

Fake friends find a flaw

New power of attorney laws may offer a loophole

WITH CHRISTINE SMYTH



What makes a ‘real friend’? The ordinary *Macquarie International English Dictionary*¹ defines friend as “...somebody emotionally close, somebody who trusts and is fond of another”.²

But we are in the new millennium, and the term ‘friend’ takes on many forms,³ to such an extent that being a ‘friend’ is now a popular paid service in certain cultures, for example Japan.⁴

Currently 27% of people aged over 65 live alone.⁵ With the rise of an ageing and frail population, friendship has never been more important and increasingly difficult to obtain. Recent statistics identify around one in seven people in Australia is aged over 65,⁶ with predictions that rate will rise to one in four by 2056.⁷

Without support structures close by, older people have a significant need to rely on paid services for all manner of day-to-day tasks, and now it seems paid friendship may be one of them. A recent news article⁸ reports on the arrival of a paid friendship service to the Gold Coast. It is not a unique service, as there are currently several services online providing access to paid friends throughout Australia.⁹

Australian households aged over 55 hold 53% of our nation’s wealth at an estimated worth of \$2.8 trillion.¹⁰ These demographic features drive the ever-growing need for members of our aged population to have an attorney to assist them to manage their affairs as their capacity to do so diminishes. While there is no registry or central data collection system¹¹ to know how many people have an enduring power of attorney, a recent report provides that around 30% of those surveyed had one in place.¹² It is not unreasonable to expect this figure to rise.

Current power of attorney law recognises the vulnerability of our elder population to exploitation. Noting that elder abuse is on the rise, our Government has seen a need to review and amend power of attorney laws through the passing of the *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) (GOLA). The GOLA aims to increase protection from exploitation, with the new laws designed to “enhance safeguards for adults with impaired capacity in the guardianship system”.¹³

In line with this policy objective, certain people are prohibited from being appointed as an enduring attorney, nor can they be a statutory health attorney. Relevantly here, one of those exceptions is anyone who is a ‘paid carer’¹⁴ for the principal, either before or after the commencement of the appointment.¹⁵

Under the current legislation, there are no time limits to this exception. The new Act¹⁶ attempts to broaden this protection by including a timeframe prohibiting a ‘paid carer’ from being an attorney if they held the role of ‘paid carer’ within three years of being appointed, or subsequently become a ‘paid carer’ after the appointment.

The intent of this amendment is to “ensure unsuitable people cannot act as attorneys and to reduce the risk of abuse or exploitation to an adult by a person appointed under an enduring document”,¹⁷

The definition of ‘paid carer’ is, in effect, someone who performs services for the principal and gets paid for those services. The question that therefore arises is, what is the scope and extent of those services? The definition of ‘paid carer’ assists us by referring us to the *Griffiths v Kerkemeyer*¹⁸ principle.

In short, it includes anyone who provides paid domestic or nursing services to the principal. So that would obviously include cleaners, gardeners, drivers and nursing assistants. But under this definition, both under the old and new legislation, it does not include being a ‘paid friend’. Who hasn’t helped a friend take the laundry off the line, mowed their lawn, cooked them a meal, or driven them

to the doctor when they are unwell? These are all services that fit within the definition of 'paid carer'. Accordingly, there is scope within 'friendship services', for the objects of the legislation to be circumvented by individuals claiming to be a 'paid friend' not a 'paid carer' in an attempt to avoid application of the legislation.

In seeking to protect the vulnerable, our legal crystal balls can only forecast so much, because the commercial world tends to move at a far greater pace than legal developments. For the moment, at best, we can be aware of this issue and raise it with the client, should it be at all relevant to their instructions at the time of making the enduring attorney.

Sometimes friends in need can be targeted by 'friends' in finance, indeed.

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Notes

- ¹ Second edition.
- ² There is no statutory definition of 'friend' of which I am aware, although there is a definition of friendly society in the *Acts Interpretation Act* (Qld).
- ³ See social networking services such as Facebook, MySpace, WhatsApp and so on. There are currently at least 60 different social networking sites that rely on the concept of friending to build networks see: makeawebsitehub.com/social-media-sites.
- ⁴ theatlantic.com/family/archive/2017/11/paying-for-fake-friends-and-family/545060.
- ⁵ aihw.gov.au/getmedia/d18a1d2b-692c-42bf-81e2-47cd54c51e8d/aihw-australias-welfare-2017-chapter5-1.pdf.aspx.
- ⁶ aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/social-and-economic-engagement/employment-and-economic-participation.
- ⁷ ABS Media Release of 4.9.2008 – one in four Australians will be 65 or older by 2056 – up from one in 10 in 2007.
- ⁸ goldcoastbulletin.com.au/subscribe/news/1/?sourceCode=GCWEB_WRE170_a&dest=https://www.goldcoastbulletin.com.au/lifestyle/a-gold-coast-woman-is-starting-a-business-charging-people-to-be-her-friend/news-story/a82b9347af1c5a94991c24f99614e358&memtype=anonymous&mcode=premium&is_silent_authentication=true&error=login_required
- ⁹ rentafriend.com.
- ¹⁰ mccrindle.com.au/insights/blog/australias-generations-wealth-income.
- ¹¹ Except in Tasmania, where registration of an EPOA is required for validity *Powers of Attorney Act 2000* (Tas.), s16; and see s7 *Powers of Attorney Act* (NT), s25 *Powers of Attorney Act* (Qld) et al – under which powers of attorney may be registered, and are required to be registered before dealing with land.

¹² *Having the Last Word: Will making and contestation in Australia*, Key Findings, ARC Linkage Project, March 2015; Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney.

¹³ Explanatory notes, GOLA.

¹⁴ Sched 3, s3 – dictionary:

- paid carer*, for a principal, means someone who—
- (a) performs services for the principal's care; and
 - (b) receives remuneration from any source for the services, other than—
 - (i) a carer payment or other benefit received from the Commonwealth or a State for providing home care for the principal; or
 - (ii) remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the principal's care.

Note— This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161—see Queensland Law Reform Commission Report No. 45, 'The assessment of damages in personal injury and wrongful death litigation, *Griffiths v Kerkemeyer*, Section 15C *Common Law Practice Act 1867*, October 1993.

¹⁵ ss29, 59, 63 of the *Powers of Attorney Act 1999*, as amended by the GOLA.

¹⁶ Not commenced at the time of writing (20 May, 2019).

¹⁷ Explanatory notes, GOLA.

¹⁸ (1977) 139 CLR 161.

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