ELDER ABUSE THROUGH THE LENS OF THE GUARDIANSHIP DIVISION OF NCAT

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1 Abuse perpetrated on the vulnerable, including the elderly, is sadly not a new phenomenon. Since the 1980s there has been growing public recognition of the extent and scale of elder abuse and the need to protect older people[1] from abuse.

2 In this paper I adopt the definition of elder abuse used by the World Health Organisation (**WHO**): "a single, or repeated act, or lack of appropriate action, occurring within any relationship **where there is an expectation of trust** which causes harm or distress to an older person".[2]

3 Elder abuse can take many forms including neglect, physical abuse, sexual abuse, psychological abuse, and financial abuse.

4 A study conducted by the Australian Institute of Family Studies in 2020 into the prevalence of elder abuse in Australia[3] revealed that approximately 14.8% of older Australians experience elder abuse, with the most common forms of abuse being psychological abuse (11.7%) and neglect (2.9%). Financial abuse was reported to be experienced by 2.1% of older Australians.[4] Those figures

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[1] In this paper the term 'older person' is used to mean people over the age of 65 and Aboriginal and Torres Strait Islander people over 50 years of age. See, *NSW Elder Abuse Toolkit: Identifying and Responding to the Abuse of Older People* 2016, p 75.

[2] World Health Organization, The Toronto Declaration on the Global Prevention of Elder Abuse (2002).

[3] Australian Institute of Family Studies, National Elder Abuse Prevalence Study Final Report (July 2021), p 2.

[4] The AIFS acknowledged that the incidence of elder abuse in Australia is likely to be higher than these figures suggest because people living in residential aged care, and people who

accord with the WHO's estimate that in high and middle-income countries, the incidence of elder abuse ranges from 2% to 14%[5]

5 It is estimated that by 2025, elder abuse will cost the Australian health care system about $350M, with additional costs being borne by the policing, legal, social welfare and other response services.[6]

6 Unsurprisingly, given its prevalence, the NSW Civil and Administrative Tribunal (**NCAT**) sees many examples of elder abuse throughout its various jurisdictions. NCAT's Consumer and Commercial Division sees cases where an older person's tenancy has been put at risk because of the actions of an adult child. NCAT's Occupational Division determines complaints about health practitioners concerning their care and treatment of older patients. Many of the applications made to NCAT's Guardianship Division involve allegations of elder abuse

7 This paper focuses on the experience of the Guardianship Division in relation to elder abuse, in particular, in the context of the appointment of enduring guardians and attorneys. It will:

- provide an overview of the Guardianship Division's powers in relation to enduring appointments
- examine several cases determined by the Guardianship Division which involved allegations of elder abuse

lacked cognitive capacity to participate in the study, were excluded from the study: Australian Institute of Family Studies, National Elder Abuse Prevalence Study, Final Report (July 2021) p 2.

[5] Australian Law Reform Commission's report "Elder Abuse - A National Legal Response" (ALRC Report 131), May 2017 (**ALRC Elder Abuse Report**) [1.1].

[6] National Older Persons Legal Services Network, Submission No 363 to Australian Law Reform Commission, Protecting the Rights of Older Australians from Abuse (March 2017) p. 22.

- touch on law reform proposals designed to mitigate the risk of enduring appointments being used to facilitate elder abuse.

Overview

8 Australia has an ageing population. In 2016, 15% of the population was aged 65 or over. It is estimated that by 2056, 8.7 million Australians, or 22% of the population, will be over 65 years of age.[7]

9 About 1 in 10 Australians aged 65 and over are now living with dementia.[8] Without a breakthrough in medical science, the number of people living with dementia is expected to reach 536,000 by 2025 and 1,100,000 by 2056.[9]

10 When the NSW Guardianship Board[10], the first NSW Tribunal to be given power to appoint substitute decision-makers for people with decision-making disabilities, opened its doors in 1989, about 50% of applications received by the Board, were made in respect of people with intellectual disabilities.[11] People with dementia accounted for only a third of applications.[12] Three decades later, people with dementia account for most applications made to the Guardianship Division.[13] Applications relating to people with intellectual disabilities have slipped into second place and now represent 17% of all applications.

11 The increase in the proportion of applications made to the Guardianship Division in respect of people living with dementia, corresponds with an increase

[7] Australian Institute of Health and Welfare. See *National Plan to Respond to the Abuse of Older Australians (Elder Abuse)* 2019-2023, p 4.
[8] Australian Institute of Health and Welfare (2016). Australia's health 2016. Australia's health series no. 15. Cat. no. AUS199. Canberra: AIHW.
[9] Brown L et al (2017) *Economic Cost of Dementia in Australia* 2016-2056 Canberra: National Centre for Social and 6 Economic Modelling, University of Canberra.
[10] The NSW Guardianship Board was established in 1987 under the *Disability Services and Guardianship Act* 1987 (NSW) (later renamed the *Guardianship Act* 1987 (NSW)). In 1998 the Guardianship Board became the "Guardianship Tribunal". In 2013, the Guardianship Tribunal was one of 22 separate tribunals to be consolidated into the NSW Civil and Administrative Tribunal (NCAT) and is now known as the "Guardianship Division of NCAT".
[11] NSW Guardianship Board, *The first two years*, August 1991, p 21.
[12] NSW Guardianship Board, *The first two years*, August 1991, p 21.
[13] In 2020/2021 40% of applications made to the Guardianship Division were made in respect of people with dementia. NCAT Annual Report 2020-2021, p 41.

in the number of applications made in respect of older people. In 2021/2022, 57% of applications made to the Guardianship Division were made in respect of people over 65 years of age; 20% of applications were made in respect of people over 85 years of age.[14] In contrast, in its first 12 months of operation, 45.1% of applications made to the Guardianship Board were made in respect of people over 61 years of age.[15]

12 In its first 12 months of operation, the Guardianship Board received just over 2,000 applications.[16] In 2020/2021, the Guardianship Division received about 14,000 applications.[17] What do these figures say about the incidence of elder abuse in NSW?

13 First, it would be a mistake to assume that applications made to the Guardianship Division necessarily relate to concerns of elder abuse. Applications are made for many different reasons. Many appear to be benign, for example, where an older person with impaired decision-making ability enjoys the support of a loving family and friends and the sole reason an application is made is to satisfy an entry requirement of an aged care facility.[18] At the other end of the spectrum are applications where there is powerful evidence that the older person has been subjected to abuse over a prolonged period.

14 Second, Australia's ageing population and the consequent increase in the number of Australians living with dementia and other decision-making disabilities will invariably result in an increase in the number of applications made to the Guardianship Division.

[14] NCAT Annual Report 2020-2021, p 41.
[15] NSW Guardianship Board, *The first two years*, August 1991, p 25.
[16] NSW Guardianship Board, *The first two years*, August 1991, pp 22,23.
[17] 10,578 applications and 3712 end-of-term reviews of guardianship or financial management orders. NCAT Annual Report 2020-2021, p 42.
[18] Many aged care facilities require applicant residents who have not made an enduring appointment and appear to lack decision-making capacity, to provide evidence that they are subject to a guardianship order and/or financial management order.

15 Third, the increase in the number of applications is attributable in part to greater rigour being employed by Australia's financial institutions, residential aged care and service providers in dealing with people who purport to hold authority to act on behalf of an older person with impaired decision-making ability.

16 Nonetheless, while I cannot point to any empirical evidence to support this proposition, the anecdotal evidence of long-time staff and members of the Guardianship Division and its predecessor Tribunals is that over the past decade there has been a steady increase in the proportion of applications triggered by allegations of elder abuse.

Guardianship Division's jurisdiction: an overview

17 One of four divisions of NCAT, the Guardianship Division exercises what is commonly referred to as a "protective jurisdiction".

18 Applications can be made to the Guardianship Division for, among other things:

- guardianship orders (*Guardianship Act 1987* (NSW), Pt 3)
- financial management orders (*Guardianship Act*, Pt 3A)
- orders consenting to medical and dental treatments (*Guardianship Act*, Pt 5)
- review of the making, revoking or operation and effect of an enduring powers of attorney instruments (*Powers of Attorney Act 2003* (NSW), Pt 5, Div 4)
- review of the appointment of an enduring guardian (*Guardianship Act*, Pt 2).

19 NCAT and the Supreme Court of NSW exercise concurrent jurisdiction under the *Guardianship Act* and Pt 5, Div 4 of the *Powers of Attorney Act*. The

Supreme Court's "inherent jurisdiction" or "*parens patriae*" is not displaced by the *Guardianship Act* or the *Powers of Attorney Act*.[19]

20 With the concurrence of the Supreme Court, NCAT may refer proceedings relating to "a person's capability to manage their [financial] affairs" to the Court.[20] In addition, NCAT may refer an application made to it under the *Powers of Attorney Act* in respect of an enduring power of attorney or the revocation of an enduring power of attorney to the Supreme Court and vice versa.[21] In deciding whether or not to make such referral, the Supreme Court and NCAT may have regard to whether the application relates to the effect of an enduring power of attorney or revocation of enduring power of attorney on third parties; whether the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine and other matters the Supreme Court or NCAT considers relevant.[22]

Enduring appointments

21 In NSW, a person may appoint another person to make decisions on their behalf in relation to their person (usually, accommodation, health care, medical treatment) and their financial affairs. Those appointments come into effect when the person loses decision-making ability.

22 NSW remains one of several jurisdictions within Australia where a person must execute separate instruments to appoint a person to manage their personal affairs and their financial affairs. In the Australian Capital Territory, Northern Territory, Queensland and Victoria, a single instrument can be used to appoint a person(s) to make both financial and personal decisions.[23]

[19] Guardianship Act, s 8.
[20] Guardianship Act, s 25L.
[21] Powers of Attorney Act, s 34(1).
[22] Powers of Attorney Act, s 34(2).
[23] Australian Guardianship and Administration Council Elder Abuse National Projects, *Enduring powers of attorney (financial), Options paper,* December 2018, pp 18,19 https://www.agac.org.au/assets/images/agac-consultation-paper.pdf

23 The *Guardianship Act* governs the appointment by a person (the **appointor**) of another person (the **appointee**, **enduring guardian**) to make decisions in relation to the appointor's personal affairs. The *Powers of Attorney Act* governs the appointment by a person (the **principal**) of another person (an **attorney**) to make decisions in relation to the principal's financial affairs. In this paper I will refer to these appointments collectively as "**enduring appointments**".

NCAT's powers: enduring powers of attorney

24 Part 5 of the *Powers of Attorney Act* gives a "review tribunal", NCAT and the NSW Supreme Court, power, on the application of an "interested person", to review the making, revocation or the operation and effect of a "reviewable power of attorney", or to not carry out such a review: *Powers of Attorney Act*, s 36(1).[24] An "enduring power of attorney" is a "reviewable power of attorney".[25]

25 To be valid, an instrument creating the enduring power of attorney must satisfy certain requirements, including that it be "expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument".[26]

26 The Guardianship Division has broad powers with respect to enduring powers of attorney. On receipt of an application for review of the making, revocation or the operation and effect of an enduring power of attorney, the Tribunal may:

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[24] Section 35 (1) of the *Powers of Attorney Act* defines an "interested person" to mean: an attorney (including an attorney whose appointment has been purportedly revoked); the principal; any person who is: (i) a guardian of the principal (whether under the Guardianship Act 1987 or any other Act or law), or (ii) an enduring guardian of the principal under the Guardianship Act 1987; and, any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the welfare of the principal.

[25] Powers of Attorney Act, s 33(1).

[26] Powers of Attorney Act, s 19(1). In addition, the instrument must be witnessed by a person who is a prescribed witness (not being an attorney under the power) (s 19(2)); endorsed on, or annexed to the instrument, must be a certificate by the prescribed witness stating: they explained the effect of the instrument to the principal before it was signed; the principal appeared to understand the effect of the power of attorney; the person is a prescribed witness; the person is not an attorney under the power of attorney, and the person witnessed the signing of the power of attorney by the principal.

- decide to review or not review the making, revocation or operation and effect of the enduring power of attorney[27]

- if the Tribunal decides to exercise the discretion to conduct a review, make one or make one or more of the orders listed in ss 36(3)-36(12) of the *Powers of Attorney Act*[28]

- if the Tribunal decides not to make an order under s 36 of the *Powers of Attorney Act*, to treat the application for review as an application for a financial management order under Pt 3A (Financial Management) of the *Guardianship Act*.[29]

27 The making of a financial management order under Pt 3A of the *Guardianship Act* operates to suspend but not to terminate the enduring power of attorney.[30] However, if the Tribunal excludes from the financial management order a specified part of the principal's estate, the Tribunal may order that the power of attorney is to remain in force in respect of that part of the estate excluded from the financial management order.[31]

28 The orders available to the Tribunal under s 36 of the *Powers of Attorney Act* vary depending on the nature of the review being conducted, that is, whether it relates to the making, revocation or operation and effect of the enduring power of attorney.

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[27] Powers of Attorney Act, s 36(1).
[28] In *Susan Elizabeth Parker v Margaret Catherine Higgins & Ors* [2012] NSWSC 1516, Slattery J at [42], explained that ss 36(1) and 36(2) of the Powers of Attorney Act give the review tribunal, "two successive discretions". First, to "decide to review" the operation and effect of a reviewable power of attorney or "not to carry out such a review" (s 36(1)). If the review tribunal decides to exercise the discretion to review, it may exercise a further discretion "whether or not to make an order under [s 36]".
[29] Powers of Attorney Act, s 37(1).
[30] Powers of Attorney Act, ss 50(1),50(3).
[31] Powers of Attorney Act, s 50(4).

29 With respect to the making of a power of attorney, the Tribunal may make one or more of the following orders[32]:

(a) that the principal did or did not have mental capacity to make a valid power of attorney,

(b) that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:

(i) the principal did not have the capacity necessary to make it,

(ii) the power of attorney did not comply with the other applicable requirements of the *Powers of Attorney Act*, or

(iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence.

30 With respect to the revocation of a power of attorney, the Tribunal may[33]:

(a) make an order declaring that the principal did or did not have mental capacity to revoke a power of attorney,

(b) make an order declaring that the power of attorney remains valid (either in whole or in part) if the Tribunal is satisfied:

(i) the principal did not have the capacity necessary to revoke it, or

[32] Powers of Attorney Act, s 36(3).
[33] Powers of Attorney Act, s 36(3A).

(ii) the revocation is invalid for any other reason, for example, the principal was induced to make the revocation by dishonesty or undue influence.

31 With respect to the operation and effect of a power of attorney, if "satisfied that it would be in the best interests of the principal to do so or that it would better reflect the wishes of the principal", the Tribunal may make one or more of the following orders[34]:

(a) an order varying a term of, or a power conferred by, the power of attorney

(b) an order removing a person from office as an attorney

(c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office

(d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office

(e) an order directing or requiring any one or more of the following:

(i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal,

(ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power,

[34] Powers of Attorney Act, s 36(4).

(iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal

(iv) that the attorney submits a plan of financial management to the tribunal for approval

(f) an order revoking all or part of the power of attorney

(g) such other orders as the review tribunal thinks fit.

32 A review tribunal may declare that the principal did or did not have "mental capacity" to make or to revoke an enduring power of attorney.[35] In addition, a review tribunal may declare that the power of attorney is invalid, or the revocation of the power of attorney is invalid, if satisfied that the principal did not have the "necessary capacity" to make, or to revoke, the power of attorney.[36]

33 The term mental capacity is not defined by the *Powers of Attorney Act*. In the context of that Act, the concept of mental capacity is informed by the general law: *Szozda v Szozda* [2010] NSWSC 804 at [12]-[19] and [27]-[42]; *Scott v Scott* [2012] NSWSC 1541 at [173]. In deciding whether the principal did or did not have mental capacity to make or to revoke the subject power of attorney, the starting point is the presumption that the principal had the requisite mental capacity: *Murphy v Doman* [2003] NSWCA 249 at [36]; *Szozda v Szozda* at [20]-[21]. The question of whether the principal had the requisite mental capacity must be assessed by reference to the particular transaction and the time it was made: *Croft v Sanders* [2019] NSWCA 303 at [126], citing *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423 at 438 (*Gibbons*).

34 In *Gibbons*, the High Court stated, "the law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions." Rather, each

[35] Powers of Attorney Act, ss 36(3)(a), 36(3A)(a).
[36] Powers of Attorney Act, ss 36(3)(b)(i), 36(3A)(b)(i).

party to a transaction must have "capacity ... to understand the general nature of what he is doing by participating in that transaction." The complexity (or otherwise) of the transaction is one variable that must be considered when determining a person's capacity to enter it: *Croft v Sanders* at [126].

NCAT's powers: appointment of an enduring guardian

35 Part 2 of the *Guardianship Act* sets out the requirements for appointing an enduring guardian and revoking the appointment of an enduring guardian. In addition, it sets out the Tribunal's powers to review the appointment of an enduring guardian.

36 A person may appoint, by an instrument in writing, a person as his or her enduring guardian.[37] The appointor and the appointee must be 18 years of age or over.[38] A person who is directly or indirectly responsible for, or involved in, for fee or reward, the provision of medical services, accommodation or any other services to support the appointor in his or her activities of daily living, and the spouse, parent, child, brother or sister of that person, is ineligible for appointment.

37 A person may appoint two or more enduring guardians to act jointly, severally or jointly and severally.[39]

38 To be valid, the instrument appointing the enduring guardian must satisfy certain requirements which include that the instrument must be in the form prescribed.[40] In addition, to be valid, the instrument revoking the appointment of the enduring guardian must satisfy certain requirements.[41]

39 Unless revoked or suspended under Pt 2 of the *Guardianship Act,* an appointment has effect during such period of time as the appointor is a "person

[37] Guardianship Act, s 6.
[38] Guardianship Act, ss 6, 6B(1).
[39] Guardianship Act, s 6D.
[40] Guardianship Act, s 6C; Guardianship Regulation 2016 (NSW), cl 5 and Sch 1.
[41] Guardianship Act, s 6H.

in need of a guardian".[42] A person in need of a guardian is "a person who, because of a disability, is totally or partially incapable of managing his or her person".[43]

40 Unless otherwise stated in the instrument of appointment, an enduring guardian may exercise the following functions while the appointment has effect:

(a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live

(b) deciding the health care that the appointor is to receive

(c) deciding the other kinds of personal services that the appointor is to receive

(d) giving consent under Part 5 of the *Guardianship Act* to the carrying out of medical or dental treatment on the appointor

(e) any other function relating to the appointor's person that is specified in the instrument.[44]

41 The Tribunal may, on its own motion, and must, at the request of any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the appointor, review the appointment (or purported appointment) of an enduring guardian.[45] On review, the Tribunal may:

- revoke the appointment[46]

[42] Guardianship Act, s 6A.
[43] Guardianship Act, s 3(1).
[44] Guardianship Act, s 6E.
[45] Guardianship Act, s 6J(1).
[46] Guardianship Act, s 6K(1)(a)

- confirm the appointment, with or without varying the functions of the enduring guardian under the appointment[47]

- if satisfied it is in the best interests of the appointor to do so, deal with the application for review as an application for a guardianship order, financial management order, or both.[48]

42 The Tribunal may confirm the appointment (or purported appointment) of a person as an enduring guardian even where:

- the instrument that purported to appoint the person as an enduring guardian was not executed in accordance with the requirements of the *Guardianship Act*[49], or

- the person purporting to make the appointment had announced his or her intention to make the appointment but became incapacitated before an instrument making the appointment could be executed.[50]

43 The Tribunal must not revoke the appointment unless:

- the enduring guardian requested the revocation[51], or

- the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked.[52]

44 An enduring guardian may apply to the Tribunal for an order declaring that the appointment has effect.[53] The Tribunal may, by order, declare that appointment has effect, if satisfied that the appointor:

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[47] Guardianship Act s 6K(1)(b).
[48] Guardianship Act s 6K(3).
[49] Guardianship Act s 6K(4)(a).
[50] Guardianship Act, s 6K(4)(b).
[51] Guardianship Act, s 6K(2)(a).
[52] Guardianship Act, s 6K(2)(b).
[53] Guardianship Act, s 6M(1).

- is a person in need of a guardian, and

- has appointed the applicant as his or her enduring guardian.[54]

45 Where the Tribunal makes a guardianship order under Pt 3 of the *Guardianship Act* that order operates to suspend, for the duration of the order, all authority of the enduring guardian to exercise a function under the appointment.[55] If a person who is the subject of a guardianship order purports to appoint an enduring guardian, that appointment is of no effect.[56]

Misuse of enduring appointments

46 Enduring appointments have obvious benefits. They enable a person to plan for potential incapacity. They give effect to the person's "will and preference" by enabling the person to decide whom to entrust with authority to make decisions on their behalf in the event they lose decision-making capability. They operate to prevent a decision-making vacuum if the person loses the ability to make decisions about their estate/person. They facilitate the orderly management of the person's affairs, which may become complex, if their care and accommodation needs change because of incapacity.

47 However, if misused, enduring appointments have the potential to facilitate abuse and exploitation of the person who made the appointment. Once the appointment comes into effect, the incapacitated principal/appointor is unable to oversee the actions of the person to whom they have given broad authority to act on their behalf.

48 Four cases recently determined by the Guardianship Division illustrate the potential for misuse of enduring appointments.

BZD [2021] NSWCATGD 28

[54] Guardianship Act, s 6M(2).
[55] Guardianship Act, s 6I(1).
[56] Guardianship Act, 6I(2).

49 In January 2015, 83-year-old BZD executed instruments of enduring guardianship and powers of attorney, appointing her husband as her enduring guardian and attorney. English was not BZD's first language. She spoke in "broken English".

50 After her husband's death in May 2018, BZD continued to live in the family home in Sydney (the **family home**).

51 In late November 2019, BZD's son (the **Son**) took BZD to his residence in regional NSW purportedly for a short holiday. On 6 December 2019, accompanied by her son, BZD attended a local solicitor, Ms X, and executed instruments of enduring guardianship and enduring power of attorney, appointing the Son as her enduring guardian and attorney and one of her two daughters as substitute enduring guardian and attorney. The instruments were witnessed by Ms X but were not signed by the daughter.

52 Two weeks later, BZD returned to see Ms X and executed fresh instruments, again appointing the Son as her enduring guardian and attorney. However, on this occasion, BZD appointed Ms W as substitute enduring guardian and attorney. The instruments were signed by BZD and both appointees and witnessed by Ms X.

53 On each occasion BZD met with Ms X, she was accompanied by the Son who acted as her interpreter.

54 Acting as BZD's attorney, in March 2020 the Son sold the family home. He used the funds from that sale to purchase a residential property in his name and to place the balance of those funds in a bank account, also in his name. The Son claimed that he did so at his mother's request and that she said that his sisters "don't deserve to have anything". The firm in which Ms X was employed acted for the Son in the sale.

55 In March 2021, one of BZD's daughters made applications to NCAT seeking guardianship orders in respect of BZD and review of the operation and effect of

the power of attorneys made in December 2019. The daughter claimed that BZD had a decision-making disability due to dementia and advanced age, and that the Son was preventing BZD from having contact with other members of the family.

56 The Tribunal found that "BZD's funds had been mismanaged, the attorney's finances were intermingled with BZD's finances and her estate has been dissipated and that [the Son] had not acted in his mother's best interests"[57]. The Tribunal concluded that the Son had "obtained significant benefit as attorney by selling his mother's house and spending the proceeds almost entirely in a manner that benefits himself".[58] The Tribunal found that the Son has "squandered almost all of his mother's remaining estate and has effectively isolated her from the rest of her family".[59]

57 The Tribunal revoked the enduring appointments, committed the management of BZD's estate to the NSW Trustee and Guardian and made a guardianship order appointing the two daughters jointly as guardians for BZD.

CKS [2021] NSWCATGD 35

58 In August 2020, 80-year-old CKS appointed her niece (the **Niece**) as her enduring guardian. Fourteen months later, CKS's sister (the **Sister**) made an application to NCAT seeking review of that appointment. The Sister alleged that the Niece had neglected and abused CKS. When the application was made, CKS was on a respite placement at an aged care facility. In the 18 months before CKS's admission to the facility, the Niece had been living with CKS in a house owned by CKS.

59 The manager of the aged care facility stated that CKS told her that she wished to remain in the facility and did not want to return to live with the Niece. CKS had begged staff not to allow the Niece to take her home. The manager said that she could not agree to CKS's request because the Niece was CKS's

[57] BZD [2021] NSWCATGD 28 at [49].
[58] *BZD* [2021] NSWCATGD 28 at [49].
[59] *BZD* [2021] NSWCATGD 28 at [54].

enduring guardian and had notified the facility that CKS would be returning to live with her in the family home.[60]

60 CKS told the Tribunal that while living with the Niece she was "a prisoner in her own home", was lonely, was made to sit in a room all day, all services and outings had been cancelled and she was not allowed to have a bath or shower.[61] CKS said she believes the Niece is an alcoholic and that she is frightened of the Niece and does not want her involved in her care.[62] The Niece denied those allegations.

61 The Tribunal found that the Niece "continues to care for her aunt" and that for some time she and CKS had "a close and loving relationship"[63]. However, the Tribunal found that the "standard of care CKS was receiving in her home was at times not optimal", and this has resulted in CKS's distress and strong wish to not return to live with the Niece.[64]The Tribunal concluded that the appointment of the Niece as enduring guardian was "no longer workable" and decided to revoke that appointment.

62 The Tribunal went on to consider whether to exercise the discretion to treat the application for review of the appointment of the Niece as an application for a guardianship order and/or financial management order. The Tribunal concluded that while CKS had been diagnosed with dementia, the evidence did not support a finding that she "lacks capacity to make important life decisions". In reaching that conclusion, the Tribunal noted that the solicitor who had represented CKS was of the opinion that CKS was "competent from her manner and discussions" but was unaware that she had been diagnosed with dementia.[65] The Tribunal decided not to make a guardianship order or a financial management order.

[60] *CKS* [2021] NSWCATGD 35 at [19].
[61] *CKS* [2021] NSWCATGD 35 at [20].
[62] *CKS* [2021] NSWCATGD 35 at [28].
[63] *CKS* [2021] NSWCATGD 35 at [34].
[64] *CKS* [2021] NSWCATGD 35 at [35].
[65] *CKS* [2021] NSWCATGD 35 at [43].

63 In June 2020, ZKN appointed her nephew's wife as her enduring guardian and a family friend as her attorney. (The family friend was later found to have stolen money from ZKN.) In September 2020, ZKN appointed her nephew's wife as her attorney.

64 In June 2021, 94-year-old ZKN, while an inpatient at a public hospital, executed instruments purporting to appoint her grandson who lived in London (the **Grandson**) as her attorney and enduring guardian. Hospital staff made an application to NCAT seeking review of those appointments, contending that ZKN lacked capacity to make them.

65 The Tribunal was critical of the solicitor who had prepared the instruments appointing the Grandson as ZKN's attorney and guardian. The solicitor had also prepared the instruments in which ZKN appointed the nephew's wife and the family friend.

66 The Tribunal found it "concerning" that the solicitor:

- appeared to have failed to consider whether ZKN had capacity to provide instructions, notwithstanding her advanced age and that when she gave those instructions, she was receiving medical treatment while an inpatient at a public hospital

- failed to obtain a medical opinion regarding ZKN's capacity or to make any enquiries of the health practitioners treating ZKN while she was in hospital

- contrary to the NSW Law Society guidelines[66], failed to make file notes of his meeting with ZKN

[66] NSW Law Society*, When a client's mental capacity is in doubt: A practical guide for solicitors* (2016).

- appeared to rely mainly on his previous dealings to satisfy himself of ZKN's understanding of the enduring appointments.[67]

67 The Tribunal found that ZKN lacked the necessary understanding to appoint the Grandson as her attorney and enduring guardian. After reviewing the appointment the Tribunal decided:

- to make a financial management order
- to commit ZKN's estate to the management of the NSW Trustee and Guardian
- to revoke the appointment of the Grandson as enduring guardian, and
- to make a guardianship order appointing the Public Guardian as guardian for ZKN.

NKT [2021] NSWCATGD 31

68 Eighty-six-year-old NKT had limited education, was illiterate and had limited English.

69 In July 2018, NKT appointed one of her three children, a son, QAT, and daughter-in law as her joint and several enduring guardians and attorneys. In the 10 months following the death of NKT's husband in October 2019, QAT transferred most of NKT's assets, including the family home and over $500,000 in savings into his name.

70 Concerned about the management of NKT's finances, one of NKT's children made an application to NCAT seeking review of the appointment of QAT and his wife as NKT's enduring guardians and attorneys.

[67] *ZKN* [2021] NSWCATGD 34 at [31], [32].

71 The Tribunal found that, in July 2018, NKT probably had capacity to appoint QAT and his wife as her enduring guardians and attorney. After considering the conflicting evidence about whether QAT had prevented his mother from having contact with her other children, the Tribunal decided not to make a guardianship order. The Tribunal noted the inherent difficulty in making "an access function in a guardianship order work when the person is living in a private home with considerable involvement by one or more family members who have a very negative relationship with family members seeking contact".[68]

72 The Tribunal found NKT now lacked capacity to manage her financial affairs. The Tribunal decided it was in NKT's best interests to make a financial management order because of the transfer of NKT's money and property to QAT, which left NKT with "very limited money and property rights". The Tribunal committed the management of NKT's estate to the NSW Trustee and Guardian and recommended that the NSW Trustee and Guardian take action to recover from QAT the assets transferred from his mother.

Observations

73 In preparing this paper I was asked whether in my experience there were any red flags which tend to suggest evidence of elder abuse in proceedings before the Guardianship Division. The complexity of human nature and the human condition is such that there is often an entirely innocent explanation for conduct which may appear to evidence abuse and vice versa. Nonetheless, in the matters which come before the Guardianship Division, the following are commonly, but not necessarily, associated with some form of elder abuse:

- unscrupulous relatives or friends weaponising the older person's fear of being placed in residential aged care to facilitate the transfer of the older person's assets to the relatives or friend, or to advantage the relative or friend in some other way

[68] *NKT* [2021] NSWCATGD 31 at [72].

- a reluctance by the older person to disclose abuse because of feelings of shame and/or fear of being placed in residential aged care

- social isolation being used as a tool to pressure the older person to change their will, or to make or to change an enduring appointment

- a tug of war between family members, resulting in the older person being moved to live with different family members, often without any consultation with, less still the consent of, the older person

- such moves being accompanied by the older person making or changing enduring appointments and/or their will in favour of the family member with whom they are residing at the time, often within a matter of days of moving to their new place of residence

- the older person making multiple changes to their enduring appointments and/or their will over a short period, often using different solicitors

- the appointee, attorney or beneficiary arranging the consultation with the solicitor, accompanying the older person to that consultation and acting as interpreter for the older person

- frequent and unexplained changes of the older person's service providers and health practitioners

- decisions being made by others in relation to the older person's care, support and/or accommodation where the primary consideration appears to be the preservation of the older person's estate

- decisions being made in relation to the older person's home where the primary consideration appears to be retaining the home as a place of accommodation for an adult child and often their family.

Conclusion

74 Most enduring guardians and attorneys carry out their duties faithfully. However, the cases referred to above illustrate that enduring appointments can be used by the unscrupulous as a safe harbour to exploit the principal. In making that observation, I am not suggesting that the risks posed by enduring appointments necessarily outweigh their advantages. The experience of the Guardianship Division is that elder abuse is not confined to people who have made enduring appointments. The Guardianship Division see numerous cases where an older person has not made an enduring appointment and are exploited and abused by a person in a position of trust.

75 In recent years, there have been calls for greater regulation because of:

> "growing awareness of the potential for this convenient legal instrument [enduring appointments] to be abused by the very representatives entrusted to wield authority over the affairs of persons with dementia."[69]

76 The 2017 Australian Law Reform Commission (**ALRC**) Report *Elder Abuse – A National Legal Response* made several recommendations about enduring appointments aimed at strengthening the "important role that enduring appointments have for older people seeking to protect against a loss of decision-making ability in the future, by reducing the potential for those appointments to be misused".[70] The ALRC recommended:

- improved safeguards to minimise the risk of abuse of enduring documents

- giving state and territory administrative and civil tribunals jurisdiction to award compensation when duties under an enduring document have been breached

[69] Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, *'Protecting the rights of those with dementia through mandatory registration of enduring powers?: A comparative analysis'* (2015) 36(2) Adelaide Law Review 360.
[70] ALRC Elder Abuse Report, pp 12, 13.

- establishing a national online registration scheme for enduring appointments, and

- developing a national model enduring document.

77 While some progress has been made, including the release by the Australian Council of Attorneys-General of a National Plan to Respond to the Abuse of Older Australians[71], these recommendations remain works in progress.

78 Finally, elder abuse demonstrates a fundamental lack of respect of the more powerful for the vulnerable. Courts and Tribunals play an indispensable role in protecting older Australians from abuse. But this is a broad *social* problem against which the legal profession, especially the solicitors' branch, good families, legislatures, governments, and the wider community must be constantly vigilant if our vulnerable older people are to be properly protected. Ultimately, respect is the key. The treatment of elders is not just a test of personal character in a family context. As we have learned in recent years, it is a litmus test of the fundamental values of this society.

[71]https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023.