

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 30 March 2010

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Ms L. Jeter, Executive Director, Elder Abuse Prevention Association.

The CHAIR — Ms Lillian Jeter, thank you very much for coming and meeting with us today. We have got half an hour. You know the discussion we will have is subject to a number of pieces of parliamentary committees legislation that afford you protection — that is, parliamentary privilege during the process of this hearing. But you will not be afforded that if you say anything outside the hearing. Do you understand what I am saying?

Ms JETER — Yes.

The CHAIR — Hansard will be recording the proceedings. You will be sent a copy of that afterwards and you can make some minor adjustments but obviously not change the substance. We will throw it open to you and then we will have some questions and discussion after it.

Ms JETER — That is fine. Please keep me on time if you do not mind.

The CHAIR — I certainly will; it is my job.

Ms JETER — As you can all tell, I am not from here, so I hope you can understand what I am saying, and I hope the poor people down here who are trying to translate into another language can understand. Can you hear me?

Mrs VICTORIA — Put it on the southern translation.

Ms JETER — Put it on the southern track please!

The CHAIR — No, we can understand you perfectly well.

Ms JETER — I come from a little bit of a different background. I am not a lawyer, I am not a solicitor and I have never been a legal person. I used to be a police commander in the United States, and I retired in January 2000.

Just as an introduction to my background and where I am coming from, when I was a police sergeant in the Charleston police department in South Carolina in 1985 I came across my first case of what now we consider to be elder abuse. I did not know anything about elder abuse at the time. I walked into a criminal situation which I deemed as a crime. I arrested the daughter involved who was not taking care of her father. His only fault in life was that a pacemaker had been inserted. She kept him on the back of the house with the curtains drawn for the next three years, barely subsisting him and keeping him just alive enough for the pension cheques and social security cheques to come in so she could live in a most wonderful manner just by herself. Her father was very debilitated.

When I walked in to that situation on 15 August 1985 — and as of this year, this marks 25 years later that I started in my elder abuse career — what I saw was a crime. I had no idea what the statute would be. I had no idea if it were covered. I did not see physical abuse; I did not see sexual abuse; I saw neglect. I handled it as a criminal incident. That particular incident became the first precedent case in the United States on elder abuse. Sitting here 25 years later I am a little bit wiser and a little bit more knowledgeable. I do not know how much more helpful, but at least I am a little bit more informed than I was 25 years ago as a police sergeant. As I said, I retired in January 2000. I came through Tullamarine airport on 15 January with two suitcases. Now 11 years later I am an Australian citizen and a dual citizen. I have my own company in elder abuse training consultation, representation at VCAT et cetera. I am also the Director of the Elder Abuse Prevention Association, which is a not-for-profit national association and one of a kind here in Australia. We deal with incidents of elder abuse not only in Victoria but also throughout Australia. That is the breadth of knowledge I am bringing to the table; however, it is not from a legal standpoint but from an advocate and law-enforcement standpoint and from 25 years of working these types of cases.

I want to go over five main points, which when I was putting my notes together and my thoughts together I thought might be very applicable to bring. I am sure you have heard some of these before. I am sure I will be going over it once more, which only enhances that there is a need there.

One is attorney shopping. What we see in most of the elder abuse cases that come to our attention through our hotline at the Association is that the abuser always knows the legal precedents and has some knowledge of legal affairs and legal issues. They have worked in the law before, they have worked as a clerk in the law, they have

been a former law enforcement officer, they are or were a solicitor, and the list goes on and on. They know the law, they know the statutes, they know how far they can go. What normally happens is that when they are the abuser or those who are getting information they never go back to the family attorney when they want to change the will or to get the power of attorney. They will always do what I call 'attorney shopping'. Even if they have to go to four or more different solicitors down the street of whatever community, they will never go back to those who have the most knowledge of the history of the family. Whether it is the 2nd, the 5th or the 10th solicitor there is always one that will be willing to take them in and then, unfortunately, give those abusers the legal power they are seeking, whether it be changing of the will or changing of the beneficiary in the will. I call it the three-for-one deal, changing the property to sell proprietary or joint proprietary or changing or getting for the first time a power of attorney. That is my first case in point. With that acquisition and that easy readiness they can walk into any solicitor's office. Some would push them back, and some would use all of the ethical and moral reasons to not go through with the power of attorney. However, with enough shopping down the street they are going to find someone under the law that will do that.

The second one is the difference between the legal capacity for decision making in granting that power of attorney from a legal perspective versus the mental capacity-type of issue. I heard the gentleman who was just here talking a little bit about that. I have spoken to quite a few solicitors and they will say, 'Look, Lillian, you have got to understand the situation from our point of view. They will answer our questions. We will ask them questions, we will take them separately and we will do everything in our power to make sure they understand what they are signing away to that loved one, that family member or family members who turn out to be the abusers after the fact or have been all along but they just did not have the legal power. But then we might see them down the street or they might be out on the street having left our office and they are talking to the fairies'. The legal capacity in that office setting is all that those solicitors have to go on. And rightfully so; I am not blaming them by any means. Whereas health-care professionals, physicians, neurogeriatricians or neuropsychologists are of course a little bit more informed about mental capacity.

This information goes to you to try to bridge that gap. In other words, we might need to toughen it up; we might need to make it a little less accessible in that solicitor's office so that they can be more comfortable, more sure and more accurate in their decision making. What has happened with the abusive situation is that the older person has been coerced and placed under undue influence prior to getting there. They have been threatened, they have been intimidated and they are now making one of the most important decisions in their life. They have left the house and now they are in the solicitor's office, but in the interim, all the way through and the night before, they have been intimidated and they are being coerced into signing on the dotted line. It happens time and time again. And of course we are talking about people with capacity, supposedly. This is, again, recognised in case after case. They have the mental capacity but have been unduly influenced, coerced and intimidated and now the abuser gets the legal power. Some type of bridging the gap to give solicitors more powers or more tools in making that decision all the way up to what they properly do with the mental capacity is needed. I am not talking about a mini mental test now, how many fingers and all of that; not just a small-scale type of instrument but one that will enable them to make a better decision.

The other thing that I see is talking about checks and balances after the fact of a power of attorney having been signed. What we normally see is that things are done and situations are looked into after the fact only upon an official complaint of misconduct or whatever going back to the solicitors is made, so obviously there is a huge open gap there where there are no checks and balances. From what I understand from solicitors, and please correct me if I am wrong, powers of attorney in Victoria are not registered — I believe the last speaker was talking about that — and there is no compulsory auditing. All of these things would help to make it a better system. I will leave that to you; you are the experts. But it does make it a lot harder.

The fourth thing would be — and I have seen this in quite a few cases — where there are no solicitors involved but the power of attorney is signed under duress or when the person is medically incapacitated, not through overdosing of drugs or anything but through debilitation. They are lying in the hospital bed. The physicians or GPs want to have a decision made and there is no power of attorney in place. Thus there is that impetus of 'We need something signed because now mum might need to go into the nursing home. We need somebody over here in the family making that decision'. Unfortunately in some cases you are making an instant decision and the physicians are signing and witnessing the documents. In one case they gave two family members a shared power of attorney and then the mother went into the nursing home even though there were up to nine siblings who could have been considered. The two abusers were granted the power of attorney. That case finally had to go to VCAT for the power of attorney to be revoked with the rest of the nine putting it back into a legal-type of

forum and having the hearing member take it away. All of this happened in the hospital with a diminished mother and the pushing of the hospital system to get her out, to get her discharged but with a power of attorney signed. It seems like there need to be some checks and balances there.

The fifth point I felt was relevant was that we do not have enough information, especially through these cases. We do not have enough documentation and information as to, firstly, how many cases there are and the statistics. For example, when are powers of attorney evident, when are they used legitimately and when have they been used not so legitimately? I do not know what documentation you have, but the Association — and we have been in existence and incorporated now for nine years — especially at the state level, has no information on that. One of the voids, especially in trying to tackle this problem, is proper statistics on evidence of misuse, looking to see if there was a power of attorney in place that got rescinded or if the children went in and had it signed or one was keeping a secret with mum or whatever the case may be. In every single one of our cases that is a question we ask when we are talking to family members. We are putting information together. We are a not-for-profit association and a pro bono provider, and we are asking that question and looking at what happens, but our databases are being finalised now. We need the information sooner rather than later. This is a huge gap and one that needs to be filled through the state government with, firstly, the proper reporting mechanism but also a reporting mechanism that takes into account all of their parameters.

The final thing I brought — I am talking fast — was from the American system. I am not saying that this is the best thing since sliced bread, but I was just looking at some of the things that they have put in, having worked in their system for so long. What they are saying now is that some of the states are looking at the person with power of attorney, like with a sports player or an actor, being an agent with a legal duty to act as a fiduciary and be required to act in a trustworthy manner and of course make decisions in the principal's best interests that are consistent with the decision that principal would have made for him or herself before losing decision-making capacity.

In the United States where these have been put into place some states have said that the violation of this duty is not only a civil responsibility that we would see it as, but now they put it into a criminal responsibility, just like if you were a support agent, or representing an actor or someone like that. The agent may have violated state and federal laws, including exploitation, embezzlement, forgery, fraud — like credit card, tax fraud and welfare fraud — larceny, money laundering or theft. There are elder abuse statutes in every single one of the 50 states, but this is above and beyond the ones that were put into place in 1986 and beyond. This has only been put into place in 2008. But to look at it from a criminal perspective, and that duty — you know, that trustworthiness and duty — —

Instead of looking at it only from a civil perspective, from their data they have said that one of the worst stumbling blocks is to get those in law enforcement educated that this might be a criminal type of matter and to handle it as criminal in those states that are applicable and not to just fob it off and say, 'I am sorry; this is a civil type of problem. We cannot deal with it'.

From attorney shopping to acting as legal agents with possible criminal responsibility, that concludes my presentation.

The CHAIR — Thanks very much. Could I come back to something you touched on in a number of the points that you made? I want to look at the issue of the extent of elder abuse arising out of powers-of-attorney arrangements. Could you pull those general comments that you were making together and give us some sense from your Association's point of view of how you would assess that?

Ms JETER — The way that we will be assessing it is through the actual cases coming through.

The CHAIR — What sort of a picture do they give you?

Ms JETER — We do not know that yet. We do not have a completed database that is filled with all of our backlog of cases, so that is a future consideration. I cannot tell you; everything right now is guesstimates.

The CHAIR — So what would your hunch be on that?

Ms JETER — My hunch overall is that here in Victoria we probably have about 20 000 cases per year. With 95 per cent of the elder population still in the community and with only 3 to 5 per cent in residential

care — we are talking only Victoria, but that would be applicable all over — the majority of the cases probably would have some type of power of attorney in the community involved, or going that way, or the utilisation of it. I would say that was so in a lot of cases, because it is a family member, it is a private carer or it is a neighbour who has come over and brought them into the fold, so to speak, and are taking the place of family. In some cases it is a trusted other that has now wormed their way into the lives of the older person. Then you have to minus out those with capacity who are still living independently, so we get rid of that section, whatever that might be. Now we are talking about those who are dependent and vulnerable. I do not really have a succinct answer for that.

The CHAIR — I understand that.

Ms JETER — I would say the majority in the community setting would have some legal considerations there, either prior to getting powers of attorney, looking into getting powers of attorney or already powers of attorney pre-existing, as well as the problems with the titles to the property or changing the will to beneficiary. As I said, I call it the three-for-one deal.

The CHAIR — I understand. It is a little bit unfair asking you to make an assessment.

Ms JETER — That is all right. You can ask.

The CHAIR — Tell me again what were the actual issues that you would say were dominant when you were talking about wills?

Ms JETER — The three-for-one deal?

The CHAIR — Yes.

Ms JETER — What the abuser wants to do is get complete control, so it is the titles to the property, joint proprietorship, because when the death — —

There is the changing of the pre-existing will. This is the other reason not to go back to the family attorney but to choose one out of the yellow pages or go up and down the street until they find one, or make a deal over here — the abuser with someone else that they have found. There is the changing of the wills and the changing of the beneficiaries as well as the signing of the power of attorney.

Mr CLARK — If I could follow on from the Chair's question, in looking at the whole 20 000-odd cases you are talking about rather than with or without the powers of attorney, are you able to give us an indication of the sorts of abuse that you are finding most common? What proportion of complaints are about direct physical violence, neglect, misappropriation of assets, inappropriate medical treatment, inappropriate care arrangements et cetera?

Ms JETER — Again, we are the cart before the horse unfortunately. We have the cases. We do not have the database. Because we are not for profit — we are doing it pro bono — we do not have the millions of dollars that a government would have. However, when all of that is backlogged along with those that are coming in, then I can certainly give you those facts and figures that would very much at that point be succinct. I can only tell you now that most of the community types of cases are mostly neglect and psychological abuse, but with a hidden offender and a hidden abuser, then that gives them the leeway to also gravitate to physical abuse and sexual abuse. I have never, ever in 25 years had a community case where they said, 'I am not concerned with the moneys; we will leave the moneys behind'. Whether that is the most important abuse that they are involved in, they never leave the moneys behind, because this is total power and control. The moneys are not only the control of the person but also the person's financial affairs.

Mr CLARK — You are saying that financial abuse is involved in just about every case you come across?

Ms JETER — I would say with every single community case they would never leave the moneys behind. When you get into residential care of course it is a different matter entirely. I do have specifics of statistics on residential if you find it applicable. I have brought those with me, too.

Mr CLARK — But do those residential abuse cases involve powers-of-attorney abuse?

Ms JETER — Not as much. A lot of those are more guardianship cases for obvious reasons, especially in nursing homes where there is a guardian involved. But there is a power of attorney still there with the family members: ‘Now mum is no longer at home, we have put her in a facility and sold the house et cetera’. There are still those powers of attorney that control her nursing home existence, obviously since she is still alive. The other concern of course is guardianship, that the family members who are now not powers of attorney but guardians — —

Mr CLARK — But you are finding similar abuse amongst guardians?

Ms JETER — Definitely, no doubt about it. This is a type of abuse about which you can imagine the reticence on the part of directors of nursing or management, because under the law they are supposed to be the decision-makers, and the only route for directors of nursing to go is of course down to a VCAT setting to oppose the guardians, and there have been many cases that they have not only from a management point of view but also ethical and moral where they have had to step in.

Mr CLARK — How effective do you find VCAT to be in that context?

Ms JETER — I have found VCAT to be very effective in some cases and others where the person who has walked out the door is the abuser goes on only to abuse more. I would say it is 50–50. I have been very pleased, but I have been absolutely aghast, to be honest with you.

Mr BROOKS — You mentioned another jurisdiction that was introducing offences if the attorney did not act in the best interests of the donor. As you can imagine, it would be very attractive for legislators to go down that path, and I think it is something we would probably consider in our deliberations. Some of the concerns that have been raised through evidence have been about ensuring that there is not a disincentive for a lot of power-of-attorney agreements, whether it is a positive agreement where there is a genuine need for a power-of-attorney agreement and a genuine partnership, if you like, and whether the fact that there are criminal sanctions hanging over people who are not acting in the best interests. It is not clearly defined whether that discouraged people from entering those agreements, particularly people acting in the power of attorney. Do you think that would be a problem?

Ms JETER — Again, to me it would be one more step in prevention. It would be one more signal to those who want to go down that route or want to not properly use their authority under the law, meaning the power of attorney. If they knew that not only would they be punished or possibly be sectioned under the civil but also now the criminal, then I think that would give a little bit of a wake-up call to the numerous abusers out there who are using that very legal document that I am sure you all hold very dear. I do, too. It would be a wake-up call that they could be not only civilly but criminally punished. Again, I am coming from a law enforcement background.

The other problem is when you have someone who has gone from capacity and is now without capacity. Maybe they are in a nursing home, but the power of attorney is still active out here. It even makes it more of an onus and responsibility to make sure that we are doing the right thing from our standing and viewpoint.

The CHAIR — Heidi, we are almost out of time.

Mrs VICTORIA — That is all right. It is to follow on to what Colin was saying. You said that they have only introduced this agent-type approach in about 2008?

Ms JETER — In 2008. I will let you have this for the record.

Mrs VICTORIA — Is there any really early evidence of that having any changes?

Ms JETER — I think it is in the early days now. As I said, it is only a couple of states, so it is not across the 50 states. All 50 states have proper criminal statutes specifically on elder abuse, so this was an extension to that to look at it not only civilly but put it into that criminal perspective. You can have this for your records.

The CHAIR — Thank you.

Ms JETER — One of the things that the author brought out of course was law enforcement and not quite understanding, so again we are back to training and education, because they have got it in their mindset that it

was a civil issue and has been forever, but now all of a sudden in certain jurisdictions it is criminal. To me it is another tool. To me, as I said, it is someone working supposedly in the best interests, and especially when they cross over into not having the mental capacity, then that trustworthiness should go to a higher plateau, not sink down to a worse level, so to speak. It is a signed agreement. They are working as an agent, albeit not exactly how we have customarily looked at it, but certainly I do not think it is off the table, so to speak, to easily apply that.

I also have the person with the American Bar Association. If you as a committee wanted to get in touch with her, then I would certainly open the door for that. I know her personally, and she was the author for the American Bar Association. Please pick her mind at great length.

The CHAIR — All right then. Thank you. I am sorry we are out of time.

Ms JETER — That is all right.

The CHAIR — I thank you very much on behalf of the Committee for the material that you are providing us with and also for coming along and talking to us.

Ms JETER — Thank you.

The CHAIR — As I said at the outset, you will be provided with a copy of the transcript that you can check over to make sure it is accurate and then send it back to us.

Ms JETER — What we would love to do in the future is when those cases start going into the database you can say, ‘This is what we need a report on’, and you have it.

The CHAIR — As you probably know, we are due to provide our final report at the end of August, so we are racing against the clock, but if there is anything that you think would be useful to us, we would be very happy to receive it.

Ms JETER — This is ongoing. It is not going to stop in August.

The CHAIR — Sure. I understand that.

Ms JETER — Certainly any data that you all want; it is ongoing, at any time whatsoever. At least it is a perspective and you can see at least some indication, and anything is better than nothing.

The CHAIR — Okay. Much appreciated.

Ms JETER — All right. Thank you.

The CHAIR — Thank you very much.

Witness withdrew.