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Welcome to the 13th edition of the quarterly STEP Australia Newsletter. It is with pride that I announce that STEP has committed to our Future STEP 2021+ strategy. This has been developed with all Australian branches’ input. The primary objective of the strategy is to put STEP and STEP members into the forefront of thinking across Australia.

Through the strategy, we intend not only to increase our membership across professions but also to influence policy at a national and state level and be recognised as thought leaders.

Part of our strategy will be directed at helping the public to understand that, when they are thinking about family succession objectives and wealth management, there is no better professional than a STEP member.

Our members come from several professions: wealth advisors, accountants, lawyers and trust personnel. Each enjoys primary association membership connected to their particular skill set. At STEP, it is our intention to work alongside those associations and develop and add to the skill set in a collegiate and cooperative way.

WHAT ARE SOME OF THE THINGS YOU CAN DO TO ENSURE THE SUCCESS OF FUTURE STEP 2021+?

1. Invite your colleagues to an upcoming STEP seminar at your branch.
2. Tell colleagues about STEP and why you are a member.
3. Encourage your colleagues to join STEP and be part of the leading global network for trust and estate practitioners.

This is part of the member-get-member quest and is especially focused on other professions. Success will result in shared visions across multiple professions that will:
- lead to a better understanding of how the skills of others fit within STEP;
- enhance cross-referral of work and relationship opportunities;
- result in greater professional confidence in individuals from other professions; and
- build the coffers of your branch through your branch STEP initiatives.

Another very important aspect of the Future STEP 2021+ strategy is to put STEP in the forefront of minds. This will be achieved by branch policy initiatives across Australia and by STEP Australia seeking media mentions of STEP.

I welcome the opportunity to share your thoughts and ideas. Together, we will make Future STEP 2021+ a success in many different ways.

With best wishes,

Peter Bobbin TEP,
STEP Australia Chair
How to determine someone’s decision-making capacity

ROSA BAZZANELLA, SENIOR ASSOCIATE, RIGBY COOKE LAWYERS
DR TRACEY WARDILL, PRINCIPAL NEUROPSYCHOLOGIST, NEUROPSYCHOLOGY MELBOURNE

Rosa Bazzanella spoke with Dr Tracey Wardill to gain a better understanding of the processes involved and why someone might see a neuropsychologist to have their capacity assessed. Tracey has more than 30 years of experience as a clinical neuropsychologist in both the private and public health systems.

WHAT SHOULD FAMILY MEMBERS LOOK OUT FOR IF THEY HAVE CONCERNS ABOUT A LOVED ONE’S DECISION-MAKING CAPACITY?

It is important to highlight that capacity is never defined in the abstract. It is always a question of: the capacity to do what?

There are various circumstances where it may be important for a person to have their decision-making capacity assessed. If someone lacks the capacity to make informed decisions, they may make decisions that are not in their best interests or place them at risk. It is important to know if a person has the capacity to sign legal documents – for example, a will, an enduring power of attorney for financial or personal matters or a medical treatment decision-maker.

Family members should consider having the capacity of their loved one assessed by a neuropsychologist if they are concerned that changes in their memory or thinking skills may be having an impact on their ability to make informed decisions. Family members may have noticed changes in the person’s ability to think or remember, or their behaviour may be out of character. Concerns might be raised if there have been changes in the way the person communicates. The person may appear to not understand everything that is said to them, express themselves in odd ways or frequently lose track of conversations. Family might be concerned if the person is often confused, gets lost easily or can no longer manage tasks they once did without difficulty. All, or any, of these things might raise the question of whether the person has developed, or is developing, a cognitive disability.

It is important to note that people can have changes in their cognition – that is, changes in their memory or thinking abilities – and still retain the capacity to make decisions. It is incorrect for people to assume that their loved one has lost decision-making capacity because they have become forgetful. It is also possible that a person with a cognitive disability can have the capacity to make some types of decisions but not others.

It is the neuropsychologist’s job to determine whether a person has memory and thinking problems that constitute cognitive disability. They can determine the nature and extent of that cognitive disability, and then provide an opinion as to whether the disability is impacting on that person’s capacity to make decisions.

There is no ‘one size fits all’ capacity assessment. The neuropsychologist, after listening to the concerns raised by family members, will tailor the assessment to the individual, taking into account what types of decisions are to be made.

CAN YOU BE DIRECTLY APPROACHED FOR AN ASSESSMENT, OR DO YOU REQUIRE A FORMAL REFERRAL?

There is no formal requirement for a medical referral in order to see a neuropsychologist. However, the neuropsychologist will often ask for a referral from a doctor and/or a letter of instruction from a lawyer.

These provide the neuropsychologist with:
- The context and background for the person and their circumstances. It is important to understand why the person has been referred for assessment, especially if there is a medico-legal question at issue.
- Information as to whom the neuropsychologist needs to report back to.
- A line of communication, should further medical investigations be needed.

WHAT DOES YOUR FORMAL TESTING CONSIST OF WHEN ASSESSING A PERSON’S DECISION-MAKING CAPACITY?

An assessment of someone’s decision-making capacity involves both a detailed interview with the person and formal testing of their cognition – that is, formal testing of their memory and thinking skills.

Testing by a neuropsychologist involves the administration of tasks that range from simple to complex. Tests predominantly involve asking the person questions and
administering pencil-and-paper tasks. A person’s performances on the various tests are interpreted, taking into account their age, education, gender and cultural background.

When conducting an assessment, neuropsychologists have a range of tests to choose from. They will select those appropriate for the person they are seeing. For example, if the person has suffered a stroke and lacks the ability to speak, then appropriate non-verbal tools are used that cater for the person’s disability. The person can be provided with a way to indicate a ‘yes’ and ‘no’ response to questions. If a person has poor literacy or numeracy skills, this can be taken into account. If English is not their preferred language, the testing will be conducted with the help of a professionally trained interpreter.

WHAT ELSE DO YOU TAKE INTO ACCOUNT WHEN ASSESSING CAPACITY?

In addition to formal testing, the person will be interviewed in detail about information that is relevant to the type of decisions being made. For example:

- If the person’s capacity to make medical decisions is being investigated, the neuropsychologist will ask the person about any illnesses they have, and treatments being proposed or already received.
- If financial decision-making capacity is being questioned, the person will be asked about their understanding of their financial situation.
- If the question is one of testamentary capacity, the person will be asked about their estate, what assets they own, the value of those assets, who their beneficiaries are, if anyone has been left out of the will and, if so, why.

As part of the interview, the neuropsychologist will determine the person’s level of insight. That is, whether the person knows and understands the extent of their problems and how these might impact on their life and any decisions they might make.

If a person has insight into their problems, they are in a better position to make informed decisions and choices. If they lack insight, which can often occur as part of a brain injury or illness, then it is difficult for the person to make an informed decision.

It will often be the person’s level of insight that is the deciding factor in determining capacity.

ARE FAMILY MEMBERS INVOLVED IN THE ASSESSMENT? HOW CAN THEY BE OF ASSISTANCE?

Family members usually accompany a person to the assessment. It is important to note that family members are unable to sit in on the assessment. The presence of a family member can be very distracting and can potentially result in misleading or unreliable test results. When there are legal issues at stake, it is particularly important that an independent assessment is conducted with no other parties present.

With the person’s permission, the neuropsychologist will speak to relevant family members to obtain background information. This might include information about the person’s medical history, any disabilities and their current circumstances and needs.

Importantly, the family will be asked about any changes they have noticed in the person’s memory, thinking skills or behaviour. The history of change in a person’s memory, thinking skills or behaviour can be crucial to establishing a diagnosis of dementia. Dementia means a progressive loss of brain function over time. These changes normally occur relatively slowly. Sometimes it is only when a family member is helped to look back over time that they are able to realise what has changed for their loved one. Establishing the nature and timing of any changes provides vital information that helps the neuropsychologist establish an appropriate history for the person being assessed.

WHY IS IT IMPORTANT TO ASSESS A PERSON ON SEPARATE OCCASIONS?

A capacity assessment can take a number of hours. An elderly person may tire if tested over an extended period. An assessment may, therefore, be broken into two or three shorter sessions. It is always important to work within the person’s limits and not to overtire them, as this may impact their performance.

Conducting an assessment over a number of sessions also allows the neuropsychologist to determine if the person’s responses to questions are consistent over time.

WHAT KEY INFORMATION SHOULD LAWYERS PROVIDE WHEN BRIEFING A NEUROPSYCHOLOGIST?

The type of decision-making capacity to be assessed

As neuropsychologists, when we have someone referred to us for a ‘capacity assessment’, the first question we ask is: capacity to do what? It is imperative that this question is answered prior to the assessment being undertaken.

The referring lawyer should inform the neuropsychologist of what types of capacity are in question before the person is seen.

The legal documents the person is proposing to sign

We need to know if the person is making or changing a will. If so, we will require information about their estate, details of potential beneficiaries, including those being excluded from the will, and changes being made to previous wills. This information remains confidential and it is usually not described in our report. It is needed, however, if the neuropsychologist is to determine whether the person has an adequate understanding of all the matters relevant to making their will.

If the person wants to appoint an attorney, we need to know which documents they are proposing to sign: financial, personal or medical.

Any relevant background information about the client

This may include information about their current circumstances, relevant medical or psychiatric history, any disabilities, their educational or occupational history and their cultural background.

In summary, if a lawyer is referring someone to a neuropsychologist, they need to provide the neuropsychologist with a complete account of the legal issues involved.

All relevant legal questions need to be laid out prior to the assessment being undertaken to ensure the relevant assessment is completed.
A n attorney is responsible for managing the principal’s legal and financial affairs. The responsibility depends on the scope of the attorney’s authority and the nature of the attorney’s fiduciary obligations. The demands placed on a fiduciary impact a third party if the third party’s involvement in the fiduciary’s actions piques equity’s conscience.

These points are analysed and explained by reference to the recent decisions of Grant v Grant; Grant v Grant (No.2); Guirguis v Girgis and Turner v O’Bryan-Turner.

Grant and Turner involved the attorney acting without authority, whereas Guirguis concerned an attorney acting with authority but in breach of his duty to the principal, as her fiduciary. In each case, the attorney’s actions conferred improper benefits on someone other than the principal or attorney: a third party.

**GRANT**

In Grant, the power of attorney (PoA) did not authorise the attorney to make gifts or confer benefits (whether on the attorney or another). Nevertheless, the attorney, the principal’s daughter, transferred title to the principal’s real estate to a third party (the attorney’s own daughter and the principal’s grand-daughter) for AUD900,000, which was never paid. The attorney improperly paid AUD134,700 from the principal’s bank account. The transfers depleted the principal’s estate available for payment of his debts and liabilities. The court observed that the attorney's conduct was in breach of his fiduciary duty. The ‘benefits clause’ was no defence. The court stated that the principal remained accountable to the attorney for the value of the property he transferred to his wife.

**ELDER ABUSE**

That attorneys may be liable for their wrongdoing is unsurprising. The attorneys’ actions in these three cases disclose sure-fire signs of elder abuse: a person disposing of significant assets for nominal, no or unpaid consideration. This must be a lesson for legal practitioners, as we will often be involved when attorneys engage in transactions of this type.

**THIRD-PARTY LIABILITY**

As explained in Farah Constructions Pty Limited v Say-Dee Pty Limited, the liability of an accomplice for a breach of fiduciary duty is not confined to the circumstances described in Barnes v Addy. Nevertheless, the claims against the third parties in all three cases relied upon one or both of the two circumstances specifically referred to in Barnes v Addy.

In each of the cases, the third party was a close member of the attorney’s family. Yet it was only the attorney’s daughter in Grant who was found to be an accomplice in the attorney’s actions such that she was required to restore property to the principal.

**THE FIRST LIMB OF BARNES v ADDY**

The first circumstance giving rise to accessorial liability, known as the first limb of Barnes v Addy, is where a person receives and becomes chargeable with property as the result of a breach of fiduciary duty. Case law establishes that property is chargeable if the third party has notice that the property is subject to fiduciary obligations and that it is being misapplied. This limb was successfully relied on in both Smith v Smith and McFee v Reilly to attach liability to third parties benefiting through the actions of an attorney.

**NO THIRD-PARTY LIABILITY IN GUIRGUIS**

The attorney’s wife in Guirguis could not be pinned with the relevant notice, even though the attorney transferred funds such that he was unable to pay his ongoing nursing home fees from his remaining resources.

‘Exploitation does not require malevolence; it may occur with good intentions’
the matrimonial home to her for no consideration. The claim failed because:

‘In circumstances in which the [principal] had armed the [attorney] with a power of attorney (with a benefits clause), had communicated about her Australian affairs exclusively with the [attorney] (that is, not with his wife) and had allowed him both to live in the matrimonial home indefinitely and to manage her Australian property generally, there is no occasion to brand the [attorney’s] wife] with notice of any breach of fiduciary obligations on the part of the [attorney].’

THIRD-PARTY LIABILITY IN GRANT

The situation was different in Grant. There, the third party, the attorney’s daughter, was found to have no genuine or well-grounded belief that the PoA authorised the gift of her grandfather’s property to her; she had never inspected the PoA nor sought to enquire what it authorised. The court observed that:

‘[The third party] was quite conscious that there was every chance that [the principal] would be very substantially disadvantaged by this transaction and she did none of the things that an honest person would do to satisfy themselves that the transaction was not in breach of [the attorney’s] fiduciary duties to [the principal]. She was in a prime position to insist [the principal] had legal advice before this transaction proceeded and to satisfy herself that the transaction was not as improvident from [the principal’s] perspective as it looked on the surface. But she did not do so.’

THE SECOND LIMB OF BARNES v ADDY

The second circumstance described in Barnes Addy as giving rise to liability is where the third party assists with knowledge in a dishonest and fraudulent design on the part of the fiduciary. In Turner, the principal sought to recover the six farms from the third parties, his younger sons, on the basis of both the first and second limbs of Barnes Addy. They were 17- and 18-years-old at the time the farms were transferred to them. The court was not satisfied that their involvement attracted liability as:

‘neither had any actual knowledge of any fraudulent or dishonest design by [the attorney] in relation to the [farm] transfers and neither received the benefit of those transfers knowing that there was any wrongdoing in the use of the Enduring Power of Attorney by [the attorney] in that regard. The fact that, inter alia, the transactions were effected with the benefit of legal advice, and to the knowledge of the incoming bank mortgagee, is to my mind fatal to any suggestion that [the younger sons] knew or ought reasonably to have known that there was any breach of fiduciary duty or wrongdoing on the part of their mother [as attorney] vis-a-vis their father [as principal].

CONCLUSION

Clients may be vulnerable to exploitation for a multitude of reasons, including physical or mental absence. Exploitation does not require malevolence; it may occur with good intentions. Those who benefit as third parties participate in the abuse, although liability may not always attach to their windfall. That refuge can be taken in the advice of a solicitor, albeit misconceived advice, as occurred in Turner, emphasises the importance of the role the legal profession can play in preventing elder abuse.

1 It appears that an attorney owes fiduciary duties either because of holding that office alone (see Klotz v Neubauer [2001] SASC 464, [35]-[36], Re Wilson [2019] VSC 219, [68], Grant at [160]) or because they are appointed to manage the affairs, and to protect the interests, of a person lacking capacity for self-management (see Smith v Smith [2017] NSWSC 408, [89], Estate Torry, Deceased [2020] NSWSC 1230, [160]). 2 This expression is intended to contain but not be confined by Lord Selborne’s extemporaneous verbal formula in Barnes v Addy (1874) LR 9 Ch App 244, 254-255 3 [2020] NSWSC 1288 (Grant) 4 [2020] NSWSC 1468 5 [2020] NSWSC 5 6 Each of the cases involves an enduring power of attorney made pursuant to the New South Wales Powers of Attorney Act 2003. That legislation provides that an attorney is not authorised to gift the principal’s property or confer benefits unless the PoA expressly authorises the action: see ss.11, 12 and 13.
Ryan Frederick Pott (the deceased) died on 17 June 2008, aged 69. He was a retired commercial airline pilot. At the date of his death, his estate was worth about AUD3.8 million in assets, separate from other income-earning assets he controlled through a family trust. At the date of trial, the net distributable value of the estate was approximately AUD2 million.

In 1959, the deceased married his first wife, Denise. They had three children, Bryan, Christine and Gregory, all of whom survived the deceased. In the 1980s and 1990s, the deceased was in a de facto relationship with Jennifer. They had two children, Cameron and Naomi (the applicants). In 1998, the deceased married his second wife, Cecilia (the respondent), and they remained married until his death.

The deceased’s last will, dated 21 August 2007, appointed Cecilia as executor and left provision for Cecilia, Bryan, Christine and Gregory. The deceased made no provision for Cameron and Naomi.

In March 2009, Cameron, by his then litigation guardian, filed an originating application for adequate provision out of the deceased’s estate. In October 2009, Naomi indicated her intention to apply for provision and was joined as the second applicant in the proceedings.

This matter had a ten-year history before it was heard in October 2019 and ultimately decided in February 2020. A brief explanation for this delay is footnoted in the judgment; however, in short, it involved:

- a stay of the proceeding pending the resolution of a de facto property dispute commenced by Jennifer in 1998 against the deceased, which was resolved in 2011, some three years after the deceased’s death;
- a challenge to Cameron and Naomi’s paternity;
- a complaint, and a subsequent charge, which was later struck out, made against Naomi for swearing false affidavits in the proceedings;
- applications for disclosure of financial records relating to the family trust records; and
- an unsuccessful mediation.

This case highlights issues of national relevance, being the circumstances in which the spouse will not be afforded primacy over claims by disabled adult children in family provision applications and how (if at all) the court takes into account National Disability Insurance Scheme (NDIS) funding for disabled applicants.

**THE SPOUSE DOES NOT ALWAYS GET THE HOUSE**

The respondent sought to have the matrimonial home, worth AUD1.45 million, which was gifted to her in the will and where she had lived since 1998, exonerated from any provision the court might make for the applicants. This was sought in circumstances where the applicants criticised the respondent’s conduct as executor, particularly by incurring significant legal costs since the deceased’s death in relation to the de facto property dispute and a subsequent costs dispute, which significantly reduced the net distributable value of the estate.

In the circumstances, the applicants argued that the court should not regard its hands as being tied by a need to exonerate the matrimonial home. Although her Honour held that she could have taken the respondent’s conduct as executor into account in refusing to exonerate the matrimonial home, Ryan J proceeded on the basis that, given the respondent did not disclose her personal and/or financial circumstances or assert any other special claim, she was able to maintain herself from her own resources. Therefore, her position did not trump the applicants’ needs.

**NDIS**

Cameron has autism spectrum disorder (ASD). In 2009, he was diagnosed with Hodgkin’s lymphoma, for which he was successfully treated. Naomi also has ASD but is not as disabled by it as Cameron. Naomi has been diagnosed with post-traumatic stress disorder from being sexually abused by her maternal grandfather. She also has a gynaecological condition. They both have high care needs.

At the date of trial, the applicants were in receipt of disability support pensions but there was some uncertainty as to their level of NDIS funding. After the trial, Cameron was approved for almost AUD30,000 in NDIS funding for the 12 months ending October 2020, and Naomi was approved for almost AUD23,000 for the same period. The applicants submitted that, given the estate was not big enough to fully provide for the applicants (which would have required a sum in excess of AUD3 million), any provision made should seek to preserve their disability pension entitlements.

Although Ryan J acknowledged the applicants’ NDIS funding, her Honour commented that such a scheme is not means tested, the benefits provided are regularly reviewed and the scheme is ‘vulnerable to changes in governments and their policies’. Therefore, it was held that the availability of NDIS support did not relieve the deceased from the applicants’ claim upon his estate.

The court awarded Cameron and Naomi, who were then aged 29 and 35 respectively, AUD400,000 each for their proper maintenance and support, which, out of an estate worth approximately AUD2 million with no competing claims, should temper expectations of what a judge might award for proper provision moving forward, particularly for able-bodied applicants.

1 [2020] QSC 7 2 Pip Coore (with Caite Brewer) appeared for the respondent, instructed by Gall Standfield & Smith.
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MEMBER EVENTS

STEP AUSTRALIA CONFERENCE 2021 - SPEAKER SPOTLIGHT

Thursday 29 July to Saturday 31 July 2021
 Sofitel Sydney Darling Harbour Hotel, Australia

stepaustralia2021conference.eventbrite.com.au

STEP AUSTRALIA EVENTS PROGRAMME

View the full events programme at www.stepaustralia.com/events

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ADVOCACY
We want to hear from you!

Do you have a burning policy issue that needs to be given the voice of STEP?
STEP Members we want to hear from you!

We welcome your input, thoughts and feedback on policy issues you would like to see STEP involved in.

GET IN TOUCH...

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STEP Australia Policy Committee Chair

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THE SUB-COMMITTEE WELCOMES EXPRESSIONS OF INTEREST FROM MEMBERS. PLEASE EMAIL ANY FEEDBACK OR EXPRESSIONS OF INTEREST TO DIOR LOCKE AT DIOR.LOCKE@STEP.ORG