



# **Assets for Care: assisting older clients at risk of financial abuse**

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# Seniors Rights Victoria

- Who are we?
- What do we do?

# Why this guide?

- **Financial abuse is the most prevalent form of abuse seen by SRV**
- **Most commonly seen as financial loss arising from the disposal of older person's assets in exchange for future care and accommodation, often due to a family member's over-protective and sometimes fraudulent behaviour.**

# Examples of financial abuse

- **Appropriating the proceeds of sale of home with the promise of providing future accommodation or care and then not providing it**
- **Threats or undue pressure to sell the house or hand over assets**
- **Threatening or coercing or forcing an older person into signing paperwork**
- **Pressuring for early inheritance or for a gift or loan**

# The SRV *Assets for Care* guide helps you to:

- **Detect financial abuse**
- **Identify lawyer's role, duties and responsibilities**
- **Identify factors that might increase vulnerability**
- **Identify appropriate protective action**
- **Try to remedy abuse that has occurred**
- **Refer client appropriately**

# Lawyers have a special role

- **Prevention – assisting older people to protect themselves**
- **Awareness – of potentially abusive nature of transactions about which family members may seek advice**
- **Drive changes in the law**

# Duties of practitioner

- **Avoid conflicts of interest (act for one client – see them alone)**
- **See Maud case p. 12**
- **Check for capacity and undue influence**
- **Interviewing and communication skills**
  - **age related needs and health issues**
  - **language and cultural issues (see Mrs Ng case p. 19)**
- **Give comprehensive and independent advice**



# Preventive Measures

What can lawyers do to help a client avoid a situation that may lead to abuse and other adverse situations?

# Preventive Measures

- Meaningful and competent advice
  - Not enough to state you were following instructions
  - Cannot turn a “blind eye” to improvident transactions
  - Advice should ensure the client fully understands the nature, effect and consequences of the proposed transaction

# Preventive Measures

- Does the advice have to include proposed alternative arrangements?
  - *Winefield v Clarke* [2008] NSWSC 882
  - *Christodoulou v Christodoulou & Anor* [2009] SCV 583

# Preventive Measures

- Implications:
  - Pension or other Commonwealth benefits
  - Asset assessment for the purposes of residential aged care
  - Their ability to access residential aged care in the future if they have no other assets
  - Possible tax implications
  - Possible planning implications

# Alternative options – family agreements

- Written agreement involving transfer of assets in exchange for care, accommodation and other support.
- Only better than a verbal agreement if properly drafted.

# Family Agreements Cont.

- What is SRV doing about this?
- Parties should consider all important matters – see pg 34 of guide for checklists

# What can be done if the relationship breaks down?

- What is the client really seeking?
- Is there anything left to pursue?
- Are there costs implications for the client?
- Merits of the case
- Impacts on family arrangements

# Possible actions

- Breach of contract
- Is it a Trust? Resulting Trust or Constructive Trust
- Equitable Lien or charge
- Estoppel
- Undue influence or unconscionable conduct
- Family law



# Possible actions

- VCAT – Real Property list
- Life estates
- See guide for other possible actions

# Caveats - To lodge or not

- Does your client have the interest claimed?
- Dangers of wrongly lodging
- Dangers of not lodging

# Case study considerations

- What are some of the alarm bells?
- How would you manage this situation?
- What kind of advice would you be looking to give?
- What are some ways law reform/policy change/practice change could assist William?
- What experiences have you had with similar cases

# Law reform

- Discussion in Older Person's Network meeting
- Formal resolution to push for a Convention on the rights of older persons
- Presumption of advancement
- Introduce presumption under undue influence

# Law reform

- Banking and financial institutions
- Regulation of family agreements
- Tribunal jurisdiction to hear equity matters
- Guardianship and administration – proposed Victorian reforms

# Law reform

- **Registration of powers of attorney, auditing, etc**
- **Increase access to the law**
- **Policy of forfeiture rule – disinheritance**
- **Centrelink to monitor nominees better**
- **Family law**