

Protecting Rights:

Witnessing Documents



CASESTUDY: MRS YOUNG

Mrs Young is a 79-year-old woman, who visits a JP with her son, in order to get their signatures on her Enduring Power of Attorney witnessed. Mrs Young says very little at the JP's house and seems compliant with proceedings. Mrs Young glances at her son, who points to the line on the form for her to sign. Once signed, the JP witnesses the document, bringing it into force.



ISSUES AND QUESTIONS TO CONSIDER

Issue: Mrs. Young has signed the form. However, although she has not said she is unhappy, neither has she stated her willingness to sign.

Question: **Has Mrs. Young clearly indicated her consent to sign this document?**

Issue: Mrs. Young's apparent compliance and glancing at her son may suggest that she is happy with proceedings. Her behaviour may also suggest that she is being coerced into handing control of her finances over to her son.

Question: **Is there any duress involved, from son to mother?**

Issue: Mrs. Young's lack of direct input into proceedings may suggest someone who is confused; equally it may indicate an older person who is content to let her son take over her finances.

Question: **Is Mrs. Young capable of giving effective consent to sign the document?**

LEGAL ASPECTS OF WITNESSING SIGNATURES

Capacity

As a witness, you are witnessing that this was the signature of Mrs. Young. Her signature would not be considered legally valid if she lacked mental capacity. Whilst it is not your role to assess her capacity, you should request a medical opinion if you have concerns in this regard. To witness her signature when you have doubts about her capacity could expose her to elder abuse.

Duress

Mrs. Young's signature may not be considered valid if it is signed under any physical or economic duress. If you have concerns in relation to the influence of a 3rd party it is appropriate to ask to see Mrs. Young on her own, so that you can be certain she is signing this document of her own free will.

Does Mrs. Young fully understand what the document is about?

As a witness it is not your role to offer legal advice. It is reasonable to ascertain that the client fully understands the document that they are signing. If they do not they should be directed to obtain legal advice prior to signing the document. For example an Enduring Power of Attorney could give the Donee power to sell a house from the date of signing. The Donor also should understand choices around whether to appoint jointly, or jointly and severally, where there are multiple Donees. They should also understand the choice between having the document commence immediately or on incapacity. The client should also be comfortable that the Donee (or Donees) is (are) the best option.

Other documents

Older people often believe Powers of Attorney cover medical treatment. If this is the case you may suggest they seek advice about other additional documents, such as an Advance Care Directive (ACD). It is not your role to give advice, however the person may not have sought any advice, and you can ensure they have the opportunity to be well informed by making an appropriate referral. When an Enduring Power of Attorney is presented to you, it would be helpful to suggest advice be sought about documents such as an ACD.

- **NB** re ACD – witnessing to say ‘signed freely and voluntarily’ and ‘appeared to understand its effects’ – this makes capacity, understanding, and duress directly relevant.

Whilst not specifically mentioned in Enduring Powers of Attorney, it is prudent to apply such guidelines, to avoid creating a situation where elder abuse can occur.

Do I have to witness this document?

No, if you are unhappy with the circumstances you can refuse to witness until you are satisfied. You have a crucial role as a gatekeeper of the legal system. In some circumstances your refusal may prevent elder abuse. This needs to be balanced against the fact that if the older person clearly has capacity, understands what they are signing, and wants to sign of their own free will, it is not your role to make moral choices about what they should and should not do.

PUTTING THEORY INTO PRACTICE

With older people it is important to establish that this is what they really want. Some times people will nominate the person who is in close proximity to them, and this is not actually a true indication of whom they would want.

- If in doubt about a person's wishes, it is wise to speak to them on their own.
- It is important to remember that a person signing an Enduring Power of Attorney should fully understand the nature and effect of that document. Feel free to ask them.
- You can refuse to witness a signature if you have doubts about their capacity to fully understand the nature of the document, or if you believe they have signed under duress.

It is not the role of the witness to make a definitive assessment of the person's capacity to consent. However, there are warning signs that may indicate that a person may not fully understand the decision they are attempting to make. For example:

- Vagueness of speech
- Attention appearing to wander.
- Appearing to need a lot of prompting or guiding from another person (e.g. being shown where to sign the document repeatedly).

Safeguarding their interests

Writing conditions into an Enduring Power of Attorney can serve as safeguards of the older person's wishes.

Conditions that act as safeguards need to be considered because of potential illness, accident, mental incapacity, or the possibility that someone an older person trusts may try and take advantage of them.

Conditions involve giving clear and written directions to the donee of a Power of Attorney. For example, an older person may specify that they would like their attorney to:

- Pay bills
- Sell property – and in which circumstances they wish their property to be sold (e.g. should they need to move to a residential aged care facility).
- Manage investments
- Follow their preferences for gifts and activities

Advice about other Advance Directives

It is also important to mention to Mrs. Young that there are other Advance Directives that complement the Enduring Power of Attorney. For example, does the person understand that there is also an Advance Care Directive form that can include their wishes and preferences and instructions for future health care, end of life, living arrangements and personal matters? This form replaces the Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction with a single Advance Care Directive form. See the contact section for sources of additional information.

Information and Assistance

Most of the following agencies are members of APEA & provide free information:

Legal Services Commission

- Information about Enduring Powers of Attorney & other legal issues.

Phone 1300 366 424 telephone advice/ personal appointments or visit:
www.lsc.sa.gov.au

Aged Rights Advocacy Service

- Information about the safeguards you can build into Powers of Attorney
- Advice about, and support to uphold the rights of older people
- Assistance to overcome situations of elder abuse.

Phone (08) 8232 5377 or 1800 700 600 or visit: www.sa.agedrights.asn.au

Office of the Public Advocate

- Information about options when someone can no longer make choices on their own behalf, particularly if there is conflict, and;
- The expressed wishes of the older person are not being upheld, and where other avenues of redress have not resolved the issues.

Phone (08) 8226 9200 or 1800 066 969 or visit: www.opa.sa.gov.au

Public Trustee

- Advice, preparation and management of Enduring Powers of Attorney
- Drawing up of an Advance Care Directive.

Phone (08) 226 9200 or 1800 673 119 or visit: www.publictrustee.sa.on.net

Royal Association of Justices of South Australia Inc.

For advice & information for individual Justices of the Peace telephone:
(08) 8297 4044

Justice of the Peace Services.

Phone: 131 882 or email: jpservices@sa.gov.au

APEA

ALLIANCE FOR THE PREVENTION OF ELDER ABUSE

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