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PUBLIC NOTARY SOLICITOR ACCREDITED SPECIALIST WILLS & ESTATES

Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne Victoria 3002

21 August 2009

Dear Sir

Re: Inquiry into Powers of Attorney

I am a solicitor of the Supreme Courts of Victoria New South Wales and the A.C.T.. I was accredited by the Law Institute of Victoria as an Accredited Specialist Wills & Estates in Victoria in 2000.

From 1998 I have operated a specialized estate planning practice using a company called Victorian Estate Planners Pty Ltd however I am a sole practitioner.

I have formed professional relationships with over 80 financial advisers who refer their clients who need estate planning advice to me. Those clients regularly refer other clients to me and currently about 50% of my work comes from the advisers and 50% from client referrals. My database of clients indicates that I have over 4000 clients for whom I have prepared estate planning documents and most of those clients would have requested at least one of the Victorian powers of attorney.

I therefore welcome the opportunity to make a submission to your committee about powers of attorney.

1. Enduring Power of Attorney (Financial)

When this document was introduced in 2004 the legislation provided that the previous Enduring Powers of Attorney remained valid and effective but on for financial matters.

What happened in practice was the major banks began rejecting the use of pre 2004 powers on the basis that such documents were invalid. This in turn involved considerable unnecessary anxiety on the part of clients who were unable to have their donor execute a new Enduring Power of Attorney (Financial). For clients who could re-execute this procedure was usually followed to avoid confrontation at bank counters. I am sure that this was not an intended outcome however the banking system should have been properly briefed on the new regime in 2004. The message that I would therefore like to make is that if there are any changes to these documents it must be made absolutely clear to the most likely users as to what is required in terms of powers of attorney.

At the time many practitioners I spoke to had no information to suggest that there was any problem with the pre 2004 Enduring Power of Attorney and I must say that I shared that view.

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At about that time Queensland created a 25 page monstrosity which was designed to cover all representation matters. I believe the ACT has a similar omnibus document.

It is my experience that the more complex the document the more problems clients have in understanding them. Powers of Attorney are documents that elderly clients must have as so and it is far easier for them to understand single use documents. It is my view that this approach should be continued and that the Queensland regime be avoided at all costs.

2. Appointment of Enduring Guardian

The first major issue that the 2004 Enduring Power of Attorney (Financial) created was the consequential need for the Appointment of Enduring Guardian.

The need for this document is patently clear and an essential document for most senior Australians. However what was not clear was the rationale for the requirement that the guardians be present at the signing. This to me was a ludicrous requirement which has transpired to cause insurmountable obstacles.

Most elderly parents who have a normal caring and loving relationship with their children want to appoint at least one of them as their guardian. If that child lives in another State or another country then clearly, without a visit from the child, they cannot be appointed as a guardian. Conversely, in relation to whether the parent could visit the child in another country, the question of who could witness this Victorian document in another country was apparently never addressed. The cost of having a foreign notary do it might create considerable expense for the parent.

It appears that the Appointment of Enduring Guardian was created before the Enduring Power of Attorney (Financial) which has a Statement of Acceptance that can be signed at any time in any place and which does not require witnessing but contains the undertakings to..

> "(a) to exercise the powers conferred with reasonable diligence to protect the interests of the donor; and
> (b) to avoid acting where there is any conflict of interest between the interests of the donor and my interests
> (c) to exercise the powers in accordance with Part XIA of the **Instruments Act 1958**"

I can only surmise that this procedure was a reaction to the problems which manifested themselves in relation to the Appointment of Enduring Guardian. However no attempt was made to correct the attendance problem in the Appointment of Enduring Guardian at that time.

I have had countless Victorian citizens as clients who have wanted to appoint their children as their guardians but are prevented from exercising the right to appoint a guardian who cannot, due to logistical barriers, attend the signing in Victoria.

What makes this requirement so ludicrous is the fact that only decisions relating to lifestyle can be made with this document. However an attorney using an Enduring Power of Attorney (Financial) can make financial decisions involving every cent of

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the donor's funds. These decisions of course must be made in the best interests of the donor however the consequences are far more serious if a breach of the fiduciary duty occurs yet the attorney does not have to attend the for the signing whereas a guardian does.

The other issue that seems to have been ill-considered is the requirement that only a one guardian and (after an amendment to the original legislation) one alternate guardian can be appointed.

As presently worded I advise my elderly clients to appoint, if possible, two of their children because elderly couples age and may become debilitated at approximately the same rate. So as to avoid the limitation of having one child as the alternate to the other spouse, I recommend the appointment of two children.

It would my view that a person should be able to appoint their spouse and then up to three alternates in a lineal order but that all appointees not be required to attend but simply be required to sign a statement of acceptance that summarizes their obligations to the donor in the same way as with the Enduring Power of Attorney(Financial).

3. Enduring Power of Attorney (Medical Treatment)

In relation to this document, I believe that it should be made mandatory that the donor be required to issue instructions to the attorney which covers the ultimate decision in relation to withdrawing life support. I provide my clients with an additional letter which gives positive directions to the attorney so as to reduce the psychological burden on the attorney of authorizing the withdrawing life support. Some clients ask (usually on religious grounds) that their existence be preserved at all cost notwithstanding that they may appear to be brain-dead.

Furthermore there is no reference or explanation in the document to the other two schedules in the Medical Treatment Act 1988 which allows for the refusal of medical treatment.

4. Terminology

In relation to the terms used I fail to see how a document styled as an Enduring Power of Attorney (Medical Treatment) does not appoint an attorney but appoints an agent and an alternate agent.

The Appointment of Enduring Guardian appoints a Guardian and the Enduring Power of Attorney (Financial) appoints an attorney. This maintained consistency with the pre 2004 regime. However I would suggest that any replacement document appoints a Financial Attorney or an Attorney (Financial)

I trust the foregoing is of assistance but if do nothing other than remove the inane requirement that guardians be present then that would be a significant improvement for all concerned.

Another major improvement would be uniform State legislation for these documents because State borders are becoming increasingly irrelevant in relation to financial

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transactions. However after seeing the Queensland regime I can't see that happening without federal intervention.

I had hoped to be able to present some suggested drafts but I have simply run out of time but I would implore you to use the same person to redraft all the powers because the current ones each clearly had totally different thought processes behind the drafting.

Yours faithfully

M.F. Spottiswood

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