Elder Abuse: Guardianship and Financial Management

NCAT Deputy President, Anne Britton*

Paper delivered to STEP (NSW)

Supreme Court of NSW, 20 August 2025

1 Abuse perpetrated on the vulnerable, including the elderly, is sadly not a new phenomenon. Since the 1980s there has been growing public recognition of the extent and scale of elder abuse and the need to protect older people[1] from abuse.

2 In this paper I adopt the definition of elder abuse used by the World Health Organisation: "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".[2]

3 Elder abuse takes many forms and including, neglect, physical abuse, sexual abuse, psychological abuse, and financial abuse. New entries to this list include "grandparent alienation", "inheritance impatience" and "cultural or spiritual abuse".[3]

4 In 2020 in the largest study conducted in Australia into the incidence of elder abuse, the Australian Institute of Family Studies[4] found that about 15% of older Australians experienced elder abuse, with the most common forms of abuse being psychological abuse (11.7%) and neglect (2.9%). Those figures accord

---

* Head Guardianship Division of NCAT. I acknowledge the research assistance provided by NCAT legal officer, Hanna Kozik. All opinions expressed and errors contained in this paper are mine.

[1] In this paper the term 'older person' is used to mean people over the age of 65 and Aboriginal and Torres Strait Islander people over the age of 50 years. See, *NSW Elder Abuse Toolkit: Identifying and Responding to the Abuse of Older People* 2016, p 75.
[2] World Health Organization, The Toronto Declaration on the Global Prevention of Elder Abuse (2002).
[3] National Plan to End the Abuse and Mistreatment of Older People, 2023-2034, Public Consultation Draft, p. 12-14.
[4] Australian Institute of Family Studies, National Elder Abuse Prevalence Study Final Report (July 2021), p. 2.

with the World Health Organisation's estimate that in high and middle-income countries, the incidence of elder abuse ranges from 2% to 14%.[5]

5 The experience of Australian adult safeguarding bodies suggests that the incidence and reports of elder abuse are increasing. The NSW Ageing and Disability Commission (**ADC**) reports that since it was established in 2019 calls to its Ageing and Disability Abuse Helpline have increased by 155%.[6] The ADC also reports that in an increasing proportion of reports it receives, the victim of the reported abuse is at high risk of harm, for example, from severe neglect, domestic and family violence and current or imminent homelessness.[7]

6 Unsurprisingly, given its prevalence, the NSW Civil and Administrative Tribunal (**NCAT**) sees many examples of elder abuse in its various jurisdictions. NCAT's Consumer and Commercial Division receives many applications where an older person's tenancy has been put at risk because of the actions of an adult child. NCAT's Occupational Division determines complaints about health practitioners where it is alleged that the health practitioner has mistreated an older person or failed to obtain their consent to treatment.[8]

7 My paper today focuses on the experience of the Guardianship Division in relation to elder abuse, in particular, in the context of the appointment of enduring guardians and attorneys. It will:

- provide an overview of the Guardianship Division's powers in relation to enduring appointments

- examine several cases determined by the Guardianship Division which involved allegations of elder abuse

---

[5] Australian Law Reform Commission's report "Elder Abuse - A National Legal Response" (ALRC Report 131), May 2017 (ALRC Elder Abuse Report) [1.1].
[6] https://ageingdisabilitycommission.nsw.gov.au/tools-and-resources/dashboard-data.htm .
[7] Annual Report, Ageing and Disability Commission, 2023-2024, p. 25.
[8] See for example, *Health Care Complaints Commission v Istephan (No 2)* [2017] NSWCATOD 116.

- discuss the role of the legal profession in representing clients who are subject to, or at risk of elder abuse

- touch on law reform proposals designed to mitigate the risk of enduring appointments being used to facilitate elder abuse.

Overview

8 Australia has an ageing population. In 2016, 15% of the population was aged 65 or over. It is estimated that by 2056, 22% of the population (8.7 million Australians), will be aged 65 years or over[9] and the number of Australians aged 85 and older will triple to 1.9 million.[10]

9 It is estimated that 536,000 Australians, including one in ten Australians aged 65 and over are now living with dementia.[11] Without a breakthrough in medical science, that number is expected to reach 1,100,000 by 2056.[12]

10 The aging of the population over the next two to three decades will be accompanied by the largest transfer of intergenerational wealth in Australia's history, with $3.5 trillion in assets likely to change hands and be passed on to younger generations.[13]

11 When the NSW Guardianship Board,[14] the first NSW tribunal to be given power to appoint substitute decision-makers for people with decision-making

---

[9] Australian Institute of Health and Welfare. See National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023, p. 4.
[10] Commonwealth of Australia, 2021 Intergenerational Report (2021) https://treasury.gov.au/sites/default/files/2021-06/p2021_182464.pdf p. 29.
[11] Brown L et al (2017) Economic Cost of Dementia in Australia 2016-2056 Canberra: National Centre for Social and Economic Modelling, University of Canberra p. 6.
[12] Ibid.
[13] Australian Government Productivity Commission, Wealth transfers and their economic effects (Research Paper, November 2021), p. 62, https://www.pc.gov.au/research/completed/wealth-transfers/wealth-transfers.pdf.
[14] The NSW Guardianship Board was established in 1987 under the *Disability Services and Guardianship Act* 1987 (NSW) (later renamed the *Guardianship Act* 1987 (NSW)). In 1998 the Guardianship Board became the "Guardianship Tribunal". In 2013, the Guardianship Tribunal was one of 22 separate tribunals to be consolidated into the NSW Civil and Administrative Tribunal (NCAT) and is now known as the "Guardianship Division of NCAT".

disabilities, opened its doors in 1989, about 50% of applications received by the Board, were made in respect of people with intellectual disabilities.[15] People with dementia accounted for only a third of applications.[16] Now, people with dementia account for most applications made to the Guardianship Division.[17]

12 The increase in the proportion of applications made to the Guardianship Division in respect of people living with dementia corresponds with an increase in the number of applications made in respect of older people generally. In 2023/2024, 59% of applications made to the Guardianship Division were made in respect of people over 65 years of age; 21% of applications were made in respect of people over 85 years of age.[18] In contrast, in its first 12 months of operation, 45.1% of applications made to the Guardianship Board were made in respect of people over 61 years of age.[19]

13 In its first 12 months of its operation, the Guardianship Board received just over 2,000 applications.[20] In 2023/2024, the Guardianship Division received about 17,000 applications.[21] What do these figures say about the incidence of elder abuse in NSW?

14 First, not all applications made to the Guardianship Division in respect of older people are made because of concerns of elder abuse. Applications are made for many different reasons. Many are benign, for example, where an older person with impaired decision-making ability enjoys the support of a loving family but requires a legally recognised substitute decision-maker to deal with,

---

[15] NSW Guardianship Board, *The first two years*, August 1991, p 21.
[16] NSW Guardianship Board, *The first two years*, August 1991, p 21.
[17] In 2023/2024 41% of applications made to the Guardianship Division were made in respect of people with dementia. NCAT Annual Report 2023/2024, p. 43.
[18] NCAT Annual Report 2023-2024, p. 43.
[19] NSW Guardianship Board, *The first two years*, August 1991, p. 25.
[20] Ibid, pp. 22,23.
[21] 12,476 applications and 4,847 end-of-term reviews of guardianship or financial management orders. NCAT Annual Report 2023/2024, p 43.

or enter into an agreement on their behalf with institutions, such as aged care facilities, banks and superannuation funds.[22]

15 Second, Australia's ageing population and the consequent increase in the number of Australians living with dementia and other decision-making disabilities will invariably result in an increase in the number of applications made to the Guardianship Division.

16 Third, the increase in the number of applications is attributable in part to greater rigour being employed by Australia's financial institutions, residential aged care and service providers in dealing with people who purport to hold authority to act on behalf of an older person with impaired decision-making ability.

17 Nonetheless, while I cannot point to any empirical evidence to support this proposition, the anecdotal evidence of long-time staff and members of the Guardianship Division and its predecessor Tribunals is that over the past decade there has been a steady increase in the proportion of applications triggered by allegations of elder abuse.

Guardianship Division's jurisdiction: an overview

18 One of four divisions of NCAT, the Guardianship Division exercises what is commonly referred to as a "protective jurisdiction". In making decisions the Tribunal is required to give paramount consideration to the welfare and interests of the person living with disability.[23]

19 Applications can be made to the Guardianship Division for, among other things:

- guardianship orders (*Guardianship Act 1987* (NSW), Pt 3)
- financial management orders (*Guardianship Act*, Pt 3A)

---

[22] Many aged care facilities require applicant residents who have not made an enduring appointment and appear to lack decision-making capacity, to provide evidence that they are subject to a guardianship order and/or financial management order.
[23] *Guardianship Act*, s 4(a).

- orders consenting to medical and dental treatments (*Guardianship Act*, Pt 5)

- review of the making, revoking or operation and effect of enduring powers of attorney instruments (*Powers of Attorney Act 2003* (NSW), Pt 5, Div 4)

- review of the appointment of an enduring guardian (*Guardianship Act*, Pt 2).

20 NCAT and the Supreme Court of NSW exercise concurrent jurisdiction under the *Guardianship Act* and Pt 5, Div 4 of the *Powers of Attorney Act*. The Supreme Court's "inherent jurisdiction" or "parens patriae" is not displaced by the *Guardianship Act* or the *Powers of Attorney Act*.[24]

Enduring appointments

21 In NSW a person may appoint another person or persons to make decisions on their behalf in relation to their personal affairs and financial affairs.[25]

22 The *Guardianship Act* governs the appointment by a person (the **appointor**) of another person (the **appointee** or **enduring guardian**) to make decisions in relation to the appointor's personal affairs. The *Powers of Attorney Act* governs the appointment by a person (the **principal**) of another person (an **attorney**) to make decisions in relation to the principal's financial affairs. In this paper, I will refer to these appointments collectively as "enduring appointments".

23 NSW remains one of the few jurisdictions where a person must execute separate instruments to appoint a person to manage their personal affairs and their financial affairs. In the Australian Capital Territory, Northern Territory,

[24] *Guardianship Act*, s 8.
[25] *Guardianship Act*, Pt 2; *Powers of Attorney Act*, Pt 4 Div 2.

Queensland and Victoria, a person can appoint a person or persons to make decisions about their financial and personal affairs in a single instrument.[26]

NCAT's powers: enduring powers of attorney

24 On the application of an "interested person",[27] a review tribunal (NCAT and the NSW Supreme Court)[28], may review the making, the revocation and/or the operation and effect of a "reviewable power of attorney" or decide not to carry out such a review.[29] An "enduring power of attorney" is a "reviewable power of attorney".[30]

25 NCAT may refer proceedings relating to "a person's capability to manage their [financial] affairs" to the NSW Supreme Court (the **Court**).[31] Likewise, NCAT may refer applications under the *Powers of Attorney Act* in respect of an enduring power of attorney to the Court and vice versa.[32] In deciding whether or not to make such a referral, review tribunals may have regard to whether the application affects third parties; whether the application raises complex or novel legal issues for the Court; and other matters that NCAT or the Court deem relevant.[33]

26 To be valid, an instrument creating the enduring power of attorney must satisfy several requirements including that it is "expressed to be given with the

---

[26] See *Powers of Attorney 2006* (ACT) s 13; *Advance Personal Planning Act 2013* (NT) ss 8, 16; *Powers of Attorney Act 1998* (Qld) s 32 (note this does not include 'special personal matters' or 'special health matters'); *Powers of Attorney Act 2014* (Vic) s 22 (note that medical treatment decisions are covered by separate appointments under the *Medical Treatment Planning and Decision Act 2016* (Vic)); see generally, Australian Guardianship and Administration Council Elder Abuse National Projects, *Enduring powers of attorney (financial), Options paper* (December 2018), pp 18,19, https://www.agac.org.au/assets/images/agac-consultation-paper.pdf.

[27] An "interested person" means an attorney (including an attorney whose appointment has been purportedly revoked); the principal; any person who is: (i) a guardian of the principal (whether under the *Guardianship Act 1987* or any other Act or law), or (ii) an enduring guardian of the principal under the *Guardianship Act 1987*; and, 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: *Powers of Attorney Act* s 35(1).

[28] NCAT and the NSW Supreme Court are "review tribunals" for the purpose of Pt 4, *Powers of Attorney Act*, s 26.

[29] *Powers of Attorney Act*, s 36(1).

[30] *Powers of Attorney Act,* s 33(1).

[31] *Guardianship Act,* s 25L.

[32] *Powers of Attorney Act*, s 34(1).

[33] *Powers of Attorney Act*, s 34(2).

intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument".[34]

27 On receipt of an application for review of the making, revocation or operation and effect of an enduring power of attorney, NCAT may:

- decide to review or not review the making, revocation or operation and effect of the enduring power of attorney;[35]
- if it decides to exercise the discretion to conduct a review:
  - to make one or more of the orders listed in s 36 of the *Powers of Attorney Act*;[36] or
  - treat the application for review as an application for a financial management order under Pt 3A (Financial Management) of the *Guardianship Act*.[37]

28 The making of a financial management order under Pt 3A of the *Guardianship Act* operates to suspend, but not to terminate, the enduring power of attorney.[38] However, if NCAT excludes a specified part of the principal's estate from the financial management order, NCAT may order that the power of attorney is to remain in force in respect of that part of the estate.[39]

---

[34] *Powers of Attorney Act*, s 19(1). In addition, the instrument must be witnessed by a prescribed witness (not being an attorney under the power) and accompanied by a certificate of that person stating, amongst other things, that they explained the effect of the instrument to the principal before signing, and that the principal appeared to understand the effect of the power of attorney: s 19(1)(c).
[35] *Powers of Attorney Act*, s 36(1).
[36] In *Susan Elizabeth Parker v Margaret Catherine Higgins & Ors* [2012] NSWSC 1516, Slattery J at [42], explained that ss 36(1) and 36(2) of the *Powers of Attorney Act 2003* (NSW) give the review tribunal, "two successive discretions". First, to "decide to review" the operation and effect of a reviewable power of attorney or "not to carry out such a review": s 36(1). Second, If the review tribunal decides to exercise the discretion to review, it may exercise a further discretion "whether or not to make an order under [s 36]": s 36(2).
[37] *Powers of Attorney Act,* s 37(1). That power may only be exercised if NCAT decides not to make an order under s 36: s 37(1).

[38] *Powers of Attorney Act*, s 50(1)–(3).
[39] *Powers of Attorney Act*, s 50(4).

29 The orders available to NCAT under s 36 of the *Powers of Attorney Act* vary depending on the nature of the review being conducted. Specifically, whether the review relates to the making, revocation or operation and effect of the enduring power of attorney.

NCAT's powers: appointment of an enduring guardian

30 Part 2 of the *Guardianship Act* sets out the requirements for appointing an enduring guardian and revoking the appointment of an enduring guardian. In addition, it sets out the Tribunal's powers to review the appointment of an enduring guardian.

31 A person may appoint, by an instrument in writing, a person as his or her enduring guardian.[40] The appointor and the appointee must be 18 years of age or over.[41]

32 A person may appoint two or more enduring guardians to act jointly, severally or jointly and severally.[42]

33 To be valid, the instrument appointing the enduring guardian must satisfy certain requirements which include that the instrument must be in the form prescribed.[43] In addition, to be valid, the instrument revoking the appointment of the enduring guardian must satisfy certain requirements.[44]

34 Unless revoked or suspended under Pt 2 of the *Guardianship Act*, an appointment has effect during such period of time as the appointor is a "person in need of a guardian".[45] A person in need of a guardian is "a person who, because of a disability, is totally or partially incapable of managing his or her person".[46]

---

[40] *Guardianship Act*, s 6.
[41] *Guardianship Act*, ss 6, 6B(1).
[42] *Guardianship Act*, s 6D(1).
[43] *Guardianship Act*, s 6C; Guardianship Regulation 2016 (NSW), cl 5 and Sch 1.
[44] *Guardianship Act*, s 6H.
[45] *Guardianship Act*, s 6A.
[46] *Guardianship Act*, s 3(1).

35 Unless otherwise stated in the instrument of appointment, an enduring guardian may exercise the following functions while the appointment has effect:

- deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live
- deciding the health care that the appointor is to receive
- deciding the other kinds of personal services that the appointor is to receive
- giving consent under Part 5 of the *Guardianship Act* to the carrying out of medical or dental treatment on the appointor
- any other function relating to the appointor's person that is specified in the instrument.[47]

36 The Tribunal may, on its own motion, and must, at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor, review the appointment (or purported appointment) of an enduring guardian.[48] On review, the Tribunal may:

- revoke the appointment[49]
- confirm the appointment, with or without varying the functions of the enduring guardian under the appointment[50]
- if satisfied it is in the best interests of the appointor to do so, deal with the application for review as an application for a guardianship order, financial management order, or both.[51]

[47] *Guardianship Act*, s 6E.
[48] *Guardianship Act*, s 6J(1).
[49] *Guardianship Act*, s 6K(1)(a).
[50] *Guardianship Act*, s 6K(1)(b).
[51] *Guardianship Act*, s 6K(3).

37 The Tribunal may confirm the appointment (or purported appointment) of a person as an enduring guardian even where:

- the instrument that purported to appoint the person as an enduring guardian was not executed in accordance with the requirements of the *Guardianship Act*[52], or

- the person purporting to make the appointment had announced his or her intention to make the appointment but became incapacitated before an instrument making the appointment could be executed.[53]

38 The Tribunal must not revoke the appointment unless:

- the enduring guardian requested the revocation[54], or

- the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked.[55]

39 An enduring guardian may apply to the Tribunal for an order declaring that the appointment has effect.[56] The Tribunal may, by order, declare that appointment has effect, if satisfied that the appointor:

- is a person in need of a guardian, and

- has appointed the applicant as his or her enduring guardian.[57]

40 Where the Tribunal makes a guardianship order under Pt 3 of the *Guardianship Act* that order operates to suspend, for the duration of the order, all authority of the enduring guardian to exercise a function under the appointment.[58] If a

[52] *Guardianship Act*, s 6K(4)(a).
[53] *Guardianship Act*, s 6K(4)(b).
[54] *Guardianship Act*, s 6K(2)(a).
[55] *Guardianship Act*, s 6K(2)(b).
[56] *Guardianship Act*, s 6M(1).
[57] *Guardianship Act*, s 6M(2).
[58] *Guardianship Act*, s 6I(1).

person who is the subject of a guardianship order purports to appoint an enduring guardian, that appointment is of no effect.[59]

Misuse of enduring appointments

41 Enduring appointments have obvious benefits. They enable a person to plan for potential incapacity. They give effect to the person's "will and preference" by enabling the person to decide whom to entrust with authority to make decisions on their behalf if they lose decision-making capability. They operate to prevent a decision-making vacuum if the person loses capacity to make decisions about their financial and/or personal affairs. They facilitate the orderly management of the person's affairs, which may become complex, if their care and accommodation needs change because of incapacity.

42 However, if misused, enduring appointments have the potential to facilitate abuse and exploitation of the person who made the appointment. Once the appointment comes into effect, the incapacitated principal/appointor is unable to oversee the actions of the person whom they have authorised to act on their behalf.

Australian Human Rights Commission survey on enduring powers of attorney

43 A recent survey conducted by the Australian Human Rights Commission (the **AHRC**) reveals widespread ignorance of the powers and responsibilities of attorneys appointed under an EPoA.[60] The Australian Human Rights Commission surveyed 3,029 Australian adults (the **respondents**). Of that group, 537 had made an EPoA; 522 were or had been an attorney appointed under an EPoA; and 1,970 were neither (the **control group**).

44 The results of that survey revealed:

[59] *Guardianship Act*, s 6I(2).
[60] Australian Human Rights Commission, *Empowering Futures: A Report on Enduring Powers of Attorney* (Report, September 2024) https://humanrights.gov.au/our-work/age-discrimination/publications/empowering-futures-report-enduring-powers-attorney-2024.

- 35% of respondents said they knew nothing about EPoAs despite having made one or having been appointed as an attorney

- most respondents were familiar with the terms 'will' and 'power of attorney'; only half had heard the term 'enduring power of attorney'

- most respondents (87%) had not made an EPoA for themselves

- three in four respondents did not understand that a person cannot make an EPoA after they lose capacity to make decisions

- of the respondents who were principals or attorneys:

  (i) one in five believed that an attorney determined their own duties under an EPoA;

  (ii) one in five thought that an attorney can decide who can visit the principal;

  (iii) one in six believed that an attorney does not need to keep records about their decisions;

  (iv) seven in ten understood that an attorney must act in the interests of the principal and must not mix their money or property with that of the principal;

- of the respondents who were principals:

  (i) they were the group most likely to report that they knew "a lot" about EPoAs but on testing they were also the group most likely to give incorrect answers when questioned about EPoAs;

  (ii) 37% had appointed attorneys who displayed characteristics identified as risk factors for perpetrating elder abuse (including substance abuse, financial and/or emotional dependence, and gambling addiction);

(iii) they were generally confident that their attorney would look after their finances in a manner consistent with their wishes and interests;

(iv) one in four had heard about EPoAs from or through a legal practitioner.

45 The results of the Survey are consistent with the experience of the Guardianship Division. In a significant number of applications made to the Division seeking review of an EPoA, it is apparent that the principal, their attorney and members of their family misapprehend the nature of an enduring appointment. In particular, the nature of fiduciary obligations owed by the enduring guardian and/or attorney to the principal.

Examples of misuse of EPoAs

46 The following decisions made by the Guardianship Division illustrate the potential for misuse of enduring appointments.

***BZD* [2021] NSWCATGD 28**

47 In 2015, then 83-year-old BZD appointed her husband as her enduring guardian and attorney. After her husband's death in May 2018, BZD continued to live in the family home in Sydney (the **family home**).

48 In late November 2019, BZD's son (the **Son**) took BZD to his home in regional NSW purportedly for a short holiday. A month later, accompanied by the Son, BZD attended a local solicitor (the **Solicitor**), and executed instruments appointing the Son as her enduring guardian and attorney, and one of her two daughters as substitute enduring guardian and attorney.

49 Two weeks later, BZD returned to see the Solicitor and executed fresh instruments, again appointing the Son as her enduring guardian and attorney but on this occasion appointing the Solicitor as substitute enduring guardian and attorney.

50 On each occasion BZD met with the Solicitor, she was accompanied by the Son who acted as her interpreter. BZD spoke in "broken English".

51 Acting as BZD's attorney, in 2020 the Son sold the family home, used the funds from that sale to purchase a residential property in his name and placed the balance of those funds in a bank account, also in his name. The Son claimed that he did so at his mother's request, who said that his sisters "don't deserve to have anything". The firm in which the Solicitor was employed acted for the Son in the sale.

52 In March 2021, one of BZD's daughters made applications to NCAT seeking guardianship orders in respect of BZD and review of the appointment of the Son as BZD's attorney. The daughter claimed that BZD had a decision-making disability due to dementia and advanced age, and that the Son was preventing BZD from having contact with other members of the family.

53 The Tribunal found that "BZD's funds had been mismanaged, the attorney's finances were intermingled with BZD's finances, her estate has been dissipated and that [the Son] had not acted in his mother's best interests"[61]. The Tribunal concluded that the Son had "obtained significant benefit as attorney by selling his mother's house and spending the proceeds almost entirely in a manner that benefits himself".[62] The Tribunal found that the Son "squandered almost all of his mother's remaining estate and has effectively isolated her from the rest of her family".[63]

[61] *BZD* [2021] NSWCATGD 28 at [49].
[62] *BZD* [2021] NSWCATGD 28 at [49].
[63] *BZD* [2021] NSWCATGD 28 at [54].

54 The Tribunal revoked the enduring appointments, committed the management of BZD's estate to the NSW Trustee and Guardian and made a guardianship order appointing BZD's two daughters as guardians for BZD.

***CKS* [2021] NSWCATGD 35**

55 In August 2020, 80-year-old CKS appointed her niece (the **Niece**) as her enduring guardian. Fourteen months later, CKS's sister (the **Sister**) made an application to NCAT seeking review of that appointment. The Sister alleged that the Niece had neglected and abused CKS. When that application was made, CKS was on a respite placement at an aged care facility. In the 18 months before CKS's admission to the facility, the Niece had been living with CKS in a house owned by CKS.

56 The manager of the aged care facility said that CKS told her that she did not want to return to live with the Niece and had begged staff not to allow the Niece to take her home. The manager said that she could not agree to CKS's request because the Niece was CKS's enduring guardian and she had notified the facility that CKS would be returning to live with her in the family home.[64]

57 CKS told the Tribunal that while living with the Niece she was "a prisoner in her own home", was lonely, was made to sit in a room all day, all services and outings had been cancelled and she was not allowed to have a bath or shower.[65] CKS said she believes the Niece is an alcoholic and said that she is frightened of the Niece and does not want her involved in her care.[66] The Niece denied those allegations.

58 The Tribunal found that the Niece "continues to care for her aunt" and that for some time she and CKS had "a close and loving relationship"[67]. However, the Tribunal found that the "standard of care CKS was receiving in her home was at times not optimal", and this has resulted in CKS's distress and strong wish

[64] *CKS* [2021] NSWCATGD 35 at [19].
[65] *CKS* [2021] NSWCATGD 35 at [28].
[66] *CKS* [2021] NSWCATGD 35 at [28].
[67] *CKS* [2021] NSWCATGD 35 at [34].

to not return to live with the Niece.[68] The Tribunal concluded that the appointment of the Niece as enduring guardian was “no longer workable” and decided to revoke that appointment.

59 The Tribunal went on to consider whether to exercise the discretion to treat the application for review of the appointment of the Niece as an application for a guardianship order and/or financial management order. The Tribunal concluded that while CKS had been diagnosed with dementia, the evidence did not support a finding that she “lacks capacity to make important life decisions”. In reaching that conclusion, the Tribunal noted that the solicitor who had represented CKS, was of the opinion that CKS was “competent from her manner and discussions” but was unaware that she had been diagnosed with dementia.[69] The Tribunal declined to make a guardianship order or a financial management order.

***KCO* [2021] NSWCATGD 29**

60 In November 2020, 88-year-old KCO appointed her son (the **Son**) as her enduring guardian and attorney. Shortly before making that appointment the Son had moved in to live with KCO in her home on a large rural property in regional NSW.

61 KCO had dementia and several other medical conditions and required significant care and support.

62 Following a report of neglect, the ADC commenced an investigation. The ADC found that throughout the day while the Son was at work KCO was left alone sitting in a chair; the home was cluttered and unhygienic; KCO was unkempt, incontinent and unable to walk.

63 In 2021, following applications made by KCO's two other children, the Guardianship Division made guardianship and financial management orders in

[68] *CKS* [2021] NSWCATGD 35 at [35].
[69] *CKS* [2021] NSWCATGD 35 at [43].

respect of KCO, appointing the Public Guardian and committing the management of KCO's estate to the NSW Trustee.

64 The Tribunal noted that KCO's finances were "extremely complex" and involved several properties and a family trust. The Tribunal noted that the Son had recently purchased two properties in his name which KCO's other children alleged he had paid for using KCO's money. In addition, the Tribunal noted that two months after giving the ADC an assurance that he would arrange care and cleaning services for KCO, the Son discontinued those services.

ZKN **[2021] NSWCATGD 34**

65 In June 2020, 93-year-old ZKN appointed her nephew's wife as her enduring guardian and a family friend as her attorney. (The family friend was later found to have stolen money from ZKN.) In September 2020, ZKN appointed her nephew's wife as her attorney.

66 In June 2021, 94-year-old ZKN, while an inpatient at a public hospital, executed instruments purporting to appoint her grandson who lived in London (the **Grandson**) as her attorney and enduring guardian. Hospital staff made an application to NCAT seeking review of those appointments, claiming that ZKN lacked capacity to make them.

67 The Tribunal was critical of the solicitor who had prepared the instruments appointing the Grandson as ZKN's attorney and guardian. The solicitor had also prepared the instruments in which ZKN appointed the nephew's wife and the family friend.

68 The Tribunal found it "concerning" that the solicitor:

- appeared to have failed to consider whether ZKN had capacity to provide instructions, notwithstanding her advanced age and that when she gave those instructions, she was receiving medical treatment while an inpatient at a public hospital

- failed to obtain a medical opinion regarding ZKN's capacity or to make any enquiries of the health practitioners treating ZKN while she was in hospital

- contrary to the NSW Law Society guidelines[70], failed to make file notes of his meeting with ZKN

- appeared to rely mainly on his previous dealings to satisfy himself of ZKN's understanding of the enduring appointments.[71]

69 The Tribunal found that ZKN lacked the necessary understanding to appoint the Grandson as her attorney and enduring guardian. After reviewing the appointment, the Tribunal decided:

- to make a financial management order

- to commit ZKN's estate to the management of the NSW Trustee and Guardian

- to revoke the appointment of the Grandson as enduring guardian, and

- to make a guardianship order appointing the Public Guardian as guardian for ZKN.

YHE v YHF [2024] NSWCATAP 95

70 Lest it be thought that enduring guardians and attorneys are the only examples seen by the Guardianship Division of fiduciaries who act in breach of their obligations to their elderly appointor/principal, I include the example of *YHE v YHF*.

[70] NSW Law Society, *When a client's mental capacity is in doubt: A practical guide for solicitors* (2016).
[71] *ZKN* [2021] NSWCATGD 34 at [31], [32].

71 YHF (the **Father**) was in his mid-80's and had been diagnosed with dementia. In September 2022, the Tribunal made a financial management order appointing YHF's son (the **Son**) as his financial manager (the **2022 FMO**).

72 In September 2022, the NSW Trustee and Guardian (the **NSW Trustee**) gave the Son a standard document entitled "Directions and Authorities" which set out what the Son was authorised/not authorised to do as a financial manager. In that document, the NSW Trustee directed the Son not to make a loan or gift from the Father's estate, not to transfer any of the Father's funds into an account in the name of another person, not to use the Father's assets for the benefit of the manager, and not to claim remuneration from the estate, without its approval.

73 In October 2022, the NSW Trustee applied to NCAT seeking review of the 2022 FMO and the replacement of the Son as manager alleging that after being appointed as manager, the Son used the Father's funds to reduce the mortgage on his own property putting the Father's estate at risk. Subsequently, the Son also made an application to the Tribunal requesting that the 2022 FMO be revoked.

74 The Tribunal said the Son's actions in dealing with the Father's estate "appear to have been motivated by his desire to reduce his own financial pressures, and, as stated in his financial proposals … to maintain the [Father's] property for his inheritance".[72] The Tribunal found that the Son did "not appear to understand that he cannot intermingle his father's funds with his own and that he cannot use his father's funds to his own financial advantage".[73] The Tribunal revoked the appointment of the Son as manager and committed the management of the Father's estate to the NSW Trustee.

75 The Son sought leave to appeal that decision to the NCAT Appeal Panel. The Son contended that the central findings made by the Tribunal – that the Son had breached the fiduciary duties he owed to the Father, and that the Son had

[72] *YHE v YHF* [2024] NSWCATAP 95 at [39].
[73] *YHE v YHF* at [42].

acted outside the authority conferred by the NSW Trustee – were illogical and irrational. Leave to appeal was refused.

Signs of abuse

76 The complexity of human nature and the human condition is such that there is often an entirely innocent explanation for conduct which may appear to evidence elder abuse.

77 Nonetheless, in the applications which come before the Guardianship Division, there are common scenarios which tend to indicate that an enduring appointment is being used to perpetrate elder abuse. These include:

- where an adult child moves in to live with their parent, isolates the parent from family, friends and service providers, "encourages" the parent to transfer the family home and any other assets to them, discontinues any external services previously provided to the parent and fails to provide the parent with adequate care and support;

- where the older person is moved between family members, often without being consulted; those moves are accompanied by the older person making or changing their enduring appointments and/or Will in favour of the family member with whom they are currently residing at the time, often within a matter of days of moving to their new place of residence.[74]

78 Older people are often reluctant to disclose that they are being subject to abuse because of:

- fear of being placed in residential aged care being used to facilitate the transfer of the older person's assets to relatives and friends

---

[74] See for example, *Rydzewski v Rydzewski* [2024] NSWSC 802.

- fear of being placed in residential aged care resulting in the older person "tolerating" neglect and abuse at home

- concern to protect the perpetrators of abuse, usually their children

- feelings of shame that "my family has come to this".

79 And of course, many older people are simply unable to report elder abuse, even if they were willing to do so because of mental and/or physical incapacity, social isolation and/or lack of knowledge.

80 The Law Society of New South Wales, *When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors*[75] provides a useful list of "red flags" which might suggest that a client lacks capacity to give instructions and/or to make or revoke an enduring appointment. I would add to that list:

- the client has made multiple changes to their enduring appointments and/or their Will, without apparent reason

- the client has not instructed their long-standing solicitor to prepare the transaction, especially where the client has instructed the solicitor of the friend or family member who appears to benefit from the transaction

- the arrangements for the consultation with the solicitor have been made by a family member or friend, especially where that person is to be appointed attorney, or is to benefit from the transaction

- the accompanying family member or friend insists that the client requires their support and will not meet with the solicitor alone

- after the initial meeting, all communication between the solicitor and the client is facilitated by that family member or friend

[75] https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf

- the client has recently changed service providers and health practitioners without explanation.

Reporting abuse: role of the legal profession

81 I do not underestimate the very difficult position faced by legal practitioners, in particular solicitors, when presented with evidence that their client is subject to, or at risk of, elder abuse.

82 It raises the potential for a conflict of the duties owed to the client, which subject to their paramount duty to the administration of justice as fiduciaries and pursuant to professional rules, require solicitors to act in their client's best interests, to adhere to the client's instructions and not to disclose any information which is confidential to a client obtained from the client in the course of the solicitor-client relationship.

83 In a paper delivered to the 2025 STEP Australia National Incapacity Conference, Professor Nola Ries cites comments made by legal practitioners who participated in the recent dementia capability project conducted by the University of Technology of Sydney about the dilemma they face when they suspect that a client is subject to or at risk of elder abuse[76]:

> "Where there are potential issues that are of concern, such as elder abuse or risks of exploitation ... It's a really difficult position for a legal practitioner because there's duties of confidentiality to the client. … So as an example, if you've got someone with dementia, they come in, they've raised some concerns about potential elder abuse. You outline to them what their legal strategies are and then they say, no, look, I don't want to rock the boat. I don't want to upset them. And so then you're left with a situation where you know that there's something wrong, and without that client's permission you can't do anything about it. And that's really, really difficult."
>
> "[T]here are times where we have to cease acting for clients, and we don't think it's in their best interest that we cease acting. And there's nothing we can do. … [Such as] a situation where someone has been financially abused quite significantly, and the more and more you get instructions and appointments from them, the client significantly declines. The client refuses to be assessed … and then disengages with your service. You are bound by your ethical obligations not to disclose to any organisation, and you know that the client's

[76] Professor Nola Ries, Legal & Medical Ethics in Practice – Navigating Conflicts and Duties throughout the Life and Death, STEP Australia National Incapacity Conference 4 & 5 August 2025, p. 15.

> out there in the community, they've been defrauded of their money, defrauded of their property, but you can't do anything. …[I]t requires a lot of resources in the community for that person to be otherwise identified by another agency to address and support them. So, I think it's really just the limits of our profession, and I think the law will always land on the side of must maintain confidentiality, and rightly so. But it just means there are a lot of people out there that we can't assist, and I'm always crossing my fingers they're helped by someone else."

84 The Law Society of NSW publication, *Elder abuse of clients: what support can solicitors offer?*,[77] offers useful guidance to solicitors who are concerned that a client or former client may be subject to, or at risk of elder abuse. However, it does not however fully address the question that I understand troubles many practitioners, whether it is permissible to disclose to the ADC a communication which is subject to legal professional privilege.

85 A person may make a report to the ADC, "if they have reasonable grounds to believe that an adult with disability or older adult is subject to, or at risk of, abuse, neglect or exploitation": *Ageing and Disability Commissioner Act 2019* (NSW), s 13(1). If acting in good faith, a person who makes a report to the ADC is not liable to any civil or criminal action, or any disciplinary action: *Ageing and Disability Commissioner Act*, s 13(4).[78]

86 Where a solicitor makes a report under s 13 of the *Ageing and Disability Commissioner Act*, that report could potentially fall within one or more of the exceptions to the duty not to disclose information which is confidential to a client contained in Rule 9.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (the **Solicitors' Conduct Rules**):

- if the client expressly or impliedly authorises the disclosure (Rule 9.2.1)
- if the solicitor is permitted … by law to disclose (Rule 9.2.2)

---

[77] https://www.lawsociety.com.au/sites/default/files/2022-05/Elder%20abuse%20of%20clients%20-%20what%20support%20can%20solicitors%20offer%20updated%20April%202022%20FINAL%20LS%20style.pdf

[78] Section 15 of the *Ageing and Disability Commissioner Act* provides additional protection to a person who makes a report to the ADC in good faith, by prohibiting the disclosure of their identity unless made with the consent of the person who made the report or is necessary for the purposes of law enforcement.

- if the information is disclosed for the sole purpose of avoiding the probable commission of a serious criminal offence (Rule 9.2.4)

- if disclosed for the purpose of preventing imminent serious physical harm to the client or to another person (Rule 9.2.5).

87 However, the question arises whether a disclosure to the ADC which falls within one of the exceptions to the duty not to disclose information confidential to a client, remains subject to legal professional privilege.

88 If the report made to the ADC under s 13 of the *Ageing and Disability Commissioner Act* is authorised by the client, privilege has been waived and the question of breaching legal professional privilege does not arise. Where the report is made for the sole purpose of avoiding the probable commission of a serious criminal offence, that report is probably not subject to legal professional privilege.[79] However, where the solicitor relies on the exception to the duty of confidentiality provided by Rule 9.2.2 of the Conduct Rules "if the solicitor is permitted … by law to disclose", the issue is less clear. This is because the *Ageing and Disability Commissioner Act* does not expressly or by implication state that legal professional privilege has been abrogated.

89 If Parliament intended that the reporting scheme available under the *Ageing and Disability Commissioner Act* would be used by the legal profession to report elder abuse, consideration ought to be given to whether that Act requires amendment to clarify that it overrides legal professional privilege.

90 A further question which warrants consideration is whether the class of confidential information permitted to be disclosed by Rule 9.2.5 "to prevent imminent serious physical harm to the client or to another person" is overly narrow and should be extended to cover other types of serious harm, such as financial harm. If I am correct that by the combined operation of s 13 of the *Ageing and Disability Commissioner Act* and Rule 9.2.2 of the Conduct Rules,

[79] *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141 at 145; *Commissioner, Australian Federal Police v Propend* (1997) 141 ALR 545.

a solicitor is permitted to report *any type of abuse* provided they "have reasonable grounds to believe that [the client] is subject to, or at risk of, abuse, neglect or exploitation", that amendment may be unnecessary.

91 I was unable to find any authority on point. In my view, clarification is necessary to assist practitioners to navigate the ethical dilemmas that those practicing in the areas of wills, estates and enduring instruments face and will increasingly face with the increase in elder abuse over the next couple of decades.

Conclusion

92 Most enduring guardians and attorneys carry out their duties faithfully often at great personal cost. However, the cases I have referred to in this paper illustrate that enduring appointments can be used by the unscrupulous as a safe harbour to exploit the principal. In making that observation, I am not suggesting that the risks posed by enduring appointments outweigh their advantages. The experience of the Guardianship Division is that elder abuse is not confined to people who have made enduring appointments. The Guardianship Division sees numerous cases where an older person has not made an enduring appointment and is exploited and abused by a person in a position of trust.

93 In recent years, there have been calls for greater regulation because of:

> "growing awareness of the potential for this convenient legal instrument [enduring appointments] to be abused by the very representatives entrusted to wield authority over the affairs of persons with dementia."[80]

94 The 2017 Australian Law Reform Commission (**ALRC**) Report *Elder Abuse – A National Legal Response* made several recommendations about enduring appointments aimed at strengthening the "important role that enduring appointments have for older people seeking to protect against a loss of

[80] Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, *'Protecting the rights of those with dementia through mandatory registration of enduring powers?: A comparative analysis'* (2015) 36(2) Adelaide Law Review 360.

decision-making ability in the future, by reducing the potential for those appointments to be misused”.[81] The ALRC recommended:

- improved safeguards to minimise the risk of abuse of enduring documents
- giving state and territory administrative and civil tribunals jurisdiction to award compensation when duties under an enduring document have been breached
- establishing a national online registration scheme for enduring appointments, and
- developing a national model enduring document.

95 Some progress has been made in advancing these recommendations. In 2019, the Australian Council of Attorneys-General launched the First National Plan to Respond to the Abuse of Older Australians[82] which resulted in some positive initiatives towards ending elder abuse in Australia.[83] The AGAC is now developing a successor National Plan to End the Abuse and Mistreatment of Older People 2024-2034, which has been released for public and sector feedback.[84] The successor plan aims to build on the work achieved by the first plan by focusing on increasing community awareness of elder abuse, enhancing legal frameworks, strengthening the capacity of services and addressing gaps in evidence.

96 However, missing from those initiatives is any apparent progress on the ALRC recommendation to harmonise state and territory laws which govern EPoAs. Such reform would represent a meaningful and pragmatic elder abuse strategy and has the added attraction of being relatively cheap and

[81] ALRC Elder Abuse Report, p. 160.
[82] https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023.
[83] For instance, strengthened research into the nature and prevalence of elder abuse in Australia, the trialling of several specialist elder services and establishing a national helpline.
[84] https://consultations.ag.gov.au/families-and-marriage/eamop/.

easy to implement. Despite widespread support for harmonisation, and recommendations made by numerous agencies, dating back to 2007, to date no meaningful progress has been made. The reason for this lack of progress is perplexing. In a recent opinion piece in *The Australian*, champions of harmonisation, Age Discrimination Commissioner, Robert Fitzgerald AM and Queensland Public Advocate Dr John Chesterman wrote that they "are yet to meet anyone who has argued against harmonisation; indeed neither of us has ever heard a cogent argument against harmonisation".[85]

97 Finally, elder abuse demonstrates a fundamental lack of respect of the more powerful for the vulnerable. Courts and Tribunals play an indispensable role in protecting older Australians from abuse. But this is a broad social problem against which the legal profession, good families, legislatures, governments, and the wider community must be constantly vigilant if our vulnerable older people are to be properly protected. Ultimately, respect is the key. The treatment of older people is not just a test of personal character in a family context. As we have learned in recent years, it is a litmus test of the fundamental values of this society.

****

[85] John Chesterman and Robert Fitzgerald, "*Why Australia needs harmonized financial powers of attorney laws*", The Australian, 8 January 2025.