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Welcome to the eleventh edition of the quarterly STEP Australia Newsletter. STEP is a professional association that spans 98 countries across the world. Our colleagues are not profession-centric; we draw on professionals in law, accounting, finance, trusts and several other areas. We support individuals and families across generations in reaching their dreams and aspirations, and, at times, we seek to correct the wrongs of the past. In short, we are trusted and we care. In these current times, I ask that you look within for that care.

Some say that this era is a once-in-a-lifetime event. Some of our colleagues are overloaded, some are financially suffering. It is at these times that we need to reach out to our colleagues. May I ask that you take the time to ask: ‘Are you okay?’

How you want to say this I leave up to you. It may be small talk at the start of a professional conversation, or a small professional concession granted to a colleague under pressure. COVID-19 is a medical pandemic; together we can stop it becoming a mental pandemic.

STEP Australia is looking to expand its care approach. Bryan Mitchell of STEP Queensland is currently leading a committee to develop a professional mentorship programme, through which more experienced STEP members can help develop the STEP professionals of the future. If you are interested in contributing to the mentorship programme, please drop us a note so that we can let you know once it has been developed.

Please remember that we are a worldwide group of professionals who act locally. Your local STEP branch is the vital stage upon which we act, and you can contribute to this. I encourage you to make time at your next STEP collegiate function to introduce yourself to your branch committee members and find out how you can contribute. This can be as small as assisting with the set-up at the next function. And when you are having that conversation, please remember to say to your committee member: ‘Thank you’. It is to our committee members that we owe the existence of STEP. They enable the services and support that STEP presents across Australia. They do this because they care.

STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE
The STEP Australia Newsletter Sub-Committee, chaired by Andrea Olsson, welcomes expressions of interest from members. Please email any feedback or expressions of interest to Dior Locke at dior.locke@step.org

With best wishes,
Peter Bobbin TEP,
STEP Australia Chair
Elder law issues including the impact of the Royal Commission into Aged Care Quality and Safety

KIM BOETTCHER, BARRISTER, FREDERICK JORDAN CHAMBERS, SYDNEY, AUSTRALIA

Investment into and discussion about the rights of ‘older people’ is arguably more advanced overseas. The annual United Nations Open-Ended Working Group (OEWG) on Ageing brings together the usual general assembly of nations and a plethora of civil society participants, both NGOs and national human rights institutions, to debate the merits of a proposed UN convention on the rights of older people. Regional and national instruments and declarations recognising the rights of older people – such as the Madrid International Plan of Action on Ageing (2002); the Chicago Declaration on the Rights of Older Persons (2014); and the Declaration on the Rights of Older People in Wales (2014) – have helped form the development of the early discussion drafts of the proposed new human rights instrument. The OEWG is the first time a process has been established to examine how to better protect older people’s rights.

The US government established the Elder Justice Initiative to support and coordinate the Department of Justice’s enforcement and programmatic efforts to combat elder abuse, neglect and financial fraud and scams that target seniors. At state level, many states, such as California, have legislated to make elder abuse a crime. Section 368 of the Penal Code of California applies to the physical or emotional abuse, neglect or financial exploitation of anyone 65 years of age or older. Elder abuse can be charged as a misdemeanour or a felony and can carry up to four years of jail or prison. In Canada, there are specific laws in each state and territory to protect the rights of older people. In the UK, in the 1990s, the abuse and neglect of older people began to elicit concerns. There is no single piece of legislation, but rather a number of different laws that may be used by individuals who are in need of protection. This is similar to the current situation in Australia, which has a patchwork of laws.

The widely accepted WHO definition of elder abuse is: ‘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.’

In Australia, the Parliamentary Inquiry into Elder Abuse in New South Wales in 2015; the 2016 Australian Law Reform Commission Inquiry into Protecting the Rights of Older Australians from Abuse; and the Independent Commissioner against Corruption’s report into the Oakden nursing home in South Australia all played a part in increasing awareness of elder abuse in Australian society. Undoubtedly, ABC TV investigative reports into retirement villages and aged care accommodation precipitated the announcement of the Royal Commission into Aged Care Quality and Safety (the RC) on 8 October 2018.

The major themes of the RC were access and inclusion, young people with disabilities, interfaces and transitions, future challenges and opportunities, and how to deliver aged care in a sustainable way. As part of the process, aged care providers were served with notices requiring production of documents in late November 2018. The largest 100 aged care providers, and then the remaining 1,882, were required to provide written submissions by early 2019. The written submissions were to be in the form of a ‘summary of occasions of substandard care including mistreatment and all forms of abuse’. This wording emanates from the legislated Accreditation Standards of the Aged Care Quality Agency, as it then existed. The RC’s interim report, published on 31 October 2019, noted:

‘A little over 1000 providers responded to our Service Provider Survey. They self-reported 274,409 instances of substandard care over the five year period to June 2018, including almost 112,000 occasions of substandard clinical care and close to 69,000 occasions of substandard medication management. They also reported 79,062 complaints about substandard care. Of these complaints, 15,700 were about personal care, 8800 were about compromises to an older person’s dignity, and 7500 were about a lack of choice and control for the people receiving aged care services.’

A number of representatives of medical and nursing organisations associated with the aged care industry gave evidence at hearings about problems they had
encountered, first hand, in aged care. That evidence was particularly confronting, and provided a background to the disclosure of occasions of substandard care, including mistreatment and all forms of abuse.

The COVID-19 pandemic has highlighted the shortcomings of aged care systems all over the world, for example the deadly cluster at Newmarch House in Sydney and the clusters in five care homes in Ontario, Canada. The Canadian Armed Forces, after arriving on the scene and recording the dire situation, released a 15-page report on 19 May 2020 outlining its concerns. These are failures over decades.

The RC’s interim report noted that: ‘This cruel and harmful system must be changed. We owe it to our parents, our grandparents, our partners, our friends. We owe it to strangers. We owe it to future generations. Older people deserve so much more.’

POWERS OF THE RC
The RC has broad powers to gather information to assist with its investigations and enquiries. It has the power to summon witnesses to appear before it and answer questions under oath or affirmation, and to summon witnesses to produce a document or other material piece of evidence. However, given that it holds parliamentary and not judicial powers, there is no final adjudication as a result of the RC, so it will fall upon legal practitioners to prosecute both civil and criminal cases arising out of the evidence from and incidental to the RC.

Historically, there have been few criminal prosecutions relating to elder abuse and neglect, because the New South Wales criminal code does not include offences designed specifically with older victims in mind. Australian coroners should play a central role. The rest will fall upon civil law practitioners.

The impact of the RC in common law may be that there will be more nervous shock cases brought, such as Cachia v DPG Services Pty Limited. In this case, a fire was deliberately lit by a staff member at the Quakers Hill Nursing Home, resulting in the death of a number of patients who were being cared for at that nursing home. The proceedings were brought by a group of members defined as being ‘people who suffered mental harm, nervous shock, loss and damage caused by the death of a close family member as a result of the fire’. Other cases may be brought as professional negligence and personal injury claims. Many of these cases may settle before hearing when a party that is well resourced defends them. It is unfortunate that there would not be the public acknowledgement of the circumstances of substandard care if a case settles. In that way, a criminal code may be more effective in providing a public deterrence in relation to institutional elder abuse.

The South Australian case The Public Advocate v C, B involved the unlawful detention of an elderly man in the locked ward of an aged care facility. The Supreme Court of South Australia determined that the powers conferred by s.32 of the Guardianship and Administration Act 1993 (SA) do not implyedly abrogate the general law powers of a guardian to detain, and use other force, when assuming responsibility for the affairs of a protected person. False imprisonment claims brought against aged care facilities may be rare where the detained person is unable to bring proceedings.

In terms of financial elder abuse, if there is money to recover, it is likely to entail an application to the Equity Division of the Supreme Court of New South Wales, and similar courts in other states. If the proceedings are a prolonged process, it may be expensive and stressful for an older person to endure, but it may also be worthwhile. There is an increase in cases presenting to legal practitioners involving ‘granny flat’ type scenarios similar to the case of Pohjaj v Reynolds. A 79-year-old pensioner mother was induced by her daughter to sell her current home and buy a property for AUD121,000 in the name of her daughter and son-in-law. They divorced, and the property was sold under family court orders. The plaintiff obtained a declaration, based on proprietary estoppel, that the daughter’s subsequent property was subject to an equitable charge in her favour for the funds advanced to be protected by a caveat. In the case of Muschinski v Dodds, Dean J referred to the equitable principal involving a ‘joint endeavour’ and said: ‘The principle operates in a case where the substratum of a joint relationship or endeavour is removed without
attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended to specifically provided that other parties should so enjoy. The content of the principal is that in such a case equity will not permit that other party to assert or to retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so.’

This approach was accepted by a majority of the High Court of Australia in Baumgartner v Baumgartner. More recently, the case of Wallis v Rudek involved a dispute between parents and a daughter who both had a financial interest in the parents’ family home. While the plaintiffs failed in their claim for lifetime occupation, the court found a ‘common intention constructive trust’ and applied the Baumgartner doctrine. Such cases are not brought before the courts where the older person who is the victim of financial abuse is unable to produce records relating to a property dispute. However, if the evidence is available, it appears that the case law has developed to support the prosecution of such a case. It is worth noting that such disputes can involve a cross-section of socioeconomic classes, because age does not discriminate and therefore legal practitioners need better training in this area.

In New South Wales, the Civil and Administrative Tribunal (Guardianship Division) is often the only avenue for many who are concerned about the financial abuse of an older person. Many older people who are involved in such proceedings are not granted leave to legal representation. Those older people unfamiliar with the legal system and proceedings are not granted leave to legal representation. Older person. Many older people who are involved in such cases require estate management orders, where the older person lacks capacity. The case of Ability One Financial Management Ltd v JB provides a summary of the general principles of management of a protected estate. In AC v OC, His Honour Justice Lindsay noted that:

‘Although there has been a shift in focus from public to private management of protected estates, it remains important for all concerned in management of the estate of a person in need of an exercise of protective jurisdiction, of one type or another, to engage with public authorities (such as the NSW Trustee) charged with overseeing the due administration of protected estates.’

Practitioners in the area of contentious wills and estates would be familiar with elder abuse cases, and may have noticed that many of their clients are increasingly able to identify situations that involve elder abuse. Undue influence and unconscionable conduct cases such as Olsen v Mentink may, in future, be framed increasingly in terms of elder abuse concepts. There may be elder abuse experts called to give evidence in testamentary capacity cases. In the case of Blendell v Byrne, His Honour Justice Hallen discussed probate undue influence, capacity and evidence of communication with deceased persons. Many elder abuse cases involve all of those complexities, plus the isolation of a victim of elder abuse from society.

It would be better for society as a whole if elder abuse cases were dealt with swiftly and effectively by either criminal prosecution or civil law suit. In the case of elder financial abuse, a successful outcome would mean that the victim could have the resources to enjoy the rest of their life, rather than being a sad footnote in a family provision or a testamentary capacity case.

The aftermath of the RC will be an opportunity for many legal practitioners, aged care providers and healthcare professionals to look overseas at more advanced multidisciplinary models of aged care, for instance those in Denmark and Taiwan. Elevating our own standards is required in a way that has been achieved for other vulnerable members of the community, by the development of legislation and enforceable human rights instruments, such as the 1990 United Nations Convention on the Rights of the Child.

COVID-19’s implications for estate planning

WHEN THE COVID-19 lockdown was imminent, the Parliament of New South Wales (NSW) passed emergency legislation that allowed regulation to amend the Electronic Transactions Act 2000 (ETA). The amended ETA has since been further amended. It allows a regulation to alter arrangements for the signing, witnessing of signatures and arrangements for attestation of a document and much more.

Using that authority, the Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW Regulation) became law on 22 April 2020. The impact of the NSW Regulation on estate planning documents is the focus of this article, with some reference to the contrasting position in other Australian jurisdictions.

The NSW Regulation provides that, if the signature of a document is required to be ‘witnessed’, the signature may be witnessed by audio visual link (AVL), and arrangements in relation to witnessing signatures and the attestation of documents may be performed by AVL. As the name of the regulation implies, it is limited to electronic witnessing. In contrast, the Victorian Regulation allows electronic signing.

In the NSW Regulation, ‘document’ is defined to include a will, power of attorney, enduring power of attorney and enduring guardianship appointment (among other documents). The NSW Regulation sets out a mandatory process if AVL witnessing of the signing of a document is used. It has five elements.

AVL WITNESSING IN REAL TIME

First, the witness must observe the person signing the document in real time. ‘Real time’ is not defined, but it is likely to mean simultaneously.

This is consistent with the definition in the NSW Regulation of ‘audio visual link’ as ‘technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing’. A homogeneous meaning of ‘real time’ would allow a person in a different time zone to witness the document, provided the witnessing occurs simultaneously with the signing (although this may give rise to conflict of laws issues discussed below).

CONFIRMATION

Second, the witness must attest or otherwise confirm the signature was witnessed by signing ‘the document or a copy of the document’. There are no limits on the way a witness may confirm the signature was witnessed; the traditional methods remain. But the NSW Regulation specifically allows the witness to adopt two new methods. A witness could sign a counterpart of the document, or, if the signatory scans and sends a copy of the signed document electronically, the witness could countersign that document. In either case, the witness must do so as soon as practicable after witnessing the signing of the document.

In contrast to the Victorian equivalent, where the witness’ signing must occur on the same day as the signatory’s signing, the NSW Regulation leaves open a more leisurely approach to the witness’ confirmation where a different method is used. This allows for intervening events, and such events could give rise to potential problems (referred to below).

VERIFYING IDENTICAL DOCUMENTS

Third, the witness must be reasonably satisfied that the document the witness signs is the same document, or a copy of the document, signed by the signatory. ‘As ordinary words, “to be satisfied” means to be furnished with sufficient proof that the [witness] is assured or convinced.’ As Dixon CJ stated, adding ‘reasonably’ to ‘satisfied’ does not change the burden:

“What the civil standard of proof requires is that the tribunal of fact … shall be “satisfied” or “reasonably satisfied”. The two expressions do not mean different things but as in other parts of the law the word “reasonably”, which in origin was concerned with the use of reason, makes its appearance without contributing much in meaning.”

This imposes a responsibility on the witness(es) that may not always be easily met where there is remote witnessing, especially where the witness is signing a counterpart.

THE ENDORSEMENTS

The document must carry an endorsement dealing with two matters. These are the fourth and fifth elements.

The AVL witness (or both witnesses where applicable) must endorse the document, or the copy of the document, with a statement specifying first the method used to witness the signature of the signatory, and second that the document was witnessed in accordance with the NSW Regulation. The endorsement may appear on the document or the copy. This aspect draws attention to an intended difference between ‘the document’ and ‘the copy’. Alas, like much else (and in contrast with Queensland), the NSW Regulation does not indicate which piece of paper is ‘the document’, which is ‘the copy’ and whether there is a difference between ‘the copy’ and ‘a copy’.

With a will that is AVL witnessed in counterparts, there will potentially be three pieces of paper that are identical as to content. With an enduring guardian appointment form completed in this manner (where alternate enduring guardians are appointed), there may be six pieces of paper of this type.

Which is ‘the document’ or ‘the copy’ that must carry the endorsement? The NSW Regulation is deliberately silent on this point. However, understanding that ‘the document’ may be plural, and the document signed by the witness must be the
same as the document signed by the signatory, it may be that each piece of paper should bear the endorsement.

The required endorsement assumes the witness has knowledge of the NSW Regulation and its requirements. This is asking a lot from a lay witness. The Queensland Regulation requires a similar statement – clause 21(2)(b); however, the witness (or, where more than one witness is required, at least one witness) must be a ‘special witness’, a newly created category of persons who have training or experience with witnessing legal documents.14

For witnesses to meaningfully state there was compliance with the NSW Regulation, practitioners should arrange for knowledgeable lawyers to be the AVL witnesses where the NSW Regulation is intended to be used.

WHERE IS THE DOCUMENT MADE?
While the succession laws in each Australian jurisdiction are not identical, the differences are not related to formal validity. The COVID-19 regulations have changed that. In four jurisdictions there has been no change to the laws. In the other four, there have been non-identical changes.

AN EXAMPLE
The following is not just a nightmare question for law students; it could become a practitioner’s problem:

‘Where a Queensland native, who has lived in Hong Kong for the last ten years, whilst in lockdown in Sydney uses a Victorian solicitor to arrange execution of their will by a substitute signatory situated in Canberra before two AVL witnesses, one situated in South Australia and the other in Perth, which jurisdiction’s law determines the formal validity of the will?’

The answer may be crucial to the formal validity of the will, but that is a problem that could be solved by using the largely identical dispensing powers for informal wills that exist in all Australian jurisdictions. The difficulty is compounded with an enduring document as no jurisdiction has a relevant dispensing power. The COVID-19 regulations have changed that. In four, there have been non-identical changes.

WHEN IS THE DOCUMENT MADE?
The relevant jurisdiction may also determine when the document is made. What if there is an intervening event – like the testator’s death, loss of testamentary capacity, marriage or divorce – between the signatory’s signing and the last witness’ confirmation? The NSW Regulation is silent on this point, whereas the Queensland Regulation specifies that the document starts to be effective when the signatory signs the document even if the witness confirms the document on a later day.15

So when the document is made, and therefore the relevance of an intervening event, may depend on the law that determines the formal validity of the document.16

WHICH IS ‘THE DOCUMENT’?
The Queensland Regulation provides that the document confirmed by the witness must be given to the relevant person – the testator or principal, as appropriate. That document is the official version of the document (even if it is not the version physically signed by or on behalf of the signatory).19

In Victoria, there will be one copy of the will on which appears the signatures and statements of all the witnesses.20

Determining ‘the document’ is important in various circumstances. For instance, the original will needs to be produced to obtain a grant of representation. The original power of attorney needs to be produced to be registered by the Registrar General in the General Register of Deeds. The original document needs to be produced to enable a certified copy to be made. The position in NSW is unclear.

WHEN DO THESE ALTERNATIVE EXECUTION PROVISIONS END?
It also will be well to remember that the various regulations have different end dates. Unless shortened by Parliament, the NSW Regulation ends on 26 September 2020. The Queensland Regulation expires on 31 December 2020. The ACT legislation ends on an indeterminate date: three months after the ending of the COVID-19 emergency.21 The Victorian Regulation ends on 25 April 2021.

WHAT IS THE TAKE-HOME MESSAGE?
Dealing with clients remotely, including witnessing documents via AVL, may carry additional risks. This is not limited to verifying a client’s identity, assessing mental capacity, identifying undue influence by third parties and ensuring client confidentiality. The risks extend to careful devotion needed to meet the demands of the relevant regulation. In the short term, the regulations demand vigilance. In the medium term, they will require practitioners to re-test choice of laws. In the long term, they will reward a good memory.

Author’s note: I am indebted to the assistance I received from Natalie Darcy and Adeline Schiralli in preparing this article. Their assistance ranged from suggestions and comments on content to editing and proofreading. It would have been a poorer article without their invaluable assistance.

1 COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW), which was assented to on 25 March 2020. 2 COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Act 2020 (ACT) which was assented to on 14 May 2020. 3 This appears in sch.1 to the Electronic Transactions Regulations 2017. It can be found at bit.ly/30sP6YV 4 Similar arrangements have been made in Victoria; Queensland and the ACT but not the other Australian jurisdictions at this time. 5 Clause 20(1) of the Schedule to the Regulation. 6 COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic) (the Victorian Regulation); clauses 35(5)(a) (concerning powers of attorney) and 40(2) (concerning wills). The Victorian Regulation commenced on 12 May 2020. 7 Clauses 22(5)(f), 24(5)(h), 26(5)(a), 26(6)(b), 30(6)(b), 31(5)(a), 32(5)(a), 34(5)(b) and 41(5)(b) of the Victorian Regulation. 8 Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020 (Qld) (the Queensland Regulation) clause 19(3)(a) requires the witness to confirm the document as soon as practicable after witnessing it but expressly recognises that this may not be the day the document is witnessed. This regulation commenced on 14 May 2020. 9 Re The Will of Alexia [2020] NSWSC 560, [62]. 10 Murray v Murray (1960) 33 ALJR 521, 524 11 The Queensland Regulation specifies the official version of the document, which must be produced where an original document is required: clauses 24 and 25. The official version may be different from the document signed by the signatory (which is called the ‘originating version’). However, where the originating version is different to the official version, they must be kept together: clause 24(4). 12 Interpretation Act 1987 (NSW), s.8(b). 13 The Queensland Regulation, clause 21(2)(b)

The Queensland Regulation, clause 5. 15 Both the Victorian and Queensland regulations allow a will and an enduring document to be signed by a substitute signatory who is directed by AVL to sign the document for the signatory. 16 The ACT legislation, COVID-19 Emergency Response Legislature (Emergency Measures) Act 2020 (ACT) (the ACT Act), commenced on 14 May 2020. In relevant respects it closely resembles the NSW Regulation. 17 Queensland Regulation, clause 22. 18 In Bendigo and Adelaide Bank Ltd v Pickard [2019] SASC 121, [14] the court explained that: ‘The law applicable to the creation of a power of attorney is the law of the jurisdiction in which it was made.’ 19 Queensland Regulation, clauses 20 and 24 20 The Victorian Regulation, clause 41(5)(b). 21 The ACT Act, Schedule clause [1.45]
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