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In early July, Andrew Simpson, head of our Elder Law Group was a panelist at the Uniting Aged Care's *Health Play – "Four Funerals in One Day"*, written by Alan Hopgood. The play explored the importance and value of stories in palliative care and the issues encountered in that sector.

In the discussion that followed the play, the importance of recording wishes for future medical treatment emerged as the

area of greatest concern for those present. Our first article discusses effective ways of ensuring that medical wishes are honoured.

The second article looks at a provision claim brought against an estate by a de facto partner. We trust you will find this edition of Elder Law Briefing of assistance and interest.

## Advance Care Plans

While the significant advance in medical treatment in the past 50 years has saved countless lives, it has also created complex and emotionally charged dilemmas for family members. When a patient is no longer able to communicate their wishes, family members are often left to determine the extent of ongoing medical treatment. Such medical advancements are now keeping many people alive in circumstances that they would never have chosen for themselves.

The Austin Hospital in Victoria is one particular institution that is assisting Australians to become actively involved in preparing a personalised Advance Care Plan through its "Respecting Patient Choices" program.

An Advance Care Plan is an innovative process which contemplates and records a person's health care wishes in advance. It is a document that is prepared while you have capacity but only comes into effect, if and when, your health deteriorates and you are no longer able to make or communicate your treatment wishes.

The Respecting Patient Choices program recommends the inclusion of a number of steps in an Advance Care Plan.

1. **The appointment of an Enduring Power of Attorney (Medical Treatment).** This document allows the appointment of a medical agent to make medical decisions on your behalf, including the refusal of medical treatment. The authority given only comes into effect when you have lost capacity.
2. **The completion of a Refusal of Treatment Certificate ("RTC").** This document enables a patient to refuse medical treatment for a current medical condition subject to a number of stringent requirements. RTCs are discussed in more detail in our March 2008 Elder Law Briefing.
3. **Preparing a Statement of Choices.** A Statement of Choices is a document that records your future health care wishes, including the following
  - whether you wish to receive life prolonging treatments or not,
  - whether CPR (Cardio Pulmonary Resuscitation) is to be instigated; and
  - the circumstances in which any such treatment is to be instigated, refused or discontinued.

It can also include an expression of your values and your wishes should you be close to death and can specify future situations that you would find unacceptable in relation to your health status.

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A Statement of Choices is intended to inform your medical attorney, family and doctor to assist them in making decisions if you are unable to make them for yourself. The Statement of Choices is a guide only and is not legally binding upon your treating doctors or family members. The document should be signed by you and witnessed.

Moore's Legal can assist with the preparation of Medical Powers of Attorney and a Statement of Choices.

Further information regarding Advanced Care Plans can be found at [www.respectingpatientchoices.org.au](http://www.respectingpatientchoices.org.au).

## Court of Appeal Confirms Provision for De Facto Partner

A recent appeal decision of the Victorian Court of Appeal, *Forsyth v Sinclair* [2010] VSCA 147, confirms that under Victorian law, a de facto partner has a good basis for a claim against their deceased partner's estate if adequate provision has not been made for them in their partner's Will.

### Background

Ms Sinclair (the claimant) met Malcolm Forsyth (the deceased) in the early 1990s. By April 1992 the two were in an intimate relationship. At the initial trial, the judge found that because the relationship had continued for twelve years (until the deceased died in 2004), the two had become the "shaping force" in each other's lives. They had shared "nearly all the most significant moments in their lives".

Twelve independent witnesses, including friends of the couple and members of Ms Sinclair's family, gave evidence that the two had been in an intimate relationship. There was also considerable objective evidence of the relationship, including telephone records and letters addressed to the couple.

The deceased's last Will was made in 1973 - more than 30 years before the deceased passed away and nearly 20 years before he met Ms Sinclair. The Will appointed the deceased's brother, Campbell Forsyth, as executor and left the entire estate to him.

### The law

Under the relevant Victorian legislation, the Court will only have jurisdiction to award a person provision from a deceased's estate where:

1. the deceased has a *responsibility* to provide for that person; and
2. the deceased's Will does not make "adequate provision" for the "proper maintenance and support" of that person.

The Court is required to consider a large list of factors set out in the Administration and Probate Act 1958 when determining these questions.

### The Decision of the Trial Judge

The trial judge held that the relationship between the deceased and Ms Sinclair gave rise to an obligation on the deceased to make adequate provision for Ms Sinclair in his Will. The judge awarded Ms Sinclair half of the deceased's estate.

### The Appeal

Campbell Forsyth (as executor) appealed the decision, arguing that the judge was incorrect:

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1. in finding that there was a relationship between the deceased and Ms Sinclair; and
2. even if there was a relationship, in finding that the relationship gave rise to an obligation to provide for Ms Sinclair; and
3. even if there was an obligation, in awarding half of the deceased's estate to her.

Mr Forsyth based his argument on the following factors:

- That the deceased had not told him (his brother) about the relationship;
- That Ms Sinclair remained married to her previous husband throughout the relationship and continued to live at the marital home in Croydon;
- That the deceased and Ms Sinclair maintained separate finances; and
- That Ms Sinclair (a nurse) had allowed the deceased to live in an untidy house.

Mr Forsyth said that even if there was a relationship, this was not a conventional *de facto* relationship, so the deceased had no obligation to provide for Ms Sinclair.

The appeal judges unanimously held that the relationship between the deceased and Ms Sinclair could be described as a *de facto* relationship and there was strong independent and objective evidence to support this finding.

One interesting aspect of the Appeal Court decision is its statement that the circumstances that give rise to an obligation to provide for another person "evolve in accordance with prevailing community views and attitudes". This signals the Court's willingness to be progressive in the way it approaches provision claims and the way it characterises relationships.

The Court confirmed that an award of half of the estate to Ms Sinclair was not outside the range of orders that could be made by a judge in the reasonable exercise of their discretion.

## Conclusion

The judgment of the Court of Appeal in this case highlights the necessity for a Will to accurately reflect current personal circumstances. It is also a reminder that every Willmaker needs to consider carefully those people to whom an obligation might be owed.

Moore's Legal can advise on all aspects of Family Provision claims.

### The Moore's 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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