

LEGAL ISSUES ASSOCIATED WITH AGEING

Taking control of legal issues

Productive Ageing Centre **National Seniors**
Australia

As you get older, you may find that your legal situation changes. You may discover that as certain legal issues arise, you need some help to take control of your affairs. Laura Adamson (*Principal Solicitor and Manager, Justice Connect Seniors Law*), a speaker at the Productive Ageing Forum, talked about where to go if things go wrong, and practical steps you can take to make sure your wishes are respected and your family's relationships are preserved during this process.



Legal issues associated with ageing

Ms Laura Adamson (Principal Solicitor and Manager, Justice Connect Seniors Law)

Laura Adamson said that Justice Connect provides a free, confidential legal service (Seniors Law) for older Victorians who may need help to deal with issues related to ageing, including elder abuse. The Seniors Law program offers legal services on a pro bono basis for:

- People who cannot afford to pay for a private lawyer
- People who are experiencing disadvantage
- Community organisations supporting people who are disadvantaged.

Laura's organisation works in partnership with Seniors Rights Victoria and is primarily funded by the Victorian Department of Health and Human Services, Victoria Legal Aid and the Legal Services Board.



Decision-making to safeguard your wishes

Laura described the arrangements you can make to ensure that your wishes are respected during your life and after your death. 'The time when you have the capacity to make decisions is an opportunity to make arrangements for when you no longer have this ability,' she said.

Powers of attorney

If you do not have the capacity to make decisions at some stage (for example, you become ill) or are struggling to look after yourself, then you can appoint someone to make those decisions on your behalf through a power of attorney. A power of attorney is a legal document that lets you choose someone who then has the legal right to make decisions for you. Laura pointed out that the Victorian Civil and Administrative Tribunal (VCAT) can choose someone to make decisions on your behalf, or you can pay for an attorney or enlist help from the State Trustees if you do not have a suitable person to appoint as your power of attorney.

Information about powers of attorney is available in Take Control – a kit for making powers of attorney and guardianship at publicadvocate.vic.gov.au/publications/121/

Laura mentioned that when deciding who to appoint as your power of attorney it is important to consider whether you can:

- Trust the person, especially when you lose the capacity to make decisions
- Be confident there is no conflict of interest – they will act in your interests and not their own
- Be confident they can make difficult decisions
- Be confident they will listen to your wishes and respect your decisions.

In Victoria, there are four different types of power of attorney: general, enduring (financial), enduring (medical) and enduring (guardianship).

The type of power of attorney you make determines the kinds of decisions the person you choose can make on your behalf. You may need one, two or a combination of all of the different types of powers of attorney to cover your needs. You may choose the same person for all the powers of attorney or you may decide to choose different people for different ones.



General power of attorney

- Short term
- Used for financial or legal matters, for example, when you go overseas and need someone to look after your finances
- Becomes invalid if you cannot make your own decisions

Enduring (financial) power of attorney

- Continues or endures
- Used for financial matters (but not lifestyle decisions), for example, investing money, paying bills, instructing a lawyer
- Can start when you have capacity to make your own decisions and then continues when you lose capacity
- Two people can be appointed

Enduring (medical treatment) power of attorney

- Continues or endures
- Used for medical decisions, for example, if you need a medical or surgical procedure (certain procedures are exempt, such as removal of tissue for transplants)
- Can start only when you lose capacity
- One person can be appointed, and a second can be appointed as a backup

Enduring power of guardianship

- Continues or endures
- Used for lifestyle and personal decisions (but not financial or legal decisions), for example, where you will live if you have dementia or who can come and visit you if you are in an aged-care facility
- Powers given to the guardian can be restricted and limited
- Can start when you have capacity to make your own decisions and then continues when you lose capacity

Changes to the power of attorney law

Laura said that there will be changes to the power of attorney law on 1 September 2015, when the Powers of Attorney Act 2014 comes into operation. The old powers will still be valid but there are a few changes including:

- A new role of a 'supportive attorney' to help you with decision-making – this person cannot be a care worker, health provider or accommodation provider
- One form to fill in for multiple powers of attorney
- More powers for VCAT – for example, the power to order compensation
- More enforcement mechanisms – for example, it will be an offence if an attorney dishonestly uses a power of attorney to gain financial advantage for themselves or causes you to lose money
- The enduring (financial) power of attorney and enduring power of guardianship will be combined into one.

Changing and revoking the powers of attorney

Sometimes you need to change or cancel (revoke) a power of attorney and Laura described some reasons people might take this action, such as changes:

- In your relationship with the person you have appointed as your power of attorney
- In your circumstances – for example, your health, finances or lifestyle
- To the powers that you have given someone – for example, you may want to remove limitations or add limitations to the powers
- To your attorney's circumstances – for example, they have moved, died or misused their power.

You can cancel your power of attorney by:

- telling your attorney or person you have appointed that you are withdrawing their power
- making a new power and including the option to revoke all previous powers
- destroying your power of attorney document and all copies
- filling out a 'Revocation' form or putting your wishes in writing.

Wills

Laura explained how to make sure your wishes are respected after you die. A will is a legal document that you make with instructions for giving away assets (e.g. property and money) after you die. The will can also contain things like how you want to be buried and who will look after your children or pets.

Anyone over 18 years old who can understand the nature of the will, the amount and type of assets and be of 'sound mind' can make a will. This is known as having 'testamentary capacity'. You can make a will by using a 'will kit' or you can use a lawyer or the State Trustees to help you put your wishes in writing. There are also resources online where you can find help to make a will.

A number of people are involved in the will including:

- You
- The executor – the person who will carry out your instructions (this might be a friend, relative, lawyer or trustee company)
- The witnesses – the people who witness your signing of the will
- The beneficiaries – the people you leave your assets to.

Making a valid will

To make a valid will, Laura said that your wishes have to be in writing, and you need to sign and date the will and have it witnessed by two people. It is also only valid if you make the will without pressure from anyone else, in other words, of your own free will.

Laura said there are things you should keep in mind if your circumstances change, for example you:

- Marry – the will you made before marriage is no longer valid
- Separate – the will is not affected and is still valid
- Divorce – gifts to your ex-partner or their appointment as your executor are automatically revoked.

She said that it is best to make a new will if you marry, separate or divorce. Above all, get legal advice.

Superannuation

It is also important to ensure that your superannuation funds are distributed in the manner that you wish. Laura pointed out that when you die the funds 'can be directed straight to a beneficiary and can bypass the estate'.

The important point to remember is that your superannuation funds will be distributed by the trustee of your superannuation fund according to instructions that you have made through a death benefit nomination. If you have:

- A binding nomination – the funds will be distributed according to your wishes
- A non-binding nomination – the trustee chooses how to distribute the funds (e.g. to a person you have nominated, to another of your dependants or to your estate)
- No nomination – the trustee chooses how to distribute the funds (e.g. to any of your dependants or to your estate).

Another point that Laura made was that your nominations last for three years if you have a standard superannuation fund, so you will need to make sure that they are up to date and reflect your current wishes. Those with a self-managed superannuation fund do not have to worry because your nominations are perpetual and stay in place until you cancel them.



Living with family

Many people prefer to age at home with a family member but this arrangement sometimes does not work if there is a breakdown in the relationship (e.g. the son or daughter can no longer look after the parent, the son or daughter's marriage breaks down), leaving the older person in a vulnerable position.

Older people often sell their homes and transfer the money to their son or daughter who will then use these proceeds to contribute towards their own mortgage while the family all lives together. Sometimes, a 'granny flat' is built on the property, or the parent keeps their house but transfers it to the son or daughter and the family lives together in the parent's house.

These 'assets for care' arrangements can work well but sometimes people end up in court trying to resolve disputes when the living arrangements turn sour. Laura said that people should think carefully and plan before agreeing to the arrangements. It is important for you to:

- Discuss and document how the arrangements will work – for example, how will the bills get paid, can you have a pet, can you have friends over when you want
- Find out if the transfer of property or money will affect your Centrelink entitlements – there are ways to show that the transfer is a payment for care and not a gift to your son or daughter.

Elder abuse

Sometimes, things go wrong and you may find yourself in a vulnerable position. Unfortunately, family relationships sometimes break down and there have been cases where children with the power of attorney have withdrawn money from their parents' account, leaving the parents homeless and without money.

Laura said that unfortunately, some people may experience elder abuse, which involves acts that cause you harm or distress that are carried out by someone you know and trust. Elder abuse can have many forms – physical, psychological, financial, sexual or social abuse or neglect.

Laura said that the most common abuse that her organisation sees is financial abuse. Some examples are:

- Threatening or pressuring an older person to sell their house
- Taking the money from the sale of an older person's house
- Threatening or forcing an older person to sign paperwork related to property, powers of attorney or wills
- Accessing an older person's bank accounts without permission
- Pressuring an older person for a gift, a loan or for an early inheritance
- Running up bills in an older person's name.

Laura also described the risk factors that can alert you to possible abuse.

Things to look out for include:

- Evidence of undue influence from a person (e.g. keeping the older person isolated or not allowing them to speak for themselves)
- Suspicious transactions in bank accounts
- Unexpected change of assets (e.g. the transfer of a property title).

Laura's advice was to seek help if you find yourself in such a situation. There are organisations that can assist you to cancel powers of attorney, organise mediation, provide legal services to recover money and help with intervention orders.

Ways to minimise the risk of things going wrong include engaging in community activities to avoid isolation (e.g. through your local council), seeking support services when necessary, getting independent legal advice and documenting significant transactions.

Information about caring for your assets is available from:
Seniors Rights Victoria –
Care for your assets booklet at seniorsrights.org.au/care-for-your-assets-booklet/
Department of Social Services –
My Aged Care website at myagedcare.gov.au



Information and legal services for older Australians are available at:
Seniors Law
Justice Connect
(03) 8636 4408
seniorslaw@justiceconnect.org.au
justiceconnect.org.au
or seniorsrights.org.au/resources/older-people/

This fact sheet was developed using information provided by Laura Adamson (*Principal Solicitor and Manager, Justice Connect Seniors Law*) in her presentation on legal issues associated with ageing at the Productive Ageing Forum 2015.

Disclaimer: The material presented in this fact sheet is general information only and not legal advice. You should seek legal advice for your individual circumstances.

The information contained in this fact sheet is current as of June 2015 and is subject to change.