

“When experience counts and you need an innovative approach, contact us”

Welcome to our second edition of Legal Insight for 2009. In this edition we focus predominately on issues related to the elderly.

## Protecting Elderly Against Abuse

The incidence of elder abuse has been made clear in prior issues of Legal Insight (see our Winter edition 2008 on our website: [hutchinsonlegal.com.au](http://hutchinsonlegal.com.au)). Once abuse has occurred, the principal aim is to return the victim to the position they were in before the abuse occurred. This recent case makes clear some remedies available to victims and the attitudes of the court in how those remedies can be applied.

The case is *Badman v Drake* [2008] NSWSC 1366. In this case, an elderly woman, Mrs Badman, empowered her two friends Mr and Mrs Drake (“the Drakes”) to act for her as her financial attorneys. Mrs Drake was



a hairdresser who befriended Mrs Badman and later began to care for her in driving her to the shops and to her medical appointments. Mrs Badman had a son, but this relationship was at the time quite strained.

The Drakes entered into a complex mortgage arrangement and Mrs Badman said she would help by giving them the amount needed to clear the mortgage. Mrs Badman’s solicitors were involved and were concerned whether Mrs Badman’s interests were being protected. However, the Drakes appeared to have taken matters into their own hands and under their power of attorney arranged for the sale of shares and the transfer of the sale proceeds of Mrs Badman’s house - the intended arrangement was that Mrs Badman could live with the Drakes. At the point of sale and the transfer

### Ancient Wisdom

**‘Law: an ordinance of reason for the common good, made by him who has care of the community’**

– St Thomas Aquinas,  
13th Century Italian Theologian

of the funds to the Drakes the only solicitor involved was that for the Drakes in drafting the discharge of mortgage documents.

In finding in favour of the application by Mrs Badman’s son for relief against this transaction, Chief Justice Young said: ‘there is no doubt that an elderly person may, if she wishes, deal with her property in any way she likes ... however, equity works by precedent and it has almost become a rule of elder law that when one is dealing with an elderly person who is lonely and friendless, a person befriends her must, if they are to gain a personal benefit, be extremely careful to ensure that there is no unworthy conduct.’

In regards to the vulnerability of the elderly, his Honour said: ‘It is not unusual for the persons receiving the benefit to have been generous to the person whose property they have taken. Sometimes this is out of the goodness of their hearts ... other times it is just bait in order to secure the transaction.’ But further, all solicitors, said his Honour, including those not directly retained by the client have a duty to ensure that there is no such unworthy conduct: ‘it is impermissible for any solicitor to take the view that because monies are going to flow in which are to the advantage of his or her client, that they can just close their eyes to the fraud ... on the vulnerable person’.

The case puts solicitors on notice that they cannot ‘close their eyes’ to potential fraud in matters dealing with the elderly or vulnerable people but equally it suggests that attorneys must be ever mindful of their role and responsibility.

If you are thinking about powers of attorney or you believe that your attorney is not acting in your best interest please call our office.

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If you would like to receive an electronic version of Legal Insight, please:

- call Tristan Tottenham of our office on 9870 9870
- write to us at PO Box 450, Ringwood 3134
- send an email to [office@hutchinsonlegal.com.au](mailto:office@hutchinsonlegal.com.au)

# Do You Have Capacity?

While remedies are available to the elderly in such cases, still the question that often presents to our clients is whether there is the requisite capacity to appoint friends as attorney's or even to draft a Will.

This recent case in Victoria suggests that the issue of capacity is more complex than first thought. In *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64 a challenge was brought by the cousins of an elderly spinster Elsbeth Jean Dyke who left her large estate (being her farm known as 'Sefton Grange' in Mount Martha on the Mornington Peninsula) to her neighbours and various charities. The family claimed she did not have testamentary capacity. Other issues related to Undue Influence.

Ms Dyke had Alzheimer's disease and the question as to her capacity related to the extent of her dementia as caused by the disease. The court accepted the view of Dr Peisah, a Psychiatrist and leading expert in this field, who made the following observations about dementia:

1. Alzheimer's disease may be plotted into four stages: pre-dementia, mild dementia, moderate dementia and severe dementia;
2. The presence of cognitive decline or dementia does not preclude testamentary capacity (though) it is probably lost in severe dementia;
3. Generalisations (re capacity) are fraught with difficulty and must be examined on merit with regard to the extent of the dementia ...the complexity of the estate and the nature and history of the relationships.
4. Obtain a detailed assessment of the cognitive functions specific to the testamentary process.

In making his findings in respect of testamentary capacity for Ms Dyke, Justice Vickery affirmed that, on the evidence before it, a court must decide whether the testator is of sound mind, memory and understanding at the time of execution of the documents. A testator (or indeed a donor of a power) must have sufficient mental capacity to comprehend the nature and effect of what they are doing; they must be able to realize the extent and character of the property they are dealing with. It is not enough to ask a testator whether they understand what the Will contains; rather, the testator needs to explain the nature of the documents and

the effect of what they are doing in their own words.

As a result of this case, detailed assessments from doctors will become critical in situations where there is some doubt about capacity; equally, however, even if you have some memory loss, it may not be that you cannot execute a new Will.

At Hutchinson Legal, we recommend that you review whether your Will meets your current requirements whenever there is a change in your circumstances and/or at least every two years. Please call Barbara Graham or Martin Reilly to talk more about your Will.

## Some Eldercare 'Thoughts'

The nice thing about being senile is that at Easter time you can hide your own Easter eggs.

Reporters interviewing a 104 year old woman asked: 'What do you think is the best thing about being 104?' The woman replied: 'No peer pressure.'

## New Website

The team at Hutchinson Legal has just unveiled their new-look website which covers everything there is to know about our legal practice which holds rich historical ties to the community of Ringwood.

Visitors to our website will find a huge array of new information outlining a complete line-up of their diverse legal services which cover Business Restructure & Insolvency and Family Law to Commercial Agreements, Lifestage Planning and Debt Recovery plus many more.

We have included a dedicated section of information covering Case Stories, News and Useful Information on each legal service page to provide people with more of an understanding of what is involved in a range of legal matters. The "Our Community" and "History" pages also showcase the beginnings of the Hutchinson Legal journey

and highlight a range of services that are available to the wider community.

We trust you take some time to explore this online legal experience at [www.hutchinsonlegal.com.au](http://www.hutchinsonlegal.com.au) and call us if you need a solution to your legal problem.

## And Finally

Martin Reilly of our office recently attended a conference for Seniors Rights Victoria World Elder Abuse Awareness Day. The purpose of the conference was not so much awareness of Elder Abuse but its prevention and a key issue discussed was that of human rights for the elderly.

We at Hutchinson Legal are aware of the many dramas that impact on the elderly: the discovery that after many decades in the same home one can no longer manage alone and you must leave familiar surroundings for a strange apartment; the indignity that a once vigorous and active life is curtailed by a sudden stroke and now walking is precarious, memory unreliable and speech rather slurred; that more than ever before one is confronted with the diminishment of life and the intrusions into your autonomy. Yet, as resonated in the conference, the elderly still have human rights that must be maintained. And equally with those rights, still a tenacity and a vibrancy to affirm life: - 'Night is drawing nigh - for all that has been: Thanks! To all that shall be - Yes!'<sup>1</sup>

We trust this edition of Legal Insight brings encouragement and a 'Yes' to all our readers.



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<sup>1</sup> Dag Hammarskjold, *Markings*, translated by W.H. Auden and Leif Sjoberg (London: Faber and Faber, 1964), 87.

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