



ELDER LAW LOOKOUT – JULY 2009

INTRODUCTION

Welcome to our new look *Lookout* containing vital and contemporary issues for older people both in retirement and beyond.

DO ADULT CHILDREN HAVE A DUTY TO CARE (AND PAY) FOR THEIR PARENTS?

In Australia, generally not, but in other countries they do.

In America, at least 30 States have what are known as ‘filial support’ laws which impose a duty on adult children to support their parents who are in need. Here is an example being an extract from sections 4400 and 4403 of the California Family Code:

“4400 Except as otherwise provided by law, an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself of herself by work.”

“4403 A parent, or the county on behalf of the parent, may bring an action against the child to enforce the duty of support under this Part.”

These laws are often used by nursing homes in the USA to force adult children, for example, to meet their parents’ nursing home fees.

Similar laws exist in other western countries such as Canada but in Australia there is no such law on our statute books. Instead, we have some rather arcane and obsolete criminal laws such as section 285 of the Queensland Criminal Code which provides:

“It is the duty of every person having the charge of another who is unable by reason of age, sickness, unsoundness of mind...and who is unable to provide for himself...with the necessaries of life...to provide for that other person the necessaries of life.”

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We are not aware of this provision ever having been used to prosecute an adult child for failing to provide the necessities of life for a parent. It has been applied to prosecute parents for failing to provide the necessities of life for their children. The limitation of the provision is that the duty only arises where a person actually has the “charge” of, or responsibility for, another person. Consequently, unless an adult child is actually caring for a parent, the provision creates no duty to do so as the California law does.

I recently gave a presentation to an Ageing Summit entitled “Ageing, Caring and the Law”. It traverses this issue in much more detail and ends with an ominous warning – the future of aged care for our families will not be in the hands of Government but rather in our own hands, the family.

If this type of presentation might interest you and an organisation you’re involved with, please let me know.

SPECIAL THINGS FOR YOUR ENDURING POWER OF ATTORNEY

It is easy to see the Enduring Power of Attorney form as just that – a beige, bureaucratic form. But it has all the rainbow hues of a living, albeit, hibernating document in which you appoint someone to make decisions for you should you ever lose your capacity to do so. But what decisions would you want them to make?

In one part of the form, for example, it asks if the person making the document wants to give any instructions to their attorneys about how they should use their powers if they have to. Most people say no to this question and prefer to simply rely on their attorney to make the appropriate decisions.

Other people however, latch on to this question and insert some very interesting instructions. Some of these include:

- How their pets should be fed, housed and cared for;
- How much, and how often to give money to their grandchildren;
- Who is not to be allowed to visit them if they end up in a nursing home;
- Where to take them on outings;
- What food they are not to be given;
- Renewing superannuation death benefit nominations;
- Whether to sell their home or not; and
- Who to get legal or financial advice from (and who not to!).

In the end, the document is your document and is your wish for your incapacity, just like your Will is your wish on your death. If you want to put special things in it which are important to you, you should, because, presumably, these things will be important to you whether you have your marbles or not.

OOPS – THERE GOES MY CARER UP IN SMOKE!

If you receive community care in your home from an organisation, what happens if, when a carer is visiting you, they somehow hurt themselves or your pet poodle mauls their ankle?

Initially and generally speaking, (lawyers like that phrase), the carer would be usually covered for their injury under worker’s compensation insurance taken out by their organisation. Is it possible however, that you could be sued by the insurer to recover the money they had to pay out to the carer under the workers compensation policy?

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What an interesting question. It raises all sorts of issues about whether your own home insurance would adequately protect you from such a claim and what your contract with the carer organisation says about it as well. Maybe it's time you checked your policy and the contract.

WHAT'S IN A NAME

Not much when it comes to Centrelink.

We often have people asking our advice about giving financial assistance to their children and the effect it could have on their pension or health card. The assistance is normally given by way of a loan or a gift. Each could have an effect on your pension entitlements.

If you lend the money to your children, the loan, while it is outstanding, remains an asset in your name. If you give money to your children, while the gift is not an asset in your name it could still affect your pension under Centrelink's gifting rules.

I recently had a client who swore black and blue that he had loaned \$20,000.00 to each of his children. When pressed on what the terms of the loan were, he told me that the loans were not documented because the children didn't have to repay the money.

Despite all my persuasive powers, I could not convince him that the money was in reality a gift not a loan. For the purposes of the law, it doesn't matter what name you give to a transaction, it is the substance of the transaction that counts. You cannot dress it up as something it is not.

TO RESTRAIN OR NOT TO RESTRAIN – THAT IS THE QUESTION

Managing challenging or risky behaviour is a constant demand on carers and aged care facilities. On the one hand, giving people the ability to do what they want and when they want, is a basic human right. On the other hand, certain behaviour can almost be guaranteed to lead to injury, or worse, for some people who simply cannot safely engage in certain activities.

Restraining people, as it is known, can include physical restraint or even chemical restraint. How far should or can you go in limiting or preventing frail or vulnerable people from hurting themselves. Should you, for example, place a polystyrene noodle or bed rails in a person's bed to prevent them from falling out?

Generally, it is unlawful to restrain a person or impede their freedom without their consent. But this issue raises the age old caring cleavage or legal conundrum for carers between assaulting a person and exercising their duty of care to that person. It is clear enough, generally speaking, that when dealing with a person who understands what the risks are in certain behaviour and still chooses to take those risks without any restraint, that person assumes the risk and the consequences.

But what if a person has lost the capacity to understand risky behaviour? This is not only an issue for them, as it can also impact more broadly in creating risks for others.

Recent amendments to the Guardianship and Administration Act in Queensland have now created a new regime and legal requirements for the use of restraints where a person lacks the capacity to consent to those restraints. Space does not permit me to go into detail about these new laws but clearly, if you are involved in decision making for people who have lost capacity, you need to know what these laws say. Curiously, the new laws do not appear to apply to residential aged care facilities.

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COOING, CUDDLING, CANOODLING & CAPACITY

Imagine one day, as a wife or husband, you catch your spouse, still married to you, but with advanced dementia and residing in a nursing home, in bed with another resident, cuddling, cooing and canoodling, as they say. How would you react? Who would you tell? What would you want them to do? What are the legal rights and wrongs?

A former judge of the United States Supreme Court, found themselves in exactly this situation when they went to visit their spouse in a nursing home. The reaction astonished the home's staff when the judge told them that they were thrilled for their spouse and were satisfied that their spouse had found some happiness in such a dark time.

How indeed would you react? If you are the Enduring Power of Attorney for example, would you be able to direct the nursing home that there be no further contact between the spouse and the resident?

These are not only legal questions but poignant personal conundrums.

LET FAMILY BE FAMILY?

A recent decision of the Guardianship and Administration Tribunal has caused some waves in the capacity community.

The Tribunal had to decide whether to appoint the grandmother of a young adult who had lost capacity as her guardian and administrator or, instead, the Adult Guardian and Public Trustee. The grandmother had been looking after the adult for many years.

In making it clear that they were not criticising the grandmother's previous supporting role, the Tribunal decided to appoint the Adult Guardian and Public Trustee instead of the grandmother and in doing so said:

"The most important thing we see when we come to situations like this is that it's much more important to have family being family, than people who are making decisions. We can appoint any number of decision-makers for a person, but we can't appoint family, so it's really important to enable a situation to exist where family can step back from the decision-making role and provide support, advice, comfort and succorance from time to time when that is needed."

To an observer, these comments appear to flag the Tribunal wanting to take decision making out of the hands of family and into the hands of benevolent bureaucrats. While this may be appropriate on occasions, I don't know how many people would agree with the underlying philosophy implied in these comments given the thrust of the capacity laws, which, as we see it, is to try to keep decision making for people who have lost capacity within the realm of those they might know and trust.

Regards

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