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VOLUME!**

2024 Australian Elder Abuse Conference

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# Australian Elder Abuse Conference

## Litigating Elder Abuse and Coercive Control - Challenges and Trends

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# Syd on a Sunny Afternoon

## Think

- Sleepy River
  - Rickety old wooden ship (Pirates of the Caribbean-style)
  - Syd, stands on the deck, grey-haired, tall, but a little stooped
  - Syd is smiling as he looks out across the river and watches a fish jumping out of the water
- 
- **Syd is a Survivor of Elder Abuse - both physical and financial**

# What I'll Discuss

## What I'll talk about:

- Elder abuse and litigating civil cases – challenges and protective steps
- Coercion - as a civil remedy
- Coercion - and where 'it is at' in terms of criminal laws
- Elder Abuse in context of Domestic Violence issues - some practical problems
- Some trends in elder abuse
- A couple of interesting elder law reports from overseas
- Call for increased role in jurisdictions of Tribunals to deal with elder abuse situations

# Elder Abuse- Unlike other Litigation

**Far more complicated because:**

- Not just a legal problem - social issues abound
- Notorious matter-types:
  - Granny-flat and co-ownership break-downs
  - Recovery of money or assets
  - Misuse of Enduring Powers of Attorneys
  - Overlap into 'capacity law'- guardianship & admin
  - Domestic Violence orders
  - Sometimes family law overlap

# Reasons challenges in this litigation area

## Several reasons for challenges:

- Race against time - client may decline cognitively or physically – court processes move slowly
- Rules of evidence apply in civil courts
- Cost jurisdictions expose elderly litigants to potential cost orders if unsuccessful
- Client is likely to be essential witness- memory may fail as litigation goes on
- Obtaining financial information and analysis may involve forensic accounting exercise
- Litigation is stressful and the client's health may be impacted
- Pressures, and uncertainties of the litigation lead to mediated outcomes that don't do justice to the client

# Preliminary Considerations

## Preliminary issues include:

- Who will be the client?
- Is pro bono necessary?
- If not pro bono, can they realistically fund it and for how long?
- Will recovery be possible against the perpetrator?
- Are there third parties with vested interests?
- How long with Court processes take?

# Preliminary essentials

- **Preliminary essentials in litigation:**

- Deal with issues of capacity- ensure the client has capacity to instruct applying appropriate 'legal test' and to enter into a Client Agreement
- If doubts about capacity, consider obtaining a medical assessment
- If client lacks capacity, is there an Enduring Attorney/ Administrator who can instruct
- If client currently has capacity and hasn't already appointed decision-makers, consider putting in place Enduring Power of Attorney with express reference to litigation
- If there is a need to commence Court proceedings, is there a potential '**litigation guardian**'

# Litigation Guardians- a topic in itself

- **Litigation Guardian:**
  - is required where a litigant is under a 'legal disability'
  - anyone can be appointed providing no adverse interest and can fairly, competently, act
  - duty is to ensure that every proper and legitimate step is taken in the litigation
  - In some States, potential personal risk to Litigation Guardians for costs of the litigation
  - For example in Qld, can make it **very difficult** to find someone prepared to act
  - Public Trustee isn't obliged to act as litigation guardian nor Public Guardian



# Challenges in the Evidence trail

- Evidence trail in elder abuse litigation can be difficult because:
  - Client may have poor financial literacy and few technological skills making for poor record-keeping
  - Easy for a perpetrator to allege that conscious and informed gifts were made by the adult at the time – especially if client has lost capacity since critical times
  - Not always a lot of visibility to independent third parties making independent evidence scarce
  - Proving lack of capacity or special disadvantage for transactions at a certain time can be difficult without retrospective medical evidence and corroborating evidence from others that are time-specific
  - Specific court expectations around expert witnesses and retrospective medical evidence (Qld)

# Other Challenges in the Litigation

## Other challenges include:

- The client may waiver in their interest and/or commitment to obtaining justice
- The “drivers” can easily become third parties, such as interested potential beneficiaries of the ageing parent
- May need to fight on a couple of different fronts eg – Tribunal over issues relating to decision-making, for example, to remove Attorney, but also need to fund civil litigation and evidence must be consistent
- Dealing with other issues such as Centrelink- impact of gifting rules/ housing issues
- The stress can be too much ...

# Protective Litigation Tools

- **Protective steps can be taken:**
  - Revocation of Enduing Power of Attorney if perpetrator currently appointed
  - De-registration of any registered Powers of Attorney
  - Urgent Interim applications to Tribunal for removal of a perpetrator
  - Caveat over land if possible- implications
  - Written notice to third parties /notifications to banks and third parties/ notification directly to alleged perpetrator/ potential injunctions
  - Greater awareness of elder abuse on part of banks and others

# Protective Litigation Tools

- It's worth mentioning:
  - If perpetrator is residing with the victim, may be grounds for an ouster order through DV court
  - Recording of vital evidence by way of affidavits and Statutory Declarations (in the interests of having admissible evidence if the elderly client declines, loses capacity, dies)
  - Think about applying for expedited trial
  - Work with, or link in with social supports
  - Consider mediation

# Coercion in the civil sense- issues

- **Coercion:**

- Featured in all types of civil disputes and Court have formulated definitions over time
- Often goes hand-in-hand with duress, unconscionable transactions, and undue influence but is a discrete remedy

- Lord Denning – ***Morgan v Fry*** {1968} 2 QB 710:

*“The essential ingredients are these: there must be a threat by one person to use unlawful means ( such as violence or a tort or a breach of contract) so as to compel another to obey his wishes and the person so threatened must comply rather than risk the threat being carried into execution.”*

# Litigating Coercion:

- **Challenges in litigating Coercion:**

- Same challenges as with other elder law issues and remedies
- Would be unusual for coercion in elder law to be the only remedy sought
- Proving coercion can be difficult because of the high bar that needs to be met in proving the elements
- Recent Qld case ***Lambourne v Marrable* [2023] QSC 219**- Martin SJ in dealing with allegation that elderly man's EPOA was invalid due to him being pressured or coerced, said:

*“Reliance is not the same as influence that overrides a free and voluntary act.” .... “Being influenced by someone does not mean that a person is not capable of making an EPOA freely and voluntarily”*

# Coercive Control – the criminal law

## An update on coercion as a criminal offence in elder law setting:

- Queensland has introduced standalone criminal offence of coercive control- *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld Act)- comes into effect in 2025
- Qld Act extends to domestic relationships such as intimate personal relationships, a family relationship or informal care relationship
- NSW's *Crimes Legislation Amendment ( Coercive Control) Act 2022* (NSW) (NSW ACT) commenced on 1 July 2024
- NSW Act doesn't extend to family relationships- but DV legislation expands 'domestic abuse' to include behaviour that coerces or controls
- South Australia has released a draft Criminal Law Consolidation (Coercive Control) Amendment Bill 2023 (SA Bill)- will be limited to intimate relationships

# Coercive Control – the criminal law

## An update on coercion as a criminal offence in elder law setting:

- South Australia has also released a Discussion and Summary Paper targeting different communities impacted by coercive control but doesn't include specific reference to older people
- Western Australia has confirmed an intention to criminalise coercive control and, there are signs that this will include to older people
- Northern Territory's civil protection regime was amended to recognize coercive control in domestic relationships but no standalone criminal offence has been introduced.
- HopgoodGanim has developed a Coercive Control tracker that is following the passing of standalone coercive control legislation-link: <https://www.hopgoodganim.com.au/uploads/images/PDFs/News-and-Insights/Coercive-control-legislation-table.pdf>



# Elder Abuse and Domestic violence proceedings

## Some practical considerations:

- Who will bring the application- the Police, the elderly victim or an authorised person?
- Need for the elderly client to find alternative temporary accommodation if living with the perpetrator and pending an ouster order
- Delays in reaching a final hearing can arise because of:
  - Difficulty in serving proceedings
  - Applications for adjournments to obtain legal representation on the part of the Respondent
  - May be necessary to seek 'protected witness' orders to prevent the respondent being face-to-face with the aggrieved during cross-examination and need to serve application of that type

# Elder Abuse and Domestic violence proceedings

## Some practical considerations:

- Proving some forms of domestic violence can be difficult because of the subtle nature of some acts of DV
- Elderly client can be hampered by recall and ability to communicate
- Fear of reprisals and further acts of DV on the part of the elderly client can lead to acceptance of 'standard orders' rather than Orders for no contact
- High emotional impact upon the aggrieved necessitates counselling and ongoing social and psychological supports

# Trends In Elder Abuse Litigation

## Some recent trends:

- **Elder abuse issues intersecting with family law, for example:**
  - New spouse appointed as Attorney;
  - Principal loses capacity
  - Spouse as attorney takes up position within related entities such as Self-Managed Superannuation Funds, Family Trusts
  - Spouse uses powers to benefit themselves through the entities eg as trustee of discretionary family trust
- **Separation of elderly spouses through the actions and interventions of Attorneys, for example:**
  - In blended family situations, the children of one of the spouses using their power of attorney to apply for Domestic Violence orders against the other spouse
  - Removal of one spouse from the home
  - Family law instigated and pursued by the two sets of children rather than the elderly spouses.

# Trends In Elder Abuse Litigation

## Some recent trends:

- **Increase in allegations of coercion:**
  - With increased awareness of coercion, allegations of coercion are being made frequently in elder law disputes
  - Likely that parties, in Qld, will seek to have police prosecute for perceived cases of coercion
  - Likely to see new cases emerging in this area
- **Increase in removal of elderly parent to interstate:**
  - With many adult children residing in other parts of Australia or overseas, rather than leave a parent in a situation that a child considers to be undesirable, they remove the elderly parent (who may be on the cusp of incapacity) to their own locality
  - not unusual to then see new Enduring Powers of Attorney made ( no doubts Will as well)

# Trends From Overseas

## Some recent trends:

- A paper from Professor Vanessa Bettinson, Northumbria University, England, June 2024, reports that:
  - Coercive control is a recognised form of domestic violence under their legislation
  - Under the Serious Crime Act 2015, it is a criminal offence to engage in controlling or coercive behaviours in an intimate or **family relationships**
  - Research shows 57% of women in prison in England and Wales have been victims of domestic abuse
  - If the woman has been a victim of coercive control, that is likely to be reflected in a pre-sentence report and may be (but there is no guarantee) taken into account in mitigating sentence
- The Elder Justice Coordinating Council on 12 June 2024 reflected on its achievements over the past decade including:
  - 1500 criminal and civil cases involving conduct that targeted or disproportionately affected older adults over the past 5 years
  - Service to over 1.5 older victims
  - The return of ‘millions of dollars’ to elder fraud victims

# Law Reform- Greater role for Tribunals

## A greater role for Tribunals:

- ALRC report 2016 and 2017 – Recommendation 5-2 stated:
  - *State and Territory civil and administrative tribunals should have:*
    - (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and*
    - (b) the power to order any remedy available to the Supreme Court.*

# Law Reform- Greater role for Tribunals

## Reasons for a greater role for Tribunals:

- Less formal
- No cost or low cost
- Elderly clients may prefer to court setting / also less fear of criminal consequences for perpetrator
- Already has jurisdiction in relation to capacity issues and familiar with elder law issues
- Ability to provide multi-disciplinary teams, if required and resourcing permits
- Could provide mediation-type processes

# Let's Keep Law Reform Happening

## Tribunals could deal with matters such as

- Matters where the elderly person **does** have capacity
- Orders to remove family members who will not leave the elderly person's home
- Deal with cases where dispute over assets taken by perpetrator where not an Enduring Power of Attorney matter
- Break-down of granny flat or co-ownership arrangements
- Subject to statutory legislation allowing for it, ability to deal with equitable remedies such as unconscionable transactions



# Thank you



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