

Submission No.	68
Date Received	

RECEIVED
11 DEC 2006
BY: LACA

Trustee Corporations Association of Australia

Submission to
House of Representatives
Legal and Constitutional Affairs Committee

Inquiry into Older People and the Law

November 2006

Introduction

The Trustee Corporations Association of Australia (TCA) is the peak representative body for the statutory trustee corporations industry in Australia.

Our 17 member organisations include all of the Public Trustees and the great majority of the 11 private trustee corporations (see attachment).

Trustee corporations provide a wide range of wealth management products and services to individual, family and corporate clients. Services include:

- estate planning
- administering deceased estates
- acting as trustee of personal trusts
- administering client assets under Powers of Attorney
- acting as financial manager for people unable to look after their own affairs
- administering charitable trusts and foundations
- acting as trustee or administrator for superannuation funds
- acting as corporate trustee / custodian for managed funds, debenture and note issues, and securitisation programs

Each year, our members:

- administer about 11,000 deceased estates
- manage assets under attorney / agency arrangements or court orders for about 45,000 people
- administer over 1,700 charitable trusts
- manage about 20,000 other trusts

We are pleased to offer comments to the Committee's *Inquiry into Older People and the Law*, particularly as a core focus of our members' business is meeting the needs of the ageing population.

Trustee corporations have been acting as attorney for people lacking capacity for many years - they are licensed and regulated by State/Territory governments, and

have the necessary expertise and resources to properly handle the task. They also offer independence, accountability, and perpetuity.

This submission deals with the specific issues of fraud and financial abuse affecting older Australians, and looks at measures to address these concerns.

Comments

The challenge facing older people

For many elderly people, managing their financial affairs can become a challenging and potentially stressful task. This is particularly so when common conditions associated with ageing, such as dementia, are involved.

Coping with this challenge is made more difficult by the complexity of the legal framework and the taxation system (notwithstanding the initiatives in the Commonwealth Government's recent 'Simpler Super' project).

Elderly people's financial assets these days are increasingly likely to comprise a greater range of financial products than in the past – eg: shares, managed funds, and property (possibly including interstate assets such as a holiday house or investment property).

Further, people are living longer and may need assistance with managing their assets for quite a few years. This could place increasing strain on well-intentioned family members or carers who often assist the elderly with their financial affairs.

Whilst errors or mismanagement may sometimes occur in those situations, the consequences might not be overly detrimental to the wellbeing of the elderly person involved.

Unfortunately, deliberate financial abuse and exploitation of the elderly also occurs. This is of greater concern as it is likely to have a more detrimental impact in terms of leaving older people without sufficient funds to maintain a reasonable standard of living during their later years of life.

Meeting the challenge

It is generally wise for people to give early attention to ways in which their financial assets can be managed and protected.

In terms of reducing potential financial abuse of older people, a Power of Attorney is particularly important.

A general Power of Attorney permits a person (the donor) to confer legal authority on another person (the attorney) to make various financial (and sometimes other) decisions on behalf of the donor - eg while the donor is overseas for an extended period. This power ceases to have effect when the donor revokes it or loses mental capacity.

An Enduring Power of Attorney (EPA), on the other hand, remains operative after the donor loses mental capacity, and thus is a valuable means of ensuring that older people's wishes in relation to their financial affairs continue to be carried out.

An EPA is a practical, flexible and relatively cheap instrument, which can be revoked or altered whilst ever the donor has legal capacity.

The fact that legislation covering powers of attorney is State / Territory based can add to the complexity of managing the financial affairs of older people.

However, there have been steps taken by the respective governments in recent years to strengthen formal power of attorney requirements, achieve greater uniformity across Australia and enhance recognition of interstate instruments¹.

Recent improvements

Recent improvements in the requirements relating to the execution and operation of EPAs have overcome some of the uncertainties that previously existed in respect of the creation and operation of these instruments. The changes, which generally can be expected to help protect donors, include:

- o providing information in the instrument itself aimed at giving the donor

¹ State and Territory governments have also developed model legislation covering the making of a will, another important instrument that elderly people in particular should prepare.

To make a valid will, a person must:

- o understand that they are making a will,
- o exercise genuine free choice,
- o understand the property being disposed of and the manner of its disposition, and
- o be free of mental disorder.

Specific legal requirements must be met and precise meaning conveyed. If the language in the document is ambiguous, it may be necessary for the Court to provide judicial interpretation. Apart from adding to costs, the outcome may fail to reflect the wishes of the deceased, despite best endeavours.

Thus, professional advice should be considered when preparing a will, particularly if the prospective estate is complex, or the family situation involves a beneficiary, such as a disabled child, with special needs.

a full appreciation of the nature and importance of the document, eg:

- the desirability of the donor seeking legal advice prior to execution;
 - the fact that the power is not to be used after the donor's death;
 - specifying conditions and limitations that attach to the attorney's powers;
 - noting that health and lifestyle decisions are made by guardians and not attorneys;
 - highlighting that the attorney has a responsibility to always act in the best interest of the donor, to keep the attorney's own money and property separate from that of the principal, and to keep appropriate accounts and records; it is important that the appointed attorney not only be a party trusted by the donor to handle the fiduciary responsibilities involved, but also be competent to do so.
- the donor must specify the time that the power is to commence, ie:
 - from the time the document is executed,
 - from a certain date; or
 - on a particular event, such as the donor being deemed to have lost capacity;
 - requiring the donor to specify whether or not the attorney can take a benefit (or confer a benefit on a third party) and if so, what is to be the extent of that benefit; this avoids unlimited access of an attorney to the donor's assets without express prior approval;
 - tighter witness requirements, which aim to ensure that an appropriate person attests that the nature and importance of the document was explained to, and appeared to be understood by, the donor;
 - the need for the attorney to formally accept the appointment; this ensures that the nominated person is aware that they have been

nominated, and has the opportunity to decline. It should make it more likely that a person suitable and available takes on the role. Having the attorney's signature on the document also assists financial institutions etc in verifying the attorney's identity when the power is being used;

- o allowing for greater recognition of EPAs prepared in other States and Territories.

Possible further improvements

1. EPA register

There have been suggestions that a central (electronic) register of EPAs should be established. At present, EPAs generally only need to be registered if the attorney is going to lease, sell or mortgage the donor's house or, in some cases, sell / deal in the donor's shares.

Uncertainty about who might have been nominated to look after the financial affairs of a particular person can cause practical problems.

We are aware of situations where a person has lost capacity and an administrator has been appointed by the Court, only to later discover that a member trustee corporation had earlier been appointed by that person as their attorney under an EPA.

Extending registration to all EPAs would seem to offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under EPAs by the authorities.

Also, were such a register publicly accessible, the bona fides of an attorney could be more readily checked.

In our members' experience, many banks and other institutions have 'over-the-top' and / or inconsistent processes before accepting the validity of an EPA. A clear process for being recognised as the attorney would be a useful practical step.

A non-compulsory register might be of limited value.

Further, if registration were to be adopted, it should be done on a national basis. Concerns would arise with regard to cross-recognition and jurisdiction-hopping if EPAs were registered in some jurisdictions only.

On the other hand, a register system potentially would be very costly.

It could also raise privacy concerns. It is possible that many elderly people would elect to do without an EPA if they felt that their privacy would be compromised by registration. If this were the case, a registration requirement might prove counterproductive.

We believe that this issue warrants further careful thought and consultation with interested parties.

2. Strengthening reporting by and monitoring of attorneys

Whilst attorneys, administrators and trustees all act in a fiduciary capacity, only administrators and trustees are required to invest funds under their control in accordance with the prudent person principle, as codified in the various regional *Trustee Acts*.

Consideration might be given to attorneys also being required to manage a donor's funds in accordance with that principle.

Further, attorneys could be required to submit regular reports of their financial dealings under an EPA, eg an annual statement (our members have found that there is often uncertainty on the part of non-professional attorneys as regards the nature of the records they are required to keep).

Enhanced monitoring of attorneys might take the form of auditing the submitted accounts on a random basis, which could be expected to help discourage inappropriate behaviour.

Such a step would require more resources for the relevant regulatory bodies, and the added costs involved would need to be weighed up against the expected benefits.

Some trustee corporations already carry out a similar function in terms of reviewing the activities of private administrators appointed by Courts and tribunals in various circumstances, eg to manage intestacies or the affairs of people with impaired decision-making abilities, and would be well placed to take on a similar role in respect of private attorneys.

Capacity assessment

Deciding exactly when a person has lost their mental capacity is a very difficult issue.

This, of course, is crucial in terms of their legal ability to execute a will or power of attorney, or in determining when an EPA should be enforced.

Questions that often arise include:

- what is considered proof of loss of capacity?
- can an attorney rely on a GP's certificate or is an expert's report required?

Also, a person can be legally capable in respect of some aspects of their affairs but not others (eg as in Qld).

As is the case with other areas of regional legislation, efforts are being made to achieve greater uniformity of approach across the various jurisdictions, which would be helpful in dealing with many of the issues associated with the ageing population.

Attachment

Trustee Corporations Association of Australia Members

- ANZ Executors & Trustee Company Ltd
- Australian Executor Trustees Ltd
- Elders Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee New South Wales
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- Trust Company Ltd
