Fiona and John undertook to care for Faith, allow her to live with them and fund her transition to an aged person's unit or care facility when necessary.[46] Even more remarkably, Faith had received independent legal advice about the Deed before entering the same.[47]

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[44] ALRC Elder Abuse Report, p 204.
[45] ALRC Elder Abuse Report, p 202-203.
[46] See full a reproduction of the Deed of Family Arrangement at [2018] NSWSC 1457 at [14].
[47] [2018] NSWSC 1457 at [15]; [168].

43. Fiona and John subsequently sold the Orange property and purchased another property at Lewis Ponds, about 25 kilometres outside Orange. Faith initially moved with Fiona and John to the Lewis Ponds property. However, on 8 June 2015, Faith moved out of the Lewis Ponds property, departing with her other daughters, Vicki and Gloria. In evidence, Faith described the Lewis Ponds property as being 24 kilometres east of Orange on a "*narrow, steep and windy road*". She said that it was "*isolated*" with "*no shops …hospitals or other medical facilities*" and "*no public transport available*".[48]

44. At the time of the hearing, she lived in private accommodation for $520 per fortnight with her primary income from an aged pension of $1,027 per fortnight.[49]

45. In the proceedings, Faith alleged that this move occurred without her consent and claimed the return of $220,000.[50] Faith also sought a charge over the Lewis Ponds property for the judgment, interest, and costs. That claim was also revised or clarified to reflect a percentage of the Lewis Ponds property of 38% to trace the contribution into the sale of the Orange Property and purchase of the Lewis Ponds Property.[51]

46. The pleading asserted that the charge arose from representations made to her by Fiona and John, including in the Deed, which induced and encouraged her to expect they would look after her and allow her to live with them in the Orange Property. Alternatively, she claimed that the defendants had breached the Deed because they moved to a property that was unsuitable for her.[52] The primary judge observed that the plaintiff's case was *not* pleaded as a *Baumgartner*-type[53] constructive trust (by way of financial contributions to a joint endeavour which failed without attributable blame where it was not explicitly intended that the benefit of the gift would be enjoyed by the other

[48] *Richardson v Lindsay* [2019] NSWCA 148 at [12].
[49] [2018] NSWSC 1457 at [27].
[50] Revised to be $345,000 together with interest from 26 March 2018: *Lurline Faith Richardson v John David Lindsay & Anor* [2018] NSWSC 1457, at [1].
[51] [2018] NSWSC 1457, at [2].
[52] [2018] NSWSC 1457 at [164].
[53] *Baumgartner v Baumgartner* (1987) 164 CLR 137.

party).[54]

47. It was found that Faith agreed to the move and was enthusiastic about it; and the defendants had not breached the terms of the Deed. Although it was not necessary to decide the question, Macfarlan JA (at [23]) observed that relations between the parties were, at least primarily, governed by the Deed, which did not expressly or impliedly confer any proprietary interest, whether by way of charge or otherwise, on Faith, but clearly identified other consideration moving from Fiona and John to Faith in return for her "conditional gift" of $220,000. Thus, there was no basis for implying that the parties intended that Faith would obtain a charge over the property when there was no indication in the Deed of that intention.

***Flourentzou v Spink* [2019] NSWCA 315**

48. Mrs Spink had made payments totaling $165,000 to her daughter and son-in-law (Dianna and Mario) towards the purchase and renovation of a property in Casula under an arrangement whereby Mrs Spink would live with them in that property indefinitely. The agreement was not reduced to writing. Mrs Spink commenced occupation in January 2013. After about three years, differences arose, and Mrs Spink was eventually "*evicted*" from the property. At the time of the hearing, Mrs Spink was dependent upon the pension and the goodwill of friends for accommodation. She was on a waiting list for public housing.[55]

49. A disagreement about the precise nature of the arrangement was a crucial issue in the proceedings. Mrs Spink rested her case primarily on the principles established by the High Court decisions of *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.[56] Dianna and Mario argued that Mrs Spink had made an absolute or unqualified gift to them of the $147,000.

50. The important ultimate conclusions were that Mrs Spink did not intend the money to be an absolute gift, but rather a gift on her death subject to conditions

[54] [2018] NSWSC 1457 at [188].
[55] *Flourentzou v Spink* [2019] NSWSC 256 at [5].
[56] [2019] NSWSC 256 at [229].

that (i) she would be allowed to live in her part of the property indefinitely; and (ii) her daughter, Dianna, would pay half of her mother's share to another daughter following her death. The payments by Mrs Spink were made to obtain the right of residence in the appellants' property. This positive intention was inconsistent with the making of an absolute gift.[57] Mrs Spink was entitled to the return of her contribution to the acquisition and renovation of the property, plus interest, secured by an equitable charge over the property.[58] Because the benefit Mrs Spink derived from living in the property only lasted for a short period, the circumstances did not warrant the application of any significant amortisation factor.[59]

***Wallis v Rudek* [2020] NSWCA 207**

51. A mother and father entered an arrangement with their adult daughter, under which the daughter paid $827,498.27 to discharge her parents' mortgage balance, and her parents transferred ownership of the home to her. The daughter and her immediate family moved into the house, and the parents continued to reside on the ground floor. A license agreement was prepared for the parents to sign at some point, but they refused to do so.

52. Difficulties emerged between the parents, on the one hand, and their daughter and her family on the other, resulting in the daughter giving notice to her parents, requiring them to vacate the ground floor of the house. The parents resisted on various equitable grounds, in particular an alleged promise by their daughter that they would live on the ground floor of the house until they died, that they would not pay any rent and that their daughter would live in the upstairs part of the house. Alternatively, the parents sought the difference between the amount paid by their daughter to discharge their mortgage and an asserted value of the home in the sum of $1,050,000.

53. Preferring the daughter's evidence, the primary judge found that there was no binding contract or promise capable of giving rise to an estoppel; ordered the

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[57] [2019] NSWCA 315 at [41].
[58] [2019] NSWSC 256 at [323].
[59] [2019[NSWCA 315 at [48]-[49].

daughter to pay the parents equitable compensation for the difference between what she paid to discharge their mortgage and the value of the property (on the basis of the inequity that would arise if an asset acquired with joint contributions fell to the party who was the registered proprietor on the breakdown of the relationship;[60] and gave the daughter possession. The Court of Appeal found no error in the judgment, which essentially depended on credit-based findings of fact.

Observations/Comment

54. The first case is unusual in that there was a formal Deed of Family Arrangement which had been prepared by a solicitor and the elderly person had received independent legal advice prior to signing it.[61] Even so, there were uncertainties and ambiguities arising from the drafting of the Deed of Family Arrangement. This is not uncommon; often these types of agreements are not drafted in unambiguous terms and do not adequately address all the potential contingencies, in particular the event of breakdown of the relationship. The drafting inadequacies contributed to the dispute. Nonetheless, the existence of a written agreement indirectly provided a basis for the conclusion that it was not intended that the elder have an interest in the property, and in that way significantly contributed to the failure of her claim.

55. The second and third cases are much more typical examples of a granny flat arrangement gone wrong; they had not been reduced to writing, the elderly persons had not had the benefit of legal advice, and the parties had not properly considered what would happen if they had a breakdown in the relationship. They also highlight a further difficulty with such cases in that parties do not ordinarily use legal language or concepts to describe their arrangements such that much uncertainty is caused.

56. It should be noted that a constructive trust or charge is not imposed merely because it would be unfair not to do so. In ***Richardson v Lindsay*** the primary

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[60] Cf *Muschinski v Dodds* (1985) 160 CLR 583 at 620 (Deane J); [1985] HCA 78; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 (Mason CJ, Wilson and Deane JJ); [1987] HCA 59.

[61] [2018] NSWSC 1457 at [14]-[15].

judge observed that *Morris v Morris*[62] and *Chalmers v Pardoe* [1963] 1 WLR 677, on which Faith relied, were decided before *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Giumelli v Giumelli* (1999) 196 CLR 101, which made it clear that fairness alone is not a sufficient reason for ordering a constructive trust.[63] However, as ***Wallis v Rudek*** indicates, analogy with equity's approach to the return of contributions upon the failure of joint ventures will often result in it being unconscionable for the registered owner to retain the entire benefit of contributions made by the other party.

'Predatory Marriages' - marriages entered with a vulnerable person for gain.

57. A "predatory marriage" is one where a vulnerable person is induced by another into marriage essentially for the other's economic benefit. Many are now wise to the fact that if merely named as a beneficiary of a vulnerable person's will, there is a significant risk that the gift may be impugned on the grounds of undue influence or mental capacity. However, it is also widely known that marriage will automatically revoke a will, and entitle a legal spouse to inherit their deceased spouse's estate under the rules of intestacy.

***Ip v Chiang* [2021] NSWSC 822**

58. By 3 September 2013 Lo Sing Ip, then aged 80, had dementia and no capacity. On that day he went through a marriage ceremony with Ms Chiang. On 4 September, he executed a transfer of a half share in his property in Redfern – where he had lived for over 30 years – in favour of Ms Chiang, in consideration of $1.00. Eight months later, Ms Chiang separated from him. In late June 2015, she orchestrated a property settlement, under which she received the balance of Mr Ip's unencumbered interest in the Redfern property, and then caused him to be admitted to a nursing home at Chatswood. While he was there, Ms Chiang's prior mother-in-law, Ms Guo Lanying, who resided in China, came to Australia, and surreptitiously entered the nursing home with a Chinese marriage celebrant who conducted a ceremony of marriage between

62 [1982] 1 NSWLR 61.
63 [2018] NSWSC 1457 at [176]-[178].

her and Mr Ip.

59. Mr Ip died on 23 August 2017, aged 84 years. The plaintiff Xiao Feng Ip (**Mrs Ip**) as administrator *ad litem* of Mr Ip's estate, brought proceedings on behalf of his Estate to recover the proceeds of the sale of the Redfern property. Ms Lanying contended that as the deceased's widow, she was entitled to the whole of the estate under the rule of intestacy.[64]

60. The validity of both marriages was disputed. The primary judge found that Mr Ip had no capacity to execute a Memorandum of Transfer of the Redfern Property on 9 September 2013, the Binding Financial Agreement dated 6 July 2015, or the second Memorandum of Transfer dated 22 April 2016 under which the first defendant ultimately became the sole registered proprietor of the Redfern Property; or to execute documents and give instructions, incidental to steps taken by Ms Chiang to acquire the Redfern Property for herself.[65] His Honour also found that Ms Chiang had actual knowledge of the deceased's incapacity,[66] and that each of the impugned transactions was liable to be set aside as an unconscionable dealing.[67] Ms Chiang was required to account for the Redfern property, including its traceable proceeds in property she had subsequently acquired.[68] His Honour also found that at the time of the marriage ceremony on 3 September 2013, the deceased was mentally incapable of understanding the nature and effect of the ceremony, and the marriage was void within the meaning of section 23B of the *Marriage Act 1961* (Cth).[69] Following this, in the probate proceedings, Lanying Guo agreed to consent orders which included a declaration that her subsequent marriage was also void.

61. Claims in negligence and breach of fiduciary duties were also brought against the professional advisers (the conveyancer, two law practices, and one employee of a law practice) who assisted in formalising the alleged "*sham*'

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64 [2021] NSWSC 822 at [15].
65 [2021] NSWSC 822 at [321].
66 [2021] NSWSC 822 at [322].
67 [2021] NSWSC 822 at [323].
68 [2021] NSWSC 822 at [325].
69 [2021] NSWSC 822 at [98]-[100]; [107].

property settlement. Those claims were settled for substantial sums.[70]

62. This was a case which demonstrates the importance of quality expert evidence. An independent geriatrician considered the medical records of Mr Ip's general practitioner; his admission, progress and discharge records at St Vincent's Hospital; his RUDAS test score of 20/30 on 27 July 2015 (indicative of dementia); and the results of CT scans from which he demonstrated significant atrophy in the brain, most likely due to blood vessel disease, as at 15 July 2015. This evidence was critical in establishing lack of capacity.[71]

Conclusion

63. As the age of our population continues to increase, these issues will become more prevalent. There are lessons in the cases for those appointed under powers of attorney, in particular that their obligations are fiduciary and not for their benefit; for those contemplating entering into granny-flat arrangements, in particular that they should strive to record them formally and make clear provision for the contingency that the relationship breaks down; and above all for lawyers: in particular to ensure that clients are aware of their fiduciary position, to exercise great caution in respect of transactions that might be in breach of that duty (for which self-dealing and transactions for nominal value only are red flags) at risk of personal liability in negligence or as a knowing assistant; and to advise and assist those who might be entering a granny-flat type arrangement to document it, and to do so in a way that addresses the relevant contingencies.

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[70] *Ip v Chiang* [2021] NSWSC 822 at [5]-[6], [9]. The orders provided for settlement sums (totalling $700,000.00) to be paid into court, to be held by the Court until further order of the Court.

[71] [2021] NSWSC 822 at [115]-[123].