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Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
MELBOURNE VIC 3002

Our ref: WGH
Matter no: MJMMPREC

By email: vpirc@parliament.vic.gov.au

Dear Sir

Enquiry into powers of attorney

The Committee is considering ways to streamline and simplify powers of attorney documents so that more Victorians can plan for their future financial, lifestyle and healthcare needs.

Background

This firm is a largely commercial based practice.

In 1989 this firm merged with the practice of Martin & Martin. Martin & Martin historically operated in the western suburbs with the majority of clients being "working class" and now quite elderly.

We continue to offer these clients with the services offered by the previous firm including estate and succession planning and conveyancing. These clients are also ageing and sometimes, due to their medical condition or frailty find it difficult to get into the city.

We provide our services with more expertise but at a higher rate because we are a city based firm with higher overheads than a suburban practice. Nevertheless these clients are loyal and have provided us with their ongoing instructions.

Over the years Hunt & Hunt has also developed a substantial private client practice comprising high wealth clients. These clients have sophisticated needs and expertise with commercial financial arrangements as well as their personal affairs.

We have found that not only do our more naïve clients have problems understanding multiple powers of attorney prescribed forms, but our more sophisticated clients also find the concept of multiple documents confusing.

Submission

The Committee has asked for public submissions to the Inquiry into Powers of Attorney including these specific issues:

1. Should powers of attorney be streamlined?

Some of the clients who attend this office for estate planning are elderly and often naïve about estate planning issues including general and enduring powers of attorney. Quite often the client is overwhelmed by the need to complete 3 separate documents to achieve their future financial, lifestyle and healthcare needs.

The confusion continues when the client is informed as to how each document is to be executed. The process is supposed to simplify their financial, lifestyle and healthcare needs for the future, not confuse them.

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Streamlining the 3 documents into one is far more practical, convenient and economical for the client.

Instead of three pieces of legislation governing the use of enduring powers of attorney there should be only one and the prescribed form should be condensed into one document under that legislation.

A similar process has been adopted in Canada with the "Substitute Decisions Act 1992"

2. "Capacity"

Our clients are often elderly and naïve about estate planning issues. The client may not understand why there are three separate documents each of which need to be executed differently.

This confusion may be interpreted by family and friends as that the donor does not have capacity. Alternatively family and friends may become concerned that the donor is not aware of his/her actions because of some abnormal brain function such as dementia not realising that the decision making capacity of a donor is not synonymous with any abnormal brain function.

When we are instructed by a client who is elderly or presents evidence of incapacity we request the donor sign the documents in the presence of his/her treating doctor. We provide the treating doctor with a written request the he/she witness each document only if the doctor is satisfied that the donor does not present any evidence of incapacity.

If the donor can indicate to the treating doctor -

- (a) the issues that face him/her; and
- (b) the possible approaches available to resolve the issues; and
- (c) he/she can appreciate the reasonable foreseeable consequences of his/her choices; and
- (d) it appears that the decisions of the donor are not based on delusional thoughts despite any cognitive impairment that may be present,

then the doctor has established a working definition of capacity. It is then in order for the documents to be executed by the donor and witnessed by the doctor.

We believe that a donor's treating doctor has far better understanding of the client's medical and personal history and is therefore better able to observe whether the client has capacity.

3. What evidence should we require to show that a donor has lost capacity?

When we are informed by the family of a client that he/she has been diagnosed with Alzheimer's or dementia and can no longer look after himself/herself we rely on the integrity and honesty of the information presented. However, in view of the level of fraud perpetrated on the elderly community we are more reliant on advice from the treating doctor of the client to clarify whether the client presents with evidence of incapacity.

For this reason, we believe that a doctor should complete some sort of assessment confirming the donor either has capacity or presents with evidence of incapacity.

4. What powers should an attorney have?

One of the protocols that we have in this office is to provide the donor with an information booklet setting out, amongst other information, the obligations of the attorney to the donor. We request the donor present the booklet to the attorney before he/she signs their respective statements of acceptance.

We believe that the information booklet assists in the education of both the donor and attorney on exactly what powers he/she/they have under each enduring power of attorney.

5. Abuse of powers by attorney

Recent current affairs programs have pointed out the amount of abuse and intimidation in our society against the elderly by younger generations enticing them to sign powers of attorney. The fact that these documents are readily available at newsagencies allows the misuse of them by unscrupulous members of our society.

Some elderly feel that they will be bullied and victimised if they don't go along with the requests of the abuser. Some clients are threatened with being turned out on the street or sent to a decrepit nursing home as a way of coercing them into signing enduring powers of attorney.

To solve this problem requires education and awareness.

There is a lot more community interest in the rights of the elderly and legal issues relating specifically to our ageing population. There are a number of organisations like Victoria Legal Aid, the local community legal services and the newly established Senior Rights Victoria, providing information about abuse and exploitation of the elderly and the support and practical assistance available.

The registration of powers of attorney will not assist those vulnerable elderly members of our community who are at threat of being intimidated, abused and exploited.

The disadvantages with registration of enduring powers of attorney are:

- (a) If the registration fees are too high then enduring powers of attorney will not be registered, unless it is compulsory to do so.
- (b) If the power is for a limited time or for a specific purpose the document may be permanently registered when it is no longer valid. Unless revocations of powers are also required to be registered, again there is the issue of fees.
- (c) Also the donor may want to keep his/her arrangements under an enduring power of attorney private due to the possibility of abuse.

Any registration process should include a medical certification from the treating doctor of the donor confirming there is no evidence of incapacity.

Solutions

1. Legislation

First and foremost we believe that the legislation in this area should be encompassed into one Act. The legislation should be compatible with all Australian jurisdictions to ensure continuity for the donor, the attorney and also practitioners.

Greater criminal sanctions should be included in the legislation in an effort to prevent the fraud towards elderly donors being perpetrated by unscrupulous attorneys.

Consider the principles establish in the Substitute Decisions Act 1992 (Canada).

2. Streamlining the documents

The prescribed form needs to be condensed from 3 forms into one document that encompasses the financial, wellbeing (guardianship) and medical treatment requirements of the donor. Something like a "tick a box" set up would be the easiest.

The majority of donors appoint the same "joint and several" attorneys to each power. This makes streamlining the documents from 3 to 1 even more sense.

The enduring power of guardianship only allows the appointment of one guardian and one alternate guardian. As most donors want continuity they insist that the same attorneys be appointed, which is not possible under the current legislation. Streamlining the documents will also assist with this anomaly.

3. Provide flexibility in drafting document

Allow practitioners to draft the enduring power of attorney document to accommodate the client's wishes rather than being limited to a prescribed form. There may be specific needs that the client requires which may not be considered in the prescribed form.

4. Education

Provide further information to the attorney in the document itself setting out in more detail what powers the attorney does and does not have. For example, most attorneys are not aware that they cannot collect the original will of the donor if the document is held in safe custody for the donor. The form should confirm that an attorney may obtain a copy of a will held in safe custody but not the original document in case it is lost or destroyed.

Set out in the document the penalties for fraud, misuse of power and abusing the donor so that the attorney is aware of the criminal sanctions.

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We trust that our submission will assist the Committee in its enquiry into powers of attorney.

Yours faithfully
Hunt & Hunt



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