

## **GENERAL PURPOSE STANDING COMMITTEE NO. 2**

### **INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES**

#### **Supplementary questions:**

Throughout this document NSW Trustee and Guardian is referred to as NSWTG.

#### **1. Ms Imelda Dodds - NSWTG**

The committee has been advised of a case where the NSWTG was appointed as financial manager by the Tribunal. Upon the death of the client, their estate was handed back to the alleged abuser from whom power of attorney was removed by the Tribunal. Could you explain the legal basis on which such a decision might be made?

#### **Response:**

Without knowing the facts of this case NSWTG is only able to provide a general response.

Upon the death of a person, including those clients whose affairs are managed by NSWTG pursuant to a financial management order, their assets are handed over to or taken control of by their legal personal representative who will be their executor where they made a will or their administrator where they died intestate. The law provides that upon the grant of probate or administration the assets of the deceased person vest in the executor or administrator of the estate. The executor or administrator of the estate may also be the sole beneficiary or one of several beneficiaries.

There are cases where the Tribunal makes a financial management order in favour of NSWTG and asks NSWTG to investigate what appears to be financial abuse. NSWTG takes very seriously all cases of abuse. Sadly not all these cases are successfully prosecuted or brought before the court. There are a number of reasons for this. There may be a lack of evidence such that it would not be possible for a court to find that financial abuse took place. This may be due to lack of evidence about the client's capacity at the time the alleged abuse took place. Clients may not want to take action against the perpetrator particularly if it is a son or daughter. While NSWTG as manager makes the decision whether or not to prosecute it does need to comply with principles of law relating to substitute decision making including taking into account the will and preference of the client.

Another reason why legal action may not be pursued is because the perpetrator of the financial abuse has wasted the funds taken from the client by gambling and is financially impecunious so that any recovery action would be a further waste of limited funds. A not uncommon situation arises where the client lives with and is dependent on the perpetrator who is an adult child. The client lives with the adult child in the child's home and the child does provide care and support. However the child has fraudulently removed money from the parent. If NSWTG was to take recovery action against the adult child it would mean the child would have to sell their home leaving the client without a place to live and without a care provider. There are the more unusual cases where the client dies shortly after the financial management order is made or prior to any legal recovery action being instigated.

However even if legal action is successfully taken by NSWTG against the abuser and the abuser repays funds to the client, the estate may still end up with the abuser. This is an entirely separate matter. The client dies, if the abuser is the executor of the will, NSWTG has no option but to pay the estate to the executor, this is the law. It would be up to any other beneficiaries to contest the application by the abuser for the grant of probate. This can be done by lodging a caveat at the Supreme Court prior to the executor of the will applying for probate. However if there are no other beneficiaries there would be no contest.

## **2. Ms Imelda Dodds - NSWTG**

### **(a) Would NSWTG support mandatory training of its staff on supported decision-making?**

#### **Response:**

NSWTG will be providing training for all its staff in supported decision making.

Supported decision making has been and continues to be trialled by staff at both the Public Guardian and NSWTG. Both the Public Guardian and NSWTG have been exercising assisted decision making where possible.

However to exercise full assisted decision making for every client is resource intensive.

With the introduction of assisted decision making there will be a need for greater support from family and friends as well as volunteers to assist with decision making. Education and training will need to be provided to these people.

Decision making is a spectrum with complete autonomy on one end and substitute decision making on the opposite end. There will be those clients especially those suffering dementia whose capacity will decline and will need to rely on substituted decision making. There are those clients who for example may have been in an accident and suffer brain injury but over time they improve. There are other clients who may have the capacity to manage a small amount of funds but not large investments and this can be accommodated by s71 of the *NSW Trustee and Guardian Act 2009*.

NSWTG is heavily involved in community education with the aim that every citizen in NSW has made future provision for decision making in case of illness or accident affecting their capacity.

**(b) How are citizens advised of their rights to appeal a decision made by the NSWTG?**

**Response:**

Information about rights to review and appeal a decision made by NSWTG is made available to clients in the following ways. The information is available on the NSWTG website and can be downloaded from the website in the form of factsheets and brochures. NSWTG also writes to clients when it makes a significant decision informing them of their rights of review and appeal.

NSWTG has defined significant decisions to be decisions about:

- Real estate - sales, leasing and purchasing
- The change in status of an asset - e.g. selling shares, collecting bank accounts
- Expenditure of more than \$10,000 or 20 per cent of a trust account
- Dispute or conflict
- Matters which require approval from someone with more authority than the Client Service Officer
- Requests for expenditure from nursing homes, group homes or other large residential centres.

NSWTG makes thousands of decisions each year and it is not possible to provide a formal document for each decision so NSWTG defines certain substitute decisions as "significant decisions". NSWTG prepares reasons for significant decisions and informs the client, their family, close friends or guardian of the significant decision in writing and also of their rights and process of appeal.

If a client or someone adversely affected by a decision made by NSW TG disagrees with the decision, they can ask for that decision to be reviewed. The *Administrative Decisions Review Act 1997* requires this to be done in writing and within 28 days of being told of NSW TG's decision. The client or other person must first ask for what is known as an internal review. That review will be done by a senior person at NSW TG who was not involved in the initial decision. That person will write to the client or other person within 21 days explaining the result of their review. To organise an internal review the client or other person is advised to then write to the Manager, Quality Service and Community Relations requesting a Review of Decision. If the client or other person is not satisfied with the result of that decision they can ask NCAT to review the decision. This must be done within 28 days from the date the internal review was completed. NCAT can only review certain decisions made by NSW TG.

An application may be made to NCAT for a review of a decision of NSW TG that relates to the functions of the office. An application to NCAT is not available where the decision by NSW TG was made in accordance with a direction given by the Supreme Court to NSW TG.

In the case of clients whose financial affairs are directly managed by NSW TG, an application to NCAT to review a decision may be made by:

- the managed person in respect of whose financial affairs the decision was made,
- the spouse of the protected person, or
- any other person whose interests are, in the opinion of NCAT, adversely affected by the decision.

Where NSW TG directs and authorises a private manager of the financial affairs of a protected person, an application to NCAT to review a decision may be made by the person appointed as private manager, or any other person who, in the opinion of NCAT, has a genuine interest in the matter to which NSW TG decision relates.

Factsheets informing clients and interested parties how to make complaints and ask for a review of a decision may be found on the following link:

<http://www.tag.nsw.gov.au/fact-sheets.html>