

# Be careful when signing it all away

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## **LAWYER Stephen Bourke has witnessed "vitriolic and very, very bitter" relationships between siblings when one suspects another of financial abuse of an elderly parent.**

Bourke, a director of Certus Law in Canberra, says the placing of a parent into inferior aged-care accommodation to minimise the spending of expected inheritances is a common form of financial abuse of the elderly.

Another means of abuse, Bourke warns, involves adult children helping themselves to the assets of an elderly parent with dementia.

"It usually becomes known to us," he says, "when one member of the family sees what's going on and raises it with us."

Peter Bobbin, a principal of Argyle Lawyers, emphasises that views differ about whether placing an aged parent in less costly accommodation than the parent can afford equates to financial abuse.

"Without doubt in some people's eyes it would be regarded as financial abuse. In other people's eyes it would be regarded as sensible," Bobbin says.

Much, of course, depends on the circumstances. Bourke suggests a way to try to deal with perceived financial abuse is for a sibling who suspects abuse and the sibling suspected of being responsible to hold a family conference with each legally represented.

He says siblings usually prefer these family conferences to litigation.

"I say to the siblings there are two ways to solve this," he says.

"The first path is that we can get together and have a rational discussion; the alternative to that we have to go to court."

He finds that people are usually fearful of placing the decision in the hands of a court.

"These family conferences can be tense but you have to make sure to bring all the issues out," Bourke emphasises.

On occasions, the siblings have other issues unrelated to their suspicions of financial abuse. "Sometimes the claims of abuse aren't founded," Bourke says. One of the siblings might be upset, for instance, that a parent had granted an enduring power of attorney to another adult child.

Jo Wainer, an associate professor with Monash University's faculty of medicine, nursing and health sciences and co-author of successive studies on financial abuse of the elderly, says most of the elderly taking part in the research adopted defences to reduce their exposure.

Wainer says these defences include granting their power of attorney to a number of their adult children "as a safety mechanism" and managing their money carefully.

Where possible, they would speak to their lawyers and accountants regarding this self-protection.

Bourke says an enduring power of attorney granted in good faith is often used as the instrument for an adult child to commit finance abuse against an ill and ageing parent.

An enduring power of attorney gives the holder authority to make financial decisions on behalf of another person even after the person who granted the authority loses mental capacity. (Enduring powers of attorney are granted under state legislation and provisions can differ.)

"The children gain enduring powers of attorney while the parents have the mental capacity to grant them," Bourke explains.

"And when a parent loses that capacity, that's when an adult child might use it to try, to put it bluntly, to access their inheritance early. The parent who has lost capacity doesn't know what's happening."

Bourke has heard of cases where an adult child places an elderly parent in a nursing home before medically necessary. And then, he says, the child misuses the already granted enduring power of attorney to sell the parent's home.

"This unlocks the value of the house, and the adult child has access to hundreds of thousands of dollars."

Bourke stresses to his clients that an enduring power of attorney is a significant document that should not be granted without proper consideration. "By giving an enduring power of attorney, you are giving someone complete control of your financial life," he says.

Peter Bobbin suggests that before granting an enduring power of attorney to an adult child or anyone else, carefully think about what motivates that person and whether that person will ensure your desired lifestyle is maintained.

He says a way to reduce the risks is to grant your enduring power of attorney to a number of people, perhaps of various ages. And perhaps include a non-family member such as a professional person or very close long-term friend as one of the attorneys.

Blended families are a fertile area for family disputes over money, before and after the deaths of their parents. Adult children of a first marriage often feel they have missed out on, or may miss, their perceived rightful share of an inheritance.

Bobbin says parents with blended families often take a two-stage approach to try to minimise future disputes over their estates.

Consider an example where both spouses were married before and each had two children from their previous marriages.

First, the couples commonly make wills leaving their estates to each other. Second, the couples agree that the last surviving spouse leaves half of the remaining estate to their children and half to the children of the spouse who dies first.

But this approach is flawed, according to Bobbin. "It is based on pure trust; there is absolutely no certainty with it," he says.

All the estate might end up going to the last surviving spouse's children or a later partner.

However, Bobbin says what is known as a mutual wills contract can overcome this uncertainty. A mutual wills contract, which is legally binding, specifies how two or more people will make their wills.

The size of a dead member's superannuation balance can give a misleading impression of the amounts that are at stake with family disputes over superannuation death benefits. Super death benefits include payments for life insurance, which can mean a dead member with even a miniscule fund balance can leave sizeable amounts for distribution among beneficiaries.

Research last year by superannuation fund researcher and consultant Chant West found that the average default death and permanent disability cover for young members of industry super funds was \$230,000, up from \$70,000 in five years.

Jocelyn Furlan, chairperson of the Superannuation Complaints Tribunal, gives the example of an interstate truck driver who was a member of seven super funds at the time of his death at 25. His total account balance from all of his funds was small yet his super death benefits amounted to \$400,000-\$500,000.

His mother and father, who had divorced when the dead man was a baby, separately complained to the tribunal about the way the trustees of five funds of his super funds intended to distribute his death benefits.

The tribunal decided that neither parent was financially dependent on the dead man and that the mother did not have an "independency relationship" with him at the time of death, as she claimed. The tribunal divided their son's death benefits equally between them. (Requirements necessary for an independency relationship to exist include having a close personal relationship and living together with at least one providing financial support.)

Daniel Butler, managing director of self-managed super fund specialist DBA Lawyers, agrees there is no panacea for fund members to prevent future family arguments over their super death benefits.

However, he emphasises that a way to minimise disputes is to have an estate plan that is tailored to a members' family circumstances.

Many of Butler's clients decide the most appropriate solution for them is to make a binding death benefit nomination to direct all of their super death benefits to their legal personal representative (executor) for distribution in accordance with their will.

And their wills, Butler says, sometimes make provisions for testamentary trusts that may distribute the super death benefits to dependants and in certain cases to such beneficiaries as grandchildren.

Typically, a grandchild in such a case would receive potentially tax-efficient income from the trust and then the capital upon reaching a stipulated age.

Sue Prestney, a principal of accountant MGI, believes a smart way to try to reduce family disputes between the children of the current owners is to begin succession planning as early as possible. And as a central part of their succession planning, Prestney helps families to create what she terms as a family business constitution.

As Prestney explains, the creation of this document ideally involves family members meeting to make their own rules about how the family interacts with the business and about its future.

A family business constitution may cover such points as what the family wants for the business regarding direction, business values, timing and method of equity transfer between generations (or other owners), and management succession.

And the family business constitution may address whether or not the parents have enough retirement savings without being paid by their children for the business.

"We don't want people [children of the owners] growing up with false ideas and their own ideas about what's going to happen in certain circumstances, and about what they are entitled to from the business," Prestney adds.