Research project: Examining access to justice for those with an enduring power of attorney (EPA) who are suffering financial abuse

The loss of capacity and the abuse of vulnerable people as a result of a breach of a valid enduring power of attorney (EPA) are becoming more common in our society as the incidents of mentally disabling conditions increase. The aim of this research project was to understand the experiences of accessing justice for individuals with an EPA where financial abuse is alleged against the attorney. We conducted a case file analysis of 121 relevant ADA Australia de-identified case files to achieve the research objectives identified below.

Key concepts

EPA (enduring power of attorney) is a legal document signed by an individual (principal) to enable someone else (attorney) to make personal and/or financial decisions on the principal’s behalf and which continues to be operative even in the event that the principal loses legal capacity to make such decisions.

Legal capacity is the ability to make legally recognised decisions by reference to the nature of the decision and the time at which the decision is made eg being able to make and/or revoke a valid EPA.

The attorney must act in the best interests of the principal. They must place the interests of the principal above any self-interest eg absent authorisation they cannot sell the principal’s house and use some of the proceeds of sale for a holiday. Failure to act in the best interests of the principal can give rise to legal rights and remedies eg monetary compensation and/or removal of the attorney.

Research objectives

1. To understand the lived experiences of accessing justice for those in circumstances where financial abuse is alleged and there is a valid EPA in place.

2. To identify the current barriers and challenges that exist for victims in attempting to access justice in circumstances where financial abuse is alleged and there is a valid EPA in place.

3. To identify the current factors which enable and facilitate access to justice in circumstances where financial abuse is alleged and there is a valid EPA in place.
Key findings

1. There is a need for better education in the community and amongst stakeholders about EPAs generally:
   - what they are;
   - what they mean;
   - who can be appointed as an attorney;
   - what those attorneys can and cannot do; and
   - what the principal (or someone acting on the principal’s behalf) can do in response to an alleged breach of the EPA.

2. There is a lack of understanding about capacity:
   - what it is;
   - the standards necessary to be able to make legally recognised decisions; and
   - how to and who should assess it.

3. The loss of legal capacity has a significant impact on the lives of those who have allegedly been abused, and their family, friends and carers. These effects can be financial, physical, emotional or relational.

4. The consequences of failing to satisfactorily assess capacity cannot be ignored for professionals and service providers.

5. Relationships with family and friends are critical to those with an EPA in effect. They can either be a positive influence or, conversely, familial conflict can act as a source of anxiety and tension. There is a need to explore multi-disciplinary ways to address these situations.

Contributors

Associate Professor Tina Cockburn and Dr Kelly Purser are members of the Australian Centre for Health Law Research (ACHLR). ACHLR is Australia’s leading health law research centre and is located at Queensland University of Technology (QUT) in Brisbane, Australia. The Centre undertakes pioneering empirical, theoretical and doctrinal research into complex problems that arise at the interface of law, health, ethics, technology, governance and public policy.

Dr Cassandra Cross is a member of the Crime and Justice Research Centre (CJRC). The CJRC is a leader in high-impact interdisciplinary criminological research. The Centre is home to distinguished international researchers. It is distinctive for applied research and a focus on the challenges confronting governments and criminal justice systems around the world.

ADA Australia (Aged and Disability Advocacy Australia) is a not-for-profit, independent community based advocacy and education service with more than 25 years’ experience in supporting and improving the well-being of older people and people with disability. Headquartered in Brisbane, ADA Australia provides advocacy services to older people and people with disability in metropolitan, regional, rural and remote communities across Queensland. ADA’s services are free and confidential. The range of services, in addition to advocacy, includes guardianship and education.