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Over recent months, there have been a number of references in the print media to aspects of elder law. The frequency of articles on elder law topics confirms the growing awareness of elder law as an area of social significance.

In this edition of the Elder Law Briefing, we focus on some of the current elder law issues.

Elder Abuse

At the end of 2009, New Yorker Anthony Marshall, the son of millionairess Brooke Astor, was found guilty of charges of defrauding his mother of millions of dollars.

Brooke Astor died at the age of 105. In her latter years she suffered from Alzheimer's Disease. In a blatant example of elder abuse, Anthony Marshall was found to have stolen millions of dollars of cash and assets from his ailing mother during her period of incapacity.

On 22 December 2009, Mr Marshall (who is 85 years old himself) was jailed for between 1 and 3 years.

As the Australian population ages, it is inevitable that the incidence of elder abuse will increase. The Federal Government has recently acknowledged the need to create protective measures to counter elder abuse.

The Federal Department of Planning and Community Development has announced the development of an *Elder Abuse Prevention Strategy Professional Education Program*. The program aims at training staff in financial institutions to recognise the signs of abuse.

Elder abuse is difficult to detect for a number of reasons. First, it often occurs at the hands of those close to the elderly person. For this reason, it often goes unnoticed and unreported.

Secondly, elder abuse is less likely to be physical in nature and more likely to be financial and or emotional, making the less visible signs difficult to identify.

The Victorian Government definition of elder abuse demonstrates the complexity of the issues. The definition states:

“Elder abuse is any act occurring within a relationship where there is an implication of trust that results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect”.

The importance of protecting the elderly has been gaining momentum in recent years.

For example, in April 2008 *Seniors Rights Victoria* was established. *Seniors Rights Victoria* enables access to a telephone helpline, advocacy and support, legal services and community education. *Seniors Rights Victoria* can be contacted on 1300 368 821.

Further, changes to the *Aged Care Act* that came into effect on 1 July 2007 made it compulsory for

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aged care providers to report acts or suspected acts of physical and sexual assault against a resident of an Aged Care facility.

Conclusion

The challenge for our lawmakers is to ensure that our laws are capable of adapting to the needs of an older population and are sufficiently robust to provide protection for our ageing demographic.

Neighbour Successfully Challenges Will

On 1 December 2009, the Supreme Court of Victoria found in favour of a woman who challenged the Will of a deceased neighbour (“the Willmaker”) in the case of *Unger v Sanchez* [2009] VCS 541

Facts

The Willmaker and her husband lived in Caulfield. They had no children. The Willmaker died in July 2007 leaving a Will made in February 2001. In her Will, the Willmaker left everything to her sister who lived in Spain (her husband having predeceased her).

The estate was valued at \$1,718,985.00.

A neighbour who lived three doors up the street made application to the Supreme Court claiming that the Will failed to make adequate provision for her. The basis of the neighbour’s claim was that in the last years of the Willmaker’s life, she assumed the role of carer and guardian for both the Willmaker and her late husband before his death.

The neighbour claimed that during this time she developed a close personal relationship with both the Willmaker and her husband. She claimed that she was regarded as their “adopted daughter”.

In support of her application for provision, the neighbour set out in detail the care and support that she gave to the Willmaker and her late husband. This included the following:

- Helping the Willmaker deal with a nervous breakdown.
- Daily contact with the Willmaker
- Attending medical appointments with the Willmaker
- Consulting and liaising with the Willmaker’s medical staff
- Having the Willmaker live with her after her discharge from hospital
- Maintenance and cleaning of the Willmaker’s house
- Daily visits to the aged care facility where the Willmaker eventually lived
- Attending the Aged Care facility after the Willmaker had a fall
- Making and attending hospital visits with the Willmaker after the fall
- Arranging transfer of Willmaker between aged care facilities
- Taking the Willmaker out on regular outings
- Supporting the Willmaker after her husband’s fatal heart attack including organising his funeral and clearing out his aged care facility room.

This kind of support and care continued for many years. The Willmaker said to the neighbour at one point that she regarded the neighbour as her daughter and wanted to formally adopt her. The neighbour did not take the suggestion seriously.

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The neighbour was reasonably well off financially. Her family home was worth approximately \$1M and she had an interest in two other rental properties and superannuation.

The Decision

The Court concluded that the relationship between the Willmaker and the neighbour contained a number of characteristics which are commonly found in a close relationship between a parent and a child and, in particular, between an elderly parent and a dedicated adult daughter.

The Judge classified the neighbour's financial position as "comfortable" rather than "wealthy". In the circumstances the Judge was not prepared to accept the argument that the neighbour's financial position negated the obligation the Willmaker had to make provision for her. The judge also stated that he regarded the circumstances as "quite exceptional".

The Court awarded the neighbour a gift of \$200,000.00.

This judgement highlights the Court's willingness to make provision for aggrieved people who can demonstrate that they were in a parent/child relationship with a Willmaker and were not adequately provided for in the Will. However, as the Judge stated in this case, the circumstances were "exceptional".

If you require advice about your rights under a Will or need assistance in defending a Will from a challenge, please contact Andrew Simpson on (03) 9843 2163.

Guardianship and Administration – The Role of VCAT

In the [April 2009 edition](#) of the Elder Law Briefing, the importance of appointing Powers of Attorney for legal/financial, medical and lifestyle decisions was discussed.

The article concluded by saying that if you need someone to act for you in these areas and you have not nominated an attorney or agent and no longer have the capacity to do so, an application to the Victorian Civil and Administrative Tribunal ("VCAT") may be required.

What is VCAT?

VCAT was created on 1 July 1998 as a cost effective way of allowing Victorians to access the civil justice system. The Guardianship and Administration List is part of the Human Rights Division of VCAT. It has the role of protecting people with a disability who are aged 18 years and over and who are unable to make reasonable decisions about themselves or their financial and legal affairs.

Powers of VCAT

VCAT's powers are broad. The following are examples of Orders that can be made in the Guardianship and Administration List:

- The appointment of a guardian or administrator to act on behalf of a person with a disability.
- The revocation, varying or suspension of an Enduring Power of Attorney (Financial) or Enduring Power of Attorney (Medical Treatment).
- The consent to the carrying out of a special procedure where the patient is incapable of giving consent and where the procedure is held to be in the patient's best interests.
- The making of an order for matters relating to medical or dental treatment either generally or of a particular kind.

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Applications to VCAT

The application procedure and hearing process at VCAT is intentionally aimed at simplifying the traditionally complex Court application procedure. The objective is to enable lay people to apply for an application and appear at the Tribunal. This is certainly the preferable method where the application does not involve a dispute.

However, it is often the case that an application to VCAT arises out of a dispute involving the exercise of an Enduring Power of Attorney's authority or other like disputes. In these scenarios, it is not uncommon for parties to be legally represented.

The Hearing

In order for a matter to be heard by the Tribunal, the sitting member must firstly be satisfied that the person who is the subject of the application has a "disability". A disability is defined in the *Guardianship and Administration Act 1986* as "an intellectual impairment, mental disorder, brain injury, physical disability or dementia".

Therefore, it is necessary to support an application with a medical report evidencing a disability.

However, the mere existence of a disability does not necessarily mean that VCAT will make an order in relation to the subject person. This is particularly the case where there is a less respective means of protecting the best interests of the person with a disability.

Can I Avoid going to VCAT?

The best way of avoiding an application to VCAT is by preparing Powers of Attorney nominating others to make legal/financial, medical and lifestyle decisions for you in the event that you are unable to make such decisions for yourself. The preparation of Powers of Attorney can avoid the anxiety, dispute and cost of applying to VCAT and ensures you determine who will make those decisions for you should the need arise.

The Moores Legal Elder Law Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

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DISCLAIMER: *This Elder Law Briefing is of a general nature only. Specific legal advice should be sought rather than relying on this newsletter.*

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