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

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NACLCC Adelaide - August 31st 2012
• 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

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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**

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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?

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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.

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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

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Law reform

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

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Law reform

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

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