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Guardianship law review

It is a source of confusion and frustration for clients and lawyers alike that the law in Victoria which relates to "guardianship" (and powers of attorney) results in three separate documents being required to cover all eventualities:

1. (Enduring) Power of Attorney (Financial);
2. Enduring Power of Attorney (Medical Treatment); and
3. Appointment of Enduring Guardian.

Each document is governed by a different Act of Parliament and each is subject to different 'formalities' in its preparation. There is obvious overlap between the three types of powers of attorney. For example, it is not immediately obvious why power to act as a person's guardian does not include a power to oversee their medical treatment.

It is also not uncommon for more than one power to be needed to cover a set of circumstances – for example, where a decision is made to move a person to supported accommodation, it is the guardian who makes the decision regarding the choice of accommodation but the financial attorney (or Administrator) who must sign the relevant documentation.

It is not unreasonable to expect that confusion will arise about how the various powers operate, which may lead an attorney to inadvertently act beyond their powers or, more seriously for the donor, enable them to abuse their powers and act in a manner that is not consistent with the donor's interests.

The Victorian Law Reform Commission (VLRC) is currently undertaking a review of these "guardianship" laws with a view to preserving individuals' dignity, autonomy and independence, particularly in the context of Victoria's ageing population and the changing demographic of the "clients" of the Office of the Public Advocate (Victoria's "public" guardian).

The VLRC's stated purpose of the review is "to ensure that guardianship and administration law in Victoria is *responsive to the needs ... and advances, promotes and protects the rights* of people with an impaired decision making capacity".

The final report was originally due on 30 June 2011, but that deadline has now been extended to **23 December 2011**. We will prepare a more detailed review of the recommendations once that report is released.

In the interim, further information about the review is available at the VLRC's website: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Guardianship/> (current as at publication).

Editorial

Welcome to the latest edition of the Elder Law Briefing. In this issue we add clarity to the terms that define guardianship. With an ageing population, the Victorian Law Reform Commission is currently reviewing the laws to remove current confusion. We also discuss two cases dealing with disputes that arose from wills.

If any of the matters raised in the Briefing resonate with you or your clients, or if you would like to discuss a matter with us, we are ready to take your call.

Andrew Simpson
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Andrew and the Elder Law team advise clients on a range of issues including:

- Wills and estate administration (including applications for Probate)
- Applications for Letters of Administration on intestacy
- Powers of Attorney (financial, medical and guardianship)
- Guardianship and Administration including applications to VCAT
- Aged care advice including review of agreements
- Retirement village advice
- Social security advice
- Age discrimination
- Reverse mortgages
- Superannuation
- Business succession planning
- Charitable giving
- Estate litigation including
 - Wills disputes including defending and challenging Wills
 - Testator family maintenance claims acting for both executors and claimants
 - Testamentary capacity and undue influence cases

Make sure you get what you paid for

Some willmakers use their will as an opportunity to create a perpetual memory to themselves or someone close to them.

This is sometimes done by way of a legacy or gift to a charitable organisation that is subject to a condition that there be a perpetual acknowledgement or the granting of naming rights.

Gifts of this nature can result in dispute and difficulties in the longer term. The case of *Horesh v The Sephardi Association of Victoria & Ors* is an interesting example.

Facts

In the late 1970's, the Sephardi Association of Victoria ("SAV") purchased property at 73 Darling Road, East Malvern and converted the existing house into a synagogue to cater for the religious needs of the Sephardi congregation. The synagogue was named "The Sassoon Yehuda Synagogue".

In about 1990, the SAV decided to sell the East Malvern property with the intention of establishing a new synagogue at 79 Hotham Street, East St Kilda in the future. This led to a dispute concerning the name of the new synagogue which resulted in litigation between Sassoon Yehuda's son, Albert Yehuda ("Mr Yehuda"), and the SAV.

An agreement was reached which provided that when the new synagogue was created on the site, the SAV would name the new synagogue "The Sassoon Yehuda Synagogue" in perpetuity. The agreement did not contemplate that the new synagogue may later be extended to include areas not used for religious purposes.

Subsequently, a new synagogue was established at 79 Hotham Street, St Kilda. It was constructed with the assistance of a ten year loan from Mr Yehuda to the SAV which was secured by a registered first mortgage over the property. When it was completed in November 1994, the new synagogue was named the "Sassoon Yehuda Sephardi Centre". That name appeared on the front facade of the new synagogue building.

In about 2002, the SAV sought to extend the premises in order to provide additional facilities including a large communal hall, commercial scale kitchen and other office space. A fund raising campaign was launched and a brochure prepared showing the proposed extension and the list of naming rights that would be attached to donations of the specified amounts.

Naming rights for the "entire extension of the synagogue" were offered for a donation of \$450,000. Naming rights for the new "hall and lighting" were offered for a donation of \$125,000.

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Mr Yehuda passed away on 4 July 2007. In 2008 Mr Yehuda's executor agreed to provide financial assistance to the SAV for proposed extension works by forgiving the 1990 loan and providing a further loan. The executor was made aware of the option of obtaining naming rights for the entire extension but declined the offer on behalf of the estate. Instead, the executor sought the naming rights to the new hall in return for the forgiveness of the original loan and the advancement of a further loan.

When the extension works were completed, the ground floor hall of the extended premises was named "Albert Sassoon Yehuda Hall".

A dispute arose in 2009 when Mr Yehuda's executor became aware that the words "Lyndi and Rodney Adler Sephardi Centre" were inscribed over the front entrance to the extended premises.

Mr Yehuda's executor brought legal action against the SAV, claiming Mr Yehuda, and later his estate, had paid for and continued to own the exclusive, perpetual naming rights over the synagogue.

The Supreme Court decided that Mr Yehuda's estate had received precisely what it had bargained for –

- The naming rights for the synagogue constructed in 1994 pursuant to the agreement that settled the initial litigation; and
- The naming rights to the new hall completed as part of the subsequent extension of the building.

The Court concluded that the SAV was free to name the other parts of the extended premises as it saw fit.

Conclusion

This case highlights the importance of ensuring that any understanding or intention regarding perpetual rights and obligations, whether in a will or other document, is clear and unambiguous. Ultimately, it comes down to the wording. Careful drafting will ensure that you get what you paid for.

Strike one, you're out! - Supreme Court dismisses challenge to a will

In the recent Victorian Supreme Court decision of *Jackson v News*, decided under the new *Civil Procedure Act 2010* (effective from 1 January 2011), a challenge to a will was summarily dismissed by the Court early in the pre-trial stages.

Facts

Charles Sandison died a widower aged 88. He had no children. He left an estate valued for probate purposes at approximately \$1.1 million.

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Need a speaker?

Our Elder Law team regularly presents seminars and workshops to accountants and financial planning organisations and community groups. We tailor our presentations to the specific needs of your organisation or audience.

Andrew Simpson is an adjunct lecturer in estate planning at Charles Sturt University in the Masters of Financial Planning course. Andrew is also the author of the chapter on Estate Planning in the Australian Master Financial Planning Guide published by CCH.

To discuss your needs, or to book a speaker, please contact Andrew Simpson.

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By his will, the deceased left his nephew a cash legacy of \$100,000 and half of the remaining balance of the estate. In all, this totalled approximately \$250,000. The nephew challenged the will under Part IV of the *Administration and Probate Act 1958 (Vic)* arguing that his uncle was akin to a "father figure" and had failed in his responsibility to make adequate provision for his (the nephew's) proper maintenance and support.

The nephew's evidence in support of his claim was put by way of affidavit.

Before filing any evidence in opposition to the nephew's claim, the executor, on behalf of the estate, made application to the Supreme Court to have the matter dismissed. This application was successful.

In allowing the application, Associate Justice Mukhtar held that:

[t]he facts here are bound to lead to the conclusion that the plaintiff was never dependent on his uncle and just because they had much in common and it seems adored each other is not enough to conclude there was a moral duty to provide for him more than was already provided. There is nothing to displace the freedom that the deceased had to deal with his estate in the way he has.

Conclusion

This decision of the Supreme Court demonstrates the Court's willingness to dismiss "frivolous" claims. It also makes it clear that will challenges brought by parties who are not immediate family members of the deceased run a real risk of failure, with cost consequences for the applicant.

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.

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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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 Briefing.

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