



Things you need to know

*Legal Information
for Women Over 50
and their Families*

women's
legal
service
tasmania

Introduction

WHO ARE WE?

The Women's Legal Service is a free community legal service funded by the Commonwealth Attorney-General's Department. Our service is statewide and whilst our offices are in Hobart we do travel throughout the state.

You can call us on our free telephone advice line if you think you have a legal problem or you want to find out about your legal rights. We provide advice on almost any area of law. If you are not sure if you have a legal problem call us to find out.

WHAT CAN WE HELP YOU WITH?

The Women's Legal Service provides free and confidential advice and referral on all legal matters including Family Violence, Family Law, Civil and Criminal Law, Wills and Property Law. Our primary contact is through our free telephone advice line.

In addition to providing legal advice we conduct community legal education (CLE) seminars and workshops throughout the community and publish information brochures and booklets. Most of these publications can now be found on our website.

WHY AN INFORMATION BOOKLET FOR WOMEN OVER 50?

This booklet is a compilation of what women in this age group are asking us when they call our free advice line so we thought it would be great to put together a number of one page "starting points".

The information is in no way definitive – we could have written a text book on every topic! We decided instead to give women a starting point. There are some additional contacts in the booklet but we have many more here so if you have a question call us. If we don't know we will find out. If your problem is not legal then we will endeavour to refer you to the right person or service to help you.

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Wills

WHAT

A Will is a written legal document by which the person making it sets out how he or she wishes their property to be distributed after their death. The person making the Will is called the Testator. A person acquiring property under the Will is called a Beneficiary.

When making a Will, a person will also have to appoint one or more persons as the executor/s of the Will. The executor is responsible for distributing property in accordance with the testator's wishes. An executor must be someone over 18 years of age.

HOW

To be able to make a Will, you must be:

- over 18 years of age; and
- of a sound mind – this means you must be able to understand that you are making a Will and have knowledge of what is contained within it.

To be valid, a Will must meet the following formal requirements:

- the Will must be in writing;
- the Will must be signed by the testator;
- the testator must sign the Will before two or more witnesses who must be there at the same time;
- each witness must sign the Will in the presence of the testator;
- you should ensure that a beneficiary or their spouse is not a witness as this may affect their entitlements.

Content of a Will

- A Will should appoint one or more persons as the executor/s.
- A Will should set out your intentions regarding the distribution of your property which is known as your estate.
- A Will should include provision for the payment of funeral expenses and any debts.
- A Will may also include other requests such as funeral arrangements or the appointment of a guardian for your children. Such requests are not legally binding on the executor meaning that he or she does not have to carry out that wish however the inclusion of such requests will demonstrate the testator's intention should a dispute arise.

Changing your Will

You can change your Will at any time. Writing a codicil, which is a separate document to the Will, can do this. To be valid, a codicil must meet the formal requirements described above.

A Will can also be changed by writing a new one. You should seek legal advice if you are changing your will.

Revoking a Will

A Will is revoked or made invalid when you:

- make a new one, or
- get married or register a deed of relationship, unless the Will is made in contemplation of this, or
- finalise your divorce in Court or revoke a deed of relationship, unless the Will is made in contemplation of this, or
- if the Will is completely destroyed by the testator or someone in their presence.

Please note: Where you divorce or revoke a deed of relationship and there is more than one beneficiary, the Will will be read as if your ex-spouse/partner has died before you, rather than be completely revoked. There may be exceptions so you should always seek legal advice when ending a relationship.

What if I Die Without Ever Making a Will?

If this occurs, you are said to have died “intestate” and your next of kin will need to apply to the Supreme Court for Letters of Administration. This means that your next of kin will obtain authority to distribute your property after your death.

If you die without having a valid Will, your assets will be distributed in a certain order, as set out in the *Intestacy Act 2010*.

Contesting a Will

A Will may be contested by a person on the basis that it is not valid. A number of matters may be raised, for example that the testator was not of sound mind, that the testator was forced by another person in to making the Will or that the Will does not meet one or more of the formal requirements.

A Will may also be contested on the basis that the testator failed to make adequate provision for the proper maintenance and support of a dependant. The *Testator’s Family Maintenance Act 1912* allows dependents to make a claim where they have been left out of a Will.

Probate

In most situations where a person has died and has made a Will, the executor will need to apply for Probate. The application is made in the Supreme Court and must be granted before the executor can distribute the property. Probate gives the executor authority to deal with the assets and liabilities of the estate.

WHERE

We recommend that a private solicitor draws up your Will for you in order to ensure that your Will is legally valid. You may also choose to have a trustee company draw up your Will, although it is often less expensive to go to a private solicitor once you take in to account the costs to your estate charged after your death when you use some trustee companies.

If you are contemplating doing your own Will, proceed with caution. Be aware that many things can go wrong, such as incorrect use of witnesses, which can make your Will invalid.

HINT

If you have a particular wish such as where you are to be buried or where you want your ashes scattered make sure someone knows. Wills are often not read until after the funeral, by then it can be too late. If you retain your will make sure someone knows where it is. You may also like to discuss if you would like to be an organ donor with your family.

Power of Attorney

WHAT

A Power of Attorney is a document that gives another person (“the attorney”) the power to act on your behalf. The content of a Power of Attorney can be general or specific.

There are two types of Power of Attorney that you can make:

- 1) Ordinary Power of Attorney – terminates if you lose mental capacity.
- 2) Enduring Power of Attorney – remains in force even if you lose mental capacity.

A Power of Attorney allows the attorney to do anything that you can legally do except make personal, medical or lifestyle decisions for you (you can appoint an Enduring Guardian for this purpose). The decisions that they can make primarily relate to financial and property matters.

An Enduring Power of Attorney gives the attorney the power to continue to make decisions for you should you lose the mental capacity to do so. When appointing an Enduring Power of Attorney your attorney must accept the power by signing a prescribed declaration of acceptance.

Both Ordinary and Enduring powers will terminate if you die, become bankrupt or insolvent, or you revoke it in accordance with the Powers of Attorney Act.

WHY

Having a Power of Attorney means that if for some reason you are unable to take care of, or execute your affairs, someone of your own choosing can take care of things for you.

You should always be careful as to who you confer a power on, especially financial powers. Many people have been financially deceived by close relatives and friends thereby leaving them in a terrible position.

If you can't take care of your own affairs because you lose mental capacity, and you don't have a Power of Attorney, the Guardianship and Administration Board may appoint an administrator to do it for you.

HOW

When making a power of attorney you should seek assistance from a solicitor or The Public Trustee. If you choose to use The Public Trustee to draw up your Power of Attorney you will be expected to make the Trustee either your attorney or your substitute attorney. Contact The Public Trustee for details of fees and charges.

Formalities

A power of attorney is not effective unless it is lodged with the Recorder of Titles for registration. There is a fee for registration.

An attorney must be 18 years or older.

Enduring Guardianship

WHAT

An Enduring Guardian is someone who has the power to make personal, medical and lifestyle decisions for you when you are no longer able to make those decisions yourself.

WHY

When drawing up your Enduring Guardianship documents you can make decisions about your future medical care and the lifestyle you want, should you later become mentally incapacitated.

Your Enduring Guardian is bound to follow your instructions provided they are practical and not against the law. If an event arises for which you have not left instructions, your Enduring Guardian will be able to make those decisions for you. Your Enduring Guardian must at all times act in your best interests while exercising their authority.

A decision to appoint an Enduring Guardian is, for most people, a lifestyle choice that allows them to dictate now how they want their lives to continue, should they become mentally incapacitated due to an accident or an illness such as dementia or Alzheimer's.

Formalities

Only people over the age of 18 may be appointed an Enduring Guardian.

You can revoke the appointment at any time while you still have the mental capacity to do so.

The document must be registered with the Guardianship and Administration Board.

If you do not have an Enduring Guardian and you lose mental capacity the Guardianship and Administration Board may appoint someone to take on the role of guardian.

Difference to an Enduring Power of Attorney

Whereas an Enduring Guardian has the power to make decisions concerning your personal, medical or lifestyle situations should you become mentally incapacitated, an Enduring Power of Attorney confers on someone the power to make decisions regarding your financial and property affairs only.

Depending on your needs or concerns, you may require both an Enduring Power of Attorney and an Enduring Guardian.

Additional Contact

Guardianship and Administration Board

Ph: (03) 6233 3085

www.guardianship.tas.gov.au

Family Violence

- It can happen to anyone

WHAT

Family violence is not limited to physical violence. It can include sexual abuse, emotional or psychological abuse or financial control or abuse. Stalking, harassment or intimidating behaviour by a current or past partner is also Family Violence.

Family Violence Orders (FVO)

WHAT

A Family Violence Order (FVO) is a Court order that may restrict contact between people or impose conditions on their behaviour, very much like a Restraint Order does.

If a person does not comply with the Order made against them, they will have committed an offence and, if found guilty, may be punished with a fine or imprisonment, depending on the seriousness of the breach.

HOW

To obtain an FVO, an application may be made to a magistrate by a victim of family violence or a police officer.

If the Court decides to make an FVO, then the FVO will remain in force for such period as the Court considers necessary to ensure the safety and interests of the applicant or until an Order is made revoking it.

Police Family Violence Orders (PFVO)

WHAT

A police officer may issue a Family Violence Order against a person if satisfied that the person has committed, or is likely to commit, a Family Violence offence. This is known as a Police Family Violence Order (PFVO).

The PFVO may have conditions attached to it and will operate for a period of no more than 12 months. The penalties for breaching a PFVO are the same as if you breach an FVO (above).

HINT

If you have a PFVO or FVO protecting you then you cannot breach your own order. For example if someone is prevented from approaching you then you cannot approach them. You may be charged and prosecuted for aiding and abetting the breach of an order.

HELP

There are a number of services that can assist you in obtaining a Family Violence Order which are free. We can also help you to contact counselling services and accommodation services should you need them.

Restraint Orders

WHAT

A restraint order is an order of the Court requiring a person to comply with certain conditions, for example, that a person not approach you or your property.

WHY

With the introduction of Family Violence Orders and Police Family Violence Orders, Restraint Orders are being used less in family situations. Restraint Orders are only used in family situations where the relationship has not been long enough to be considered “significant” under the *Relationships Act* or where there is violence between adult family members. If you are not sure what order to pursue, ask us.

Restraint Orders are also used where the dispute or disturbance is of a non-related kind such as a neighbourhood dispute where there has been injury to you or property. For example if a person is doing something that prevents you from having a quiet enjoyment of your property then a Restraint Order may be appropriate but only as a last resort.

It is always preferable that the parties try to mediate their differences however sometimes people have to be compelled by an order of the Court to stop doing the offending act before they will.

HOW

To obtain a Restraint Order against someone you need to make an application to the Magistrates Court using the appropriate form. The form is available either at your local Magistrates Court, or on the internet at www.courts.tas.gov.au/magistrate/index.html.

Your application for a restraint order must contain sufficient information so that the Magistrate can be satisfied that the person you are seeking to restrain has committed an offence, for example caused damage to property or made threats, and is likely to do so again.

Your application is served on the other party and they are given the option to contest the application, accept the application or accept the application but not the alleged incidents contained within the application.

If someone applies for a Restraint Order against you it is important that you think carefully before accepting the orders even if you do so without accepting the alleged incidents contained in the application. Having a Restraint Order against you can have serious ramifications for your employment or may prevent you from holding permits such as a firearms licence.

Breaching an Order

If someone takes a Restraint Order against you and you breach the order there are penalties that apply. You can be fined and face imprisonment depending on how the Court views your actions.

Grandparents and their Grandchildren

WHO

From time to time many grandparents find themselves in unexpected situations concerning their grandchildren. It may be that for various reasons they are caring full time for their grandchildren. Alternatively they might find themselves estranged from their grandchildren after the marriage of their own child breaks down.

WHAT

For a long time the law has acknowledged that most grandparents play an important role in the development and welfare of their grandchildren, with some taking on an even larger role than others.

When it comes to where children will live and who they will spend time with, the Family Court of Australia is the primary court of jurisdiction and this is governed by the *Family Law Act*. On occasion a State Court might take precedence if the matter concerns child protection or removal from the home by a State body for reasons concerning the child's welfare.

If grandparents have their grandchildren residing with them, and they provide full time care for them there are provisions under the *Family Law Act* to give those grandparents the ability to make decisions for their grandchildren concerning such important issues as their education and health care.

Under the *Family Law Act* there are provisions that allow grandparents to apply to the court to have contact with their grandchildren if for some reason it cannot be arranged with the parents directly. This is an unfortunate but not uncommon side effect of the increasing number of family breakdowns in Australia.

HOW

Grandparents can apply to the Family Court for the appropriate orders, whether they be that the children live with them or spend time with them. In some situations this can be done through consent orders, but often an application to the Court is required. It is important that you, and the biological parents receive independent legal advice about this.

Depending on the situation Legal Aid may or may not be available to assist you. Court costs can be expensive if the application is a disputed one.

Advice should also be sought concerning your entitlements from Centrelink.

Separation

Matrimonial Property Settlements

WHAT

A matrimonial property settlement is the division of property arising out of a marriage. This type of property settlement will be made in the Family Court or Federal Magistrates Court.

WHEN

The parties can divide property at any time from separation.

Upon a divorce being finalised, the parties have 12 months to institute property proceedings in the Family Court or Federal Magistrates Court.

HOW

Matrimonial property is divided according to two main factors, being *Contributions* to the marriage (both financial and non-financial) and the *Future Needs* of the parties (such as employment, age and health). The division must be just and equitable.

The parties may choose to participate in family dispute resolution. This may allow the issues in dispute to be identified and the parties may come to an agreement.

If the parties come to an agreement, they can file Consent Orders in the Court. These Orders set out how the parties have agreed to divide the property, and they are legally binding.

You should get any agreement you make in writing. It is a good idea to see a lawyer before you reach any final agreement.

If the parties cannot reach an agreement they may file an application in either the Family Court or the Federal Magistrates Court. There is a filing fee.

De Facto and Same Sex Property Settlements

WHAT

A de facto relationship is between two adults who are not married or related by family, who have a relationship as a couple living together in a domestic basis. It includes relationships between adults of the opposite sex and adults of the same sex.

WHEN

An application to the Court must be made within 2 years of the relationship ending. Time can be extended in some circumstances.

HOW

The law in Tasmania has changed. If the relationship had broken down before 1 March 2009, State laws apply and the relevant legislation is the *Relationships Act*. Parties will need to apply to either the Magistrates Court or the Supreme Court, however, parties can choose to 'opt in' and have the new laws

apply to them.

If the relationship breaks down after 1 March 2009, the new laws apply and the property settlement is governed by the *Family Law Act*.

Under the *Family Law Act*, property is divided according to two main factors, being *Contributions* to the marriage (both financial and non-financial) and the *Future Needs* of the parties (such as employment, age and health). The division must be just and equitable.

The process for a property settlement is the same as for matrimonial property settlements (see above).

Divorce

WHAT

A divorce is different to a property settlement. It is the legal end to a marriage.

WHEN

You and your husband must have been separated for at least 12 months before applying for a divorce. The Court will take into account time that you may have been separated but still living under the one roof.

HOW

An application for divorce is made in the Federal Magistrates Court. There is a filing fee.

Caring Relationships

A caring relationship is one which is not of an intimate nature but where one or both parties provides the other with domestic support and personal care, without receiving a wage for doing so. A carer's allowance or payment from Centrelink is not counted as a wage.

A caring relationship can be registered under the *Relationships Act*. The benefits of registering include that it certifies the existence of a relationship, and gives the ability to have immediate access to relationship rights.

The danger of caring relationships can be that if the relationship breaks down, parties are entitled to make an application to Court for a property settlement.

Tasmania's Website for registration:

"Births Deaths and Marriages: Relationships"

www.justice.tas.gov.au/bdm/relationships

Aged Care Complaints

WHAT

The Aged Care Complaints Investigation Scheme (the “scheme”) is designed to investigate complaints about health, safety and welfare for all people receiving care under the *Aged Care Act 1997*. They also refer issues that may better be dealt with by the Police, Medical Registration Board, Aged Care Standards and Accreditation Agency.

The scheme is over seen by an Independent Aged Care Commissioner and is a free and safe service set up to help care recipients or their representative to make a complaint about any Aged Care service that is a Commonwealth funded service. The Commissioner can also review decisions made by the scheme.

These may include:

- Aged Care Homes
- Community Aged Care Packages
- Flexible Care
- Staff members of Aged Care Facilities.

WHO

The care recipient or their representative may make a complaint if they feel a decision to be unfair, they are unhappy with a service, or they believe the service provider is in breach of their responsibilities.

HOW

The scheme attempts to resolve complaints by

- Investigating concerns;
- Referring matters to the appropriate authorities if appropriate;
- Providing details of advocacy services;
- Where appropriate, requiring the service provider to take action.

Additional Contacts

Complaints can be lodged at:

Aged Care Complaints Investigation Scheme
GPO Box 9848, Hobart Tasmania 7001

Complaints Investigation Officer (Tasmania)

FreeCall 1800 550 552

Or online at www.health.gov.au/oacqc

Elder Abuse

WHAT

Elder abuse is unacceptable behaviour towards an older person such as physical harm, neglect, financial control or exploitation, the infliction of emotional or psychological anguish, social isolation or sexual abuse.

Elder abuse generally occurs at the hands of a family member or a carer either in the older person's home or aged care facility. It can be a deliberate act or an unintentional one resulting from ignorance of proper care issues and procedures.

Self abuse or self neglect or attacks by unknown persons are not elder abuse.

Signs of Abuse

Below are examples of some of the types of abuse and the signs that someone experiencing elder abuse may show. It is in no way definitive, merely a guide.

PHYSICAL ABUSE

Physical abuse is where pain, injury and or physical force is inflicted upon another person. It may include hitting, slapping, pushing, burning, pinching, kicking, strangling, physical restraint, sexual assault or even the misuse of medication.

A person suffering from physical abuse might have bruises, cuts, scratches, burns, bite marks, breaks or fractures. They may also claim to be "accident prone" or have a history of accidents or injuries that are not explained. They may become emotionally and or socially withdrawn.

FINANCIAL AND MATERIAL ABUSE

Financial and material abuse is where someone else misappropriates or takes control of an older person's finances, valuables and or property usually in a manner that benefits someone other than the older person. The older person may be forced to change their will, grant a Power of Attorney, sign over personal funds or real estate or surrender their pension amounts. They may notice valuables missing from their home or withdrawals from their bank accounts that are unaccounted for.

A person subjected to financial or material abuse may suddenly be unable to pay bills, appear to have lost their credit cards and or bank books or experience unexplained withdrawals from their accounts. In some instances they may face eviction from their own homes. Confusion as to personal finances or the whereabouts of personal property may also be a sign.

NEGLECT

Neglect can be intentional or unintentional and occurs where the basics of life are not provided by those responsible for the care of an older person. Neglect includes the inadequate or delayed provision of housing, bedding, food, clothing, hygiene, medical or dental attention as well as the inappropriate

use of medication such as under or over medication. Prolonged absences in care or abandonment also constitute neglect.

A person suffering neglect will often display signs of poor health such as malnourishment, malnutrition, dehydration and or weight loss along with poor skin care and or hygiene. They may appear depressed or withdrawn. Other signs of neglect include a lack of clean weather appropriate clothing, glasses, hearing aides, mobility aides or dentures.

PSYCHOLOGICAL OR EMOTIONAL ABUSE

Psychological or emotional abuse results in an older person experiencing feelings of shame, humiliation and powerlessness. Fear is often a large factor and can be inflicted through physical and or verbal intimidation and or threats of violence, even threats of “being put in a home”. The withholding of affection or contact with family and friends, or the threat to do so, along with acts of continued harassment also constitute abuse. “Talking down” to an older person or treating them without respect may also have an adverse effect. Such abuse often results in anguish and isolation.

A person suffering psychological abuse will often become withdrawn, isolated and emotionally distressed. Once confident people may become indecisive and anxious, suffer depression and resignation. Many psychologically or emotionally abused people are unable to make or maintain eye contact.

SOCIAL ABUSE

Social abuse is where an older person is prevented or restricted from participating in social activities or social interactions with family and friends. This may be done deliberately or through ignorance on the part of a care giver.

Social abuse results in immense feelings of isolation. This can lead to depression, apathy and feelings of powerlessness. If someone has been absent from regular social situations it may be that this has been forced upon them and is not their choice.

How – Preventing Abuse

Elder abuse can be prevented by taking some precautionary measures to both protect yourself but also those around you.

REGULAR SOCIAL CONTACT

It is important to maintain your social ties and contacts. As people become older it can become difficult to do this. Where possible become involved in a regular social activity whether it be through a local sporting, social or seniors club or simply with friends. Most residential or aged care facilities have activities so become involved.

By remaining as active as possible and maintaining regular contact outside of your family or care based circle it becomes more difficult for someone to inflict many of the forms of elder abuse described above without others noticing. If you are a regular at the club or involved in a regular social outing people will notice if you are not present or if you do not seem your usual self. If a regular attendee becomes an absentee ask questions!

REMAIN INDEPENDENT

As people age necessity often sees them become more reliant upon others. This may be for such things as transport or assistance shopping or it could be that due to health reasons a greater degree of care is needed. Regardless of this it is possible to remain independent. The body may not be willing but that does not mean the mind is not.

Retain control of your finances. You should always remain fully informed as to your financial situation and not let someone else take over for you. It may not always be possible for you to physically pay your bills but you can view the bill, write and or sign the cheque and account for your finances that way.

Never sign anything unless you are certain as to the nature of the document and what it means and never ever sign legal documents without comprehensive and independent legal advice. You should never feel pressured to surrender financial control to anyone or be a guarantor to their loans. If someone is exerting such pressure ask yourself why and investigate further. Remain independent and retain control wherever you can.

Never be afraid to ask questions

KNOW YOUR RIGHTS

Knowledge really is the best weapon. Know your rights. If someone is treating you or someone you know in a way that is described in this publication then chances are it is a case of elder abuse and that is wrong.

If you are feeling isolated or are unsure of your legal rights or think that you or someone you know may be experiencing elder abuse then call the Women's Legal Service. It is a free call and completely confidential.

ACKNOWLEDGEMENTS

The Women's Legal Service (Tasmania) is funded by the Commonwealth Attorney-General's Department.

DISCLAIMER

"Things You Need to Know - Legal Information for Women Over 50 and their Families" is intended to give general information about the law in Tasmania. While we have made every effort to ensure that the contents of this publication are accurate at the time of printing the law does change. Legal exactness is not possible in a publication of this nature. This publication should not be used as a substitute for legal advice. This publication is accurate as at 1st July 2011.

Women's Legal Service (Tasmania) does not accept any responsibility for any loss, damage or injury, financial or otherwise, suffered by any person acting on information contained in it or omitted from it.

SERVICE CONTACT DETAILS

Telephone Legal Advice Line:
Freecall 1800 682 468

Telephone Advice Line Opening Times

Monday, Tuesday,
Thursday & Friday
10.00 am - 12.30 pm
and 1.30 pm - 3.30 pm

Wednesday
2.00 pm - 4.00 pm

Face to face appointments
by arrangement.

Administrative Matters

Telephone: (03) 6231 9466
Facsimile: (03) 6231 9566

Email Address

admin@womenslegaltas.org.au

Internet

www.womenslegaltas.org.au

Postal Address
PO Box 707
North Hobart TAS 7002