



ASSETS FOR CARE:

A GUIDE FOR LAWYERS TO
ASSIST OLDER CLIENTS AT
RISK OF FINANCIAL ABUSE

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ELDER LAW IS RAPIDLY EMERGING
AS AN AREA OF SPECIALISED LAW
— BECAUSE OF THE UNIQUE AND
COMPLEX LEGAL NEEDS OF THE
ELDERLY, WHICH INCLUDE SUBSTITUTE
DECISION MAKING, GUARDIANSHIP AND
CRIMINAL LAW RELATING TO FRAUD
AND FINANCIAL ABUSE.*

* Submission of the Law Council of Australia to the 2011 Productivity Commission Inquiry,
(Caring for Older Australians, p. 454)

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1.

ADDRESSING THE FINANCIAL
ABUSE OF OLDER PEOPLE



Seniors Rights Victoria (SRV) is the primary, government-funded destination for older Victorians seeking information and support relating to abuse of older people. Financial abuse is the most prevalent form of abuse seen by SRV. This abuse most commonly manifests as financial loss arising from the disposal of an older person's assets in exchange for their future care and accommodation, often under pressure from another party.

In most instances, SRV sees clients after the event, so the older person is left without adequate resources for their retirement and with broken relationships with the closest people in their lives. The emotional upset involved often occurs in conjunction with serious health issues, and the untangling of the arrangements entered into between the parties can be fraught with difficulties, not the least of which is the complexity of obtaining legal redress in such situations.

Based on the prevalence of these cases, SRV sought funding from the Legal Services Board (LSB) to produce two guides, this one, aimed at the legal profession and the second, for the community, with a view to:

- raising awareness of the extent to which older people are being exploited in exchanges of their assets for future care and accommodation;
- minimising risks;
- offering alternatives; and
- outlining processes for obtaining relief.

A final stage of this LSB-funded project is aimed at law reform. A research and policy paper will present the experience of SRV and the research and consultation for these publications, to advocate for changes in the law to address the current legal complexities and impediments.

CONTEXT

We are undergoing a 'new demographic reality' (Roszak 2009, p. 22). In another generation people over the age of 50 will outnumber those below for the first time, while the proportion of very old people in our society is also increasing. Between 1990 and 2010, the number of Australians over the age of 85 increased by 170.6% and the number of centenarians increased by 185%, compared with a total population growth of 30.9%.

This change is not only demographic but attitudinal as the over-50s, many of whom are asset-rich, play a critical role in all facets of society including the workforce, paid and otherwise, share valued knowledge and experience, help their families with caring responsibilities and are presumed able and entitled to make their own decisions (Roszak 2009, p. 2).

Also a reality, however, is that age can be accompanied by increased vulnerability and there are those who exploit this vulnerability (EAPP 2005, p. 7).

The combination of these factors has resulted in abuse of older people becoming a significant and growing phenomenon.

Financial abuse is the most frequently reported form of this abuse and the main perpetrators of abuse are adult children. A recent Western Australian report found an average prevalence rate of abuse to be 4.6%, with the number of victims likely to almost double over the next 20 years. People with some form of decision-making disability are more likely to be subject to abuse. (See Clare et al. 2011; Wainer et al. 2010; and DHS 2009.)

Given that assets are largely managed privately it is not surprising that financial abuse generally occurs within families (EAPP 2005, p. 7) nor that the most common form of financial abuse is where there has been a breakdown of a relationship of trust through what has become an exploitative arrangement – the exchange of assets for care and accommodation.

This is the focus of this guide.

WHY LAWYERS NEED TO READ THIS GUIDE

Lawyers have a special role in the prevention of financial abuse of older people. Older people can be assisted in protecting themselves against current and future abuse and lawyers can also be alert to the potentially abusive nature of transactions about which younger family members may seek legal advice.

Lawyers have been found to be negligent in cases where they have not properly advised clients, and dispositions have been set aside in cases of undue influence or unconscionability because the advice of the lawyer was found to be lacking.

This is a practical guide for lawyers on what to do and what resources are available to assist older clients.

This guide will help lawyers to:

- detect actual or potential financial abuse of an older client, particularly where there has been a promise, or an intention, to transfer assets in exchange for care and/or accommodation;
- identify the lawyer's role, duties and responsibilities when acting for older clients in these kinds of dealings;
- identify and advise on the factors that will increase a client's vulnerability to exploitation or abuse;
- identify the most appropriate protective action to take;
- try to remedy any financial abuse that has already occurred; and
- refer the client to the appropriate services where required.

LAW'S LIMITATIONS AND A PROACTIVE RESPONSE

Your older client may not be seeking a legal remedy. This reluctance may be due to inaccurate perceptions of what lawyers can do for them, the cost of legal services or a desire to maintain a family relationship, however flawed.

Even if there are actionable legal issues, the matter may be best resolved another way. The client may also have medical and social issues as financial abuse is almost always accompanied by emotional abuse. Research suggests that older abused people can be supported to make far-reaching decisions to overcome the abuse if they receive a response from professionals that addresses the whole problem (Cripps et al. 2002). A client may benefit, for example, from a mediation service or from referral to a service provider who can attend to broader social or health issues affecting the client and who may spend more time with them, such as an Aged Care Assessment Service or a community health centre. An effective practice, therefore, is to build relationships with other professionals and relevant referral agencies to provide support in areas outside your legal expertise.

At the end of this guide there is a Referrals and Resources section listing agencies where you can refer your client for non-legal support. Alternatively, you can call Seniors Rights Victoria on 1300 368 821 to discuss your client's situation.



RECOGNISING FINANCIAL ABUSE

Elder abuse is any action in a relationship of trust that results in harm to an older person. 'This definition is consistent with Australian and international agreement about what constitutes abuse of older people and ... it excludes relationships that, for example, are based on the exchange of money for services.' (DHS 2009, p. 4)

Financial abuse covers the illegal use, improper use or mismanagement of a person's property or financial resources by someone with whom they have a relationship implying trust (DHS 2009, p. 12).

Financial abuse tends to exist in the grey area between thoughtless practice and outright theft. It is usually not a single event but a process that develops over time and so it is difficult to assess at what point a well-intentioned but ill-considered financial act tips over into abuse, or when borrowing money becomes misappropriation.

For example, if a person moves their parent or older relative in with them, accepts a Centrelink carer's benefit and manages the older person's pension and super payments while the older person recuperates from an illness, this may become exploitative in the long term if the older person has not been involved in any decision-making, feels they are not cared for in the way they wished, and loses control of their assets.

The following are common examples of financial abuse of an older person:

- Appropriating the proceeds of the sale of an older person's home with the promise of providing future accommodation or care and then not providing it
- Threats or undue pressure on an older person to sell the house or hand over assets
- Threatening, coercing or forcing an older person into signing paperwork concerning property, wills or powers of attorney
- Misusing or neglecting powers of attorney to manage an older person's finances
- Using an older person's bank accounts, credit cards or financial documents without authorisation
- Managing the finances of a competent older person without permission
- Pressuring an older person for earlier inheritance or for a gift or a loan
- Incurring bills for which an older person is responsible (DHS 2009, pp. 12-13)

SIGNS AND RISK FACTORS

It is not always easy to recognise financial abuse, but there are a number of accepted warning signs or 'red flags' and practitioners frequently speak of intuition or 'gut feelings' that something is not right.

Signs of financial abuse include:

- promises of 'good care' in exchange for transferring property or money from bank accounts to the carer,
- fear, stress and anxiety expressed by an older person,
- unfamiliar or new signatures on cheques and documents,
- the inability of an older person to access bank accounts or statements,
- significant withdrawals from accounts,
- transfer of assets in circumstances where the person may no longer be sufficiently competent to manage their own financial affairs,
- accounts suddenly switched to another financial institution or branch,
- drastic changes in the types of banking activities, or to a will. (DHS 2009, p. 13)

The following factors provide some reasons to be alert to possible abuse:

1. vulnerability of an older person due to lack of capacity or other conditions, such as physical frailty, dependence, social isolation;
2. a trusting relationship with the likely perpetrator;
3. isolation and control of the older person and/or transaction;
4. evidence of undue influence – for example, coercive behaviour by a family member at appointments, or the older person being unable to speak for themselves or appearing confused, withdrawn or fearful;
5. lack of concern for the welfare of older person – for example, the older person appearing unclean or unkempt;
6. no money being available for an aged care bond when there should be sufficient funds;
7. suspicious or dubious transactions – for example, drastic changes to wills, or suspicious banking activity such as recent addition of a signature on an account or changes to mode of banking e.g. ATM withdrawals in place of in-person banking;
8. secretiveness of the older person;
9. change of assets during a period of vulnerability – evidenced, for example, by a new found prosperity of the person in control or by the transfer of a title;
10. new client with a sense of urgency regarding a proposed transaction.

(These factors are based on an 8-point framework developed by Kemp and Mosqueda 2005, pp. 1123–27.)

FOR MORE INFORMATION ON ELDER ABUSE AND FINANCIAL ABUSE, SEE...

With Respect to Age – 2009: Victorian Government Practice Guidelines for Health Services and Community Agencies for the Prevention of Elder Abuse, Aged Care Branch, DHS Victoria, Melbourne. Accessible in PDF from www.health.vic.gov.au/agedcare/publications/respect/index.htm

Banking & Finance – Financial Abuse of the Vulnerable Older Person, Financial Ombudsman Service Bulletin No. 56, Dec 2007 www.fos.org.au/centric/home_page/publications/bulletins/banking_finance_bulletins.jsp for valuable information on how to identify financial elder abuse, case studies and an outline of the legal framework.



ASSETS-FOR-CARE: A POTENTIALLY ABUSIVE TRANSACTION

The most prevalent kind of transaction involved in financial abuse is a disposal of land owned by the older person, or an investment in land without adequate protection or for consideration which is illusory. These scenarios take many forms: a direct transfer of property to a child, using proceeds of the sale of a property to build a 'granny flat' at the back of a son's or daughter's property, use of sale proceeds to discharge the mortgage of a child's property or to buy another property in their name. A loose agreement to care for the older person is the usual accompaniment to these transactions.

Why do older people agree to enter into these transactions?

The older person is usually trying to keep assets in the family, trusting that their adult child or younger family member will care for them for life and in preference to 'aged care'. Although most family members involved in these transactions have sound intentions and act appropriately, there are too many cases where the older person's wishes and interests have been overridden by over-protective or even fraudulent behaviour.

These kinds of cases are complicated, and your client's right to self-determination may appear to be at odds with your duty of care. Your client may seem to be accepting exploitation as payment for care in what you might consider to be a financially unwise action but one taken in the knowledge that a relationship is at stake. Research shows that the maintenance of family relationships is consistently given priority over effective accountability of family members (McCawley et al. 2006). Also, while the sacrificing of home ownership may be irrational, it would be wrong to assume that it was intended to be altruistic (Barkehall-Thomas 2008).

Older people often remain silent about abuse and fail to act due to:

- fear of the costs or consequences such as being removed from their home, being placed in an aged care facility, losing the right to see grandchildren, losing a relationship with a family member or the chance of providing parental love;
- feelings of shame about their adult child's behaviour;
- not wanting to reveal deeply held personal matters;
- the tendency to excuse the failings of their children or reluctance to get their children into trouble (protective love);
- lack of understanding that what is occurring is abusive;
- cognitive impairment;
- multiple health problems.

Have you come across cases like this?

Case study:

SALE OF HOUSE IN EXCHANGE FOR CARE AND ACCOMMODATION

Patrick is 84 years old. His wife Maud recently passed away, and he now lives alone in a house he owns in Melbourne. Since Maud's death he has been struggling to care for himself at home and believes he is in need of some support in the home. He does not have many friends and his only son, Bruce, is pressuring him to sell his house and move in with him and his family. Patrick does not want to leave his home but Bruce has threatened to put his father into residential aged care if he does not agree to the arrangement. Bruce told his father that he should use the proceeds of sale to pay off Bruce's mortgage and in return, he would have accommodation and care for life. Patrick has no other family and is dependent on Bruce and his grandchildren for emotional support. Patrick feels compelled to do as his son says and comes to you with Bruce to arrange the sale of his home.

WARNING SIGNS IN THIS CASE INCLUDE:

The older man's dependency, loneliness, health problems, recent death of partner, pressure from son, lack of benefit from disposing of assets and no future protection.



2.

LEGAL PRACTITIONER'S ROLE

Your client has the right to act with autonomy and to choose to make improvident transactions or not to act in their own best interests; this does not absolve you from properly advising a client, even where they have not actively sought advice, rather than 'just following instructions'. See Davis (2008, p. 46) citing *Riz & Anor v Perpetual Trustees Australia & Ors* [2007] NSWSC 1153; and see *Dominic v Riz* [2009] NSWCA 216; and *Cavenham Pty Ltd v Robert Bax & Associates* [2011] QSC 348 regarding the retainer to act generally in a client's interests and to give appropriate advice.

Lawyers play a crucial role in protecting the interests of older people and helping them make informed choices about their legal affairs. Recent 'elder law' cases recognise a greater risk for lawyers regarding personal liability and thus a greater need for diligence. There are particular challenges for lawyers in this area, including being able to recognise ethical issues such as conflicts of interest and identifying who your client is. When dealing with a vulnerable elderly person, you must be sure they have received independent legal advice, that they have the capacity to understand and that any decision to transact money is free and voluntary. (See *Badman v Drake* [2008] NSWSC 1366 para 84.)

Clients will often come to you with a specific transaction in mind (a property transfer or a redrawing of a will) and want to spend as little time as possible with you. They may not be keen to answer your questions or hear your warnings. They may be driven to try to minimise costs or they may be under pressure from a family member and want you to just get on with arranging the transaction. This situation is difficult for legal practitioners but is one that needs to be handled effectively.

The LIV Professional Conduct and Practice Rules 2005 set out duty-to-client requirements (see Rules 8, 9, 12 & 13). See www.liv.asn.au/Practising-in-Victoria/Professional-Standards/Acts-Regulations-Forms



DUTIES OF PRACTITIONER

AVOID CONFLICTS OF INTEREST

It is advisable to act for one client only.

You must not act for both clients where there is an actual or potential conflict, for example, between an older person and their adult child. If you are contemplating acting for more than one party, then you need to be quite sure that the advice you are giving each one would be no different if you were not acting for the other, and that their individual interests will still be properly protected. If you are unsure, then you should not act for the two parties. (In the type of dealings covered by this guide, this will almost certainly be the case.)

To ensure confidentiality and develop trust, and to ensure that you get the whole story, it is also advisable to interview your client without anyone else present (unless you need an independent interpreter). It is important, however, to recognise the role of support people. If a client asks for a support person to be present, their presence could be considered for the initial introduction, provided they are a neutral person.

You need to be absolutely independent of the party with the influence or control over the older person. You need to clearly state that you cannot take instructions from the adult child/relative of your client or any other party with an interest in the transaction. (It can be difficult to convince clients that family members must be sent elsewhere for independent legal advice, but that is what must be done.) If a family member with an interest in the transaction insists on being present, inform them of your professional obligations and explain that in order to advise your client properly, you need to speak to your client in confidence.

Confirmation of instructions taken alone and any correspondence or follow-up work should be sent to your client and not to their children or other family members.

FOR ADVICE ON POTENTIAL CONFLICTS OF INTEREST








Call the Law institute of Victoria Ethics Advice line on 03 9607 9336 or go to
www.liv.asn.au/Practising-in-Victoria/Ethics

Case study:

Maud is 77 years old. She owns a house in the suburbs of Melbourne. Lately she has been observing a gradual decline in her general health and she feels she is starting to become quite forgetful. She has three adult children, all of whom live in Melbourne. None of her children get on with each other. Her youngest daughter, Julia, is the closest to Maud as she is not married and has a lot of time to help her mother manage her day-to-day affairs and household chores. They have a lovely relationship. Julia has suggested to her mother that she transfer her house into Julia's name and Julia gives her a licence to reside there for life. In exchange, Julia has promised Maud that she will care for her in the home until her death.

Maud and Julia come to you to do the conveyancing and to prepare a licence agreement.

CONSIDERATIONS

-  Who is your client?
-  Would your client's interest be properly protected if you acted for both parties in this transaction?
-  Would you interview Maud and Julia together?
-  Who would you seek instructions from?
-  Has Maud come to your office of her own free will?
-  Is Maud making the decision of her own free will?
-  Can you identify a potential conflict?

SENIORS RIGHTS VICTORIA'S VIEW

The client should be Maud or you should not act at all. A conflict arises because there is a proposed disposition of assets with inadequate consideration. The relationship between mother and daughter is good now but there is potential for it to break down. No protection has been put in place for Maud. There are issues of Maud's dependence on her daughter and of her capacity.

Advice given to Maud should be comprehensive and you will need to make an assessment of her capacity. [\(See Capacity on p. 23.\)](#)

GIVE COMPREHENSIVE AND INDEPENDENT ADVICE SO THE CLIENT CAN MAKE AN INFORMED DECISION

Any legal advice we provide to older clients when dealing with exchange of assets for care must be completely independent, fully informed and comprehensive so that the older person fully appreciates the nature of the transaction and enters into it freely.

A standard for proper legal advice in a situation like this was set by Barrett J in *Winefield v Clarke* [2008] NSWSC 882:

- Obtain full instructions.
- Identify the client's level of capacity and their understanding of the nature of the transaction.
[\(See Capacity on p. 23.\)](#)
- Conduct a full discussion of arrangements and consequences.
- Ensure the client is entering into the transaction freely.



You must be fully informed of all the material facts when giving advice, such as whether the property constituted your client's only asset.

It would also be prudent to consider your client's motivations and intentions. Are they driven by a desire to support their children or to avoid institutional care? Do they wish to stay in their home? Do they understand the consequences? If an arrangement appears to be unwise or improvident, what other options are possible?

You may need to suggest alternative ways to achieve a desired outcome, such as by discussing options with other service providers such as social workers or financial advisers, or structuring a proposed transaction differently.

Remember that when acting in such a case, you need to ensure that the older person has understood the precise effect of what they want to do, the alternatives which are available to them in law, and the comparative advantages of those alternatives. They may still prefer to dispose of the assets. (See *Stivactas v Michelatos* (no 2) [1993] Australian Contract Reports 90-031.)

Solicitors need to ensure that they not only provide adequate advice but that the advice given is fully documented. Five percent of the total costs of claims against Victorian practitioners in 2007-2009 were Amadio claims (LPLC 2009 and 2010). This case underlines the need for security providers (including guarantors and direct borrowers) to receive independent legal advice and for solicitors to sign a certificate attesting to advice being given, particularly where the guarantors are under some special disability. (In Amadio the disability was the guarantor's age and limited English.)

FOR RESOURCES ON MANAGING RISK, SEE...

Legal Practitioners Liability Committee information www.lplc.com.au/risk_management/risk_booklets/

ENSURE YOUR CLIENT HAS THE CAPACITY TO MAKE THE DECISION AND IS NOT ACTING UNDER UNDUE INFLUENCE

CAPACITY

Capacity issues can compound conflict of interest situations where, say, a family member arranges a legal appointment for their elderly relative and attends with them. [\(See Capacity on p. 23.\)](#)

UNDUE INFLUENCE AND UNCONSCIONABILITY

A person may be subject to undue influence or unconscionability whether or not they have the capacity to make their own decisions.

Your role includes knowing when and how to act regarding enforceability of dispositions and arrangements which have been affected by undue influence or unconscionability and the remedies for determining the respective equities of the parties. [\(See Equity on p. 43 \).](#)

SOME THINGS TO LOOK OUT FOR:

In the older person:

- What is their standard of education and literacy, financial and otherwise?
- Does the older person (your client) suffer a disadvantage or disability that could affect their ability to make decisions in their best interests? For example, are they ill, alcohol or drug-dependent, infirm, illiterate, at a disadvantage in speaking English, financially unaware, or mentally incapable?
- Is the older person physically or emotionally dependent on another? Do they, for example, rely on a family member for the basic necessities of life, are they incapable of looking after themselves without support?
- Is the older person financially dependent on another?
- Can they manage their finances? Are their finances left in the hands of another?
- Has the older person sold properties before?

In the relationship:

- Is there a relationship of trust and confidence with the person looking to benefit?
- Is there evidence of domination of the older person?
- Is there a difference in bargaining power between the older person and the person receiving the benefit?
- Has a person of influence used duress or any other influence to procure the transaction?

In the proposed transaction:

- Is there adequate consideration for the proposed disposition?
- Does the older person know the value of the assets? Have they been misled into believing the value is less than it is?
- Will the older person suffer a manifest disadvantage as a result of the disposition?
- Does the person receiving the benefit know about the disadvantage?
- Has the older person been misled by a person looking to benefit?
- Has the older person been discouraged from seeking legal advice?

Case study:

William is 81 years old. He owns a home in country Victoria and his daughter Philippa now lives with him. Three years ago William's other children placed him in a residential facility because of numerous health problems. They also noticed that William was disoriented and forgetful and that his capacity to make decisions was appreciably impaired. William did not want to stay in the aged care facility and Philippa's marriage had just ended and she had nowhere to go. Philippa suggested he leave the facility and that they live together in his country property. She took him to a lawyer and had a power of attorney and enduring guardian executed in her favour. William has been in a position of increasing dependence on her ever since.

William has a number of health issues and cognitive decline. Philippa cares for William at home and attends to his daily needs. She helps him take his medication, cleans the house, takes him shopping and on other outings, does his banking and is generally attentive to his well-being. William has become totally dependent on Philippa. William trusts his daughter implicitly and is grateful she brought him home when she did. He has been concerned that his other children will try to put him in aged care again and sell the house for a bond. Philippa has suggested they go to a lawyer to have half the house transferred to her (for no consideration). She has promised to keep him in his home and stop any sale from happening. They come to you to carry out the transfer.

CONSIDERATIONS



Has Philippa assumed ascendancy or a position of influence over William?



Has William placed trust and confidence in Philippa?



Is William coming to you of his own free will?



Does William properly understand the decision he wants to make? ([See Capacity on p. 23.](#))

SENIORS RIGHTS VICTORIA'S VIEW

You should perceive alarm bells here – is William's will being overborne? His understanding and decision-making appear to be affected by his dependence on Philippa, which is, in part, the product of his mental deterioration. (See *Winefield v Clarke* [2008] NSWSC 882.) Philippa probably has influenced William's thinking. ([See Undue influence on p. 46.](#))

FOR ADVICE ON A CLIENT AFFECTED BY UNDUE INFLUENCE

If you believe your client is acting under the influence of another yet insists that you act on their instructions, call the Law Institute of Victoria Ethics Advice line on 03 9607 9336 or go to www.liv.asn.au/Practising-in-Victoria/Ethics

INTERVIEWING AND COMMUNICATION SKILLS – ENSURE A CLIENT RECEIVES AND UNDERSTANDS YOUR ADVICE

Just as being a good communicator helps you to meet your duty to give proper legal advice and raise all necessary matters, your interviewing skills are vital in eliciting instructions from your client.

Clients do not always understand how a lawyer can help them. They may not disclose information critical to their case without skillful questioning. It is your job to elicit the relevant information.

The following points are to build your awareness and develop your skills. Many of these are really just about knowing your older client.

YOUR APPROACH

Try to alleviate stress. Your client's fear or anxiety, for example, will hinder communication. If your client is very distressed, you may need to refer them to a social worker or doctor.

Be aware of ageist attitudes and behaviour affecting your client (for example, overprotective behaviour or an overdeveloped sense of entitlement in adult children). Encourage your client to consider their assets as their own, and to assert their own interests. Take the approach that you are developing awareness in your client to reduce their vulnerability.

Be aware of your client's expectations.

AGE-RELATED NEEDS AND HEALTH ISSUES

Older clients may need more time. Allow sufficient time for the appointment or set up a series of short appointments.

Appointments earlier in the day may be preferable, and you may need to interview an older client in a more relaxed and quiet environment. Are home visits possible? If your client feels unduly pressured by time or other people, this may indicate undue influence; [see p. 45](#).

Be aware that if your client is suffering from illness, is in pain or is taking medication or other drugs, their ability to absorb, understand, or remember information, or to sit through a long appointment, may be affected.

If your client suffers from hearing or visual difficulties, cater to their needs by:

- providing written information in large print;
- identifying yourself and introducing anyone else in the room whom they may not be able to see;
- speaking into your client's portable listening device or investing in a hearing amplifier;
- maintaining eye contact if the client lip reads;
- using a quiet room with no background noise;
- carrying a magnifying glass for documents to be read.



LANGUAGE AND CULTURAL ISSUES

Always use a properly qualified, professional interpreter if required (see [Interpreter services in Referrals and Resources](#)). Do NOT use a family member. Be aware that your client may be literate in their first language but not in English, or literate in neither, and so may need documents translated or read to them by an interpreter. (See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 where the client's age and limited English were considered a special disability relevant to the solicitor's duty to communicate effectively.)

Be aware of any cultural issues that might affect your client's ability to speak openly or affect the way they see their responsibilities and options ([see Awareness of diversity on p. 18](#)).

In the interview:

Use simple, commonly used, clear English. Avoid jargon and legalese.

Practise active listening skills. Remember to:

- face your client (there may also be hearing difficulties);
- focus on what your client is saying and maintain eye contact;
- minimise distractions such as other sounds, your mobile, answer machine;
- make appropriate responses such as 'What did she say then?';
- ask questions for clarification but try not interrupt them. For example, 'So you are telling me ...';
- not make assumptions about your client.

Ask open-ended questions such as 'What sort of decisions can your attorney make for you?' rather than questions that just require a yes or no.

Convey information in different ways by giving your client something to take away with them, such as some notes, a brochure, a tape of your interview.

Establish what your client needs to know. For example, you may need to educate a donor about the consequences of a power of attorney, and their attorney about their responsibilities.

Frame your questions to quickly identify any areas where a person may need support or require a substitute decision-maker ([see Substitute decision-making on p. 54](#)). For example, 'Will anyone else be affected by the contract? Will anyone benefit from the contract? Who? Tell me about some of the important parts of the contract?'

Do not give your client too much information without asking them, at regular intervals, to tell you what they have understood. Be wary of an older person agreeing with your questions just to avoid appearing difficult, to avoid embarrassment or to placate you. (Expert witness, Dr Lloyd, referred to this tendency to gratuitous concurrence in an older person as 'Noddy syndrome' in *Nicholson v Knaggs* [2009] VSC 64 at para 382.)

After the interview:

Follow up with a clear, simple letter that confirms instructions and covers the main points – use short sentences and a large font if necessary. Include the Telephone Interpreter Service number if your client needs to have the letter translated ([see Interpreter services in Referrals and Resources](#)).

FOR MORE ON INTERVIEWING, SEE...

Lawyer's Practice Manual, Ch. A, paras [A.101]–[A.312]

Checklist

ADVISING AN OLDER CLIENT WHO WANTS TO DISPOSE OF ASSETS TO A FAMILY MEMBER OR FRIEND

☒ HAVE YOU TAKEN PROPER INSTRUCTIONS?

These should include and be clear about:

- the client's (older person's) wishes and intentions;
- the older person's present and future needs;
- the nature of the relationship of the parties – the type of dependence the older person has on the other person(s), e.g. financial, emotional, physical;
- any powers of attorney and/or guardianship and administration orders or issues **(see Substituted decision-making on p. 54);**
- the business and financial acumen of all the parties.

The transaction:

- the nature of the proposed transaction;
- the reason why the transaction is proposed;
- who proposed the transaction;
- the view of the older person regarding the proposed transaction;
- the viability of the transaction.

The assets and liabilities of the parties:

- the total assets and liabilities of the older person and whether the older person is planning to dispose of all his/her assets;
- the total assets and liabilities of the person receiving the benefit of the transaction;
- whether the proposed transaction can be financed by the older person or the person receiving the benefit;
- how the assets and liabilities of the parties will be used in the transaction.

☒ HAVE YOU IDENTIFIED WHETHER THE CLIENT HAS CAPACITY?

See Capacity on p. 23.

☒ HAVE YOU IDENTIFIED WHETHER THE CLIENT IS BEING INFLUENCED BY THE PERSON LOOKING TO RECEIVE THE BENEFIT OR ANYONE ELSE?

See Undue influence in Ensure your client has the capacity to make the decision, above on p. 13.

☒ HAVE YOU GIVEN MEANINGFUL AND COMPETENT ADVICE?

- Your advice should ensure that the older person fully understands the nature, effect and consequences of the proposed transaction.
- You must give the older person a correct explanation of the terms of the transaction.
- You should explain:
 - the propriety of the transaction;
 - the advisability of the transaction;
 - the reasons it should or should not occur.
- You should put forward alternative options **(see Family agreements on p. 32).**
- Suggest to the older person that they could more prudently dispose of their assets and benefit the donee just as effectively by bestowing the property by will.
- Advise the older person that disposing of all or a large part of their assets can have implications for:
 - their pension or other Commonwealth benefit;
 - asset assessment for the purposes of residential aged care and **(see Gifting in Centrelink issues on p. 36);**
 - their ability to access residential aged care in the future if they have no other assets;
 - tax **(see Financial and tax implications on p. 39).**
- Advise them that if they are providing funds for the building of a 'granny flat' or an extension to an existing house, planning approval may be needed **(see Planning law on p. 40).**
- You need to adequately inform the client of the impact the transaction might have on their ability to meet their present and future needs.

☒ HAVE YOU DOCUMENTED THE ADVICE AND CONFIRMED IT IN WRITING TO YOUR CLIENT?

- You need to take detailed notes and confirm your advice in writing.
- You should request a letter signed by your client stating the advice you have given and acknowledging that they understand it and, if necessary, that they still wish to proceed with the transaction, despite its nature and possible consequences as explained by you.



AWARENESS OF DIVERSITY

Being aware of cultural and linguistic diversity can help you meet your duties to your clients. A client's feelings of difference or the lawyer's inability to identify diversity as a factor may lead to a client not seeking help or communicating their needs.

Diversity spans not just ethnic, language and religious background, but other factors such as gender, sexual orientation, disability, financial disadvantage, coming from a rural community. Membership of a minority or particular cultural or religious group may create particular perceptions of privacy and confidentiality. For example, a client from the same cultural background as you may not wish to speak to you; rural dwellers may not wish to see a local lawyer.

SOME FACTORS TO CONSIDER:

Gender:

The role or standing of women of a particular culture may differ from your expectations. A woman may have a different attitude to and experience of money, access to resources and decision-making due to her cultural background.

A client may not wish to speak with you because you are of the opposite gender.

Cultural tradition:

Different communities have different approaches to caring for older relatives and different understandings of the significance of trust, privacy, shame, and of relationships and responsibilities between generations. This can also be affected by gender and gender identity.

FOR INFORMATION AND RESOURCES ON CULTURAL AND LINGUISTIC DIVERSITY

Culturally inclusive practice guides and some community profiles can be downloaded from the Centre for Cultural Diversity in Ageing at www.culturaldiversity.com.au/

A range of cultural profiles relating to older people can be downloaded from Diversicare at www.diversicare.com.au/

Many local Migrant Resource Centres offer community profiles and information, and cross-cultural awareness resources and training.

Indigenous issues:

For Indigenous Australians an older person is considered to be someone in their 40s and older. Family dynamics, attitudes to ownership and ways of resolving problems may be unfamiliar to you.

Economic or material status:

A client with few assets still suffers indignity if abused financially.

Sexual orientation:

A client's sexual orientation and the perceptions of others can reduce their willingness to speak out about abuse.

Country dwellers:

People living in rural and remote areas face particular challenges. Often home and business are intermingled, inheritance and family succession issues may be complicated accordingly and distance and access to services can be issues.

Case study:

THE 'BOOMERANG CHILD' – USING UP A PARENT'S ASSETS

Mrs Ng lives alone in her own home, which has a separate unit. Her husband died a few years ago. She has four children. She does not speak English very well and her husband used to manage the finances. Since he died, she has relied on her children to pay the bills and manage money matters.

One of Mrs Ng's sons, Anh, moved into the unit some months ago after he separated from his wife, promising to be a support to his mother. A few weeks ago Anh's friend, Ray moved into the unit. Anh and Ray are both unemployed and have been spending their time drinking, going to the local TAB and having noisy parties. Mrs Ng has been paying all the utility bills, which have increased markedly since Anh's arrival. Anh begrudgingly helps with the shopping and other small chores when asked. He teases his mother about her forgetfulness and threatens to put her in a home. Mrs Ng's friends have stopped visiting her.

Anh has run up gambling debts on the credit card Mrs Ng gave him to make some purchases for the unit and to pay some bills. When Mrs Ng confronted her son about the debt, he was apologetic and agreed to make repayments. Mrs Ng agreed to keep the matter a secret between them and not involve other family members. A small amount was repaid. Some months later the gambling debt had grown. When Mrs Ng approached her son, he became abusive. Mrs Ng is frightened. Her daughter brings her to you for advice.



CONSIDERATIONS

- ! Do you have an independent interpreter present?
- ! Is your client comfortable with you? There may be cultural issues around things such as greetings, shaking hands.
- ! What does Mrs Ng want as an outcome?
- ! Does Mrs Ng want her son to leave the house?
- ! Should the police be involved? ([See Criminal law on p. 49.](#)) (Involving police may go against her cultural and family values.)
- ! Can an Intervention Order be obtained? ([See Family violence on p. 53.](#))
- ! Does Mrs Ng need to organise an Enduring Power of Attorney? ([See Powers of attorney on p. 56.](#))

Think about appropriate referrals, for example the Ethnic Communities Council for support and linking Mrs Ng into ethno-specific services, a family violence support centre or a financial counsellor to help Mrs Ng manage her own money.

HUMAN RIGHTS

Relevant legislation:

Charter of Human Rights and Responsibilities Act 2006 (Vic.)

Elder abuse is a human rights issue.

Human rights law is not particularly effective in dealing with private relationships between family members (although Vickery J drew on the United Nations Convention on the Rights of People with a Disability in formulating a more flexible test for testamentary undue influence in *Nicholson v Knaggs* [2009] VSC 64, see McCallum 2010); nevertheless the principles contained within it (such as the right to self-determination, to participation and to privacy) provide meaningful context.

Lawyers employed by a public authority, such as Victoria Legal Aid or the Department of Justice, are bound to comply with the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act). The Charter Act makes no direct reference to older persons but Charter rights include equality and non-discrimination (s. 8), freedom from torture and degrading treatment (s. 10), freedom of expression (s. 15), protection against medical treatment without consent (s. 10(c)) and privacy (s. 13). Although these rights are only actionable against a public authority they have proven to have strong political and educational value.

It is good practice for all lawyers to respond to clients within a human rights framework. This will help to maximise the potential for action that enables older clients to live their lives with dignity and respect.

Lawyers can promote their clients' rights by:

- providing comprehensive information to clients on all their options;
- involving clients in decision-making (self-determination);
- maintaining confidentiality;
- respecting clients' wishes and instructions (where the client has decision-making capacity – [see Capacity on p. 23](#));
- arguing for accessibility of services to older people (e.g. making decisions to prioritise certain cases with human rights in mind, ensuring physical accessibility for people with mobility impairment, and providing measures to assist accessibility for people from diverse cultural and linguistic backgrounds).

Other legislation that provides protection for older people includes:

- Age Discrimination Act 2004 (Cth)
- Disability Discrimination Act 1992 (Cth)
- Equal Opportunity Act 2010 (Vic.).

These acts potentially apply when a client has been discriminated against on age or disability grounds by a service provider (e.g. a bank or other financial service provider, or real estate agent involved in a financial or other transaction).

COSTS

Be open with your client about costs. Legal practitioners who are good communicators are particularly valued by older clients.

The convenience and cost effectiveness of actions to resolve your client's issues have to be carefully considered. The potential cost of legal action and a preference for the preservation of family relationships are factors to take into account

Older clients perceive cost as a barrier to gaining legal advice. Consequently, while being up front about costs and in keeping your client informed, you may need to practise greater sensitivity and spend extra time explaining things. You may have an obligation under equal opportunity law to make reasonable adjustments that the client should not pay for – such as taking more time – because of the client's age-related issues.

You could consider allowing staggered payments to alleviate client concerns about costs. (Not all work needs to be done at one time – stagger the implementation of the advice.)

You have obligations under the Civil Procedure Act 2010 (Vic.) which include:

- ensuring that costs are reasonable and proportionate (s. 24);
- minimising delay (s. 25); and
- using 'reasonable endeavours' to resolve a dispute (s. 22).

You also have obligations linked to the overarching purpose of this Act to facilitate a 'just, efficient, timely and cost-effective resolution of the issues in dispute' ... (which may be) 'achieved by an agreement between parties or any appropriate dispute resolution process' (s. 7(1)).

FOR MORE INFORMATION ON MANAGING COSTS AND PRACTICE ISSUES, SEE...

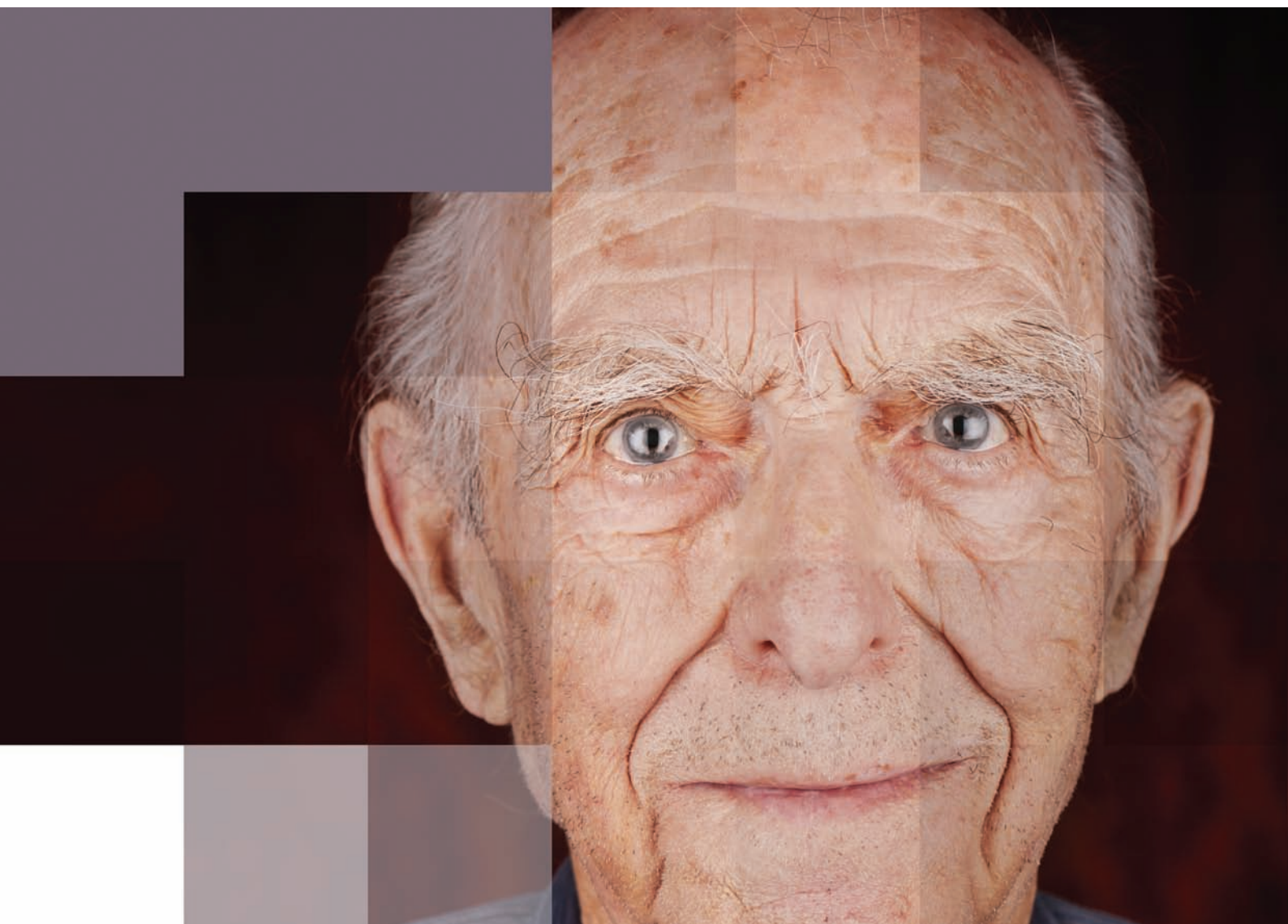
Legal Profession Act 2004 (Vic.)

Law Institute of Victoria information at

www.liv.asn.au/Practising-in-Victoria/Practice-Management/Costing

Lawyers Practice Manual, Ch A, para [A.115] on communicating costs and Ch D paras [D.301]–[D.303] on costs





3.

CAPACITY

RECOMMENDED RESOURCES ON CAPACITY

The NSW Capacity Toolkit

http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_capacity_toolkit

The Law Society of NSW Guide – When a Client’s Capacity is in Doubt

www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf

The Office of the Adult Guardian, Queensland – Capacity guidelines for witnesses of enduring powers of attorney www.justice.qld.gov.au/_data/assets/pdf_file/0009/7569/capacityguidelines.pdf

PRESUMPTION OF CAPACITY

There is a common law presumption that every adult has the legal capacity to make their own decisions. All adults (unless proven otherwise) are able and entitled to make decisions, even in situations of abuse. Decision-making capacity is a legal construct and not a medical or healthcare construct.

It is acknowledged that there is a lack of clear guidelines and law for assessing capacity. Nevertheless, as a legal practitioner you could:

- make an initial assessment of capacity looking for warning signs, using basic questioning and observation of the client;
- if in doubt, seek a clinical consultation or formal capacity evaluation by someone with expertise in assessing capacity, such as a psychiatrist, geriatrician or neuropsychologist
([see Referrals and Resources](#));
- make a final legal judgment about the client’s capacity for the particular decision or transaction (The Law Society of NSW, 2009, p. 1).

You may feel you are faced with a dilemma. On the one hand you might be exposed to liability for negligence for failing to act on instructions to, say, prepare a will or a power of attorney; on the other hand, you might be in trouble for failing to ensure that your client has the required capacity and is not unduly influenced by a beneficiary. (See Hamilton & Cockburn 2009, p. 16.)

If, taking into account the information on capacity in this section, you are still in doubt as to the capacity of a client who is asking you, for example, to draft a new will or other document, it might be best to discuss the matter with the Law Institute of Victoria Ethics Committee – www.liv.asn.au/Practising-in-Victoria/Ethics (See also [Referrals and Resources](#).)



HOW IS CAPACITY ASSESSED?

Indicators of capacity appear in Burke's case [2005] QB 424. (The United Kingdom Mental Capacity Act 2005 has relied on Burke's case regarding capacity.)

If a person has capacity, they have the ability to:

INDICATOR	EXPLANATION
Understand information	Do they understand key terms? Do they understand the nature and effect of any important documents? Are they able to engage in discussion with you about the information you are providing, about the advantages and disadvantages, about the options?
Retain information	Can they remember all the recent personal, family, and financial matters that are relevant to this decision? Is their rationale for their decision consistent or stable over time?
Believe information	Do they seem to believe or accept the information you have given them, such as the value of assets, options, advantages and disadvantages and possible outcomes? Are they making decisions on the basis of potentially paranoid ideas or false information?
Evaluate, process and weigh up information	Can they demonstrate to you that they have spent some amount of time considering their options or thinking about their decision? Do they seem to be listening and taking time to process new information you are providing them? Does their decision-making seem impulsive, flippant, poorly considered, or easily influenced by you?
Communicate information	Can your client explain in their own words what you have told them? (Rather than just saying 'yes' or 'no' to your questions.) Do their explanations include important and relevant information? Do they ask questions? Have they shown that they are thinking about how your advice applies to them and their personal and financial situation?

The test of capacity needs to be particular to the situation, that is, it is decision and time-specific.

Does your client have the capacity to understand, retain, weigh up and communicate information in relation to the particular matter? Loss of capacity may be a gradual or partial process with people tending not to be either 'totally incapable' or 'totally capable' (see discussion in PVLRC 2010, p. 13).

Whether the client has the required level of capacity will depend on a number of factors, including the type of legal transaction.

DIFFERENT LEGAL TESTS ARE APPLIED.

1. Testamentary capacity

The will maker must be of sound mind, memory and understanding when giving instructions for the will and when executing the will. (See *Legal Services Commissioner v Ford* [2008] QLPT 12 (22 Aug 2008) where a solicitor was found guilty of unsatisfactory professional conduct in preparing a new will and an enduring power of attorney for an elderly client.) The will maker must know what he or she is doing and must understand the effect of the will, including the effect of its principal clauses; he or she must have a general knowledge of the nature of the property and its value; and must know which people might have a legitimate claim upon it. (See *Nicholson v Knaggs* [2009] VSC 64 at 100.)

2. A donor making an enduring power of attorney (financial)

S. 118 Instruments Act 1958 sets out the test for capacity. The donor needs to understand the 'nature and effect of the enduring power of attorney' which includes understanding matters as set out in s. 118(2) Instruments Act.

Witnesses to an enduring power of attorney are required to attest that 'at the time, the donor appeared to the witness to have the capacity necessary to make the enduring power of attorney' (s. 125A Instruments Act 1958).

3. Capacity to enter into an agreement

In *Gibbons v Wright* (1954) 91 CLR 423, the High Court (at 437 per Dixon CJ, Kitto and Taylor JJ) defined a decision-specific test for capacity to enter into a contract:

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation.

It is prudent to identify that the person is able to understand the nature of the contract, its purpose, its possible outcomes, and the risks, which may be many.

EVIDENCE OF INCAPACITY

Capacity does not have to be proven but there may be evidence of incapacity.

For example, if a client does not know:

- the issues that face them (even after having them explained) OR
- the approaches available to them OR
- appreciate the reasonably foreseeable consequences of their choices OR
- if their decisions are based on delusional constructs,

AND cognitive impairment is present THEN it can be said they lack capacity.

Medical experts can help with determining whether or not cognitive impairment is present.

You need to be aware that your client's lack of capacity may be intermittent and that you may be able to establish capacity and avoid substitute decision-making (see *Substitute decision-making* on p. 54) just by making an effort to find a better time, or a better way to communicate. Lack of capacity may also be due to stress, a move to an unfamiliar environment, infections, hearing and sight difficulties, educational level and language and cultural barriers.

You need to be alert to indicators of incapacity such as the following. Remember that these are indicative only.



INDICATOR	EXPLANATION
Poor concentration – limited ability to interact with solicitor or to repeat advice and ask key questions.	Client appears overwhelmed by what you are saying or is frequently changing topics during the conversation, going off on tangents, being flippant. You may also sense they are only taking in the gist of what you are saying.
Difficulty with recall or memory loss	Client does not remember important details about their personal or family history, their past or current financial situation, what and when any previous documents were signed.
Ongoing difficulty with communications	Client is not explaining themselves or their reasoning well to you, they struggle to recall important words, they say very little or do not seem to understand many terms you are using despite attempts to clarify and use simpler language.
Lack of mental flexibility	Client is not open to even hearing about other options or potential risks. They may inadvertently return to the same topic of conversation several times.
Poor insight or judgment	Client clearly lacks insight or judgment into the degree of risk they are placing themselves in, how vulnerable they are, what the value of their assets currently are.
Problems with simple calculations which they did not have previously	This might be elicited by asking about financial ingoings and outgoings, how much they will have left in the bank after a certain amount had been spent or lent.
Sense that ‘something about the client has changed’.	Deterioration in personal presentation, isolation, mood or social withdrawal; overly anxious; presenting with a family member or friend when normally they would present alone (this could also be an indication of abuse.)
Client has changed solicitors several times over a short period, particularly if there has been a change from a solicitor who has advised the client for many years (this could also be an indication of abuse).	Solicitor easily able to change client’s mind about an important decision or appointment. Client giving little consideration to whether the advice is right for them.

Source: The Law Society of NSW, 2009, A Practical Guide for Solicitors, as amended by Dr Georgina Lowndes, a Project Reference Group member.

STRATEGIES TO REDUCE RISK

- See your client on their own at first to assess capacity and obtain instructions. Focus on practising good communication ([see Interviewing and communication on p. 15](#)). In some cases of supported decision-making ([see Substitute decision-making, on p. 54](#)), it might be acceptable to have another person present.
- Take careful detailed notes of your instructions, recording your questions and the client's responses, and also their observations. (The Legal Practitioner's Liability Committee recommends practitioners keep written records of matters discussed in relation to determining capacity. If there is doubt about capacity, then appropriate inquiries e.g. to the donor's doctor need to be made, with consent of the client/donor. See LPLC 2005b, p.2.) In some case it might be advisable to have an additional witness, for example, if client's instructions are somewhat eccentric. If your client has given you instructions to significantly change their will, this should alert you to the need to question them about their reasons and to document their answers.
- If your client is in hospital, seek advice from staff as to the best time to take instructions or execute a will so as to optimise capacity. It is important to raise this issue with your client openly, explaining the legal need to ensure capacity for the decision at hand.
- Consider referring the client for a formal capacity assessment to a medical professional with expertise in assessing cognitive capacity where the client has a diagnosed condition affecting decision-making capacity or where you believe that the client has impaired capacity based on their answers in an interview. Remember that the final decision about legal capacity is up to you, but you need to have regard to clinical findings.
- Document the scope and limits of your retainer, particularly where the client and other family members present with instructions.

(This section draws on materials in T. Cockburn & B. Hamilton, 'Assessment of Capacity: disciplinary issues and potential liability' in Proctor, March 2009, 15 at 17.)

SEEKING AN EXPERT CAPACITY ASSESSMENT

There is a range of medical professionals who can undertake capacity assessments of older people. You need to consider the client's disability before undertaking the referral. Mental illness, acquired brain injury, and dementia each require a different capacity assessment. Who you approach will also depend on the circumstances, such as the level of urgency or where the client is placed (for example, they may already be in hospital). Your client needs to agree to the referral and the possible costs.

The medical practitioner must be properly briefed. When referring a client, it is important to include in the referral letter:

- client background
- reason the client contacted you
- purpose of the referral – the decision at hand, the legal standard of capacity to perform the task, any known medical information, information about the client's living situation and client preferences (The Law Society of NSW 2009, p. 8).

The LIV Elder Law Committee has material on its website which outlines matters to consider when requesting a medical assessment of a person's cognitive capacity. LIV members can access this resource material at www.liv.asn.au/Membership/Practice-Sections/Elder-Law

See also The Law Society of NSW, 2009. When a Client's Capacity is in Doubt – A Practical Guide for Solicitors. Accessible at www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf



CLIENT DOES NOT HAVE CAPACITY

If your client cannot provide instructions or make a legal decision on which you can act, and there are no powers of attorney in place, you may have to consider the appointment of a guardian and/or administrator. This Victorian Civil and Administrative Tribunal (VCAT) application is best made by a family member, friend or health care professional, as there may be ethical issues if you were to apply (The Law Society of NSW 2009, p. 9). Such action should be a last resort, remembering that capacity is decision-specific and that you might be able to assist your client with some legal tasks, such as obtaining an intervention order, but not others, such as appointing a financial power of attorney. (See Substitute decision-making on p. 54.)

Case Study

Jamilla, in her 70s, returned home after treatment for a broken hip and a serious urinary tract infection (UTI). In hospital she was assessed as lacking capacity to manage her financial affairs and her eldest son, Abraham, took over her affairs. Jamilla has three children and a network of friends.

Abraham and his wife and three children moved into Jamilla's house because Jamilla needed their support. With her consent, they accessed her bank accounts to fund the building of a bungalow for her and transferred the house into their names, enabled by the Power of Attorney (financial) that she had given them.

Months after Jamilla moved into the bungalow, one of her friends visited and found Jamilla greatly distressed. Jamilla was rarely seeing her grandchildren, felt isolated and bullied by her daughter-in-law and no longer had any control over her finances. Her other children, who live interstate, were fighting with Abraham because they thought it wrong that he, and not they, was advantaged by these new arrangements.

Jamilla's son then told her that she was to go into aged care because his wife could no longer cope with her. After Jamilla was placed in the aged care facility, her property was put up for sale. No one at the aged care facility speaks her language and she has never before eaten the type of food she is given there.

Jamilla asks her friend to help her. The friend contacts you and with Jamilla's consent, arranges for you to visit Jamilla in the aged care facility. Jamilla tells you she remembers when she was in hospital some people asking her questions about a country leader and having to count backwards. She does not remember an interpreter being present at the time. She did not receive legal or other assistance.

IS CAPACITY AN ISSUE?

You would need to satisfy yourself of Jamilla's legal capacity or lack of it. Do not rely on the medical assessment made at hospital. It may have been done without an interpreter and Jamilla may have been confused and may have had reduced capacity in that setting (due to disorientation, the pain and stress of her injury, her medication, or an infection—urinary tract infections (UTIs) often result in confusion in older people). Jamilla may have regained or increased her capacity with time and physical recovery.

To make your own assessment you would:

- Interview Jamilla, preferably at home or in a quiet place, at a time that works best for her, scheduling a longer appointment.
- Check for hearing and sight issues and use aids where required.
- Ask Jamilla what she wants. She may have capacity to instruct you to do some things, for example, investigate the asset transfer for her but may not have capacity to do other things, such as revoke the power of attorney.
- Ask for any power of attorney documents or other documents she has, and question her to see if she understands their nature and effect.
- Call the VCAT to see if any guardianship and administration orders are in place.
- Seek to obtain medical information about Jamilla with her consent (if you think she has capacity to consent to this).

ARE THERE CULTURAL AND LANGUAGE ISSUES TO CONSIDER IN COMMUNICATING WITH JAMILLA?

See Interviewing and communication on p. 15 and Awareness of diversity on p. 18.

After interviewing Jamilla, if you still questioned her capacity, you would seek a second assessment from an expert (a gerontologist, for example) briefing them on the context for the assessment and the type of decisions Jamilla needs capacity for. You would also need to arrange for an independent interpreter and any other communication aids required.



What advice would you give?

Suggestions for advice and action:

Title search

Caveat (See Caveats on p. 48.)

Is there an equitable interest? (See Equity on p. 43.)

Has there been a misuse of the power of attorney?

Possible action in unconscionable dealing.





4.

PREVENTIVE MEASURES – SOME CONSIDERATIONS

A transfer of assets between an older person and their adult children or other family members is not, of course, inherently abusive. Problems generally only arise because arrangements have not been properly thought through, the situation has changed, and there is no written documentation. It is of vital importance that preventive steps be taken to reduce the likelihood of these transactions becoming detrimental to your client's interests.

The need for legal assistance and protection for these cases is a major challenge, especially where the older person has not been properly advised on the risks associated with entering into transactions where another stands to benefit, and the older person is potentially left without adequate resources.

Seniors Rights Victoria frequently sees clients when it is too late. Assets have been disposed of in exchange for care and accommodation, based on a belief that a family relationship would never break down. The older person failed to seek legal advice before entering into the arrangement because they trusted a family member and believed everything would be fine. These agreements are almost always made orally and when they fail, the relationship may degenerate into abuse. A lack of evidence of any binding legal agreement and the presumption of gift can make it difficult to recover assets. A transaction looks like a gift where the caregiver gives nothing in return. Even where it might be possible to prove an agreement, a court process may be beyond a client's resources.

These 'assets for care' transactions take many forms – the direct transfer of property to an adult child (or other relative); the use of proceeds of a sale of the older person's property to build a 'granny flat' at the back of an adult child's property, or to discharge the mortgage on an adult child's property, or to buy another property and place it in an adult child's name; a conveyance of property to an adult child as joint tenant. These transactions are made in the belief that the adult child or other family member will care for the aged parent or relative for life. The older person does not wish to enter an aged care facility, and there may be a shared desire to keep assets in the family and not have to realise assets for an aged care accommodation bond.

If an elderly client comes to you seeking advice or wanting to instruct you to arrange disposition, it is crucial you do all that is outlined earlier ([see Legal practitioner's role on p. 10](#)), that is:

- act for one party only,
- assess capacity,
- look for undue influence,
- communicate effectively,
- be aware of cultural nuances and
- give independent, fully informed and comprehensive advice so that the older person fully appreciates the nature of the proposed transaction.

It is important that you advise your client of other ways they can structure the transaction to better protect them from future loss should the relationship breakdown. This section of the guide deals with those preventive or protective measures.



FAMILY AGREEMENTS

It is far better for your services to be sought for the drafting of a family agreement beforehand than after the failure of a poorly considered transfer of assets.

A written family agreement 'which includes private commitments made between elders and their relatives, friends and carers ... to accommodate the health care and security needs and wishes of the elder ... consistent with the needs and resources and other or competing commitments of friends and family who may decide to assume the position of carer' (Lewis, 2009) can reduce the risk of asset transfers 'going wrong'.

WHAT ARE FAMILY AGREEMENTS?

Family agreements (also known as independent or private care agreements, personal services contracts, or lifetime care contracts) typically involve a transfer of an older person's property (usually the home) or other assets to a trusted family member in exchange for a promise of long-term care and support. The problem with most agreements, and a reason they frequently fail despite original good intentions, is that they are usually made orally and without any legal advice or detail as to their terms, and without all the relevant issues being canvassed and agreed (see Hall 2003, p. 24).

Properly drafted family agreements are clearly written and are the end point in a process where family members take time to consider a long list of important matters. Even if an agreement is never drafted, the mere fact that family members have sat down and discussed things can avoid future conflict.

Mediation or dispute settlement services may be able to help parties to negotiate and reach agreement. If you feel you cannot conduct a meeting between family members yourself, then you could consider a referral to such services for mediated discussion (see Referrals and Resources section).

WHAT IS YOUR CLIENT GIVING UP AND WHAT ARE THEY GOING TO GET?

Agreements may fail because the details of day-to-day living arrangements were not worked through and agreed on. Encourage your client and their family to think in advance about issues such as:

- What care will be provided and by whom? What will happen when the older person's care needs increase, as they likely will over time? (For example, if they lose mobility or continence.) What care will definitely not be provided?
- How will the proposed agreement affect other family members? Some, for example, may feel dispossessed or overlooked.
- What household tasks such as cooking and cleaning will the older person have to do or share?
- How will the cost of food and utilities be shared?
- What arrangements will there be for holidays? For respite for carers?
- Will they share the space with children? Will they be expected to look after children as part of the arrangement?
- Will the older person have access to a car, or be able to be driven when they need to go out?
- Will they have a separate telephone or internet access?
- Will they be able to have a social life separate from the family's, including having people visit them when they choose?
- Will their accommodation have a private entrance? Will their mail be delivered direct to them?
- Will they be able to have a pet?

And so on...

FORM AND FEATURES OF A FAMILY AGREEMENT

A family agreement may take many forms, such as a deed of family arrangement, a co-ownership agreement in relation to sharing possession of particular property, a 'granny-flat' type of agreement, a loan agreement, or a care and residence agreement (Lewis 2009).

It is important to communicate the binding nature of family agreements, that parties are aware that they each need to gain independent legal advice and that they are structured appropriately (see below). For example, will there be a dispute resolution section? Does your client's will reflect the family agreement? (A wills agreement can also provide for an advance on an inheritance to care for a parent. Mutual wills would add complications to the drafting of a family agreement. The crucial element for the latter is that if the first testator has acted to his or her detriment by exercising the power of testamentary disposition in the agreed manner then as a consequence the second testator should not act contrary to the mutual wills agreement.)

Family agreements should be properly witnessed. It is prudent for family agreements to require the signature of two witnesses and also the certificates of solicitors evidencing independent legal advice.

See the Sample Family Agreement at the end of this guide.

CANVASSING ISSUES WITH YOUR CLIENT

To support your client properly you need to ensure that you have taken comprehensive instructions and discussed arrangements fully.

- Have all family members likely to be affected by the agreement been involved (not only members party to the intended agreement)? Your client may need to consider a new will if a family agreement is entered into and there is more than one child. If a family agreement has set up a loan to a particular child and the loan is repaid to the estate on the older person's death, the will can enable the amount of the loan to be distributed to the children equally, reducing the possibility of disputes in relation to the estate.
- Are you aware of inequalities in bargaining positions or any conflict of interest that can lead to unfair or unjust transactions that could be voidable for unconscionability? (See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and [Equity on p. 43](#).)
- Is there potential for misunderstanding due to your client's cultural views on inheritance and caring roles and their family's expectations? (Inheritance rights and caring obligations may be determined by family structure, see Radermacher et al. 2009; while caring for parents may be seen as a cultural duty versus a contractual obligation, see discussion in Herd 2002, p. 73).



Checklist

DRAFTING A FAMILY AGREEMENT

✓ INITIAL CONSIDERATIONS

- Is it clear that the family agreement intends to create legal relations? (See *Monro 2002*, p. 68.)
- Is it clear to all that there is no intention of a gift?
- Has each party sought financial advice such as in relation to tax implications?
- Are there caveats that need to be lodged at the time of the agreement?

✓ PLANNING THE AGREEMENT

- Consider effects on relationships. Have other members of the family endorsed the agreement? Are there arrangements to share information? All close family members need to sign off/acknowledge the family agreement.
- Is there a clause in relation to the legal costs of creating the agreement?
- Are there arrangements to commence and terminate the family agreement?
- What is the frequency of review or update of family agreement?
- Is there a system to monitor the family agreement?
- Have the Centrelink ramifications been identified and explained to the client? For example, the effect on their pension; granny flat rules; gifting rules.
- What is the security of tenure? (Tenancy or licence.)
- Have insurance and indemnity issues been considered?
- Is there any concern about client capacity? What if your client, or any party, loses capacity? (**See Capacity on p. 23.**)
- Have powers of attorney been arranged? Have conflicts of interest been avoided? (**See Powers of Attorney on p. 56.**)
- Have other appropriate referrals (e.g. social and medical) been considered?

✓ ENSURING ALL CONTINGENCIES HAVE BEEN EXPLORED

What if:

- there is a separation, divorce or bankruptcy of carers?
- the property is sold?
- a party moves interstate or overseas?
- a party dies or becomes ill?
- the carers wish to change their lifestyle when children are grown?
- the older person remarries or re-partners?
- care requirements become too great, for example, dementia worsens considerably or the aged parent suffers a stroke? If they need aged care accommodation, how will the fees be met?
- What holiday and respite arrangements are in place?
- Are there pets to be considered?

✓ HOW TO STRUCTURE THE AGREEMENT

- Is it a life interest, trust, loan, etc? (Specify to avoid a presumption of advancement.)
- Does interest apply or not?
- Should your client's name be on title as well as their family member's/adult child's?
- Will compensation be paid for their contributions to the adult child's property? How will it be calculated?
- How will the agreement affect inheritance arrangements?
- What care, support and accommodation will be provided? How will care arrangements be quantified? If there are other children involved or other persons with expectations regarding inheritance, the circumstances could easily give rise to discord unless some pre-agreed formula has been agreed.
- What ongoing payment obligations exist or what will they be?

✓ DEALING WITH DISPUTES

- What happens if the relationships between the parties break down?
- How will disputes be dealt with? (A dispute settlement clause is required.)
- What happens if there is any default of the terms of the family agreement?

Case study

Jean is 78 years old. She has four adult children. She has been living independently in a unit she owns. She is starting to become physically more frail and unable to cope on her own. She needs assistance with some daily living tasks.

Jean and her family are confronted by the need to consider an aged care facility (such as a nursing home or hostel), community care or the family itself as the vehicle for her ongoing care. However, the children do not want Jean to move into a facility. Jean herself does not want to give up her independence but wants to 'keep it in the family'. One of the daughters, Bev, suggests that Jean sell her unit and lend part of the proceeds to Bev and her husband, Bob, to build an addition to their home where Jean will live. Bev says that she will provide her mother's daily care. Jean's other children are anxious about this and can see part of their inheritance going to Bev. Jean comes to you for advice.

SUGGESTIONS FOR ADVICE AND ACTION:

See if Jean will consent to a family meeting to discuss the issues, risks and possible outcomes. If you do not attend the meeting, make sure that Jean knows beforehand what issues need to be canvassed.

Prepare a family agreement after the consultation. ([See the Sample Family agreement at the end of this guide.](#))

One suggested arrangement:

- Jean sells her property.
- Jean uses part of the sale proceeds to loan Bev the money to build an extension to her home.
- Bev gives Jean a licence to occupy the unit for life.
- In consideration of the loan and in acknowledgment of the increased capital improvement of the property, Bev agrees that she will care for Jean. (List details of care to be provided.)
- The debt would be amortised over time by the comparable community care rate in recognition of the care provided by Bev.
- The agreement outlines when the loan to Bev would become immediately due and payable, such as, if Jean is hospitalised for a lengthy period and needs to go into care, Bev's circumstances change, the parties' relationship deteriorates, or there is some other change. Jean can stay in the Unit until alternative accommodation is found for her.
- The agreement outlines who is responsible for outgoings, what happens on holidays and respite periods.
- If Bev breaches the agreement, the debt would become immediately due and payable together with interest.

As a self-funded independent retiree, this arrangement would have no impact on any pension entitlements of Jean, although it does have income tax implications for Bev.



CENTRELINK ISSUES

Relevant legislation:

Social Security Act 1991 (Cth)

Social Security (Administration) Act 1999 (Cth)

Loans, gifts, mortgages and property transfers can affect how Centrelink views assets and income. Are you aware of what impact a financial transaction between an older client and their family member can have on pensions, benefits, tax entitlements and future aged care fees and charges? It might be better for your client to keep their money or to give it away more judiciously. Do you know where to source relevant information? Financial advice may also be required and you should be prepared to make the appropriate referral when required.

Centrelink rules are complex and should be studied carefully or the client should be advised to seek advice elsewhere, for example:

- Financial Information Service Officers (FISO) in Centrelink. Anonymous inquiries can be made but information you provide is not confidential. FISOs can also help people to assess aged care fees.
- Social Security Rights Victoria is a community legal service specialising in the impact of social security law. www.ssr.org.au
- The National Information Centre on Retirement Investments Incorporated (NICRI) is a free, independent, confidential service for people with modest savings. Its role is to provide up-to-date independent information to assist people to make the best possible investment decisions they can regarding their financial planning, superannuation, reverse mortgages. www.nicri.org.au

GIFTING

Centrelink places restrictions on the amount of assets that older people on age pensions can 'gift'. Gifting more than the allowed sum may lead to a reduction in pension entitlement and increased aged care accommodation fees. (See Aged Care Act 1997.) Assets gifted above the amount specified by Centrelink will also be included in the assets assessment for residential aged care and may result in a resident not being eligible for government assistance with their accommodation costs.

Older people or their families sometimes try to divest themselves of property to avoid an aged care accommodation bond or to attract Centrelink payments. Attempts to do this often work to the detriment of the older person and you need to be aware of this so to alert your client to the possible disadvantages. Financial abuse can have a cascading effect on the older person's pension entitlements as well as aged care costs.

Example

A mother transfers her house to her daughter. Her children are angry and fighting about her supposed favouritism. Meanwhile she needs to go into aged care. The house transfer is made without advice from Centrelink who consider such a gift a transfer of assets for inadequate consideration. Centrelink treats the property as still being owned by the person 'gifting'. This will affect the mother's pension entitlement and aged care fees.

See link to Centrelink FIS Fact Sheet on 'Gifting' on p. 38.

GRANNY FLATS

The 'granny flat' arrangements that families make vary. They include building an extension or a bungalow in the backyard, but are not just limited to those. They usually involve transferring property to adult children, or selling property to invest the proceeds in children's property or business, in exchange for living with and being cared for long term by adult children and their families.

Centrelink's 'granny flat' exceptions are designed to encourage people to stay out of supported care. They may, however, inadvertently leave openings for financial detriment (abuse).

Assets transferred in return for a 'right to accommodation for life' can create 'granny flat rights' where the transfer of assets will not impact on pension entitlements. But be aware that Centrelink may apply a reasonableness test to the amount paid for a granny flat interest. If it is considered to be excessive, this may affect pension entitlement. See Centrelink FIS Fact Sheet on 'Granny Flats' (link on p. 38).

Each of the following scenarios can be considered granny flat interests and therefore Centrelink may not alter pension entitlements where these arrangements are undertaken.

Example 1

Bryan transfers title of his home to his son while retaining the right to live in it.

Example 2

Mira sells her home and pays for the construction of a bungalow on her daughter's property.

Example 3

Anna provides \$50,000 to her son when she moves in with him.

Trying to maximise their pension entitlement through Centrelink's recognition of granny flat rights encouraged Mira and Anna (above) to live with their adult child.

If they later wish to move out because they are unhappy, unwell, or inadequately cared for:



Can they get their money back?



Can they claim a property interest?



What are the tax and pension repercussions?



If they move into aged care, what effect does this new arrangement have on aged care costs?

Placing a parent in a granny flat then into aged care just a few months later is a strategy that has been used to try to circumvent Centrelink asset assessment and avoid an accommodation bond payment, but it will not work if the need for care could have been anticipated.



These matters need to be considered before your client enters into these arrangements. For example, you could assist your client to draw up a family agreement ([see Family agreements on p. 32](#)) which could provide evidence of a life interest to help access this granny flat exception.

See link below to Centrelink FIS Fact Sheet on 'Granny Flats'.

FOR INFORMATION ON CENTRELINK ISSUES

Financial Information Service Fact Sheets, including on 'Gifting' and 'Granny Flats', at www.centrelink.gov.au/internet/internet.nsf/publications/fis.htm

SEE ALSO

Rob Phillips, 2008, Older Residents and the Law: Accommodation, Care and Legal Rights in Victoria, 2nd ed., Victoria Law Foundation. See pp. 9-18 on pensions, reverse mortgages, superannuation and financial planning advice; pp. 43-79 on residential aged care.

The Department of Families, Housing, Community Services and Indigenous Affairs Accommodation Choices booklet has information about aged care options and contains other valuable information and referrals. www.fahcsia.gov.au/sa/seniors/pubs/accom_choices/Pages/default.aspx

REVERSE MORTGAGES AND HOME REVERSION SCHEMES

Your client's pension entitlement may be affected by a lump sum received.
(See [Financial and tax implications on p. 39](#).)

NOMINEE ARRANGEMENTS

There are cases of family members collecting their aged relative's Centrelink payments. A family member can arrange to be appointed as their older relative's nominee. The completion of an authorisation form available from the Centrelink website is all that is needed for a person to act on another's behalf.

These arrangements are usually voluntary and can be cancelled at any time by contacting Centrelink (unless the arrangement is legally enforced, for example, under an Administrator arrangement).

CARER PAYMENT AND CARER ALLOWANCE

Carer Payment provides income support to people who, because of the demands of their caring role, are unable to support themselves through substantial paid employment. Carer Payment is income- and assets-tested and paid at the same rate as other social security pensions. It can be paid to people providing constant care to a person with a disability.

Abuse of Centrelink payments is sometimes discovered or suspected by services that deal with financial abuse of older people. An adult child may be claiming a Carer Payment but not providing adequate care and is thus failing to meet Centrelink eligibility requirements.

SEEKING A WAIVER FROM CENTRELINK

If your client has been deemed to have gifted property and has subsequently lost part of their pension, or has been assessed to pay a bond but has no money due to having transferred their house, you could write to Centrelink, advising them of what has happened and seek an exemption or waiver of fees.

FINANCIAL AND TAX IMPLICATIONS

Note that the age pension is taxable.

REVERSE MORTGAGE AND HOME REVERSION

Home reversion, unlike a reverse mortgage, is not a loan but the sale of a proportion of a person's equity in their home.

Equity release products such as these require that independent legal advice be obtained. Your client and their family members may have been given the impression by a lender that the advice can be obtained in a few minutes. Your job is to ensure your client is informed and understands the complexity, pitfalls and future effects of these arrangements. For example, what will it cost them? How will it affect your client's current and future finances and their retirement lifestyle?

See the Legal Practitioners' Liability Committee Bulletins on equity release products www.lplc.com.au/risk_management/bulletins/equity_release_products/

You also need to ensure your client is entering into such arrangements without influence or external pressure. You should interview your client on their own and keep thorough records of the advice you have given and the instructions received. [\(See Ensure your client has the capacity to make the decision on p. 13.\)](#)

Your client's pension or benefit eligibility, as well as the level of assets assessed for an accommodation bond, may be affected by any lump sum received and how they use it.

You may need to refer your client for specialist advice to, for example, a financial advisor, an Elder Law specialist, or to the National Information Centre on Retirement Investments (NICRI). [\(See Financial services in Referrals and Resources on pp. 65-66.\)](#)

RESIDENTIAL AGED CARE ACCOMMODATION BONDS

If an accommodation bond arrangement is entered into, it must be structured in a way that protects the interests of the older person NOT their child. Sometimes your client may wrongly perceive these interests to be the same. Your client may choose to ignore your advice and wish to structure the arrangement to benefit others. Nevertheless make certain you have given them the opportunity to consider all options. Their family may wish to avoid paying this bond but a bond may (although does not always) ensure a better standard of aged care. On the other hand, some families may wish to place more than the required bond payment into the aged care home as a way to 'hide' assets.



What are the tax implications of accommodation bonds?



Is a house considered to be an asset if one moves into aged care?



What if it is rented out or sold?



CAPITAL GAINS TAX

There may be capital gains tax implications for your client or their family members in selling their home, renting it out, or giving it or other assets away. For example, if your client is considering giving away a property that is not their main residence, this may be subject to capital gains tax.

See also Phillips 2008, pp. 9–18 on pensions, reverse mortgages, superannuation and financial planning advice; and pp. 43–79 on residential aged care.

STAMP DUTY

Inquiries need to be made to the State Revenue Office (www.sro.vic.gov.au) as to whether stamp duty is payable (by the person who has had property transferred to them).

Example 1

A parent transfers their house to an adult child or a long-term lease is arranged. Stamp duty may be payable.

Example 2

A parent promises to bequeath their home to their child in the future if they perform certain caring functions now. Stamp duty may be payable.

PLANNING LAW

If your client is planning to move into a ‘granny flat’, you may need to advise them about their local government’s planning requirements. The kind of permit obtained may have financial implications. An addition to the property, for example, may only be permitted for the current owners and not have any resale value. Ensure your client is not spending money on building a dwelling on another person’s property that does not meet the planning requirements and has to be removed. Each council has its own planning codes. For example, the City of Greater Dandenong refers to a granny flat as a ‘dependent person’s unit’ and defines it as a movable building which may not require a permit.

Additionally, the ‘granny flat’ may not necessarily increase the value of the property on which it is built, which may then affect any interest the ‘dependent’ older person has in the property.

WILLS

When preparing a will for a client, lawyers need to ensure that they have taken detailed instructions regarding any inter vivos gift, advancements and loans. Client instructions should stipulate intentions such as whether gifts or advancements are to be deducted from a child’s estate and whether loans are to be forgiven. Such instructions should be reflected in the will where possible and detailed notes should be kept on file.

There are three main protections available to assist will-makers to dispose of their property voluntarily and with full knowledge.

1. Testamentary capacity

The will-maker must be of sound mind, memory and understanding when executing the will.

[\(See Capacity on p. 23.\)](#)

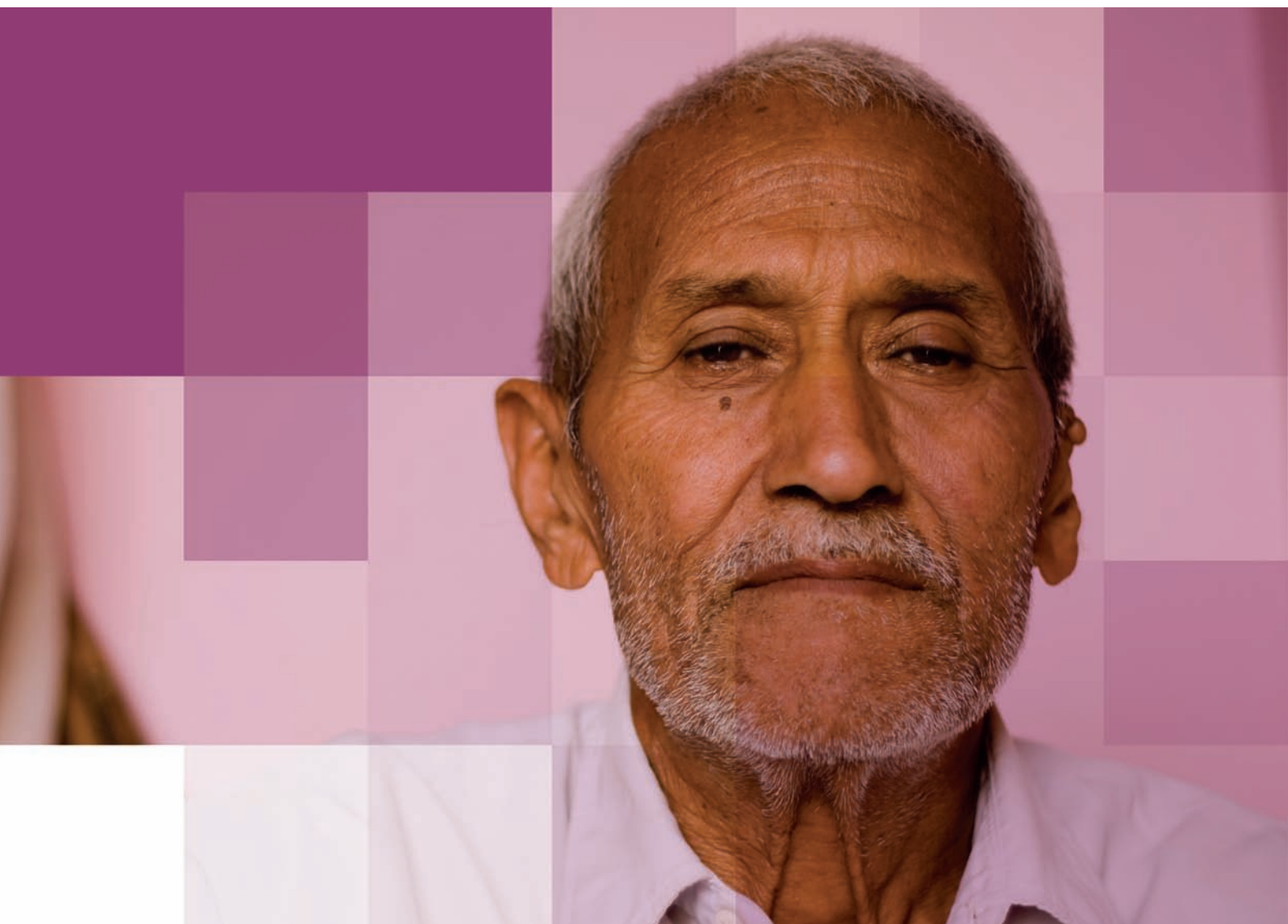
2. Testamentary undue influence

A will may be set aside if it is the product of testamentary undue influence. A party making the allegation of undue influence must prove that such undue pressure has been brought to bear that the will can be said to have been a product of this conduct (see *Nicholson v Knaggs* [2009] VSC 64 at 111). The key concept is that of 'influence'. The influence becomes 'undue' at the point where it can no longer be said that the making of the testamentary instrument represents the free, independent and voluntary will of the testator (*Nicholson v Knaggs*, at 150).

3. Knowledge and approval of the contents

A testator must have knowledge and approve of the contents of the will (*Nicholson v Knaggs*, at 151–155).





5.

WHAT CAN BE DONE
IF THE RELATIONSHIP
BREAKS DOWN?

WHAT IS THE RELEVANT LAW?

There is a significant amount of case law that deals with disputes arising from an older family member agreeing to contribute resources to a family member in exchange for care and accommodation. This section outlines the most relevant law which may be called upon to resolve the older person's entitlement, although this list is not intended to be exhaustive.

With all of these cases, it is important to remember the potential for mediation as an alternative method of resolving a dispute before litigation is commenced.

CONSIDERATIONS IN TAKING INSTRUCTIONS

It is very important to take a detailed statement early on from your client with respect to transactions that have occurred, particularly verbal ones, because over time your client's ability to recall events may be affected by illness, memory issues and loss of capacity.

What outcome is your client seeking? The action taken will depend on the answer to this question. Do they seek to:

- be returned to the position they were in prior to the abuse occurring?
- have their property restored to them?
- be moved away from a situation of undue influence?

The following factors need to be considered:

- client's wishes,
- whether funds can be recovered,
- jurisdiction,
- costs of legal action,
- merit of case,
- impacts on family relationships.

For example, if the recovery of funds is sought following a misuse of a power of attorney, be aware that VCAT cannot order restitution. You first need to check whether there are funds left to be recovered and (taking costs into account and assuming your client agrees), proceedings may be issued in the County or Supreme Court ([see Equity below](#)).

Where appropriate, an administrator appointed by VCAT (such as a relative or State Trustees or a private firm for a fee) may assist clients to regain control of their finances or take action to recover money. The factors above are relevant. Some administrators may not assist unless the case has merit and the client has money to fund any litigation. ([See Guardianship and Administration on p. 60.](#))

EQUITY

USEFULNESS OF CAUSES OF ACTION IN EQUITY

Equitable causes of action might be appropriate to try to recover a client's assets where preventive measures were not put in place or were inadequate. Note that these actions are stressful, expensive, lengthy and hard to make out. For these reasons, an older person may not want to pursue an action in equity ([see Law's limitations on p. 6](#)). Arguing equity, however, may be useful in negotiating a settlement.

The risks of litigation are illustrated in *Hamilton v Carter* ([2011] NSWSC 394) where a claim that a nephew had taken advantage of his aunt's known position of disadvantage was not made out. There was no finding of undue influence or unconscionability and the claimant had to pay costs to the accused.



Determining what cause of action to pursue must be done on a case-by-case basis. Running a case on grounds of unconscionability, for example, may not help where a parent has voluntarily (but ill-advisedly) transferred land or provided their son or daughter with the purchase price for a property that is then registered in their child's name. For a property that has significantly increased in value, a constructive trust is a more favourable remedy than a lien (Barkehall-Thomas 2008).

CONSTRUCTIVE TRUSTS

A constructive trust can be imposed in equity on the basis of unconscionability or common intention. In relation to unconscionability, where a defendant unjustly gains a benefit at the expense of a plaintiff, this is arguably an unjust enrichment in restitution law. (See Goff & Jones 1986, pp. 13 and 16; and Baumgartner v Baumgartner (1988) 62 ALJR 29, and Muschinski v Dodds (1986) 160 CLR 583.)

Parties may be found to hold their respective interests on trust to repay other parties' contributions and to divide the residue between them. Some cases have drawn the analogy between the failure of a relationship and the failure of a joint endeavour in terms of the rights and interests created. In Swettenham v Wild ([2005] QCA 264) a joint endeavour (a granny flat), which was to be for mutual benefit, failed through no attributable fault of either party and gave rise to a constructive trust so that the elderly widower had a proportionate interest in the property. And see Giumelli v Giumelli [2007] VSCA 89 for an example of the fulfillment of an equitable obligation by 'making good the expectation' that had been encouraged (cited in Barkehall-Thomas 2008, p. 154).

RESULTING TRUSTS

A resulting trust could be created where an informal agreement to transfer assets in exchange for care has failed, for example, where an older person contributes to the purchase price of a property (in which they understood they were to reside with their adult child and family) and legal title equivalent to their contribution was not given.

What was the intention in transferring the assets?

Was a resulting trust intended or is there evidence that a gift was intended (presumption of advancement)? (Herd 2002, p.76)

A major obstacle for your client is rebutting the presumption of advancement because equity presumes, subject to contrary intention, that the transfer by the older person was intended to be an advancement or gift. You will therefore need to show that such a gift was not intended, for example, with evidence that a life interest was reserved, or that the transfer was motivated for reasons inconsistent with an intention to give beneficial ownership.

Case study

Alan, a 75-year-old man, contributes \$100,000 towards the purchase of a home for his only daughter. He moves in with his daughter, who later becomes verbally and physically abusive. She forces Alan to let her make direct debits from his bank account. She also withdraws money regularly. His pension is his only source of income. One afternoon she locks him out of the house.

In Alan's mind, the transfer of money to his daughter for the house was not a gift but his contribution to a joint venture whereby he would be provided with a home and care in exchange for money.

Possible causes of action and remedies:

Resulting or constructive trust

Equitable charge or lien

Caveat

Orders sought for repayment or sale of property to compensate him

EQUITABLE LIENS AND CHARGES

In cases such as Alan's (above), it may be argued that the older person has an equitable charge or equitable lien over the property. Charges and liens are not estates of any kind, but merely a right to secure the performance of an outstanding obligation (Dal Pont et al. 2007). They are available in similar circumstances to a constructive trust and arise where it would be inequitable for one party (such as an adult child) to retain the benefit of the older person's contribution to the property (Burns 2002a, p. 1).

Australian courts in recent times have been using equitable liens or charges over constructive trusts where it finds that this would satisfy the demands of justice and good conscience (Burns, 2002a, p. 1).

If an equitable lien is imposed, payment can be made without the owner of the property being compelled to sell it. Also, if a lien is imposed, the claimant is not entitled to any appreciation in the value of the property.

ESTOPPEL



Has there been an assumption created?

For estoppel cases it needs to be shown that the older person relied on an assumption created or encouraged by, say, their adult child.

Example

A widow sells her home to pay for construction on her son and daughter-in-law's property on the understanding that she would live in an extension on the property for the rest of her life. The relationship between them breaks down and she is asked to leave.

What needs to be proved is:

- the existence of an expectation that she could live in the property for the rest of her life;
- her son created the expectation; and
- she relied on the expectation to the extent that she would suffer detriment if the expectation was not enforced and the son knew of her reliance (Barkehall-Thomas 2008, p. 25).

The detriment suffered by the older person may be, in addition to the loss of a property interest, loss of expectation of family companionship and care in old age, and may involve 'life-changing decisions with irreversible consequences of a profoundly personal nature'; as such it may be 'beyond the measure of money' (Donis v Donis [2007] VSCA 89; see also Barkehall-Thomas 2008, p. 31).

Possible remedy:

Fulfill the expectation/reverse the detriment

UNDUE INFLUENCE AND UNCONSCIONABLE DEALING

These two doctrines (sometimes referred to as the doctrines of equitable fraud, Hall 2006) are designed to achieve fairness in transactions by providing remedies to overcome the effect of an unfair transaction (Davis 2008, p.50). The distinction between the doctrines was discussed by Deane J in *Commercial Bank v Amadio* (1983) 151 CLR 447 at 474. They do not require intent to be shown although sometimes undue influence may be exercised intentionally.

It is quite difficult to make out a case of undue influence or unconscionable conduct in Australia for the care arrangement scenarios contemplated by this guide (Burns 2002, 2003).



UNDUE INFLUENCE

The doctrine of undue influence refers to a situation where the weaker party is influenced into entering into an agreement. Undue influence can be 'actual' or 'presumed'. Actual undue influence may arise as a result of physical coercion which prevents the exercise of independent judgment. Certain relationships also create a presumption of undue influence. However, a relationship between an older person and their adult child does not result in an automatic presumption of undue influence.

For undue influence, what needs to be shown is that:

- 'there was such a strong relationship of trust and confidence that the court should be compelled to presume that the transaction was not the result of the free and independent will of the older person; and
- the transaction was manifestly disadvantageous to the older person' (Burns 2002, p. 517).

When identifying whether a case of undue influence could be made out, you should look at things like:

- intelligence, education, character of the older person,
- age, state of health of the older person,
- the older person's previous experience in business and finances, such as selling a house before and whether they manage their business affairs,
- strength of character and personality of the younger person,
- period of closeness of parties and their relationship,
- vulnerability of the older person in relation to the younger family member,
- opportunity of the younger person to influence the older person,
- whether the older person received independent legal advice.

If the presumption is raised, what needs to be shown by the other party is that the transaction was a result of the donor's independent and informed judgment. You can at this point look to see whether your client initially obtained independent legal advice about the nature and effect of the transaction. If they did, then usually the presumption can be rebutted. (This underlines the importance of fully and properly advising your client at first instance – [see Duties of practitioner on p. 11.](#))



Is it the action of the perpetrator or the experience of the plaintiff that counts?

It is the experience of the plaintiff that counts. Consequently, the focus is on the common situation of older people in relationships with family members where dependence exists (situations of trust), rather than just situations of clearly abusive behaviour such as threats and coercion. (Such behaviour in itself could amount to common law duress.) The attention is on the circumstances of the transaction and the alleged perpetrator is required to establish consent, such as by providing evidence that the older person received independent legal advice (see also Burns 2002b on cases concerning trust and dependence).



Did the plaintiff consent? Did they have the ability to consent?

That is, what was the integrity of the plaintiff's consent? (See Hall 2006, citing Birks & Chin 1995).

Although a parent/child relationship in itself is not sufficient basis to presume a transaction between them is tainted by undue influence (Kaye J in *Christodoulou v Christodoulou & Anor* [2009] VSC 583), the fact that a daughter acts towards her mother out of respect and affection does not change the conclusion that a daughter may unduly influence her parent (Barrett J in *Winefield v Clarke* [2008] NSWSC 882 at para 43).

[See the case study under Undue influence and unconscionability in Duties of practitioner on p. 14.](#)

Possible remedy:

Rescission

UNCONSCIONABLE DEALING

This doctrine can help prevent benefit being gained through deliberate exploitation of a power imbalance or 'special disadvantage'. Its focus is on the conduct of the more powerful party. If applied successfully, a transaction can be set aside as unconscionable (Hall 2006).

Case law determines that an older person's emotional dependence can be a 'special disadvantage'. (See *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457.) For example, the older person and an adult family member meet on unequal terms and the adult family member takes advantage of their position to obtain a benefit through an improvident transaction (*Bridgewater v Leahy* at para 123).

Some examples of special disadvantage include 'poverty or need of any kind, sickness, age, sex, infirmity of body, mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary' (*Blomley v Ryan* (1956) 99 CLR 362 at para 9).

Case study

Magda was 90 years old, partly deaf, poorly educated, with limited experience in practical affairs, and limited ability to read and write English. She was accustomed to rely on her son Vlad for financial affairs. She bought a property from her own funds with the belief, created by Vlad, that she had to transfer a one half interest in the property to herself and the other half to Vlad. Magda claims that no explanation of the effect of the documents had been given to her, she was unable to read them and she did not receive independent legal advice (see *Sleboda v Sleboda* [2008] NSWCA 122 (3 June 2008)).

Possible remedy:

Rescission

CONTRACT

BREACH OF CONTRACT

Where it can be established that the parties to a care agreement intended to create contractual relations and the agreement has broken down, a breach of contract could be argued. A contractual remedy of damages may meet your client's needs, especially where specific performance may not be appropriate because family relations have broken down.

EXISTENCE AND ENFORCEABILITY OF A CONTRACT

Enforcing a family agreement for exchange of assets for care may be difficult under contract law because:

1. The arrangement is usually informal and often lacking documentation of the relevant rights and responsibilities of the parties.
2. There is a presumption that the parties, being family members, did not intend to create binding legal relations.
3. The terms of the agreement may be uncertain and if the relationship breaks down it would be difficult to identify any useful remedies.

If there are clear difficulties with proving intention to create legal relations and the terms of the agreement are uncertain, an action in contract may not be suitable.



CAVEATS

Relevant legislation:

Transfer of Land Act 1958 Part V Division 1 (particularly s. 89; and ss. 89A and 90(3) re removal of caveats)

See Department of Sustainability and Environment for relevant guides and forms

www.dse.vic.gov.au/property-titles-and-maps/land-titles-home/forms-guides-and-fees

A caveat may be placed on land to notify of the older person's potential interest in a property that they had transferred or that they have partly paid for in an informal exchange for care, so that they can continue to live in what was once their home or be cared for in their adult child's or family member's new home.

The use of a caveat to prevent any further dealings by the Registrar of Titles on the relevant property may be seen, however, as a provocative act and should be dealt with tactfully where the preservation of family relationships is a priority.

What is your client seeking to achieve?

IS IT NECESSARY TO LODGE A CAVEAT?

Practitioners need to be confident that a caveat is justifiable and take care not to risk taking on a liability for lodging a caveat without reasonable cause (ss. 118 and 119 Transfer of Land Act 1958).

IS THERE AN IMMEDIATE NEED TO LODGE A CAVEAT?

Explain the advantages and disadvantages to your client and let them decide. If, however, in your judgment the lodgment is not legally justifiable, and your client insists, you should direct them to lodge the caveat themselves (after fully explaining the risks).

IS THERE A CAVEATABLE INTEREST?

There must be 'an estate or interest in land' and a caveat which will temporarily forbid dealings with the relevant land must be lodged in an 'approved form'. You need to properly describe the interest claimed. For example, is it a constructive or resulting trust or an equitable charge?

You also need to be prepared to defend the caveat application.

Case study

Norma, a 71-year-old woman, was pressured by her son and daughter-in-law to provide them with \$100,000 to enable them to buy a new house, on the understanding that Norma could live with them into her old age. Norma was asked to move out after only six months of this arrangement because relationships had broken down and Norma was frequently at the receiving end of verbal abuse. Norma had no money to move.

CONSIDERATIONS:



Does Norma have an equitable and caveatable interest in the property?



Was it a gift or a loan?

When an older person passes property or other assets to their children the presumption of advancement may arise – where the voluntary transfer of assets to children is presumed to be a gift.

[\(See Equity on p. 43.\)](#)

Centrelink gifting rules may also be relevant. [\(See Centrelink issues on p. 36.\)](#)

LIFE ESTATES

Does your client have a life interest in the property they are living in? It is important to determine whether your client has a life interest which would confer on them a proprietary interest in the property, or merely a personal right to reside on the land for life: see *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 at para 21.

A personal right to reside on land is enforceable in contract. A proprietary interest, on the other hand, may be enforceable against third parties which may allow your client to remain in possession of the property.

If your client is a life tenant in possession of the land, they can claim a paramount interest: s. 42(2)(e) of the Transfer of Land Act 1958 (Vic). There has been a series of decisions which have held that s. 42(2)(e) is wide enough to encompass the interest of a life tenant in possession of land. For discussion of these see, for example, *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 at para 19.

CRIMINAL LAW

Most cases of financial abuse of older people involve ‘improper’ conduct and not criminal conduct. Nevertheless, where a criminal offence is suspected, as your client’s advocate you need to ensure they understand that criminal action is an option and that what has been done to them is no less serious because the perpetrator is a family member.

It may be a big step for your client to have spoken about these matters. They may be attempting to change a dynamic of ongoing abuse, so it is important that you acknowledge the seriousness of what they are communicating, help them feel that you can look after their interests, and give them the appropriate advice.

Possible criminal offences include:

- duress
- fraud
- obtaining financial advantage by deception
- forgery
- assault or the threat of assault.

WHY REPORT A SUSPECTED OFFENCE?

- The fear of prosecution might encourage a perpetrator to desist.
- If the civil period for recovery has ended or there are no assets remaining, a successful criminal prosecution could lead to an order of compensation under the Sentencing Act 1991.
- If there has been a crime involving violence and the matter has been reported to the police, it might be possible to make a claim for crimes compensation to the Victims of Crime Assistance Tribunal – www.vocat.vic.gov.au

It is your client’s choice whether to report suspected offences. If you are instructed to follow up such a report, then you should ensure your client is fully advised, for example, that an outcome of criminal prosecution could be the punishment of the accused, but not necessarily the return of their assets. You may need to assist them in contacting the police and help explain to investigating police the seriousness of the allegations and the history and the context of your client’s concerns.

For many clients, however, criminal prosecution may not be a desired or appropriate course of action. Many older people may feel they cannot afford to lose the relationship. Proving that a person has acted with the intention to defraud a family member may be difficult. Your client may be required to give a sworn statement of evidence in court. Even if they were prepared to do this, it might be wise to try instead to negotiate a civil law settlement for compensation or restitution for lost assets.

If your client has been assaulted or threatened with assault but is unwilling to prosecute, seeking an Intervention Order may be an alternative ([see Family violence on p. 53](#)).



CIVIL DEBT AND ASSET RECOVERY

Just as clients are reluctant to take criminal action, civil action, too, is a last resort due to the costs, delays, stress, risk and damage to relationships that can accompany litigation.

If the transfer of assets was a loan not a gift, but the loan remains unpaid (and you have judgment regarding this – see Lawyers Practice Manual Ch 3.1 ‘Acting for a Creditor in the Magistrates’ Court’ for a guide to process), recovery options may include:

- attachment of earnings
- instalment orders
- attachment of debt (against bank account)
- warrant of seizure or sale
- warrant to sell a house
- sequestration order.

Negotiation might be more advisable.

Mediation is also an option and the free services of the Dispute Settlement Centre of Victoria might assist – www.disputes.vic.gov.au

CONSUMER CREDIT

Relevant legislation:

National Consumer Credit Protection Act 2009 (Cth), particularly Schedule 1, the National Credit Code

The Financial Ombudsman Service recommends that lawyers encourage their clients to set up a pre-existing authority with their financial services provider (FSP) so that the FSP has another person to discuss matters with if they believe there may be untoward movements in accounts or arrangements regarding loans.

You may also be able to assist your client by exploring the possible liability of a financial services provider (FSP), a bank or other lender. The involvement of a financial or credit ombudsman service (see below) can be effective in resolving disputes between a client and the FSP and avoids legal proceedings.

CONSUMER CREDIT PROTECTION

The national credit reforms under the National Consumer Credit Protection Act 2009 (NCCPA) introduced a National Credit Code (NCCPA Sch 1) and statutory ‘responsible lending’ obligations which apply to loans or increases in loans (FOS 2011, p. 25).

The NCCPA obligations require a financial services provider (FSP) to make ‘reasonable inquiries’ about a customer’s financial situation (such as their capacity to repay) and about the consumer’s requirements and objectives. The Australian Securities and Investments Commission (ASIC) provides guidance on, and examples of, the extent of the inquiries an FSP should make when assessing a consumer’s application for credit, including whether a loan was suitable (see FOS 2011, p. 26). For example, a loan should not be allowed if the borrower could never have met the repayments and the FSP is relying on the family home being sold as their security.

Case study 1

Rita is tricked into signing a loan and mortgage documents by her son-in-law.

There is evidence that supports an unfair contract as the bank's loan officer had knowledge of Rita's vulnerability.

Case study 2

A pensioner refinances his credit card debts with a line of credit attached. In fact, the debt has been created by his adult son who is drug-dependent.

CONSIDERATIONS:



Does this credit product meet the pensioner's needs and objectives?



Did the FSP make inquiries as to whether there was an ability to repay the debt?

ASSISTING AN OLDER CLIENT WHO HAS AN UNSUITABLE LOAN

The National Credit Code allows for a loan to be determined to be unsuitable on the basis that your client does not have the capacity to repay the loan without experiencing substantial hardship.

- Obtain a copy of the credit assessment. The credit provider must provide this on request.
- Apply to the credit provider to seek changes in the contract terms.

If the credit provider does not agree to the change, they must provide: the name of the approved external dispute resolution (EDR) scheme of which they are a member; the person's rights under that scheme; and the reasons for not agreeing to negotiate. You can then apply to the dispute resolution scheme or the court (ss. 72-78 National Credit Code).

- A request can also be made to the credit provider to negotiate a postponement of enforcement proceedings (ss. 94-96 National Credit Code).
- Put your client in touch with the relevant external dispute resolution (EDR) scheme (see below).

For clients who are having difficulty meeting loan repayments, see also FOS Fact Sheet on Financial Difficulty at:

http://fos.org.au/centric/home_page/publications/fact_sheets.jsp?str=fact+sheets

DISPUTE RESOLUTION SCHEMES (INTERNAL AND EXTERNAL)

All financial service providers that are members of the Financial Ombudsman Service (FOS) or the Credit Ombudsman Service (COSL) are required to have an Internal Dispute Resolution (IDR) procedure for handling customer complaints. ASIC also requires licensed financial service providers to have a documented IDR process (see ASIC Regulatory Guide 165).

If a consumer is unhappy with a financial, insurance or investment product or service, they can complain to the FSP and ask it to resolve their dispute in accordance with its IDR process.

If the consumer is not happy with the response received, they can contact the relevant Ombudsman who offers free (to consumers) independent and confidential conciliation processes (EDR). Alternatively, the Ombudsman may investigate the dispute and issue a written decision. Once an application is lodged with the Financial Ombudsman, the FSP cannot commence legal action against the older person until EDR has taken place.



Financial Ombudsman Service (FOS)

FOS' jurisdictional limits (disputes involving over \$500,000 and compensation over \$280,000) may restrict the outcomes it can provide. If the older person is seeking to have security over their home released, FOS may not be able to make that award if the mortgage secures a principal debtor's liability over \$280,000. But FOS may still be able to negotiate a resolution of a debt where the debt is greater than \$280,000 as long as the parties agree.

http://fos.org.au/centric/home_page.jsp

FOS Circulars

www.fos.org.au/centric/home_page/publications/the_circular.jsp

Credit Ombudsman Service (COSL)

As with FOS (above), COSL provides consumers and financial service providers with an accessible and independent dispute resolution service as an alternative to legal proceedings for resolving complaints with a participating financial service provider.

www.cosl.com.au/Home

BANKING CODES

Banks that adopt codes of practice such as the Code of Banking Practice (CBP) and the Mutual Banking Code of Practice (MBCP) are contractually bound by the codes' obligations. These require FSPs to try to help a client overcome financial difficulty (for example, by helping them work out a repayment plan). Further, a FSP is not to accept a client as a joint debtor where it is clear they are not to receive any benefit from a credit arrangement. All reasonable steps must be taken by the FSP to ensure that a co-debtor understands their rights and liabilities.

Code of Banking Practice (developed by the Australian Bankers Association)

www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Code-of-Banking-Practice

CBP Clause 28 for example includes a requirement for the guarantor to sign the guarantee in the absence of the debtor (to avoid undue influence on the guarantor) – that is, the FSP is aware of the possibility of say, an older parent's will being overborne in guaranteeing a son's company debts. (See Undue influence in Equity on p. 46).

Mutual Banking Code of Practice (for credit unions, mutual banks and mutual building societies)

www.abacus.org.au/consumers/mutual-banking-code-of-practice

Code of Practice of the Mortgage & Finance Association of Australia (MFAA)

www.mfaa.com.au/default.asp?menuid=513

And note the Centrelink Code of Operation with Participating Financial Institutions, which protects individuals who depend on Centrelink payments.

[www.centrelink.gov.au/internet/internet.nsf/filestores/co098_0706/\\$file/co098_0706en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co098_0706/$file/co098_0706en.pdf)

FAMILY VIOLENCE

Relevant legislation:

Family Violence Protection Act 2008 (Vic)

Under the Family Violence Protection Act 2008 (Vic) (FVPA) an intervention order can be obtained to protect your client from abuse by a family member. 'Economic abuse' is recognised as a form of family violence by the FVPA (s. 5) and includes behaviour that is coercive, deceptive or unreasonably controlling and which:

- denies a person economic or financial autonomy;
- involves withholding or the threat of withholding financial support necessary for meeting reasonable living expenses;
- coercing a person to sign a power of attorney, a contract or other legal document.

S. 6 of the FVPA gives further examples of these behaviours, and s. 7 covers the emotional and psychological abuse that usually accompanies financial abuse.

WHO IS A 'FAMILY MEMBER'?

The FVPA (s. 8) extends its application to relatives and intimate partners in addition to relationships of dependence or where a person may provide sustenance or support.

APPROPRIATE REMEDY?

An application for an intervention order is a civil law process which, if successful, could protect your client from further abuse by a 'family member'. The order can help your client feel supported and more in control. The perpetrator of family violence can be brought to account by this process. With an intervention order in place, for example, the police can be called to take action on the breach of a condition of that order.

A wide range of conditions reflecting the situation can be requested for the order. These might include forbidding certain contact and stopping certain behaviour. For example, an intervention order could require an adult child to stop pressuring their parent to dispose of an asset or could be used by a parent where a child becomes abusive after other action has been taken.

Although an intervention order is a civil law process, people often perceive it to be like criminal prosecution and may be reluctant to use it for the same reason that they are reluctant to make a criminal report against a family member. Note that breach of an intervention order is a criminal offence.

Refer your client to the booklet Safe at Home, from Victoria Legal Aid.

www.legalaid.vic.gov.au/2197.htm

FAMILY LAW

Family law may be a tool for regaining lost assets.

S. 92 of the Family Law Act 1975 allows for an 'other' person to intervene in property proceedings as a third party.

Case study

Dina, an older woman, gave money to her son and daughter-in-law to help them buy a new home with the promise she could live there with them. This property later became subject to family law proceedings. With leave of the court, Dina was able to intervene in the property proceedings to have her rights to the property considered.





6.

SUBSTITUTE DECISION-MAKING:
POWERS OF ATTORNEY
AND GUARDIANSHIP AND
ADMINISTRATION

Substitute decision-making instruments include general and enduring powers of attorney, guardianship and administration processes and health care plans and directives.

If a client comes to you for advice regarding assets for care arrangements, this may be a good time to also discuss substitute decision-making.

Lawyers require a detailed understanding of current mechanisms for substitute decision-making and their problems and failings. You need to know where to go and what to do if abuse of powers is suspected or reported.

Regarding the need for substitute decision-making tools, see [Capacity on p. 23](#). A diagnosis of dementia does not necessarily equate with incapacity to make decisions, and a medical assessment does not determine a person's ability to instruct a solicitor (see O'Connor & Purves 2009). The older person may need empowering as much as protecting and there may be less intrusive ways to support the older person than to activate an enduring power of attorney or appoint a guardian or administrator. Removing another's autonomy to act independently should be the last resort and consequently preference needs to be given to supported decision-making rather than substitute decision-making. The 'supported decision-making' approach involves empowering a person to make decisions for himself or herself to the maximum extent possible (PVLRC 2009). (See box Law under review, and Carter 2009.)

The Guardianship and Administration Act 1986 s. 4(2)(a) supports this approach;

It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that –

(a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted.

LAW UNDER REVIEW

In 2009–10 the Victorian Parliament's Law Reform Committee conducted an inquiry into powers of attorney, and in 2009–11 the Victorian Law Reform Commission reviewed guardianship and administration law. These reviews will lead to law reform. For example, attorneys are likely to have more thorough reporting obligations; and people with reduced capacity may be able to move from substituted to supported decision-making, where they make decisions jointly with another person or with their support, rather than have decisions made for them by another.

Report of Inquiry into Powers of Attorney www.parliament.vic.gov.au/lawreform/inquiries/article/1124

Guardianship Review: Final Report

www.lawreform.vic.gov.au/projects/guardianship-final-report



RECOMMENDED RESOURCES ON SUBSTITUTE DECISION-MAKING

The **Office of the Public Advocate** has **information** and **fact sheets** on administration, guardianship, powers of attorney and medical treatment (including in other languages).

www.publicadvocate.vic.gov.au

The **Take Control kit** from OPA/VLA can assist in the drafting of documents to ensure they contain safeguards and limit the attorney's powers to what are needed. The kit has information and forms to make, change or revoke powers of attorney and guardianship.

www.legalaid.vic.gov.au/cle.take_control.pdf

OPA's **Guardianship and Administration Flowchart** is a useful guide to the process of decision-making, capacity assessment, types of substitute decision-making needed.

www.publicadvocate.vic.gov.au/file/file/Guardianship/Guardianship_and_Administration_Poster_07.pdf

See also **Victorian Civil and Administrative Tribunal** website for online and video guides, online application forms and useful information about VCAT procedures. www.vcat.vic.gov.au

See also **Victoria Legal Aid**

Fact Sheets on Powers of Attorney or Guardianship www.legalaid.vic.gov.au/612.htm

Fact Sheets on Administration Orders www.legalaid.vic.gov.au/3906.htm

See also **Lawyers Practice Manual Victoria** – Ch 8.2 (Vol 2) for further information on powers of attorney and guardianship and administration.

POWERS OF ATTORNEY

Relevant legislation:

Instruments Act 1958 Part X1 (Powers of Attorney) and X1A (Enduring Powers of Attorney)

Medical Treatment Act 1988 Schedule 2 – Enduring Power of Attorney (Medical Treatment)

Guardianship and Administration Act 1986 Part 4 Division 5A (Schedule 4 – Enduring Guardian)

Ask to see any documents of appointment such as powers of attorney.

Generally, it is advisable for a person to have enduring powers of attorney in place so that the appointment of a guardian and/or administrator is not necessary in the event that the person loses capacity to manage their own affairs.

Appointing an Enduring Guardian as well as an Enduring Power of Attorney is also advisable for a number of reasons, including for Advanced Health Care Directives. Advanced care planning increases individual choice and facilitates the receipt of palliative and end-of-life care that accords with their wishes (Productivity Commission 2011, p. 450).

However, enduring powers of attorney may also be misused and are not subject to the same reporting requirements and monitoring as appointments under guardianship and administration laws.

PRACTICAL CONSIDERATIONS

If you are drafting an enduring power of attorney, be very clear that you are acting for the donor. You have a responsibility to explain how each different power of attorney works, what options are available and the responsibilities of attorneys, agents and guardians. Provide your client with a list of commonsense questions to consider carefully when they are appointing an attorney. For example, has the person they are considering making their attorney had a history of alcohol, drug abuse or gambling? What is their attitude to money? Or to paperwork? Are they likely to outlive the donor? Are they in regular contact with the donor, or do they see them only rarely? Has the person agreed to be their attorney?

It may be a good idea not to execute a document on the day but to allow the client time to go away and think about the contents and their choice of attorney, and then come back another time to formalise it.

ARE RELATIVES BEST?

The appropriate person for a client to appoint as attorney will not necessarily be a relative. It cannot be assumed that family members have the necessary knowledge and skills to make good decisions, nor that they will act in the best interests of an older person with impaired capacity. In the case of an enduring power of attorney (financial), it might be advisable for the powers of attorney to be held jointly so that actions must be agreed upon by more than one person. (If siblings are in conflict, however, it is not advisable to appoint them as joint attorneys.)

You may be able to assist in educating an attorney by giving them information about their roles and responsibilities - which include keeping accurate records, avoiding conflicts of interest, acting in the donor's best interests - or they may find themselves before VCAT.

FORMS OF POWER OF ATTORNEY

These different forms of substitute decision-making can be made by a donor:

General Power of Attorney

Limits on powers can be specified. If not, an attorney can make any financial or legal decisions on the donor's behalf until the power is changed, cancelled or the donor loses capacity or dies.

Enduring Power of Attorney (Financial)

The attorney has legal obligations, such as to keep their property separate.

The date the power is activated and the responsibilities given to the donor or donors can be specified. For example, the enduring power of attorney can be drafted so that the power may only take effect when capacity is lost and this is verified by medical evidence; and so that the attorney has limits on how they can manage assets. If no limits are given then the attorney(s) can make any financial or legal decisions from the date the power begins until cancelled or changed.

More than one attorney can be appointed to act at the same time and the appointment may be joint and several.

This form of power of attorney must be properly witnessed. One witness must be a person authorised to witness statutory declarations.



WHO CAN WITNESS STATUTORY DECLARATIONS?

See Guidelines for Authorised Witnesses:

www.justice.vic.gov.au/home/the+justice+system/statutory+declarations/

See also LPLC Bulletin EPOAs – Witnessing and Certification Issues and Checklist

www.lplc.com.au/risk_management/bulletins/powers_of_attorney/

Enduring Power of Attorney (Medical Treatment)

The agent appointed under this document has the power to make decisions about medical treatment, including the decision to refuse treatment, only from the date the donor is unable to make such decisions themselves. The document may specify an alternative agent in the case that the first agent is unable to act (e.g. they die, lose capacity or are absent for a period of time). The agent has certain responsibilities, such as to make decisions that the donor would have made themselves. Therefore it is important that they are well instructed and that there is no conflict of interest. The donor may choose to record their instructions for the agent's reference.

Enduring Power of Guardianship (also known as appointment of Enduring Guardian)

A guardian's powers, which are only activated when a donor is unable to make their own decisions, can be limited to powers specified. An alternative guardian can be listed in the case that the first guardian is unable to act (e.g. they die, lose capacity or are absent for a period of time). The powers relate to lifestyle matters such as health care, where a donor lives, who they interact with and their activities. Responsibilities include making decisions based on wishes expressed by the donor.

CAPACITY TO MAKE AN ENDURING POWER OF ATTORNEY

It is a requirement of all enduring powers of attorney that the donor makes the document freely and understands its nature, importance and effect and that the witnesses are satisfied of this.

See Instruments Act s. 118 re Enduring Power of Attorney (Financial); Medical Treatment Act 1988, Schedule 2 re Enduring Power of Attorney (Medical Treatment) and Guardianship and Administration Act 1986 Schedule 4 re Enduring Power of Guardianship.

See also Capacity on p. 23.

To make sure that your client has understood the nature, importance and effect of each enduring power of attorney and to create a record of this for your file, it is a good idea to develop a checklist of questions to ask before executing any enduring power of attorney. (See Office of Public Advocate publications.) Questions should be adapted for each client to determine whether the client is making their enduring powers of attorney voluntarily and freely, such as:

- What brought you to make your powers of attorney today?
- Has anything ever caused you to doubt your trust in your nominated attorney(s)?
- Do you believe that your nominated attorney(s) understand and respect your wishes and will make the decisions they believe you would make for yourself?

SUGGESTIONS FOR A CHECKLIST

Enduring Power of Attorney (financial)

- What is an Enduring Power of Attorney (Financial)?
- Who have you appointed?
- How are they appointed?
- Are there any limitations, conditions or instructions on your EPA financial?
- When does the power start?
- What sort of things can your attorney(s) do for you?
- If you lose capacity, can the attorney(s) still continue to act?

Enduring Power of Attorney (Medical Treatment)

- What is an Enduring Power of Attorney (Medical Treatment)?
- When does the power start?
- Who have you appointed?
- When can the alternate agent act for you?
- What sort of decisions can the agents make?

Appointment of Enduring Guardian

- What is an appointment of an Enduring Guardian?
- What sort of decisions can a guardian make?
- When does the power start?
- Who have you appointed?
- When can the alternate guardian act for you?

CHANGING OR REVOKING POWERS OF ATTORNEY

Powers of attorney and guardianship can be changed or revoked in different ways:

- A client can change a power at any time as long as they still have capacity.
- The client's death or the attorney's resignation will extinguish a power.
- Telling the attorney(s) their power is withdrawn and destroying the document and copies or completing a new document will also extinguish powers.
- The appointment of an administrator to undertake financial and legal decisions can extinguish powers given to attorneys (see Part XIA, Division 4 and 6 of the Instruments Act 1958).

If powers have been revoked, the previous attorney(s) and relevant agencies need to be informed.

ABUSE OF ENDURING POWERS OF ATTORNEY (FINANCIAL)

If a client informs you that their attorney has acted without their knowledge or consent and taken or used money for their own ends, the lawyer can do a number of things such as:

- revoke the Enduring Power of Attorney (Financial) if the client still has capacity;
- ask the attorney to account for all dealings undertaken as attorney;
- apply to VCAT to suspend the Enduring Power of Attorney and audit the accounts (see Applying to VCAT on p. 60);
- apply to VCAT to revoke the Enduring Power of Attorney if the client has lost capacity (see Applying to VCAT on p. 60);
- apply to VCAT to order the Office of the Public Advocate to investigate if required;
- seek to recover misappropriated funds and assets through the courts;
- make a complaint to the police with respect to any fraud that may have occurred.



GUARDIANSHIP AND ADMINISTRATION

Relevant legislation:

Guardianship and Administration Act 1986 (Vic.)

Victorian Civil and Administrative Tribunal Act 1998 (Vic.)

The appointment of a guardian or administrator or their reassessment or removal is the jurisdiction of the Victorian Civil and Administrative Tribunal (VCAT). These appointments can be made when a person is unable, due to a disability such as dementia, to make decisions for themselves.

A guardian is given responsibilities for decisions affecting lifestyle, while an administrator has power to make decisions about financial and legal matters. These responsibilities may be limited by the tribunal as required. For example, a guardian may be restricted to dealing with accommodation only and an administrator's powers may exclude selling property.

APPLYING TO VCAT FOR GUARDIANSHIP OR ADMINISTRATION ORDERS

... the role of the Guardianship list is to protect persons aged 18 years or over who, as a result of a disability, are unable to make reasonable decisions about their person or circumstances or their financial and legal affairs (VCAT website).

Applications for orders to the VCAT Guardianship List may include:

- appointing a guardian to make lifestyle decisions and/or health care decisions;
- appointing an administrator to manage financial and legal affairs;
- revoking an attorney's appointment, or varying, suspending or making another order in relation to a financial Enduring Power of Attorney under the Instruments Act 1958 Part X1A Div 4 (for example, to rectify a breach, limit an attorney's authority or request that an attorney produce accounts for an independent audit);
- revoking or suspending an Enduring Power of Attorney (Medical Treatment) under the Medical Treatment Act 1988;
- declaring that an Enduring Power of Attorney is invalid.

You may have to accompany an application with relevant reports such as expert medical and/or psychological reports, and reports from other service providers such as social workers or case managers.

See the VCAT website for forms and guides to their completion, for example:

- Application to appoint an administrator or guardian or to make orders regarding enduring powers of attorney/guardianship
- Application to revoke or reassess a Guardianship or Administration order

In special circumstances, urgent hearings can be scheduled and temporary orders can be made. Video link hearings can be arranged for your client if they are unable to attend at VCAT.

WHO TO APPOINT?

A suitable person can be nominated or VCAT can be requested to make a determination.

VCAT may appoint a relative, friend, solicitor, accountant, private trustee company or State Trustees Limited as administrator. VCAT's emphasis is to take the least restrictive path and so they are likely to appoint a family member before a friend or a professional. They will, however, discount a family member where there is a dispute between family members or because no family member is considered suitable.

Note that in some cases a social worker or other health professional may apply for appointment as guardian or administrator where they believe an older person is at risk of abuse. Your client and/or their family may want to challenge this application.

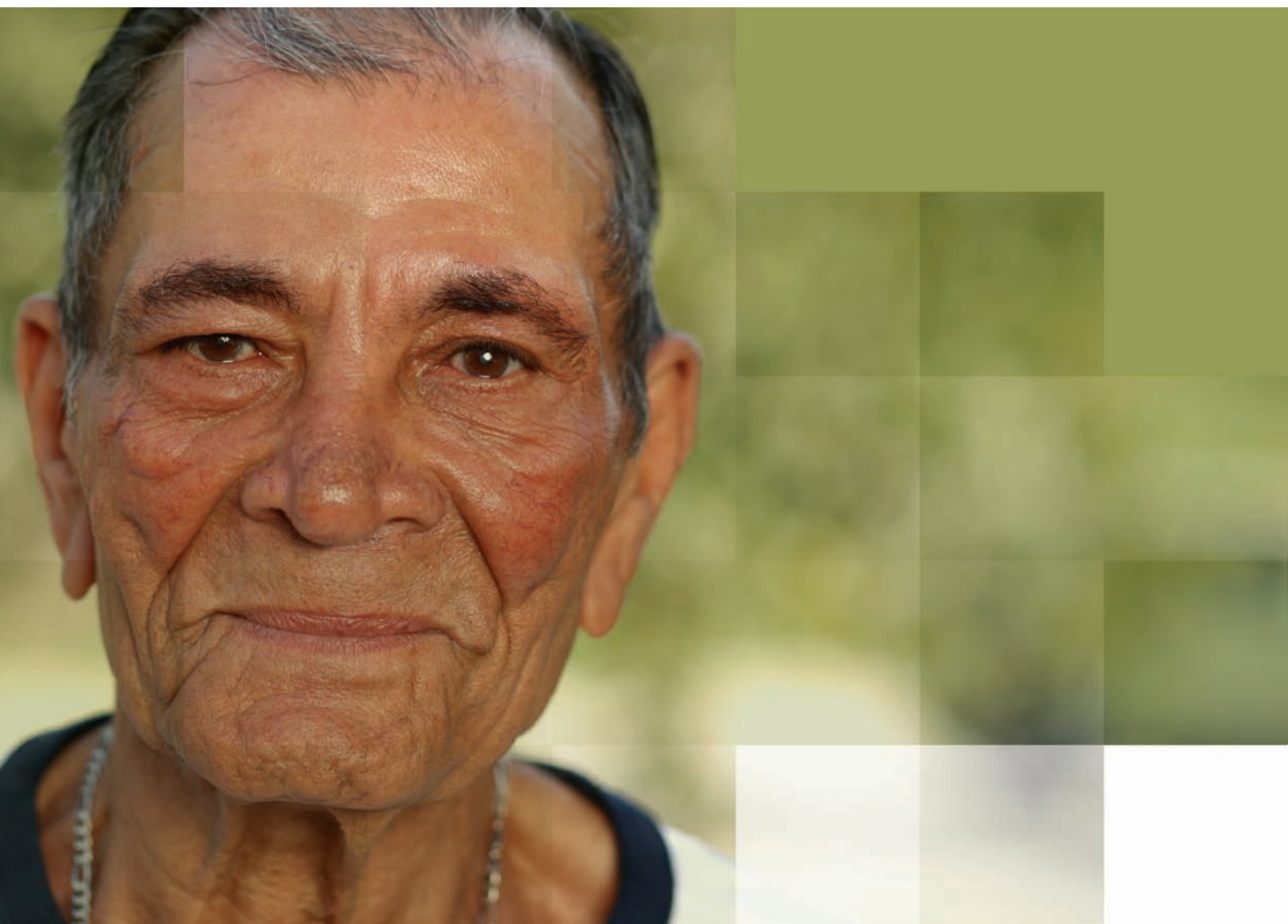
The appointment of an administrator can have the effect of revoking or suspending previous powers of attorney. S. 125G Instruments Act states that an attorney may exercise powers under an Enduring Power of Attorney only to the extent authorised by VCAT.

You need to ensure attorneys and any other relevant agencies are notified of the appointment of an administrator, otherwise the previous powers may mistakenly continue to the detriment of your client.

FAMILIES IN CONFLICT

Often families can be in conflict and not agree over issues such as where and how a parent should live and financial management matters. It might be best to refer a client to mediation services – through VCAT, the Dispute Settlement Centre or a private mediation service. (OPA can provide advocacy support to the older person in such circumstances.) Note that the preservation of family relationships may in fact be your client's first priority and that mediation is said to be appropriate where the parties have a desire to preserve relationships.





7.

REFERRALS AND RESOURCES

A collaborative, multidisciplinary approach to supporting older people is recommended.

As a legal practitioner, you need to be able to identify when referral is necessary, where to go to get more information, and to understand local contact points for referral to services and support networks for older people, for example, extra-familial care/accommodation options. You could also consider developing an 'interagency protocol' with other service providers in the community in order to guide your referrals to them. (See DHS 2009.)

You need to give your clients information about services providing information, advice and support (including counselling and mediation) available in their local area or that they may be eligible to use. Relevant services to access are technological, cultural and language supports such as telephone interpreter services, hearing and visual and other disability services (see below).

LEGAL SERVICES, DISPUTE RESOLUTION, SUPPORT FOR RIGHTS

VICTORIA LEGAL AID

www.legalaid.vic.gov.au/forlawyers.htm

www.legalaid.vic.gov.au/handbook

03 9269 0120 (Melbourne)

1800 677 402 (Vic country)

All Victorians can apply for legal assistance if they meet the means and merits test of Victoria Legal Aid (VLA). VLA's online handbook for lawyers sets out guidelines for assistance, how to apply for a grant of legal aid, and the guidelines and conditions of receiving a grant. It also explains the payment structure for private lawyers who perform legal aid work.

Where an applicant is over 65 years of age, the family home is exempt from the means test.

Where a person is likely to lose their principal place of residence they may gain a grant of legal assistance through use of VLA's civil law guideline. There are also guidelines for guardianship and administration matters.

Grants of legal assistance are limited in civil matters. There may be greater scope for grants of assistance for older clients by using VLA's 'special circumstance' guideline. (See VLA Handbook).

VLA provides duty lawyer services to a wide variety of courts and tribunals including VCAT.

Victoria Legal Aid Kit on Powers of Attorney and Guardianship.

www.legalaid.vic.gov.au/cle.take_control.pdf

Victoria Legal Aid community legal education materials on administration.

www.legalaid.vic.gov.au/3906.htm

COMMUNITY LEGAL CENTRES

The Federation of Community Legal Centres (CLCs) supports two types of CLC – generalist and specialist. Generalist CLCs provide general legal services to people in their local geographical area in metropolitan Melbourne and in rural, regional and remote Victoria. Specialist CLCs focus on particular groups of people or areas of the law.

www.communitylaw.org.au (Find a Community Legal Centre)

www.fclc.org.au/cb_pages/getting_legal_help.php#clc

03 9652 1500.

Seniors Rights Victoria (SRV)

www.seniorsrights.org.au

1300 368 821

SRV provides information and referral, legal advice, legal casework and individual advocacy services on elder abuse.

Social Security Rights Victoria (SSRV)

www.ssrv.org.au

Advice – 03 9416 1111 (Melbourne residents),

5221 4744 (Geelong residents) or

1800 094 164 (rural residents)

Victorian Aboriginal Legal Service (VALS)

<http://vals.org.au>

1800 064 865 (freecall).

VALS provides legal advice and representation for the Koori community.

Consumer Action Law Centre (CALC)

www.consumeraction.org.au

Legal advice line: 03 9629 6300 or 1300 881 020

CALC provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria.



APPROPRIATE OR ALTERNATIVE DISPUTE RESOLUTION (ADR)

Dispute Settlement Centre of Victoria (DSCV)

www.disputes.vic.gov.au

03 9603 8370

1800 658 528 (freecall for regional callers)

The DSCV is part of the Victorian Department of Justice and provides free dispute resolution services to all Victorians.

Court-based programs operate in conjunction with the Magistrates' Court of Victoria. Suitable cases will be referred to DSCV at court for assessment or mediation. Interested parties can also contact DSCV without waiting for their matter to get to court.

DSCV also provides a mediation service for defended civil claims at some Magistrates' Courts. This service provides a quick and inexpensive means for the parties to resolve their civil claim without having to go through a court hearing. The service currently operates at Broadmeadows, La Trobe Valley, Sunshine and Werribee Magistrates' Courts for claims under \$40,000. (This information is based on material on the DSCV website accessed 19 Jan 2012.)

DSCV does not deal with disputes under the Family Law Act 1975 (Cth) or involving family violence.

Relationships Australia

www.relationships.org.au

1300 364 277

Fee-for-service relationships counselling but also family dispute mediation.

There are also private agencies which offer mediation services.

LEGAL PROFESSIONAL SUPPORT

The Law Institute of Victoria

Ethics

www.liv.asn.au/Practising-in-Victoria/Ethics

03 9607 9336 (Advice line)

Professional practice standards

www.liv.asn.au/Practising-in-Victoria/Professional-Standards/Acts-Regulations-Forms

Information on costing

www.liv.asn.au/Practising-in-Victoria/Practice-Management/Costing

Legal Practitioners Liability Committee

www.lplc.com.au

03 9672 3800

For information on capacity

The NSW Capacity Toolkit

http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_capacity_toolkit

When a Client's Capacity is in Doubt

(The Law Society of NSW)

www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf

Capacity guidelines

(Office of the Adult Guardian, Qld)

www.justice.qld.gov.au/_data/assets/pdf_file/0009/7569/capacityguidelines.pdf

Capacity assessments

See the Australian Psychological Society - Find a Psychologist webpage

www.psychology.org.au/findapsychologist

For clinical neuropsychologists in your area who undertake capacity assessments or medico-legal assessments.

TRIBUNALS

Victorian Civil and Administrative Tribunal (VCAT)

www.vcat.vic.gov.au

1300 309 337

Access the website regarding applications concerning guardianship, administration and changes to powers of attorney; for guides to completing forms online and other general information.

RIGHTS OF OLDER PEOPLE/PEOPLE WITH A DISABILITY

Office of the Public Advocate

www.publicadvocate.vic.gov.au

1300 309 337

The Victorian Office of the Public Advocate (OPA) is an independent statutory body established by the Victorian Government to protect and promote the interests, rights and dignity of people with a disability. OPA can assist with legal Issues, Powers of Attorney and Guardianship.

Australian Human Rights Commission

www.hreoc.gov.au/legal/humanrightsreports/older_australians/index.html

Human rights of older Australians, including age discrimination.

Victorian Equal Opportunity and Human Rights Commission

www.humanrightscommission.vic.gov.au

1300 292 153

Re discrimination on basis of age, disability, gender etc.

Complying with the Charter of Human Rights and Responsibilities Act 2006,

A Community Legal Centre Guide, Federation of Community Legal Centres Victoria, October 2008

www.fclc.org.au/cb_pages/federation_reports.php

INFORMATION FOR OLDER PEOPLE

Seniors Online

<http://www.seniorsonline.vic.gov.au/Home.aspx>

Content ranges from information on relevant Victorian Government programs and initiatives to community contacts and links to relevant organisations.

Australian Government Directory of Services for Older People 2011

[www.health.gov.au/internet/main/publishing.nsf/Content/AB724C0DE3D26BAFCA2576A9007B98CC/\\$File/AGDOS2011.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/AB724C0DE3D26BAFCA2576A9007B98CC/$File/AGDOS2011.pdf)

Seniors Information Victoria

1300 135 090

Seniors Information Victoria offers free information as an independent service, supported by the Victorian government, on a wide range of issues of interest to older Victorians.

COTA (Council on the Ageing) Victoria

www.cota.org.au

03 9654 4443

COTA represents the interests of older Victorians.

PENSIONS AND FINANCIAL INFORMATION AND SERVICES

Centrelink

www.centrelink.gov.au/internet/internet.nsf/individuals/index.htm

13 2300

Information for individuals including on pensions, retirement, carers, disability.

Financial Information Service

13 2300

www.centrelink.gov.au/internet/internet.nsf/services/fis.htm

Centrelink Multilingual Call

13 1202

This is not an interpreter service. Caller can speak to Centrelink and have their questions answered directly by Centrelink employees in their own language.

Service in some languages is available by return call.

Department of Veteran's Affairs (Cth)

www.dva.gov.au/pages/home.aspx

1800 555 254

Pensions and compensation etc.

Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)

www.fahcsia.gov.au/guides_acts/homeint.html

Provides guides to social policy law – social security, family assistance, paid parental leave.



National Information Centre on Retirement Investments (NICRI)

www.nicri.org.au

1800 020 110

NICRI is a free (government-funded) independent, confidential service providing quality investment information to people with modest savings who are investing for retirement or facing redundancy.

State Trustees

www.statetrustees.com.au

03 9667 6466 (Melbourne residents)

1300 138 672 (regional residents)

A Victorian government-owned business that provides Victorians with wills, estate planning and management, and attorney, trustee and financial services.

FINANCIAL COUNSELLING

Money Help

www.moneyhelp.org.au

1800 007 007

Free, confidential and independent financial information and counselling service for Victorians experiencing difficulty paying their rent or mortgage or facing job loss.

Consumer Affairs Victoria

www.consumer.vic.gov.au

1300 55 81 81

Advice and information on credit and debt issues and referral to a financial counsellor.

OMBUDSMEN/FINANCIAL DISPUTE RESOLUTION

Credit Ombudsman Service (COSL)

www.cosl.com.au/Home

COSL provides consumers and financial service providers an accessible and independent dispute resolution service as an alternative to legal proceedings for resolving complaints with a participating financial service provider.

Financial Ombudsman Service (FOS)

www.fos.org.au/centric/home_page.jsp

FOS works to resolve disputes independently between consumers and member financial services providers. Membership of the Financial Ombudsman Service is open to any financial services provider carrying on business in Australia.

SUPPORT AGENCIES

Consider referring clients to social workers and general medical practitioners as emotional and psychological abuse is usually accompanied by or is a by-product of financial abuse.

INFORMATION AND REFERRAL SERVICES

WIRE (Women's Information and Referral Exchange)

www.wire.org.au

1300 134 130

WIRE provides Victorian women with free and confidential support, information and referrals on any issues.

Mensline Australia

www.mensline.org.au/What-We-Do.html

A professional telephone support, information and referral service for men, specialising in family and relationship concerns.

1300 78 99 78 (Australia-wide for local call cost, 24 hours/7 days).

Men's Referral Service

www.mrs.org.au

03 9428 2899

1800 065 973 for free, anonymous and confidential advice about male family violence.

COUNSELLING SERVICES

Counselling services and psychologists can also be accessed through the client's GP or Community Health Centre.

Veterans and Veterans Families Counselling Service

www.dva.gov.au/health_and_wellbeing/health_programs/vvcs/access/Pages/index.aspx

VVCS provides specialised, free and confidential counselling services to all Australian veterans, peacekeepers and their families Australia-wide.

CRISIS LINES

Lifeline

13 1114

24-hour telephone crisis support service for anyone needing emotional support.

Veterans Line

1800 011 046

A national after-hours crisis counselling service, which complements the Veterans and Veterans Families Counselling Service.

Suicide Line

24-hour free, anonymous, professional telephone counselling and information.

1300 651 251

The Women's Domestic Violence Crisis Service

03 9322 3555

1800 015 188 (STD freecall)

24 hours/7 days a week.

AGED CARE SERVICES AND INFORMATION

Aged Care Information

www.agedcareaustralia.gov.au

1800 200 422

Information regarding aged care assessments, community care services and residential aged care services.

Aged and community care information line

1800 500 853

Commonwealth government helpline re aged care assessment, community services and residential services.

Department of Health and Ageing (Cth)

www.health.gov.au

www.health.gov.au/internet/main/publishing.nsf/Content/ageing-aged-care-information.htm

Range of useful information and services re ageing, including Aged Care Assessment Teams (ACAT).

Department of Human Services (Vic) – A to Z of programs: Aged Care

http://rss.health.vic.gov.au/atoz/?Aged_Care

Aged Care Assessment Teams (ACAT)/ Aged Care Assessment Services (ACAS)

www.agedcareaustralia.gov.au

www.health.vic.gov.au

Aged Care Complaints Investigation Scheme

www.health.gov.au/internet/main/publishing.nsf/content/ageing-complaints-index.htm

1800 550 552

For complaints about community or residential services. Complaints can be made by phone or online.

Elder Rights Advocacy (ERA)

www.era.asn.au

03 9602 3066

1800 700 600

ERA offers a free, confidential and independent service to older people (or their representatives) who are receiving an Australian Government subsidised aged care service in Victoria. ERA provides advocacy assistance to support older people to uphold their rights. See ERA's website for more about its work and advocacy.

Aged and Community Services Australia (ACSA)

www.agedcare.org.au

Aged and Community Services Australia (ACSA) is the national peak body representing not-for-profit and faith-based providers of residential and community care, and housing and support for people with a disability and their carers. Information for providers rather than consumers.

Local councils provide Aged and Disability services. These often include Home and Community Care (HACC) services which can include Meals on Wheels and social programs as well as home care.



HEALTH & WELLBEING

Community Health Services/Centres

www.health.vic.gov.au/pch/commhealth/directory.htm

Online directory. Look up the nearest community health service by postcode.

Men's sheds

www.mensheds.org.au

0457 888 387 (Help desk)

'Men's sheds' have become part of the health infrastructure that supports programs to improve men's health and wellbeing. It is a not-for-profit public company.

MENTAL HEALTH, DEMENTIA, DISABILITY AND CARER SUPPORT SERVICES

Alzheimer's Australia (Vic.)

<http://www.fightdementia.org.au/victoria.aspx>

Alzheimer's Australia (Vic.) is a non-profit organisation and Victoria's peak body dedicated to supporting people with dementia, their families and carers.

Alzheimer's Australia

www.fightdementia.org.au/help-sheets-and-update-sheets.aspx

Useful fact sheets.

ARBIAS

www.arbias.org.au

03 8388 1222

Provides services to people with alcohol and other drug related brain injury.

Carers Victoria

www.carersvic.org.au

1800 242 636

Represents and provides support to family members and carers (of people who have a disability, mental illness, chronic condition, terminal illness or who are frail aged).

Dementia helpline

1800 639 331

National Dementia helpline

1800 100 500

HOUSING

Office of Housing

www.dhs.vic.gov.au/for-individuals/housing-and-accommodation

13 11 72 Housing call centre

Information about public housing, social housing, disability supported accommodation services and other accommodation-related support for Victorians most in need.

Housing for the Aged Action Group (HAAG)

www.olderrenters.org.au

1800 637 389

HAAG offers free, confidential and quality advice to older people who rent their home and who need information and support about accommodation issues or have a housing problem.

MULTICULTURAL AND INTERPRETER SERVICES

Ethnic Communities Council

www.eccv.org.au

03 9349 4122

Peak body for ethnic and multicultural organisations in Victoria.

In Touch Multicultural Centre Against Family Violence

www.intouch.asn.au

1800 755 988 (freecall)

Telephone Interpreter Service (TIS National)

www.immi.gov.au/living-in-australia/help-with-english/help_with_translating

13 1450

VITS Language Link

www.vits.com.au/onsite_interpreting.htm

03 9280 1955

SAMPLE FAMILY AGREEMENT

Supplied by Carne Reidy Herd Lawyers, Brisbane. Email: bherd@crhlaw.com.au

NOTICE AND DISCLAIMER

This document is copyright.

It was drafted by Brian Herd of Carne Reidy Herd Lawyers to illustrate a loan arrangement suitable for the circumstances outlined in the case study in the Family Agreements section of this guide (p. 35) and therefore uses the names (Jean, Bev and Bob) used in that example.

The terms of this agreement will not suit all cases.

For use as a pro forma, legal practitioners have permission to adapt this document, substituting the names and circumstances of the parties to the agreement and changing the terms as appropriate.

This document should not be used or adapted without proper legal and financial advice.

THE [Insert name] FAMILY AGREEMENT

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EXECUTION

DEED OF FAMILY AGREEMENT FOR THE [Insert name] FAMILY

A DEED made at _____ on the _____ day of _____ 20 _____

BETWEEN _____ ('Jean')

of _____ Queensland.

AND _____ ('Bev and Bob')

of _____ Queensland.

BACKGROUND AND PURPOSE

- A. Jean is the mother of Bev who is married to Bob.
- B. Jean is a self-funded retiree aged 78 and currently owns a unit at [insert address] ('the Property') where she lives by herself.
- C. Jean enjoys her independence but is finding it difficult to cope with certain activities of daily living and is now in need of assistance in this regard.
- D. Bev is the eldest child of Jean and the other adult children are [insert names].
- E. Jean appreciates that she now needs some assistance but neither she, nor the family, want to resort to an assisted living facility to meet Jean's needs.
- F. The family have discussed the issues and addressed the options available to Jean in respect to her lifestyle and support needs.
- G. Bev lives at [insert address] with Bob and their [insert number] children aged [insert ages] and they own the property as Joint Tenants subject to the following encumbrances: [insert details].
- H. Bev, with the support of Bob, has proposed that Jean sell her unit and use part of the proceeds to lend to Bev and Bob to construct an addition to their home where Jean will live and be cared for as required by Bev and Bob.
- I. The parties now wish to record the terms upon which the arrangement will proceed and to set out the basis of their ongoing relationship and to clearly define their current and future rights and record their intentions as to the regulation of their affairs during their relationship and in the event that it should end.
- J. The parties also enter into this Deed in order to prevent confusion, to promote harmony between themselves and the family and to reduce the possibility of resorting to litigation at a later date.
- K. The other members of the family are aware of the provisions of this Deed and jointly and separately endorse it as evidenced by their signatures to the Deed.
- L. Bev and Bob have each been separately and independently advised prior to signing this Deed by their lawyers and, if they have thought it appropriate, their accountants and an actuary, as to the following matters:
- The effect of this Deed on their rights;
 - Whether or not it is in their interests, financially or tax-wise, that each of them make this Deed;
 - Whether or not it is prudent for each of them to make this Deed; and
 - Whether or not, and in light of circumstances that are reasonably foreseeable, the provisions of this Deed are fair and equitable.

OPERATIVE PART

1. Agreement

- 1.1 The parties covenant and acknowledge that they intend this Deed to govern their rights and to be a guide to their relationship as well as to their separate and common property during their relationship and in the event that the arrangement should come to an end.
- 1.2 The parties also intend this Deed to create a legally enforceable agreement between them.

2. Legal Advice

- 2.1 **Bob** certifies that he has received independent legal advice from a Lawyer in relation to this Deed before signing this Deed.
- 2.2 Annexure A to this Deed is a Certificate of Legal Advice from [insert name] a Lawyer, stating that he or she has advised **Bob** in relation to this Deed.
- 2.3 **Bev** certifies that she has received independent legal advice from a Lawyer in relation to this Deed before signing this Deed.
- 2.4 Annexure B to this Deed is a Certificate of Legal Advice from [insert name], a Lawyer, stating that he or she has advised **Bev** in relation to this Deed.
- 2.5 **Jean** has received legal advice from the drafter of this Deed, Brian Herd, a Lawyer.

3. Dealing with the Property

- 3.1 **Jean** will take reasonable steps to sell the property for a price that is at least sufficient to leave her with enough money to make the loan required by this agreement.
- 3.2 The loan shall not be required to be made, however, until settlement of the sale of the property.
4. The Loan
- 4.1 **Jean** shall lend to **Bob** and **Bev** the sum of \$ [insert amount] on the settlement of the sale of the property.
- 4.2 Such loan shall be held in a joint bank account held by the parties and applied by **Bob** and **Bev** as required from time to time and with **Jean's** consent, to pay for the cost of construction of an independent and self-contained living unit at their property ('the Unit') where **Jean** may live, rent-free.

- 4.3 The loan shall be repayable on the terms set out in this agreement.

- 4.4 **Bev** and **Bob** shall account to **Jean** for the expenditure of the loan and, if the monies required to complete the construction of the Unit are:

- 4.4.1 Less than the amount the builder invoices, then the surplus shall be refunded to **Jean**; or

- 4.4.2 More than the amount the builder invoices, then **Bev** and **Bob** shall pay the deficit.

5. The Unit

- 5.1 The Unit shall be constructed by a registered builder engaged by **Bev** and **Bob** and fitted out in accordance with the Council approved plans and specifications that the parties have agreed upon.
- 5.2 No material variations to the Unit shall be made without **Jean's** prior approval.
- 5.3 **Jean** shall provide the necessary furnishings for the Unit and shall be responsible for their upkeep and replacement as well as any special aids or other devices which may be necessary to assist **Jean** in her everyday living activities.
- 5.4 **Bob** and **Bev** shall be responsible for, and pay for, the structural maintenance and upkeep of the unit but **Jean** shall be responsible for and pay for any damage caused to the unit by her.
- 5.5 The unit shall be constructed and be fit for occupation by **Jean** within such period as may be agreed by the parties provided that, if no agreement is reached or the Unit is not fit for occupation within 6 months from the date of this agreement, then the agreement will terminate and the loan shall become immediately repayable to **Jean**.

6. Licence to Occupy

- 6.1 On practical completion of the unit, **Bev** and **Bob** grant to **Jean** a licence to occupy the Unit for life subject to the terms and conditions of this agreement.
- 6.2 The relationship between the parties shall not be of landlord and tenant nor shall anything constitute this agreement as a partnership in law.

7. Jean's Care

- 7.1 In consideration of the loan made by Jean and in acknowledgement of the increased capital value of their property, but also because of their desire to do so, Bob and Bev (together and individually) agree and declare that they will care for Jean and provide their personal services to her on an 'as needed' basis including but not limited to:
- 7.1.1 Provision of meals, cleaning and personal laundry;
 - 7.1.2 Maintenance and repairs of the unit;
 - 7.1.3 Assistance with grooming, bathing, dressing and personal affairs;
 - 7.1.4 Purchasing with monies made available by Jean, or assisting her to purchase, food, clothing, toiletries and other personal items or necessities of life as needed and for the enjoyment of her life;
 - 7.1.5 Monitoring Jean's physical and mental condition and nutritional needs on a regular basis in cooperation with health care providers;
 - 7.1.6 Arranging to transport Jean to health care providers of Jean's choice and assisting her in carrying out their instructions and directions;
 - 7.1.7 Arranging and facilitating social or community services for Jean;
 - 7.1.8 Catering for activities such as outings and walks in keeping with Jean's lifestyle and health;
 - 7.1.9 Respecting Jean's privacy where it is needed or required by her; and
 - 7.1.10 Encouraging Jean's autonomy and independence and to stay active and involved in social and family interaction.

8. Consideration for Services

- 8.1 In acknowledgement of the services and assistance that Bob and Bev provide, which will be for an unspecified period of time, Jean agrees that the loan shall be reduced over the period of this agreement by the following calculation:

The agreed average number of hours of care each week is expected and determined to be (insert number) which shall be multiplied by one half of the relevant community care dollar rate per hour as determined by the rate charged by the organisation, Blue Care from time to time.

OR

Insert alternative calculation.

[Delete one]

- 8.2 The parties understand that, over the lifetime of the agreement, the hours spent in providing care will fluctuate according to Jean's needs but that, on average, Bev and Bob will expend approximately [insert number] hours per week.

9. Payment of Outgoings

- 9.1 In the event that utility services to the property and the Unit are not separately metered, the parties shall agree on their proportional share of the cost of electricity, gas and water as is appropriate. Failing agreement, the matter shall be referred to the dispute process set out below.
- 9.2 Bev and Bob shall ensure that they meet all outgoings and liabilities in relation to the property and the Unit, subject to Jean's contribution to the specific costs referred to above.
- 9.3 Bev and Bob will pay for, and maintain at all times, appropriate Household Insurance (including Public Liability) to cover the usual risks in respect to their property and the Unit and indemnify Jean in respect to any liability she may suffer arising out of any claim against her in respect to her occupation of the property or unit.

10. Holidays, Absences and Respite

- 10.1 The parties acknowledge that it is important for the continuing happiness of their relationship that they are able to take breaks away from each other.
- 10.2 Bev and Bob may take at least 4 weeks holidays per year away from the property and shorter periods, from time to time, for respite. Jean may wish to do similarly.
- 10.3 During the times of Bev and Bob's or Jean's absence (incl hospitalisation), the amortisation of the loan referred to above (if applicable) shall be suspended.
- 10.4 In the event of Bev and Bob's absence, however, they shall make such arrangements as are necessary to ensure that Jean receives all necessary care from alternative services. Jean shall be liable for the cost of all such services.

11. Security of Jean's Interests

- 11.1 The parties acknowledge that the loan made by Jean is unsecured.
- 11.2 To better secure the repayment of the loan, however, Bev and Bob agree that they will, if required by Jean, sign a mortgage over the property in usual terms to secure the repayment of the monies owing to Jean.
- 11.3 Bev and Bob agree also that Jean may, at anytime, lodge a caveat over the property as a beneficiary of a constructive trust constituted by this agreement to further secure her interests under this agreement.
- 11.4 Bev and Bob shall sign all such documents as may be required by this clause when required and, if they do not, they appoint Jean to be their Attorney to do so.

12. Voluntary Ending of the Agreement

- 12.1 The parties acknowledge that, at some time during the agreement, circumstances may arise which bring this agreement to an end, for example:
- Jean may be hospitalised for a lengthy period;
 - Jean may be assessed as being unable to care for herself without full time assistance;
 - Bev and Bob's circumstances may change such that they are unable to continue to provide the care required by this agreement;
 - The parties' relationship may deteriorate to the extent that they do not wish to continue the arrangement.

In any of these events, any party can bring this agreement to an end and Bev and Bob shall do all such things as are reasonably necessary to identify and obtain alternative accommodation for Jean which is suitable for her and within her financial capacity. Jean shall not be required to vacate the unit however, until alternative suitable accommodation has been found.

- 12.2 In any of the events mentioned above, the loan outstanding to Jean shall become immediately due and payable on Jean vacating the Unit and will accrue interest from that date at the then prevailing variable home loan rate as charged by the Commonwealth Bank of Australia.

13. Involuntary Ending of the Agreement

- 13.1 Circumstances may also arise during the Agreement when one party wishes to end the Agreement and the other does not. Such circumstances may include:
- Bev and Bob wish to, or have to sell the property;
 - Bev and Bob suffer matrimonial discord resulting in the property having to be sold;
 - Bev or Bob have a sequestration order made against their estate;
 - Any party dies; or
 - Any party defaults in its obligations under this agreement.

In such event, this agreement shall come to an end and the provisions of the previous clause shall apply as if the agreement came to an end voluntarily.

14. Disputes

- 14.1 Any disagreement or dispute shall be addressed in a 2-step process:
- The parties agree that [insert name] is appointed as a monitor of this agreement. This means that he may, at the request of any party and from time to time, review and make recommendations on how the arrangement is working and how it may work better;
 - If the monitoring above is not resolving any issues promptly, then any party may refer the matter to a Mediator appointed by the Queensland Dispute Resolution Centre and each party shall do all such things as are necessary to resolve the matter through mediation.
- 14.2 No party is entitled to resort to litigation until the mediation process above has been completed and been unsuccessful.

15. Indemnity and Insurance

- 15.1 Bob and Bev indemnify Jean against any loss or damage she may suffer because of the actions or inactions of Bob and Bev.
- 15.2 Bob and Bev shall maintain at all times during Jean's residence, all such insurance policies as may be necessary and reasonable to support the indemnity above including but not limited to Public Liability, Professional Indemnity, Building and Contents.

16. Incapacity

- 16.1 All parties agree that they will each complete, and keep in force, a valid Enduring Power of Attorney in which they appoint a person(s) chosen by them to make decisions, both financial and personal, in the event that any of them should lose the capacity to do so.

17. Status of this Agreement

- 17.1 The parties acknowledge and accept that this agreement does not create a relationship of employment or partnership but that Bob and Bev contract as independent contractors to Jean.
- 17.2 Each party shall ensure that they comply at all times with their tax obligations that may arise under this agreement and each of them indemnifies the other in this respect.

18. Binding of Estates

- 18.1 This agreement binds each party's estate.

19. Interest

- 19.1 Any monies due and owing to Jean under this agreement which are not paid to her on time shall accrue interest at the rate specified by the Commonwealth Bank for overdraft accounts over \$100,000.00.

20. Costs

- 20.1 Each party shall pay their own legal costs in relation to this agreement but Bev and Bob shall pay any stamp duty assessed.

SIGNED AS A DEED

SIGNED SEALED AND DELIVERED by _____

JEAN _____

Before me: _____

Witness _____

SIGNED SEALED AND DELIVERED by _____

BEV _____

Before me: _____

Witness _____

SIGNED SEALED AND DELIVERED by _____

BOB _____

Before me: _____

Witness _____

FAMILY ENDORSEMENT

The endorsement of this agreement by other members of the family is attached.

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