THE CONTRACTUALISATION OF CARE:

THE EMERGENCE OF FAMILY

AGREEMENTS IN AN AGEING WORLD

PIP COORE

ST EDMUND HALL

THESIS SUBMITTED FOR THE DPHIL IN LAW

HILARY 2021

ABSTRACT

THE CONTRACTUALISATION OF CARE:

THE EMERGENCE OF FAMILY AGREEMENTS

IN AN AGEING WORLD

PIP COORE

ST EDMUND HALL

THESIS SUBMITTED FOR THE DPHIL IN LAW

HILARY 2021

In life one thing is certain: we will all age. Due to increased life expectancy, the number of people affected by age-related illnesses, particularly dementia, who require ongoing, extended care will increase. Therefore, the question of who will care for older people is significant. Currently, limited places in aged care facilities, coupled with government policies encouraging people to age in the community, means that there is pressure on adult children, particularly daughters, to provide unpaid care for their older parent(s). Today, however, many adult children cannot afford to reduce their working hours to care for their older parents. Older parents are therefore compensating their adult children for the care they provide (or will provide) by transferring assets to them during the parents' lifetime. To facilitate these transactions, family care agreements (Family Agreements) are increasingly being entered into. This thesis considers some of the legal issues associated with Family Agreements to better understand whether (if at all) Family Agreements are giving effect to the intentions of the parties whilst adequately protecting them from harmful outcomes. The thesis outlines ways in which the law has responded to population ageing and identifies areas that require further attention. This thesis mainly considers the position in Queensland, Australia, but also draws on case law and research from countries with comparable legal, health and aged care systems, particularly the United Kingdom, New Zealand and British Columbia, Canada. It concludes that the law in Queensland inadequately protects older people who wish to enter into Family Agreements. Further, it demonstrates that caregiving adult children are vulnerable to post-mortem equitable claims challenging the validity of the transaction(s) under Family Agreements, particularly because the law does not sufficiently recognise or value care work.

ACKNOWLEDGEMENTS

I came to study law after the death of my beloved grandfather, George, resulted in my uncle, Christopher, suing my mother, Penny, seeking to set aside an *inter vivos* gift George gave her in exchange for her care. It was this experience that motivated me to pursue a doctorate at Oxford in the areas of elder law, equity, trusts and succession law to better understand whether (if at all) Family Agreements give effect to the intentions of the parties whilst adequately protecting them from harmful outcomes.

I dedicate my thesis to my mother, Penny, and my grandparents, George and Pamela. Without them I would not have embarked on this journey. I would also like to take this opportunity to thank my sister, Sal, and my brother, Chris, for their continued love and support. I am also extremely grateful to my supervisors, Professor Jonathan Herring and Dr Charles Foster, for their guidance and support on my DPhil journey.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

1. INTRODUCTION

We will all, at some point in our lives, care for an ill or disabled loved one, or need care ourselves.[1] As the global population ages, the number of people affected by age-related illnesses requiring ongoing, extended care will dramatically increase.[2] Currently, limited places in aged care facilities coupled with government policies encouraging people to remain in the community as they age puts new pressures on families to retain the caring role for their older relatives.[3] As outlined in more detail below, adult children, particularly daughters, are the main source of unpaid care for older people. This is creating a situation where '… life comes full circle, where the parents become the dependents and the children become the carers'.[4]

---

1 Jonathan Herring, *Caring and the Law* (Hart Publishing 2013); Carers UK, 'Caring and Family Finances Inquiry: UK Report' (2014) 6 <http://www.carersuk.org/for-professionals/policy/policy-library/caring-family-finances-inquiry> accessed 21 April 2020.

2 Alzheimer's Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

3 Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72; Brian Herd, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23.

4 Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (16 July 2007) Brisbane 4 <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10368/toc_pdf/5569-1.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10368/0000%22> accessed 21 April 2020.

Today, however, many adult children cannot afford to reduce their working hours to care for their older parent(s). Although government assistance, such as carer's allowance and carer's pension, provides some support to family members who care for their close relatives, such pensions are not intended to, and therefore do not adequately, financially compensate the caregiver for long-term, and often full-time, care. Furthermore, although direct payment schemes enable older people requiring long-term care to directly employee caregivers in a quasi 'employer-employee relationship', these 'cash for care' schemes in Australia and the United Kingdom (**UK**) expressly preclude the employment of family members living with their older parent. As a consequence, older parents are financially compensating their adult children for their care from their own pockets or assets, rather than relying on government support and assistance. To facilitate these transactions, many families are entering into family agreements.[5]

Family Agreements have many forms. They are known as family care agreements, private care agreements, personal service contracts and lifetime contracts. For the purposes of this thesis, a family agreement is defined as an arrangement between an older parent and their adult child whereby the older parent provides a benefit to the adult child in exchange for continuing or lifelong care (**Family Agreement**). The 'benefit' received may be the payment of money, the transfer of real property and/or the older parent(s) selling their own home to either (i) pay for a self-contained residence to be built on the adult child's property, or (ii) purchase a larger home for them all to reside in together. This living arrangement, which is discussed in more detail below, is known as the granny flat scenario which involves the adult child and older parent living together, or at least in very close proximity.

---

5 Herd (2002a) (n 3).

Although many people create their own circle of members which they consider 'family',[6] this thesis focuses on the relationship of care between an older parent(s) and their adult child (the **Caring Relationship**), particularly as (i) research suggests Family Agreements are typically made between an older parent and their adult child,[7] and (ii) adult children are the main source of care for their older parent(s). Given there is no legal age at which a person becomes 'old',[8] or a legal definition of 'older person',[9] the use of the generic phrase 'older people' is accepted in the academic world of gerontology to describe persons over the age of 65.[10] Therefore, for the purposes of this thesis, the use of '**older person(s)**' and '**older parent(s)**', despite variations between jurisdiction and literature, will be used to describe persons over the age of 65.

This thesis mainly considers the position in Queensland, Australia. Due to limited literature on Family Agreements, this thesis draws on case law, useful government sources

---

6 British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, 'Private Care Agreements Between Older Adults and Friends of Family Members' Report No. 18 (2002) (the BCLI Committee Report) 4 <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020.

7 Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths 2004) 260.

8 Alison Brammer and Simon Biggs, 'Defining Elder Abuse' (1998) 20(3) Journal of Social Welfare and Family Law 285, 295.

9 Jonathan Herring, *Family Law* (7th edn, Pearson 2015) 720; Office of the Public Advocate (Qld) and Queensland Law Society, 'Elder Abuse: How well does the law in Queensland cope?' (2010) 2 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf> accessed 21 April 2020.

10 Alison Brammer and Simon Biggs, 'Defining Elder Abuse' (1998) 20(3) Journal of Social Welfare and Family Law 285, 294.

and key secondary sources from Australia and countries with comparable legal, health and aged care systems, particularly the UK, New Zealand and British Columbia, Canada.

1.2 THE RIGHTS OF OLDER PEOPLE

The Universal Declaration of Human Rights provides, *inter alia*, that 'All human beings are born free and equal in dignity and rights'[11] and, 'All are equal before the law and are entitled without any discrimination to equal protection of the law'.[12]

In 1977, United States Senator Hubert Humphrey eloquently said:

> … the moral test of government is how that government treats those who are in the dawn of life, the children; those in the twilight of life, the elderly; and those who are in the shadows of life, the sick the needy, and the handicapped.[13]

Despite global support for the development of an international Convention on the Rights of Older Persons, older people are the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights.[14]

---

11 The United Nations, 'The Universal Declaration of Human Rights', Article 1 <https://www.un.org/en/universal-declaration-human-rights/> accessed 21 April 2020.

12 ibid Article 7.

13 Speaking at the Hubert Humphrey Building dedication in Washington, D.C., November 1, 1977.

14 Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 Sydney Law Review 99, 115, citing Diego Rodriguez-Pinzón and Claudia Martin, 'The International Human Rights Status of

Although Family Agreements are increasingly being entered into, there is (i) currently no specific legislation governing them, (ii) little written about them, and (iii) limited information to guide families wishing to enter into them. This is further complicated by common law presumptions that presume Family Agreements are not intended to be binding, and, therefore, assume that transfers under Family Agreements are gifts with no obligations attached. This is further complicated by other presumptions that exist in relation to caregivers who are also appointed as attorneys under the Powers of Attorney Act 1998 (Qld). Therefore, the current law does not (i) reflect family realities that many adult children, particularly daughters, are making significant sacrifices to provide long-term care for their older parent(s), and (ii) protect older people and/or caregiving adult children who are entering into Family Agreements from harmful outcomes.

In 2006, the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs (the **Committee**) investigated whether current legal regimes within Australia are adequately addressing the legal needs of older people.[15] In 2007, the Committee tabled its report to the Parliament of Australia (the **Committee Report**)[16] and

---

Elderly Persons' (2003) 18 American University International Law Review 915, 1008.

15 House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Media Release: Inquiry into Older People and the Law' (2006) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/media.htm> accessed 21 April 2020.

16 The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

the Australian Government's response to the Committee Report was tabled in 2009.[17] The Committee received a total of 157 submissions and 43 supplementary submissions,[18] and the Committee Report made a total of 48 recommendations with a particular focus on Family Agreements.[19] This thesis draws heavily on these significant Australian Government sources.

Although Family Agreements are intended to safeguard older people, their informal and familial nature makes it difficult for the law to recognise and enforce them as contracts. In recognition of this, the Committee recommended that the Australian Government propose that the [then] Standing Committee of Attorneys-General[20] undertakes an investigation of legislation to regulate Family Agreements.[21] It was further recommended that the Australian Government (i) provide dispute resolution services for families when Family Agreements breakdown, and (ii) develop guidelines, model provisions and educational material regarding Family Agreements. The Government accepted all of these recommendations 'in principal' and agreed that further study is needed on how abuse under

---

17 Australian Government, 'House of Representatives Standing Committee on Legal and Constitutional Affairs Older People and the Law Government Response' (2009) (the Government's Response) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=laca/reports.htm> accessed 21 April 2020.

18 The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law Submissions' <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

19 The Committee Report (n 16) ch 4.

20 In December 2013, the Law, Crime and Community Safety Council replaced the Standing Committee of Attorneys-General.

21 The Committee Report (n 16) ch 4 [4.45].

Family Agreements can be limited or ameliorated.[22] Yet, unjustifiably, no such investigation, or further study, has been conducted.

In an attempt to address this knowledge deficit, this thesis considers some of the legal issues associated with Family Agreements to better understand whether (if at all) such agreements are giving effect to the intentions of the parties while adequately protecting them from harmful outcomes. This thesis (i) examines the ways in which the law has responded to population ageing, and (ii) identifies areas that require further attention. In doing so, this thesis demonstrates that the current law in Queensland is inadequately protecting the rights of older people and their caregiving adult children who enter into Family Agreements. As a consequence, older parents are vulnerable to financial exploitation, and the caregiving adult children are vulnerable to claims challenging the validity of the Family Agreement, or the transfer(s) made under it.

1.3 AN AGEING WORLD

In life one thing is certain, we will all age. Due to decreased mortality and declining fertility, the world is ageing at a rapid rate.[23] The rapidly ageing population is a 'global

---

22 The Government's Response (n 17) 21.

23 George Leeson, 'Increasing Longevity and the New Demography of Death' (2014) International Journal of Population Research; United Nations, 'Economic and Social Affairs: World Population Ageing' (United Nations, New York, 2013) <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf> accessed 21 April 2020; Carol T. Kulik, Susan Ryan, Sarah Harper and Gerard George, 'From the Editors: Aging Populations and Management' (2014) 57(4) Academy of Management Journal 929.

phenomenon'.[24] The United Nations (the **UN**) observed that that in 2017, there was an estimated 962 million people aged 60 or over worldwide, which is 13 per cent of the global population.[25] The UN predicts this number will increase to 1.4 billion in 2030 and 2.1 billion in 2050.[26] In 2017, more than 15 per cent of the total population was aged 65 and over in Australia[27] and the UK.[28]

In addition to global population ageing, life expectancy has also significantly increased.[29] Between 2016 and 2018, life expectancy in Australia was 80.7 years for males and 84.9 years for females.[30] For the same period in the UK, life expectancy for males was

---

24 United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Ageing 2015 (2015) 2 <https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf> accessed 21 April 2020; Leeson (n 23); Kulik et al (n 23).

25 United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Prospects: The 2017 Revision' (2017) 11 <https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf> accessed 21 April 2020.

26 ibid.

27 Australian Government, Australian Institute of Health and Welfare, 'Older Australia at a glance' (2018) <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile> accessed 21 April 2020.

28 Office for National Statistics, 'Overview of the UK population: July 2017' (2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/july2017> accessed 21 April 2020.

29 UN (n 25); Leeson (n 23).

30 Australian Bureau of Statistics, 'Life Tables, States, Territories and Australia, 2016-2018' (2019) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3302.0.55.001> accessed 21 April 2020.

79.3 years and 82.9 years for females.[31] The reasons for this increase in life expectancy includes, but is not limited to, improved healthcare and lifestyles,[32] safer working environments, and advances in medicine and technology.[33]

1.4 DEMENTIA

Although living longer should be celebrated,[34] and although ageing does not automatically result in a decline in health,[35] increased life expectancy may mean longer stretches of frailty, disability, and dependence,[36] particularly due to the increasing rates of dementia. Today, dementia is ranked ahead of some cancers, cardiovascular disease and stroke as one

---

31 Office for National Statistics, 'National life tables, UK: 2016 to 2018' (2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/bulletins/nationallifetablesunitedkingdom/2016to2018> accessed 21 April 2020.

32 Office for National Statistics, 'Overview of the UK population: July 2017' (2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/july2017> accessed 21 April 2020.

33 Australian Bureau of Statistics, 'Life Tables, States, Territories and Australia, 2016-2018' (2019) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3302.0.55.001> accessed 21 April 2020.

34 Secretary of State for Health, 'Government Response to the House of Lords Select Committee on Public Service and Demographic Change Report of Session 2012-13: 'Ready for Ageing?'' (2013) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236036/8677.pdf> accessed on 21 April 2020.

35 Sandra Fredman and Sarah Spencer (eds.), *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart Publishing 2003) 11 – 20, citing Grimley-Evans, J., 'Age Discrimination: Implications of the Ageing Process'. See also Jonathan Herring, *Older People in Law and Society* (OUP 2009).

36 Kulik et al (n 23) 930.

of the main causes of disability amongst older people.[37] There is an estimated 54 million people worldwide with dementia and this number is expected to increase to 130 million by 2050.[38] In the UK and Australia, one in every fourteen people,[39] and one in every ten people respectively,[40] aged 65 and over has dementia.

This projected growth of the number of older people with dementia presents a significant challenge for governments,[41] particularly in relation to the provisions of health and aged care services.[42] In Australia, the total direct health and aged care system expenditure on people with dementia was estimated to be $15 billion in 2018.[43] By 2025, the total cost of dementia is expected to increase to more than $18.7 billion in today's

---

37 Alzheimer's Society, 'Facts for the media' (2020) <http://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=535&pageNumber=2> accessed 21 April 2020.

38 Alzheimer's Disease International, 'World Alzheimer Report 2015, The Global Impact of Dementia: An Analysis of Prevalence, Incidence, Cost and Trends' (2015) <https://www.alz.co.uk/research/WorldAlzheimerReport2015.pdf> accessed 21 April 2020.

39 Alzheimer's Society, 'What is dementia?' (2017) <https://www.alzheimers.org.uk/download/downloads/id/3416/what_is_dementia.pdf> accessed 21 April 2020.

40 Professor Laurie Brown, Erick Hansnata and Hai Anh La, Report Prepared for Alzheimer's Australia, 'Economic Cost of Dementia in Australia: 2016-2056' (2017) <https://www.dementia.org.au/files/NATIONAL/documents/The-economic-cost-of-dementia-in-Australia-2016-to-2056.pdf> accessed 21 April 2020.

41 House of Lords, Select Committee on Public Service and Demographic Change, Report of Session 2012 – 13, 'Ready for Ageing?' (2013) 22 (House of Lords Committee Report) <http://www.cpahq.org/cpahq/cpadocs/UK%20Parliament%20HOL%20Ready%20for%20the%20Ageing.pdf> accessed 21 April 2020.

42 The Committee Report (n 16) vii.

43 Dementia Australia, 'Dementia statistics' (2020) <https://www.dementia.org.au/statistics> accessed 21 April 2020.

dollars, and by 2056, to reach more than $36.8 billion.[44] Currently, there are approximately 885,000 people living with dementia in the UK.[45] In 2019, the overall economic impact of dementia in the UK was £34.7 billion and by 2040, this cost is expected to increase to £94.1 billion.[46]

Due to the rationing of subsidised aged care, older people with dementia have difficulty accessing appropriate services and support.[47] As government support is diminishing,[48] there is an increasingly divergent picture of adult children providing unpaid care for their older parents.[49]

---

44 ibid, citing Dementia Australia (2018) Dementia Prevalence Data 2018-2058, commissioned research undertaken by NATSEM, University of Canberra.

45 Raphael Wittenberg, Bo Hu, Luis Barraza-Araiza, Amritpal Rehill, Care Policy and Evaluation Centre, 'Projections of older people with dementia and costs of dementia care in the United Kingdom, 2019-2040' (2019) 3 <https://www.alzheimers.org.uk/sites/default/files/2019-11/cpec_report_november_2019.pdf> accessed on 21 April 2020.

46 ibid 9.

47 National Aged Care Alliance, 'Aged Care Reform Information Sheet: Dementia and Aged Care Reform' <https://www.cotasa.org.au/cms_resources/Documents/dementia_aged_care_reform.pdf> accessed on 21 April 2020.

48 David De Vaus, 'Children's Responsibilities to Elderly Parents' (1996) 45 Family Matters, Australian Institute of Family Studies 16 <https://aifs.gov.au/sites/default/files/fm45dd.pdf> accessed 21 April 2020.

49 Carers UK (n 1) 28; Fiona R. Burns, 'Protecting elders: Regulating intergenerationally transmitted debt in Australia' (2005) 28 International Journal of Law and Psychiatry 300, 301.

1.5 LIVING ARRANGEMENTS OF OLDER PEOPLE

Unlike many cultures, co-residence of older parents with their adult children is not traditionally common in Australia and England.[50] However, due to the increased life expectancy of older people,[51] and diminishing support from governments,[52] the need for older people to co-reside with their family members is increasing.[53] Reluctance of older people to live in a care home,[54] age related frailty, the death of a spouse, loneliness and financial difficulty are all circumstances that may precipitate an older person's decision to co-reside with their adult child.[55] In many instances, an adult child will persuade their older parent to sell their home and put the settlement proceeds towards a new home purchased in conjunction with their adult child.[56] Alternatively, the settlement proceeds of the older parent's home is often used towards extending the adult child's existing home to incorporate a self-contained flat for either or both older parents to reside.[57] This living arrangement is commonly referred to as the 'granny flat' scenario[58] (the **granny flat**

---

50 Jonathan Herring, *Family Law* (6th edn, Pearson 2013) 702; Sue Field, 'Issues Facing Older Australians: Legal, Financial and Societal' (2005) 1 Journal of International Aging Law and Policy 95, 103.

51 José Miguel Latorre Postigo and Rigoberto López Honrubia, 'The Co-Residence of Elderly People with Their Children and Grandchildren' (2010) 36(4) Educational Gerontology 330.

52 De Vaus (n 48).

53 Postigo and Honrubia (n 51).

54 ibid 346.

55 Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68.

56 Field (n 50) 104.

57 Herd (2002a) (n 3).

58 The Committee Report (n 16) 136; Field (n 50) 105; Herd (2002b) (n 3) 24.

scenario), and is usually associated with the promise that the adult child will care for their older parent(s) for life.[59]

Although evidence suggests that older people are living alone,[60] the need for older people to live with their family members for care and assistance is increasing,[61] which is challenging the traditional concepts of living arrangements of families. Recent research indicates that adult children are the most common providers of care when care needs become 'greatest', with 3 in 10 people aged 85 years and over receiving informal care from their children.[62] This correlates with Pickard et al's research that by 2031, 400,000 more older people aged 80 years and over will require care from their adult children than today.[63]

The dramatic shift in age structure of the population presents many challenges for governments.[64] Alarmingly, the House of Lords Select Committee on Public Service and

---

59 Herd (2002b) (n 3); Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

60 Liliana E. Pezzin, Robert A. Pollak and Barbara S. Schone, 'Efficiency in Family Bargaining: Living Arrangements and Caregiving Decisions of Adult Children and Disabled Elderly Parents' (2007) 53(1) CESifo Economic Studies 69, 70, citing Kotlikoff, L. and J. Morris, 'Why Don't the Elderly Live with Their Children? A New Look' (1990) in D. Wise, ed., *Issue in the Economics of Aging*, University of Chicago Press, Chicago, 149 - 169; United Nations (n 23) 38.

61 Postigo and Honrubia (n 51).

62 Office for National Statistics, 'Living longer: implications of childlessness among tomorrow's older population' (2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/ageing/articles/livinglonger/implicationsofchildlessnessamongtomorrowsolderpopulation> accessed on 13 January 2021.

63 Linda Pickard, Raphael Wittenberg, Adelina Comas-Herrera, Derek King and Juliette Malley, 'Care by Spouses, Care by Children: Projections of Informal Care for Older People in England to 2031' (2007) 6(3) Social Policy and Society 353.

64 Kulik et al (n 23) 929.

Demographic Change concluded that the UK Government is 'woefully underprepared' for the rapidly ageing population, noting that, 'Nothing like enough is being done to face up to these challenges.'[65] Moreover, it is commented that, 'Publicly funded care alone has never met all the needs of older people who are frail, vulnerable, ill or isolated.'[66] More recently, the King's Fund found that, 'The social care system in its current form is struggling to meet the needs of older people'.[67] Amidst this 'funding crisis',[68] government policies continue to encourage and support older people, and those with disabilities, to live in the community as they age rather than in institutional care.[69] In recognition of this, David De Vaus raises the question, 'Does the current policy reliance on families to provide care and support for older family members assume a society and set of values that no longer exists?'[70] In response to our 'inescapable demographic destiny',[71] and with the debate raging over how care for older people is to be financed,[72] the question of who will care for older people is significant[73] and needs to be carefully considered.

---

65 House of Lords Committee Report (n 41) 75.

66 ibid 14.

67 Richard Humphries, Ruth Thorlby, Holly Holder, Patrick Hall, and Anna Charles, 'Social care for older people: home truths' (The King's Fund and Nuffield Trust, London 2016) 3 <https://www.nuffieldtrust.org.uk/research/social-care-for-older-people-home-truths> accessed 22 April 2020.

68 ibid.

69 De Vaus (n 48).

70 ibid.

71 The Committee Report (n 16) ch 1, vii.

72 Herring (n 9) 723.

73 Alzheimer's Australia (n 2) 20.

1.6 FAMILY CARING

It is well understood that families are the main source of care and support for older people.[74] As Herring rightly argues, 'Care is at the centre of family life.'[75] In 1989, the UN General Assembly proclaimed 1994 as the International Year of the Family (**IYF**).[76] During the IYF, the UN noted:[77]

> In spite of the many changes that have altered their roles and functions, families continue to provide the natural framework for the emotional, financial and

---

74 Isabella Aboderin, ''Conditionality' and 'Limits' of Filial Obligation' Working Paper Number WP205 Conceptual Levers for Developing a Better Understanding of the Motivational Basis and Societal Shifts or Patterns in Old Age Family Support (2005) 2, citing Chen, S. and Adamchak, D.J. 1999. The effects of filial responsibility expectations on intergenerational exchanges in urban China. Hallym International Journal of Aging, 1, 58 – 68; Randel J., German, T. and Eqing, D. (eds) 1999. The Ageing and Development Report: Poverty, Independence and the World's Older People. Earthscan, London; United Nations 2002. Report of the Second World Assembly on Ageing. United Nations, New York; Daatland, S.O and Herlofson, K. 2003. 'Lost solidarity' or 'changes solidarity': a comparative European view of family solidarity. Ageing and Society, 23, 537 – 60; Hermalin, A. (ed) 2003. The Well-Being of the Elderly in Asia. A Four-Country Comparative Study. University of Michigan Press, Ann Arbor, MI; Means, R., Richards, S. and Smith, R. 2003. Community Care. Policy and Practice. 3rd Edition. Palgrave Macmillan, Basingstoke; Katz, R., Daatland, S.O., Lowenstein, A., Bazo, M.T., Ancizu, K., Herlofson, K., Mehlhausen-Hassoen, D. and Prilutzky, D. 2003. Family norms and preferences in intergenerational relations: a comparative perspective. In V.L. Bengston and A. Lowenstein (eds) Global Aging and Challenges to Families. New York: Aldine de Gruter, pp: 305 – 326.

75 Herring (n 1) 187.

76 United Nations Digital Library, 'International Year of the Family: resolution (1990) <https://digitallibrary.un.org/record/82451?ln=en> accessed 21 April 2020.

77 United Nations, 'Experiences Concerning Population and Development Strategies and Programmes' (1994) UN. Doc. A/CONF.171/4, 1994 [67] (emphasis added) <https://www.unfpa.org/sites/default/files/resource-pdf/A_CONF.171_4_Exp._Concerning_Pop._Dev.pdf> accessed 21 April 2020.

> material support essential to the growth and development of their members, particularly … for the care of other dependants, including the elderly, disabled and infirm. **The family in all its forms is the cornerstone of the world community**.

In anticipation of the IYF, the UN argued that, during the IYF, governments should give more consideration to enabling families to provide care and support to older people so as to enable them to remain in the community for as long as possible.[78] Currently, government policies encouraging older people to remain in the community as they age rely on family members to support and care for their older relatives that aged care services cannot meet.[79] Yet, as outlined in more detail below,[80] older parents are not allowed to employ their own children under the government 'cash-for-care' schemes, which is placing the burden of care work on the individual and/or the family.

It is rightly argued that caring relationships should be at the centre of family law.[81] Yet, the literature, and inexcusably the law, pays very little attention to the family,[82] ideas of care,[83] the relationship between an adult child and their older parent or the position of

---

78 The Parliament of the Commonwealth of Australia, Department of the Parliamentary Library, 'International Year of the Family 1994'(1993) 6 <http://www.aph.gov.au/binaries/library/pubs/bp/1993/93bp16.pdf> accessed 21 April 2020.

79 De Vaus (n 48) 16 - 17.

80 See Chapter 4, titled 'Direct Payment Schemes'.

81 Herring (n 1) 189, citing J Masson, 'Caring for our Future Generations' in G Douglas, *The Continuing Evolution of Family Law* (Jordans, 2009).

82 Pezzin et al (n 60) 72 - 73.

83 John Offer, 'Dead Theorists and Older People: Spencer, Idealist Social Thought and Divergent Prescriptions For Care' (2004) 38(5) Sociology 891.

older people in families.[84] Furthermore, there is limited research on the rights of the caregiving adult child under Family Agreements. As reliance on families to care for their older parent(s) increases, and government support diminishes,[85] there is an urgent need for (i) guidelines within a legal framework to support the many families who are entering into Family Agreements, and/or (ii) the common law to recognise and reflect family realities in relation to family caring.[86]

It is argued that '… supporting families to care … is not only a moral goal, but an economic one.'[87] It is observed that without family carers, health and social care systems would collapse.[88] In 2015, there was an estimated 2.86 million unpaid carers in Australia providing 1.9 billion hours of unpaid care, which had an estimated replacement value of $60.3 billion.[89] In the UK, there was an estimated 6.8 million people providing unpaid care in 2015, which saved the public purse £15.1 million per hour and had an economic value

84 Herring (n 1) 188.

85 De Vaus (n 48).

86 Alzheimer's Australia (n 2) 20.

87 Emily Holzhausen, 'News: Without carers, health and social systems would collapse' (NHS England 2015) <http://www.england.nhs.uk/2015/10/01/emily-holzhausen/> accessed 21 April 2020.

88 ibid; Carers UK (n 1) 6.

89 Deloitte Access Economic, 'The economic value of informal care in Australia in 2015' (Carers Australia, 2015) <http://www.carersaustralia.com.au/storage/Access%20Economics%20Report.pdf> accessed 21 April 2020.

of £132 billion.[90] Carers UK have reported that by 2037, nine million people are expected to be caring for an older or disabled loved one.[91]

As many older people wish to remain in the community as they age, it is observed that the majority of care provided by family members takes place in the context of co-residence of the older parent with their adult child.[92] In Australia, it is observed that out of the 8.2 per cent of older people living with relatives other than their spouse or partner, 6.9 per cent were likely to be living with one of their children.[93] Older people living with their adult child, as opposed to living with other relatives or a spouse or partner, are the most likely to need assistance with one or more of the core everyday activities of self-care, mobility and communication.[94] This demonstrates that an older person's choice about their living arrangements is influenced by their care needs.[95] Further, research has observed that the majority of older people living with their adult child are widowed.[96] Therefore, due to

---

90 Lisa Buckner and Sue Yeandle, 'Valuing Carers 2015: The rising value of carers' support' (Carers UK, 2015) <www.carersuk.org/for-professionals/policy/policy-library/valuing-carers-2015> accessed 21 April 2020.

91 Secretary of State for Health (n 34); Carers UK (n 1) 128.

92 Pezzin et al (n 60) 70.

93 Australian Bureau of Statistics, 'Reflecting a Nation: Stories from the 2011 Census, 2012-2013' (2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features602012-2013> accessed on 21 April 2020.

94 ibid.

95 ibid.

96 ibid.

higher life expectancy of women than men, co-residence with an adult child is a more common living arrangement for older women than men.[97]

It is also observed that caring for an older parent at home has many social, individual and economic benefits for both the older parent and the family.[98] Interestingly, co-residence of an older parent with their adult child has been linked to promoting the health of the older parent[99] and the adult child.[100] Further, Moon has observed that an older parent cared for in the home of an adult child had better health outcomes than those who were cared for in an institution.[101] In the majority of cases, family caring allows the older parent to exercise choice and control in relation to their care, which contributes to their (i) health,[102] (ii) well-being,[103] and (iii) quality of life.[104] Although the intangible rewards achieved through family care are said to be the impetus behind publicly funded social care

---

97 ibid.

98 Alzheimer's Australia (n 2) 21.

99 Pezzin et al (n 60) 70, citing Moon, M., 'The Role of the Family in the Economic Well-Being of the Elderly' (1983) 23 The Gerontologist 45.

100 Pezzin et al (n 60) 71.

101 ibid, citing Moon, M., 'The Role of the Family in the Economic Well-Being of the Elderly' (1983) 23 The Gerontologist 45.

102 ibid.

103 Caroline Glendinning, 'Increasing Choice and Control for Older and Disabled People: A Critical Review of New Developments in England' (2008) 42(5) Social Policy and Administration 451, 460, citing Witcher, S., Stalker, K., Roadburg, M. and Jones, C. (2000), *Direct Payments: The Impact on Choice and Control for Disabled People,* Edinburgh: Scottish Executive; Glendinning, C., Halliwell, S., Jacobs, S., Rummery, K. and Tyrer, J. (2000), *Buying Independence: Using Direct Payments to Integrate Health and Social Services*, Bristol: Policy Press.

104 Alzheimer's Australia (n 2) 21.

services,[105] government policies are '… remarkably silent on the extension of choice to … family carers.'[106] Similarly, literature on long-term care policies of disabled older people tend to ignore that older people are members of families[107] and pays very little attention to the Caring Relationship[108] or the position of older people in families.[109] It is commented that the, rather misleading, assumption underlying the policy shift of 'cash-for-care' schemes is that personal care budgets empower care receivers,[110] as they have greater control over whom they employ and under what terms.[111] However, the reality of the implementation of social care is that many older and disabled people find they have very limited choice over the person who provides their care services.[112] The apparent benefit of flexibility of personal care budgets is resulting in the older person being blamed for failing

---

105 Glendinning (n 103) 454, citing Glendinning, C. and Means, R. (2006), Personal social services: developments in adult social care. In L. Bauld, K. Clarke and T. Maltby (eds), *Social Policy Review 18: Analysis and Debate in Social Policy 2006*, Bristol: Policy Press, 15 - 32.

106 ibid 464, citing Arksey, H. and Glendinning, C. (2007), Choice in the context of informal care-giving, *Health and Social Care in the Community*, 12, 2: 165 - 75.

107 Pezzin et al (n 60) 72.

108 ibid 72 - 73.

109 Herring (n 1) 188.

110 Glendinning (n 103); Ellen Grootegoed, Trudie Knijn and Barbara Da Roit, 'Relatives as paid care-givers: how family carers experience payments for care' (2010) 30(3) Ageing and Society 467, 468, citing Ungerson, C. 2004. Whose empowerment and independence? A cross-national perspective on 'cash for care' schemes. *Ageing & Society*, 24, 2, 89 - 212.

111 Grootegoed et al (n 110) 468.

112 Glendinning (n 103) 456, citing Hardy, B., Young, R. and Wistow, G. (1999), Dimensions of choice in the assessment and care management process: the views of older people, carers and care managers, *Health and Social Care in the Community*, 7, 6: 483 - 91 and Parry-Jones, B. and Soulsby, J. (2001), Needs-led assessment: the challenges and the reality, *Health and Social Care in the Community*, 9, 6: 414 - 28.

to manage their care needs with the little money that is available to them,[113] particularly as '… the local authority cannot be blamed.'[114] It is therefore evident that the primary responsibility for care lies with the older person and their family rather than with the State.[115] These limitations on the construction of 'choice' illustrate that government policies do not recognise nor promote pervasive family values of care in allowing older people to choose their family as caregivers. Parry argues that the capacity to exercise choice and control is central to concepts of independence.[116] In this context, Barnes notes:

> Independence does not refer to someone who can do everything themselves … but indicates someone who is able to take control of their own life and to choose how that life should be led. It is a thought process not contingent upon physical abilities.[117]

In not recognising nor promoting the Caring Relationship, government policies are inadequately supporting adult children who choose to care for their older parent(s).

---

113 Luke Clements, 'Individual Budgets and Irrational Exuberance' (2008) 11 Community Care Law Review 413, citing I Ferguson, 'Increasing User Choice or Privatizing Risk? The Antinomies of Personalization' (2007) 37 British Journal of Social Work 387.

114 Herring (n 1) 133, citing I Ferguson, 'Increasing User Choice or Privatizing Risk? The Antinomies of Personalization' (2007) 37 *British Journal of Social Work* 387.

115 Herring (n 1) 133.

116 Glendinning (n 103) 460, citing Parry, J., Vegeris, S., Hudson, M., Barnes, H. and Taylor, R. (2004), *Independent Living in later Life: Research Review Carried out on Behalf of the Department of Work and Pensions,* Research Report 216, London: Department for Work and Pensions.

117 ibid 460, citing Barnes, C. (1991), *Disabled People in Britain: A Case for Anti-discrimination Legislation for Disabled People,* London: British Council of Organizations of Disabled People: 129.

Furthermore, the inability of older people to 'choose' their family as caregivers, whilst being supported by government policies, undermines older people's equality and rights as equal citizens.[118] Many commentators have argued for the shift from the notion of care towards attendant services,[119] with the aim to increase independence of the older person.[120] However, as Herring argues, no one can be truly independent.[121] Therefore, law and policy frameworks need to stop treating older people as solely independent individuals but seek to recognise, and promote, the Caring Relationship.

Further, the power imbalances, which are inherently entailed in the Caring Relationship, and the experience of the recipients of care, are often overlooked in the care literature.[122] As a consequence, little work has analysed interactions within the Caring Relationship. Julie Twigg's research on older people's experience of care does however highlight the vulnerabilities that arise within the relationship of care. She states that, 'It is hard to maintain adulthood or dignity in the face of being fed with a spoon, having your pads changed or your face and body washed.'[123] In Twigg's more recent work she notes,

---

118 ibid, citing Cabinet Office (2005), *Improving the Life Chances of Disabled People*, London: Cabinet Office Strategy Unit: 44 and Morris, J., (2006), Independent living: the role of the disability movement in the development of government policy. In C. Glendinning and P.A. Kemp (eds), *Cash and Care: Policy Challenges in the Welfare State*, Bristol: Policy Press, pp. 235 - 48: 245.

119 Jonathan Herring, 'The Disability Critique of Care' (2014) 8 Elder Law Review 1, 7.

120 ibid 7, citing Nick Watson et al, '(Inter)Dependence, Needs and Care: The Potential for Disability and Feminist Theorists to Develop an Emancipatory Model' (2010) 38 *Sociology* 221.

121 Herring (n 119) 13.

122 ibid 6.

123 Glendinning (n 103) 461, citing Twigg, J.(2000), *Bathing – The Body and Community Care*, London: Routledge: 45 - 6.

'Being naked in the face of someone who is not, contains a powerful dynamic of domination and vulnerability …'.[124] Herring comments, 'What is captured in these comments, but often lost in the ethics of care literature, is the way that caring for another can amount to an exercise of power.'[125] Glendinning comments that increasing the choice and control that older people have in relation to their care is crucial in redressing the vulnerabilities which exist.[126] As Vernon and Qureshi observe, the capacity to exercise choice and control over daily life is a social care outcome that is commonly desired by older people.[127]

With new pressures on adult children to care for their older parent(s),[128] is there a need for the law to enforce a positive obligation on adult children to care for their older parent(s), similar to filial responsibility laws?

1.7 FILIAL OBLIGATIONS

In many regions around the world, such as Singapore, China, the United States and Canada, adult children have a legal duty to care for their parents under filial responsibility laws.[129] These laws, also known as filial support laws, emanated from the Elizabethan Poor Laws

---

124 Herring (n 119) 6, citing Julia Twigg, 'Carework as a Form of Bodywork' (2000) 20 *Ageing and Society* 389.

125 ibid 6.

126 ibid.

127 ibid 461, citing Vernon, A. and Qureshi, H. (2000), Community care and independence: self-sufficiency or empowerment? *Critical Social Policy*, 20, 2: 255-76.

128 Herd (2002a) (n 3).

129 GHY Ting and J Woo, 'Elder care: is legislation of family responsibility the solution?' (2009) 4 Asian Journal of Gerontology & Geriatrics 72.

during the sixteenth century (the **Poor Laws**),[130] although the duty of children to support their parents can be traced back to the third century in Roman society.[131]

Under the Poor Laws, parents and their children were legally responsible for each other and indigent older parents were expected to live with their adult children.[132] Historically, a person was considered indigent if they were so poor that they must be supported at public expense.[133] This definition, however, expanded[134] to include people with limited income and other means to provide for their basic maintenance and care.[135] Today, it is argued that filial support obligations safeguard older people as they compel adult children to financially support their indigent older parents who are unable to provide for themselves.[136]

---

130 Elizabethan Act for the Relief of the Poor, 43 Eliz. 1, c. 2 (1601).

131 Jean Van Houtte and Jef Breda, 'Maintenance of the Aged by Their Adult Children: The Family as a Residual Agency in the Solution of Poverty in Belgium' (1978) 12(4) Law & Society Review 645.

132 Marje Bloy, 'The 1601 Elizabethan Poor Law' (The Victorian Web 2002) <http://www.victorianweb.org/history/poorlaw/elizpl.html> accessed 22 April 2020.

133 Allison E. Ross, 'Taking Care of Our Caretakers: Using filial responsibility laws to support the elderly beyond the government's assistance' (2008) 16 Elder Law Journal 167, 169, citing Katherine C. Pearson, *Re-thinking Filial Support Laws in a Time of Medicaid Cutbacks—Effect of Pennsylvania's Recodification of Colonial-Era Poor Laws*, 76 PA. B. ASS'N Q. 162, 166 (2005) at 166 (quoting Case of Rising, 29 York 146 (1915)).

134 ibid.

135 ibid 169, citing Matthew Pakula, A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly, 39 FAM. L.Q. 859, 863 (2005); Matthew Pakula, 'The Legal Responsibility of Adult Children to Care for Indigent Parents' (2005) 521 National Center for Policy Analysis <http://www.ncpathinktank.org/pub/ba521> accessed 22 April 2020.

136 ibid.

In response to the rapidly ageing population, it is argued that legislation compelling the performance of filial obligations should be investigated in Australia.[137] Herd commented that '… we need to visit, as a seminal issue in relation to our demographic destiny, the duty of family to care for family along the lines of the American provision.'[138] The current filial support laws in the United States and Canada emanated from the Poor Laws in response to the difficulty of providing for the older members of the population.[139] The California Family Code provides:

> Except as otherwise provided by law, an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work.[140]
>
> The promise of an adult child to pay for necessaries previously furnished to a parent described in Section 4400 is binding.[141]

Further:

---

137 Commonwealth of Australia, Official Committee Hansard (n 4) 4 per Herd.

138 ibid.

139 Lucinda Ferguson, 'The Parental Support Obligation' contribution to Nicholas Bala, Martha Shaffer, Lucinda Ferguson, 'Family Law for the Older Canadian' in Ann Soden (ed), *Advising the Older Client* (Toronto, Ont.: Butterworths 2005) 1, citing James Snell, 'Filial Responsibility Laws in Canada: An Historical Study' (1990) 9 Canadian Journal on Aging 268, 269.

140 California Family Code, s 4400.

141 ibid s 4401.

> A parent, or the county on behalf of the parent, may bring an action against the child to enforce the duty of support under this part.[142]

In 1948, England repealed its filial support laws.[143] As a result, no such law exists in the UK. The only comparable legislative provision in Australia that bears any resemblance to the Californian Family Code exists under the Criminal Code 1899 (Qld) (**Criminal Code**),[144] which provides:

> It is the duty of every person **having charge of another** who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the **necessaries of life**, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.[145]

---

142 ibid s 4403.

143 National Assistance Act, 1948, 11 & 12 Geo. 6, c. 29.

144 Commonwealth of Australia, Official Committee Hansard (n 4) 4 per Herd; The Committee Report (n 16) ch 4 [4.65]; Louise Kyle, 'Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7(4) Elder Law Review 1.

145 Criminal Code, s 285 (emphasis added).

This provision is notably narrower than the relevant provisions of the Californian Family Code as it is not drafted specifically in relation to the parent/adult child relationship.[146] Therefore, it has only ever been applied to the parent/minor child relationship,[147] presumably because the duty only arises when the person has 'charge of another'.[148] Similarly, unlike the laws that impose responsibilities on parents to care for their children,[149] there is no clear equivalent legal responsibilities on adult children to care for their older parents.[150] This lacuna in the law clearly demonstrates that family caring is not an idea embraced by the law,[151] particularly the Caring Relationship.

In response to the rapidly ageing population, the position of older people within families is an important aspect of the law, and raises the question: to what extent (if at all) should adult children be legally required to care for their older parent(s)?[152] Ferguson has suggested that this little known, and under used, area of law may become fertile ground for governments seeking to recover the cost of caring for other people's older relatives,[153] particularly as there is an increased amount of older people with quality of life

---

146 The Committee Report (n 16) ch 4 [4.66].

147 Commonwealth of Australia, Official Committee Hansard (n 4) 4 per Herd.

148 Criminal Code, s 285(1).

149 ibid s 286(1); Herring (n 9) 723, citing Child Support Act.

150 Herring (n 50) 704, citing Herring (2008d) *Older Together forever? The rights and responsibilities of adult children and their parents* in J. Bridgeman, H. Keating, and C. Lind, (eds) *Current Legal Problems*, Oxford: OUP; Alison Brammer, 'Elder Abuse in the UK: A New Jurisdiction?' (1997) 8(2) Journal of Elder Abuse & Neglect 33, 43.

151 Commonwealth of Australia, Official Committee Hansard (n 4) 4 per Herd.

152 Herring (n 50) 732.

153 Ferguson (n 139).

expectations.[154] However, filial support laws are viewed as archaic and not suitable for enforcement in contemporary societies that have assumed public responsibility for the care of its indigent elderly.[155] Many legal commentators have encouraged the repeal of all remaining filial support laws because the laws are '… destructive to families, distasteful, ineffective, and unconstitutional.'[156] Herring argues strongly against creating legally enforceable obligations on adult children to support their older parents however notes that the law can '… uphold, bolster or reinforce the obligation in other ways, free of direct enforcement.'[157] Herring argues that a preferable response is for the law to offer benefits or advantages to those family members who fulfil their care obligations,[158] which in turn would encourage family members to perform practical or undertake financial aid for their

---

154 Israel Doron and Ann M. Soden, *Beyond Elder Law: New Directions in Law and Aging* (Springer-Verlag Berlin Heidelberg 2012).

155 Terrance A. Kline, 'A Rational Role for Filial Responsibility Laws in Modern Society?' (1992) 26(3) Family Law Quarterly 195, 196, citing George Indest, *Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes,* 15 S.U.L. Rev. .225 (1988); Renae Patrick, *Honor Thy Father and Mother: Paying the Medical Bills of Elderly Parents,* 19 U. Rich. L. Rev. 69 (1984); David Thomson, *"l am Not my father's keeper": Families and the Elderly in Nineteenth Century England,* 2 Law & Hist. Rev. 265 (1984); and Leo Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition,* 5 Fam. L. Q. 32 (1971).

156 ibid.

157 Jonathan Herring, 'Together Forever? The Rights and Responsibilities of Adult Children and their Parents' in Jo Bridgeman, Heather Keating and Craig Lind, Responsibility (eds), *Law and the Family* (Ashgate Publishing Group 2008).

158 ibid.

older parents.[159] One example of such benefits is tax concessions.[160] Herring has suggested that 'A tax credit similar to that available to those caring for children could be offered to those caring for relatives in need'.[161] Similarly, Herd argued that 'children who take on the caring role should receive some tax recognition and concessions'.[162]

Despite recommending '… that the Australian Institute of Family Studies investigate the desirability and feasibility of implementing legislation in Australia compelling the performance of filial obligations',[163] the Committee concluded that legislating to compel right conduct, particularly in the context of familial relationships, is problematic,[164] arguing '… such legislation would not be effectual or appropriate in Australia.'[165] Ultimately, the Australian Government did not accept the Committee's recommendation to further investigate the implementation of filial support laws in Australia[166] and as such, no filial support obligations exist in Queensland.

Although no filial support obligations exist in the UK and Australia, Alzheimer's Australia comment that, '… the term "Family Agreement" is a way of formalizing filial

---

159 ibid 56, citing Wise, K. (2002), 'Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly', *New York University Journal of Legislation and Public Policy* 5, 563 - 98.

160 ibid. See also Herd (2002a) (n 3), Herd (2002b) (n 3) and Commonwealth of Australia, Official Committee Hansard (n 4) 5 per Herd.

161 Herring (n 157) 56.

162 Herd (2002a) (n 3); Commonwealth of Australia, Official Committee Hansard (n 4) (n 4), 5 per Herd.

163 The Committee Report (n 16) ch 4 [4.69].

164 ibid [4.68].

165 ibid.

166 The Government's Response (n 17) 23.

obligation in western culture where the responsibility of caring for older parents has moved away from the obligation to do so.'[167]

Aside from whether adult children have a legal duty to support their older parent(s), it is argued that adult children have a moral obligation to provide care for their older and/or infirmed parent(s).[168] Although there are a number of ways this moral obligation could be established,[169] it is typically established on a norm of reciprocity;[170] whereby adult children have a responsibility to care for their older parent(s) in return for, or 'repayment' of, the parental care they received during childhood.[171]

---

167 Alzheimer's Australia (n 2) 20.

168 Herring (n 9) 723.

169 ibid.

170 Maria C. Stuifbergen, Johannes J. M. Van Delden, 'Filial obligations to elderly parents: a duty to care?' (2011) 14 Medicine, Health Care and Philosophy 63, 64, citing Blieszner, R., and RR. Hamon. 1992. Filial responsibility: attitudes, motivators, and behaviors. In *Gender, families, and elder care. Sage focus editions,* vol. 138, ed. J.W. Dwyer, and R.T. Coward, 105 – 119. Thousand Oaks, CA, US: Sage Publications Inc.and Dykstra, P.A., and T. Fokkema. 2007. Personal norms of care: willingness to give and willingness to receive. In Blijvend in balans. Een toekomstverkenning van informele zorg, ed. De Boer A. and Timmermans J. M. Den Haag: Sociaal en Cultureel Planbureau.

171 Aboderin (n 74), citing Daniels, N. 1988. *Am I My Parents Keeper?: An Essay on Justice Between the Young and the Old.* Oxford University Press New York; Finch, J. and Mason, J. 1993. *Negotiating Family Responsibilities.* Routledge, London; Choi, S.-J. 2001. Changing attitudes to and promotion of filial piety in modern Korean society. *Paper presented at the 17th conference of the International Association of Gerontology (IAG),* Vancouver, Canada, 1 – 6 July 2011.

1.8 RECIPROCITY

The reciprocal nature of a child's duty to their older parent(s) is encapsulated, and clearly expressed, in the following Ghanaian proverb, 'If your parents look after you when you cut your teeth you must look after them when they are losing theirs.'[172] The phenomenon of families caring for their older relatives is not a new concept;[173] it goes back to what has always been a traditional obligation.[174] The moral obligation to support one's parents is rooted in Eastern, Roman and Biblical laws.[175] Traditionally, societies supported older people via a system of intergenerational reciprocity, whereby adults provided for their young children, and, when those children grew up, they cared for their older parents.[176] From 1950 onwards, women, who were traditionally the main caregivers,[177] increasingly engaged in employment outside the home.[178] This shift away from family care challenged the viability of traditional intergenerational reciprocity, which encouraged the further

---

172 ibid, citing Nukunya, 1992; Apt, N.A. 1996. *Coping With Old Age in a Changing Africa*. Avebury, Aldershot; Gyekye, 1996.

173 Herd (2002a) (n 3).

174 Commonwealth of Australia, Official Committee Hansard (n 4) 5 per Slipper.

175 Allison E. Ross, 'Taking Care of Our Caretakers: Using filial responsibility laws to support the elderly beyond the government's assistance' (2008) 16 Elder Law Journal 167, 172.

176 Kulik et al (n 23).

177 Australian Bureau of Statistics, 'Disability, Ageing and Carers, Australia: Summary of Findings, 2009' (2010) <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4430.0Main%20Features22009?opendocument&tabname=Summary&prodno=4430.0&issue=2009&num=&view> accessed 22 April 2020; Joshua C. Tate, 'Caregiving and the Case for Testamentary Freedom' (2008) 42 University of California, Davis Law Review 129, 135.

178 Herd (2002a) (n 3); Herd (2002b) (n 3).

development of aged care facilities.[179] However, currently, limited available places in aged care facilities is placing new pressures on families to provide care for their older relatives that aged care services cannot meet.[180]

1.9 THE GENESIS OF THE FAMILY AGREEMENT

Today, however, many adult children are highly leveraged with little savings to afford to reduce their working hours to care for their older parent(s).[181] Therefore, unless the older parent assumes responsibility for some of the liabilities incurred by the adult child in relation to their care, this dependency is likely to be '… an intolerable financial burden on younger generations …'.[182] Moreover, research has observed that payment in return for care is, '… crucial for the material wellbeing of the care-giver.'[183] In observance of this, it is argued that uncompensated care is unrealistic and will, therefore, be replaced with the notion of compensated caring.[184] For older people, this is often achieved through the payment of money or the transferring of assets to their children during their lifetime[185] in return for the promise that they will be cared for.[186] Herd comments this is the genesis of

---

179 ibid.

180 ibid; De Vaus (n 48).

181 Herd (2002a) (n 3) 73; Lewis (n 7).

182 Burns (n 49) 302.

183 Grootegoed et al (n 110) 478.

184 Herd (2002b) (n 3); the BCLI Committee Report (n 6) 8.

185 Monro (n 55) 69.

186 Damien Carrick, ABC Radio National, 'Law Report: Elderly People and the Law' (2003) <http://www.abc.net.au/radionational/programs/lawreport/elderly-people-and-the-law/3545598#transcript> accessed 22 April 2020.

the Family Agreement, which is '… the transformation of a cultural duty into a compensatable, contractual obligation of care.'[187]

[187] Herd (2002b) (n 3).

2. FAMILY AGREEMENTS

For many people, the contractualisation of care is 'anathema',[188] and the idea of an older parent paying their adult child for care is 'distasteful'.[189] As the Queensland Office of the Public Advocate observed, 'For many families there is a psychological barrier to formalising care arrangements in a legally binding contract around a family care arrangement where trust is thought to be sufficient.'[190] Due to the natural reluctance of families to formalise intimate relationships in a written contract,[191] the majority of people are not engaging with the law when entering into a Family Agreement.[192] This reluctance is, as Reece comments, 'optimism bias' which Weinstein succinctly regards as, '… a cognitive error … which prevents people from realizing, and, therefore, preparing for the objective risks of external threats such as relationship breakdown.'[193] Therefore,

---

188 Brian Herd, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23.

189 Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72, 73.

190 Office of the Public Advocate Submission, The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law Submissions' 8 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

191 British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, 'Private Care Agreements Between Older Adults and Friends of Family Members' Report No. 18 (2002) (the BCLI Committee Report) 24 <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020; Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68, 71.

192 Monro (n 191).

193 Helen Reece, 'Leaping Without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 121, citing Weinstein, N.D. and

persuading family members to enter into Family Agreements may, as Reece suggests, '… dent unrealistic optimism …' which, in turn, will have a negative impact on familial relationships and cause them to fail.[194] Eekelaar notes the deeper concern is that, '… if we attach legal obligations to selfless relationships then there is a danger that these relationships will become polluted with people using friendship for personal or material advantage.'[195] As Herring notes, the joy of intimate relationships is that they are law free governed only by '… love, trust and care.'[196] Although legal interventions, such as Family Agreements, may misplace these virtues, it is argued that there are dangers associated with not doing so.[197]

The dramatic shift in the age structure of the population, coupled with the increased reliance on adult children to care for their older parent(s), is altering existing patterns of asset transfer.[198] As a result, more gifts of property are being transferred between older parents and their adult children,[199] particularly as older parents are financially

---

Klein, W.M. (1995) 'Resistance of personal risk perceptions to debiasing interventions', *Health Psychology*, 14: 132.

194 ibid 124.

195 Jonathan Herring, *Caring and the Law* (Hart Publishing 2013) 195, citing J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2006).

196 Herring (n 195) 195.

197 ibid 196; Reece (n 193) 124.

198 Misa Izuhara, 'Residential Property, Cultural Practices and the 'Generational Contract' in England and Japan' (2005) 29(2) International Journal of Urban and Regional Research 327, 328.

199 Emily Knowles and Jane Knowler, 'The Presumption of Undue Influence: Elderly Parents, their Adult Children and Transactions Between Them' (2014) 22 Restitution Law Review 35, 36, citing Fiona R Burns, 'Legally Regulating Intergenerationally Transmitted Debt' (2005) 24 *Australasian Journal on Ageing* S46; Tina Cockburn and Barbara Hamilton, 'Equitable remedies for elder financial abuse in inter vivos

compensating their caregiving adult children 'on the spot' for their care, rather than letting them accumulate any advantage and passing it on to them at death.[200] Family Agreements are therefore challenging the cultural aversion[201] against cash-for-care schemes[202] whilst altering preconceived ideas of property transfer within the family.[203] With new pressures on adult children to retain the caring role for their older parents,[204] Family Agreements are increasingly being entered into.[205] Therefore, the question arises: how (if at all) is the law coping with this trend?

transactions' (2011) 31(2) The Queensland Lawyer 1; Fiona R Burns, 'The elderly and undue influence inter vivos' (2003) 23 Legal Studies 251, 251 – 254.

200 Misa Izuhara, 'Negotiating Family Support? The 'Generational Contract' between long-term Care and Inheritance' (2004) 33(4) Journal of Social Policy 649, 659 – 60.

201 Herd (2002b) (n 188).

202 Ellen Grootegoed, Trudie Knijn and Barbara Da Roit, 'Relatives as paid care-givers: how family carers experience payments for care' (2010) 30(3) Ageing and Society 467, 468, citing Ungerson, C. 2004. Whose empowerment and independence? A cross-national perspective on 'cash for care' schemes. *Ageing & Society*, 24, 2, 89 - 212.

203 Izuhara (n 198).

204 Herd (2002a) (n 189).

205 Herd (2002a) (n 189); Law Institute of Victoria, Submission (n 190) 5; Human Rights and Equal Opportunity Commission (HREOC) Submission (n 190) 35; COTA Over 50s Submission (n 190) 12.

2.1. WHAT ARE FAMILY AGREEMENTS?

Family Agreements are said to be '… one of the great social, legal and economic issues of the future.'[206] Yet, there is no specific legislation governing them,[207] there is little written about them, and there is limited information to guide families wishing to enter into Family Agreements.[208] As outlined above, Family Agreements take many forms. They are also known as family care agreements, private care agreements, personal service contracts and lifetime contracts.[209] The Australian House of Representatives Standing Committee on Legal and Constitutional Affairs (the **Committee**) described Family Agreements as:

> … an arrangement between an older person and another party or parties (usually family members or carers) whereby the older person provides a benefit

---

206 Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (16 July 2007) Brisbane 3 per Herd <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10368/toc_pdf/5569-1.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10368/0000%22> accessed 21 April 2020.

207 The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.16], citing Queensland Attorney-General Submission (n 190) 5; Victorian Government Submission (n 190) 30 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

208 Alzheimer's Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) 20 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

209 ibid; Herd (2002a) (n 189); Herd (2002b) (n 188); National Seniors Association Submission (n 190) 11; Office of the Public Advocate Submission (n 190) 8; HREOC Submission (n 190) 34.

> to the other party in exchange for continuing or lifelong care. The benefit can take various forms, for example a transfer of property or a compensatory payment.[210]

Typically, Family Agreements are made between an older parent and their adult child,[211] particularly daughters, as they are the main source of care for older people.[212] Although the 'benefit' can take a number of forms, it usually involves an older person transferring their home to their adult child in exchange for a promise of long-term care.[213] Herd has identified a number of factors that have contributed to the existence of Family Agreements. These are:

- a general aversion to 'institutional' residential aged care;
- limited access to residential aged care places;

---

210 The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.2] <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

211 Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths 2004) 260.

212 Linda Pickard, 'A growing care gap? The supply of unpaid care for older people by their adult children in England to 2032' (2015) 35(1) Ageing and Society 96.

213 Herd (2002a) (n 189); Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1, 24.

- a preference by older people and their families to remain in the community and have a choice in terms of how and who provides them with care;

- difficulties accessing community care;

- the ageing population and an increased number of older people living with disabilities;

- a desire by older people to preserve their assets, in particular the family home, for future generations and a consequent reluctance to sell the family home so as to pay an accommodation bond or similar for an aged care place or to pay for community based care; and

- high levels of workforce participation and high debts (particularly mortgages) among adult children which may make it difficult for them to give up their job or cut back on their hours of work in order to carry out care for parents.[214]

Due to their private nature,[215] there is little statistical or empirical evidence of families systematically formalising or documenting Family Agreements.[216] However, anecdotal evidence suggests that families are undoubtedly entering into Family Agreements,[217] albeit

---

214 HREOC Submission (n 190) 34 - 35; Law Institute of Victoria Submission (n 190) 5.

215 Monro (n 191).

216 Herd (2002a) (n 189) 74; Office of the Public Advocate Submission (n 190) 8.

217 Alzheimer's Australia (n 208) 21; Herd (2002a) (n 189) 74; Herd (2002b) (n 188) 2; The Committee Report (n 210) ch 4 [4.9], [4.10].

on an informal or oral basis.[218] In response to the dramatic shift in age structure of the population, and the strong preference of older people to remain in a familial and familiar environment as they age, usage rates of Family Agreements will increase.[219]

2.2. THE GRANNY FLAT SCENARIO

One common derivative of Family Agreements is the granny flat scenario,[220] which, as discussed above,[221] involves an older person using their life savings, or the proceeds from the sale of their previous home, to build a self-contained residence on their adult child's property,[222] and is usually in exchange for a promise of 'care for life'.[223] In some instances, the adult child may persuade their older parent(s) to sell their home, which, in many cases, is their main asset,[224] and contribute the sale proceeds to a larger home purchased together with the adult child for everyone to reside. In the granny flat scenario, it is common for the title of the main property to remain in the name of the adult child,[225] despite the, often significant, financial contribution of the older parent(s). As Field rightly comments, 'The problems associated with the transfer of money, without an associated transfer of title, are

---

218 Alzheimer's Australia (n 208) 21; Herd (2002a) (n 189) 74; Herd (2002b) (n 188) 26; Monro (n 191); Hall (n 213) 2.

219 The Committee Report (n 210) ch 4 [4.9].

220 Herd (2002b) (n 188) 24; The Committee Report (n 210) ch 4 [4.5].

221 See text to (n 58) above under section 2.1 'Living Arrangement of Older People', Chapter 2.

222 The Committee Report (n 210) ch 4 [4.5].

223 Herd (2002a) (n 189); Herd (2002b) (n 188); Sue Field, 'Issues Facing Older Australians: Legal, Financial and Societal' (2005) 1 Journal of International Aging Law and Policy 95, 104; Hall (n 213).

224 Field (n 223) 103.

225 ibid 104.

all too obvious.'[226] For example, what happens if the Caring Relationship breaks down or if the adult child gets a divorce? In many instances, the older parent is left vulnerable with no money to seek legal recourse to get their money back, which is further complicated by the precarious legal framework regulating Family Agreements that involves legal issues including, but not limited to, contract law, property law, equity and trusts. Further, as outlined in more detail below, hidden amongst the law is, often conflicting, legal presumptions that shift the onus on the older parent to uphold the validity of the Family Agreement and/or the transfer(s) made under it. As explained in more detail below, these presumptions can be disadvantageous for the caregiving adult child in circumstances where they have been appointed as an attorney under an enduring power of attorney and the transfer(s) under a Family Agreement occur within the exercise of that power.

The State Trustees Ltd noted that Family Agreements '… are an area of considerable risk to older people; they can result in significant depletion of the older person's assets for minimal tangible benefit.'[227] Despite being 'best intention' agreements,[228] there is significant potential for Family Agreements to degenerate into abusive relationships[229] with virtually no practical avenue for redress.[230] In the event that the Caring Relationship breaks down, the older parent is likely to lose their entire savings with the subsequent breakdown

---

226 ibid.

227 State Trustees Ltd Submission (n 190) 12.

228 Monro (n 191); Field (n 223) 104; Victorian Government Submission (n 190) 29.

229 The Committee Report (n 210) ch 4 [4.27], citing Victorian Government Submission (n 190) 29; the BCLI Committee Report (n 191) 9.

230 Scott Johnson, 'Elder Abuse: The Need for Law Reform Enduring Powers of Attorney & Family Agreements' (2010).

of the Caring Relationship being inevitably irreparable.[231] Ironically, despite the considerable risk of elder abuse associated with Family Agreements, the Queensland Office of the Public Advocate argues that Family Agreements, '… are an important safeguard for older people who may have invested their life savings into the building of a granny flat of a family member's home in exchange for services to be provided by the family.'[232] Contrastingly, the Committee commented, 'The potentially disastrous consequences that can be suffered by parties to Family Agreements due to uncertainty, dispute or abuse warrant some form of regulation, particularly if the use of Family Agreements increases in the future.'[233]

2.3. ELDER ABUSE

There is no standard definition of elder abuse[234] nor is it a term that is recognised by law.[235] One definition of elder abuse, which this thesis adopts, was established by Action on Elder Abuse (UK) to mean, '… a single or repeated act, or lack of appropriate action, occurring within any relationship *where there is an expectation of trust* which causes harm or distress to an older person.'[236] Unlike other definitions of elder abuse, this definition is more

---

231 Field (n 223) 104.

232 Office of the Public Advocate Submission (n 190) 8.

233 The Committee Report (n 210) ch 4 [4.40].

234 House of Commons Health Committee, 'Elder Abuse: Second Report of Session 2003-04 Volume 1' (2004) 7 <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhealth/111/111.pdf> accessed 22 April 2020.

235 Alison Brammer, 'Elder Abuse in the UK: A New Jurisdiction?' (1997) 8(2) Journal of Elder Abuse & Neglect 33, 43.

236 World Health Organization (WHO), 'A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem

worthy of consideration as it explicitly recognises a relationship where there is an expectation of trust, which is recognised as being at the core of Family Agreements.[237] Abuse can include physical, sexual, financial, psychological, and social and/or neglect.[238] Research suggests that financial abuse is the most commonly reported form of abuse of older people.[239] Disturbingly, it is the older person's *trusted* adult child who is the main

Worldwide: Main Report' (2008) 6 <http://www.who.int/ageing/publications/ELDER_DocAugust08.pdf> accessed 22 April 2020 (emphasis added).

237 Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 Reform 29; Hall (n 213); Louise Kyle, 'Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7(4) Elder Law Review 1, 25.

238 Dale Bagshaw, Sarah Wendt, Lana Zannettino and Valerie Adams, 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' (2013) 66(1) Australian Social Work 86, 88, citing Australian Network for the Prevention of Elder Abuse. [ANPEA]. (2007). *ANPEA Brochure.* Retrieved December 20, 2010, from http://www.agedrights.asn.au/pdf/ANPEA%20Brochure%20June%2007.pdf.

239 ibid.

perpetrator of such abuse.[240] Significantly, it is observed that elder abuse frequently occurs within relationships of care.[241]

2.4. FINANCIAL ELDER ABUSE

Despite financial abuse being the most commonly reported form of abuse of older people,[242] there are currently no laws dealing specifically with financial elder abuse[243] and thus no statutory definition exists.[244] As a consequence, the definition of financial abuse

---

240 ibid 87, citing Brill, D. (1999, October 21 – 22). *Safeguarding the financial interests of vulnerable seniors.* Paper presented at the 7th National Guardianship & Administration Conference, Wesley Conference Centre, Sydney, Australia. Office of the public Advocate WA; Cripps, D. (2011). Rights focused advocacy and elder abuse. *Australasian Journal on Ageing, 20,* 1, 17 – 22; Boldy, D., Webb, M., Horner, B., Davey, M., & Kingley, B. (2002). *Elder abuse in Western Australia: Report of a survey conducted for the Department for Community Development – Seniors Interest.* Perth, WA: Freemasons Centre for Research Into Aged Care Services, Curtin University of Technology, Division of Health Sciences; Faye, B., & Sellick, M. (2003). *Advocare's speak out survey "SOS" on elder abuse.* Perth; Abuse Prevention Program Advocare Inc, WA; James, M., & Graycare, A. (2000). *Preventing crime against older Australians,* research and Public Policy Series, No. 32. Canberra, ACT: Australian Institute of Criminology; James, M., Graycare, A,, & Mayher, O. (2003) *A safe and secure environment for older Australians,* Research and Public Policy Series, No. 51. Canberra, ACT: Australian Institute of Criminology; Tina Cockburn and Barbara Hamilton, 'Equitable remedies for elder financial abuse in inter vivos transactions' (2011) 31(2) The Queensland Lawyer 1, citing Robinson, Setturlund, Wilson, Tilse, Rosenman "Financial Abuse within families: Views from Family Members and Professionals" paper presented to Australian Institute of Family Studies Conference Melbourne February 2003; cited by A Lyons 'Enduring Powers of Attorney – Common Problems and Emerging Issues' page 12 fn 8, paper presented to Queensland Law Society Succession Law Conference, Brisbane, October 2004.

241 Cockburn and Hamilton (n 240) 1.

242 Bagshaw et al (n 238).

243 The Committee Report (n 210) ch 2 [2.13].

244 Assets and Ageing Research Team Submission (n 190) 2.

has had to evolve from the literature,[245] which has inevitably resulted in ambiguous and inconsistent interpretations. Callahan argues that a lack of a common and legally authoritative definition of financial abuse has served as an excuse for inaction,[246] particularly as it is difficult to recognise a problem that is not adequately defined.[247] It has been observed that '… operationalising the definition has been a major stumbling block for both researchers and the legal fraternity.'[248] Therefore, it is argued that a widely accepted working definition of financial abuse is crucial to adequately protect older people from financial abuse.[249] Defining this multifaceted, under researched, area of law is further complicated by the diversification of the financial norms of families.[250] As the Victorian Government commented, 'What may be seen as a normal transaction or course of events within one family may be considered abuse by another.'[251]

Despite these difficulties, many agencies have developed working definitions of financial abuse.[252] One commonly accepted definition of financial abuse is that of the World Health Organisation (**WHO**), which defines financial abuse as, '… the illegal or

---

245 Assets and Ageing Research Team Submission (n 190).

246 James J. Callahan, 'Elder Abuse: Some Questions for Policymakers' (1988) 28(4) The Gerontological Society of America 453.

247 Susan Kurrle, 'Elder Abuse' (2004) 33(1) Australian Family Physician 807.

248 Professor Peteris Darzins, Dr Georgia Lowndes, Dr Jo Wainer, Ms Kei Owada and Ms Tijana Mihaljic, *Financial Abuse of Elders: A Review of the Evidence* (Melbourne, Monash University 2009) 9 <https://www.statetrustees.com.au/wp-content/uploads/2015/05/Financial-elder-abuse-report-1-review-of-evidence.pdf> accessed 22 April 2020.

249 Kurrle (n 247).

250 The Committee Report (n 210) ch 2 [2.11].

251 ibid, citing Victorian Government Submission (n 190) 18.

252 Darzins et al (n 248) 7.

improper exploitation or use of funds or resources of the older person.'[253] An extension of this definition, which this thesis adopts, defines financial abuse as the '… illegal or improper use of a person's finances or property by another person with *whom they have a relationship implying trust*.'[254] Similar to the justification for the definition of elder abuse, this definition of financial abuse is more worthy of consideration as it recognises a relationship implying trust, which is recognised as being at the core of Family Agreements.[255]

On 29 December 2015, section 76 of the Serious Crime Act 2015 (UK) came into force, which created a new offence relating to controlling or coercive behaviour in an intimate or family relationship. The Statutory Guidance published by the Home Office pursuant to section 77(1) of the Serious Crime Act 2015 identified examples of the types of behaviour associated with coercion and control. One of these examples was, 'financial abuse including control of finances, such as only allowing a person a punitive allowance'.[256] Recently, Hayden J commented that this example is one that is, sadly, seen

---

253 WHO/INPEA, 'Missing voices: views of older persons on elder abuse' (Geneva, WHO, 2002) <http://apps.who.int/iris/bitstream/10665/67371/1/WHO_NMH_VIP_02.1.pdf> accessed 22 April 2020.

254 Green Taylor Partners, 'Elder Abuse – Can you Recognise the Signs?' (2017) <https://greentaylor.com.au/blog/elder-abuse-can-recognise-signs/> accessed 22 April 2020, citing the definition of the Elder Abuse Prevention Unit (emphasis added).

255 Hall (n 237); Hall (n 213); Kyle (n 237).

256 Home Office, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf> accessed 14 January 2021.

with some frequency by those concerned with the welfare of vulnerable adults.[257] For this provision to apply to the Caring Relationship, the parties must be living together and members of the same family.[258]

On 17 February 2021, the Queensland Government announced that an independent taskforce, led by former Court of Appeal judge, the Honourable Margaret McMurdo AC, will consult on similar legislation in Queensland.[259] Although it is not yet known whether new offences will be created, it is a significant step in the right direction of ameliorating abuse within familial relationships.

2.5. PREVALENCE OF FINANCIAL ELDER ABUSE

Financial abuse is 'an extremely hidden topic'.[260] As Gary Fitzgerald rightly notes, 'The voice of older people is rarely heard by those who have a responsibility for commissioning, regulating and inspecting services.'[261] Because the majority of financial abuse occurs behind closed doors,[262] in people's own homes,[263] the prevalence of financial abuse of older

---

257 *A County Council v LW & Anor* [2020] EWCOP 50 [21]. See also *F v M* [2021] EWFC 4 [60].

258 Serious Crime Act 2015, s 76(2).

259 Queensland Government, 'The Queensland Cabinet and Ministerial Directory: Former Court of Appeal judge to lead taskforce into coercive control' (February 2021) <https://statements.qld.gov.au/statements/91494> accessed on 18 February 2021.

260 House of Commons Health Committee (n 234) 6, citing Tessa Harding, Senior Policy Adviser for Help the Aged.

261 House of Commons Health Committee (n 234) 1, citing Gary Fitzgerald.

262 House of Commons Health Committee (n 234) 14.

263 ibid, citing Gary Fitzgerald.

people is difficult to quantify.[264] Further, due to the stigma and shame that is associated with financial abuse,[265] many older people are unable, frightened and/or embarrassed to report it.[266] As a consequence, evidence of financial abuse is hard to obtain.[267] Further, in the absence of mandatory reporting obligations in Australia, the prevalence of financial abuse is impossible to determine.[268] In observance of this, many experts have called for more research to measure the prevalence of financial abuse of older people.[269]

---

264 House of Commons Health Committee (n 234) 9; Darzins et al (n 248) 16.

265 Dale Bagshaw, Sarah Wendt and Lana Zannettino, 'Preventing the Abuse of Older People by their Family Members' Stakeholder Paper 7, Domestic Violence Clearing House (2009) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.843.2682&rep=rep1&type=pdf> accessed 22 April 2020.

266 Cockburn and Hamilton (n 199); House of Commons Health Committee (n 234) 3l.

267 House of Commons Health Committee (n 234) 9.

268 Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) Journal of Adult Protection 20, 23, citing, Smith RG (1999) *Fraud and financial abuse of older persons. (Trends and issues in crime and criminal justice no. 132)* Canberra. ACT: Australian Institute of Criminology.

269 Darzins et al (n 248) 5, citing O'Keefe, M., Hills, A., Doyle, M., McCreadie, C., Scholes, S., Constantine, R., Tinker, A., Manthorpe, J., Biggs, S. and Erens, B. (2007) *UK study of abuse and neglect of older people: Prevalence survey report.* London: National Centre for Social Research and King's College London; Bavel, M.V., Janssens, K. Schakenraad, W. and Thurlings, N. (2010) *Elder abuse in Europe: Background and position paper.* Utrecht: The European Reference Framework Online for the Prevention of Elder abuse and Neglect (EuROPEAN); Acierno, R., Hernandez, M.A., Amstadter, A.B., Resnick, H.S., Steve, K., Muzzy, W. and Kilpatrick, D.G. (2010) 'Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The national elder mistreatment study'. *American Journal of Public Health*, 100 (2), 292 – 297.

Despite the difficulties in identifying the full extent of abuse of older people,[270] it is observed that the incidence of financial abuse is increasing.[271] The Madrid Plan of Action on Ageing recognised that financial abuse '… occurs in every social, economic, ethnic and geographical sphere.'[272] Financial abuse is the most common form of elder abuse in Australia[273] and the second most common type of abuse experienced by older people in the UK.[274] Moreover, research has identified that older people with dementia are particularly vulnerable to financial abuse.[275] Wolf notes that the impact of financial abuse on an older person is debilitating.[276] The long-term consequences of depression and social isolation can leave older people vulnerable to further exploitation.[277] Due to the inherent belief that,

---

270 Bagshaw et al (n 238) 88.

271 ibid 87.

272 United Nations, 'Political Declaration and Madrid International Plan of Action on Ageing: Second World Assembly on Ageing, Madrid, Spain 8 - 12 April 2002' (United Nations, New York, 2002) [107] <http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf> accessed 22 April 2020.

273 Bagshaw et al (n 238).

274 Darzins et al (n 248) 9, citing O'Keefe, M., Hills, A., Doyle, M., McCreadie, C., Scholes, S., Constantine, R., Tinker, A., Manthorpe, J., Biggs, S. and Erens, B. (2007) *UK study of abuse and neglect of older people: Prevalence survey report.* London: National Centre for Social Research and King's College London.

275 Dale Bagshaw, Valerie Adams, Lana Zannettino and Sarah Wendt, 'Elder Mediation and the Financial Abuse of Older People by a Family Member' (2015) 32(4) Conflict Resolution Quarterly 443, 444, citing Weeks, E., and P. Sadler. 1996. *Elder Abuse and Dementia.* Sydney: NSW Advisory Committee on Abuse of Older People.

276 Bagshaw et al (n 265), citing Wolf, R 2000, 'The nature and scope of elder abuse', Generations, vol. 24, no. 2, Summer, 6 - 12.

277 City of London, 'Assessment: Financial crime against vulnerable adults' (Social Care Institute for Excellence, 2011) 11, citing Rabiner, D.J., O'Keeffe, K. and Brown, D. (2006) 'Financial exploitation of older persons: challenges and opportunities to identify, prevent, and address it in the United States', *Journal of Aging and Social Policy*, vol 18, no 2, pp 47 - 68.

'… family relationships should be preserved at any cost',[278] older people are reluctant to engage with the legal system when they experience financial abuse.[279] As a consequence, financial abuse is likely to be discovered *after* the older person's assets have been squandered, with little recourse to get them back.[280] Due to their lack of earning potential,[281] and/or lack of capacity,[282] older people who experience financial abuse are often unable to re-establish themselves financially.[283]

2.6. PERPETRATORS OF FINANCIAL ELDER ABUSE

It is distressing that the majority of perpetrators of financial elder abuse are family members,[284] particularly the older person's adult son or daughter.[285] In order to understand

---

278 Monro (n 191) 71.

279 Kyle (n 237).

280 The Committee Report (n 210) ch 2 [2.4].

281 City of London (n 277), citing Walsh, K. and Bennett, G. (2000) 'Financial abuse of older people', *Journal of Adult Protection*, vol 2, issue 1, pp 21 - 9.

282 Gillian Crosby, Angela Clark, Ruth Hayes, Kate Jones and Nat Lievesley, 'The Financial Abuse of Older People: A review of the literature carried out by the Centre for Policy on Ageing on behalf of Help the Aged' (Help The Aged, 2007) 5 <http://www.cpa.org.uk/information/reviews/financialabuse240408%5B1%5D.pdf> accessed 22 April 2020.

283 The Committee Report (n 210) ch 4 [4.28], citing EAPU Submission (n 190) 4 - 5.

284 House of Commons Health Committee (n 234); Bagshaw et al (n 238).

285 Bagshaw et al (n 275) 445, citing Brill, D. 1999. "Safeguarding the Financial Interests of Vulnerable Seniors." Paper presented at the Seventh National Guardianship and Administration Conference, Sydney, Australia; Cripps, D. 2001. "Rights Focused Advocacy and Elder Abuse." *Australasian Journal on Aging* 20 (1): 17 – 22; Faye, B., and M. Sellick. 2003. *Advocare's Speak Out Survey "SOS" on Elder Abuse.* Perth, WA: Abuse Prevention Program Advocare; Livermore, P., R. Bunt, and K. Biscan. 2001. "Elder Abuse among Clients and Carers Referred to the Central Coast ACAT: A Descriptive Analysis." *Australasian Journal on Ageing* 20

more about the threat posed to vulnerable adults, the Association of Chief Police Officers commissioned an assessment of financial crime against vulnerable adults.[286] This assessment revealed that the most frequent perpetrator of financial abuse is a person acting in a trusted capacity, such as a family carer.[287] Further, it is observed that people with higher levels of dependency on others assign higher levels of trust.[288] In the context of Family Agreements, given the older parent is dependent on their adult child for care and support, the caregiving adult child is in a position of trust. Although the majority of family carers act with honesty and probity,[289] people in positions of trust have a greater opportunity to commit financial abuse.[290] Alarmingly, it is observed that 4.6 per cent of older people are victims of abuse perpetrated by family members and those in the duty-of-care relationship.[291] Given the majority of care for an older person with chronic illness is provided by family members,[292] there is a concern that abuse within the Caring Relationship will increase.

---

(1): 41 – 47; Boldy, D., M. Webb, B Horner, M. Davey, and B. Kingley. 2002. *Elder Abuse in Western Australia: Report of a Survey Conducted for the Department for Community Development, Seniors Interest, Freemasons Centre for Research into Aged Care Services.* Perth: Curtin University of Technology, Division of Health Sciences.

286 City of London (n 277).

287 ibid 8.

288 ibid.

289 Carers Queensland Submission (n 190).

290 City of London (n 277) 8.

291 Bagshaw et al (n 238) 88.

292 Marilyn Macdonald and Ariella Lang, 'Applying Risk Society Theory to findings of a scoping review on caregiver safety' (2014) 22(2) Health and Social Care in the Community 124.

Many older people trust that their family will always look after their best interests,[293] particularly when their capacity is diminishing.[294] Therefore, naturally, the assumption underpinning Family Agreements is that families are 'safe'.[295] Disturbingly however it is these *trusted* family members, particularly the older person's adult son or daughter,[296] who are most frequently the perpetrators of elder abuse.[297] In 2007, the Committee recommended that, '… the Australian Government propose that the [then] Standing Committee of Attorneys-General[298] undertake an investigation of legislation to regulate family agreements.'[299] The Government accepted this recommendation and agreed '… that the role of Family Agreements and the issues of how the scope for abuse can be limited or ameliorated needs to be further studied.'[300] Yet, unjustifiably, no such investigation has been conducted.

---

293 Monro (n 191) 71; McCawley et al (n 268) 20.

294 Alzheimer's Australia (n 208) 15.

295 McCawley et al (n 268) 22, citing Tilse C, Wilson J, Rosenman L & Setterland D (2005) Older people's assets: A contested site. *Australasian Journal on Ageing* 24 (Supplement – June) 51 - 56.

296 Bagshaw et al (n 285).

297 McCawley et al (n 268); City of London (n 277) 8; Age UK, 'Safeguarding older people from abuse and neglect' (2019) < https://www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs78_safeguarding_older_people_from_abuse_fcs.pdf?epslanguage=en-GB?dtrk=true> accessed 22 April 2020.

298 In December 2013, the Law, Crime and Community Safety Council replaced the Standing Committee of Attorneys-General.

299 The Committee Report (n 210) ch 4 [4.45].

300 Australian Government, 'House of Representatives Standing Committee on Legal and Constitutional Affairs Older People and the Law Government Response' (2009) (the Government's Response) 21 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=laca/reports.htm> accessed 21 April 2020.

In 2016, the Australian Law Reform Commission (the **ALRC**) undertook an inquiry into Protecting the Rights of Older Australians from Abuse. The ALRC recognised a specific type of financial abuse of older people in the context of Family Agreements given it may be difficult to establish the parties intended to create legal relations. As a consequence, that older parent may be left without money or a place to live if the Family Agreement breaks down. The ALRC recommended that, in addition to the existing avenues of legal redress available through the court system, disputes with respect to residential property that is the principal place of residence of one or more parties to Family Agreements ought to be heard by Tribunals, given it is a cheaper and less formal forum for dispute resolution. Although this would be useful for disputes involving residential property transferred under Family Agreements, it fails to recognise situations whereby the 'benefit' received under the Family Agreement is a transfer of money.

Presumably, the 'existing avenues of legal redress through the court system' the ALRC referred to is the commencement of a civil action by an aggrieved party for a breach of contract and/or a cause of action in equity seeking to give effect to the 'minimum equity' to do justice. However, in the absence of (i) specific legislation to govern and regulate Family Agreements,[301] and/or (ii) the common law recognising and reflecting family realities in relation to family caring, Family Agreements are difficult to enforce. The next chapter will outline the current legal status of Family Agreements to better understand the legitimacy and utility of such agreements.

---

[301] The Committee Report (n 210) ch 4 [4.16]; Office of the Public Advocate (Qld) and Queensland Law Society, 'Elder Abuse: How well does the law in Queensland cope?' (2010) 8 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf> accessed 21 April 2020.

3. THE LEGAL STATUS OF FAMILY AGREEMENTS

3.1. INTRODUCTION

As outlined above, Family Agreements are, typically, made between an older parent and their adult child,[302] particularly daughters, as they are the main source of care for older people.[303] Due to their private nature, the prevalence of Family Agreements is unknown.[304] However, anecdotal evidence suggests that families are entering into Family Agreements,[305] albeit on an informal or oral basis.[306]

However, a significant problem with Family Agreements is that they tend to be nothing more than a very general and vague promise of the adult child to take care of their

---

302 Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths 2004) 260.

303 Linda Pickard, 'A growing care gap? The supply of unpaid care for older people by their adult children in England to 2032' (2015) 35(1) Ageing and Society 96.

304 Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68.

305 Alzheimer's Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) 21 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020; Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72; Brian Herd, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23; The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.9], [4.10] <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

306 Alzheimer's Australia (n 305) 21; Herd (2002a) (n 305); Herd (2002b) (n 305); Monro (n 304); Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1, 2.

older parent for the rest of their life.[307] Therefore, it is difficult for the law to recognise and/or enforce them as contracts. As the below analysis makes clear, even in circumstances where there is an agreement in place the presumption against family members intending to be legally bound makes enforcing Family Agreements difficult. Therefore, this chapter illustrates that that the current law does not reflect current family realities, particularly in relation to care work.

It is trite law that in order to establish an enforceable contract:[308]

> … the parties, through a process of offer and acceptance, must enter into an agreement, whose terms are sufficiently certain to allow for legal enforcement, with the intention that the agreement be legally binding; the agreement must be supported by consideration; and the agreement must comply with any formal requirements laid down by law.

However, in the context of Family Agreements, it is arguable that schematic analysis of the elements of contract, established in the late nineteenth and early twentieth century,[309] is artificial as it does not reflect the way contracts are 'formed' in real life situations.[310] In the context of Family Agreements, Alzheimer's Australia commented, 'The common law

---

307 Hall (n 306) 9; Damien Carrick, ABC Radio National, 'Law Report: Elderly People and the Law' (2003) <http://www.abc.net.au/radionational/programs/lawreport/elderly-people-and-the-law/3545598#transcript> accessed 22 April 2020.

308 Michael Furmston, Eliza Mik and GJ Tolhurst, 'Formation of Contracts' in Michael Furmston (ed). *Common Law Series: The Law of Contract* (5th ed, LexisNexis 2015).

309 ibid.

310 ibid 2.

of contract still has the perception that the "family" is based on early twentieth century notions of a family when there were much clearer expectations of the role of each member with no expectation of compensation.'[311] Therefore, the common law of contract needs to respond to current needs and practices,[312] particularly as contract principles developed in the early twentieth century fail to adequately address the inherent power imbalance between parties to Family Agreements.[313] Further, it is observed that the common law is '… neither clear nor consistent …' in its treatment of Family Agreements.[314] This confusion regarding the legal status of Family Agreements has arisen due to the well-established presumption that agreements between spouses,[315] and between close relatives such as parent and child,[316] are not contractual in character, nor are they intended to create legal relations.[317]

3.2. THE LEGAL NATURE OF THE CARING RELATIONSHIP

First, it is important to consider the legal nature of the Caring Relationship under a Family Agreement. Is it a contractual relationship or merely a familial relationship between an

311 Alzheimer's Australia (n 305) 22.

312 ibid 20, citing Skousgaard T. *Promoting Family Provided Elder Care*. Presented at the Canadian Conference on Elder Law October 2006 3.

313 Monro (n 304) 71.

314 British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, 'Private Care Agreements Between Older Adults and Friends of Family Members' Report No. 18 (2002) 11 <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020.

315 *Balfour v Balfour* [1919] 2 KB 571, 578 obiter per Atkin LJ.

316 *Jones v Padavatton* [1969] 2 All ER 616, 621 per Salmon LJ.

317 *Balfour* (n 315); *Cohen v Cohen* [1929] HCA 15.

older parent and their adult child? In order for the Caring Relationship to be characterised as a contractual one, the parties must have, amongst other things, intended to be legally bound.

3.3. INTENTION TO CREATE LEGAL RELATIONS

It is trite law that in order to constitute a contract, there must be an agreement, consideration, and an intention to create legal relations.[318] The doctrine of intention to create legal relations has been a separate requirement since the nineteenth century.[319] Some legal commentators attribute the doctrine to nineteenth century academics,[320] while others acknowledge the English Court of Appeal decision of *Carlill v Carbolic Smoke Ball Co*[321] as being the first case to recognise the separate requirement.[322] However, it is most widely accepted that the judgment of Atkin LJ in *Balfour v Balfour*[323] firmly established the doctrine of intention to create legal relations in English contract law.[324] *Balfour v Balfour* concerned a married couple that had been living together in Ceylon where the husband held

---

318 Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (18th edn, Oxford University Press 2018).

319 Mindy Chen-Wishart, *Contract Law* (6th edn, Oxford University Press 2018) 96, citing A W B Simpson, 'Innovations in Nineteenth Century Contract Law' (1975) 91 LQR 247, 263-5.

320 Andrew Grubb and Michael Furmston (eds), Butterworths Common Law Series: *The Law of Contract* (4th edn, LexisNexis 2010) [2.169], citing Leake on Contracts (1st edn, 1867); Pollock Principles of Contract (1st edn, 1876); Anson's Law of Contract (1st edn, 1879).

321 [1893] 1 QB 256.

322 McKendrick (n 318) 270, citing Professor Simpson; Grubb and Furmston (n 320) [2.169].

323 [1919] 2 KB 571.

324 McKendrick (n 318) 270; Grubb and Furmston (n 320) [2.169].

a Government appointment. After a holiday in England, the wife was unable to return to Ceylon with her husband due to illness. The wife alleged that her husband, before returning alone to Ceylon, made a verbal promise to pay her a living allowance of £30 per month while they lived apart. The couple subsequently decided to remain apart, and the wife sued her husband for the money owed to her under the agreement.

In *Balfour v Balfour*, Atkin LJ said:

> It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves … . To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement.[325]
>
> …
>
> Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts.[326]

[325] [1919] 2 KB 571, 578.

[326] [1919] 2 KB 571, 579 (emphasis added).

In *Pettitt v Pettitt*,[327] Lord Hodson commented that, on the facts, *Balfour v Balfour* was an 'extreme case',[328] and Lord Upjohn said that it 'stretched the doctrine to its limits'.[329] Despite these comments, the doctrine of intention to create legal relations has not (yet) been judicially questioned and has subsequently been applied with approval in many cases.[330] In particular, the courts have relied on the judgment of Atkin LJ in *Balfour v Balfour* for the proposition that English law recognises, and requires, the existence of a separate doctrine of intention to create legal relations.[331] This means that in order for there to be a legally enforceable contract, it must be established that the parties intended to be legally bound.[332]

Many domestic and social arrangements do not amount to legally binding contracts because it is clear from the nature of the agreement that there was no intention between the parties to be legally bound.[333] In *Balfour v Balfour*, Atkin LJ commented:[334]

---

327 [1970] AC 777.

328 [1970] AC 777, 816.

329 *Pettitt v Pettitt* [1970] AC 777, 816. Also cited by Lord Denning MR in *Gould v Gould* [1970] 1 QB 275, 280.

330 Edwin Peel and G. H. Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) [4-017].

331 McKendrick (n 318) 274.

332 Sir Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 74, 77.

333 Sir Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 74; Edwin Peel and G. H. Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) [4-016].

334 [1919] 2 KB 571, 578.

> It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract.

Therefore, since *Balfour v Balfour*, there is a strong[335] presumption under English law that parties to domestic or social agreements do not intend to be legally bound. While the courts do not exactly recognise domestic or social agreements as legally binding contracts, the courts have at least recognised the importance of giving effect to nuptial agreements between spouses.[336] This is explored in more detail below.[337]

Although *Balfour v Balfour* was a case regarding a husband and wife, the presumption has been applied to agreements made between a mother and daughter.[338] While the English cases speak in terms of presumption, the High Court of Australia has warned against speaking in those terms. In *Ermogenous v Greek Orthodox Community of SA Inc*,[339] the majority of the High Court of Australia, whilst affirming that the doctrine of intention to create legal relations is an essential precondition to contractual liability, stated

---

335 See *Balfour v Balfour* [1919] 2 KB 571, 580 per Atkin LJ; *Gould v Gould* [1970] 1 QB 275, 281 per Edmund Davies LJ.

336 *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534.

337 See text below in relation to *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534 (n 364).

338 *Jones v Padavatton* [1969] 1 WLR 328.

339 (2002) 187 ALR 92; (2002) 209 CLR 95.

that they 'doubt the utility of using the language of presumptions in this context'.[340] The High Court of Australia warned that there is a danger that the presumption might 'ossify into a rule of law … , distorting the proper application of basic principles of the law of contract'.[341] However, it is argued that the presumption of fact, which the High Court of Australia commented should do no more than identify the party who bears the onus of proof,[342] has already ossified into strict rules of law.[343]

It is widely accepted that the presumption that parties to domestic or social agreements do not intend to create legal relations is based on public policy.[344] In his Lordship's celebrated judgment, Atkin LJ in *Balfour v Balfour* outlined the rationale for the presumption:[345]

> All I can say is that the small Courts of this country would have to be multiplied one hundredfold if [domestic agreements] were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses.

---

340 ibid [26] per Gaudron, McHugh, Hayne and Callinan JJ.

341 ibid.

342 ibid.

343 Mary Keyes and Kylie Burns, 'Contract and the Family: Whither Intention?' (2002) 26 Melbourne University Law Review 577, 579.

344 Chen-Wishart (n 319) 97.

345 [1919] 2 KB 571, 579 per Atkin LJ.

> Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.

The public policy arguments raised by Atkin LJ are twofold. First, his Lordship raised the floodgates argument, namely that the judicial system would be inundated with litigation relating to domestic agreements. Secondly, his Lordship argued that the law should, in general, keep out of private family life.[346]

3.4. THE FLOODGATES ARGUMENT

The first public policy argument raised by Atkin LJ in *Balfour v Balfour* was that enforcing domestic agreements as contracts would result in the number of small courts being 'multiplied one hundredfold'.[347] Similar to Atkin LJ, Duke LJ in *Balfour v Balfour* also raised the floodgates argument, stating that enforcing domestic agreements as contracts 'would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind'.[348] However, it is commented that these concerns are 'the most melodramatic floodgates claims ever made'.[349]

Although enforcing domestic agreements as contracts may result in an increase in litigation, the floodgates argument raised by Atkin LJ in the nineteenth century is perhaps not as relevant today. This is so for several reasons. First, courts exercise a degree of

---

[346] McKendrick (n 318) 278; Chen-Wishart (n 319) 97.

[347] [1919] 2 KB 571, 579 per Atkin LJ.

[348] [1919] 2 KB 571, 577 per Duke LJ.

[349] Keyes and Burns (n 343) 585.

vigilance to ensure that they are not used as a forum for vexatious litigation.[350] There is no reason to doubt that existing procedural mechanisms applicable to vexatious litigants are adequate in deterring individuals from litigating unmeritorious claims.[351] Secondly, the substantial costs associated with legal proceedings are likely to deter people from commencing 'unlimited litigation' over small and petty breaches of minor domestic duties and similar obligations.[352] Thirdly, the natural reluctance of people to sue their relatives, and the enormous stress litigation has on people, particularly the elderly, is likely to deter many worthy claims from being commenced.[353] Rather, it is perhaps arguable that enforcing domestic agreements as contracts may reduce the number of claims that are commenced seeking a declaration that there was an existing contractual relationship. Furthermore, there are tribunals and alternative dispute resolution processes available to parties wishing to resolve contract disputes,[354] which is a cheaper and less formal forum for resolving such disputes than through the court system.[355]

---

350 J W Carter, *Carter on Contract* (LexisNexis, 2001) 354 [08-030].

351 ibid; Keyes and Burns (n 343) 585.

352 *Balfour v Balfour* [1919] 2 KB 571, 577 per Duke LJ.

353 Barbara Hamilton, 'Be Nice to your Parents or Else!' (2006) 8(4) Elder Law Review <http://www.austlii.edu.au/au/journals/ElderLawRw/2006/8.html> accessed 22 April 2020; Teresa Somes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (2019) 12 Elder Law Review 1.

354 Keyes and Burns (n 343) 585; J W Carter, *Carter on Contract* (LexisNexis, 2001) 354 [01-140].

355 Australian Government, Australian Law Reform Commission, 'Elder Abuse— A National Legal Response: Final Report' (2017) [1.30], [6.4], [6.48] <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/> accessed 22 April 2020.

In light of the above, the floodgates argument in *Balfour v Balfour* is arguably unfounded, and therefore it is unacceptable to exclude recovery of *all* domestic arrangements, particularly in circumstances where the claim is substantial.[356]

3.5. THE PRIVACY ARGUMENT

The second public policy argument advanced by Atkin LJ in *Balfour v Balfour* is of a similar vein to what Sir Edward Coke espoused several centuries earlier. That is, '… the house of every one is to him as his … castle and fortress…'.[357] In *Balfour v Balfour*, Atkin LJ was of the opinion that the law should, in general, keep out of private family life,[358] and therefore the law's intervention in the home environment was inappropriate.[359] His Lordship commented, '… each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.'[360] However, this public policy argument does not reflect today's reality, nor is it line with developments taking place in family law.[361] The exclusion of contract law from family life is not valid.[362]

Until relatively recently, pre-nuptial and post-nuptial agreements were void as a matter of contract law as they were deemed contrary to public policy due to their potential

---

356 Keyes and Burns (n 343) 585.

357 *Semayne's Case* (1604) 5 Coke 91, 91b, 77 Eng. Reprint 194, 195.

358 McKendrick (n 318) 278; Chen-Wishart (n 319) 97.

359 Keyes and Burns (n 343) 583.

360 *Balfour v Balfour* [1919] 2 KB 571, 579 per Atkin LJ.

361 Professor Michael Freeman, 'Contracting in the Haven: Balfour v Balfour Revisited' in R Halson (ed), Exploring the Boundaries of Contract (Dartmouth 1996) 68 at 75-77.

362 ibid.

to encourage or to make it easier for parties to divorce.[363] However, in *Radmacher v Granatino*,[364] the majority of the UK Supreme Court commented that nuptial agreements are not against public policy, and therefore parties to such agreements should be entitled to enforce their agreement.[365] The Court commented:[366]

> The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

Therefore, while it is in the court's discretion to decide what award is suitable, the court will attach considerable weight to nuptial agreements when granting such relief.[367] Although the decision that nuptial agreements are not against public policy and are enforceable is 'mercifully obiter',[368] the Privy Council has previously held that post-nuptial agreements are not against public policy.[369]

---

363 See *Cocksedge v Cocksedge* (1844) 14 Sim 244; *H v W* (1857) 3 K & J 382, cited in *Radmacher v Granatino* [2010] UKSC 42; [2011] 1 AC 534 at [31].

364 [2010] UKSC 42; [2011] AC 534.

365 ibid [52] per Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Collins of Mapesbury and Lord Kerr of Tonaghmore JJSC.

366 *Radmacher v Granatino* [2010] UKSC 42; [2011] 1 AC 534 [75] per Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Collins of Mapesbury and Lord Kerr of Tonaghmore JJSC.

367 ibid [37].

368 *Radmacher v Granatino* [2010] UKSC 42; [2011] 1 AC 534 [138] per Baroness Hale.

369 *MacLeod v MacLeod* [2008] UKPC 64; [2010] 1 AC 298.

Since *Radmacher v Granatino*,[370] the courts will give effect to ante-nuptial and post-nuptial agreements that are freely entered into by each party with a full appreciation of its implications unless, in the circumstances, it would be unfair to do so.[371] In other words, if both parties freely enter into a nuptial agreement, there is a rebuttable presumption that the agreement is legally enforceable.[372] In practice, the party seeking to set aside the agreement will have to prove that it would be unfair to enforce it.[373] Although the Court in *Radmacher v Granatino* considered that the contractual status of the ante-nuptial and post-nuptial was a 'red herring',[374] it outlined some of the factors that will be taken into account when determining what weight such an agreement is to be afforded:[375]

> The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may

---

370 [2010] UKSC 42; [2011] AC 534.

371 Chen-Wishart (n 319) 98; Paul S Davies, *JC Smith's The Law of Contract* (Oxford University Press 2016) 104. See [2010] UKSC 42; [2011] AC 534, [75], citing *MacLeod v MacLeod* [2010] 1 AC 298.

372 Chen-Wishart (n 319) 98.

373 Mindy Chen-Wishart, *Contract Law* (5th edn, 2012) 97.

374 [2010] UKSC 42; [2011] AC 534 [62].

375 [2010] UKSC 42; [2011] AC 534 [72].

> not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.

Similar to nuptial agreements, cohabitation contracts were also at one time void on the ground of public policy because they encouraged sexual immorality.[376] However, the courts now recognise the reality of cohabitation. As Bridge LJ in *Dyson Holdings Ltd v Fox*[377] commented:

> … there has been a complete revolution in society's attitude to unmarried partnerships of the kind under consideration. Such unions are far commoner than they used to be. The social stigma that once attached to them has almost, if not entirely, disappeared.

Similarly, Treitel has commented:[378]

> The traditional common law approach to immoral contracts no longer applies to persons who live together in a common household as husband and wife without being married.

---

376 *Gammans v Ekins* [1950] 2 KB 328; [1950] 2 All ER 140; *Diwell v Farnes* [1959] 2 All ER 379; [1959] 1 WLR 624.

377 [1976] QB 503, 512.

378 Edwin Peel and G. H. Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) [11-045].

In *Sutton v Mischon de Reya*, Hart J commented (in obiter):[379]

> I accept the submission that there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.

Therefore, unlike nuptial agreements, the courts *will* uphold a cohabitation contract as legally binding as long as it is a contract '*between* persons who are cohabiting in a relationship', rather than 'a contract *for* sexual relations outside marriage'.[380]

Given the law recognises and regulates ante-nuptial and pre-nuptial agreements[381] and enforces cohabitation agreements as contracts,[382] the privacy argument espoused by Atkin LJ in *Balfour v Balfour* is 'fallacious'.[383] Furthermore, although Atkin LJ in *Balfour v Balfour* commented that domestic agreements '… are outside the realm of contracts altogether',[384] the agreements his Lordship was concerned with were those that involved consideration in the form of 'love and affection'.[385] It is argued that these types of agreements are not contracts and therefore are not subject to the presumption because there

---

379 *Sutton v Michon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837 [22].

380 ibid [23].

381 *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534.

382 *Sutton v Michon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837.

383 Keyes and Burns (n 343) 583.

384 [1919] 2 KB 571, 579.

385 *Balfour v Balfour* [1919] 2 KB 571, 579.

is insufficient consideration.[386] Further, as Stoljar commented, Atkin LJ failed to notice the 'crucial difference'[387] between a purely social promise, such as arranging to have dinner or play a game of chess, which is not intended to be legally enforceable, from a 'benevolent' promise, which contemplates, and often encourages, reliance of a serious or injurious kind.[388] This failure to distinguish between 'ordinary' examples of agreements and agreements that involve detrimental reliance has resulted in the presumption applying to *all* domestic and social agreements, which can have serious consequences for family members, particularly women.[389] As Carter argues, '[t]o leave the wife in *Balfour v Balfour* without a means of supporting herself seems entirely unjustified and smacks of bias against married women.'[390] Professor Stoljar has commented, '[a]mong candidates for legal enforcement, neglected wives and children can surely have no lesser social priority than commercial promises.'[391]

In 1952, Professor Kahn-Freund stated that '*Balfour v Balfour* is one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate'.[392] However, today, nearly 100 years after *Balfour v Balfour* was decided, it is arguable that the rationale behind the presumption is no longer viable, particularly in

---

386 J W Carter, *Carter on Contract* (LexisNexis, 2001) 354 [08-030].

387 Samuel Stoljar, 'Enforcing Benevolent Promises' (1989) 12 Sydney Law Review 17, 19.

388 ibid 19-20; JW Carter, *Carter on Contract* (LexisNexis, 2001) 354 [08-030].

389 J W Carter, *Carter on Contract* (LexisNexis, 2001) [01-080].

390 ibid [08-030].

391 Samuel Stoljar, 'Enforcing Benevolent Promises' (1989) 12 Sydney Law Review 17, 20.

392 Professor Kahn-Freund, 'Inconsistencies and Injustices in the Law of Husband and Wife' (1952) 15 MLR 133, 138 cited in McKendrick (n 318) 279.

relation to Family Agreements, as it does not reflect the realities of family life. Furthermore, the prejudice that the common law has shown towards women, particularly married women, is inconsistent with current community standards and needs to be reconsidered.

3.6. CERTAINTY AND COMPLETENESS

In order for a Family Agreement to be legally enforceable, its terms must be sufficiently certain and complete.[393] It is commented that there is a 'close link' between uncertainty and a lack of intention to create legal relations.[394] For example, an agreement may satisfy the requirement of contractual intent but be too vague to legally enforce.[395] It is commented that '[t]o be uncertain, the term must be so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention'.[396] As Weinberg J stated in *Macdonald v Australian Wool Innovation Ltd*:[397]

> It goes without saying that the fact the parties have entered into a contract, particularly one which is to run for [several] years, does not mean that they must be able to state with precision exactly how every contingency that might arise will be

---

393 Michael Furmston, Eliza Mik and GJ Tolhurst, 'Formation of Contracts' in Michael Furmston (ed). *Common Law Series: The Law of Contract* (5th ed, LexisNexis 2015); J W Carter, *Carter on Contract* (LexisNexis, 2001) [02-020].

394 Sir Jack Beatson, Andrew Burrows, and John Cartwright, Anson's Law of Contract (30th edn, Oxford University Press 2016) 74.

395 Joseph Chitty, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [2-194].

396 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.35], citing *Thorby v Goldberg* (1964) 112 CLR 597 at 607.

397 [2005] FCA 105 [221].

resolved. When it comes to construing language that is inherently open textures, the quest for 'certainty' can be illusory.

Contrastingly, in the context of mutual Wills, although 'clear and satisfactory evidence of a contract between two testators' is 'legally necessary', an argument based on alleged insufficiency or uncertainty was found to be 'misconceived'.[398] Despite this, many domestic arrangements have been held to be void due to uncertainty. For example, in *Shiels v Drysdale*,[399] a married woman agreed that she would attend upon her older parents for as long as they lived, and provide them with washing, cooking, and other necessary services. In consideration of these services, it was agreed that her father should, when requested, transfer his interest in certain land to her.[400] The Court held that the alleged agreement was void for uncertainty because no particular land was identified.[401] Therefore, it is evident that consideration must be definite, not vague.[402]

In *Gould v Gould*,[403] a husband, upon leaving his wife, promised that he would pay her £15 a week 'so long as he had it' or 'so long as the business was O.K.'. The Court held that the words used by the husband imported such uncertainty as to strongly indicate that there was no intention to create legal relations.[404] However, in dissent, Lord Denning MR

---

398 *Olins v Walters* [1009] Ch 212, 221; [2008] EWCA Civ 782 [36] per Mummery LJ, with whom Dyson [47] and Maurice Kay [48] LLJ agreed; J W Carter, *Carter on Contract* (LexisNexis, 2001) [04-001]. Cf *Legg v Burton* [2017] EWHC 2088 (Ch).

399 6 VLR (Eq) 126.

400 *Shiels v Drysdale* 6 VLR (Eq) 126.

401 *Shiels v Drysdale* 6 VLR (Eq) 126, 130 per Molesworth J.

402 *Shiels v Drysdale* 6 VLR (Eq) 126.

403 [1970] 1 QB 275.

404 *Gould v Gould* [1970] 1 QB 275, 281 per Edmund Davies LJ, 282 per Megaw LJ.

concluded that the husband's statement, although not at all precise, was not so uncertain as to make the whole agreement void.[405] His Honour, in referring to his Honour's judgment in *Fawcett Properties Ltd v Buckingham County Council*,[406] commented, '… in cases of contracts, as of wills, the courts do not hold the terms void for uncertainty unless it is utterly impossible to put a meaning on them'.[407] In *Jones v Padavatton*,[408] the Court, in finding that there was no legally binding contract, identified a problem relating to the certainty of the agreement, particularly in relation to its duration.[409]

3.7. REBUTTING THE PRESUMPTION

Although the courts are sceptical about the contractual intention of domestic agreements, like all presumptions of fact, the presumption is rebuttable[410] by 'clear and convincing'[411] evidence that establishes that the parties intended to create legal relations.[412] The onus is

405 ibid 280 per Lord Denning MR.

406 [1961] AC 636, 678.

407 *Gould v Gould* [1970] 1 QB 275, 280.

408 [1969] 1 WLR 328.

409 [1969] 1 WLR 328, 334 per Salmon LJ, 331 per Danckwerts LJ.

410 *Jones v Padavatton* [1969] 1 WLR 328, 333 per Salmon LJ.

411 *Gould v Gould* [1970] 1 QB 275, 281.

412 McKendrick (n 318) 270; Chen-Wishart (n 319) 100.

on the party seeking to displace the presumption.[413] The test of an intention to create legal relations is an objective one.[414] As Salmon LJ in *Jones v Padavatton* said:[415]

> Did the parties intend the arrangement to be legally binding? This question has to be solved by applying what is sometimes (although perhaps unfortunately) called an objective test. The court has to consider what the parties said and wrote in the light of all the surrounding circumstances, and then decide whether the true inference is that the ordinary man and woman, speaking or writing this in such circumstances would have intended to create a legally binding agreement.

In *Ermogenous v Greek Orthodox Community of SA Inc*,[416] the High Court of Australia considered the issue of intention to create contractual relations in the following passage:

> Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the

---

413 *Balfour v Balfour* [1919] 2 KB 571.

414 *Jones v Padavatton* [1969] 1 WLR 328; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; Sir Jack Beatson, Andrew Burrows, and John Cartwright, Anson's Law of Contract (30th edn, Oxford University Press 2016) 75; McKendrick (n 318) 270; Grubb and Furmston (n 320) [2.172].

415 [1969] 2 All ER 616, 621.

416 [2002] HCA 8.

> word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.[417]

In determining whether the presumption has been rebutted, Ward J in *Darmanin v Cowan*[418] commented:

> … account is taken of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances (*Ermogenous v Greek Orthodox Community,* at [24]). Regard is also had to the consideration for the promise(s) in question and the certainty with which the parties have expressed their agreement.[419]

Although there are a number of different ways to rebut the presumption that parties to domestic agreements do not intend to create legal relations, there are some common features that arise in the cases, which are outlined below.

---

417 ibid [25] per Gaudron, McHugh, Hayne and Callinan JJ.

418 [2010] NSWSC 1118.

419 ibid, [213] per Ward J.

3.8. THE CONTEXT OF THE AGREEMENT

First, the context in which the agreement is concluded is an important factor in persuading the court that there was an intention to create legal relations.[420] In *Radmacher v Granatino*,[421] Baroness Hale of Richmond JSC commented:[422]

> There is nothing to stop a husband and wife from making legally binding arrangements, whether by contract or settlement, to regulate their property and affairs while they are still together … These days, the commonest example of this is an agreement to share the ownership or tenancy of the matrimonial home, bank accounts, savings or other assets. Agreements for housekeeping or personal allowances, on the other hand, might run into difficulties.

The court is more likely to rebut the presumption in circumstances where the relationship between the parties is breaking down and the parties are living apart,[423] rather than when the parties are living together 'in amity'.[424] Interestingly, as outlined in more detail below,[425] the same approach has been adopted by the legislature in expressly excluding older people from directly employing their resident relatives under direct payment schemes.

---

420 McKendrick (n 318) 276.

421 [2011] 1 AC 534.

422 ibid [142].

423 *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534 [142] per Baroness Hale.

424 *Merritt v Merritt* [1970] 1 WLR 1211.

425 See discussion under the heading 'Direct Payment Scheme Restrictions: The Rationale', chapter 4, section 4.9 at page 119.

The court is also more likely to rebut the presumption when the context of the agreement is in connection with running a family business.[426] For example, in *Snelling v John G Snelling*,[427] an agreement between the plaintiff and his brother was held to be legally binding. In that case, the plaintiff, Mr Snelling, and his two brothers, the second and third defendants, were directors of a family company, which owed the brothers a large amount of money. There was a dispute between the brothers and in an effort to make amends, they all entered into a written agreement which provided that if any of the brothers resigned as director, they would immediately forfeit all moneys due to him from the company so that the money could be used to repay the mortgage. A few months later, the plaintiff, Mr Snelling, resigned as director and his two brothers passed a resolution upholding the terms of the agreement. The plaintiff issued a writ against the company claiming the moneys owed to him. The Court held that the agreement was intended to give rise to legal relations and therefore, the two director brothers were entitled to the declaration that the plaintiff was bound by the terms of the agreement.

Further, an agreement between persons living in the same household can be legally enforceable if it does not have anything to do with the routine management of the household.[428] In *Simpkins v Pays*,[429] the plaintiff, Ms Simpkins, was living as a lodger in Ms Pays house, who was an elderly woman who lived with her granddaughter. The three parties agreed that (i) Ms Simpkins, who habitually entered into newspaper competitions, would fill in a weekly coupon with each person making their respective forecasts, (ii) it

---

426 McKendrick (n 318) 276. See *Snelling v John G Snelling* [1973] QB 87.

427 [1973] QB 87.

428 See *Simpkins v Pays* [1955] 1 WLR 975.

429 ibid.

would be sent off in Ms Pays' name, and (iii) they would share the winnings (if any). The incidental expenses associated with this entry were informally shared, being sometimes paid by one party and sometimes by another. After several weeks of this arrangement, a forecast made by Ms Pays' granddaughter was successful. Because the coupon was submitted in Ms Pays' name, she received the £750 prize. Ms Simpkins sought to recover one-third of the prize money, alleging that the agreement was to 'go shares' in any winnings. Ms Pays argued, among other things, that Ms Simpkins had merely assisted her in completing the coupon and the arrangement to share the winning was arrived at in a family association and therefore there was no intention to be legally bound. The Court held that there was an enforceable contract because there was a mutuality in the arrangement between the parties that they would 'go shares' in the winnings. Sellers J said:[430]

> I think there was here a mutuality in the arrangement between the parties. It was not very formal, but certainly in effect it was agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally. That seems to be the implication from or the interpretation of what was said, that this was in the nature of a very informal syndicate so that they should all get the benefit of success.

Therefore, Ms Simpkins was entitled to payment of a third share in the prize money, being £250. Although in *Simpkins*, the Court ultimately found an enforceable contract, this case demonstrates that many Family Agreements would not be enforceable as nearly all of them

[430] *Simpkins v Pays* [1955] 1 WLR 975, 979.

would relate to the routine management of the household, which, again, demonstrates that the common law does not reflect the realities of family life.

Hedley has commented that the 'academic conundrum' of whether there is a contract is dependent upon the 'perspective' of the claim that is being made. For example:

> Jack and Jill agree to go out to dinner and split the bill. By asking the academic question 'Is there a contract?' we are immediately in the realm of the abstract. If, however, we approach the matter from a practical standpoint, we must know what claim is being made. If Jill is suing Jack because Jack has refused to go to dinner at all, the arguments against liability are compelling. Surely Jack cannot be taken as giving an outright commitment to go to dinner—what if he is ill, or they cannot agree on a suitable restaurant? But imagine that the two already had their dinner, for convenience Jill pays the bill in full, but Jack subsequently refuses to pay his half. The perspective changes. It is no longer so obvious that the contract cannot be enforced. *If it is the 'reasonable man' we are consulting, then the 'reasonable man's' opinion may change in the course of the transaction*. Jack's contention that there was no intention to form a binding contract is likely to receive little sympathy. Blanket statements in cases that there is no 'intention to contract' on the facts before the court should therefore be treated with suspicion; it is vital to note whether this was being said in relation to an executed or an executory contract.[431]

[431] Stephen Hedley, 'Keeping Contract in its Place—Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 5(3) Oxford Journal of Legal Studies 391, 408 (emphasis in original).

In adopting this approach, there is obviously a difference between cases whereby an adult child promises to care for their older parent at some point in the future as against cases whereby the adult child is seeking payment of the care services they have already provided. It would be unlikely for a court to find in favour of an enforceable contract for the former case as the court could not compel an adult child to care for their parent(s) in the future. In *Coward v Motor Insurers' Bureau*,[432] the court had to consider whether there was a contract between workers who agreed to drive their colleagues to work in return for a contribution towards the petrol costs. In that case, Upjohn LJ said, 'The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either party contemplated that the one was legally bound to carry and the other to be carried to work.'[433]

However, if the court is being asked to order that an older parent pay their adult child for care services already rendered, then the plea on the part of an older parent that they never intended to enter into a legally binding contract would 'receive short shrift'.[434]

3.9. DETRIMENTAL RELIANCE

While it is unlikely that courts will enforce contracts made between parties living 'in amity', the courts have rebutted the presumption when one party has acted to their

---

[432] [1963] 1 QB 259.

[433] *Coward v Motor Insurers' Bureau* [1963] 1 QB 259, 271.

[434] Hedley (n 431) 409, citing Lord Cross in *Albert v Motor Insurers' Bureau* [1972] AC 301, 340ab.

detriment in reliance of the agreement,[435] such as selling a home in reliance of a promise.[436] However, this is not always the case, particularly in circumstances where there are issues relating to the certainty of the terms of the agreement.[437]

In *Parker v Clark*,[438] a young couple (**the Parkers**) were induced to sell their house and move in with their elderly relatives (**the Clarks**) on the promise that the Clarks will leave them a share of the proposed joint home upon their death. After the Parkers sold their home and moved in with the Clarks, the Clarks told the Parkers the arrangement was not working and asked them to move out. The Parkers successfully brought an action for breach of contract. The Court rejected the Clarks' argument that there was no intention to create legal relations because, amongst other things, the Parkers would not have taken the important step of selling their own home unless they thought they were securing another permanent home. Devlin J commented:[439]

> I cannot believe either that the defendant really thought that the law would leave him at liberty, if he so chose, to tell the Parkers when they arrived that he had changed his mind, that they could take their furniture away, and that he was indifferent whether they found anywhere else to live or not. Yet this is what the defence means … . I am satisfied that an arrangement binding in law was intended by both sides.

---

435 McKendrick (n 318) 276; Chen-Wishart (n 319) 100.

436 *Parker v Clark* [1960] 1 WLR 286.

437 *Jones v Padavatton* [1969] 2 All ER 616.

438 [1960] 1 WLR 286.

439 ibid 294.

In *Schaefer v Schuhmann*,[440] the testator, by a codicil to his Will, left his house to the appellant, who was the housekeeper he employed to maintain his house at $12 per week, on the condition that she should 'still be employed by me as a housekeeper at the date of my death'. The housekeeper read the codicil to the testator and accompanied him to the bank to have it executed. From that date, the housekeeper agreed to forego her wages for an interest in the testator's house on his death. After the death of the testator, the deceased's daughters made an application to the court claiming that adequate provision had not been provided for their proper maintenance. After considering the financial circumstances of the applicants, the court, at first instance, ordered that their legacies be increased and that the burden be met partly by the property given to the housekeeper. While not disputing that the deceased had failed to make adequate provision for his daughters, the housekeeper successfully argued that the court had no jurisdiction to throw any of the burden of such orders on the property given to her but the whole burden should come out of the residuary estate left to the three sons. On appeal, the Court held that that testator was bound by an enforceable contract to leave the property to the housekeeper by his Will.

Todd v Nicol[441] is another example where an intention to create legal relations was found. In that case, the defendant, who was a widow living in South Australia, wrote to the plaintiffs, the sister and niece of her deceased husband, who both resided in Scotland, to come to South Australia to share her house during her life. The defendant promised that once they arrived, she would alter her Will so that the house would be theirs for the rest of their lives, or in the case of her niece, until she was married. The plaintiffs accepted the offer, sold their property in Scotland, the niece resigned from her employment, and they

[440] [1972] AC 572; 1 All ER 621; [1972] 2 WLR 481.

[441] [1957] SASR 72.

moved to South Australia where they resided for some years rent free with the defendant. Difference then arose between the parties and the defendant terminated her permission for the plaintiffs to live with her. The plaintiffs sought to enforce the agreement. The defendant argued that because the agreement was made between relatives, it must be presumed that it was not legally enforceable. Despite the arrangement was one that was made between relatives, Mayo J found that they had entered into a legally binding contract.

3.10. FORMAL DOCUMENTATION

Although the absence of formal documentation will not be decisive evidence against a rebuttal of the presumption, it has been commented that it may be 'easier' to rebut the presumption if the agreement is made in a formal manner.[442] In *Merritt v Merritt*,[443] a husband left his wife and went to live with another woman. The husband agreed to pay his wife £40 a month out of which she was to pay the £180 that was outstanding to the building society for their matrimonial home which was held in joint names. The wife insisted that the husband put a further agreement in writing. As a result, the husband wrote the following words on a piece of paper:[444]

> In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage repayment has been completed, I will agree to transfer the property into your sole ownership.

---

442 Grubb and Furmston (n 320) [2.173].

443 [1970] 1 WLR 1211.

444 *Merritt v Merritt* [1970] 1 WLR 1211, 1212.

Signed, John Merritt. May 25, 1966.

The wife paid off the balance of the mortgage. When the mortgage was paid off, the husband reduced the £40 monthly payments he was making to the wife down to £25 per month. As per the written agreement, and because the mortgage was completely repaid, the wife asked the husband to transfer her the house, but the husband refused to do so. The wife successfully brought an action in the Chancery Division seeking a declaration that the house belonged to her and orders that the husband make the conveyance. The husband unsuccessfully appealed to the Court of Appeal. The Court of Appeal held that the agreement regarding the ownership of the matrimonial home was intended to create legal relations and was therefore binding upon the parties. The Court of Appeal distinguished the case from *Balfour v Balfour* on the grounds that the parties were separated, and therefore not living in amity. Furthermore, the written agreement signed by the husband was further evidence of an intention of the parties to be legally bound.

Further, in *Haggar v de Placido*,[445] the plaintiff was seriously injured in a road accident and required nursing care. Before the accident, the plaintiff was already suffering from ankylosing spondylitis and his injuries resulted in him becoming a tetraplegic. On discharge from hospital, the plaintiff returned to live with his mother who received all of his income, maintained him and managed the household. At that time, there were two lodgers living with the mother, who each paid her £4 per week for their board, and the plaintiff's brother. The mother agreed to waive the lodger's payment as they helped her, and her other son, nurse the plaintiff. The plaintiff's brother changed jobs at reduced wages so he could have more time to care for the plaintiff and while the mother was ill, he gave

[445] [1972] 1 WLR 716.

up work altogether. The plaintiff entered into a written agreement with his mother, which contained the following clause:

> In consideration of the sum of 12 guineas per week paid by the plaintiff to the mother, the mother will provide full-time nursing and physical assistance to the plaintiff for so long as she shall be physically able.[446]

The second clause in the agreement read, 'Either party shall be at liberty to cancel this agreement without notice to the other.'[447]

Later, the plaintiff made a similar agreement with his brother for £10 per week.[448] The plaintiff brought an action against the defendant for damages for personal injuries and sought to recover, inter alia, the financial loss sustained by his mother and brother and the amount payable to them under the two agreements. The Court held that the plaintiff was only entitled to recover the amount of expenditure or of loss sustained by a third party if (i) he had a legal liability to that third party in respect of that expenditure or loss, and (ii) that expenditure or loss was reasonably incurred. Because the plaintiff had no legal liability to his mother for the loss of income from waiving the £4 per week from the lodgers or to his brother for his loss of income, he could not recover those losses from the defendant. However, because the plaintiff had a legal liability under the agreements to pay his mother and brother, and because that expenditure was reasonably incurred, he could recover the amount paid under the agreements.

---

446 *Haggar v de Placido* [1972] 1 WLR 716, 720.

447 ibid.

448 [1972] 1 WLR 716, 721.

3.11. THE CURRENT LEGAL STATUS OF FAMILY AGREEMENTS

In light of the above, it is evident that there are many examples of cases where agreements made between family members have been held to be legally enforceable. As recognised in *Bovaird v Frost*[449] there are many examples of cases involving promises by older parents to confer benefits on their relatives in consideration for taking up residence with them or rendering household or personal services, in which the requisite intention to create legal relations and obligations have been found, particularly where implementation involved the promise leaving existing advantages or selling an existing resident.[450]

However, the approach to the presumption is not consistent in the case law, which (i) contributes to the confusion regarding the legal status of Family Agreements, and (ii) makes enforcing them as contracts difficult. For example, in *Jones v Padavatton*, when considering whether or not the mother and her daughter intended to be legally bound, Salmon LJ commented:

> The point was made by Mr. Sparrow [for the plaintiff] that the parties cannot have had a contractual intention since it would be unthinkable for the daughter to be able to sue the mother if the mother fell upon hard times. I am afraid that I am not impressed by this point. The evidence which the county court judge accepted showed that the mother was a woman of some substance, and prior to the agreement

---

449 [2009] NSWSC 337.

450 ibid [52], citing *Wakeling v Ripley* (1951) 51 SR (NSW) 183; *Todd v Nicol* [1957] SASR 72; *Parker v Clark* [1960] 1 All ER 93; *Schaefer v Schumann* [1972] AC 572; *Tanner v Tanner* [1975] EWCA Civ 4; [1975] 1 WLR 1346; *Raffaele v Raffaele* [1962] WAR 29; *Re Gonin (deceased)* [1979] Ch 16; see also *Scheps v Cobb* [2005] NSWSC 455, [29].

had assured her daughter that there would be no difficulty in finding the money. **The fact that if, contrary to everyone's expectation, the mother had lost her money, the daughter would have been unlikely to sue her throws no light on whether the parties had an intention to contract**. **The fact that a contracting party is in some circumstances unlikely to extract his pound of flesh does not mean that he has no right to it. Even today sometimes people forbear from mercy to enforce their undoubted legal rights**.[451]

Contrastingly, nearly a decade later, Walton J in *Re Gonin (deceased)* considered whether or not the daughter plaintiff would sue the mother was the correct way to determine whether there is an intention to create legal relations:

> I then come to a final consideration strongly urged on me by counsel for the first defendant, namely that in a family situation of this nature one would not expect to find any strict contractual bond between parents and daughter, the whole resting much more on the ground faith of each side without there being any intention on either side to enter into strict legal relationships. **I am inclined to think that this is in fact a correct way to view the matter.** Supposing, for example, that [the plaintiff] had in fact, contrary to her parents' expectations, met an eligible man she had wanted to marry? Would her parents have stood in her way by threatening to sue her for damages for breach of contract, which could have been very heavy if she had left the house? I think not. Nor indeed if her mother had required a highly expensive course of medical treatment which involved selling up The Gables completely, and using the bulk of the proceeds in that way, do I think that [the

[451] [1969] 1 WLR 328, 333-334 (emphasis added).

> plaintiff] would have thought that she had a legal claim to stop her mother doing just that, although of course I must make it clear that even if she had thought that, [the plaintiff] would certainly not, as a pure matter of fact, have done so.[452]

Family Agreements are said to safeguard older people from harmful outcomes, particularly when they have transferred a substantial asset to their adult child in exchange for care.[453] Yet, the current legal status of Family Agreements is 'unclear'[454] and the legal framework regulating Family Agreements is 'precarious'[455]. Berridge has commented that the whole area of law is 'still clouded with much uncertainty' and, as a consequence, '[i]t is far from clear what attitude other judges in the Chancery Division will adopt'.[456]

Therefore, it is likely that a dispute regarding a Family Agreement, particularly one that is informal, will give rise to a 'confusing amalgam of legal issues including, but not limited to contract law, land law, equity, trusts and family law'.[457] Given it is unlikely that a case relating to a Family Agreement will be litigated as a contract case, the plaintiff is likely to seek an equitable remedy. The equitable remedies available to either party within the Caring Relationship will depend on the individual circumstances of each case, and most

---

452 [1977] 2 All ER 720, 733 (emphasis added).

453 Office of the Public Advocate Submission (n 305) 8.

454 The Committee Report (n 305) [4.12], citing New South Wales Ministerial Advisory Committee on Ageing (NSW MACA) Submission (n 305) 5.

455 Teresa Somes and Eileen Webb, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33 Law Context: A Socio-Legal Journal 24, 25.

456 Susan J. Burridge, 'A Metric Measurement of the Chancellor's Foot' (1982) 41 (2) Cambridge Law Journal 290, 294.

457 Somes and Webb (n 455) 26.

importantly what evidence is available. The available equitable actions include, resulting trust, undue influence, unconscionable conduct, remedial constructive trusts and equitable estoppel. These equitable actions are discussed in more detail below.[458]

In the event that the requisite intention to create legal rights and obligations under a Family Agreement is found, and in the event that there is a breach of the Family Agreement, the aggrieved party may commence civil litigation for breach of contract.[459] There are however policy arguments in relation to contractual remedies for breach of a Family Agreement. First, it is commented that if Family Agreements were construed as enforceable contracts, such agreements would flood the courts with '… unlimited litigation …'[460] over petty breaches of minor household, and caring, duties and similar obligations.[461] Secondly, there is a fear that enforcing a Family Agreement may cause harm or abuse.[462] Anecdotal and case law evidence suggests that the majority of Family Agreements fail due

---

458 See discussion under the heading 'Equitable Actions', chapter 8, section 8.1 at page 241.

459 British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, 'Private Care Agreements Between Older Adults and Friends of Family Members' Report No. 18 (2002) (the BCLI Committee Report) 13 <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020; Queensland Attorney-General Submission (n 305) 5. The contractual remedies available to an aggrieved party for a breach of a Family Agreement is discussed in chapter 6, commencing at page 138.

460 *Balfour v Balfour* [1919] 2 KB 571, 577 per Duke LJ.

461 ibid.

462 Banks McDowell, 'Contracts in the Family' (1965) 45 Boston University Law Review 43, 50.

to relationship breakdowns.[463] As Bryson J commented, 'It is a sadly recurring judicial experience to see that family relationships do deteriorate and become intolerable, and that the persons involved did not foresee that this might happen.'[464] Further, it is observed that, in the majority of cases, actions for enforcement of Family Agreements are commenced after the Caring Relationship has completely broken down.[465] It is therefore questionable whether a contractual remedy forcing the adult child to provide care for the older parent is suitable. It is commented that family members must be available and willing to provide care and accept the caring role.[466] If in fact an adult child no longer wishes to do so but is forced to, it is unlikely that that the caring will be effective which will inevitably result in, '… poor care, resistance to care and elder abuse and neglect.'[467] That is why McDowell has argued that Family Agreements should not be treated as contracts but be left '… totally outside the control of the legal system.'[468]

---

463 Herd (2002a) (n 305); Herd (2002b) (n 305); Monro (n 304); Hall (n 306) 3, citing *Folia v Trelinski* [1996] B.C.J. No. 2135 (S.C.); [1997] B.C.J. No. 2417; *Sweetenham v Wild* [2005] QCA 264, *Simpson v Simpson* [2006] QDC 83; *Field v Loh* [2007] QSC 250; *Bennett v Horgan* unreported, NSWSC, 3 June 1994), BC9402569.

464 *Bennett v Horgan* unreported, NSWSC, 3 June 1994), BC9402569, 12.

465 Herd (2002b) (n 305) 26.

466 De Vaus (n 48) 17.

467 ibid. The general rule against allowing for specific performance of a contract for personal services is discussed under the heading 'Specific Performance', chapter 6, section 6.3 commencing at page 165.

468 McDowell (n 462) 49.

If, however, Family Agreements were not recognised as enforceable contracts, contractual remedies will not be available[469] and common law presumptions would assume that the transfer(s) of property is a gift, with no obligations attached.[470] The Victorian Government has commented:[471]

> The informality and familial nature of these agreements may make it difficult for the law to recognise and/or enforce them as contracts, and common law presumptions may assume that the transfer of property is a gift with no obligations attached.

In *Re Gonin (deceased)*,[472] a mother, whose health was deteriorating, asked her daughter the plaintiff, if she would return home to care for her and her husband. It was orally agreed that the daughter would get the house in which her parents lived in exchange for care 'for the rest of their lives'. The daughter left her employment and returned home to live with, and care for, her parents. The mother did not make a Will because she mistakenly believed she could not gift her daughter her house because she was an illegitimate child. As an alternative, the mother, unbeknown to the plaintiff, signed a cheque in the plaintiff's favour for £33,000, which was to be given to the plaintiff on the mother's death. The mother died intestate. The plaintiff daughter argued that the cheque was evidence of the mother's intention that the plaintiff should have the house upon the mother's death. The plaintiff

---

469 Tina Cockburn, 'Equitable relief to enforce family agreements' (2008) 86 Precedent 41, 42.

470 The Committee Report (n 305) [4.11], citing Victorian Government Submission (n 305) 29; the BCLI Committee Report (n 459).

471 Victorian Government Submission (n 305) 29.

472 [1977] 2 All ER 720.

argued (i) that there was an oral contract between her and her parents, which resulted in an immediate gift of her parent's house in return for her to care for her parents for life, and if that was not right, (ii) that there was a continuing intention on the part of her mother to gift her the house and its contents in accordance with the rule in *Strong v Bird*.[473] In essence, the rule in *Strong v Bird*, which was first formulated by Sir George Jessel MR and later described by Neville J in *Re Stewart, Stewart v McLaughlin*,[474] operates to perfect an otherwise imperfect gift where the intended donee acquires the gift property by indirect means. The Court in *Re Gonin (deceased)* held that since there was no written contract of the alleged contract that related to land, it was necessary for the plaintiff to rely on the doctrine of part performance. Walton J found that there were insufficient acts performed by the plaintiff that were referable to a contract concerning the freehold property.[475] As a result, the plaintiff had failed to prove the alleged contract. Further, the Court held that the rule in *Strong v Bird* was not applicable as there was no continuing intention of the mother to give the house to the plaintiff.

In *Ellis v Chief Adjudication Officer*,[476] the Court held that a gift of a flat by a mother to her daughter on the condition that the daughter would care for the mother in that property and pay off the mortgage did not amount to a contract because there was not an intention to create legal relations.[477] In *Ellis v Chief Adjudication Officer*, a mother transferred her property to her daughter by a gift *inter vivos* that was subject to two conditions: (i) that the

---

473 (1874) LR 18 Eq 315.

474 [1908] 2 Ch 251, 254.

475 [1977] 2 All ER 720, 731.

476 [1998] 1 FLR 184.

477 [1998]] 1 FLR 184, 188 per Staughton LJ, 190 per Otton LJ, and 192 per Schiemann LJ.

daughter would care for the mother in the property, and (ii) that the daughter would pay off the mortgage of £6,000. After the daughter had repaid the £6,000 mortgage, she evicted her mother, who had to be rehoused by the local authority and, eventually, the daughter sold the property. Prior to the house being sold, the mother claimed income support. Her claim was rejected on the ground that the daughter had breached a condition subsequent of the gift, which was that the daughter would look after the mother in the property, when she evicted the mother from the house. As a result, the gift failed, and the daughter held the property on trust for the mother. Therefore, because the capital asset in the home exceeded the approved amount under reg 45 of the Income Support (General) Regulations 1987, which at the time was £6,000. As a consequence, the mother was not entitled to income support.

Given the majority of Family Agreements are made on an informal and/or oral basis, they are likely to fall within the scope of the 'domestic agreements' *Balfour* and *Jones v Padavatton* speak of, being '… merely one of those family or domestic arrangements where the parties at the time had no thought or intention of invoking the assistance of the courts should the arrangement not be honoured'[478] or be '… far too vague and uncertain to be itself enforceable as a contract …'.[479]

Therefore, an alternative approach to Family Agreements is to consider whether cash-for-care government schemes, such as direct payment schemes, should be broadened so as to allow older parents to employ their adult children as their care providers.

---

[478] *Jones v Padavatton* [1969] 2 All ER 616, 624 per Fenton Atkinson LJ.

[479] ibid 625 per Fenton Atkinson LJ.

4. DIRECT PAYMENT SCHEMES

In response to the rapidly ageing population, governments have embraced 'cash-for-care schemes', which are systems that allow older people requiring long-term care to directly employ caregivers in an 'employer-employee relationship'.[480] In 1997, Ungerson commented 'the temptation of governments to introduce reinforcements of care responsibilities through the use of payments to informal carers in order to maintain an adequate supply of care is likely to be great'.[481] Ungerson noted, '… welfare states are searching for ways to underwrite the provision of care within households and kin networks through cash subvention both to carers and to care recipients. The consequence is the marketization of intimacy and the commodification of care'.[482] In 2005, Ungerson said:

> The introduction of schemes which commodify and attach an income to care activities, which in the past have been unpaid, has introduced new hybrids of paid work and unpaid care activity, such that, materially as well as theoretically, the boundaries between paid and unpaid care work are shifting and blurring in many developed welfare states – particularly in relation to the care of frail elderly and other disabled people.[483]

---

480 Clare Ungerson, 'Social Politics and the Commodification of Care' (1997) 4 (3) Social Politics 362, 369; Ellen Grootegoed, Trudie Knijn and Barbara Da Roit, 'Relatives as paid care-givers: how family carers experience payments for care' (2010) 30(3) Ageing and Society 467.

481 Ungerson (n 480) 374.

482 ibid 363.

483 Claire Ungerson, 'Care, work and feeling' (2005) 53 The Sociological Review 188, 189.

The types of payments made under these schemes have been described as 'quasi-wages' because, just like wages in an employment context, the exchange of money from the care recipient to the caregiver is said to be 'contingent on satisfaction with the service provided'.[484] Older people may make what is called 'symbolic payments', which are paid out of their own money in an attempt to 'lubricate a reciprocal system' within the family.[485] Although 'symbolic payments' are considered to be 'nice gestures', they are not enough to compensate the adult child in a long-term care situation,[486] particularly in circumstances where the adult child has foregone and/or reduce other paid employment to provide care. Therefore, the type of payment that this chapter is focused on is direct payment schemes funded by the government, rather than the individual.

Within the care literature, an important distinction is made between (i) payments paid directly to the caregiver ('carer allowances'), and (ii) payments made to care recipients ('direct payments').[487] The first payment is paid directly to the caregiver (adult child) through tax and social security systems and is based on eligibility criteria.[488] Whereas, the second type of payment is paid to the care recipient (older parent) from state provided direct payments and then directed to the caregiver. It has been commented that payments made via direct payments is based on 'contract, and rules of contract between individual carer and individual care user'.[489]

---

484 Ungerson (n 480) 365.

485 ibid.

486 Grootegoed et al (n 480) 478.

487 Ungerson (n 480) 364.

488 Ungerson (n 480) 365.

489 Ungerson (n 480) 365.

It should be noted that 'direct payments' and 'personal budgets' are the terms used for the scheme in the UK and 'personal budgets' is the term used for the scheme in the Netherlands. However, these terms, including more general terms such as 'direct payment schemes', 'cash-for-care schemes' and 'payments for care' are used interchangeably throughout this chapter.

4.1. THE NETHERLANDS

Since 1968, with the introduction of the long-term care insurance scheme, *Algemene Wet Bijzondere Ziektekosten*, the range of long-term care services in the Netherlands has gradually expanded.[490] In 1996, older people in the Netherlands acquired the 'right' to receive a *Persoonsgebonden Budget* (personal budget), which is also known as a PGB.[491] In order for an older person to access the long-term insurance scheme, they must receive a positive assessment by the *Centrum Indicatiestelling Zorg*, which is the Care Assessment Office.[492] If an older person is considered eligible, they may choose between (i) receiving formal care services, either in their own home or in a nursing facility, (ii) a personal budget (**PGB**), or (iii) a mix of both.[493]

---

490 The Health Foundation, 'Improvement in Practice: The Personal Touch, The Dutch experience of personal health budges (2011) <https://www.health.org.uk/sites/health/files/ThePersonalTouchDutchExperienceOfPersonalHealthBudgets.pdf> accessed on 22 April 2020.

491 Grootegoed et al (n 480) 468.

492 Grootegoed et al (n 480) 469.

493 ibid.

Due to the growing demand for home-based care, PGB have become increasingly popular.[494] It is commented that the drive for PGB arose partly due to the limitations in the traditional healthcare system and partly as a way to allow care recipients to exercise greater choice and control over their healthcare.[495] Unlike in other countries, such as the UK and Australia, in the Netherlands disabled older people are allowed to use their personal budgets to directly employ their relatives as their carers.[496] These cash payments are treated as income for tax purposes.[497] It is commented that the main reason older people choose a PGB is for the opportunity to directly employ informal caregivers, such as relatives.[498] In 2011, Mr Johan Knollema, the (then) PGB National Coordinator for the Health Care Insurance Board, commented that around one third of carers employed using PGB were thought to be relatives and neighbours.[499]

4.2. ENGLAND

Unlike in the Netherlands, when the direct payment scheme in Britain was introduced by the Community Care (Direct Payments) Act 1996, it specifically forbid older people from employing their close relatives as their carer.[500] In 1996, the Department of Health justified this restriction because:

---

494 ibid.

495 The Health Foundation (n 490).

496 Grootegoed et al (n 480).

497 Grootegoed et al (n 480) 470.

498 Grootegoed et al (n 480) 469, citing Ramakers et al 2008.

499 The Health Foundation (n 490).

500 Ungerson (n 480) 370.

> the relationships which people have with their informal carers is very different from their relationships with employees. Direct payments will be an alternative to services which people would otherwise receive from the local authority—not to replace existing support networks within families and communities.[501]

When direct payments were first introduced in Britain they were only available to disabled adults of working age,[502] which were people aged between 18 and 65 years.[503] In 2000, the scheme was extended to include older people aged 65 years and over.[504] In 2003, a duty to provide direct payments was introduced under The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003 (UK), which made it mandatory for local authorities to make direct payments to people who consented to and were able to manage them with or without assistance.[505] This meant that people living with dementia were unable to access direct payments.

---

501 ibid citing Department of Health. 1996. Community Care (Direct Payments) Bill: Consultation Paper. London: Department of Health, the Scottish Office, Welsh Office, Northern Ireland Office.

502 Explanatory Memorandum to The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, 8 <http://www.legislation.gov.uk/uksi/2009/1887/pdfs/uksiem_20091887_en.pdf> accessed 22 April 2020.

503 Hannah Bullmore and Simon Lawton-Smith, Mental Health Foundation, 'Personalising social care for people living with dementia' (2012) Elder Law Journal 97, 98.

504 ibid; (n 535) 1; Clare Ungerson, 'Whose empowerment and independence? A cross-national perspective on "cash for care" schemes' (2004) 24 Ageing & Society 189, 203.

505 The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003 (UK), reg 2(a). See also Health and Social Care Act 2001 (UK), s 57.

In 2009, The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, in conjunction with the Mental Capacity Act 2005 (UK), revoked The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003 (UK) and extended the scope of direct payments to include persons appointed to receive and manage direct payments on behalf of the individuals who lacked capacity,[506] which was known as a 'suitable person'. Significantly, this 'suitable person' could be a family member of the adult requiring care, namely:

(a) the spouse or civil partner of P[507] [adult];

(b) a person who lives with P as if their spouse or civil partner;

(c) a person who is P's—

(i) parent or parent-in-law,

(ii) son or daughter,

(iii) son-in-law or daughter-in-law,

(iv) stepson or stepdaughter,

---

506 The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, reg 8(1).

507 'P' means, inter alia, a person falling within the description prescribed by The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, reg 3 who falls within subsection (2)(a) of the Health and Social Care Act 2001 (UK), s 57.

(v) brother or sister,

(vi) aunt or uncle, or

(vii) grandparent;

(d) the spouse or civil partner of any person specified in sub-paragraph (c); and

(e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.[508]

Today, direct payments are made under the Care Act 2014 (UK).[509] Unlike The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, The Care and Support (Direct Payments) Regulations 2014 contains conditions that *must* apply to the making of direct payments. In particular, direct payments must *not* be used to employ the following people:

(a) the spouse or civil partner of the adult;

(b) a person who lives with the adult as if their spouse or civil partner;

(c) a person living in the same household as the adult who is the adult's—

(i) parent or parent-in-law,

---

[508] The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, reg 8(3).

[509] Care Act 2014 (UK), ss 31-33. See also the Mental Health Act 1983, s 117(2C).

(ii) son or daughter,

(iii) son-in-law or daughter-in-law,

(iv) stepson or stepdaughter,

(v) brother or sister,

(vi) aunt or uncle, or

(vii) grandparent;

(d) the spouse or civil partner of any person specified in sub-paragraph (c) who lives in the same household as the adult; and

(e) a person who lives with any person specified in sub-paragraph (c) as if that person's spouse or civil partner.[510]

Although the employment of family members living with the older person is precluded under the current regulations, in exceptional cases it is possible for direct payments to be used to pay co-resident relatives if the local authority agrees it is the most effective, or only,

[510] The Care and Support (Direct Payments) Regulations 2014, reg 3(3).

way of meeting the person's care needs.[511] Carers UK have commented that this might be necessary, for example, if there are religious or communication reasons.[512]

4.3. AUSTRALIA

Before an older Australian (usually 65 years and over or 50 years and over for Aboriginal and Torres Strait Islander people) can be eligible for Australian Government funded aged care services in their home, they must first have a 'My Aged Care assessment'.[513] This assessment will determine the care needs of the older person and what types of care and services they are eligible for.[514] There are two types of assessment depending on the care needs of the older person: (i) the home support assessment with a Regional Assessment Service if the older person requires low-level support to remain living independently in their home (**Commonwealth Home Support Programme**), and (ii) the comprehensive assessment with an Aged Care Assessment Team for older people who have more complex care needs (**Home Care Packages**).[515]

---

511 Age UK, 'Personal budgets and direct payments in social care: Factsheet 24 (2019) <https://www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs24_personal_budgets_and_direct_payments_in_social_care_fcs.pdf> accessed on 22 April 2020; Carers UK, 'Direct Payments' <https://www.carersuk.org/help-and-advice/practical-support/getting-care-and-support/direct-payments#sec6> accessed 22 April 2020. See also The Care and Support (Direct Payments) Regulations 2014, reg 3(3).

512 Carers UK, 'Direct Payments' <https://www.carersuk.org/help-and-advice/practical-support/getting-care-and-support/direct-payments#sec6> accessed 22 April 2020.

513 Australian Government, My Aged Care, 'Apply for an assessment' <https://www.myagedcare.gov.au/eligibility-and-assessment/how-assessment-works> accessed 22 April 2020.

514 ibid.

515 ibid.

4.4. COMMONWEALTH HOME SUPPORT PROGRAMME

In July 2015, the Australian Government introduced the Commonwealth Home Support Programme (**CHSP**), which provides entry-level home support for older people who need assistance. The CHSP consolidated four previous care programmes, the Commonwealth Home and Community Care Program, the planned respite from the National Respite for Carers Program, the Day Therapy Centre Program, and the Assistance with Care and Housing for the Aged Program. Older people receiving entry-level support at home receives help with 'housework, personal care, meals and food preparation, transport, shopping allied health, social support and planned respite'.[516]

4.5. HOME CARE PACKAGES PROGRAMME

For older Australians requiring more complex coordinated care at home, they will be eligible to receive services such as 'personal care, support services and nursing, allied health and clinical services'.[517] Unlike older people receiving assistance entry-level care on the CHSP, the Home Care Packages Program requires the older person and their home care provider to enter into a 'Home Care Agreement'[518]. The older person can choose *not* to sign the Agreement however if they do (i) the home care provider is still required to discuss the type of care and services the older person needs, and (ii) the home care provider

---

516 Australian Government, My Aged Care, 'Your guide to Commonwealth Home Support Programme services' (2019) 5 <https://www.myagedcare.gov.au/sites/default/files/2019-07/your-guide-to-commonwealth-home-support-programme-services.pdf> accessed 22 April 2020 .

517 Australian Government, My Aged Care, 'Your guide to Home Care Package service' (2019) 2 <https://www.myagedcare.gov.au/sites/default/files/2019-06/your-guide-to-home-care-package-services-march-2019.pdf> accessed 22 April 2020.

518 ibid.

is encouraged to record the reason why the older person has not signed the agreement. The older person and their service provider's responsibilities are outlined under the Charter of Care Recipients' Rights and Responsibilities for Home Care.[519] The service provider must deliver care following the Home Care Standards.[520] If the older person is unhappy with any aspect of the care they are receiving, they can make a complaint to the Aged Care Complaints Commissioner.[521]

4.6. HOME CARE AGREEMENT

The legal framework for the Home Care Packages Programme is provided by the Aged Care Act 1997 (Cth) (the **Aged Care Act**). Under section 61-1(1) of the Aged Care Act, a Home Care Agreement entered into between a care recipient and an approved provider must specify the following:

(a) the home care service through which the approved provider will provide care to the care recipient; and

(b) the levels of care and services that the approved provider has the capacity to provide to the care recipient while the care recipient is being provided with care through the home care service; and

519 ibid.

520 ibid.

521 ibid.

(c) the policies and practices that the approved provider will follow in setting the fees that the care recipient will be liable to pay to the approved provider for the provision of the care and services; and

(d) if the care recipient is not to be provided with the home care service on a permanent basis—the period for which the care and services will be provided; and

(e) the circumstances in which provision of the home care may be suspended or terminated by either party, and the amounts that the care recipient will be liable to pay to the approved provider for any period of suspension; and

(f) the complaints resolution mechanism that the approved provider will use to address complaints made by or on behalf of the person; and

(g) the care recipient's responsibilities as a recipient of the home care.[522]

In addition, a Home Care Agreement must comply with the User Rights Principles 2014 (Cth), particularly in relation to:

(a) the way in which, and the process by which, the agreement is to be entered into; or

(b) the period within which the agreement is to be entered into; or

[522] Aged Care Act 1997 (Cth), s 61-1(1).

(c) any provisions that the agreement must contain; or

(d) any other matters with which the agreement must deal.[523]

Further, a Home Care Agreement 'must not contain any provision that would have the effect of the care recipient being treated less favourably in relation to any matter than the care recipient would otherwise be treated, under any law of the Commonwealth, in relation to that matter'.[524] Under reg 23(2) of the User Rights Principles 2014 (Cth), a Home Care Agreement must contain the following provisions:

(a) the date when the provider will start to provide home care to the care recipient;

(b) statements specifying:

(i) whether the home care will be delivered on a consumer directed care basis; and

(ii) the care and services that the care recipient will receive; and

(iii) the level of home care to be provided; and

(iv) the care recipient's rights in relation to decisions about the care and services that are to be provided; and

[523] Aged Care Act 1997 (Cth), s 61-1(2).

[524] Aged Care Act 1997 (Cth), s 61-1(3).

(v) that the provider will provide a care plan, and any changes to the care plan, to the care recipient;

(c) a clear itemised statement of the fees (if any) payable by the care recipient and how those fees are calculated;

(d) provision for financial information to be given to the care recipient about the home care that the care recipient will receive, including a statement that the approved provider must, within 7 days after a request by the care recipient, give the care recipient:

(i) a clear and simple presentation of the financial position of the home care service, including the costs of home care, that explains any ongoing fees payable by the care recipient; and

(ii) a copy of the most recent statement of the audited accounts of the approved provider's home care service or, if the home care service is operated as part of a broader organisation, the most recent statement of the audited accounts of the organisation's aged care component (that includes the home care service);

(e) a guarantee that all reasonable steps will be taken to protect the confidentiality, so far as legally permissible, of information provided by the care recipient, and details of the use of the information that is to be made by:

(i) the provider; and

(ii) each person or body to whom the information is disclosed by the provider;

(f) a statement that the care recipient may suspend, on a temporary basis, the provision of the home care, from a particular date;

(g) the conditions under which either party may terminate the provision of home care.[525]

Under reg 23(3), a Home Care Agreement must provide:

(a) that the agreement may be varied:

(i) by the approved provider, if the variation is necessary to implement the *A New Tax System (Goods and Services Tax) Act 1999*; or

(ii) in any other case, by mutual consent, following adequate consultation, of the care recipient and approved provider; and

(b) that the agreement must not be varied under subparagraph (a)(i) by the provider unless the provider has given reasonable notice in writing about the variation to the care recipient; and

[525] User Rights Principles 2014 (Cth), reg 23(2).

(c) that the agreement must not be varied in a way that is inconsistent with the *A New Tax System (Goods and Services Tax) Act 1999*, the *Aged Care Act 1997* or the *Extra Service Principles 2014*.[526]

Under reg 23(4), a Home Care Agreement must:

(a) state that the care recipient is entitled to make, without fear of reprisal, a complaint about the provision of the home care; and

(b) state the mechanisms for making such a complaint.[527]

Furthermore, a Home Care Agreement 'must be expressed in plain language and be readily understandable by the care recipient'.[528] An 'approved provider' must be a corporation or a person that has been approved to provide care under the Aged Care Act.[529] A person cannot be approved if they are not an incorporated organisation. Therefore, if the applicant is a sole trade, their application will not be assessed.[530]

In deciding whether the applicant is suitable to provide aged care, the Secretary must consider:

---

526 User Rights Principles 2014 (Cth), reg 23(3).

527 User Rights Principles 2014 (Cth), reg 23(4).

528 User Rights Principles 2014 (Cth), reg 23(5).

529 See Aged Care Act 1997 (Cth), Pt 2.1, Sch 1.

530 Australian Government, Aged Care Quality and Safety Commission, 'Becoming an approve aged care provider' <https://www.agedcarequality.gov.au/providers/becoming-approved-aged-care-provider> accessed on 29 March 2020.

(a) the applicant's experience in providing aged care or other relevant forms of care; and

(b) the applicant's demonstrated understanding of its responsibilities as a provider of the type of care for which approval is sought; and

(c) the systems that the applicant has, or proposes to have, in place to meet its responsibilities as a provider of the type of care for which approval is sought; and

(d) the applicant's record of financial management, and the methods that the applicant uses, or proposes to use, in order to ensure sound financial management; and

(e) if the applicant has been a provider of aged care—its conduct as a provider, and its compliance with its responsibilities as a provider and obligations arising from the receipt of any payments from the Commonwealth for providing that aged care; and

(f) any other matters specified in the Approved Provider Principles.[531]

Further, the approved provider has an obligation 'not to act in a way which is inconsistent with any rights and responsibilities that are specific in the User Rights Principles'.[532]

---

[531] Aged Care Act 1997 (Cth), s 8-3.

[532] Aged Care Act 1997 (Cth), ss 56-1(m), 56-2(k).

An alternative to Family Agreements is for the current legislative regime to be amended so as to include family members within the definition of an 'approved provider'. That way, (i) care recipients (older parents) could directly employ their adult children as their carers, which would give them greater choice and control over their healthcare, and (ii) the Caring Relationship would be regulated by the existing provisions that already govern analogous caring relationships under Home Care Agreements.

4.7. NATIONAL DISABILITY INSURANCE SCHEME

The National Disability Insurance Scheme Act 2013 (Cth), which was passed by the Australian Parliament in March 2013, established the National Disability Insurance Scheme (the **NDIS**), which is another way disabled older people can access government support. In order for a person to be eligible to access the NDIS, they must meet the age requirements,[533] the residence requirements,[534] and the disability requirements.[535] This means that the older person must (i) have been 65 years or younger when they entered the NDIS, (ii) be a resident and an Australian citizen, or, inter alia, a permanent visa holder, and (iii) have a disability. If an older person (over 65) became an NDIS participant prior to them turning 65, they can continue to receive disability support through the NDIS, or they can choose to receive support through the Commonwealth aged care system.[536]

---

533 National Disability Insurance Scheme Act 2013 (Cth), s 22.

534 National Disability Insurance Scheme Act 2013 (Cth), s 23.

535 National Disability Insurance Scheme Act 2013 (Cth), s 24.

536 NDIS, 'The NDIS for people aged 65 and over' <http://ndis.nsw.gov.au/ndis-resources/fact-sheets/fact-sheet-the-ndis-for-people-aged-65-and-over/> accessed 22 April 2020.

Relevantly, the NDIS will *not* fund a family member to provide personal care support, except in what the NDIS has described as 'most exceptional circumstances'.[537] Therefore, it is unlikely than an adult child will be able to be paid to care for their older parent under the NDIS unless, for example, 'there is risk of harm or neglect to the participant or where a suitable provider is not available to provide the support'.[538] This is another example of the law excluding family members from the category of persons who can provide care to older people.

4.8. CARER VISA

Although family carers are excluded as care providers under the abovementioned health care schemes, under Migration law, family members are eligible to apply for a Carer visa (subclass 116) (**Carer visa**), which, if successful, would facilitate their permanent migration to Australia to provide care to a relative.[539] The essential visa requirements for the Carer visa are found in the Migration Regulations 1994 (Cth), which are made under the Migration Act 1958 (Cth). In order to be eligible for a Carer visa, the applicant (carer) must satisfy the following requirements:

---

537 NDIS, 'Module 2 — Self-directing my NDIS plan' (2016) [1.1] <http://www.hdn.org.au/wp-content/uploads/2017/07/Self-managing-plan-module.pdf> accessed 22 April 2020.

538 ibid.

539 Australian Government, Department of Home Affairs, 'Carer visa (subclass 116) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/carer-116> accessed 22 April 2020.

(1) An applicant for a visa is a ***carer*** of a person who is an Australian citizen usually resident in Australia, an Australian permanent resident or an eligible New Zealand citizen (***the resident***) if:

(a) the applicant is a relative of the resident; and

(b) according to a certificate that meets the requirements of subregulation (2):

(i) a person (being the resident or a member of the family unit of the resident) has a medical condition; and

(ii) the medical condition is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life; and

(iii) the impairment has, under the Impairment Tables (within the meaning of subsection 23(1) of the *Social Security Act 1991*), the rating that is specified in the certificate; and

(iv) because of the medical condition, the person has, and will continue for at least 2 years to have, a need for direct assistance in attending to the practical aspects of daily life; and

(ba) the person mentioned in subparagraph (b)(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and

(c) the rating mentioned in subparagraph (b)(iii) is equal to, or exceeds, the impairment rating specified in a legislative instrument made by the Minister for this paragraph; and

(d) if the person to whom the certificate relates is not the resident, the resident has a permanent or long-term need for assistance in providing the direct assistance mentioned in subparagraph (b)(iv); and

(e) the assistance cannot reasonably be:

(i) provided by any other relative of the resident, being a relative who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; or

(ii) obtained from welfare, hospital, nursing or community services in Australia; and

(f) the applicant is willing and able to provide to the resident substantial and continuing assistance of the kind needed under subparagraph (b)(iv) or paragraph (d), as the case requires.[540]

The applicant (carer) must also meet certain health[541] and character[542] requirements before they will be granted the Carer visa.[543]

It is perhaps arguable that one of the biggest hurdles for applicants (carers) stems from regulation 1.15AA(1)(e), which is the requirement that 'the [care] assistance cannot reasonably be provided by any other relative of the resident, being a relative who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen' or 'obtained from welfare, hospital, nursing or community services in Australia'[544]. Judges of the Federal Court of Australia have considered this regulation on a number of occasions.[545] In *Minister for Immigration and Border Protection v Nguyen*,[546] the Federal Court of Australia referred to the seminal decision of Gray J in *Biyiksiz v Minister for Immigration & Multicultural & Indigenous Affairs*,[547] in which his Honour, whilst considering a visa application in respect of a (then) 'special need relative', concluded that

---

[540] Migration Regulations 1994 (Cth), reg 1.15AA.

[541] Migration Act 1958 (Cth), s 65. 'Health criterion' is defined under Migration Act 1958 (Cth), s 5(1).

[542] See Migration Act 1958 (Cth), s 501.

[543] See also Migration Regulations 1994 (Cth), reg 1.15AA(2).

[544] Migration Regulations 1994 (Cth), reg 1.15AA(1)(e).

[545] *Minister for Immigration and Border Protection v Nguyen* [2017] FCAFC 149 [17].

[546] [2017] FCAFC 149 [18].

[547] [2004] FCA 814.

the phrase 'cannot reasonably be obtained'[548] had to be read in the context of the person needing assistance, rather than availability to the person requiring assistance. Gray J commented:

> It cannot have been the intention of the framer of the Migration Regulations that the residence visa should be available to no-one, or should only be available in the rarest of cases. In Australia, health and welfare services are highly developed. There must be very few disabilities or prolonged illnesses for which assistance is unavailable from health or aged care institutions and professionals. If par (b)(ii) of the definition of [the then] 'special need relative' were to be construed as meaning that assistance reasonably available was reasonably obtainable in every case, there would be very few, if any, visas granted. For this reason, to accord with the purpose of the Migration Regulations in this respect, it is necessary to construe 'cannot reasonably be obtained' as 'cannot reasonably be obtained by the person requiring assistance'. It is necessary to recognise that this aspect of the definition of 'special need relative' focuses on obtainability by the person requiring assistance, as distinct from availability to the person requiring assistance.[549]
>
> ...
>
> … The words 'cannot reasonably be obtained' must be construed by reference to reasonableness from the point of view of the person requiring assistance, and not only by reference to the reasonable availability of the assistance from other sources.

---

548 See Migration Regulations 1994 (Cth), reg 1.15AA(1)(e)(ii).

549 *Biyiksiz v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 814 [17].

> This proposition accords with my own view of the purpose of the definition of 'special need relative' in the context of the criteria for a visa of the kind sought by the applicant.[550]
>
> For this reason, factors that are subjective to the person requiring long-term assistance will be of relevance in determining whether assistance can reasonably be obtained by that person from sources other than an applicant for the relevant visa.[551]

In relation to regulation 1.15AA(1)(f), the Federal Court of Australia concluded that the first limb, regarding the applicant's willingness to provide the required care, 'is concerned with the applicant's state of mind'.[552] Contrastingly, the second limb, whether the applicant is 'able' to provide the required care, 'calls for an objective inquiry' as to 'whether the applicant is a person who is suitable or fit to provide thee assistance'.[553] However, before determining subsection (f), it is likely that the application will fall down at subsection (e), which is an 'onerous criterion to satisfy'.[554] To succeed, the decision-maker must be positively satisfied that the assistance cannot reasonably be (i) provided by the sponsor's relatives currently residing in Australia, which is assessed cumulatively between all

---

550 *Biyiksiz v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 814 [20].

551 *Biyiksiz v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 814 [21].

552 *Xiang v MIMIA* [2004] FCAFC 64 [7] per Goldberg, Finkelstein and Weinberg JJ, cited with approval in *Jung v Minister for Immigration and Border Protection* [2017] FCA 173 [13] per Flick J.

553 *Xiang v MIMIA* [2004] FCAFC 64 [7] per Goldberg, Finkelstein and Weinberg JJ, cited with approval in *Jung v Minister for Immigration and Border Protection* [2017] FCA 173 [13] per Flick J.

554 *Valencia v Minister for Immigration & Anor* [2018] FCCA 939 [33] per Driver J.

relatives living in Australia,[555] (ii) obtained from community sources, or (iii) a combination of the two.[556] It is likely that the sponsor will lead evidence to suggest that, cumulatively and with professional assistance, the relatives currently residing in Australia could not provide the assistance required. In some circumstances, the sponsor may not have the financial means to afford hiring professional help. Therefore, family care could perhaps be the only option the older person has, or at least the most economical. In *Nguyen v Minister for Immigration & Border Protection & Anor*,[557] the appellant's evidence to the Tribunal was 'that the money that will be required by the visa applicant and his family would be considerably less than the money that might be required if the family were to hire a carer.'[558] Although the Tribunal acknowledged that concern, the Tribunal found that a full time carer was not required 'because other family members would be able to contribute some degree of care and support'.[559]

4.9. DIRECT PAYMENT SCHEME RESTRICTIONS: THE RATIONALE

In light of the above, it is evident that older people in the UK and Australia are expressly forbidden to employ their relatives as their carer under current direct payment schemes, unless exceptional circumstances can be proven. Furthermore, it is evident that even when

---

555 *Valencia v Minister for Immigration & Anor* [2018] FCCA 939 [33] per Driver J.

556 ibid; *Nguyen v Minister for Immigration and Border Protection* [2016] FCA 1460 [69] per Bromwich J.

557 [2015] FCCA 3254.

558 *Nguyen v Minister for Immigration & Border Protection & Anor* [2015] FCCA 3254 [50].

559 *Nguyen v Minister for Immigration & Border Protection & Anor* [2015] FCCA 3254 [50].

the legislation allows the family member to apply to become a carer, such as the Carer visa, the application process is onerous and, in many cases, will be unsuccessful.

Given direct payment schemes in the UK and Australia do not allow employment of family members as carers, it is evident that older people do not have complete choice and/or control over their healthcare, in particular their care provider. Therefore, in reality, older people have 'very limited choices over the person providing their services, the timing of services or the tasks that social care services would undertake'.[560] These limitations on the construction of 'choice' illustrate that government policies do not recognise nor promote pervasive family values of care. It is argued that the inability of older and disabled people to 'choose' their family as caregivers, whilst being supported by government policies, undermines older and disabled people's equality and rights as equal citizens.[561] Furthermore, in not recognising nor promoting the Caring Relationship, government policies are not adequately supporting adult children who choose to care for their older parent(s). Ungerson argues that it is important for policy makers to fully understand how these 'commodified care relationships'[562] impacts the 'empowerment and independence'[563] in respect of both parties in the Caring Relationship.

---

560 Caroline Glendinning, 'Increasing Choice and Control for Older and Disabled People: A Critical Review of New Developments in England' (2008) 42(5) 451, 456, citing Hardy et al. 1999; Parry-Jones and Soulsby 2001.

561 ibid, citing Cabinet Office (2005), Improving the Life Chances of Disabled People, London: Cabinet Office Strategy Unit: 44 and Morris, J., (2006), Independent living: the role of the disability movement in the development of government policy. In C. Glendinning and P.A. Kemp (eds), Cash and Care: Policy Challenges in the Welfare State, Bristol: Policy Press, pp. 235 - 48: 245.

562 Ungerson (n 504) 210.

563 ibid 211.

Herring comments that, presumably, the rationale behind this restriction is to ensure that direct payments are used to 'discharge social care obligations', rather than benefit a co-resident who is likely to provide the care to their older relative whether they are paid for it or not.[564] The restriction on using direct payments to employ relatives has also been justified by 'a desire to prevent existing informal care arrangements from becoming too formalised, to prevent the risk of exploitation and to prevent family members from feeling under pressure to become full-time carers'.[565]

However, these rationales overlook the reality that many adult children, particularly daughters, are making significant sacrifices to provide long-term care for their older parent(s). Such as, forgoing and/or reducing their working hours. As outlined above,[566] traditionally women were the full-time caregivers but since 1950 onwards, women have increasingly engaged in employment outside the home. Today, many adult children are highly leveraged with little savings to afford to reduce their working hours to provide unpaid care for their older parent(s), particularly those who are caring, and providing, for their own families.

Further, Glendinning comments that restricting who older people can employ under direct payment schemes may deter them from utilising such benefits as they would rather

---

564 Jonathan Herring, *Caring and the Law* (Hart Publishing 2013) 130.

565 Charlotte Pearson, 'Direct Payments: Policy development across the UK (second draft)' (2004), citing Glasby and Littlechild, 2002 <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/2011/10/draft-policy-development-paper.pdf> accessed 22 April 2020.

566 See discussion under the heading 'Reciprocity', chapter 2, section 2.7, commencing at page 31.

employ a relative they live with rather than employ a personal care assistant from the open market.[567]

In light of the above, it is evident that the rationales for excluding family members as care providers under direct payment scheme regimes is unjustified as it does not reflect (i) modern society, and (ii) family realities. There is no reason why direct payment schemes should not be extended so as to allow care recipients to directly employ their relatives as carers, similar to the PGB in the Netherlands.

4.10. Advantages of Direct Payment Schemes

Grootegoed et al reported on a qualitative study in the Netherlands of a small sample of women who cared for their relatives as employees under a contractual relationship. The sample was confined to women because 'they are by far the most numerous non-spousal care-givers'.[568] The main research question was: 'how do paid family care-givers envision being paid for their contractual care relationship?'[569] This study revealed that paid carers were more satisfied with the arrangement, rather than unpaid carers, as the payments recognised and rewarded them for their care work. A daughter caring for her older mother commented:[570]

---

567 Caroline Glendinning, 'Increasing Choice and Control for Older and Disabled People: A Critical Review of New Developments in England' (2008) 42(5) 451, 453.

568 Grootegoed et al (n 480) 474.

569 Grootegoed et al (n 480) 468.

570 Grootegoed et al (n 480) 480.

> I think that when you provide paid home-care, you work, and so you are a working woman. Otherwise, you are a daughter helping out ... and that's a crucial difference.

In the same study, some carers found that the contractual nature of the relationship under the PGB ameliorated strained relationships as the care tasks were clearly separated from affection.[571] As a result, carers tried to achieve professional standards[572] as they did not want to disappoint their relative.[573] As one daughter commented:[574]

> Now [with a contract] you are extra motivated to provide help, because you receive a payment. Now you do it much better – once you did it 100 per cent and now you do it 150 per cent. It is no longer out of charity what you do, and now you are obliged to perform.

Therefore, the contractualisation of care may result in a better quality of care. Another study of 'cash for care' schemes has shown that, in general, there were high levels of satisfaction on both sides of the caring relationship.[575] This demonstrates that older people requiring care are comfortable paying for their care from the people they most preferred,

---

571 Grootegoed et al (n 480).

572 Grootegoed et al (n 480) 480.

573 Grootegoed et al (n 480) 483.

574 Grootegoed et al (n 480) 483.

575 Ungerson (n 504) 199.

and, significantly, carers are comfortable receiving payments.[576] This may be because care recipients are becoming increasingly aware that familial care has a value attached to it.[577]

Further, direct payments that allow care recipients to directly employ their carers promotes choice and efficiency.[578] It is argued that direct payment schemes empower care recipients to 'control the care relationship and act independently of the professional social services system'.[579] Therefore, direct payment schemes empower disabled people through 'the extension to them of contractual rights, in contrast to the purely rhetorical empowerment underwritten through procedural rights, where the gatekeepers to care resources remain social workers and health care professions'.[580]

Moreover, it is argued that direct payment schemes, such as the PGB, 'recognises women's care work, while transforming aspects of family relationships into contracted employment relationships'.[581] The contractual nature of direct payment schemes is said to be relevant to the larger debate of how to establish women's rights and promote women's employment.[582] It is commented that payments 'validate and compensate' the care work within the private sphere, which is largely done by women.[583] Therefore, personal care budgets can empower care recipients, and provide the caregiver an incentive to continue

---

576 ibid.

577 Ungerson (n 480) 374.

578 Ungerson (n 480) 375.

579 Ungerson (n 504) 190, citing Morris 1993.

580 Ungerson (n 480) 370, citing Morris 1993.

581 Grootegoed et al (n 480) 485.

582 Ungerson (n 480) 375 - 376.

583 Ungerson (n 480) 376.

their care work.[584] Furthermore, it is commented that a long-term care relationship can be 'bolstered' by payments, 'which may restore a perception of reciprocity in a structured care situation'.[585]

4.11. Disadvantages of Direct Payment Schemes

Although there is limited literature regarding the implications of payments on the Caring Relationship, there are concerns that cash for care schemes may result in relatives 'providing (inadequate) care "only" for money'[586]. However, this is not a problem that is only relevant to relatives as it could be argued that non-familial carers only provide care for money. Knollema from the Health Care Insurance Board said, 'The fact that there is no official system of supervising the quality of care is something that surprises everybody'.[587] Therefore, more could be done to ensure quality assurance of the care that is being delivered behind closed doors, for both familial and non-familial carers. Further, it is commented that 'a businesslike agreement between relatives may have unintended and unforeseen outcomes for the relationship',[588] with critics arguing that cash for care relationships 'reproduce many of the control aspects of the nineteenth century master/servant relation'.[589] However, it is important to recognise that allowing care recipients to employ their relatives as carers is not intended to diminish the loving relationship between a parent and their child, but, instead, it goes to the fundamental issue

---

584 Grootegoed et al (n 480) 468.

585 Grootegoed et al (n 480) 471.

586 Grootegoed et al (n 480) 471.

587 The Health Foundation (n 490).

588 Grootegoed et al (n 480) 471.

589 Ungerson (n 480) 370.

which is that the law is yet to recognise that many adult children, particularly daughters (i) are engaged in the workforce and not staying at home providing unpaid care to their families, and (ii) may need to be financially remunerated for their care services.

Although the PGB in the Netherlands enables family caregivers, typically women, to become 'care workers', they are denied basic social-security rights, such as holidays, sick leave, and minimum wage.[590] It is commented that, 'most family members contracted under the PGB do not build up a pension entitlement and do not benefit from other work-related social security rights'.[591] Therefore, more could be done to ensure carers are entitled to, and can claim, appropriate statutory rights just like any other worker.

4.12. MOVING FORWARD

It is evident that the relationship between paid caregiving relatives to the conventional labour market requires close attention.[592] This is particularly relevant for women as, currently, whilst they may be getting paid for their care work, they are not getting adequately rewarded in the labour market. Grootegoed et al argues, '[i]n order to achieve equality between the care receiver *and* giver, more professional guidance and employment rights for paid family care-givers should be realised'.[593] Ungerson has commented, '[t]here is yet to be any systematic research of motivations and satisfactions of the carers employed

590 Grootegoed et al (n 480).

591 Grootegoed et al (n 480) 470, citing Social Insurance Bank 2008.

592 Grootegoed et al (n 480) 486.

593 Grootegoed et al (n 480) 487.

through these arrangements, or of the long-term effects on their labour market position and social security rights'.[594] It is commented that the discourse within social policy:

> could focus on the question of regulation of caring relationships and the rights of both carer and care recipient. The commodification of care exists and is growing; we have yet to develop an adequate understanding of its implications for citizens, carers, and users.[595]

In many ways, direct payment schemes resembles conventional employment because (i) it is subject to a contract, (ii) the care recipient (as the employer) has the right to hire and fire their carer, and (iii) the carer (as the employee) has the right to leave.[596] Yet, as Manthorpe et al has commented, 'there is surprisingly little information on the management and negotiations of employment relationships, particularly when family members step into paid roles'.[597]

It is argued that if direct payment schemes were amended so as to include family members within the definition of 'approved providers', knowledge around issues of family employment relations will become more important.[598] However, due to the obstacles older

---

[594] Ungerson (n 480) 370, citing Ungerson 1997.

[595] Ungerson (n 480) 379.

[596] Ungerson (n 504) 192.

[597] Jill Manthorpe, Jo Moriarty, Michelle Cornes, 'Keeping it in the family? People with learning disabilities and families employing their own care and support workers: Findings from a scoping review of the literature' (2011) 15(3) J Intellect Disabil 195, 207.

[598] Hilary Arksey, Kate Baxter, 'Exploring the Temporal Aspects of Direct Payments' (2012) 42 1(1) The British Journal of Social Work 147.

people face when trying to employ their relatives as their carer under direct payment schemes, many people are looking for other legal protections, such as Family Agreements. Until the legislation recognises relatives as eligible caregivers, contract law may provide the answer. The next chapter considers whether Family Agreements could be enforceable as employment contracts, as the Caring Relationship is analogous to an employment relationship.

Generally, employment contracts arise in commercial contexts and, therefore, the law presumes that the parties intended to be legally bound.[599] However, as outlined above, since the nineteenth century there has been a presumption that agreements made between family members are *not* intended to be legally binding. The following chapter challenges this presumption and demonstrates that precluding the employment of a family member for their care work under a Family Agreement is not justified.

As outlined in the next chapter, Solkoff suggests that one approach to Family Agreements is to assign an hourly wage value to the care services provided by the adult child, calculate the hours per week and then multiply it by the life expectancy of the care recipient.[600] When setting the hourly wage, reference may be had to the wages of general care providers in the community[601] because '[w]hen informal care is paid, it acquires

---

599 *Edwards v Skyways* [1964] 1 WLR 349; *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* [1989] 2 NSWLR 309.

600 Scott Solkoff, 'Personal Service Contracts for the Elderly: Revisited' (2004) <https://www.elderlawanswers.com/Documents/SolkoffArticle.pdf> accessed 22 April 2020; Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

601 Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72, 75.

market value'.[602] Given the next chapter deals with the scenario whereby an older parent pays their adult child for care, the 'carer' is a 'care worker'.

[602] Grootegoed et al (n 480) 470.

5. AN EMPLOYMENT CONTRACT

Although informal work arrangements made between close family members will often lack the requisite contractual force, it is commented that an intention to create legal relations is more likely to be found if 'there is a link between the remuneration and the work performed'.[603] In *Williamson v Suncorp Metway Insurance Ltd*,[604] the plaintiff father injured himself when he fell through a roof whilst carrying out maintenance for his son's business. The father lodged a notice of claim with the first defendant, who was the insurer of the son's business. After an investigation of the claim, the first defendant notified the son that it would indemnify the business in respect of the father's claim under the policy. Some time later, the first defendant decided that it would not be extending indemnity in relation to the plaintiff's claim because the plaintiff was an employee of his son's business at the time of the accident, and was therefore excluded from the policy. The plaintiff sought damages from the insurer on the basis that that the first respondent was obligated to compensate him for his injuries under the insurance policy. In determining whether the plaintiff was in an employment relationship with his son, the Court highlighted that the 'threshold issue'[605] is whether there was a contract of service between the plaintiff father and his son. In citing *Dietrich v Dare*,[606] Mullins J commented, 'An employment

---

603 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.30].

604 [2008] QSC 244.

605 [2008] QSC 244 at [38], [44].

606 (1980) 30 ALR 407, 411.

relationship only exists if the employee has entered into a contract of service with the employer with the mutual intention of creating relations.'[607]

Further, Mullins J commented:

> Where there is a family or social or volunteer arrangement involved in the undertaking of tasks in a work environment, it may suggest that there was not an intention to create legal relations.[608]

Based on an objective analysis of the evidence, namely that (i) the father helped out on a needs basis, (ii) the father's pay varied each week depending on how much cash there was on site, and (iii) the father's pay bore no relation to the number of hours worked, the Supreme Court of Queensland found that there was no intention to create legal relations and therefore there was no employment relationship between the plaintiff and his son.

In *Rawlings v Rawlings*,[609] the plaintiff son, who was a carpenter, sought damages from his mother, who was his employer, for psychiatric injury sustained whilst undertaking tasks relating to the winding up of his parent's failed business for which, he alleged, he was neither trained nor experienced. The plaintiff claimed that his psychiatric injuries destroyed his capacity to gain employment and caused him pain and suffering. The Court found that the son was an employee in respect of the carpentry work he was paid to perform, but not for the other tasks he performed at his mother's request. Dixon J commented:

---

607 *Williamson v Suncorp Metway Insurance Ltd* [2008] QSC 244 at [38].

608 ibid.

609 [2015] VSC 171.

> It was not part of the plaintiff's agreed employment duties that he undertake administration and there was no evidence that the plaintiff was ever paid for administrative duties by the defendants.[610]

Therefore, the tasks that the plaintiff alleged caused his psychiatric injuries were not performed in the course of his employment.[611]

Contrastingly, in *Roufos v Brewster*,[612] the South Australian Court of Appeal held that an agreement made between Mr and Mrs Brewster and their son-in-law, Mr Roufos, to transport their truck from Coober Pedy to Adelaide for repairs was not merely a domestic arrangement but one that created a legal relationship.[613] Although this was a familial relationship, (i) they were conducting separate businesses at Coober Pedy, (ii) there was occasional hostility between Mr and Mrs Brewster and the son-in-law, and (iii) Mr and Mrs Brewster had a commercial interest in getting their truck (which was damaged in transit) back as quickly as possible.[614]

In light of the above, it is evident that the courts are more likely to find an employment contract when the family member is paid a regular wage that is measured by the time worked.[615] Therefore, a Family Agreement that pays the adult child a regular wage for

---

610 ibid [20].

611 [2015] VSC 171 [88] per Dixon J.

612 (1971) 2 SASR 218.

613 ibid 222 per Bray CJ.

614 ibid.

615 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.30].

their care work could be enforced as an employment contract if all of the below elements of an employment contract are satisfied.

5.1. CONSIDERATION

First, the element of consideration would be satisfied under a Family Agreement because the adult child (as employee) has agreed to perform care work in exchange for wages paid to them by their older parent (as employer).[616] However, interestingly, consideration can be satisfied in circumstances where the employee does not receive a wage. For example, in *Cudegegong Soaring Pty Ltd v Harris*,[617] a live-in caretaker and instructor at a flying club was found to be an employee even though he did not receive a wage. The provision of rent-free accommodation in lieu of his services was held to be sufficient consideration.[618] Therefore, in circumstances where an adult child is living rent-free with their parents while providing them with care, the court may consider that to be sufficient consideration.

5.2. MARKET VALUE

In determining fair market value for the promise of lifetime care, Solkoff suggests the following formula is used, 'W x H x 52 X L = C'. In this formula, 'W' is the caregivers hourly wage, 'H' is the number of hours worked per week reasonable expected of the caregiver, '52' is the number of weeks in a year, 'L' is the life expectancy of the older

---

616 ibid [9.32], citing *Browning v Crumlin Valley Collieries* [1926] 1 KB 522, 528.

617 (1996) 13 NSWCCR 92.

618 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.32], citing Cudgegong Soaring Pty Ltd v Harris (1996) 13 NSWCCR 92. See *also Kemp v Lewis* [1914] 3 KB 543, 546-8; *Frattini v Mission Imports* [2000] SAIRComm 20 [40].

parent, and 'C' is the compensation.[619] If, however, there was no remuneration agreed between the parties, it is commented that the courts are willing to imply that there must be a '"reasonable" payment, judged by prevailing market rates'.[620]

5.3. SERVICES

Solkoff comments that all services under the Family Agreement should be separately listed and contracted for on an as 'needed' basis, rather than a generic obligation that the caregiver must provide 'personal care services'.[621] Recognising care services in this way will enable a better criterion for valuing the services provided,[622] particularly because care needs can change and are often impossible to predict. However, as Herring comments, care work, especially for disabled older people, is not a 'matter of nine to five, with four weeks holiday' and therefore is extremely difficult to reduce into writing.[623]

5.4. TERMS

The duration of a Family Agreement is typically for the life of the older person. Therefore, a Family Agreement will come to an end when the older parent dies, which is consistent

---

619 Scott Solkoff, 'Personal Service Contracts for the Elderly: Revisited' (2004) <https://www.elderlawanswers.com/Documents/SolkoffArticle.pdf> accessed 22 April 2020.

620 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.36] and [15.07], citing *Fagan v Public Trustee* (1934) 34 SR (NSW) 189; *Way v Latilla* [1937] 3 All ER 759; *Midya v Sagrani* [1999] NSWCA 187.

621 Solkoff (n 619) 7.

622 ibid.

623 Jonathan Herring, 'Will-substitutes and the claims of family members and carers' 297 in Braun, A. and Rothel, A. (ed.) *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart, Oxford 2016).

with contract law principles.[624] A contract of employment is terminated on the death of one of the parties. On the death of either party, a claim lies for the salary of wages of the employee up to the date of the death that terminated the contract.[625] However, one problem with this broad promise to care for life is the question of what happens to the Family Agreement if, and when, the older parent is required to move into a nursing home?[626]

In *Simpson v Simpson*,[627] Mrs Simpson offered to transfer her house to her adult son, Mr Simpson, and his wife, Marilyn. It was agreed that Mrs Simpson would occupy the ground floor suite and that her son 'would pay the bills and pay rent of $400 a month'. Mr Simpson said, 'it was just assumed' that he would provide care for his mother and made a verbal promise to Mrs Simpson 'that he would help her out when she needed help'. In 1987, the defendants, Mr Simpson and Marilyn, moved into the house and Mrs Simpson transferred ownership of her home to Mr Simpson and his wife. In 1989, Mrs Simpson was transferred to hospital for nursing care. After Mrs Simpson's death, the plaintiffs, who were disgruntled heirs, sought to have the conveyance of her house set aside on three grounds, one of which alleged that Mrs Simpson's admission to the nursing home (hospital)

---

624 Joseph Chitty, *Chitty on Contracts*, vol 2 (32nd edn, Sweet & Maxwell 2015) para 20-176, citing Law Reform (Frustrated Contracts) Act 1943. See also Joseph Chitty, *Chitty on Contracts*, vol 1 (32nd edn, Sweet & Maxwell 2015) [23-074].

625 ibid.

626 Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members (2003) 2 Elder Law Review 1, 5; Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72, 75.

627 [1997] BCJ No 2275.

was contrary to the agreement that she could live in the ground floor suite 'for life'. In finding that the claim for breach of contract was 'frivolous',[628] Thackray J commented:

> Common sense dictates that the time may well come in anyone's life when institutional life is a practical necessity. Short of outfitting the suite as a quasi-hospital, such was the case with Mrs. Simpson.[629]

Another way to overcome this difficulty is for the Family Agreement to expire when the older person can no longer perform two activities of daily living, such as toileting and bathing, which is often the criteria for entry into a nursing home.[630] This approach would arguably cover the situation where the adult child is no longer able to provide suitable or appropriate care for their older parent until such time that the parent cannot perform two activities of daily living.

5.5. EMPLOYMENT BENEFITS

It is perhaps arguable that the Caring Relationship is analogous to the Master and Servant relationship. As the High Court of Australia observed in *Byrne & Frew v Australian Airlines Ltd*:

---

628 ibid [216].

629 ibid [215].

630 Hall (n 626) 6; Herd (2002a) (n 626) 75.

> The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee).[631]

Interestingly, however, domestic servants employed in a private household *are* within the scope of the Employment Rights Act 1996 (UK), *unless* the servant is a close relative of the employer.[632] Again, another example of the law excluding close relatives. Therefore, relative caregivers are unable to claim statutory employment rights.[633] Section 161 of the Employment Rights Act 1996 (UK) provides:

> (1) A person does not have any right to a redundancy payment in respect of employment as a domestic servant in a private household where the employer is the parent (or step-parent), grandparent, child (or step-child), grandchild or brother or sister (or half-brother or half-sister) of the employee.
>
> (2) Subject to that, the provisions of this Part apply to an employee who is employed as a domestic servant in a private household as if—
>
> (a) the household were a business, and
>
> (b) the maintenance of the household were the carrying on of that

631 (1995) 131ALR 422, 436; (1995) 185 CLR; [1995] HCA 24.

632 Astra Emir, *Selwyn's Law of Employment* (17th edn, Oxford University Press 2012) 522 - 523 [18.63].

633 ibid 70 [2.108].

business by the employer.

Further, it is commented that in circumstances where a resident relative is employed as a caregiver in a private dwelling house their employment 'is to be entirely *disregarded* for contribution purposes, provided it is not employment for the purposes of any trade or business carried on in the house by the employer'.[634] The kind of employment to which this regulation may relate includes employment as a 'housekeeper or companion'.[635]

Despite this, it is argued that 'there is no reason why other categories of home-based work cannot be treated as involving an employment contract, providing all of the elements of an employment contract can be satisfied'.[636] Kirby P put this imperative eloquently when he commented:

> Nor should … [those] who have provided 'women's work' over their adult lifetime … be told condescendingly, by a mostly male judiciary, that their services must be regarded as 'freely given labour' only or, catalogued as attributed solely to a rather one-way and quaintly described 'love and affection', when property interests come to be distributed.[637]

---

634 Vince Ashall (ed), *Tolley's National Insurance Contributions 2018-19* (LexisNexis 2018) [41.18]. See also the Social Security Contributions and Benefits Act 1992 (UK), s 2(2)(a).

635 ibid.

636 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [10.14].

637 *Bryson v Bryant* (1992) 29 NSWLR 188, 204 per Kirby P.

Although a full analysis of the employment law aspects of Family Agreements are outside the scope of this thesis, the above analysis makes it clear that such agreements are analogous to employment contracts. If this is accepted, further consideration of employment and tax law regulations, including statutory entitlements of care workers, require further consideration, and will no doubt be of significant interest to law and policy makers in the future, particularly as Family Agreements are increasingly being entered into.[638]

638 Alzheimer's Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) 21 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020; Herd (2002a) (n 626); The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.10], citing National Seniors Association Submission, 11 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

6. CONTRACTUAL REMEDIES

Although it is generally true that courts are unlikely to enforce Family Agreements as contracts, particularly those that are made orally and on an informal basis, there are cases where agreements made between family members have been held to be valid and enforceable.[639] According to Herd, '… anecdotal evidence suggests that most care agreements fail because of relationship breakdown.'[640] I am not sure whether Herd intended to use the word 'fail' in the sense that the contract would be void. It is perhaps more appropriate to say that the majority of Family Agreements 'breakdown' because of relationship 'failures' because it is not correct to say that a contract 'fails' if it is breached. Indeed, upon a breach of a contract, the aggrieved party will often rely on the contract to seek damages. In light of these common 'failures' in familial relationships, this chapter considers the contractual remedies that may be available to an aggrieved party under a Family Agreement as a result of a breach.

Given care work is undefined and unpredictable, which is, ironically, the antithesis of what is required under contract law, many unexpected and unforeseen things may arise during the lifetime of a Family Agreement, such as (i) an unexpectedly short life of the older parent or the caregiving adult child, (ii) an unexpectedly long life of the older parent, (iii) the caregiver's own health problems, and (iv) an intervening family event for the caregiver for example, illness within their own family, loss of income and divorce.

---

639 See for example, *Wakeling v Ripley* (1951) 51 SR (NSW) 183; *Todd v Nicol* [1957] SASR 72; *Parker v Clark* [1960] 1 WLR 286 at 292-294; *Raffaele v Raffaele* [1962] WAR 29; *Riches v Hogben* [1985] 2 Qd R 292, which was affirmed on appeal in *Riches v Hogben* [1986] 1 Qd R 315.

640 Herd (2002a) (n 626) 75.

Although it is impossible to predict what these are, this chapter considers a variety of cases from the UK, Australia, New Zealand and Canada to outline the remedies that may be available to parties when there has been a breach of a Family Agreement.

6.1. BREACH

6.1.1. ANTICIPATORY BREACH

Where the breach occurs prior to when the performance of the defaulting party is due,[641] that is known as an anticipatory breach. So, if the performance of care has not yet commenced and one party is unwilling or unable to perform the agreement, a repudiation will occur. If the aggrieved party accepts the repudiation, they can elect to terminate the contract and claim damages at once.[642] However, if the aggrieved party does not accept the breach before the time for performance, the contract remains in force and they will have no right to damages until, and unless, an actual breach occurs.[643]

---

641 G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (1998) (Clarendon Press, Oxford) [279].

642 ibid; *Progressive Mailing House v Tabali Pty Ltd* (1985) 157 CLR 17, 48 per Brennan J; *Foran v Wright* (1989) 168 CLR 385, 416, 441 - 442.

643 Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (3rd edn, Thomson Reuters) [22.10].

The general rule is that damages for breach of contract are meant to, as much as money can, place the injured party in the same situation as if the contract had been performed.[644] As Parke B in *Robinson v Harman* commented:[645]

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.

If the anticipatory breach occurs at the fault of the older parent prior to any care being provided, the damages are likely to be merely the loss of income from the time the adult child caregiver quit their previous employment (if any) and the breach, which may or not be a substantial amount of money. It is likely that the court will also award damages for a reasonable time so as to allow the adult caregiving child to find meaningful employment and/or other housing. If the adult child is unable to gain meaningful employment, they

---

644 N C Seddon and M P Ellinghause, *Cheshire and Fifoot's Law of Contract* (9th edn) LexisNexis Butterworths [23.6], citing *Robinson v Harman* (1848) 1 Exch 850 at 855; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J and 460 per Barwick CJ; *Holmes v Jones* (1907) 4 CLR 1692 at 1709; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 637; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12; *Johnson v Perez* (1988) 166 CLR 351 at 371; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 61 CLR 653 at 666-667, 672; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 98, 117, 134, 148, 161; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503; *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128 at [33]; *Bartonvale Management Services Pty Ltd v International Linen Services Pty Ltd* [2003] SASC 254 at [15]; *Nguyen v Luxury Design Homes Pty Ltd* [2004] NSWCA 178 at [53]; *Castle Constructions Pty Ltd v Fekala Pty Ltd* [2006] NSWCA 133 at [30]. See generally Dawson, (1995) 9 *JCL* 125; Coote, (1995) 9 *JCL* 159.

645 (1848) 1 Ex 850, 855; (1848) 154 ER 363, 365.

could presumably seek an award for future loss of income along the lines conventionally ordered in personal injury claims.

If the adult child has lost the benefit of living with their older parent rent free, as well as the value of other benefits so associated, the adult child could seek to recover that amount.[646] However, in assessing the damages for consequential loss, any increase in living expenses is arguably compensable, and the plaintiff would have to give credit for any diminution in such expenses. Although a detailed discussion of the assessment of damages is outside the scope of this thesis, this chapter outlines various examples of how the court has approached, or could approach, the assessment of damages in relation to care contracts.

In relation to damages that may be awarded to an older parent who sues for anticipatory breach, they may be able to seek damages for the care they will have to pay for due to the breach by the adult child for the duration of the Family Agreement if it was more than what they were going to pay under the agreement. They may also have spent money on their property, in preparation for their adult child coming to live with them to provide them with care, which could be reimbursed due to the breach. For example, building a new bedroom, bathroom or purchasing new furniture for them.[647] I acknowledge, however, that in relation to changes to property it may not just be a simple

---

646 This is what the Parkers sought in the first category of damage in *Parker v Clark* [1960] 1 WLR 286. See text at (n 654), commencing at page 143 below.

647 See for example *Etchison v ANZ Executors and Trustee Company Ltd* [2005] QSC 363, whereby the plaintiff carer put in a claim to the estate for $228,000 being $25 per hour for 10 hours per day, 7 days per week for two and half years, plus additional expenses for the removal of a bathroom installed at the deceased's expense and the renovation of the kitchen, from alleged wear and tear from the deceased's live-in assistants.

question of giving credit for the increased value of the property. However, as outlined above, a full discussion of how this type of compensation is assessed is outside the scope of this thesis.

In relation to anticipatory repudiation, there is no breach unless the injured party accepts it as ending the contract. Therefore, if there is no breach, there is no requirement of mitigation.[648] As Diplock J commented in *Shindler v Northern Raincoat Co Ltd*,[649] 'It seems to me that on a matter of law it cannot be said that there is any duty on the part of the plaintiff to mitigate his damages before there had been any breach, which he has accepted as a breach.' The question of mitigation of damages does however arise in circumstances where there has been an actual breach of the contract.[650]

6.1.2. ACTUAL BREACH

If there is an unwillingness or inability of one party to perform their obligations under a Family Agreement once the time for performance has arrived, that constitutes an actual breach. For example, does an older parent entering a nursing facility constitute an actual breach of the Family Agreement? The plaintiff in the Supreme Court of British Columbia

---

[648] N C Seddon and M P Ellinghause, *Cheshire and Fifoot's Law of Contract* (9th edn) LexisNexis Butterworths [23.44], citing *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038 at 1048; [1960] 2 All ER 239 at 248-9 (Diplock J); *Bak v Glenleigh Homes Pty Ltd* [2006] NSWCA 10 at [3]. See generally Davies, (1960-2) *5 UWALR 576*.

[649] [1960] 1 WLR 1038, 1048.

[650] ibid. See also J D Heydon, *Heydon on Contract* (Law Book Co 2019) [26.800], citing *Jones v Edwards* (1994) 3 Tas R 250; *Mouritz v Hegedus* [1999] WASCA 1061.

case, *Simpson v Simpson*[651] argued that it ought to. In light of *Simpson v Simpson*,[652] outlined in detail above,[653] it is unlikely that the need for an older parent to move into a nursing home due to their health or care needs would constitute an actual breach of a Family Agreement.

A good example of how a number of issues can be raised when a Family Agreement is breached is *Parker v Clark*.[654] In *Parker v Clark*, briefly outlined above,[655] a young couple, Mr and Mrs Parker (the **Parkers**), were induced to sell their house and move in with an elderly couple, Mr and Mrs Clark, on the promise that the Clarks will leave Mrs Parker, who was Mrs Clark's niece, a share of their home, known as Cramond, upon their death. After the Parkers sold their home, known as The Thimble, and moved in with the Clarks, the Clarks told the Parkers that the arrangement was not working and asked them to move out.

The Parkers commenced an action against the Clarks for breach of contract seeking (i) the value to the Parkers of such benefits attributable to living at Cramond, and (ii) the value to Mrs Parker of the prospect of inheriting a one-third share of Cramond when both Mrs and Mrs Clark die. Devlin J commented that, although it was an 'unusual sort of contract', the 'facts are clear'. In acknowledging that there was little conflict as to the evidence, his Honour accepted the Parkers' evidence, which was that upon leaving

---

651 [1997] BCJ No 2275.

652 [1997] BCJ No 2275.

653 See the discussion of this case underneath the heading 'Terms', chapter 5, section 5.4 at page 132 above.

654 [1960] 1 WLR 286.

655 See text to (n 438).

Cramond, after a three-week visit, Mr Clark suggested to Mr Parker that they should both, 'Come and live with us'. Mr Parker assumed that this arrangement would be permanent and therefore required them to sell their cottage, The Thimble. Mr Parker wrote to Mr Clark outlining the facts. In response, Mr Clark wrote, in essence, that in return for them having to sell The Thimble, they would leave them Cramond when they die. Mr Parker accepted the offer and proceeded to act on the arrangement and sold The Thimble.

In circumstances where a plaintiff would have daily living expenses in their prior home, it would be difficult for them to establish that the living expenses at their parent's, or parents', house was any more than their expenses in their own home. In *Parker*, under the first category of damage, the Parkers had lost the benefit of living at Cramond rent free and the value of the use of a car and a television set provided by Mr Clark. Under the second category of damage, Mrs Parker was promised a one-third share of Cramond upon the death of both the Clarks.

In answer to the claim, the Clarks submitted that the letters which established the alleged contract, showed 'no intention to enter into a legal relationship or to make a binding contract'.[656] In response to this submission, Devlin J commented:

> No doubt a proposal between relatives to share a house and a promise to make a bequest of it may very well amount to no more than a family arrangement of the type considered in *Balfour v Balfour* which the courts will not enforce. But there

[656] [1960] 1 WLR 286, 292.

> is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract.[657]

In further defending the claim, the Clarks relied heavily on the fact that the agreement lacked formality. That is, that it was not reduced into writing. In response Devlin J said, 'This, I think, is largely explained by the relationship between the parties; it is easier to demand formal documents from a stranger than it is from a relative and friend.'[658]

Devlin J found that Mr Clark, who was one of the 'contractual protagonists',[659] induced the Parkers to move to Cramond, and that Mr Clark made the Will in fulfilment of the promise. Therefore, his Honour was satisfied that 'an arrangement binding in law was intended by both sides'.[660]

The other defence relied on by Counsel for the Clarks was that the agreement was not sufficiently clear on its terms and, therefore, was not capable of constituting a legal contract. First, the Clarks submitted that there was nothing, either express or implied, that required the Parkers to sell The Thimble, which Counsel for the Parkers accepted. The only term implied from the letter regarding The Thimble was that the Parkers should cease to occupy it, which they have done. Secondly, the Clarks submitted that there was nothing in the agreement that specified the period for which Cramond was to be shared, and

---

657 ibid.

658 ibid 293.

659 ibid 292.

660 ibid 294.

therefore, nothing which justified the argument that the agreement was for 'the period of the lifetime of the survivor of the defendants'.[661]

If no specific period was agreed, Devlin J found that the duration would be 'subject to reasonable notice on either side'[662]. However, in this case, his Honour was satisfied that the agreement intended to be 'a long-term arrangement'.[663] Devlin J held that, although an agreement 'for life must be exceptional', the facts of this case warranted that construction, particularly due to that fact that (i) both Mr and Mrs Clark were nearly 80 years old and described their condition as being in 'very bad health' with neither of them having 'much chance to live long', and (ii) the Clarks were receiving benefits of care and support during a time of illness. Further, his Honour found that the fact that the offer of a one-third share in the property was to pass to Mrs Parker at the time of their deaths showed that the Clarks contemplated that the Parkers would still be living at Cramond at the time of their deaths.

Lastly, in defence, the Clarks submitted that section 40(1) of the Law of Property Act 1925[664] had not been complied with since the agreement was not in writing. Devlin J, referring to relevant authorities, held that the letters written between the Mr Clark and Mr Parker were 'good memorandum', which constituted a written offer.[665]

---

661 ibid 294.

662 ibid 294.

663 ibid.

664 Section 40 of the Law of Property Act 1925 was repealed by the Law of Property (Miscellaneous Provisions) Act 1989.

665 [1960] 1 WLR 286, 296.

Accordingly, Devlin J was satisfied that there was a breach of contract and found that the Parkers were entitled to damages for (i) the value to them such benefits attributable to living at Cramond, and (ii) the value to Mrs Parkers prospect of inheriting Cramond when both Mrs and Mrs Clark die. In deciding the quantum of the first head of damage, the Court guessed the life expectancy of the Clarks to be four years, so multiplied the benefits so determined, which was £300, by four years.[666] In determining the quantum for the second head of damage, the Court took into account the prospect of Mrs Parker having to pay death duties and also contingencies, such as that Cramond might be destroyed before their deaths.[667]

Parker v Clark is a good example of a case where the presumption that there is no intention to create legal relations between close relatives can be rebutted in circumstances where the adult child acts on a promise made by the older parent to transfer them property in exchange for care 'for life'. Further, it demonstrates that substantial damages can be awarded after a limited time spent in the caring relationship if the aggrieved party acted in reliance on those promises to their detriment. In *Parker v Clark*, it was clear that the Parkers would not have sold their home if they did not think the agreement was binding and enforceable. Another example of an agreement for care 'for life' made between an older person and their relative that has rebutted the presumption, and therefore was held to be a valid contract, is *Wakeling v Ripley*.[668]

---

666 ibid 296.

667 ibid 296.

668 (1951) 51 SR (NSW) 183.

Similar to the Parkers in *Parker v Clark*, the Wakelings in *Wakeling v Ripley* acted on a promise made to them by the older person that they would be left all of his property and be provided with a home and a living if they would provide him with care. In *Wakeling v Ripley*,[669] a wealthy old man, who was living in Australia and in need of care and assistance, invited his sister and her husband, who were residing in the UK, to move to Australia to care for him on the basis that he would give them an income and also leave them everything in his Will upon his death. This invitation was made by way of correspondence. Mr Ripley urged the Wakelings to abandon their English ties and come to Australia, adding 'I will keep you all for all time and I trust with no worry—for the future'.[670]

At the time of the invitation, the husband was in a stable job as a lecturer at Cambridge University. The couple agreed. The husband gave up his employment and they relocated to Australia with their daughter, albeit some years after the original offer. After approximately one year of living together, a dispute arose between the parties arising from the Wakelings allowing their daughter to (i) remove some linen from Mr Ripley's home, and (ii) to come and stay at the property with her husband and child. Following this quarrel, Mr Ripley (i) sold the property, which forced the Wakelings to leave, and (ii) changed his Will. It was for this breach of the alleged agreement that the Wakelings commenced proceedings against him. At first instance, the jury returned a verdict in favour of the Wakelings for £12,000.

669 ibid.

670 ibid 185.

Mr Ripley unsuccessfully appealed on four grounds. First, he argued that the agreement was a mere family agreement which was incapable of being legally valid. Street CJ held that the evidence established an intention to create legal relations, particularly due to the fact that the Wakelings sold their home in England and Mr Wakeling gave up his paid position in order to move to Australia. Secondly, Mr Ripley unsuccessfully argued that the agreement was void for uncertainty. Street CJ said the letters made it clear that the Wakelings were to leave everything in England to come to Australia and 'keep house' for Mr Ripley, who promised he would always provide for them and leave everything to them, including his house, at his death. Thirdly, Mr Ripley argued that the agreement was not the original contract made between the parties. Street CJ saw no substance to this argument. Lastly, Mr Ripley argued that if a contract was found, then the Wakelings repudiated it when they disobeyed him in allowing their daughter to use his linen and stay in his home, which thereby exonerated them from further performance of the contract. In support of this submission, Mr Ripley argued that the agreement was nothing more than a 'service agreement' and the relationship was one of master and servant. On that footing, it was argued that the behaviour of the Wakelings amounted to 'disobedience of the master's instructions'.[671] In dismissing this ground, Street CJ said:

> … it is absurd to say that they came out [to Australia] as servants. They came out under the terms of the agreement between them, and I think it is impossible to suggest that … the plaintiffs had committed such a breach of the agreement as to

[671] ibid 187.

> justify the defendant in summarily terminating the same and refusing to provide a home any longer for the plaintiffs.[672]

Therefore, in dismissing the appeal, the Court of Appeal found that there was a definite and binding contract between the parties.

Wakeling v Ripley is a good example of when an aggrieved party can successfully sue for breach of contract on the basis that the agreement was 'more than a mere family or social agreement'. Further, similar to *Parker v Clark*, *Wakeling v Ripley* demonstrates that damages will be awarded even if the agreement for care 'for life' has been on foot for only one year. In determining the quantum, it seems that the court is not so concerned with the duration of the agreement that has already been performed but instead the detriment that has been suffered in reliance of the agreement.

6.1.3. FRUSTRATION

Unlike an actual breach of a Family Agreement, whereby a party does not fulfill his or her contractual obligations, frustration of an agreement can occur without fault of either party. Frustration of a contract occurs due to a supervening and unanticipated event that renders some or all of the obligations of the contract 'incapable of being performed'.[673] The

672 ibid 188.

673 *Davis Contractors Ltd v Fareham Urban District Counsel* [1956] AC 696, 729. See also Dr Nicholas C Seddon, *The Laws of Australia* (2012) [7.8.420].

doctrine of frustration was summarised by the House of Lords in *Davis Contractors Ltd v Fareham Urban District Counsel*,[674] in which Lord Radcliffe commented:

> [Frustration] occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
>
> …
>
> There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

This summary has been adopted by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*.[675]

Given Family Agreements often involve a promise that the adult child will care for their older parent(s) 'for life', it is likely this means for the natural life of the older parent. Therefore, it reasonably to suggest that the parties contemplated that the adult child would

---

674 [1956] AC 696, 729; [1956] 3 WLR 37; [1956] 2 All ER 145. This definition of frustration was adopted in *Brisbane CC v Group Projects Pty Ltd* (1979) 145 CLR 143; 54 ALJR 25; 44 LGRA 330; 26 ALR 525, Stephen J at 161 (Murphy J concurring) (CLR), and by a majority of the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (*Codelfa Case/Eastern Suburbs Railway Case*) (1982) 149 CLR 337; 56 ALJR 459; 41 ALR 367; [1982] NSW ConvR 55-070; (1982) 1 BCL 16, Mason J at 357, Aickin J at 377 (CLR) (Stephen and Wilson JJ agreed with Mason and Aickin JJ on this point).

675 (1982) 149 CLR 337, 357 per Mason J, 377 per Aickin J, and with whom Stephen and Wilson JJ agreed with Mason and Aickin JJ on this point.

survive their older parent(s). Therefore, the question arises: what happens in circumstances where the caregiving adult child predeceases the older parent? Does death of the adult child frustrate the agreement?

Generally speaking, contractual promises are enforceable against the promisor's estate. However, generally, a contract that requires personal services is frustrated by that party's death, injury or illness.[676] Despite this general rule, the Manitoba Court of Appeal decision of *Re Witwicki*[677] held that an obligation to provide maintenance by an adult son was a financial obligation rather than a contract of personal services, and therefore the death of the adult son did *not* frustrate the contract.

In *Re Witwicki*, the older parents, Marion John Witwicki (**Marion**) and Josephine Witwicki (**Josephine**), entered into an agreement with their youngest son, Richard Walter Witwicki (**Richard**), transferring their family homestead, which was owned solely by Marion, to both Marion and Josephine as life tenants with a remainder to Richard in fee simple upon the death of both of his parents. In consideration of the execution and registration of the transfer, Richard agreed that, amongst other things, he:

> … shall, during the lifetime of both of the parties … permit them to occupy the aforesaid described land and to provide them with all the necessities of life, including, without restricting the generality of the foregoing, all necessary food and

---

676 N C Seddon and M P Ellinghause, *Cheshire and Fifoot's Law of Contract* (9th edn) LexisNexis Butterworths [19.18], citing *Whim Well Copper Mines Ltd v Pratt* (1910) 12 WAR 166; *Carmichael v Colonial Sugar Co Ltd* (1944) 44 SR (NSW) 233; *Chapman v Taylor* [2004] NSWCA 456; *Renehan v Leeuwin Ocean Adventure Foundation Ltd* [2006] NTSC 4 [76].

677 [1979] M.J. No. 145; 101 D.L.R. (3d) 430; [1979] 5 W.W.R. 242.

clothing as shall be befitting to persons of their station of life so that they may live in comfort and ease for the remainder of their life.[678]

The agreement was executed on 20 September 1961. On the following day, the transfer was registered which transferred the land from Marion's name into the names of him and Josephine as life tenants, with a remainder to Richard in fee simple.

About seven months after the agreement was signed and the land transferred, Richard's father, Marion, died. After his father's death, Richard continued to reside with his mother, Josephine, at the family residence. In 1964, Richard married his wife, Joyce. They both lived with Josephine at the family homestead. Joyce assisted with the household chores and worked around the garden. Richard and Joyce had two children. In April 1972, Richard died unexpectedly. He died intestate. His widow, Joyce, was appointed administer of his estate. Joyce was aware that an agreement had been signed by her late husband and his parents, but she had never seen or read the document. Therefore, at the time of Richard's death, Joyce was unaware that Richard's estate was the owner of a remainder interest in the land.

Several years later, Josephine commenced proceedings to interpret the contract, in particular she sought an order declaring that the contract was frustrated by Richard's death and sought a re-conveyance of title to the property to herself. At first instance, Hamilton J held that the majority of the contract was *not* frustrated and, therefore, Richard's estate was entitled to retain its remainder interest in the land, subject to providing some financial support to Josephine as required under the terms of the agreement. After considering the

---

678 ibid [5].

evidence about the needs of Josephine, the trial judge concluded that Richard's estate was liable to '… pay the accumulated real estate tax arrears, and should pay the annual real estate taxes thereafter'.[679]

Josephine appealed (again) seeking a declaration that the contract was frustrated by Richard's death and that the land should be re-conveyed to her. In the alternative, Josephine sought an upward adjustment of the measure of financial support the trial judge had awarded her from Richard's estate. The Court of Appeal declined both invitations. In doing so, Huband JA (with whom Hall JA agreed) commented:

> In my opinion, the death of the son does not frustrate the agreement. On the contrary, to give the applicant the relief she seeks would be unconscionable. The son fulfilled his obligation towards his father during the father's lifetime. With respect to his mother, the son provided for her needs, (as well as for the needs of his own family) over a span of eleven years. It would be manifestly inequitable to declare the contract frustrated and re-convey the remainder interest in the property to the mother at this stage.[680]

Further, in citing the statement by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Counsel*, outlined above, Huband JA said it would also be wrong at law, stating:

---

679 ibid [12].

680 ibid [15].

> In the present case, the death of Richard Witwicki has not changed the obligation undertaken by him in the document of September 20, 1961. The obligation remains the same, but it now must be fulfilled by his estate, rather than by him personally.
>
> In my view, the agreement of September 20, 1961, is not a contract of personal service, which would be frustrated by the death of Richard Witwicki. Where the obligation is one of personal services, death or illness of the person to provide those services will frustrate a contract. If a concert artist agrees to give a performance, the contract will be frustrated by death or illness, which makes the fulfilment of the contract impossible. But the obligation we are here concerned with is not one of personal services. The obligation is to permit Josephine Witwicki to continue occupancy of the land, if she so desires, and to maintain her. A maintenance obligation is a financial obligation. No doubt, the son, while he was alive, went beyond the financial obligation set forth in the document. He provided care, concern, companionship and security, all of which vanished upon his death. But the obligation to meet the material needs of Josephine Witwicki is financial in nature, and as such, it is an obligation which can be assumed by the estate of the late Richard Witwicki.[681]

Monnin JA dissented. His Honour was of the view that Richard's death did frustrate the contract as it had changed the footing upon which the contract was made which had become

---

[681] ibid [18].

so changed that it could no longer be completed as originally contemplated by all parties.[682] His Honour commented:

> It would be unjust to hold the parties to their bargain and this is where I disagree with my colleague Huband. In order to provide for the basic necessities of life and a decent home for this widow to live in, the estate of the son would be saddled with substantial costs. That also would be unjust to the widow because she is of little means and has not the ready cash available to make the necessary repairs. On the other hand, if the situation is to continue as up to the present, the widow and the two children are apt to get a windfall upon the death of the mother.[683]
>
> The son's death made it impossible for him or for his estate to provide what he had bargained to give to his parents. This was not only food and clothing, but companionship and manly assistance around the household in their old age. We are not here dealing with a matter of dollar and cents or services which can be amply provided by anybody else, provided the requisite fee is paid.[684]

In Monnin JA's opinion, the contract ought to have been declared frustrated and, therefore, terminated at the date of Richard's death, and his estate should be reimbursed for all tax monies paid by it, plus interest. If Monnin JA's view was accepted, evidence would have needed to be adduced regarding the contributions both Richard and Joyce made to the

682 ibid [29].

683 ibid [29].

684 ibid [30].

homestead and the household expenses during Richard's lifetime so that his estate could be adequately compensated. In turning his mind to this issue, Monnin JA said:

> No evidence was tendered on this matter, in view of the refusal by the trial judge to find that the contract had been frustrated. I do not think that this is a case which warrants hearing additional evidence because it would be very difficult to account for what happened during that decade. I would arbitrarily fix a sum of $6,000.00 as adjustment of all rights and liabilities under section 4(1) of The Frustrated Contracts Act.[685]

In my opinion, Monnin JA's judgment makes good sense, and it follows the general rule regarding frustration of contracts involving personal services, which is that the death of a party to a contract brings the contract to an end. However, the ultimate conclusion of *Re Witwicki* does *not* follow the general rule and, therefore, raises an interesting question regarding whether a Family Agreement could be considered to be a contract for financial maintenance as opposed to personal services, and therefore *not* be frustrated by the death of the adult child.

There is a strong argument that the death of a caregiving adult child does frustrate a Family Agreement, particularly because such agreements are predominately about personal care services by that specific child. It would be unlikely that the parties to a Family Agreement would contemplate anyone else other than that adult child providing the older parent(s) with care and maintenance in the event that the adult child should predecease them. In the words of Monnin JA:

---

685 ibid [35].

> The parties contemplated that the son would survive both of them, that he would remain with them under the same roof and contribute to their food, clothing, shelter, and do all the necessary odd jobs that a man can do around a farm household. Death has changed this. The footing upon which this agreement was made has become so changed that it can no longer be completed as originally contemplated by all parties.[686]

However, in light of *Re Witwicki*, Family Agreements that include a maintenance obligation may *not* be frustrated on the death of the caregiving adult child and, therefore, the obligation to meet the material needs of the older parent(s) would be assumed by the estate of the deceased adult child. Adopting the Manitoba Court of Appeal's approach, the obligation to maintain the older parent may fall on the caregiving adult child's estate, rather than them personally, which perhaps would result in the adult child's estate funding for their older parent's future care and maintenance. Although that is against the general rule that the death of a party to a contract brings the contract to an end, it is perhaps arguable that the adult child's estate could fund the older parent's care by possibly paying for another suitable carer. In other words, paying for the costs associated in 'maintaining' their older parent.

In light of the above, *Re Witwicki* highlights the importance of not only reducing the Family Agreement into writing but to ensure the use of the word 'maintain' is clear so as to not be construed as meaning a financial obligation which could subsist after the death

686 ibid [29].

of the adult child. Further, *Re Witwicki* is a good example of how a court will take into account unconscionability of the contract.

Although evicting a party out of the home during a contract that provided them a place to live would usually constitute an actual breach, the British Columbian case of *Folia v Trelinski*[687] is an example of whether asking a party to leave the house in a 'temporary' basis frustrates or breaches the agreement. In *Folia v Trelinski*, a 64-year-old woman, Ms Juliana Folia, sued her daughter and son-in-law seeking to set aside a transfer of her home she made to them on the basis of unconscionability. Mrs Folia argued that the transfer was for no consideration and given in exchange for an unenforceable promise by the Trelinskis to take care of her 'for life'. Interestingly, in this case both parties accepted that the contract was binding and enforceable. What was in dispute, however, was whether the agreement had been frustrated or breached. The defendants argued that the contract had been frustrated by the parties' inability to live together due to Mrs Folia's allegations of fraud, breach of trust, duress and undue influence. They said that a contracting party is not entitled to compensation when the frustrating event was brought about by their own conduct. Mrs Folia argued that if the contract was frustrated, she was entitled to restitutionary relief. Given the breakdown in relationship was one that involved personal services, it would be perhaps highly unlikely that the older parent would want to return to live with the caregiving adult child.

The Court, referring to *Davis Contractors Ltd v Fareham Urban District Counsel*[688] for the proposition that '[h]ardship and inconvenience are, themselves, not grounds for

---

687 [1997] BCJ No 2417. See also reasons for judgment that were delivered after the trial, *Folia v Trelinski* [1996] BCJ No 2135.

688 [1956] AC 696.

relieving the defendants of their obligation to care for Mrs Folia', held that the contract had not been frustrated.[689] Further, the Court, citing *Krell v Henry*,[690] held that the parties must have contemplated the risk of future incompatibility when the agreement to care for Mrs Folia for life was made.[691] The Court acknowledged that '[l]iving together for the parties, particularly after this litigation, will be awkward and difficult, but not impossible'.[692]

In determining the plaintiff's claim for damages, the Court held that (i) in order to find for the plaintiff, the contract would have to be repudiate, and (ii) to find a repudiation, there must be conduct which amounts to 'total rejection of the obligations of the contract; there must be lack of justification for that conduct; and the repudiation must be accepted by the innocent party who treats the contract as ended'.[693]

On the facts of that case, the Trelinskis asked Mrs Folia to leave the home for the duration of the litigation, which the Court found was not a breach that went to the root of the contract. Under the contract, the Trelinskis had an obligation to provide Mrs Folia with food and lodging. Therefore, by asking her to leave the house they breached the contract because they did not provide her with a room and board. Although the Court found that the Trelinskis were in breach, the Court held that they had not permanently evicted Mrs Folia as they had told the Court she was welcome to return home.[694]

---

689 [1997] BCJ No 2417 [19].

690 [1903] 2 KB 470.

691 [1997] BCJ No 2417 [20].

692 [1997] BCJ No 2417 [21].

693 [1997] BCJ No 2417 [23].

694 [1997] BCJ No 2417 [25].

At the trial, Mrs Folia did not treat her eviction as repudiation. Instead, she argued that the agreement should be set aside as unconscionable or because there was no consideration. Even if the breach by the Trelinskis amounted to a total rejection of their obligations under the contract, without an explicit acknowledgement by Mrs Folia that the contract had been brought to an end, the Court was unable to find that the agreement had been repudiated.

Therefore, the Court held that Mrs Folia was entitled to damages for the period of time she was out of the house and incurred any expense for food or lodging or other items which the Trelinskis would have otherwise provided.[695]

In deciding that the Trelinskis had not permanently evicted Mrs Folia, as they had told the Court she was welcome to return home, shows, in my opinion, a lack of appreciation by the Court of the difficulties Mrs Folia would have faced in returning to live with her daughter and son-in-law in a house where there would ultimately be hostility, anger and awkwardness following litigation of this kind. As Gzell J commented in *Stoklasa v Stoklasa*, 'In the tragic circumstances of this breakdown in family relationships it is inappropriate that the defendant should take the plaintiff back into the house.'[696]

Further, the approach adopted by the Court in *Folia v Trelinski* is, in my opinion, contrary to the general rule against allowing for specific performance of a contract for personal services, which is discussed in more detail below.[697]

---

695 [1997] BCJ No 2417 [26].

696 [2004] NSWSC 518 [42].

697 See discussion under heading 'Specific Performance', section 6.3 at page 165 below.

6.2. DEFENCES

6.2.1. UNFAIR CONTRACT TERMS

In addition to the defences raised by the Clarks in *Parker v Clark*, namely that the agreement lacked (i) an intention to create legal relations, (ii) formality, and (iii) clarity, it may also be argued that a Family Agreement is an unjust contract which ought to be set aside.

In what Einstein J called 'unfortunate proceedings', *Menka Tasevska v Vlado (Larry) Tasevski and Anor*[698] is an example of how an arrangement that appears to favour the interests of all of the parties ultimately becomes the source of a disagreement. In that case, the plaintiff, Menka Tasevska (**Menka**), and her adult son and daughter in law, Vlado Tasevski (referred to in the case as **Larry**) and his wife, Susan, entered into an agreement which ended in proceedings involving 'a number of heavily contested parameters concerning the precise arrangements made by the current parties and allegations that neither the plaintiff nor her late husband had been properly advised either by her son or by her son's solicitors'.[699]

In this case, Larry and Susan purchased a vacant lot, which they jointly owned, and subsequently developed (the **Property**). Larry and Susan promised Menka and her late husband (**Dusan**) that if they contributed money towards the building of a home on the Property for them all to live in together then they could co-own the home and live there with them for the rest of their lives, and that they would take care of them as needed. In

[698] [2011] NSWSC 174.

[699] ibid [2].

reliance on that promise, Menka and Dusan not only placed Dusan's retirement payment at the disposal of Larry and Susan to build the contemplated home, but they also sold their home and used the majority of the sale proceeds for that purpose. Around that time, Larry took Menka and Dusan to see his solicitor.

In May 1993, after moving into the residence, the parties entered into a Deed of Agreement, which inaccurately set out the oral agreement the parties had previously entered into. After some time, Menka and Dusan realized that they were not on the title. They confronted Larry and Susan about this, but they refused to change the title to reflect the fact that Dusan and Menka were co-owners. On a number of occasions over the next six years, Menka and Dusan requested that their names be put on the title. They also instructed a solicitor to write a letter to Larry and Susan requesting the return of the money they injected into the building of the home however, no further legal action was taken at that time. Dusan's health deteriorated and he died in October 1999, leaving his estate to Menka. Menka continued to live with Larry and Susan for nearly ten years after Dusan's death. However, in April 2008, after Larry demanded Menka to give her pension to him, the relationship soured to the point where Menka was refused access to amenities of the home, including hot water, TV, stove, and the phone. In August 2008, Menka stopped contributing to the household bills and Larry told her that he wanted her to leave and threatened to kill her if she did not leave the house. In fear, Menka fled the house and subsequently commenced proceedings.

The dispute centred on the relative contributions Menka, Dusan, Susan and Larry made to the Property and what contributions they were entitled to. Menka sought a declaration that the home was held on trust for her in whatever proportion the Court deemed fit, or, in the alternative, sought equitable compensation. Menka argued that the document

signed was unjust and ought to be set aside as, amongst other things, it did not give effect to the oral agreement reached between the parties. Menka argued that aspects of the contract were unfair on the basis that she, and her late husband, were (i) much less educated than Larry and Susan, (ii) not experienced in property matters, and (iii) not sophisticated people.

Further, Menka argued that (i) her and her late husband did not speak much English, (ii) the contract was not translated in their preferred dialect prior to signing it, (iii) they did not have the opportunity to receive independent legal advice in relation to the contract, and (iv) Menka's late husband was ill for at least some of the period during which these events occurred. In light of these factors, Menka argued that it was unjust for her to be bound by the contract pursuant to the Contracts Review Act 1980 (NSW), which permits the court to review contracts and to set aside unjust contract.[700] Although the Contracts Review Act 1980 (NSW) goes some way to regulate and govern Family Agreements in New South Wales, no similar legislation exists in other Australian jurisdictions.

Although the Court ultimately found that the contract was not unjust, and therefore not set aside,[701] the Court wanted to 'make clear' that, '… it was indeed unfortunate that the plaintiff and her husband were not given the courtesy of being taken to an entirely independent solicitor'.[702]

---

700 Contracts Review Act 1980 (NSW), s 9. Note, similar legislation to the Contracts Review Act 1980 (NSW) does not exist anywhere else in Australia.

701 [2011] NSWSC 174 [38].

702 ibid [129].

Further, and in relation to the point raised above regarding the inappropriateness of encouraging an older parent to move back in with their adult child after a breakdown in the relationship such as this,[703] the Court commented:

> … it is clear from the evidence that it is not desirable for Menka to return to the defendants' house. This would not be in the interests of either party, and would lead to further conflict.[704]

This approach, unlike the approach adopted by the Court in *Folia v Trelinski*, aligns with the general rule against allowing for specific performance of a contract for personal services.

6.3. SPECIFIC PERFORMANCE

It is well established that the courts will not award specific performance for a contract for personal services. Specific performance is said to be an 'exceptional remedy', which will be denied if (i) damages are an adequate remedy and (ii) enforcing compliance will involve the supervision of the court.[705] In *Rigby v Connol*,[706] Jessel MR commented:

> … the Courts … have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of

---

703 See text to (n 696) above.

704 [2011] NSWSC 174 [118].

705 Gareth Jones, *Specific Performance of a Contract of Services?* The Cambridge Law Journal Vol. 46 No 1 (March 1987) 21-23.

706 (1880) 14 Ch D 482, 487.

> pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy'.

In 1853, Sir James Knight Bruce commented:

> A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose riding is excellent, a cook whose performances are perfect, and yet he may not have confidence in him: and while on the one hand all that the servant requires or wishes, and that reason may be reason enough, is money, you are on the other hand to destroy the comfort of a man's existence for a period of years, by compelling him to have constantly about him in a confidential situation one to whom he objects.[707]

Although this comment from Sir Bruce is archaic, Heydon has commented that the underlying point 'holds good'.[708] That is, 'where an element of confidence is inherent in the contractual relationship, there are dangers in specific performance once that confidence is felt, justifiably or not, no longer to be deserved'.[709]

In *JC Williamson Ltd v Lukey*,[710] Dixon J commented that specific performance 'is not a form of relief which can be granted if the contract involves the performance by one

---

[707] *Johnson v Shrewsbury and Birmingham Railway Co* (1853) 3 De GM & G 914, 926; 43 ER 358, 363 (citations omitted). See also *Pickering v Bishop of Ely* (1843) 2 Y & CCC 249; 63 ER 109; *Chaplin v North-Western Railway Co* (1862) 5 LT 601; *Firth v Ridley* (1864) 33 Beav 516; 55 ER 468, cited in J D Heydon, *Heydon on Contract* (Law Book Co 2019) at [27.500].

[708] J D Heydon, *Heydon on Contract* (Law Book Co 2019) [27.500].

[709] J D Heydon, *Heydon on Contract* (Law Book Co 2019) [27.500].

[710] (1931) 45 CLR 282, 298.

party of services to the other or requires their continued co-operation'. As Lord Langdale MR said, '[i]t is impossible to make persons who will not concur, carry on a business, jointly, for their own common advantage'.[711]

In circumstances where one party has breached the contract, leading to a loss of mutual confidence, Megarry J has commented 'if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster'.[712]

Given the majority of Family Agreements fail due to relationship breakdowns,[713] or, rather, breakdown due to relationship 'failures', it is unlikely that the aggrieved party will sue for performance of the agreement as that would force the parties to live together. In light of the above cases, even if the aggrieved party did sue for performance of the agreement, the court is unlikely to force the parties to live together after a relationship breakdown, as doing so, in the words of Megarry J, is a 'recipe for disaster'.[714]

6.4. INJUNCTIVE RELIEF

Similar to the general approach not to grant a decree for specific performance in relation to contracts of personal service, the courts are equally reluctant to grant an injunction which would essentially have the same effect.[715] This is because enforcing such a contract by

---

711 *England v Curling* (1844) 8 Beav 129, 137-138; 50 ER 51, 55.

712 *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482, 506.

713 Herd (2002a) (n 626) 75.

714 *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482, 506.

715 J D Heydon, *Heydon on Contract* (Law Book Co 2019) [28.210].

injunction would, in effect, compel the specific performance of a contract of personal services, which would 'compel the parties to remain in a close personal relationship which had become offensive and distasteful to one of them'.[716]

6.5. VALUING CARE: REASONABLE REMUNERATION

The key principle used in assessing damages for work done under a contract is reasonable remuneration. A good example of how the application of that principle could work is the case of *McKay v McKay*.[717] In that case, a seriously ill father entered into an agreement with his adult daughter and her partner that they could buy his ex-partner's half share in his home and he will transfer his half share to them in exchange for a right to reside with them and be provided with care for the rest of his life. They agreed. The parties entered into a deed and were subsequently transferred the entire property. Unfortunately, after some time, the relationship deteriorated, and the daughter and her partner moved out and the elderly man lived in the property alone. The daughter and her partner commenced proceedings for the recovery of $20,000, which they had advanced to the elderly man. The old man argued that the breakdown of the relationship meant that it was impossible for his daughter to provide him with ongoing care, or for the parties to live in the same property together:

> … thus destroying the substratum of the relationship on which the transfer of his half interest in the property to them had been based and accepted, and that it is unconscionable for the plaintiffs to retain the benefit of the transfer in

716 ibid [28.210].

717 [2008] NSWSC 177.

> circumstances which had not been intended, freed of the obligation to care for him and to permit him to live in the property for the rest of his life.[718]

The plaintiffs argued that they were entitled to the whole of the property, '… subject only to an obligation to pay Mr McKay the capitalised present value of his lifetime right of residence, and possibly the value of the care to which he was entitled under the … agreement'.[719]

The father filed a cross-claim seeking his half interest in the property be returned. He argued that the contract did not provide for the eventuality of a failed joint venture with no attributable blame. Therefore, he claimed that, in equity, each party ought to recover their contributions. The plaintiffs unsuccessfully argued this was not a case of a failed joint venture but a 'mere contractual relationship':

> Mr Sneddon [for the plaintiffs] submits that this is a case in which the contractual provisions implicitly if not expressly provide for the consequences of the failure of the joint relationship, and accordingly should prevail. Mr Evans [for the father], to the contrary, submits that this is a case in which the contractual provisions do not specially deal with the consequences of failure of the joint relationship.[720]
>
> In the present case, the contract plainly does not make express provision for what is to happen if the relationship breaks down so that further performance of the contract becomes impossible; it is silent on the issue. Mr Sneddon submits that the

---

718 ibid [8].

719 ibid [10].

720 ibid [17].

> contract makes implicit provision in that behalf, in the sense that if a lifetime right of residence and lifetime care is not provided, then there is a breach of contract, and the implicit intention is that damages are payable. However, I do not accept that an officious bystander who asked these parties at the time of making the contract what would happen if the relationship broke down, would have been testily suppressed with "Then the plaintiffs will keep the land and pay the defendant damages". Indeed, it is quite unrealistic to suppose that would have been the attitude of the parties, had they turned their mind to the question. To the contrary, it seems to me that it was never intended that the plaintiffs should have a half share of the property unencumbered by an obligation to provide care and a lifetime right of residence. At the very least, to borrow Deane J's words, "it was not specifically intended nor specially provided" that they should retain the property in these circumstances. It follows that this is a case to which the equitable principle enunciated by Deane J in *Muschinski v Dodds* applies, and the parties should not be left to their rights at law — namely, to recover damages for breach of contract — which would be the effect of acceding to the plaintiffs' submissions.[721]

In response to the plaintiffs' argument that they ought to be entitled to the value of the care they provided to Mr McKay, the Court commented that it is difficult to value right to receive care. Brereton J commented:

> Personal injury cases of seriously disabled plaintiffs show that the cost of care can be enormous. It is quite unknown whether, and if so for how long, Mr McKay would require intensive care in the future. While, as in common law personal injury

[721] ibid [19].

> cases, an estimate can be made, it is an unsatisfactory approach in the context of Mr McKay's reduced life expectancy, where the risk of error and consequent injustice is magnified in quantum. The Court might easily allow too much or too little in financial terms to care for him in the events which ultimately transpire.[722]

Further, his Honour commented:

> As to the rendering of care services by Ms McKay, the parties agree that between late 1996 and at least early 1999 she cared for Mr McKay as required by the December 1996 agreement. However, that agreed fact is equivocal as to the quantum and quality of the care provided. Mr McKay says that, in fact, very little was provided. Ms McKay says [para 65 of her affidavit] that on her return from work or her sporting commitments she cooked dinner, sometimes prepared meals for Mr McKay to take to work, cleaned the kitchen and washed up, washed, dried and folded clothes, shopped for groceries and household supplies, washed the floors, for the first 12 months cleaned Mr McKay's rooms, vacuumed the floors, took him to medical appointments when necessary and took him to the library to borrow books. But she also says [para 70] that in early 1997 Mr McKay's condition improved to the extent that he was working at his factory at Revesby, and that he could lift things that she would find difficult to lift.[723]
>
> In other cases … the rendering of the services contemplated by the arrangements for some considerable time have not only not precluded a return of contributions,

---

722 ibid [37].

723 ibid [42].

> but also have not resulted in any allowance. Indeed, I am not aware of a case in this area of discourse in which an allowance has been made for the provision of care. That is not to say that in an appropriate case, if appropriate evidence were adduced, such an allowance could not be made. But there is nothing in this case to suggest that Ms McKay gave up her employment, or forewent other opportunities, in order to render care to her father over the period in question, and there is even less to attribute any value in financial terms to what she did. The evidence does not descend to the detail that would be required to support a *Griffiths v Kerkemeyer* claim in a personal injuries action. In those circumstances, I do not think it is possible or appropriate to make any allowance for the rendering of care services.[724]

Although the Court in *McKay* did not ultimately make any allowance for the care services provided to Mr McKay, it illustrates that the court may make an allowance in the appropriate case, and upon appropriate evidence being adduced.[725]

In valuing care services, the court could be guided by market and/or commercial rates of carers or by and/or how the court determines gratuitous care payments in personal injury cases regarding disabled plaintiffs who require care. First, under the National Disability Insurance Scheme Act 2013, the costs of support must be reasonable and relative to the 'benefits achieved and the cost of alternative support'.[726] Further, the National Disability Insurance Scheme (**NDIS**) releases a price guide that lists costs for all support

---

724 ibid [43].

725 ibid.

726 National Disability Insurance Scheme Act 2013 (Cth), s 34(c).

areas under the NDIS. For example, if a client lives in New South Wales and is in receipt of care supports under the item, 'Assistance with self-care activities during daytime weekdays', the support worker's cap rate for that service is $44.71 per hour according to the NDIS Price Guide.[727]

Secondly, in determining the hourly rate for domestic services in a personal injuries context, the Supreme Court of Queensland in *Baig v AWX Pty Ltd & Anor*[728] recently accepted that $55 is an appropriate hourly rate for past and future gratuitous care. In the England and Wales Court of Protection decision *Re HC*,[729] (the then) Senior Judge Lush summarised the principles relating to gratuitous care payments as follows:

> … when it calculates a 'gratuitous' care allowance for family members who provide care to someone with an acquired brain injury, the Court of Protection broadly applies the criteria applied by the Queen's Bench Division of the High Court in quantifying this head of damages in personal injury litigation. Accordingly, as long as such an allowance is affordable, the court will take the commercial cost of care as the ceiling and reduce it by 20%.

---

727 Mable, Formerly Better Caring, NDIS cap rates: what all disability support workers should know (9 December 2019) <https://blog.mable.com.au/blog/care-workers/ndis-cap-rates-support-workers/> accessed on 29 March 2020. See also NDIS Price Guide 2019-20 at NDIS, Price guides and pricing (30 March 2020) <https://www.ndis.gov.au/providers/price-guides-and-pricing> accessed on 30 March 2020.

728 [2017] QSC 325 [171]-[176] per McMeekin J.

729 [2015] EWCOP 29.

In *Housecroft v Burnett* [1986] 1 All ER 332, at 342g and 343e, Lord Justice O'Connor held that:

> Where the needs of an injured plaintiff are and will be supplied by a relative or friend out of love and affection (and, in cases of little children, where the provider is a parent, duty) freely and without regard to monetary award. How should the court assess 'the proper and reasonable cost'? There are two extreme solutions: (i) assess the full commercial rate for supplying the needs by employing someone to do what the relative does; (ii) assess the cost at nil, just as it is assessed at nil where the plaintiff is cared for under the national health scheme. …. It follows that in assessing 'the proper and reasonable cost of supplying the needs' each case must be considered on its own facts.
>
> In cases where the relative has given up gainful employment to look after the plaintiff, I would regard it as natural that the plaintiff would not wish the relative to be the loser and the court would award sufficient to allow the plaintiff to achieve that result. The ceiling would be the commercial rate.[730]

As outlined above,[731] Solkoff suggests that when determining fair market value for the promise of lifetime care, the following formula ought to be used, 'W x H x 52 X L = C'. In this formula, 'W' is the caregivers hourly wage, 'H' is the number of hours worked per week reasonable expected of the caregiver, '52' is the number of weeks in a year, 'L' is the

[730] ibid [27]-[28], cited with approval in *Re HNL* [2015] EWCOP 77 [37].

[731] See discussion under the heading 'Market Value', chapter 5, section 5.2 at page 131.

life expectancy of the older parent, and 'C' is the compensation.[732] If the parties did not agree to a set remuneration, it is commented that the courts are willing to imply that there must be a '"reasonable" payment, judged by prevailing market rates'.[733] Because care services, especially for older people, are impossible to predict, it is important that the Family Agreement outlines or lists the services which will be undertaken on a 'needs' basis rather than a generic obligation to provide 'care for life'. Solkoff comments that recognising care services in this way will enable a better criterion of valuing the services provided,[734] which will ultimately assist the court in determining what allowance ought to be made for the provision of care services.

The High Court of Australia in *Commonwealth v Amann Aviation Pty Ltd*[735] commented:

> The settled rule, both [in Australia] and England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can.[736]

---

732 Scott Solkoff, 'Personal Service Contracts for the Elderly: Revisited' (2004) <https://www.elderlawanswers.com/Documents/SolkoffArticle.pdf> accessed 22 April 2020.

733 Andrew Stewart et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016) [9.36] and [15.07], citing *Fagan v Public Trustee* (1934) 34 SR (NSW) 189; *Way v Latilla* [1937] 3 All ER 759; *Midya v Sagrani* [1999] NSWCA 187.

734 ibid.

735 (1991) 174 CLR 64.

736 ibid 83 per Mason CJ and Dawson J, citing *Fink v. Fink* (1946), 74 C.L.R. 127, at p. 143; *McRae v. Commonwealth Disposals Commission* (1951), 84 C.L.R. 377, at pp. 411·412; *Chaplin v. Hicks*, (1911) 2 K.B. 786, at p. 792.

Therefore, although the provision of care services may be difficult to value, a court will do the best it can with the information provided. In order to assist the court to quantify the care, the caregiving adult child should adduce appropriate evidence. For example, evidence that proves the adult child gave up their employment or forewent paid opportunities in order to render care services to their parent(s) over the period in question.[737]

[737] See *McKay v McKay* [2008] NSWSC 177 [43].

7. ENDURING DOCUMENTS

One way in which the law has responded to population ageing is through the implementation of preventative legal tools, such as enduring documents.[738] As the global population ages, the number of people affected by chronic illness and disability resulting in intellectual impairments will increase.[739] Therefore, a significant proportion of older people, affected by some form of decision-making incapacity, will require another person to make decisions on their behalf in relation to their financial or personal affairs. In recognition of this, governments are encouraging older people to execute an instrument appointing another person, or persons, to act on their behalf should they suffer from decision making incapacity.[740] Accordingly, reliance on advance planning tools will significantly increase.[741]

---

738 Israel Doron and Iddo Gal, 'The Emergence of Legal Prevention in Old Age: Findings from an Israeli Exploratory Study' (2006) 21 Journal of Cross Cultural Gerontology 41.

739 Alzheimer's Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020; The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 3 [3.1] <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

740 Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) Journal of Adult Protection 20.

741 Natalia Wuth, 'Enduring Powers of Attorney with Limited Remedies – It's Time to Face the Facts!' [2013] 7(3) Elder Law Review 1.

In the UK, this instrument is called a lasting power of attorney[742] and in Australia, it is called an enduring power of attorney.[743] Under these instruments, an older person can appoint an attorney to make decisions, including personal and/or financial decisions, on their behalf that, significantly, is not revoked upon the older person losing capacity.[744] Under an enduring power of attorney an attorney is authorised '… to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult has capacity for the matter when the power is exercised …'.[745]

Under the current law in Queensland, a person who is a 'paid carer' is not eligible to be a person's attorney.[746] This means that a caregiving adult child receiving payment under a Family Agreement is *not* eligible to be their older parent's attorney. Further, if an attorney becomes a paid carer, the enduring power of attorney is revoked[747] to the extent that it gives power for a 'personal matter'.[748] In contrast however, a guardian or administrator for an adult is entitled to reimbursement for the 'reasonable expenses', and trustees (including personal representatives) are also entitled to be reimbursed for 'all expenses reasonable

---

742 See Mental Capacity Act (2005), s 9.

743 In a Queensland context, see Powers of Attorney Act 1998 (Qld), s 32.

744 Mental Capacity Act (2005) (UK), s 9(1); Powers of Attorney Act 1998 (Qld), s 32(2).

745 ibid s 32(1).

746 Powers of Attorney Act 1998 (Qld), s 29(1)(a)(ii). This does not include receipt of a carers pension: Guardianship and Administration Act 2000 (Cth), s 26.

747 Powers of Attorney Act 1998 (Qld), s 59.

748 *Etchison v ANZ Executors and Trustee Company Ltd* [2005] QSC 363 [40] per McMurdo J.

incurred' in the execution of the trust[749] and can be remunerated for their services.[750] Furthermore, a personal representative can apply to be paid a commission for their services.[751] This chapter outlines the various roles, duties and entitlements other fiduciaries have under the current law in order to provide an analogy through which the quantum of appropriate remedies under Family Agreements could be ascertained. This chapter illustrates that the current law, in treating certain fiduciaries differently to a carer, does not value care work.

Under the Powers of Attorney Act 1998 (Qld), a 'personal matter' relates to, *inter alia*, the older person's care, including health care, or welfare,[752] and a legal matter not relating to the principals financial or property matters.[753] Although Family Agreements relate to care work, it is likely that the older parent would appoint their caregiving adult child as an attorney for decisions relating to personal as well as for decisions relating to financial matters.

In the absence of an appointed attorney, and when there is doubt as to a person's capacity to execute an enduring power of attorney, the Queensland Civil and Administrative Tribunal can appoint a guardian for a personal matter, or an administrator for a financial matter, on behalf of the person with impaired capacity under the

749 Trusts Act 1973 (Qld), s 72.

750 Trusts Act 1973 (Qld), s 101.

751 Succession Act 1981 (Qld), s 68.

752 Powers of Attorney Act 1998 (Qld), s 32(1), Schedule 2.

753 Powers of Attorney Act 1998 (Qld), s 32(1)(i), Schedule 2. See also the Guardianship and Administration Act 2000 (Qld), s 2, Schedule 2.

Guardianship and Administration Act 2000 (Qld).[754] Although there is separate legislation for each appointee, the legislative provisions relating to the powers of an attorney, guardian or an administrator are essentially the same[755] and are to be read together.[756]

7.1. CARERS AS ATTORNEYS

Typically, older people appoint their family members as attorneys,[757] particularly those they are in a caring relationship with.[758] Therefore, if, during the lifetime of a Family Agreement, an older parent loses capacity, the caregiving adult child may be required to make decisions on their behalf in relation to their personal and/or financial matters. The assumption underpinning enduring documents is that families will always act in the best interests of the older person, particularly when they lack capacity.[759] Moreover, the Queensland Government encourages people making an enduring power of attorney to consider a family member '… who understands your personal wishes and health care needs.'[760] Herd, a leading expert in the areas of elder law, retirement, disability and aged

---

754 Guardianship and Administration Act 2000 (Qld), s 12.

755 ibid s 33; Powers of Attorney Act 1998 (Qld), s 32.

756 Guardianship and Administration Act 2000 (Qld), s 8; Powers of Attorney Act 1998 (Qld), s 6A.

757 Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: older people with impaired capacity and financial abuse' (2006) 8(1) Journal of Adult Protection 20.

758 Jonathan Herring, *Caring and the Law* (Hart Publishing 2013) 168.

759 McCawley et al (n 757).

760 Queensland Government, 'Power of Attorney' (2017) <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/power-of-attorney/> accessed on 22 April 2020.

care in Queensland, has drafted a sample Family Agreement.[761] This sample agreement contains an 'incapacity' clause which encourages families entering into Family Agreements to execute an enduring power of attorney, namely:

> All parties agree that they will each complete, and keep in force, a valid Enduring Power of Attorney in which they appoint a person(s) chosen by them to make decisions, both financial and personal, in the event that any of them should lose the capacity to do so.[762]

Due to the firmly held belief that older people can '… trust family members to look after their best interests',[763] it is likely that an older parent would appoint their adult child as their attorney under an enduring power of attorney when entering into a Family Agreement with them.

However, unfortunately, as discussed above,[764] it is those trusted family members who often take advantage of their position. The Australian Law Reform Commission (the **ALRC**) has recently commented that although enduring documents play an important role in protecting an older person from abuse, they may facilitate abuse by the very person

---

761 Brian Herd, 'Sample Family Agreement' (Senior Rights Victoria, 2013) <http://www.seniorsrights.org.au/assetsforcare/sample-family-agreement/> accessed on 22 April 2020.

762 ibid.

763 Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68, 71.

764 See text to (n 240) and (n 287) above.

appointed to protect the older person.[765] In the words of (the then) Judge Lush, attorneys are using enduring documents as a 'licence to loot'.[766]

The Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld) allow the exercise of power for a matter for an adult with impaired capacity for the matter.[767] A person can be appointed as a substituted decision maker on an informal or formal basis.[768] If an older person has not appointed a substituted decision-maker prior to them losing capacity, the law allows someone with automatic authority to make health care decisions for them. This is known as a statutory health attorney.[769] Section 63 of the Powers of Attorney Act 1998 (Qld) outlines categories of people that are authorised to act as a statutory health attorney in order of priority.

Under Schedule 3 of the Powers of Attorney Act 1998 (Qld)[770], a 'paid carer' is defined to mean someone who:

---

765 Australian Government, Australian Law Reform Commission, 'Elder Abuse— A National Legal Response: Final Report' (2017) [1.30], [6.4], [6.48] <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/> accessed 22 April 2020.

766 *MJ, JM v The Public Guardian* [2013] EWHC 2966 (COP) per (the then) Judge Denzil Lush 98.

767 Guardianship and Administration Act 2000 (Qld), s 9(1).

768 See Guardianship and Administration Act 2000 (Qld), s (9)(2). Note, pursuant to s 8(1) of the Guardianship and Administration Act 2000 (Qld), that Act is to read in conjunction with the Powers of Attorney Act 1998 (Qld). If there is an inconsistency between the Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld), the Guardianship and Administration Act 2000 (Qld) prevails: s 8(2).

769 Powers of Attorney Act 1998 (Qld), s 62.

770 See also Guardianship and Administration Act 2000 (Qld), Schedule 4.

(a) performs services for the principal's care; and

(b) receives remuneration from any source for the services, other than—

(i) a carer payment or other benefit received from the Commonwealth or a State for providing home care for the principal; or

(ii) remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the principal's care.

7.2. DUTIES OF AN ATTORNEY

An attorney has many duties. Similar to the 'best interests' principle being relevant to all decisions involving the care or treatment of the older person under the Mental Capacity Act 2005 (UK),[771] a person who performs a function or exercises a power under the Guardianship and Administration Act 2000 (Cth) for a matter in relation to an adult with impaired capacity for the matter must apply the general principles,[772] and for a health matter or a special health matter, they must apply the health care principle.[773] These principles provide, *inter alia*, the presumption of an adult's capacity, an adult's right to the same basic human rights as others, the importance of encouraging and supporting an adult to achieve independence and the right to participate to the greatest extent practicable in decisions

[771] Mental Capacity Act 2005, s 5.

[772] Guardianship and Administration Act 2000 (Qld), Schedule 1.

[773] Guardianship and Administration Act 2000 (Qld), s 11.

affecting the adult's life.[774] If a caregiving adult child is appointed as an administrator in relation to financial matters, they must give a 'financial management plan' to the tribunal for approval.[775]

An attorney must exercise their power honestly and with reasonable diligence to protect the older person's interests.[776] An attorney must keep their property separate from the adult's property, which includes their money.[777] They must also avoid conflict transactions, without the authorisation of the older person.[778]

7.2.1. FIDUCIARY DUTY

The relationship of an attorney (the caregiving adult child) and principal (the older parent) is a recognised class of fiduciary relationship.[779] As Rein J commented in *Perpetual Trustee Company Ltd v Gavin Bruce Gibson*:

> An attorney exercising a power of attorney owes fiduciary duties to his or her principal. A short statement of the position can be found in Dal Pont, *Law of Agency*, 2nd ed, 2008, LexisNexis Butterworths at [10.10]:

---

774 ibid.

775 Guardianship and Administration Act 2000 (Qld), s 20.

776 Guardianship and Administration Act 2000 (Qld), s 35.

777 Guardianship and Administration Act 2000 (Qld), s 50; Powers of Attorney Act 1998 (Qld), s 86.

778 Guardianship and Administration Act 2000 (Qld), s 37; Powers of Attorney Act 1998 (Qld), s 73.

779 *Hospital Products Ltd v United States Surgical Corporation* (1985) 156 CLR 41, 68 per Gibbs CJ.

> Donees of powers of attorney, as fiduciary agents, must not exercise their authority in a way contrary to the interests of their principals. So, like other agents, a donee of a power of attorney is, in the absence of a clear power to do so, prohibited from utilising that authority to pay personal debts, or to make presents to himself or herself or to others of the principal's property. Apart from any liability at common law, the donee becomes a constructive trustee of the misapplied property. Some jurisdictions give statutory effect to this fiduciary proscription by providing that a power of attorney confers no authority to do any act by which a benefit would be conferred on the donee, except as expressly permitted by its terms, and prohibiting a donee of a power of attorney from entering into a transaction giving rise to a conflict of interest and duty.[780]

In *Saad v Doumeny Holdings Pty Limited*,[781] the Court held that the attorney had 'departed from his duty of undivided loyalty to his principal's interests'[782] by deliberately attempting to dilute the value his principal's shareholding in a company to another person. In that case, Burchett AJ commented:

> A power of attorney is a species of agency, to which the rule stated by Lord Langdale MR in ***Gillett v Peppercorne*** (1840) 3 Beav. 78 at 83 – 84; 49 ER 31 at 33 has always been held to apply, that "where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for

---

780 [2013] NSWSC 276 [15] (footnotes omitted).

781 [2005] NSWSC 893.

782 ibid [25] per Burchett AJ.

> the benefit of his employer". In general, the "fundamental basis of the contract of agency requires the agent to give an exclusive allegiance to his principal and to promote his interests with singleness of purpose": ***Sutton v Forst*** (1925) 55 OLR 281 at 284, cited in Dal Pont, ***Law of Agency*** (2001) at 227. As Cardozo J said in ***Meinhard v Salmon*** (1928) 249 NY 458 at 468, in a passage quoted by Asprey J (with whom Sugerman and Collins JJ agreed) in ***Greenwood v Harvey*** (1965) 66 SR (NSW) 496 at 500, "the rule of undivided loyalty is relentless and supreme". Specifically in relation to a power of attorney which authorised in wide terms the drawing of cheques by the attorney on the principal's account, Lord Atkin, in ***Midland Bank, Limited v Reckitt*** 1933 AC 1 at 14, said the "only actual authority" of the attorney was "to draw cheques for his principal's purposes.[783]

Although powers of attorney can expressly authorise an attorney to benefit themselves, it has been held that 'that is a matter of power or authority, and does not exonerate the attorney from the fiduciary obligations by which an attorney under power is bound'.[784]

In *Spina v Conran Associates Pty Ltd; Spina v M & V Endurance Pty Ltd*,[785] Austin J had to construe a power of attorney that contained the following clause:

> *2. In the exercise of the authority conferred on him/her/them by Section 163B of the Conveyancing Act, 1919, my attorney(s) is/are authorised to execute

[783] ibid [24] (emphasis in original).

[784] *Ward v Ward (No 2)* [2011] NSWSC 1292 [3] per Brereton J.

[785] [2008] NSWSC 326.

an assurance or other document, or do any other act, whereby a benefit is conferred on him/her/them.[786]

(**Clause 2**)

In construing Clause 2, Austin J held that that the words '… whereby a benefit is conferred on my attorney' seemed to '… envisage conduct on the part of the attorney undertaken in the interests of the grantor, which also confers a benefit on the attorney'.[787] His Honour held that the absence of the words '… solely for the benefit of the attorney, whether or not also to the detriment of the grantor' after the words 'benefit is conferred on him/her/them' bolstered the view that the language of Clause 2 was not clear enough to permit the attorney to use a general power to enter into a transaction that was solely for the attorney's benefit.[788]

In considering the construction of Clause 2 of the power of attorney, Austin J commented that is it not his task to construe that clause in 'isolation' but, rather, it is his task 'to give effect to it in its context, which included clause 1, and also the statutory provisions that govern the effect of such a power of attorney'.[789]

Clause 1 of the power of attorney read:

1. I appoint Michele [sic] Spina of 43 Bain Place, Dundas [name and address written in by hand] and [blank] of [blank] to be my attorney(s) (where more

---

786 ibid [67].

787 ibid [73].

788 ibid [74]. See also *Perpetual Trustee Company Ltd v Gavin Bruce Gibson* [2013] NSWSC 276 [22] per Rein J.

789 ibid [75].

than one jointly and/or severally) to exercise, subject to any conditions and limitations specified in Part 2 of this Instrument, the authority conferred on him/her/them by Section 163B of the Conveyancing Act, 1919, to do on my behalf anything I may lawfully authorise an attorney to do.[790]

Austin J commented:

> A person authorised to act in the affairs of another may be a fiduciary, but the terms of such an appointment would exclude the fiduciary duty and permit the person to act solely in his or her own interests, provided that the appointment was made freely and was properly understood by the grantor. There is no bright-line proposition of law saying that a grantor who wishes to engage in such an act of benevolence to another person is prevented from doing so. Therefore using a grant of general authority to obtain a loan secured on the grantor's property, solely for the benefit of the person to whom the authority is given, is something the grantor may lawfully authorise that person to do.[791]
>
> However cl 1 does not confer on the attorney the authority to do anything the grantor may lawfully authorise another person to do. It only gives the attorney authority to act "on [the grantor's] behalf", and it only authorises things that the grantor may lawfully authorise *an attorney* to do. These words are very important. They make it plain that the person to whom the authority is given is limited to acting in an agency capacity, subject to the constraints of a fiduciary position. In

790 ibid [67].

791 ibid [76].

> particular, the person receiving the authority, being a fiduciary, is subject to the obligation to act on the grantor's behalf in the grantor's interests. By no conceivable stretch of the English language could the use of a general power of attorney for the execution of a mortgage over the grantor's land to secure a borrowing solely for the benefit of the attorney be regarded as a use "on behalf of" the grantor, or as something that "an attorney" might do. Therefore cl 1 is not an impediment to my adopting the construction that I would be inclined to take of cl 2 if I considered it in isolation; on the contrary, cl 1 reinforces that construction.[792]

Austin J drew support[793] from *Tobin v Broadbent*,[794] in which the question to be determined was whether the attorney, Hodgetts, had actual authority to pledge the grantor's share certificates as security for a personal loan to the attorney. In *Tobin v Broadbent,* Dixon J commented:

> But the cardinal fact of the transaction which it is sought to bring within the power is that the loan was made to Hodgetts, the donee of the power, and not to either of the Tobins, the principals. Hodgetts was the borrower, the loan was for himself, he did not contract it as an agent but he gave the lender his principals' property as security. The question is, therefore, whether the power of attorney extended to authorizing Hodgetts to give a security over his constituents' shares for his own debt, not simply whether it authorized him to give a security. You cannot sever the giving of the security from the indebtedness secured. A transaction of security is

---

792 ibid [77].

793 ibid [81].

794 (1947) 75 CLR 378.

unintelligible without an identification of the obligation secured. This is not the case of an agent misapplying moneys borrowed in his principal's name on the security of his assets pursuant to an authority covering the borrowing of money on the principal's behalf. If a transaction is ostensibly on the principal's behalf and is of a description that falls within the authority, it is nothing to the point that the agent's purpose was to act for his own benefit and to defraud the principal, that is, unless the opposite party to the transaction had notice.

But here the transaction was the attorney's own, both in form and substance, and the only incident of it concerning the constituents was when the latter's property was drawn in as a support for the loan. Prima facie, a power, however widely its general words may be expressed, should not be construed as authorizing the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation. 'The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property.' Per Russell J, *Reckitt v Barnett Pembroke and Slater Ltd* (1928) 2 KB 244 , at p 268 a judgment approved in the House of Lords (1929) AC 176 , at p 183 and p 195. In my opinion, the words of the powers of attorney do not in themselves suffice to confer authority upon Hodgetts to secure a

> borrowing of his own by a deposit of the plaintiffs' scrip. Such a transaction is in itself beyond the limits of the power.[795]

In *Spina v Permanent Custodians Limited*,[796] the late Angelina Spina (**Angelina**) gave her (now late) son Michael Spina (**Michael**) a general power of attorney under the *Conveyancing Act 1919* (NSW). Michael used the power to enter into a loan agreement with Permanent Custodians Limited to borrow $400,000 for Michael's benefit. The loan was secured against Angelina's home, which was her only asset. Angelina did not receive independent legal advice regarding the loan. At the time Michael obtained the loan, Angelina was 86 years old, had no income and was frail[797]. Following Angelina's death, her tutor, Sarina Spina, who is Angelina's daughter, commenced proceedings against Permanent Custodians Limited seeking to impeach the loan and mortgage on the grounds that the power of attorney did not authorise Michael to perform the transaction.

At first instance, Hammerschlag J, in refusing to follow Austin J in *Spina v Conran Associates Pty Ltd; Spina v M & V Endurance Pty Ltd*[798] commented that '… neither the term "attorney" nor the term "on behalf of" necessarily imports any notion of benefit'.[799] Consequently, Hammerschlag J found that the donor of the power may '… authorise, by

---

795 *Spina v Conran Associates Pty Ltd; Spina v M & V Endurance Pty Ltd* [2008] NSWSC 326 [81] per Austin J, citing *Tobin v Broadbent* (1947) 75 CLR 378 401 per Dixon J. See also *Perpetual Trustee Company Ltd v Gavin Bruce Gibson* [2013] NSWSC 276 [23] per Rein J.

796 [2009] NSWCA 206.

797 *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 [2008] NSWSC 561.

798 [2008] NSWSC 326.

799 *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 [2008] NSWSC 561 [151].

the power of attorney, an action entirely inimical to the donee's interest'.[800] In the course of his judgment, Hammerschlag J commented:

> Whether a particular action by the agent under a general power of attorney on the principal's behalf involves a breach of fiduciary duty is a different matter. The principal may have redress against his agent and a third party who participates in the breach with requisite knowledge. Such a case would have to be pleaded. No such assertion is made in these proceedings against the defendant.[801]

Following Hammerschalg J's decision, Angelina died. Angelina's executor, Joe Spina, who was Angelina's other son, successfully appealed the decision. The New South Wales Court of Appeal, in setting aside Hammerschalg J's decision, commented:

> … the lender was not innocent. It was the master of the situation; it knew what to do in its operations manual and that was not complied with in a case where it was quite clear that an 86 year old lady was putting her only substantial asset on the line in a situation where she may lose the lot without herself receiving independent legal advice.[802]

This case demonstrates that not only does the attorney have to comply with the terms of the general or enduring powers of attorney but also act honestly and with reasonable

---

800 *Perpetual Trustee Company Ltd v Gavin Bruce Gibson* [2013] NSWSC 276 [25] per Rein J.

801 *Angelina Spina v Permanent Custodians Limited* [2008] NSWSC 561 [2008] NSWSC 561 [153].

802 *Spina v Permanent Custodians Limited* [2009] NSWCA 206 [119] per Young J, with whom Tobias and Campbell JJA agreed.

diligence. This case is an important lesson for lenders to ensure the principal's interest are always considered. Further, this case also demonstrates that not only does the attorney have to comply with the terms of the general or enduring powers of attorney, but they must also avoid conflict transactions.

7.2.2. DUTY TO AVOID CONFLICT TRANSACTIONS

A conflict transaction is one where they may be a conflict, or which results in conflict between (i) the duty of an attorney towards the principal, (ii) the interests of the attorney, or a relation, business or close friend of the attorney, and/or (iii) another duty of the attorney.[803] Section 73 of the Powers of Attorney Act 1998 (Qld) provides:

> (1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.
>
> (2) A conflict transaction is a transaction in which there may be conflict, or which results in conflict, between—
>
> (a) the duty of an attorney towards the principal; and
>
> (b) either—

[803] *SLRM* [2018] QCAT 140 [11] per Member Allen, citing the Powers of Attorney Act 1998 (Qld), s 73(2).

(i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or

(ii) another duty of the attorney.

(3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal—

(a) deals with an interest in property jointly held; or

(b) acquires a joint interest in property; or

(c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).

(4) In this section—

joint interest includes an interest as a joint tenant or tenant in common.

The requirement to avoid a conflict transaction, unless authorised by the older person, is said to be 'an important protective feature'[804]. It appears to be settled as to when a transaction becomes a conflict transaction. In *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban*,[805] Boddice J commented:

[804] *Re Narumon Pty Ltd* [2019] 2 Qd R 247; [2018] QSC 185 [76] per Bowskill J.

[805] [2011] QSC 380 [27].

> … there is no issue as to when a transaction becomes a conflict transaction. The transaction having been undertaken, the relevant question is whether, at the time of authorising this transaction, using her power as … attorney, there was conflict between the first defendant's duty as attorney, and her interests.

In *Reilly v Reilly*,[806] Lindsay J summarised the relevant principles in relation to a conflict transaction:

> [114] The primary object of a power of attorney is to enable the attorney to act in the management of his or her principal's affairs; an attorney cannot, in the absence of a clear power so to do, make presents to himself or herself or to others of his or her principal's property: *Tobin v Broadbent*(1947) 75 CLR 378 at 401 (quoting *Reckitt v Barnett Pembroke and Slater Ltd* [1928] 2 KB 244 at 268, approved in the House of Lords [19c] AC 176 at 183 and 195), recently applied by the Full Court of the Federal Court of Australia in *Great Investments Ltd v Warner* (2016) 243 FCR 516 at 538 [85].
>
> [115] Under the general law of agency it is a breach of duty for an agent to exercise his or her authority for the purpose of conferring a benefit on himself or herself or upon some other person to the detriment of his or her principal. But, at the same time, if his or her act is otherwise within the scope of his authority it binds the principal in favour of third parties who deal with him *bona fide* and without notice of his fraud: *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142.

---

806 [2017] NSWSC 1419 [114]-[116].

> [116] Where a fiduciary (such as an agent) exercises a power which results in his or her obtaining some incidental benefit, there may be nothing *per se* improper with his or her having that benefit if the benefit itself is, in the circumstances, an inevitable consequence of his or her properly exercising the power which produces it. A beneficiary (principal) may be able to upset such an exercise of power only if he or she can show that the fiduciary (agent) exercised it with the dominant purpose in mind of obtaining that benefit irrespective of the interests of his beneficiary (principal).

In circumstances where the older person no longer possesses the requisite mental capacity to give fully informed consent to a proscribed transaction, the attorney could seek authorisation via an order of the court, or the Guardianship Tribunal.[807] In Queensland this could be done by way of an application seeking to exercise the court's protective jurisdiction or an application for advice or directions pursuant to section 96 of the Trusts Act 1973 (Qld) and/or section 118 of the Powers of Attorney Act 1998 (Qld).

Although an attorney can seek the approval for a conflict transaction, the legislation requires the approval be made *prior* to the transaction taking place. In some instances, however, it is likely that an attorney cannot afford, or cannot wait, for the application to be made and therefore this may mean that attorneys are breaching their duties, albeit unintentionally. To rectify this, on 26 March 2019, the Queensland Parliament passed the Guardianship and Administration and Other Legislation Amendment Bill 2018 (the

[807] See *Reilly v Reilly* [2017] NSWSC 1419 [112] per Lindsay J.

Amendment Bill).[808] The Amendment Bill amended the Guardianship and Administration Act 2000 (Cth), Powers of Attorney Act 1998 (Qld) and Public Guardian Act 2014 (Qld).[809]

The Amendment Bill amended, among other things, the Powers of Attorney Act 1998 (Qld) to allow attorneys to seek *retrospective* approval for conflict of interest transactions, rather than make attorneys seek *prior* approval. The amendment to section 73 of the Powers of Attorney Act 1998 (Qld) includes:[810]

> (1A) Despite subsection (1), if an attorney enters into a conflict transaction without obtaining an authorisation mentioned in subsection (1) for the transaction, a conflict transaction of that type or conflict transactions generally, the principal may retrospectively authorise the transaction if the principal has capacity to do so.

The amendments came into effect on 30 November 2020.[811] Only time will tell what impact these amendments will have however they ensure a consistent approach to the authorisation of conflict transactions for attorneys,[812] which will perhaps reduce the risk of

---

808 QCAT, Queensland Civil and Administrative Tribunal, GAA Bill 2018 <https://www.qcat.qld.gov.au/matter-types/gaa-bill-2018> accessed on 29 March 2020.

809 ibid.

810 Guardianship and Administration and Other Legislation Amendment Bill 2018 (Qld).

811 QCAT (n 808).

812 Hansard, Guardianship and Administration and Other Legislation Amendment Bill (26 March 2019) 640 <https://www.parliament.qld.gov.au/documents/hansard/2019/2019_03_26_WEEKLY.pdf> accessed 19 April 2020.

having an attorney removed as a result of an unintentional breach of their duties.[813] However, despite these amendments, an attorney is still not allowed to pay themselves or be paid for the care they provide.[814]

7.3. DEFENCE

Generally, an attorney who breaches their duties is liable to be removed. However, in circumstances where an attorney has acted honestly and reasonably, the court has statutory power to excuse them for any breach.[815] Section 105 of the Powers of Attorney Act 1998 (Qld) provides:

> (1) If the court considers—
>
> (a) an attorney is, or may be, personally liable for a breach of this Act; and
>
> (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the breach; the court may relieve the attorney from all or part of the attorney's personal liability for the breach.
>
> (2 In this section—

[813] See for example the Powers of Attorney Act 1998 (Qld), ss 73 (an attorney must avoid conflict transactions), 86 (an attorney must keep property separate).

[814] Powers of Attorney Act 1998 (Qld), ss 29 and 59.

[815] *Ede v Ede* [2006] QSC 378; [2007] 2 Qd R 323.

attorney means—

(a) an attorney under a general power of attorney made under this Act; or

(b) an attorney under an enduring document; or

(c) an attorney under a power of attorney made otherwise than under this Act, whether before or after its commencement; or

(d) a statutory health attorney.

Ede v Ede[816] addressed the obligations of an attorney to avoid conflict transactions. In that case, the defendant, who was the plaintiff's son and attorney under an enduring power of attorney, sold the plaintiff's house without the plaintiff's authority to the defendant's daughter for less than market value. Although the Court found that the defendant had acted 'honesty' under section 105(1) of the Powers of Attorney Act 1998 (Qld), he was liable for the loss. Muir J held that where an attorney (or relative) has benefited from a conflict transaction, the court will not readily excuse liability for the breach.[817]

816 [2006] QSC 378; [2007] 2 Qd R 323.

817 ibid 334 [50].

7.4. GUARDIANS AND ADMINISTRATORS: REIMBURSEMENT FOR 'REASONABLE EXPENSES'

Pursuant to section 47 of the Guardianship and Administration Act 2000 (Cth), 'a guardian or administrator for an adult is entitled to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator'. Similar to the revocation provision provided or under section 59 of the Powers of Attorney Act 1998 (Qld), an appointment as a guardian or administrator for an adult for a matter automatically ends if they become a paid carer for the adult.[818] If an appointment as a guardian or administer is automatically revoked under section 26(1)(a), the former guardian or administrator must advise the tribunal in writing of the ending of the appointment. The tribunal must review an appointment of a guardian or administrator at least every 5 years.[819] The tribunal may however review an appointment of a guardian or administrator for an adult at any time on its own initiative or on the application of the adult, an interested person for the adult or the Public Trustee.[820]

Although an administrator cannot be a paid carer or health provider for the adult,[821] it is questionable whether, under a Family Agreement, can a caregiving adult child who is also an administrator be 'reimbursed' for the costs spent on caring for their older parent(s)?

---

818 Guardianship and Administration Act 2000 (Cth), s 26(1)(a).

819 Note, the Tribunal must review an appointment of a guardian or administrator for an appointment made because an adult has impaired capacity for a matter, but the tribunal does not consider the impaired capacity is permanent —in accordance with an order of the tribunal, but at least every 5 years.

820 Guardianship and Administration Act 2000 (Qld), s 29.

821 Guardianship and Administration Act 2000 (Qld), s 14 (1)(a)(i).

7.4.1. REIMBURSEMENT FOR EXPENSES

An administrator is entitled to reimbursement from the adult for 'reasonable expenses incurred in acting as administrator'[822]. However, according to the Queensland Civil and Administrative Tribunal (**QCAT**), they 'cannot be paid for their services or time'[823]. QCAT has stated:

> An administrator is entitled to reimbursement from the adult for reasonable expenses incurred in acting as administrator, however, they cannot be paid for their services or time.
>
> Administrators must decide what is reasonable, taking into account the adult's financial circumstances and ensure sufficient funds are retained for the adult's care. Administrators must keep records detailing what was reimbursed, and retain copies of receipts for individual items more than $500.
>
> For travel costs, an administrator can be reimbursed for reasonably incurred expenses such as air travel, accommodation and petrol costs. In relation to fuel costs, a set rate per kilometre is acceptable, though this should be reasonable with regards to the adult's financial situation.

---

822 Guardianship and Administration Act 2000 (Qld), s 47.

823 QCAT, Queensland Civil and Administrative Tribunal, 'Frequently asked questions' <https://www.qcat.qld.gov.au/matter-types/administration-for-adults-matters/appointed-administrator-section/FAQs> accessed on 29 March 2020.

Administrators may be required to justify their expenses to QCAT.[824]

Pursuant to section 153 of the Guardianship and Administration Act 2000 (Cth), an administrator or attorney for 'a financial matter' must keep a summary of receipts and expenditure for the adult. Interestingly, the same requirement does not appear to apply for attorneys authorised to do anything in relation to a personal matter that the older person could have done if they had capacity for the matter when the power is exercised.

In the UK, deputies are also entitled to be reimbursed for their expenses. Section 19(7) of the Mental Capacity Act 2005 provides that:

> The deputy is entitled –
>
> (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and
>
> (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.

In *Re HNL*,[825] (the then) Senior Judge Lush, in considering the issue of gratuitous care allowances to be paid to deputies or members of the adult's family, commented:

---

824 ibid.

825 [2015] EWCOP 77.

I believe that section 19(7) relates solely to the functions performed by the deputy as a deputy, rather than to the functions performed by him in any other capacity, such as a carer or case manager.

The court has broader powers under sections 16(5) and 18(1) of the Act, which enable it to set a level of remuneration for carer or case management services.

If a deputy were to remunerate himself without obtaining a court order authorising him to do so, there would be a conflict with his fiduciary duty, which is described in paragraph 8.58 of the Mental Capacity Act Code of Practice in the following terms:

> "A fiduciary duty means deputies must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. … Deputies must not allow anything else to influence their duties. They cannot use their position for any personal benefit, whether or not it is at the person's expense."

Because of this conflict of interests, a deputy should always apply to the court for authority to pay himself or herself a gratuitous care allowance. A lay or non-professional deputy should also apply to the court for approval if he or she intends to pay a gratuitous care allowance to any other member of the family.[826]

In light of the comments made by (the then) Senior Judge Lush in *Re HNL*, the Mental Capacity Act 2005 seems to have broader powers than the Queensland guardianship laws

---

826 ibid [40]-[44].

in relation to remunerating deputies for their care work. If similar powers were adopted in Queensland, attorneys and administrators would be able to apply to court for authority to pay themselves a care allowance, or at least to be reimbursed for their care services.

In *Mega-Top Cargo Pty Ltd v Moneytech Services Pty Limited*,[827] the New South Wales Court of Appeal commented:

> … an agent ordinarily has rights of indemnity and reimbursement in respect of expenses incurred by it for its principal. However, those rights are subject to their being excluded by any express contractual terms governing the relationship between principal and agent. The position is stated in *Halsbury's Laws of England* (5th ed, 2008), vol 1, para 111 (citations omitted):
>
> > The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them.

Therefore, it appears that a caregiving adult child who is also an attorney could be reimbursed for monies *spent* on caring for their older parent, as an agent who has expended money for the benefit of their principal. Rather than being reimbursed for their time in providing care to their older parent. Presumably, the caregiving adult child would need to be able to prove with corroborative evidence that they paid for their older parent's care. If

---

827 [2015] NSWCA 402 [41] per Leeming JA, with whom Gleeson JA and Emmett AJA agreed.

they can do that, it is likely that they would be reimbursed by their parent, or by their parent's estate post-death.[828] However, this does not entitle them to be reimbursed for *their* care services. So, again, it is evident that the legislation, unjustifiably, precludes close relatives to be paid as carers.

7.5. TRUSTEES

A trustee (which includes a personal representative[829]) is also entitled to be reimbursed for expenses they properly incur in administering the trust or estate.[830] Section 72 of the Trusts Act 1973 (Qld) provides:

> A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

In England, the analogous provision to section 72 of the Queensland Act was section 30(2) of the Trustee Act 1925, however section 31 of the Trustee Act 2000 (UK) replaced it. Section 31 makes express provision for trustees to be reimbursed from the trust funds, or may pay out of the trust funds, 'expenses properly incurred [by the trustee] when acting on

---

828 See *Reilly v Reilly* [2017] NSWSC 1419 [121] per Lindsay J, citing *Re Clune; Ex parte Verge v Isabella Nominees Pty Ltd (in liq)* (1988) 14 ACLR 261, 266; *Mega-Top Cargo Pty Ltd v Moneytech Services Pty Limited* [2015] NSWCA 402 [41]-[48].

829 Trusts Act 1973 (Qld), s 5.

830 Trusts Act 1973 (Qld), s 72.

behalf of the trust'.[831] The section also applies to a trustee who is authorised to act as an agent of the trustees, or as a nominee or custodian.[832]

In *Hempseed v Ward & Anor*,[833] McMeekin J commented that, 'Ordinarily a trustee or executor is entitled as of right to be indemnified for expenses incurred before paying out the trust funds to anyone else'. In *Octavo Investments Pty Ltd v Knight*,[834] the High Court of Australia, citing *Vacuum Oil Co Pty Ltd v Wiltshire*,[835] commented:

> It is common ground that a trustee who in discharge of his trust enters into business transactions is personally liable for any debts that are incurred in the course of those transactions. However, he is entitled to be indemnified against those liabilities from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets.[836]

---

831 Trusts Act 2000 (UK), s 31(1).

832 Trusts Act 2000 (UK), s 31(2).

833 [2013] QSC 348, footnote 24, citing *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367; *J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691 [50]; *Nick Kritharas Holdings Pty Ltd (In Liq) v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 [9] - [11].

834 (1979) 144 CLR 360.

835 (1945) 72 CLR 319.

836 ibid 367 per Stephen, Mason, Aickin and Wilson JJ (citations omitted).

It is commented that this 'long-standing rule of equity' stems from the principle that, 'because a trustee carries on the trust for the benefit of the beneficiaries, the trustee should be 'saved harmless' from obligations that are attached inseparably to that office'.[837]

If the trust estate is insufficient so as to allow the trustee to be indemnified against the liabilities incurred, and if the beneficiary of the fund is an adult with full legal capacity, then the trustee's right to be indemnified extends further and imposes on the beneficiary a personal obligation enforceable in equity to indemnity the trustee. In *Hardoon v Belilios*,[838] Lord Lindley said:

> But where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property ; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trust themselves.

In *Ron Kingham Real Estate Pty Ltd v Edgar*,[839] the Queensland Court of Appeal commented:

> A trustee who properly incurs liability in acting as trustee is entitled to be indemnified out of the trust assets. In Queensland the right of indemnity is recognised in s. 72 of the Trusts Act 1973, which authorises a trustee to pay out of

---

837 QLRC [11.67], citing *Balsh v Hyham* (1728) 2 P Wms 453, 455; 24 ER 810, 810 (Lord King LC); *Re The Exhall Coal Co Ltd* (1866) 35 Beav 449, 453; 55 ER 970, 971–2 (Lord Romilly MR); *Hardoon v Belilios* [1901] AC 119, 125 (Lord Lindley).

838 [1901] AC 118, 124.

839 [1999] 2 Qd R 439, 441-442 per McPherson JA.

the trust property all expenses "reasonably incurred" in or about the execution of the trust, and which, by force of s. 65 of the Act, is an invariable provision of every trust instrument. See *Kemtron Industries Pty Ltd v. Commissioner of Stamp Duties* [1984] 1 Qd.R. 576, 585. In the present case, according to the admission in the defence, the entire trust assets have been paid away to the defendants as beneficiaries. Whether it is correct to say that, in consequence, there is no longer anything on which s. 72 is capable of operating would no doubt depend on whether the assets paid away are capable of being identified or traced in equity and so retain their character as "trust property" for the purpose of that section.

Except perhaps in a limited respect, however, it is not necessary to consider those questions here. The plaintiff does not found its claim on the right of a trustee to be indemnified out of the trust assets. Instead, it relies in this action on the alternative right which a trustee has to be indemnified by the beneficiaries personally for liabilities properly incurred in the trust. That right to personal indemnity from a beneficiary has been recognised in various authorities including, most prominently, the decision of the Privy Council in *Hardoon v. Belilios* [1901] A.C. 118, 125, where it was said the obligation of a beneficiary to indemnify the trustee rests on "the plainest principles of justice", which require "that the cestui que trust who gets all benefit of the property should bear its burden". See also *Trautwein v. Richardson* [1946] A.L.R. 129, 134–135; and *Marginson v. Ian Potter & Co.* (1976) 136 C.L.R. 161, 175–176, where Jacobs J. quoted with approval a passage from *Halsbury's Laws of England*, 3rd ed., vol. 38, at 943–944, describing the trustee as having the right to an indemnity "from a person sui juris who is beneficially entitled" to the trust property. The right of a trustee to indemnity from the beneficiary is capable of being expressly excluded; but the terms of the trust

> instrument are not in evidence, and there is nothing at all to suggest that the indemnity was excluded in the case of this Trust.

It is commented this right is based on the 'plainest principles of justice', that is:

> … that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself.[840]

7.5.1. REASONABLY VS PROPERLY INCURRED

As outlined above, section 72 of the Trusts Act 1973 (Qld) provides that expenses 'reasonably incurred' may be reimbursed to a trustee out of trust property whereas the Trustee Act 2000 (UK) allows expenses 'properly incurred' to be reimbursed.

In *Re Beddoe*,[841] 'properly incurred' was held to mean 'not improperly incurred', or 'reasonably as well as honestly incurred', which conformed with the 'settled practice in Chancery'. In *Ron Kingham Real Estate Pty Ltd v Edgar*,[842] McPherson JA, citing *Re Beddoe*, equated 'reasonably incurred' with expenses that are 'properly incurred'.[843]

---

840 *Hardoon v Belilios* [1901] AC 118, 123 per Lord Lindley. See also the Queensland Law Reform Commission, A Review of the *Trusts Act 1973* (Qld): Discussion Paper (December 2012) [11.70] <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/372028/WP70.pdf> accessed on 29 March 2020.

841 [1893] 1 Ch 547, 558 per Lindley J.

842 [1999] 2 Qd R 439, 441 - 442.

843 Queensland Law Reform Commission, 'A Review of the *Trusts Act 1973* (Qld): Discussion Paper' (December 2012) [11.72].

7.6. TRUSTEES: REMUNERATION AND COMMISSION

Historically, a professional trustee could not charge professional fees unless authorised under the trust instrument.[844] Furthermore, charging clauses for professional services under trust instruments were strictly construed, and there was a distinction between professional and non-professional work.[845] The Trusts Act 1973 (Qld) overcomes these restrictions by expressly providing that trustees can be remunerated for their services.[846] Section 101 provides:

> (1) The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person's services as the court may think fit.
>
> (2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for

---

844 Queensland Law Reform Commission, A Review of the *Trusts Act 1973* (Qld): Discussion Paper (December 2012) [12.140], citing *Re Sherwood* (1840) 3 Beav 338; 49 ER 133; *Re Gates* [1933] 1 Ch 913; *Re Hill* [1934] Ch 623; *Re Edmonds* [1943] VLR 97. The one exception to this rule is that, where a solicitor-trustee acts in legal proceedings on behalf of the solicitor-trustee and a co-trustee or on behalf of the solicitor-trustee and beneficiaries, the solicitor-trustee or the solicitor-trustee's firm will be allowed to receive the usual costs: *Cradock v Piper* (1850) 1 Mac & G 664; 41 ER 1422; *Re Corsellis* (1887) 34 Ch D 675; *Umphelby v Grey* (1899) 24 VLR 979 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/372028/WP70.pdf> accessed on 29 March 2020.

845 Queensland Law Reform Commission, A Review of the *Trusts Act 1973* (Qld): Discussion Paper (December 2012) [12.140], citing *Re Ames* (1883) 25 Ch D 72; *Clarkson v Robinson* [1900] 2 Ch 722; *Re Smith* (1916) 16 SR (NSW) 422 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/372028/WP70.pdf> accessed on 29 March 2020.

846 ibid [12.142].

whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person's firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court may take into account any charges that have been paid out of the trust property under this subsection.

(3) For the purpose of this section—

trustee includes a custodian trustee.

7.7. A PERSONAL REPRESENTATIVE

Further, a personal representative is entitled to be remunerated and has a right to commission, unless their conduct in the administration of the estate disentitles them to any remuneration[847]. It is commented that this right derives from different legislation from that relating to trustees.[848] Section 68 of the Succession Act 1981 (Qld) provides:

---

847 See *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 [18] per Le Miere J.

848 A A Preece, Lee's Manual of Queensland Succession Law (7th edn) Thomson Reuters [9.10], citing the Succession Act 1981 (Qld), s 68 and the Trusts Act 1973 (Qld), s 101. See also Ford & Lee, *Principles of the Law of Trusts* (Looseleaf, 3rd edn, Law Book Co 1995) [13100].

> The court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

It is important to note that, unless the Will contains a charging clause or there is a valid agreement between the executor and all of the beneficiaries, who are of full age and capacity, an executor is not *entitled* to commission. An order for commission depends upon the exercise of the court's jurisdiction.

Under rule 657C(1) of the Uniform Civil Procedure Rules 1999 (Qld), a trustee of an estate (which includes a personal representative[849]) seeking commission must file an affidavit setting out:

(a) the basis of the application; and

(b) the commission sought; and

(c) the trustee's justification for the commission; and

(d) an inventory of the estate; and

(e) material to identify the appropriate respondents to the application.[850]

---

849 Uniform Civil Procedure Rules 1999 (Qld), r 644.

850 Uniform Civil Procedure Rules 1999 (Qld), r 657C(2).

The court may also require that an estate account be filed.[851] In deciding an application for commission by a trustee/personal representative of an estate, the court may take into account:

(a) the value and composition of the estate; and

(b) the provisions of the will or trust instrument for the estate; and

(c) the conduct of all persons (including the parties) connected with the administration of the estate; and

(d) the nature, extent and value of work done by persons other than the trustee, including non-professional work delegated to a lawyer; and

(e) the result of any assessment of the estate account, including the scope and merit of any objections raised in a notice of objection before the estate account is passed; and

(f) the efficiency of the administration of the estate; and

(g) any other matter the court considers relevant.[852]

An application for commission can be complex and expensive, particularly if costs have to be assessed. Because of this, it is common for an agreement to be reached between the executor/administrator and the beneficiaries. Generally, this would require the executor to

[851] Uniform Civil Procedure Rules 1999 (Qld), r 657D.

[852] Uniform Civil Procedure Rules 1999 (Qld), r 657E.

provide particulars of the expenses and works undertaken. If all beneficiaries agree, and are all over the age of 18, they can provide their consent to the amount to be paid out of the estate to the executor/administrator.[853] If, however, an agreement cannot be reached, or all beneficiaries are not of full age, the executor/administrator will need to apply to the court, the costs of which will, generally, be paid out of the estate.

In *Walker & Ors v D'Alessandro,*[854] an agreement for commission between the executor, who was a solicitor, and the beneficiaries was set aside due to a lack of information being disclosed to the beneficiaries prior to the agreement being reached. In that case, T Forrest J outlined what he said was the 'bare minimum' an executor, who is a solicitor, should disclose in order for the beneficiaries' consent to be informed:

(a) The work that he has done to justify the commission. This should be done with particularity.

(b) If he is invoicing the estate for legal fees and disbursements he ought identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.

---

853 See *Re Sherwood* (1840) 3 Beav 338; 49 ER 133; *Re Moore* (1896) 17 LR (NSW) B & P 78.

854 [2010] VSC 15.

(c) That the beneficiaries are entitled to have this Court assess his commission pursuant to s 65[855] of the [*Administration and Probate Act* 1958]. This needs to be explained fully.

(d) That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought insist upon them receiving independent legal advice and ought not enter into any commission agreement they have.[856]

In *Walker & Ors v D'Alessandro*,[857] the Court found that the executor 'failed the beneficiaries as their fiduciary' in the following ways:

(a) At no stage did he provide any information as to how the 3% executor's commission was determined. In the letter of 12 March the bald assertion is made that the figure is considered a "fair claim";

(b) At no stage did Mr D'Alessandro offer any particulars as to how the $16,000- $17,000 estimate of legal costs was calculated. Without this

---

855 Note, the Victorian provision (s 65(1)) provides, 'It shall be lawful for the Court to allow out of the assets of any deceased person to his executor administrator or trustee for the time being such commission or percentage not exceeding Five per centum for his pains and trouble as is just and reasonable.'

856 *Walker & Ors v D'Alessandro* [2010] VSC 15 [30].

857 [2010] VSC 15.

information the beneficiaries cannot measure the appropriateness of the 3% commission;

(c) At no stage did he suggest (in the absence of providing the information above) that they ought obtain independent legal advice.[858]

In light of the above 'failures', it was held that the beneficiaries' consent was *not* informed consent, which equity requires.[859]

7.8. HOW MUCH REMUNERATION IS REASONABLE?

Historically, the rule in England was that an executor or trustee should not be entitled to remuneration for the performance of their duties on the basis that 'a trustee should not profit from his trust'.[860] Equity regarded trusteeship as an honorary position[861] and for that reason, it was considered that a trustee 'shall have no allowance for his care and trouble'.[862] Today, however, these principles have been displaced by statute in both England and Queensland, whereby trustees are entitled to remuneration, albeit in different situations.

---

858 ibid [32].

859 ibid.

860 *Re Lack* [1983] 2 Qd R 613, 614 per McPherson J, citing *Winter Irving v Winter* [1907] VLR. 546 at 554; *Re Murphy* [1928] St R Qd. 1, 5.

861 *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 [15] per Le Miere J.

862 Queensland Law Reform Commission, A Review of the *Trusts Act 1973* (Qld): Discussion Paper (December 2012) [12.131], citing *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/372028/WP70.pdf> accessed on 29 March 2020.

The Queensland Law Reform Commission has commented:

> Unlike the English Court of Chancery, which traditionally exercised this jurisdiction sparingly, the inherent jurisdiction of the Australian courts has developed so that "allowance of commission is the rule not the exception".[863]

In Queensland, a trustee, which includes a personal representative, is entitled to seek remuneration or commission for their services, whether or not they were left a legacy under the instrument creating the trust, which includes a Will.[864] Whereas, in England, under section 29(5) of the Trustee Act 2000 (UK), a trustee is 'not entitled to remuneration … if any provision about his entitlement to remuneration is made … by the trust instrument'. That is, if the trustee is entitled to remuneration under the trust instrument, they are precluded from additional remuneration out of the trust funds for any services they provide under section 29(1).

In *Re Lack*,[865] the Supreme Court of Queensland held that there is no presumption in Queensland that a legacy given to a person named as executor is, if accepted, *prima facie*

---

863 ibid [12.134], citing RS Geddes, CJ Rowland and P Studdert, Wills, Probate and Administration Law in New South Wales (LBC Information Services, 1996) [86.02]. See *Nissen v Grunden* (1912) 14 CLR 297, 304–5 (Griffith CJ), 314 (Isaacs J); *Re Whitehead* [1958] VR 143, 145 (Herring CJ, Dean J); *Re the Will of Stratton* [1981] WAR 58, 61 (Brinsden J); Re Lack [1983] 2 Qd R 613, 614 (McPherson J); *Zevering v Callaghan* [2011] QCA 180. See also Queensland Law Reform Commission, Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General, Report No 65 (2009) vol 3, [27.10]–[27.11]. See also *Kirkpatrick v Kavulak* [2005] QSC 282 at [13] per McMurdo J.

864 See *Re Lack* [1983] 2 Qd R 613, 617 per McPherson J.

865 [1983] 2 Qd R 613.

to be regarded as exhausting their right to apply for commission for the 'time and trouble' taken in performing their duties of trustee or executor of the Will. In determining what was the appropriate amount of commission to be awarded, the Court considered the time, per hour, that was expended by the executors in attending to their duties.

Re Lack appears to be the only case in which the court has assessed the commission on the number of hours spent by the executor in administering the estate. Although the court will take into account the hours spent by the executor administering the estate while assessing the quantum of commission,[866] the more accepted practice is that the court will allow commission on a percentage of the capital and income of the estate.[867]

For example, in *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors*,[868] where the executor had spent more than 170 hours on estate matters, Le Miere J commented:[869]

> It is not appropriate that the plaintiff's remuneration be assessed by applying an hourly rate to the number of hours that the plaintiff spent on the administration of the estate. However, I take into account that the plaintiff spent a substantial amount of time on the affairs of the estate.

---

866 See *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 [83] per Le Miere J.

867 *Spence v Spence* [2003] NSWSC 1232.

868 [2006] WASC 83.

869 ibid [83].

In *Spence v Spence*,[870] Windeyer J commented:[871]

> Mr Norton says in his affidavit that he has spent 160 hours on the affairs of the trust during the year in question. In these matters one takes such statements at their face value and accepts them, but it must be remembered that this is one trust and that amount of time is four weeks of work for a person who works 40 hours per week. That seems to me to be a vast amount of time to be spending on this trust when the trust fund in modern terms while significant is not particularly large.
>
> The practice of the court has nearly always been in estates with continuing accounts to allow commission on a percentage rate on income and on original corpus realizations; it has never been to allow lump sums on continuing accounts.

In *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors*, Le Miere J commented:[872]

> It may be that in times gone by there were more people with the leisure and resources to take on unremunerated trusteeships. However, in contemporary times the payment of executors' remuneration is conducive to the good administration of estates. An executor is more likely to be able to devote the time and resources to the proper administration of an estate if he or she is remunerated for doing so.

---

870 [2003] NSWSC 1232.

871 ibid [4]-[5].

872 [2006] WASC 83 [17].

7.9. ASSESSMENT OF AN EXECUTOR'S COMMISSION

In *Re Niclasen*,[873] Englefield J commented:

> In assessing commission, the responsibility of the role as executor needs to be sufficiently taken into account, as well as the performance and complexity of the various tasks required to complete the administration. For example, clearing out a home may take hours of physical work, including appointing, supervising and paying cleaners, removalists and the like, but it can also involve a multitude of decisions about how to deal with each item contained in the home. Any of these decisions may later be challenged. This consideration can be particularly acute if family members are at odds with one another.

In *In the estate of Stone (deceased); Patterson v Halliday*,[874] Smith J outlined some factors that the court may consider in assessing the quantum of commission:

(a) the work and judgment involved in the realisation of assets and earning income,

(b) the extent of administrative activities,

(c) the responsibility generally,

(d) the amount of work done not reflected in financial terms,

---

873 [2018] VSC 287 [18].

874 [2003] VSC 298.

(e) how long the estate was administered,

(f) the size of the estate and its capacity to pay,

(g) the work of a non-professional character not undertaken by the applicant and performed by professionals, and

(h) executors' pains and troubles relative to the result.[875]

Most recently, the Queensland Supreme Court commented:

> Whilst there is no statutory guidance as to what a reasonable executor's commission ought to be, the purpose of the commission is to remunerate the executor for the "pains and troubles incurred". Commission is often allowed as a percentage of the capital income of the estate. In *Re Estate of Ghidella*, Jones J reviewed the authorities and allowed commission at the rate of 1.5% upon income and 2% upon capital.[876]

It has been commented, 'if any rule of thumb can be distilled from the cases in the practice of the court, it is perhaps that commission on capital of 2.5% and 5% on income is appropriate in many cases'.[877]

---

875 ibid [27]. These factors were cited with approval in *Re Niclasen* [2018] VSC 287 [19] per Englefield J.

876 *Jones v Jones* [2020] QSC 6 [77] per Crow J (citations omitted).

877 Dr John de Groot, *Wills, Probate & Administration Practice (Queensland)* (Release 19 [603.1].

Although the Queensland provision does not state the particular words 'pains and trouble', the quantum of an executor's commission must reflect 'the value of those services, or otherwise the pains and trouble to which he or she has been subject as a result of the office'.[878] In *In the estate of Stone (deceased); Patterson v Halliday*, Smith J commented:[879]

> In Vance, "Executor's Commission", citing *re Allan McLean deceased*, the learned author states that:
>
> > the expressions 'pains' and 'trouble' have been defined in the New Zealand case of re Allan McLean deceased, 'pains' – as responsibility, anxiety and worry, and 'trouble' – as covering the work done.

In *In re McLean*,[880] Denniston J commented:

> The Act gives, as is to be expected, no hard-and-fast method of gauging the amount or value of such pains and trouble.[881]
>
> …
>
> [The Court] can—and, I think, should—in assessing the extent and value of the 'pains and trouble' of the administration, deal with each case on the merits. I take

878 G E Dal Pont, K F Mackie, *Law of Succession* (2013) LexisNexis Butterworths [13.48].

879 [2003] VSC 298 [30] (footnotes omitted).

880 (1911) 31 NZLR 139.

881 ibid 143.

> the "trouble" to be intended to cover the work done, and the "pains" to apply to the responsibility and consequent anxiety and worry undertaken and undergone.[882]

In many circumstances, the Will will include a charging clause, which entitles the executor, who is a professional person, such as a solicitor or an accountant, to charge for their services. In the absence of a charging clause, an executor can only receive remuneration for the exercise of their professional skills indirectly through the allowance of commission.[883]

Under the Trusts Act 1973 (Qld), the executor's commission is deemed to be a testamentary expense. Section 114 provides:

> The fees, commission, remuneration, and other charges payable to a personal representative in respect of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

7.9.1. PROSPECTIVE COMMISSION

The power of the court to grant an executor commission is not limited to work already done. The court has the power to grant an executor commission for past and future work.

---

882 ibid 144.

883 *Chick & Anor v Grosfeld (No. 3)* [2012] NSWSC 1536 [8] per White J, citing *In Re Craig* (1952) 52 SR (NSW) 265 at 267-268; *Broughton v Broughton* (1854) 5 De G, M and G 160 at 164; 43 ER 831; *In Re Doody; Fisher v Doody* [1893] 1 Ch 129 at 134-135; *In Re Gates; Arnold v Gates* [1933] Ch 913 at 918; *In the Estate of Instone* at BC9303622 at 30-35.

The fact that orders have been made for prospective commission[884] demonstrates that it is possible for the court to determine, and award commission, for work that will be required to be done in the future. Therefore, the same approach could be adopted when determining the quantum of appropriate remedies under Family Agreements.

7.10. DISENTITLEMENT TO COMMISSION

A trustee(s) will not be entitled to commission unless their conduct is 'free of suspicion and there has been no neglect on their part which has in any way prejudiced the estate'.[885] In *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors*, Le Miere J commented:[886]

> The court may refuse commission on a number of grounds where there has been some misconduct in the execution of the executor's duties. If the misconduct is serious or amounts to fraud, commission will probably be refused. If the misconduct amounts to an honest or inadvertent breach of duty, commission may still be allowed. Commission may be reduced or, in serious cases, refused where there has been negligence in the carrying out of the executor's duties.

---

884 Dr John de Groot, *Wills, Probate & Administration Practice (Queensland)* (Release 19 [13.52], citing *Re Moore (deceased)* [1956] VLR 132; *Re Gambling (deceased)* [1966] SASR 134; *Re Duke of Norfolk Settlements Trusts* [1982] 1 Ch 61; *Re White* (2003) 7 VR 219; [2003] VSC 433.

885 *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 [20] per Le Miere J.

886 [2006] WASC 83 [19] (citations omitted).

In *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors*, the third defendant, relying upon *In the Will of Sherringham*[887] and *In the Will of Greer*,[888] argued that, '… a trustee should be refused commission where he has committed breaches of trust and it cannot be said that his conduct is "above board and not in any way reprehensible"'.[889]

In the case of *In the Will of Sherringham*,[890] one of the assets of the estate was a property known as 'Norwich Farm', which was mortgaged. Norwich Farm was being sold by the bank at a public auction as the mortgage was in default. At the auction, one of the trustees purchased the property at a reduced price and in the name of his son. A beneficiary of the estate threatened proceedings to set aside the transaction as a breach of trust. It was subsequently arranged between the trustees and the beneficiaries that Norwich Farm should be resold at an enhanced price. Walker J held that not only had the trustee acted in breach of trust, but he also admitted that he had purchased the property at an under value. In holding that commission should be refused, his Honour stated:[891]

> Under these circumstances the trustees are not in a position to say that they had done their duty and done it well. It is highly important that the trustees should show that their conduct is absolutely above-board and not in any way reprehensible.

---

887 (1901) 1 SR (NSW) (B&P) 48.

888 (1911) 11 SR (NSW) 21.

889 [2006] WASC 83 [20].

890 (1901) 1 SR (NSW) (B&P) 48.

891 ibid, 49 cited with approval in *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors* [2006] WASC 83 at [21] per Le Miere J.

Another case that involved an executor purchasing estate property is *In the Will of Greer*.[892] In that case, the executors subdivided farming land into four blocks and sold them at auction. One of the executors purchased two of the lots sold. In depriving the executors of commission, Street J held that the executors had deliberately chosen to disregard their duty.[893]

In *Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors*, the deceased's three children, and residuary beneficiaries, commenced an action against the executor and trustee, Dr Robert Charles Godfrey, who was a retired solicitor and an old friend of the deceased. In that case, the Will contained a charging clause, which provided that Dr Godfrey could be paid all the usual professional fees for his work. The beneficiaries alleged that the executor (i) paid himself excessive legal fees, (ii) engaged, and paid, his son for legal advice, (iii) delayed in finalising the estate, and (iv) used estate funds to fund the action for which he sought commission. Despite these numerous allegations, the Court found that the executor had not committed a breach of trust or duty that disentitled him to claim commission. However, the court did reduce the commission that would otherwise have been awarded to him for his failure (i) to exercise the scrutiny over the legal fees, and (ii) to ensure that the estate was finalised earlier.[894]

7.11. QUANTUM UNDER FAMILY AGREEMENTS

In circumstances where an executor is entitled to claim costs for their 'pain and suffering' of administering an estate post-death, it seems only reasonable that similar provisions, and

---

892 (1911) 11 SR (NSW) 21.

893 ibid 23.

894 [2006] WASC 83 [77] per Le Miere J.

entitlements, apply to adult children who provided care for their parent(s) during their lifetime. If the caregiving adult child keeps accurate records, similar to those duties imposed on trustees, there is arguably no reason to preclude these expenses being justified for the care services provided, similar to the executorial or trustee duties outlined above, which the adult could be reimbursed for either during their parent's lifetime or after their parent's death. This is what the plaintiff argued in *Etchison v ANZ Executors and Trustee Company Ltd*.[895]

In *Etchison v ANZ Executors and Trustee Company Ltd*, the plaintiff, Mrs Barbara Etchison (**Barbara**) was a close friend and carer of the deceased, Mrs Helen Rimmer (the **deceased**), who died on 12 July 2003 leaving an estate worth about $1.5Million. Barbara had been 'close friends' with the deceased since about 1965 however in the years leading up to 2001, she was not amongst her closest friends. Both Barbara and the deceased were widows with no children. Barbara was a qualified nurse with a successful nursing career until she was injured in a serious car accident in 1981. Following her accident, although she worked as a consultant to various hospitals, Barbara did not resume her nursing career although she did maintain her nursing registration.

The deceased's 'closest friend', who was a woman called Mrs Holland, was appointed by the deceased as her attorney. In about August 2000, after suffering an injury for which she was hospitalised, the deceased was admitted into a nursing home. Around that time, Barbara contacted the deceased and subsequently went to visit her at the nursing home in December 2000.

---

[895] [2005] QSC 363.

At this time, the deceased 'was in a poor state: she was physically frail and on heavy medication'. Barbara visited the deceased at the nursing home regularly. Barbara's evidence, which was accepted by the court, was that the deceased was 'unhappy' in the nursing home and wanted to move. At this time, it was agreement between Barbara and the deceased that she would move in with Barbara until she was well enough to return to her own home. Barbara subsequently arranged for the deceased to revoke the power of attorney that was granted to Mrs Holland. In January 2001, the deceased revoked the power of attorney appointing Mrs Holland and executed a new one appointing Mr Graham Isles, the deceased's (then) solicitor, Barbara and another close friend of the deceased, Beverley Hermann. The deceased also made a new Will. Around that time, there was conflicting evidence regarding the deceased's legal capacity, but it was ultimately accepted she did have the requisite capacity to execute those documents. The unchallenged evidence at trial was that, although the deceased had told Barbara she would be given something under her Will, Barbara, at all times, did not know the contents of the deceased's Will.

On 25 January 2001, the deceased moved in with Barbara. At this time, Barbara was 65 and the deceased was 77. In February that year, the deceased moved into the granny flat situated behind Barbara's house and began to pay her $300 per week in rent. Barbara said that she cared for the deceased on a 'full time basis', however there was evidence of agency carers who attended upon, and assisted, the deceased. McMurdo J commented:[896]

> Mrs Etchison says that she was attending to Mrs Rimmer on a full time basis, from early morning until late at night, on nearly every day. Consistently with that, she says that any reasonable allowance for her work should be calculated on the basis

[896] ibid [27]-[30].

that she was working at least a ten hour day. I am satisfied that she provided very valuable assistance by overseeing and co-ordinating the work done by the various assistants, by helping Mrs Rimmer in the administration of medication and often physically helping Mrs Rimmer to move about and to do things such as bathe and dress. She also provided constant companionship for Mrs Rimmer. What all of that amounted to as an average per day cannot be assessed with any precision. But for several reasons I am not persuaded it was something approximating ten hours per day over the whole time that Mrs Rimmer was at Rosalie. First, the very considerable assistance which Mrs Etchison provided did not keep her at home. She continued to carry on her cleaning agency business and actively manage her rental properties in Toowoomba, including organising significant improvements to them. From August through October 2002, she was employed two days a week at the Greenslopes Hospital, resuming her nursing career. She says that she had to give up that work, and to reject an offer of full time employment, because when at work she was being repeatedly telephoned by Mrs Rimmer. Whether she stopped this work for this or other reasons is discussed below. But Mrs Etchison must have believed that she could leave Mrs Rimmer in the care of others whilst she went to work at the hospital. The extensive diary entries for much of 2002 indicate that the various assistants then employed by Mrs Rimmer were reporting upon Mrs Rimmer's day in terms which suggest that Mrs Etchison had not been home. And the diaries indicate that on a routine basis, the assistants were administering at least much of the medication, although under Mrs Etchison's supervision at the end of the day in question. At least once there was in place the system whereby the assistants were living and working at Rosalie, Mrs Etchison's workload must have lessened. I accept that until that system was in place, Mrs Etchison was working

full time in the care of Mrs Rimmer and that, for that relatively short period, she was precluded from doing much else and, in particular, things outside her own home. I find that it was the need to be relieved of that burden which led to the employment of these assistants. Just when that system was put in place does not precisely appear from the evidence. It was not in place before Mrs Rimmer became a tenant of the flat, which was on or shortly after 16 February 2001. But it was in place by mid 2001, because some records kept by Ms Knight, a book-keeper employed by Mrs Rimmer, date from June 2001 and show expenditure for the assistants by then.

In her evidence, Mrs Etchison was at pains to avoid describing these assistants as "carers". This was consistent with her maintaining that none of these people was involved in administering any medication or providing anything other than a cooking and housekeeping service. The particular contribution of an assistant probably varied from person to person, but as I have said, in many cases the role went beyond that which Mrs Etchison would now concede. In the one tax return of Mrs Rimmer which is in evidence, she claimed that in the year to June 2002, she spent $17,243 upon the deductible item of "home care", an amount which substantially corresponds with the book-keeper's record as paid to "carers". The records show the amount for carers as progressively increasing through that financial year. The total expenditure for July, August and September was $2,810 whereas the expenditure for the following April, May and June was $5,450. Yet the extent to which Mrs Rimmer needed cooking and housekeeping could not have changed much. What the records indicate is that more personal assistance was being provided by the live-in carers, thereby lightening the load upon Mrs Etchison.

> I accept that in the last few months of her life, Mrs Rimmer required and received relatively more care from Mrs Etchison. In broad terms, Mrs Etchison's care was a full time task for the first and last few months of this two and a half year period. Otherwise I accept that Mrs Etchison provided daily and valuable care, but not on anything like a full time basis as she claims, and probably amounting to something no more than an average of two hours per day.
>
> Mrs Etchison kept no record of the time she was spending in looking after Mrs Rimmer. Ultimately, no precise assessment can be made. But I am not persuaded that, averaged over the two and a half years, Mrs Etchison's assistance, valuable though it was, involved more than four hours a day (allowing ten hours a day for six months and two per day for 24 months).

In seeking an order for the payment of $258,883.42 by way of compensation against the executors of the deceased's estate, being $25 per hour for 10 hours per day, 7 days per week for two and half years, Barbara argued that she acted to her detriment in reliance of promises made to her by the deceased that she would be paid 'the going rate' by her estate after her death if she cared for her until she was well enough to return to her own home.[897] The deceased also told Barbara that she would 'have a gift from the estate as well'.[898] The deceased was clear that Barbara was to be paid for her care services over and above the gift left to her under the Will. As to what was meant by 'the going rate', Barbara argued that she thought this meant the 'going rate of a registered nurse for nursing somebody in their

---

[897] ibid [38].

[898] ibid.

own home'.[899] One of the reasons for why the deceased had not paid Barbara on the spot for her care was that she was advised by the solicitor, Mr Isles, that pursuant to section 59 of the Powers of Attorney Act 1998 (Qld), outlined above, that the enduring power of attorney would be revoked if she became a paid carer. So, to get around this, it was agreed between the parties that she would be paid *after* the deceased's death.[900]

After carefully considering the elements of equitable estoppel, the court ultimately held that it was not unconscionable for the executor to not fulfil Barbara's expectation of being paid for her care services from the deceased's estate.[901] This was on the basis that Barbara had not demonstrated any financial detriment from her caring for the deceased, particularly in light of the substantial gift she was left under the Will of approximately $350,000. Despite Barbara's submission that the size of her bequest under the Will is not 'a relevant circumstance',[902] McMurdo J commented that Barbara '… was rewarded by the operation of the will. The relatively large provision made in her favour was surely due to Mrs Rimmer's gratitude for her efforts.'[903] Further, McMurdo J commented:[904]

> In my view a consideration of what is or is not unconscionable must have regard for the benefits she has already received from Mrs Rimmer's estate as a reward for her efforts. The extent of the provision made in her favour under this will deprives this case of that aspect of unconscionability which is ultimately the justification for

899 ibid [37].

900 ibid [40].

901 ibid [64].

902 ibid [58].

903 ibid [60].

904 ibid [62].

> equitable intervention. Equity intervenes not because Mrs Rimmer may have intended that she receive some further payment or because Mrs Rimmer made statements to that effect.

Although Barbara was not paid for her care services outside the gift under the deceased's Will, in light of *Etchison v ANZ Executors and Trustee Company Ltd*, it is arguable that if a caregiving adult child does not receive a substantial bequest under their parent's Will, then they may be entitled to 'put in an account' to their parent's estate for the 'going rate' for their care services. It also provides an interesting solution to get around section 59 of the Powers of Attorney Act 1998 (Qld), which is the automatic revocation of an enduring power of attorney when an attorney becomes a paid carer.

7.12. FIDUCIARIES VS CARERS: WAY FORWARD?

In light of the above, it is evident that the current law allows, and in some instances entitles, some fiduciaries to be paid for their services, both pre and post the death of the older person, but not others. For example, the law does not afford the same right to adult children who are an attorney whilst also providing care to their older parent(s). This inequality under the law is unjustified. As outlined above, there is a strong argument that the cost of providing care for an older parent is an expense that is reasonably incurred by the adult child while acting as a fiduciary and therefore such expenses ought to be reimbursed. Why can an executor be reimbursed or remunerated for their 'pain and suffering' in administering their parent's estate, but they cannot be reimbursed for administering their parent's medication? Why do trustees have the right to be indemnified out of trust funds when they incur expenses on behalf of the trust, yet caregiving adult children do not have the same right to be reimbursed for their care costs out of estate funds after their parent's death? If the

Queensland legislative regime was broadened so as to enable attorneys to be remunerated for their care, there would presumably be no need for Family Agreements. Instead, the caregiving adult child could seek to be reimbursed and/or remunerated for their care work either prospectively or retrospectively under the current regime, which is arguably a simpler and more cost effective way for adult children to be compensated for their care whilst avoiding the confusing amalgam of legal issues that arise at common law.

Another avenue that is perhaps available under the current law, which is discussed in more detail below,[905] is to utilise the family provision legislation to compensate the caregiving adult child post the older parent's death. Although resolving the provision of care ex post facto, post-death carries 'many benefits',[906] under the current law the adult child applicant would need to satisfy what is known as the 'jurisdictional requirement' under the first stage of the two-stage test in *Singer v Berghouse*[907] before any award could be made.

In the High Court of Australia decision of *Singer v Berghouse*,[908] Mason CJ, Deane and McHugh JJ commented that the Succession Act 1981 (Qld) requires the court to carry out a two-stage process to determine whether an order for provision should be made:

> The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and

---

905 See text to (n 1287) and subsequent discussion, commencing at page 315 below.

906 Jonathan Herring, 'Will-substitutes and the claims of family members and carers' 298 in Braun, A. and Rothel, A. (ed.) *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart, Oxford 2016).

907 (1994) 181 CLR 201.

908 ibid 208 - 210.

> advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant…
>
> The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.
>
> The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant.

At the first stage of the test, it is necessary to ask whether the older parent made adequate provision for the adult child's proper maintenance and support, which must be answered at the time of the deceased's death.[909] If the answer to that question is yes, then no award will be made. However, if the deceased did fail to make adequate provision for their adult child, then the court goes on to consider the second stage of the test. At the second stage, it is

---

[909] *Coates v National Trustees Executors and Agency Co Ltd* (1956) 85 CLR 494, 507.

necessary to consider what, if any, provision should be made for the adult child's proper maintenance and support. That question is to be answered as at the date the court comes to make an order.

It must also be remembered that the court does not have jurisdiction to re-write the deceased's Will and will, therefore, not intervene 'just because it would have been 'nice or good' of a testator to give a benefit'.[910] The court must also remember that:

> … it is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must of course be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with a testator's dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator's bounty and give it to someone else.[911]

The court may, however, 'interfere with the dispositions in a will or under the rules of intestacy only to the extent necessary to make adequate provision for the claimant's proper maintenance, education and advancement in life.'[912] As Dixon CJ said in *Pontifical Society for the Propagation of the Faith v Scales*:

---

910 *Warriner v McManus* [2015] VSC 314 [57].

911 *Grey v Harrison* [1997] 2 VR 359, 366. See also *Golosky v Golosky* [1993] NSWCA 111.

912 *Re Fulop* (1987) 8 NSWLR 679, 680; *Alexander v Jansson* [2010] NSWCA 176 [20].

> All authorities agree that it was never meant that the court should re-write the will of a testator. Nor was it ever intended that freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a *prima facie* effect, the real dispositive power being vested in the court. An observer of the course of development in the administration in Australia of such statutory provisions might be tempted to think that, unchecked, that is likely to become the practical result.[913]

In determining whether a deceased person has made adequate and proper provision, the court will consider what provision a wise and just person in the position of the deceased would have made in the circumstances.[914] In *McCosker v McCosker*,[915] Dixon CJ and Williams J commented that 'proper':

> … means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance

---

913 (1962) 107 CLR 9, 19.

914 *Re Allen, Allen v Manchester* [1922] NZLR 218, 220 - 221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 479.

915 (1957) 97 CLR 566, 571 - 572.

> education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent.

Although the court's role is to not interfere with the dispositions in the Will, it is also not the court's role to keep 'a tight rein' on the family provision application jurisdiction,[916] nor approach it 'with great caution because of its intrusion on testamentary freedom'.[917] Instead, the role of the court is to give the statute its '… full operation according to its terms, notwithstanding that it encroaches on testamentary freedom'.[918]

Unlike the family provision legislation, the trustee and attorney legislation, outlined above, that enables and, in some circumstances, entitles, fiduciaries to be paid for their services both pre and post the death of the older person does **not** require the fiduciary to satisfy any jurisdictional test. Further, the fiduciary's financial position is not at all relevant to whether or not they are eligible to be reimbursed and/or remunerated for their services.

Why is it that an adult child executor can be reimbursed for the 'pain and suffering' in administering their parent's estate, which is often resolved quickly and without reducing their working hours, when another adult child cannot be reimbursed or remunerated for the 'pain and suffering' in providing long-term care? This unequal treatment of certain fiduciaries is unjustified as, on one hand, adult children who are acting as trustees can financially benefit from their fiduciary position, whereas, on the other hand, caregiving

---

916 *Steinmetz v Shannon* [2019] NSWCA 114 [96].

917 ibid [97].

918 ibid.

adult children who may not be able to satisfy the ‘jurisdictional question’ under family provision laws cannot.

8. POST-DEATH FAMILY FEUDS

Due to the strongly held belief that parents should treat their children equally,[919] the *inter vivos* transfers made under Family Agreements will undoubtedly give rise to '… feelings of disappointment or worse …'[920] on the part of the siblings of the caregiving adult child who did not equally benefit. This will likely result in the aggrieved sibling(s) commencing proceedings against the caregiving adult child after the death of their older parent (i) seeking to set aside the *inter vivos* transfer(s) made under the Family Agreement, and/or (ii) commencing a family provision application against their parent's estate claiming further provision. This chapter explores some of the feuds that might arise following the death of an older parent in circumstances where one sibling has received a benefit (or benefits) for the care they provided to their parent during their lifetime and the equitable actions often used to set aside *inter vivos* transactions post-death, namely resulting trusts, unconscionable dealings, undue influence and breach of fiduciary duty.

As explained above, given the majority of Family Agreements (i) are being made informally and on an oral basis, and (ii) are, therefore, rarely enforceable as contracts, it is likely that the transfer(s) made under the Family Agreements will be presumed to be a gift with no obligations attached. In recognition of this presumption, this chapter identifies the transfer(s) made under Family Agreements as *inter vivos* transfers and/or *inter vivos* gifts.

---

919 Misa Izuhara, 'Residential Property, Cultural Practices and the 'Generational Contract' in England and Japan' (2005) 29(2) International Journal of Urban and Regional Research 327, 329.

920 *Gill v Woodall and others* [2010] EWCA Civ 1430 [17] per Lord Neuberger of Abbotsbury MR.

8.1. EQUITABLE ACTIONS

8.1.1. RESULTING TRUST

Stripped to its bare essentials, the legal issue in relation to Family Agreements is whether the older parent *gave* the money or property to their adult child, in the sense of making a gift to them with no obligations attached.[921] The default legal presumption about the intention of a person who gratuitously transfers property to another is that they do not intend the transferee to take the property beneficially.[922] Therefore, the transferee holds the property on resulting trust for the transferor.[923] However, there is a counter-presumption of advancement, which applies to transfers of property where it may be inferred that the transferee would have intended to make a gift to the transferor.[924]

Traditionally, due to the rationale that mothers were not under an obligation to financially provide for their children,[925] it was held that the formal presumption of advancement only applied to transactions from father to child.[926] Nowadays, the

---

921 Victorian Government Submission, the Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law Submissions' <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

922 John McGhee, *Snell's Equity* (33rd edn Sweet & Maxwell 2015) [25-001].

923 ibid [25-003].

924 ibid.

925 ibid [25-009], citing *Bennett v Bennett* (1879) 10 Ch.D.474 (not following *Sayre v Hughes* (19868) L.R. 5 Eq. 376).

926 ibid, citing *Tribe v Tribe* [1996] Ch. 107.

presumption of advancement applies to transactions from both a mother and a father[927] to their adult child[928] as the presumption is no longer confined to cases where the parent has a duty to provide for their minor child.[929] The rationale behind the presumption has broadened to the point where the courts are now prepared to draw an inference that a transaction between family members is intended to be a gift when that accords with common social experience.[930] Therefore, in the context of Family Agreements, it would be readily inferred that the older parent (transferor) intended to make a gift to their adult child (transferee) in exchange for providing care to them for life. The result of which will be that there is no presumption of a resulting trust but rather, the formal presumption of advancement would *prima facie* apply to the *inter vivos* transfer of property from an older parent to their adult child,[931] with the result being that the equitable interest is at home with the legal title.[932] The presumption of advancement has been described as nothing more than, '… a situation to which the presumption of resulting trust does not apply.'[933] However, both the presumption of resulting trust and the presumption of advancement can be rebutted by evidence of the parties' actual intentions.[934] In cases of incapacity, it has previously been held that, where property is transferred while the owner is suffering from

---

927 ibid, citing *Edwards v Bradley* [1956] OR 225; *Brown v Brown* (1993) 31 NSWLR 582; *Nelson v Nelson* (1995) 184 CLR 538.

928 ibid, citing *Hepworth v Hepworth* (1870) LR 11 Eq. 10; *Nelson v Nelson* (1995) 184 CLR 538; *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695.

929 McGhee (n 922) [25-009].

930 ibid [25-007].

931 ibid [25-008].

932 *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242 [4] per Gibbs CJ.

933 Robert Chambers, *Resulting Trusts* (Oxford: Clarendon 1997) 31, citing *Martin v Martin* (1959) 110 CLR 297, 303 - 4; *Calverly* (n 932).

934 McGhee (n 922) [25-011].

'unsoundness of mind',[935] a resulting trust may apply where the provider lacked capacity.[936] Therefore, in the context of Family Agreements, if the older person is suffering from an incapacity, such as dementia, there will be no intention to benefit the adult child because the older parent is unaware of the transfer.[937]

However, in the circumstances of many Family Agreements, it is only natural that the older parent would wish to benefit their adult child, particularly as the gift was done in exchange of, and by way of compensation for, the care their adult child provided them. Moreover, as outlined above,[938] the fact that the older parent is likely to leave the title of the property in the name of their adult child[939] may perhaps demonstrate the intention of the older parent to benefit their adult child. Therefore, the likely inference to be drawn in relation to the transfer of property under a Family Agreement is that the older parent intended to benefit their adult child. This inference is supported by the *prima facie* presumption of advancement.

If the courts do not accept this argument, an equitable claim alleging unconscionable conduct may be commenced against the caregiving adult child in an

---

935 *Goodfellow v Robertson* (1871) 18 Gr. 572, 574 per Spragge C.

936 ibid 575 per Spragge C; *Lench v Lench* (1805) 10 Ves. 511.

937 Robert Chambers, *Resulting Trusts* (Oxford: Clarendon 1997) 23.

938 See text to (n 1110) at page 274 below.

939 Sue Field, 'Issues Facing Older Australians: Legal, Financial and Societal' (2005) 1 Journal of International Aging Law and Policy 95, 104.

attempt to set aside the *inter vivos* transfer to enlarge the estate for the benefit of the applicants under a family provision application.[940]

8.1.2. UNCONSCIONABLE DEALING

The equitable doctrine of unconscionable bargains may be invoked to set aside the *inter vivos* transfer in circumstances where the caregiving adult child unconscientiously takes advantage of their older parent(s) at a special disadvantage.[941] Although the equitable doctrines of undue influence and unconscionable dealings are closely related, Deane J in *Commercial Bank of Australia Ltd v Amadio*[942] commented that the two doctrines are, however, distinct:

> Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party … . Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.[943]

In order to establish unconscionable dealing, the plaintiff must show that the caregiving adult child has unconscientiously taken advantage of the older parents special

---

940 Barbara J Hamilton and Tina LC Cockburn, 'Equity in Australian estate litigation' (2014) 20(5) Trusts & Trustees 437, 439.

941 Tina Cockburn and Barbara Hamilton, 'Equitable remedies for elder financial abuse in inter vivos transactions' (2011) 31(2) The Queensland Lawyer 1, 8, citing *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

942 [1983] HCA 14; (1983) 151 CLR 447.

943 ibid 475 [13] per Deane J.

disadvantage.[944] The High Court of Australia in *Amadio*[945] made it clear that the adult child (receiver) must have knowledge of the disadvantage or disability under which the older parent (giver) labours for the transaction to be unconscionable emphasising that the result will be the same if the adult child is even '… aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person …'.[946] In circumstances where this is shown to exist, the onus lies on the stronger party to establish that the *inter vivos* transfer was '… fair, just and reasonable …'.[947] Accordingly, '… the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract …'.[948] Failing which, the *inter vivos* transaction will be set aside.[949] The types of disability or disadvantage affecting the older parent that may induce the court to set aside a gift was catalogued by Fullagar J in *Blomley v Ryan*:[950]

> The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy,

---

944 Cockburn and Hamilton (n 941) 1, citing *Amadio* (n 941).

945 *Amadio* (n 941).

946 ibid 467 [22].

947 ibid, 474 [12], referring to Lord Hatherley, *O'Rorke v Bolingbroke* (1877) 2 App Cas, 823; *Fry v Lane* (1888) 40 ChD 312, 322; *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362, 428 - 429.

948 ibid.

949 *Blomley v Ryan* (1956) 99 CLR 362; *Amadio* (n 941); *Johnson v Smith* [2010] NSWCA 306.

950 *Blomley* (n 949).

> or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.[951]

Moreover, Kitto J added ignorance and experience[952] and depending on the circumstances of the case, the emotional dependence or attachment of the older parent on the adult child is also likely to result in a relationship of special disadvantage.[953]

The disability or position of disadvantage that an older person under a Family Agreement would arguably labour is analogous to *Bridgewater*.[954] In that case, the deceased's wife and daughters commenced proceedings by way of a family provision application to set aside an *inter vivos* transfer by which the deceased, an elderly grazier, Bill York (**Bill**), transferred his rural property at an undervalue to his nephew, Neil York (**Neil**), with the practical effect of enlarging the estate available for the testator's wife and daughters, who brought a family provision application against a largely depleted estate.[955] The basis of the challenge to the transaction was alleged undue influence and unconscionable conduct on the part of the nephew, Neil. For completeness, and by way of background, Bill was a grazier who had lived all of his life in rural Queensland. Bill had one wife, four daughters and no sons. Bill's nephew Neil had worked on Bill's property

---

951 ibid 406 [9] per Fullagar J.

952 ibid 415 [8] per Kitto J.

953 *Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457; *Louth v Diprose* (1992) [1992] HCA 61; (1992) 175 CLR 621.

954 *Bridgewater* (n 953).

955 Cockburn and Hamilton (n 941).

for many years and Bill did not want his land to be broken up after his death '… but intended that they [the holdings] would pass, intact, to his nephew.'[956] In the first instance, de Jersey J of the Supreme Court of Queensland rejected the assertions of both undue influence and unconscionable conduct stating that, '… there is no doubt that Bill greatly admired Neil, and fully trusted him.'[957] Moreover, de Jersey J stated:

> In light of Bill's enormous affection for Neil, Neil's life-long dedication to those particular properties, and Bill's determination to keep Neil in the partnership, it is hardly surprising that Bill would wish to pass the properties to Neil – especially regarding him, as he did, as the 'son' he always wanted by never had.[958]

Bill's widow and daughters appealed to the Queensland Court of Appeal who refused to overturn this decision. On appeal to the High Court of Australia, a narrow majority of the High Court of Australia (Gaudron, Gummow and Kirby JJ) set aside the *inter vivos* transaction as an unconscionable bargain procured by the nephew on the basis that Bill's strong emotional dependence upon or attachment[959] to his nephew placed him in a position of disadvantage such that it was unconscionable for the nephew and his wife '… to retain the benefit of the improvident transaction.'[960] Accordingly, it was found that, due to Bill's

---

956 *Bridgewater* (n 953) [10].

957 ibid [5].

958 ibid [11].

959 ibid [115], citing *Louth v Diprose* (1992) [1992] HCA 61; (1992) 175 CLR 621, 626, 629 - 630, 637 - 638, 643.

960 ibid [125].

'… emotional attachment to and dependency upon Neil',[961] Bill was in a position of special disadvantage *vis-à-vis* Neil at the time he transferred the property. The nature of the relevant disadvantage in *Bridgewater*[962] was made clear in *Amadio*.[963] In *Amadio*,[964] after referring to Fullagar J in *Blomley*[965] Mason J commented:

> It is made plain enough … that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasise that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.[966]

If this argument is not accepted, an equitable claim alleging undue influence may be commenced post-death in an attempt to set aside the *inter vivos* transaction under a Family

---

961 ibid [122].

962 *Bridgewater* (n 953).

963 *Amadio* (n 941).

964 ibid.

965 *Blomley* (n 949).

966 *Amadio* (n 941) 462 [6] per Mason J.

Agreement, with the practical consequence of reversing the transfer and thus enlarging the estate for the benefit of the beneficiaries or an applicant of a family provision application.[967]

8.1.3. UNDUE INFLUENCE

The leading authority on the doctrine of undue influence is the decision of the House of Lords in *Royal Bank of Scotland plc v Etridge (No. 2)*[968] in which Lord Nicholls noted, 'Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused.'[969] A gift *inter vivos* is liable of being set aside on two recognised grounds of undue influence: actual undue influence and presumed relational undue influence.[970] In relation to actual undue influence, which must be proven as a matter of fact,[971] Dixon J in *Johnson*[972] stated:[973]

> The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction

---

967 Barbara J Hamilton and Tina LC Cockburn, 'Equity in Australian estate litigation' (2014) 20(5) Trusts & Trustees 437.

968 [2002] 2 AC 773 (HL).

969 ibid 794 [6] per Lord Nicholls.

970 Fiona Burns, 'Undue Influence Inter Vivos And The Elderly' (2002) 26(3) Melbourne University Law Review 499, citing *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 134 – 6 per Dixon J.

971 *Johnson* (n 970) 119 per Latham CJ and 134 per Dixon J.

972 *Johnson* (n 970).

973 ibid 134 per Dixon J.

was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act.

Given the burden of proof of actual undue influence is very difficult to discharge, the stronger argument is based on the presumption of undue influence on the basis that there was a special relationship of influence between the parties to a Family Agreement.[974] As Burns comments, 'Presumed relational undue influence does not require proof that improper influence was exercised.'[975] Instead, the claimant must show there was '… a relationship of trust and confidence …'[976] or a special antecedent relationship so as to reasonably presume that the transaction was the result of influence exercised within that special relationship.[977] According to the doctrine, if this special relationship of influence is established, the onus shifts to the adult child who procured the bargain to rebut the presumption of undue influence to prove that the bargain is '… fair, just and reasonable …'[978] and that the transaction was the independent and well-understood act of the older

---

974 Hamilton and Cockburn (n 967).

975 Fiona Burns, 'Undue Influence Inter Vivos And The Elderly' (2002) 26(3) Melbourne University Law Review 499, 505.

976 ibid, citing *Barclays Bank plc v O'Brien* [1993] UKHL 6; [1994] 1 AC 180, 189 per Lord Browne-Wilkinson.

977 ibid, citing *Johnson* (n 970) 134 – 5 per Dixon J; *Barclays Bank plc v O'Brien* [1993] UKHL 6; [1994] 1 AC 180, 189 – 90 per Lord Browne-Wilkinson; *Whereat v Duff* [1972] 2 NSWLR 147, 167 per Asprey J; Jill Martin, Hanbury and Martin: Modern Equity (15th ed, 1997) 829 – 30; Tony Duggan, 'Undue Influence' in Patrick Parkinson (ed), The Principles of Equity (1996) 379, [1101]; M Cope, Duress, Undue Influence and Unconscientious Bargains (1985), [140], [161].

978 *Amadio* (n 941) 474 [12], referring to Lord Hatherley, *O'Rorke v Bolingbroke* (1877) 2 App Cas, 823; *Fry v Lane* (1888) 40 ChD 312, 322 ; *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362, 428 - 429.

parent[979] entered into '… after full, free and informed thought …'.[980] In *Etridge*, Lord Nicholls provided a number of examples of relationships which the law has adopted a '… sternly protective attitude …'[981] and thus are presumed to be relationships of influence.[982] These are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, doctor and patient, spiritual advisor and follower, and fiancé and fiancée.[983] Although the relationship between parent and child is one which is well-accepted as giving rise to a presumption of undue influence, it arises only in the context that the parent is presumed to exercise influence over his or her child and thus no presumption in the opposite direction exists.[984] Consequently, in order to establish a presumption that an adult child has exercised influence over their older parent, it is necessary to prove '… that there was a "special relationship" of influence between the parties.'[985] A special relationship of influence is likely to arise in circumstances where there is reliance upon guidance and advice, awareness of the reliance by the dominant party, a benefit being received by the adviser and an element of confidentiality in the relationship.[986] It is observed that evidence of old age, physical or mental infirmity,

---

979 *Johnson* (n 970) 134 per Dixon J.

980 *Zamet v Hyman* [1961] 3 All WE 933 per Lord Evershed MR and Danckwerts LJ.

981 *Etridge* [2002] 2 AC 773 (HL) 797 per Lord Nicholls.

982 McGhee (n 922) [8-024].

983 ibid [8-024] – [8-028].

984 *Brown v The NSE Trustee & Guardian & Anor* [2011] NSWSC 1203 [46] per Brereton J.

985 *John Patrick Courtney v Maureen Anne Powell; Peter Michael Courtney v Maureen Anne Powell* [2012] NSWSC 460 [38] per Ball J.

986 *Johnson* (n 970); Cockburn and Hamilton (n 941) 1, citing *Lloyd's Bank Ltd v Bundy* [1975] 1 QB 326.

financial distress, illiteracy and ignorance of business affairs are also relevant in establishing a special relationship of influence.[987]

As outlined above,[988] a common derivative of Family Agreements is the granny flat scenario, which typically involves an adult child persuading their older parent(s) to sell their home and put the settlement proceeds towards a new home purchased in conjunction with their adult child.[989] Alternatively, the settlement proceeds are often used towards extending the adult child's existing home to incorporate a self-contained flat for either or both older parents to reside.[990] This living arrangement is often associated with a promise that the adult child will care for their older parent(s) for life,[991] thus resulting in the creation of a Family Agreement (albeit informal and/or oral).

The more recent case of *Courtney v Powell*[992] concerns a granny flat scenario. It involved an elderly father, John, who had two sons and one daughter, Maureen. John's wife died in February 2007, following which he became depressed and concerned about his own future and whether he would be able to remain living in his property. The evidence suggested that Maureen assured John that she and her husband Stephen would '… continue

---

987 Cockburn and Hamilton (n 941) 14, citing *Johnson* (n 970).

988 See discussion under heading 'Living Arrangements of Older People', chapter 2, section 2.4, commencing at page 12 above.

989 Field (n 939).

990 Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72.

991 Brian Herd, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23; Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

992 *Courtney* (n 985).

to care for him …'.[993] In early March 2007, John raised with Maureen the subject of transferring his property to her in exchange for care.[994] Maureen tried to dissuade her father from pursuing the gift of the house to her, and eventually suggested to him that he give her a half-interest in the house[995] and arranged for him to see a solicitor to effect the transaction.[996] During this meeting, at which Maureen was present, John was 'very adamant'[997] that the transfer be amended to give the whole property to Maureen. John's son, and co-executor of the estate, Peter sought to set aside the transfer on the grounds of undue influence and unconscionability.

Ball J refused to set aside the transfer as he was not satisfied that '… the deceased's ability to judge what was in his own best interests was seriously impaired.'[998] It was concluded that although John's dementia, which Maureen knew of, affected his memory and his ability to care for himself, it did not affect his ability to evaluate the transaction. Ball J continued:

> In evaluating the transaction, it was necessary for the deceased to make an assessment of Maureen and the genuineness of her desire to care for him. It was also necessary for the deceased to evaluate the risks of making the gift

---

993 ibid [22] - [23].

994 ibid [23] – [24].

995 ibid [24].

996 ibid [25].

997 ibid [27].

998 ibid [56] per Ball J.

against what was obviously a strong sense of gratitude he felt and his desire to express that gratitude.[999]

In the context of Family Agreements, and depending on the facts of the case, it is arguable that, due to the older persons age, illness, impaired faculties and/or emotional dependence on their adult child, a special relationship of influence will exist and therefore the presumption of undue influence will arise. In these circumstances, the onus shifts to the caregiving adult child to prove that the bargain is '… fair, just and reasonable …'[1000] and '… that the gift was the independent and well-understood act of a man [or woman] in a position to exercise a free judgment based on information as full as that of the donee.'[1001] Moreover, given the family home is likely to constitute the majority, if not the entire, asset of an older person,[1002] the *inter vivos* transfer(s) under a Family Agreement is likely to raise suspicion, particularly as 'Courts are naturally suspicious of transactions in which an elderly and frail person gives his or her principal asset to a family member.'[1003] However, following *Courtney v Powell*,[1004] there is also the argument that an older parent's dependence on their adult child for care does *not* affect their ability to exercise independent judgment.[1005]

---

[999] ibid.

[1000] *Amadio* (n 941) 474 [12], referring to Lord Hatherley, *O'Rorke v Bolingbroke* (1877) 2 App Cas, 823; *Fry v Lane* (1888) 40 ChD 312, 322 ; *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362, 428 - 429.

[1001] *Johnson* (n 970) 134 per Dixon J.

[1002] Field (n 939) 104.

[1003] *Courtney* (n 985) [56] per Ball J.

[1004] ibid.

[1005] ibid.

In either argument, whether or not the older parent received independent legal advice will be important in proving that the transaction was an independent and well-understood act of free will.[1006] As Latham CJ stated in *Johnson v Buttress*:

> It may not be necessary in all cases to show that the donor received competent independent advice … . But evidence that such advice has been given is one means, and the most obvious means, of helping to establish that the gift was the result of the free exercise of independent will; and the absence of such advice, even if not sufficient in itself to invalidate the transaction, would plainly be a most important factor in determining whether the gift was in fact the result of a free and genuine exercise of the will of the donor.[1007]

In Queensland, there is also a statutory presumption of undue influence[1008] that arises when the transaction is between the principal and attorney.[1009] The following section will consider the likely scenario in which this statutory presumption could arise under a Family Agreement, in circumstances where the transaction is between an older parent, as principal, and caregiving adult child, as attorney. First, however, it is necessary and important to discuss the relationship between an enduring power of attorney and a Family Agreement, particularly as a large cohort of older people entering into Family Agreements will likely suffer from incapacity at some point during the life of the agreement.

[1006] ibid [42].

[1007] *Johnson* (n 970) 119 – 20 per Latham CJ.

[1008] Powers of Attorney Act 1998 (Qld), s 87.

[1009] *Smith v Glegg* [2004] QSC 443.

8.2. ACTIONS AGAINST A CAREGIVING ATTORNEY

In circumstances where the caregiving adult child is an attorney under an enduring power of attorney, the aggrieved sibling could seek to have the impugned transfer(s) set aside under the much sounder and strategically easier ground of undue influence, pursuant to section 87 of the Powers of Attorney Act 1998 (Qld). The advantage of relying on this presumption is that the onus falls on the caregiving adult to uphold the validity of the transfer(s). To do so, the caregiving adult child would need to demonstrate that the older parent was not influenced by his or her relationship but instead did so in the exercise of his or her free and independent will.

Section 87 of the Powers of Attorney Act 1998 (Qld) provides:

> The fact that a transaction is between a principal and 1 or more of the following—
>
> (a) an attorney under an enduring power of attorney or advance health directive;
>
> (b) a relation, business associate or close friend of the attorney;
>
> gives rise to a presumption in the principal's favour that the principal was induced to enter the transaction by the attorney's undue influence.[1010]

[1010] Powers of Attorney Act 1998 (Qld), s 87.

The purpose of this provision is, as Philip McMurdo J said in the Queensland case *Smith v Glegg*,[1011] '… to apply to a transaction the equitable doctrine of undue influence and the availability of relevant equitable remedies.'[1012] His Honour continued:

> Absent s 87, a presumption of influence would not arise in the context of every transaction between a principal and an attorney, or between a principal and a relation, business associate or close friend of the attorney. Applying only the principles of equity, many of those transactions would not give rise to the presumption, because they would not fall within a recognised category of presumed influence or involve circumstances in which a relation of influence could be proved. The interpretation for which the plaintiff contends would undoubtedly impose the presumption in many cases where it would not otherwise arise. But that is the apparent purpose of s 87. Because of a perceived risk of undue influence in the context of principal and attorney, the evident intent is to provide strong protection against the risk of some misconduct by an attorney, by requiring the recipient in all cases to justify the transaction.[1013]

Smith[1014] provides a good example of how statutory and equitable remedies can intermingle to set aside *inter vivos* transfers.[1015] In 1999, Daphne Smith (**Daphne**) executed an enduring power of attorney to her daughter Marlene. Daphne was a widow who had three

---

[1011] *Smith* (n 1009).

[1012] ibid [38] per McMurdo J.

[1013] ibid [39] per McMurdo J.

[1014] *Smith* (n 1009).

[1015] Cockburn and Hamilton (n 941) 18.

daughters but, as a result of estrangement from her two daughters, had become entirely dependent upon Marlene for company, domestic and health care and financial assistance.[1016] In September 2000, Marlene and her husband Alan drove Daphne to the solicitors where she, who was at this stage legally blind, executed a transfer of her house in favour of Marlene's adult son for which no consideration was given for the transfer. In March 2011, Daphne had taken up permanent residence at a retirement home and in September 2001, twelve months after the initial transaction, Marlene, acting purportedly as her son's attorney, sold the house to an arms-length purchaser and applied the entire proceeds of the sale for her own benefit. Eventually, one of Daphne's estranged daughters located her, which led to reconciliation with her two other daughters. Daphne revoked the enduring power of attorney in favour of Marlene and sought compensation both in equity and under the Powers of Attorney Act 1998 (Qld).

Significantly, *Smith*[1017] demonstrates that, in circumstances where a caregiving adult child under a Family Agreement is also an attorney under an enduring power of attorney, section 87 of the Powers of Attorney Act 1998 (Qld) is simply engaged from the fact that the *inter vivos* transfer is one which is between an older parent (as principal) and an adult child (as attorney).[1018] As McMurdo J commented, 'There is no expressed limitation in s. 87 that the transaction must involve an exercise of the attorney's powers.'[1019] Therefore, section 87 of the Powers of Attorney Act 1998 (Qld) will be engaged when the transaction is between the principal and the attorney '… whether or not

---

[1016] *Smith* (n 1009) [41].

[1017] *Smith* (n 1009).

[1018] ibid.

[1019] ibid [40] per McMurdo J.

the transaction was effected by the exercise of the powers under the enduring power of attorney.'[1020] Therefore, in the context of Family Agreements whereby the adult child is also the attorney, the statutory presumption of undue influence will exist in favour of the older parent and thus it will be presumed that the older parent was induced to enter into the impugned transaction by the caregiving adult child's undue influence.

Therefore, in the context of Family Agreements, and due to the power relations and degrees of dependence and control inherently entailed in the Caring Relationship, the necessary relationship of influence is likely to be established. Adopting the approach taken by McMurdo J in *Smith*,[1021] it is likely that the older parent will be entirely dependent upon their adult child for domestic and health care, financial assistance and personal company.[1022] In the context of Family Agreements, the essential question in proving a relationship of influence is whether the adult child was in a position to influence the older parent into effecting the transaction of which the complaint is later made.[1023] Analogous to *Smith*,[1024] it is likely that, due to the very high level of dependence and trust in the Caring Relationship, the case for a presumption of influence under a Family Agreement is '… a compelling one …'.[1025]

In circumstances where the presumption of undue influence is found to exist, the onus will shift to the caregiving adult child to uphold the validity of the transfer, failing

---

[1020] ibid.

[1021] *Smith* (n 1009).

[1022] ibid [41].

[1023] McGhee (n 922) [8-031].

[1024] *Smith* (n 1009).

[1025] ibid [41] per McMurdo J.

which the *inter vivos* transfer will be set aside.[1026] In order for the caregiving adult child to rebut the presumption of undue influence, they must show (i) that the transaction '… cannot be ascribed to the inequality between them which must arise from [their] special position',[1027] and (ii) that '… the gift made was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee.'[1028] In *Hillston v Bar-Mordecai*,[1029] Bryson J doubted whether the presumption was irrebuttable[1030] noting that the onus is a heavy one:

> … the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent.[1031]

In assessing whether the transaction was an '… independent and well understood act …',[1032] entered into '… after full, free and informed thought …',[1033] the court will have

---

[1026] *Blomley* (n 949); *Amadio* (n 941); *Johnson v Smith* [2010] NSWCA 306.

[1027] *Johnson* (n 970) 135 per Dixon J.

[1028] ibid 134 per Dixon J.

[1029] [2003] NSWSC 89.

[1030] Brian Sloan, *Informal Carers and Private Law* (Hart Publishing, 2013) 226, citing ibid [48].

[1031] [2003] NSWSC 89 [34], citing *Watkins v Combes* [1922] HCA 3; (1922) 30 CLR 180, 194 where Isaacs J cited with approval the passage in a judgment of the Privy Council*, Poosathurdi v. Kanappa Chettiar* [1919] LR 47 IA 1.

[1032] *Johnson* (n 970) 134 per Dixon J.

[1033] *Zamet* (n 980).

regard to the size of the *inter vivos* gift compared to the older person's total assets[1034] and the adequacy of consideration provided.[1035] In the context of Family Agreements, it will therefore be difficult for the adult child to rebut the presumption of undue influence to which section 87 of the Powers of Attorney Act 1998 (Qld) gives rise. Due to the natural reluctance of older people to seek legal advice before, during and after the formation of Family Agreements,[1036] it is unlikely that the older parent received independent legal advice when entering into a Family Agreement. Given the family home is arguably the principal asset of an older person;[1037] a high degree of understanding will be required for the *inter vivos* gift to be valid.[1038] Therefore, the lack of independent legal advice may be 'fatal',[1039] particularly given the *inter vivos* transfer is likely to be such a substantial portion of the older person's estate. Furthermore, under a Family Agreement, it is likely that the older parent has given their adult child a substantial asset for no consideration save for that of '… natural love and affection …'.[1040]

In addition to a claim under the statutory presumption of undue influence, the caregiving adult child may be liable for a breach of fiduciary duty by obtaining a profit in conflict of their duty to protect their older parent's interests.[1041] A claim for breach of

---

[1034] *Bester v Perpetual Trustee Co Ltd* [1970] NSWLR.

[1035] *Johnson* (n 970).

[1036] Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68.

[1037] Field (n 939) 104.

[1038] *Re Beaney* [1978] 1 WLR 770, 774.

[1039] *Lloyd's Bank Ltd v Bundy* [1975] 1 QB 326339E.

[1040] *Johnson* (n 970); *Smith* (n 1009).

[1041] *Smith* (n 1009).

fiduciary duty, as Hamilton and Cockburn observe, does not generally face the same evidentiary hurdles as the other equitable actions usually commenced post-mortem.[1042]

In addition to an action commenced under section 87, the aggrieved beneficiary can seek compensation pursuant to section 106 of the Powers of Attorney Act 1998 (Qld), which is what occurred in *Smith*. If it can be proven that an adult child breached any of their obligations under the Powers of Attorney Act 1998 (Qld), the court can order them to repay their parent's estate for any loss caused by their failure to comply in the exercise of a power. Arguably the most commonly alleged breaches that would arise in relation to the Caring Relationship would be in relation to a (i) failure to act honestly and with reasonable diligence,[1043] (ii) conflict transaction,[1044] and/or (iii) failure to keep their property separate from the principal's.[1045] This is outlined in more detail in the next section.

8.2.1. BREACH OF FIDUCIARY DUTY

In circumstances where an adult child who is party to a Family Agreement is an appointed attorney under an enduring power of attorney for their older parent, as principal, [1046] there

---

[1042] Hamilton and Cockburn (n 967).

[1043] Powers of Attorney Act 1998 (Qld), s 66.

[1044] Powers of Attorney Act 1998 (Qld), s 73.

[1045] Powers of Attorney Act 1998 (Qld), s 86.

[1046] McGhee (n 922) [7-004], citing *De Bussche v Alt* (1878) 8 Ch.D. 286; *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch.D. 339; *Kelly v Cooper* [1993] A.C. 205; [1992] 3 W.L.R. 936; *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26 [33]; [2007] 3 N.Z.L.R. 169; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 [2]; [2014] 3 W.L.R. 535; J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, Australia 2015, Fifth Edition), ch 5 'The Fiduciary Relationship' 139.

is a strong, yet rebuttable, presumption that a fiduciary duty is owed.[1047] Because the categories of fiduciary relationships are not closed,[1048] and aside from the argument based on a breach of statutory fiduciary duty arising in relation to attorney and principal,[1049] the existence of a fiduciary relationship can be implied in the circumstances[1050] of the Caring Relationship, which underpins Family Agreements. Although the courts have deliberately preserved flexibility in the concept of fiduciary duty by declining to provide a uniform description of a fiduciary relationship,[1051] there is growing judicial support for the view that, 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of **trust and confidence**.'[1052]

[1047] McGhee (n 922) [7-004], citing *Lac Minerals Ltd v International Corona Resources Ltd* 1989) 61 D.L.R. (4th) 14, 28.

[1048] McGhee (n 922) [7-005], citing *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, 110; *Tate v Williamson* (1866–67) L.R. 2 Ch. App. 55 LC at 61; *Waxman v Waxman* (2004) 7 I.T.E.L.R. 162 [504] Ont CA; *South Australia v Peat Marwick Mitchell & Co* (1997) 24 A.C.S.R. 231, 264; *Schipp v Cameron* [1998] NSWSC 997 [695].

[1049] McGhee (n 922) [7-004]; J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis Butterworths, Australia 2015, Fifth Edition) [5-005].

[1050] McGhee (n 922) [7-005].

[1051] ibid, citing *Lloyds* (n 1039) 341; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41, 96 and 141; *Maclean v Arklow Investments Ltd* [1998] 3 N.Z.L.R. 680, 691; *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) [138].

[1052] ibid, citing *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18; *Arklow Investments Ltd v Maclean* [2000] 1 W.L.R. 594, 598-600; *Peskin v Anderson* [2000] EWCA Civ 326, [34]; *Hooper v Gorvin* [2001] W.T.L.R. 575, 590; *Kyrris v Oldham* [2003] EWCA Civ 1506 [142]; *Maclean v Arklow Investments Ltd* [1998] 3 N.Z.L.R. 680, 691 and 723; *Button v Phelps* [2006] EWHC 53 (Ch) [58]–[61]; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No.4)* [2007] FCA 963 [272]; *South Australia v Peat Marwick Mitchell & Co*

Other factors which are relevant in establishing the existence of a fiduciary relationship include, '… a relationship of ascendancy or influence by one party over another, and dependence or trust on the part of that other.'[1053] Relevantly, the court has already recognised that financial arrangements between an older parent and their adult child is a relationship of 'trust and confidence'.[1054] Moreover, the necessary relationship of 'trust and confidence' has been recognised between an adult child and their older parents.[1055] Therefore, it is arguable that, in the context of Family Agreements, a fiduciary duty is implied in the circumstances and an action for breach of fiduciary duty may be commenced alleging breach of the conflict and profit rules.[1056] The general principle relating to conflicts between duty and interest is that, 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not allowed to put himself in a position where his interest and his duty conflict.'[1057]

(1997) 24 A.C.S.R. 231, 265; *Schipp v Cameron* [1998] NSWSC 997 [697]; *Galambos v Perez* [2009] SCC 48; [2009] 3 S.C.R. 247; *Grimaldi v Chameleon Mining NL (No.2)* [2012] FCAFC 6 [177]; (2012) 200 F.C.R. 296; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 [5] (emphasis added).

[1053] J D Heydon et al (n 1049) [5-005], citing *Johnson* (n 970) 134 - 135; [1936] ALR 390, 397 - 198; *Breen v Williams* (1996) 186 CLR 71, 82, 107; 138 ALR 259, 265, 284 - 285.

[1054] Fiona R Burns, 'The elderly and undue influence inter vivos' (2003) 23 Legal Studies 251, 266, citing *Love and Love* (Unreported, 11 March, 1999), CA(Civ), 3.

[1055] *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 577.

[1056] *Chan v Zacharia* (1984) 154 CLR 178; *Breen* (n 1053).

[1057] McGhee (n 922 [7-018], citing *Bray v Ford* [1896] A.C. 44, 51; *Aberdeen Railway Co v Blaikie Brod* (1854) 1 Macq. 461, 471 (149 R.R. 32, 39); *Wright v Morgan* [1926] AC 788, 797.

In circumstances where a caregiving adult child under a Family Agreement is an attorney under an enduring power of attorney, they are likely to be in breach of their statutory duty contained in section 66 of the Powers of Attorney Act 1998 (Qld), being:

> (1) An attorney must exercise power honestly and with reasonable diligence to protect the principal's interests.
>
> Maximum penalty—200 penalty units.
>
> (2) In addition to any other liability the attorney may incur, the court may order the attorney to compensate the principal for a loss caused by the attorney's failure to comply with subsection (1).[1058]

As *Moylan v Rickard*[1059] illustrates, attorneys acting under an enduring power of attorney must exercise their statutory powers for the benefit of the principal.[1060] Further, Millett LJ in *Bristol & West Building Society v Mothew* commented:

> A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[1061]

[1058] Powers of Attorney Act 1998 (Qld), s 66.

[1059] [2010] QSC 327.

[1060] ibid.

[1061] [1998] Ch. 1,18 per Millett LJ.

In circumstances where the transaction arises from a breach of section 66 of the Powers of Attorney Act 1998 (Qld), the compensation provisions of that Act can provide effective relief.[1062] Similar to the difficulty of the plaintiff in *Smith*,[1063] the plaintiff's difficulty with section 66 of the Powers of Attorney Act 1998 (Qld) is that the potential matters complained of under a Family Agreement is unlikely to involve the exercise of the caregiving adult child's powers under the enduring power of attorney because the older parent transfers the property to the adult child. However, given an attorney must avoid conflicts between their responsibilities to the principal and their own personal interests, and must not use their position as attorney to acquire any benefit,[1064] it is likely that the adult child's acceptance of the transfer under a Family Agreement is a breach of the conflict and profit rules,[1065] and thus a breach of fiduciary duty.[1066] Accordingly, the caregiving adult child, (as attorney) will be required to compensate the older parent's (principal's) estate for the loss sustained through their breaches of the Powers of Attorney Act 1998 (Qld) as an equitable debt.[1067] Similar to the other equitable claims discussed above, this will have the practical consequence of enlarging the deceased's estate for the benefit of the applicant(s) to a family provision application.[1068]

[1062] Hamilton and Cockburn (n 967).

[1063] *Smith* (n 1009) [32].

[1064] Nicola Plant, 'Financial Abuse' in Christopher Whitehouse and others (eds), *Finance and Law for the Older Client* (LexisNexis 2015) [H1.15].

[1065] Hamilton and Cockburn (n 967) 437, citing *Chan v Zacharia* (1984) 154 CLR 178; *Breen* (n 1053).

[1066] *Smith* (n 1009) [62].

[1067] ibid [65], citing *Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544; J D Heydon et al (n 1049) [5-245].

[1068] Hamilton and Cockburn (n 967).

The informal and familial nature of Family Agreements creates significant potential for disputes over the content of the agreement,[1069] which can have harsh and unfair consequences for both the older parent and the caregiving adult child.[1070] It is evident from the above discussion that a transfer made between an older parent and their adult child under a Family Agreement leaves the caregiving adult child vulnerable to post-mortem claims challenging the validity of the transaction(s). In these circumstances, the deceased's intentions can only be examined in a second-hand way and much of the evidence will be entirely partisan. In the event that the transfer(s) is set aside, the caregiving adult child is eligible to make a family provision application. However, as observed above, that is conditional upon (i) the adult child meeting the 'jurisdictional question', and (ii) the court recognising the value of care work performed in the past, which, given the case law discussed in the next section, is unlikely.[1071]

8.3. FAMILY PROVISION APPLICATIONS

If a Will or intestacy laws fail to make adequate provision for the proper maintenance and support of the deceased's spouse,[1072] child or dependant, the court may, in its discretion, order provision be made out of the estate for such person (**section 41 order**).[1073] Recent

---

[1069] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.22] <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

[1070] ibid 24.

[1071] See Sloan (n 1030) 192.

[1072] Succession Act 1981 (Qld), s 5AA.

[1073] ibid s 41.

research has observed that family provision applications are the most frequent category of Will contestation across all Australian States[1074] and family provision claims by children of the deceased are the largest category of persons instigating these disputes.[1075] It was also observed that the majority of these claims were successful,[1076] with the most significant cost of Will contestation being damage to familial relationships.[1077]

Although this thesis is mainly focused on Family Agreements entered into between an older parent and their adult child, it is relevant to carefully consider the family provision application jurisdiction as the caregiving adult child is vulnerable to claims seeking to set aside the *inter vivos* transfer(s) made under a Family Agreement during the lifetime of the older parent.

As outlined above, due to the majority of Family Agreements being made informally and/orally it is unlikely that they will be recognised as contracts. Therefore, the common law will presume that the transfer(s) made under a Family Agreement was a gift, with no obligations attached. Further, given the transfer of property from an older parent to their adult child under a Family Agreement occurs by the older parent during their lifetime,[1078] it is characterised as a gift *inter vivos*. A gift *inter vivos* is distinguishable from

---

[1074] Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, 'Review of Public Trustee Files - Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia, (2014) 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808922> accessed 22 April 2020.

[1075] ibid 15.

[1076] ibid.

[1077] ibid 11.

[1078] Monro (n 1036) 69.

a testamentary disposition in that a Will only takes effect on death.[1079] A gift *inter vivos* is, in essence, '… the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death.'[1080] Given a gift *inter vivos* ultimately '… strips the donor of his property during his lifetime',[1081] the *inter vivos* transfer made under a Family Agreement is likely to largely deplete the older parent's estate. Due to the natural reluctance of older people to sue their adult child,[1082] and the enormous stress litigation has on an older person,[1083] equitable claims are more commonly being made post-death by children of the deceased to set aside *inter vivos* transactions entered into during the deceased's lifetime,[1084] particularly in conjunction with a family provision application.[1085] In Queensland, the court has no jurisdiction to reach property disposed of by the deceased *inter vivos*.[1086] As a result, equitable claims are increasingly becoming

---

[1079] *Cock v Cooke* (1866) LR 1 P & D 241, 243 per Sir James Wilde.

[1080] Halsbury's Laws of England, 'Gifts made between living persons: Introduction' [201] Forms of gifts inter vivos in *Gifts* (Volume 52, 2014).

[1081] *Craig v Lamoureux* [1920] AC 349 (PC) 356.

[1082] Barbara Hamilton, 'Be Nice to your Parents or Else!' (2006) 8(4) Elder Law Review <http://www.austlii.edu.au/au/journals/ElderLawRw/2006/8.html> accessed 22 April 2020.

[1083] ibid.

[1084] Sloan (n 1030) 138; Hamilton and Cockburn (n 967).

[1085] Hamilton and Cockburn (n 967).

[1086] Alun A. Preece, 'The Impact of the Law of Inheritance on the Family', A Paper delivered at the 7th Australian Institute of Family Studies Conference Sydney Convention and Exhibition Centre, Darling Harbour Sydney, 24 - 26 July 2000, 19.

intertwined with estate litigation to set aside *inter vivos* transfers with the practical effect of enlarging the estate available for the family provision application.[1087]

8.3.1. ELIGIBLE APPLICANTS

In Queensland, a deceased person's spouse, child or dependant is eligible to make a family provision application.[1088] Under the Succession Act 1981 (Qld), a person's spouse is the deceased's husband or wife, de facto partner[1089] or registered partner.[1090]

In this section, it is relevant to note that a 'dependent former spouse, husband, wife or civil partner' is also eligible to apply for a family provision application however section 5AA(4) of the Succession Act 1981 (Qld) outlines the rather limited qualification for a dependent and it may be that very few spouses are 'dependant' under this section, particularly if they have had a property settlement following a divorce. Secondly, a 'dependant' is defined to mean:

> … any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being—
>
> (a) a parent of that deceased person; or

[1087] Hamilton and Cockburn (n 967); *Bridgewater* (n 953); *Moylan v Rickard* [2010] QSC 327.

[1088] Succession Act 1981 (Qld), s 41(1).

[1089] As defined in the Acts Interpretation Act 1954, s 32DA.

[1090] ibid Schedule 1.

(b) the parent of a surviving child under the age of 18 years of that deceased person; or

(c) a person under the age of 18 years.[1091]

Under section 41(1A) of the Succession Act 1981 (Qld) there is an additional requirement for dependants namely, the court must be satisfied having regard to the extent to which the applicant was being maintained of the need of the dependant '… for the continuance of that maintenance or support …'. Lastly, a child of a deceased person is defined to mean, 'any child, stepchild or adopted child of that person'.[1092] It is important to note that illegitimate children[1093] and stepchildren[1094] fall within the ambit of this provision. Further, section 5A of the Succession Act 1981 (Qld) includes a child *en ventre sa mere* at the death, provided such child is born alive and remains alive for a period of thirty days.[1095]

8.3.2. TIME LIMITATIONS TO COMMENCE

Although a family provision application must be instituted within nine months of the deceased's death,[1096] the court may, at its discretion, hear and determine an application out of time.[1097] This provision is to be read in light of section 44(3) of the Succession Act 1981

[1091] Succession Act 1981 (Qld), s 40.

[1092] ibid s 40.

[1093] Status of Children's Act 1978 however a paternity must be established to the satisfaction of the court as per *Re Riley* [1996] 1 Qd R 209.

[1094] Succession Act 1981 (Qld), s 40A.

[1095] ibid s 5A; *Re Lawrence* [1973] Qd R 201.

[1096] Succession Act 1981 (Qld), s 41(8).

[1097] ibid s 41(8).

(Qld) which states, a personal representative (**PR**) is protected and will not be liable if he or she distributes the estate after six months after the testator's death provided there is no notice of an application or intended application for a section 41 order.[1098] If notice has been received, the PR cannot distribute earlier than nine months from the testator's death unless the PR receives written notice that the application has been commenced in the court or is served with a copy of the application.[1099] Therefore, an applicant must give notice to the PR or executor of their intention to make a claim within six months after the testator's death but before the estate is distributed.

8.3.3. EXTENSION OF TIME

In Queensland, the court has unfettered discretion to allow an application to be heard out of time,[1100] but only if the estate has not been distributed.[1101] As Sir Robert Megarry VC observed in *In re Salmon, Decd. Coard v National Westminster Bank Ltd*,[1102] of similar legislation in England, '… the onus lies on the plaintiff to establish sufficient grounds for taking the case out of the general rule, and depriving those who are protected by it of its benefits.'[1103] The Queensland case *Enoch v Public Trustee of Queensland*[1104] outlines

[1098] ibid s 44(3)(a).

[1099] ibid s 44(3)(b).

[1100] ibid s 41(8).

[1101] ibid s 44(3).

[1102] [1981] Ch 167.

[1103] ibid 175 per Sir Robert Megarry VC.

[1104] [2005] QSC 194. Cited with approval in *Mortimer v Lusink & Ors* [2017] QCA 1 [21].

factors that are relevant to the exercise of the discretion to the grant of an extension of time, namely:

(a) whether there is adequate explanation for the delay;

(b) whether there would be any prejudice to the beneficiaries;

(c) whether there has been any unconscionable conduct by the applicant; and

(d) where strength of the applicant's case.[1105]

In Queensland, an application for an extension of time will *not* be granted in circumstances where the estate has been distributed to the beneficiaries[1106] or where the administration of the estate is fully completed but title to the property is still held in the name of the trustee.[1107] However, it is a complex factual question whether either of those things have occurred.[1108] In the majority of cases, an application for an extension of time is made where an applicant is unaware of their rights, particularly when their solicitor has wrongly advised

[1105] ibid [6] per Wilson J, referring to *Warren v McKnight* [1996] NSWSC 419; (1996) 40 NSWLR 390, 394 and *Bird v Bird* [2002] QSC 202.

[1106] Succession Act 1981 (Qld), s 44(3); *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 218 [23] per McMurdo P.

[1107] *Re McPherson* [1987] 2 Qd R 394.

[1108] *Frey v Frey* [2009] QSC 43; *Curran v McGrath* [2010] QSC 172.

them. When this occurs, there is potential for a claim in negligence against a solicitor for failing to ensure a claim is made within the time limits.[1109]

8.3.4. THE ESTATE

First, the estate against which an order can be made in Queensland does not include property held under joint tenancy. This is relevant because, in the context of Family Agreements (and granny flat scenarios), it is common that the title of the property remains in the name of the adult child,[1110] rather than be registered in the names of the adult child *and* the older parent. The Property Law Act 1974 (Qld) provides, 'Any property and any interest, whether legal or equitable, in any property may be held by two or more persons as joint tenants …'.[1111] In the case where joint tenancy applies and the older parent dies, their interest in the property is extinguished and the surviving joint tenant (the adult child) holds the property absolutely.[1112] As Latham CJ in *Wright v Gibbons*[1113] commented, 'If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant or joint tenants is correspondingly enlarged.'[1114] Although a full examination of the common law rights regarding real property is outside the scope of this thesis, it highlights the importance of families entering into Family Agreements to consider how the property is owned. Secondly, the estate against which a section 41 order can be made

---

[1109] *Holdway* (n 1106).

[1110] Field (n 939) 104.

[1111] Property Law Act 1974 (Qld), s 33(1).

[1112] *Wright v Gibbons* [1949] HCA 3; (1949) 78 CLR 313.

[1113] ibid.

[1114] ibid 323 [14] per Justice Latham CJ.

includes property that is the subject of a *donatio mortis causa*,[1115] which is a gift made in contemplation of death,[1116] and also can include property the subject of a mutual Will.[1117]

As mentioned above, the court in Queensland has no jurisdiction to reach property disposed of by the deceased *inter vivos*[1118] but, significantly, this is subject to equitable doctrines namely, undue influence and unconscionable bargains. It is argued that an estate has not been fully distributed when, because of a successful claim, a subsequent fund has come into being.[1119] As Hart J in the Queensland case *Re Lowe*[1120] commented:

> In my view when an estate has been distributed there has ceased to be any estate of the testator out of which provision can be made … . It may not, however be true to say that there is no jurisdiction to make an order because there is always the possibility that further property will fall into the estate.[1121]

In the leading High Court of Australia case *Bridgewater v Leahy*,[1122] an *inter vivos* transfer was set aside on the grounds of unconscionable bargain, which had the practical

---

[1115] Succession Act 1981 (Qld), s 41(12).

[1116] Halsbury's Laws of England, 'Gifts made in contemplation of death' [271] Gifts made in contemplation of death in *Gifts* (Volume 52, 2014).

[1117] *Barns v Barns* [2003] HCA 9; 214 CLR 169.

[1118] Preece (n 1086).

[1119] Barbara Hamilton and Tina Cockburn, 'Sale of property gifted under a will by an attorney acting under an enduring power of attorney: Does the gift adeem and what is the attorney's duty?' (2011) 13(9) Retirement and Estate Planning Bulletin 417.

[1120] [1964] QWN 37, 82 - 83.

[1121] See also Preece 'Lee's Manual of Queensland Succession Law' (2007) LawBook Co [13.180].

[1122] *Bridgewater* (n 953).

consequence of enlarging the estate for the testator's wife and daughters, who brought a family provision application against a largely depleted estate.[1123] Since *Bridgewater*,[1124] it is becoming increasingly common for people to commence an equitable action intertwined with a family provision application.[1125]

8.3.5. DOES THE LAW VALUE CARE?

In Queensland, pursuant to section 41(1) of the Succession Act 1981 (Qld), applicants must show that adequate provision has not been made from the deceased's estate for their proper maintenance and support:

> If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.[1126]

[1123] Hamilton and Cockburn (n 967).

[1124] *Bridgewater* (n 953).

[1125] ibid.

[1126] Succession Act 1981 (Qld), s 41(1).

As outlined above,[1127] the High Court of Australia in *Singer v Berghouse*[1128] has set out a two-stage approach that a court must adopt in applications under family provision laws.[1129] The first stage is the jurisdictional question of whether the provision (if any) made for the applicant is '… adequate provision for his or her proper maintenance, education and advancement in life.'[1130] The second stage, should it arise, is the discretionary question, which requires the court to decide what provision ought to be made out of the deceased's estate for the applicant.[1131] As to the meaning of '… proper maintenance and support …,'[1132] *Bosch v Perpetual Trustee Co Ltd*[1133] made it clear that the amount to be provided is not to be measured solely by the need of maintenance but rather what is proper maintenance measured in the context of the size of the estate.[1134] In that case, Lord Romer referred to a quote by Edwards J in a decision of the Court of Appeal of New Zealand, *In re Allardice v Allardice*,[1135] namely:

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a

---

[1127] See text to (n 908).

[1128] [1994] HCA 40; (1994) 181 CLR 201 subsequently adopted in *Vigolo v Bostin* [2005] HCA 11.

[1129] Rodney Lewis, *Elder Law in Australia* (LexisNexis Butterworths 2004) 408.

[1130] ibid.

[1131] *Singer v Berghouse* (1994) 181 CLR 201 [15].

[1132] Succession Act 1981 (Qld), s 41(1).

[1133] [1938] AC 463.

[1134] ibid 478 per Lord Romer.

[1135] (1910) 29 NZLR 959.

> manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.[1136]

The most frequently cited statement of this basic principle is that of Salmond J in *In re Allen (Deceased), Allen v Manchester*:[1137]

> The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.[1138]

This statement emphasises the significance of a '… moral duty …' owed by the deceased to the applicant.[1139] It is observed that the courts usually require an adult child to establish a 'moral obligation' for the claim to succeed.[1140] However, some confusion was created in

---

[1136] *Bosch* [1938] AC 463, 478 per Lord Romer, referring to ibid 972 per Edwards J.

[1137] [1922] NZLR 218.

[1138] *Bosch* [1938] AC 463, 479 per Lord Romer, referring to ibid 220 per Salmon J.

[1139] Sloan (n 1030) 195.

[1140] Jonathan Herring, *Family Law* (7th edn, Pearson 2015) 748; Sloan (n 1030) 195.

an obiter statement in *Singer*[1141] when Mason CJ, Deane J and McHugh J, speaking of the above statement of principle from *In re Allen (Deceased)*,[1142] said:

> For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to "moral duty" or "moral obligation" may well be understood as amounting to a gloss on the statutory language.[1143]

In *Vigolo v Bostin*,[1144] the High Court of Australia made it clear, by a majority (Gleeson CJ, Callinan and Heydon JJ), that the concept and terminology of 'moral duty' or 'moral considerations' or 'moral claim' are still relevant to a family provision application and therefore it is not just a question of need.[1145] Nonetheless, in *Vigolo*[1146] the whole Court rejected the applicant's 'moral claim', which was based on a promise made by a father that his son would inherit a farm in return for his '… dedication and hard work in building up family assets.'[1147] The Court found that the son had been adequately compensated following the break-up of the family business relationship for which the son received a substantial settlement.[1148] Although the requirement of 'moral obligation' or that some

---

[1141] *Singer* (n 1131).

[1142] *In re Allen* (n 1137).

[1143] *Singer* (n 1131) [17] per Mason CJ, Deane and McHugh JJ.

[1144] [2005] HCA 11; (2005) 221 CLR 191.

[1145] Barbara Hamilton, 'Be Nice to your Parents or Else!' (2006) 8(4) Elder Law Review <http://www.austlii.edu.au/au/journals/ElderLawRw/2006/8.html> accessed 22 April 2020.

[1146] *Vigolo* (n 1144).

[1147] ibid [45].

[1148] ibid [48] – [49].

other special circumstances still exists,[1149] this case demonstrates the general reluctance of the courts to allow adult children with sufficient earning capacity to succeed in a family provision application.[1150]

Despite this general reluctance, there has been a recent increase in financially independent adult children successfully contesting estate distributions.[1151] Yet, ironically, the law fails to recognise the value of care work provided by an adult child prior to the death of the testator.[1152] This can have unfair outcomes on caregiving adult children who have made significant personal and financial sacrifices to care for their older parents. Although recognising that care is relevant in determining provision, the courts have made it clear that 'future need' is a crucial factor rather than the value of care work performed in the past.[1153] The courts are ambivalent in their attitude towards the relevance of care thus a caregiving adult child is much more likely to succeed if they can demonstrate a need for maintenance in the future rather than a devotion to the care of the deceased in the past.[1154] Consequently, a caregiving adult child may, after defending an equitable claim by their siblings seeking to set aside an *inter vivos* transfer made to them by their parent either while acting as an attorney or under a Family Agreement, be stripped from the benefit of the *inter*

[1149] Herring (n 1040) 748; Sloan (n 1030) 192.

[1150] Herring (n 1040) 748.

[1151] Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, 'Review of Public Trustee Files - Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia, (2014) 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808922> accessed 22 April 2020.

[1152] Sloan (n 1030) 192.

[1153] ibid 190 – 192.

[1154] ibid 137 – 138.

vivos transfer and subsequently may not receive adequate provision under a family provision application for care work they performed in the past. The law therefore needs to better recognise the value of past care so as to encourage family caring and to reward them justly for their efforts.[1155] When assessing whether 'adequate provision' has been made from the estate for an applicant's 'proper maintenance and support', the court in *Goodman v Windeyer*[1156] noted:

> … the very fact that a claimant has been a dutiful and devoted spouse or child is one of the relevant circumstances of the case to be considered together with all the other circumstances in deciding whether proper maintenance has been provided.[1157]

Although *Goodman*[1158] illustrates that a loving, helpful or dutiful child cannot and should not be ignored,[1159] more recent cases demonstrate that family provision law fails to adequately recognise the value of care work performed by adult child caregivers.[1160] The New South Wales case *Permanent Trustee Co Ltd v Fraser*[1161] explicitly stated that, '… a wealthy child who had cared for the parent throughout his or her life may have no claim for further provision under the [family provision] legislation'.[1162] The laws failure to

---

[1155] ibid 138.

[1156] [1980] HCA 31; (1980) 144 CLR 490.

[1157] ibid 498 per Gibbs J.

[1158] *Goodman* (n 1156).

[1159] ibid 498 per Gibbs J.

[1160] Sloan (n 1030) 192.

[1161] (1995) 36 NSWLR 24.

[1162] Sloan (n 1030) 192, citing ibid 42 per Sheller JA.

recognise family caring is further demonstrated in cases where the court has awarded provision to so-called 'lame-ducks',[1163] who have financial 'needs' due to their own failings and in spite of the fact that the applicant neglected and failed to care for their father.[1164] Kerridge criticises this unfairness towards caregiving adult children who, '… having led virtuous lives, are then treated less generously than their prodigal brothers and sisters'.[1165] In *Permanent Trustee Co Ltd*,[1166] it was commented that a '… wealthy child who had cared for the parent throughout his or her life may have no claim for further provision under the [family provision] legislation'[1167] and that '… a dependant is less likely to succeed if he has done something for the deceased.'[1168]

Therefore, there is a risk that the value of care provided by an adult child to their older parent is given no recognition post-death,[1169] and thus a caregiving adult child is unlikely to succeed in a family provision claim. *Re Hancock (decd)*[1170] confirmed that a moral obligation was not a precondition of a successful application.[1171] Despite this

---

[1163] ibid 192, citing *Re Hatte* [1943] St R Qd 1, 26 per Philp J.

[1164] ibid, citing *Espinosa v Bourke* [1999] 1 FLR 747 (CA) 755 per Butler-Sloss LJ.

[1165] ibid, citing Parry and Kerridge: The Law of Succession 12th edn (London, Sweet & Maxwell, 2009) [8-62].

[1166] *Permanent Trustee Co Ltd* (n 1161).

[1167] Sloan (n 1030) 192, citing *Permanent Trustee Co Ltd* (n 1161) 42 per Sheller JA.

[1168] ibid.

[1169] ibid 194.

[1170] [1998] 2 FLR 346 (CA).

[1171] ibid.

clarification, the courts are reluctant to clarify its meaning[1172] and thus the law remains unclear. In Australia, it is observed that a moral obligation is generally thought to be important even though its consideration is not explicitly required under the legislation.[1173] Similarly, the English courts are recognising the relevance of moral obligations even though it is not necessary to do so.[1174] When this scenario occurs, it is often the intention of the testator who enters into the impugned transaction that is critical for the determination of these claims within the family.[1175] The problem which arises in post-mortem claims, however, is that the intention of the testator can only be examined in a second-hand way, particularly as one sibling might regard the transfer as '… inexplicable, unfair, and even improper …'[1176] that the testator benefited, or favoured, one sibling over them.

Although the court is reluctant to place a value on care when assessing a family provision application, as outlined below, the court may refuse to make an order in favour of any person whose character or conduct disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.[1177]

[1172] Sloan (n 1030) 195, citing A Borkowski, 'Moral Obligation and Family Provision: *Re Hancock (Decd)* and *Espinsoa v Bourke*' (1999) 11 *Child and Family Law Quarterly* 305.

[1173] ibid, citing JK de Groot and BW Nickel, *Family Provision in Australia* 3rd edn (Chatswood, LexisNexis Butterworths, 2007) ch 1 [2.6].

[1174] Sloan (n 1030) 195.

[1175] *Johnston v Herrod* [2012] QSC 98; *Wilcox v Wilcox* [2012] NSWSC 1138.

[1176] *Gill v Woodall and others* [2010] EWCA Civ 1430 [26].

[1177] Succession Act 1981 (Qld), s 41(2)(c).

8.4. FAMILY AGREEMENTS: PROTECTIVE OR PROBLEMATIC?

Doron and Gal suggest that, 'The aging of the world has led the field of law to realization that it must respond and change in order to deal with this phenomenon.'[1178] One way in which the law has responded to societal ageing is through the implementation of preventative legal tools, such as enduring power of attorneys, which enable people to prepare for old age.[1179] A durable document, such as an enduring power of attorney, is described as an *individual* planning tool,[1180] which is implemented and determined by the individual's choice rather than by the State.[1181] As Brick comments:

> … the purpose of prevention in old age is to enable the *individual* to prepare for it, to better control and handle its side effects, so as to ensure the *individual's* autonomy and beliefs be fulfilled even in situations of declined capabilities.[1182]

Arguably, Family Agreements are an advanced care planning tool as they provide an avenue for families to discuss their expectations regarding the provision and receipt of

---

[1178] Israel Doron and Iddo Gal, 'The Emergence of Legal Prevention in Old Age: Findings from an Israeli Exploratory Study' (2006) 21 Journal of Cross Cultural Gerontology 41.

[1179] ibid.

[1180] ibid (emphasis added).

[1181] Charles P. Sabatino, 'Death in the Legislature: Inventing Legal Tools for Autonomy' (1992) 19(2) New York University Review of Law and Social Change 309.

[1182] Doron and Gal (n 1178) 43, citing Brick, I. (1985). Prevention in old age: The welfare perspective. *Gerontology*, 32, 5 (emphasis added).

future care for their older relatives before they lose decision making capacity.[1183] However, the significant difference between an enduring power of attorney and a Family Agreement is that a Family Agreement affects more than the older person as an individual, but rather has significant legal, and personal, ramifications for the caregiving adult child. Although preventative legal tools have many advantages in the field of law,[1184] they focus primarily on the *individual* as they are determined by the choice of the individual.[1185] The increased reliance on adult children to care for their older parent(s) challenges individualistic-based legal tools.[1186] In recognition of this, it is observed that the law does not recognise and reflect family realities.[1187] Israel Doron relevantly commented '… the more important social question in this field is whether preventative legal tools are "appropriate" as a policy tool for treating the older population … when the underlying social and cultural values are

---

[1183] The Committee Report (n 1069) ch 4 [4.19], citing Carers Queensland Submission (n 18) 5.

[1184] Doron and Gal (n 1178) 42.

[1185] Sabatino (n 1181) (emphasis added).

[1186] Doron and Gal (n 1178).

[1187] Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (16 July 2007) Brisbane 23 per Schlecht <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10368/toc_pdf/5569-1.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10368/0000%22> accessed 21 April 2020.

totally different.'[1188] Therefore, it is evident that the law treats older people as *individuals* rather than as members of families.[1189]

8.5. DISENTITLING CONDUCT: THE FORFEITURE RULE

There is legal debate about whether the policy of the forfeiture rule should be used to support legislation allowing disinheritance where a beneficiary is proved to have abused the deceased.[1190] In Australia, the forfeiture rule is the only directly behaviour-based disinheritance provision that allows the court to refuse to make an order in favour a beneficiary because of character or conduct towards the deceased.[1191] However, the forfeiture rule does not extend to sanctions against elder abuse.[1192] Hamilton argues that there are significant benefits to be gained from an extended concept of the forfeiture rule as, 'It would allow disinheritance to occur in circumstances where abuse was proven …'.[1193] Whilst acknowledging that extending the concept of 'unworthy heir' would interfere with testamentary freedom, Hamilton argues legislating this concept could encourage, *inter alia*, respect towards older people whilst creating financial incentives for family members to monitor their behaviour towards older family members.[1194] Given

---

[1188] Doron and Gal (n 1178) 50, citing Doron, I. (2002b). Elder guardianship kaleidoscope: A comparative legal perspective. *International Journal of Law, Policy and the Family 16,* 268 – 398.

[1189] Pezzin et al (n 60) 72 (emphasis added).

[1190] Hamilton (n 1082).

[1191] ibid.

[1192] ibid.

[1193] ibid.

[1194] ibid.

Queensland has no equivalent law to the Forfeiture Act 1995 (NSW), individuals convicted of the forfeiture rule in Queensland are convicted under the Criminal Code.[1195]

8.6. TESTAMENTARY FREEDOM

It is important to acknowledge the imposition family provision applications have on testamentary freedom,[1196] which in its purest form is the freedom of individuals to leave their assets without consideration of rights or obligations towards their families.[1197] The law claims to recognise and uphold freedom of testamentary dispositions.[1198] Yet, the Parliament of Australia has provided exceptions in recognition of '… occasional harshness and unfairness of uncontrolled testamentary disposition …'.[1199] Their Honours Gleeson CJ and Kirby P with Handley JA commented that family provision laws '… empower courts, in the defined circumstances, to disturb a will which has left a family member without adequate provision for proper maintenance, education, or advancement in life.'[1200] Their Honours continued, 'Parliament held back from providing a larger discretionary power where a court considered that the testator had acted unjustly, unwisely or harshly. The

---

[1195] Criminal Code, s 311(c).

[1196] Lewis (n 1129) 407.

[1197] Misa Izuhara, 'Negotiating Family Support? The 'Generational Contract' between long-term Care and Inheritance' (2004) 33(4) Journal of Social Policy 649, 656, citing Finch, J. (1997), 'Individuality and adaptability in English kinship', in M. Gullestad and M. Segalen (eds.), *Family and Kinship in* Europe, London: Pinter and Twigg J. and Grand, A. (1998), 'Contrasting legal conceptions of family obligation and financial reciprocity in the support of older people: France and England', *Ageing and Society*, 18: 131 - 46.

[1198] Lewis (n 1129) 408, citing *Re Estate of Griffith (Dec'd); Easter v Griffith* (SC(NSW) per Gleeson CJ, Kirby P and Hanley JA, 7 June 1995, unreported, BC9504790) 3 – 4.

[1199] ibid.

[1200] ibid.

freedom of testamentary disposition includes a freedom to be unfair, unwise or harsh with one's own property.'[1201] To this end, the comments by Scarman J in *In the Estate of Fuld deceased (No 3)*[1202] are relevant here, namely:

> … when all is dark, it is dangerous for a court to claim that it can see the light … a court should be very slow to find that a will does not represent the genuine wishes of the testatrix simply because its terms are surprising, inconsistent with what she said during her lifetime, unfair, or even vindictive or perverse.[1203]

Family Agreements, like cohabitation agreements, are said to force family members into the future.[1204] In the context of cohabitation agreements, Reece suggests that, 'The optimal time to answer the question of fairness on separation is on separation, when all the facts and circumstances are known.'[1205] Extending this argument to Family Agreements, it is perhaps arguable that the more suitable time to determine the value, and thus the reward, of the care performed by an adult child is at the time the caring ends, which, in most cases, is likely to be upon death of the older parent, when the older person enter a nursing facility or in the event of a failure in the Caring Relationship. If this argument is accepted, consideration of the courts power to redistribute the property upon either the death of the

---

[1201] ibid.

[1202] *In the Estate of Fuld, deceased (No 3)* [1968] P 675, 714E.

[1203] This passage is cited with approval in *Gill v Woodall and others* [2010] EWCA Civ 1430 [17] per Lord Neuberger of Abbotsbury MR.

[1204] Helen Reece, 'Leaping Without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 126, citing Beck-Gernsheim, E. (2002) *Reinventing the Family: In Search of New Lifestyles*, Cambridge: Policy Press: 48.

[1205] ibid 126.

older parent, the breakdown of the Caring Relationship or the time the older parent requires nursing care requires further attention. Although a full examination of the relevant division of assets within the Caring Relationship is outside the scope of this thesis, it is arguable that the 'equal contribution to a partnership' theory[1206] would be a suitable approach. Applying this theory to Family Agreements, the Caring Relationship would be analogous to a business partnership so in the event of a breakdown in the relationship, or the death of a party, each person (or the relevant estate) would be entitled to a share of the profits of their enterprise.[1207] This approach is arguably suitable for Family Agreements as it attaches weight to the performance of caregiving obligations,[1208] which is often ignored and not valued under the law.[1209] Further consideration as to whether it is more suitable to document the division of assets in advance or to retrospectively look backwards at the care that has been provided by the adult child is required. In the meantime, however, and under the current law, the caregiving adult child would be required to make a family provision application against the estate to claim provision for the years of unpaid care they provided. However, as outlined above, caregiving adult children are disenfranchised to claim, particularly as current family provision laws do not value care work performed in the past.[1210]

[1206] Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (2nd edn, Palgrave Macmillan 2015) 252.

[1207] ibid 253.

[1208] ibid, citing L. Glennon, 'The Limitations of Equality Discourses on the Contours of Intimate Obligations', in J. Wallbank, S. Choudhry and J. Herring (eds), *Rights, Gender and Family Law* (Routledge, 2010).

[1209] ibid 253, citing J. Herring, 'Where Are the Carers in Healthcare Law and Ethics?' (2007) 27 *Legal Studies* 51.

[1210] Sloan (n 1030) 192.

In the context of Family Agreements, a deceased's estate is likely to be largely depleted as a result of the substantial *inter vivos* transfer made to the caregiving adult child during the lifetime of the deceased. As outlined above, there has been an increase in equitable claims being made in conjunction with family provision applications so as to reverse the *inter vivos* transaction(s) to enlarge the estate available for provision.[1211] In circumstances where the transaction(s) is set aside, the caregiving adult child is eligible to make a claim against the estate however, as already discussed, the law and the courts are ambivalent to recognise and value past care performed by an adult child to their older parent.[1212] Given family provision applications are increasingly being intermingled with equitable claims, it is questionable whether the family provision jurisdiction is being extended too far so as to disenfranchise the caregiving adult child who, ironically, is the person the older parent intended to benefit at the time of making the impugned transfer(s). Therefore, it is evident that the law needs to change to rightfully acknowledge care work, and the value attached to it. Although the implementation of legislative safeguards has resulted in positive changes to guardianship laws in Queensland, the current law is inadequately protecting the rights of older people and their caregiving adult children who enter into Family Agreements.

[1211] Hamilton and Cockburn (n 967).

[1212] Sloan (n 1030) 192.

9. FAMILY AGREEMENTS: THE WAY FORWARD?

For many people, documenting a loving, caring and/or supportive personal relationship seems abhorrent. However, the law has already challenged the cultural aversion of contracting with family members with the recognition, and regulation, of ante-nuptial and pre-nuptial agreements,[1213] and cohabitation agreements.[1214] In the context of cohabitation agreements, Reece has commented that, 'Making a [living together] agreement prompts you to discuss how your living together will work in practice and what your expectations of each other are.'[1215] Similarly, in the context of Family Agreements, Carers Queensland informed the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs (the **Committee**) that:

> The most beneficial thing about such agreements is that they provide an avenue for people to discuss and consider their, often previously unstated, expectations and assumptions regarding the provision and receipt of future care for older people.[1216]

[1213] *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534.

[1214] *Sutton v Michon de Reya* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837; Brian Herd, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23.

[1215] Helen Reece, 'Leaping Without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 119, citing Advice Services Alliance.

[1216] Carers Queensland Submission, The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law Submissions' 5 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

With new pressures on adult children to care for their older parents, Family Agreements are increasingly being entered into.[1217] As usage rates of Family Agreements increases,[1218] it is crucial that families entering into such agreements protect themselves from '… whatever the future holds'.[1219] In theory, Family Agreements have the potential to safeguard older people and their caregiving adult children. However, the major problem with most Family Agreements, and a reason they frequently fail despite original good intentions, is that they are usually made informally, without any legal advice or details as to their terms, and without all the relevant issues being canvassed and agreed.[1220] This is inevitably leading to ambiguous arrangements[1221] that are breaking down behind closed family doors.[1222] In the context of cohabitants, Reece has commented that couples do not

---

[1217] Alzheimer's Australia Submission (n 1216) 21; Brian Herd, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72.

[1218] Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) (the Committee Report) ch 4 [4.9] <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

[1219] Helen Reece, 'Leaping Without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 119, citing Advicenow 'LivingTogether' (2008) <www.advicenow.org.uk/living-together/> accessed 17 March 2020.

[1220] Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

[1221] Rosslyn Monro, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68.

[1222] Herd (2002a) (n 1217) 77.

contract with one another because they assume doing so would have a negative emotional impact on their relationship.[1223] Williams suggests:

> Once cohabitants focus in on the potential failure of their relationship, they may believe their relationship is more likely to fail, which may, in turn, cause them to act as if the relationship is failing, causing the relationship to fail.[1224]

However, the danger of not entering into a Family Agreement is, as outlined above, that there will be no discussion around who and how care will be provided to the older parent. Furthermore, the caregiving adult child will not have any evidence of such an agreement if and when they have to defend a claim commenced by their older parent. a rival sibling and/or their parent's estate. Speaking in the context of the dangers associated with not making cohabitation agreements, Reece comments that '… the simpler, and stronger, argument …' is that it is '… wise to make an agreement on the basis that you do not trust

---

[1223] Reece (n 1219) 121, citing Lewis, J. (2002) *The End of Marriage? Individualism and Intimate Relations,* Cheltenham, UK: Edward Elgar: 183; Mahar, H. (2003) 'Why are there so few prenuptial agreements?', Discussion Paper, Cambridge, MA: Harvard Law School: 2; Douglas, G., Pearce, J. and Woodward, H. (2007) *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown*, Bristol, UK: University of Bristol: 14, 50; Panades, R, Corney, R., Ayles, C., Reynolds, J. and Hovsepian, F. (2007) *Informing Unmarried Parents about Their Legal Rights at Birth Registration*, London: OneplusOne: 33; Barlow, A. and Smithson, J. (2012) 'Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales', *Child and Family Law Quarterly*, 24: 304 - 19: 316, 318.

[1224] Reece (n 1219) 124, citing Williams, S.H. (2009) 'Sticky expectations: Responses to persistent over-optimism in marriage, employment contracts, and credit card use', *Notre Dame Law* Review, 84: 733 – 92: 767.

your partner.'[1225] Therefore, it is perhaps arguable that Family Agreements make 'legal good sense'.[1226]

In the absence of specific legislation to govern and regulate Family Agreements, families are too readily entering into Family Agreements[1227] that '… exist beneath both the law and the law maker's radar'.[1228] Moreover, it is observed that families are too readily appointing family members as attorneys without fully understanding the risks and responsibilities of an enduring power of attorney,[1229] particularly in relation to those that receive remuneration from their older parent(s) for their care. A further concern is that, due to the reluctance of older people to seek legal advice, older people are too readily entering into Family Agreements without considering all of the legal and financial implications associated with *inter vivos* transactions.[1230]

In observance of the reluctance of older people to utilise the law, it is likely that older people may be relying on the Internet to access legal information they need but not necessarily have the confidence, and/or the finances, to seek in person. Although levels of

---

[1225] ibid.

[1226] Herd (2002a) (n 1217).

[1227] Louise Kyle, 'Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7(4) Elder Law Review 1.

[1228] Herd (2002a) (n 1217) 74.

[1229] Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) Journal of Adult Protection 20.

[1230] NSW MACA Submission (n 1216).

Internet access amongst the older population is lower than the wider population,[1231] research suggests that older people are increasingly using online facilities[1232] and are seeing potential uses that apply to their specific needs and circumstances.[1233] Given that older people's engagement with the Internet is beneficial for their social interaction, education and cultural integration,[1234] legal information websites may be encouraging older people to enter into Family Agreements and/or enduring documents. At present, the making of an enduring power of attorney in Queensland is easily accessible via the Internet,[1235] which is encouraging older people to execute an advanced legal planning tool without legal advice and without understanding the legal implications of such documents. It is observed that making financial decisions on behalf of another is a difficult task[1236] that can inadvertently lead to mismanagement of assets and abusive practices.[1237] This concern is equally relevant to the execution of Family Agreements. As a consequence, older people are vulnerable to

---

[1231] Christine Milligan and Don Passey, 'Ageing and the Use of the Internet: Current Engagement and Future Needs' (Nominet Trust, 2011) <https://pdfs.semanticscholar.org/442a/944b986752993a7063ba52e092146c5bb09f.pdf?_ga=2.69281808.140943205.1587733876-2079421668.1587733876> accessed 22 April 2020.

[1232] ibid.

[1233] ibid.

[1234] ibid.

[1235] Queensland Government, 'Power of Attorney and Advance Health Directive' (2020) <https://publications.qld.gov.au/dataset/power-of-attorney-and-advance-health-directive> accessed 22 April 2020.

[1236] McCawley et al (n 1229); Cheryl Tilse, Deborah Setterlund, Jill Wilson and Linda Rosenman, 'Minding the money: a growing responsibility for informal carers' (2005) 25(2) Ageing and Society 215, 224.

[1237] Joan Langan and Robin Means, 'Financial Management and Elderly People with Dementia in the U.K.: As Much a Question of Confusion as Abuse?' (1996) 16(3) Ageing & Society 287, 310.

abuse and caregiving adult children are vulnerable to post-mortem claims that are being intermingled with family provision applications. Therefore, lawmakers, as a seminal issue in response to the ageing population, need to consider the regulation of family care relationships[1238] within the context of estate planning. Currently, government policies and the law treat older and disabled people as individuals rather than as members of families.[1239] As a consequence, the law '… tends to create responsibilities for families and carers that are quite contrary to the way in which families typically act.'[1240]

As Alison Brammer rightly observes, '… intervention may itself cause as many problems as it is likely to solve …'.[1241] Despite being 'best intention agreements',[1242] Family Agreements are likely to result in exactly what they aim to avoid, particularly in relation to increasing family conflict and the likelihood of litigation.[1243] Therefore,

---

[1238] Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (16 July 2007) Brisbane 4 – 5 per Herd <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10368/toc_pdf/5569-1.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10368/0000%22> accessed 21 April 2020.

[1239] ibid 23 per Schlecht; Liliana E. Pezzin, Robert A. Pollak and Barbara S. Schone, 'Efficiency in Family Bargaining: Living Arrangements and Caregiving Decisions of Adult Children and Disabled Elderly Parents' (2007) 53(1) CESifo Economic Studies 69, 72; Jonathan Herring, 'The Disability Critique of Care' (2014) 8 Elder Law Review 1, 15.

[1240] Commonwealth of Australia, Official Committee Hansard (n 1238) 23 – 24 per Schlecht.

[1241] Alison Brammer, 'Elder Abuse in the UK: A New Jurisdiction?' (1997) 8(2) Journal of Elder Abuse & Neglect 33, 34.

[1242] Monro (n 1221); Sue Field, 'Issues Facing Older Australians: Legal, Financial and Societal' (2005) 1 Journal of International Aging Law and Policy 95, 104.

[1243] HREOC Submission (n 1216) 36.

population ageing presents a challenge for governments, that is, to ensure the legal system adequately meets the needs of older people.[1244] Further, as Herring rightly argues, the failure of government support applies not just to older people but the family members that care for them.[1245] In theory, Family Agreements appear to protect older people and adult children from harmful outcomes but, as is evidenced in this thesis, Family Agreements have the potential to degenerate into abuse of the older parent whilst leaving the caregiving adult child vulnerable to post-mortem claims. Therefore, it is evident that the law is currently a morass of antiquated equitable and common law notions that are out of touch with the reality of how families operate.[1246] Therefore, the starting point in moving forward to a solution is to recognise legally, politically, philosophically and societally that (i) family care work is increasing, and (ii) family carers may require remuneration for their care work.

As this thesis outlines, the difficulty with enforcing Family Agreements as contracts is that they are rarely made with legal advice or certainty as to its terms and without all of the relevant issues being canvassed and agreed.[1247] This is leading to ambiguous arrangements[1248] between, often cohabitating, family members that are breaking down behind closed doors.[1249] Furthermore, as discussed above, given Family Agreements are most often made informal and/or orally they are giving rise to a confusing amalgam of legal issues, including, but not limited to, contract law, equity and trusts.

[1244] The Committee Report (n 1218) ch 1, vii.

[1245] Jonathan Herring, *Family Law* (7th edn, Pearson 2015) 727.

[1246] Commonwealth of Australia, Official Committee Hansard (n 1238) 4 per Herd.

[1247] Hall (n 1220).

[1248] Monro (n 1221) 69.

[1249] Herd (2002a) (n 1217) 77.

One solution for preventing the breakdown of Family Agreements is for State and Territory Tribunals to have jurisdiction to review Family Agreements at their inception to ensure they are legally valid prior to (i) the parties entering into such an agreement, and (ii) any care work being performed. Subject to the circumstances of each case, this could involve the Tribunal imposing requirements such as (i) each party must have obtained independent legal advice, and (ii) all family members have consented to the terms of the Family Agreement, which may avoid the post-death feuds commenced by an aggrieved sibling outlined above. Although Tribunals provide a low cost and less formal forum for resolving disputes, for the reasons already identified, it is likely that family members will not utilise the law prior to entering into a Family Agreement. However, having a low cost and less formal forum may encourage parties to seek advice earlier. As outlined above, the ALRC recommended that Tribunals could have jurisdiction to hear disputes with respect to residential property that is the principal place of residence of one or more parties to Family Agreements. However, that recommendation is reactive, rather than preventative, as it only assists parties *after* a dispute has arisen. Allowing parties to a Family Agreement to ensure there is a valid and binding contract at the beginning of the Caring Relationship will hopefully reduce the risk of litigation when and if the relationship breaks down. This solution warrants further consideration.

As outlined above, in the absence of a valid contract, common law presumptions will likely assume the transfer(s) made under such agreements is a gift which, as discussed above, are liable to be set aside. Therefore, the question is: is legislation the answer?

9.1. IS LEGISLATION THE ANSWER?

Due to the uncertain legal status of Family Agreements, and the fact that most Family Agreements are not formalised as contracts, it is argued that legislation allowing the courts to dissolve Family Agreements, restore property and compensate the caregiving adult child has merit.[1250]

In 2000, the British Columbia Law Institute (**BCLI**), which is the successor organisation to the Law Reform Commission of British Columbia, formed the Project Committee on Legal Issues Affecting Seniors. The first project undertaken by them was 'Private Care Agreement Between Older Adult and Friends or Family Members'. The primary reason for this project was because the Committee recognised '[t]he severity of the problems associated with private care agreements …'.[1251] The purpose of the project was '… not to recommend or endorse private care agreements, but to protect seniors from potentially harmful outcomes in a way that is fair to caregivers'.[1252] In 2002, the Committee recommended, amongst other things, that legislation, modelled on the approach taken in the New Brunswick Judicature Act, which gives courts power to intervene or set such agreements aside, is '… necessary to provide for fair, workable and consistent

---

[1250] The Committee Report (n 1218) ch 4.

[1251] British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, 'Private Care Agreements Between Older Adults and Friends of Family Members' Report No. 18 (2002) (the BCLI Report) 4 <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020.

[1252] ibid.

outcomes, especially where agreements have not been formalised'.[1253] The BCLI's legislative recommendation is:

1. Where the consideration for a disposition of property of any kind is, in whole or in part, the provision of services for the care of the transferor, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances including an order that,

   (a) the disposition be set aside,

   (b) the transferee pay to the transferor an amount not to exceed the value of the property at the time the order is made,

   (c) the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made,

   (d) any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is no longer enforceable by the transferor,

   (e) security be provided for any payment ordered under this section.

[1253] The BCLI Report (n 1251) 24.

2. Any order under section 1 must be made on such terms as appear fair having regard first to the interests of the transferor.

3. In exercising its discretion under this section, the Court must consider all of the circumstances including:

(a) the circumstances in which the agreement was made;

(b) the nature of the relationship between the transferor and transferee;

(c) the state of the relationship between the transferor and transferee;

[blank space in BCLI report]

(e) the nature of the care required by the transferor;

(f) the health of the transferee;

(g) the nature of the care provided by the transferee;

(h) the duration of any care provided;

(i) the value of the care that has been provided;

(j) any expenses incurred by the transferee;

(k) the ability, including the financial ability, of the transferee to continue to provide the care required by the transferor;

(l) the value of property at the time of the disposition and at the time of the hearing; and

(m) the terms of any agreement between the parties and the reasonableness of those terms.

4. For the purposes of sections 1 through 3, the provision of "care" includes the provision of assistance and support.[1254]

The BCLI recommends that this legislation should be incorporated into the Law and Equity Act into either section 59, which deals with 'enforceability of contracts' and/or section 60, which deals with 'spousal capacity and property'.[1255]

In its submission in response to the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into Older People and the Law,[1256] the Victorian State Government was sceptical about how legislation could address the disadvantages of Family Agreements but stated legislation similar to the one proposed by the BCLI could help with resolving the problems which arise:

> It is difficult to see how legislation can specifically address many of the issues raised by family agreements. However, the British Columbia Law Institute has

[1254] The BCLI Report (n 1251) 22 – 23.

[1255] The BCLI Report (n 1251) 22.

[1256] House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Media Release: Inquiry into Older People and the Law' (2006) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/media.htm> accessed 21 April 2020.

> proposed a legislative provision to deal with situations where the relationship between parties breaks down that would allow courts to dissolve the agreement, restore property and compensate caregivers. Such a reform would not prevent the problems that arise with the use of care agreements but it would assist with providing a resolution after the problems have arisen.[1257]

As outlined above, there is currently no legislation in Australia governing Family Agreements. The New South Wales Contracts Review Act 1980, which the court applied in *Menka Tasevska v Vlado (Larry) Tasevski and Anor*,[1258] discussed above,[1259] could apply to Family Agreements however this legislation is 'highly qualified' and similar legislation does not exist in any other jurisdiction.[1260] A legal practitioner from New South Wales, Mr David Walsh, spoke at the public hearing of the Inquiry into 'Older people and the law' on 23 March 2007 and said:

> The need to provide care for older Australians in a family setting is increasing, for the simple reason that such care is not available elsewhere. If one wishes to establish the need for explicit legislation with respect to what are referred to as 'family agreements', I would suggest a visit to the Supreme Court of New South

---

[1257] The Committee Report (n 1218) ch 4 [4.35].

[1258] [2011] NSWSC 174.

[1259] See text to (n 698) and subsequent discussion of that case.

[1260] Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (23 March 2007) Canberra 32 <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10091/toc_pdf/5349-2.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10091/0000%22> accessed 22 April 2020.

> Wales in Sydney on any sitting day. Family agreements, if properly structured, are simply a form of contract. The only jurisdiction that offers the older Australian some hope when things go wrong is New South Wales via the Contract Review Act, though even this is highly qualified.[1261]

The only other legislation in Australia which considers the interests of older people who have entered into a Family Agreement is the Family Law Act 1975 (Cth). Under Part VIIAA of that Act, the Family Court can consider the interests of third parties in matrimonial property proceedings. This means that an older person's interests under a Family Agreement is protected in the event that the adult child divorces from their spouse during the lifetime of the agreement.[1262] However, it is not intended to regulate and or govern the Caring Relationship and/or Family Agreements.

The Queensland Attorney General was of the same view, that Family Agreements are merely contracts, which can be resolved via the usual avenues of civil litigation:

> There is no legislation which specifically governs Family Agreements. If an older parent believes that the agreement has been breached by their child or children, the older parent may commence civil litigation on the grounds of breach of the contract or on grounds such as, undue influence or unconscionable conduct on behalf of the child or children.

[1261] ibid.

[1262] Attorney-General's Submission No. 100.1 (n 1216) 4. See also the Committee Report (n 1218) ch 4 [4.41].

> In circumstances where it is believed that the older parent did not have capacity to understand the nature and effect of the agreement or may have been coerced into making the decision, the matter can be referred to the Adult Guardian to investigate and take protective action if necessary.[1263]

In 2007, the Australian Committee, in supporting the BCLI legislative recommendation, agreed that there may be a need for a specific mechanism to equitably resolve disputes that arise under Family Agreements.[1264] Therefore, the Australian Committee recommended that there should be an investigation of legislation regulating Family Agreements.[1265] The Australian Committee suggested that requiring formalisation of Family Agreements in writing would be desirable,[1266] and that registration of Family Agreements could reduce uncertainty and would assist the courts in cases where disputes arise.[1267] In 2009, the Australian Government accepted this recommendation in principle,[1268] agreeing that '… the role of family agreements and the issues of how the scope for abuse can be limited or

---

[1263] Queensland Attorney-General Submission (n 1216) 6.

[1264] The Committee Report (n 1218) ch 4 [4.43].

[1265] ibid [4.40].

[1266] ibid [4.41].

[1267] ibid [4.42].

[1268] Australian Government, 'House of Representatives Standing Committee on Legal and Constitutional Affairs Older People and the Law Government Response' (2009) (the Government's Response) 21 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=laca/reports.htm> accessed 21 April 2020.

ameliorated need to be further studied.'[1269] Yet, unjustifiably, no such investigation, or further study, has been conducted, and thus no such legislation exists.

In addition to the ALRC's recommendation regarding the Tribunals having jurisdiction with respect of residential property under Family Agreements,[1270] it also recommended that the Social Security Act 1991 (Cth) should be amended to require that the granny flat scenario is expressed in writing in order for the older person to be entitled to receive the Age Pension.[1271] The ALRC did not recommend the introduction of specific legislation to govern Family Agreements as contemplated by the Australian Committee in 2002 or by the BCLI in 2000.

However, as outlined below, there is merit in considering broadening the already existing legislative regimes to include caregiving family members in the definition of 'approved providers'.

9.2. CURRENT LEGISLATION

As outlined above, the current legal framework that governs the Home Care Packages Programme under the Aged Care Act already allows for a Home Care Agreement to be entered into between an older parent and an approved care provider. This agreement is a legally binding contract between the care recipient and the approved provider and is

[1269] ibid.

[1270] Australian Government, Australian Law Reform Commission, 'Elder Abuse— A National Legal Response: Final Report' (2017) Recommendation 6-1. <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/> accessed 22 April 2020.

[1271] ibid, Recommendation 6-2.

governed by the User Rights Principles 2014 (Cth). Further, as discussed above,[1272] a Home Care Agreement 'must not contain any provision that would have the effect of the care recipient being treated less favourably in relation to any matter than the care recipient would otherwise be treated, under any law of the Commonwealth, in relation to that matter'.[1273] However, unjustifiably, the regime precludes family members from being 'approved providers'. This legislative regime could be amended so as to include family members within the definition of an 'approved provider'. This would be one small step to allow the older parent to exercise full choice and control of how, when, where, and, significantly, by whom, they will receive care. This would ensure the legal rights of both the older parent (the care recipient) and the adult child (the care provider) are protected, similar to the PGB in the Netherlands.

The exclusion of family members from direct payment schemes, discussed above,[1274] is unjustifiable and is arguably discriminatory. This is what the New Zealand Court of Appeal held in *Ministry of Health v Atkinson and others*,[1275] where it was found that a Ministry of Health policy refusing to pay parents of disabled adult children was discriminatory on the grounds of 'family status', which contravened the Human Rights Act 1993 (the **HRA**).

In *Ministry of Health v Atkinson and others*, a group of seven parents and two disabled children commenced proceedings against the Ministry of Health alleging that its

---

[1272] See text to (n 524) at page 105 above.

[1273] Aged Care Act 1997 (Cth), s 61-1(3).

[1274] See discussion under the heading 'Direct Payment Scheme Restrictions: The Rationale', chapter 4, section 4.9 at page 119.

[1275] [2012] NZCA 184.

policy of refusing to pay parents of disabled adult children was discrimination on the grounds of family status, which contravened the HRA. In defending the action, the Ministry submitted that the policy is justified because parents are 'natural supports' of disabled children and are bound by the social contract that means the State does not pay families to look after their own family members.[1276]

In that case, the Human Rights Review Tribunal of New Zealand succinctly outlined that the relevant provisions:

> … are s.20L which provides that an act or omission is in breach of Part 1A of the Act if it is inconsistent with s.19 of the New Zealand Bill of Rights Act 1990 ("NZBORA") in that it limits the right to freedom from discrimination affirmed by s.19 and is not under s.5 NZBORA a justified limitation on that right and s.21(1)(I)(iv) which provides that family status, namely being a relative of a particular person, is a prohibited ground of discrimination for the purposes of the Act.

Section 20L of the HRA provides:

> (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.

[1276] *Atkinson and others v Ministry of Health* [2010] NZHRRT 1 [12]; *Attorney General v Spencer* [2015] NZCA 143 [1] per Harrison J.

(2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission-

(a) limits the right to freedom from discrimination affirmed by that section; and

(b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.

(3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised by an enactment.

Section 19 of the New Zealand Bill of Rights Act 1990 (**NZBORA**) provides:

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

Section 5 of the NZBORA provides:

Justified Limitations

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 21 of the HRA outlines the prohibited grounds of unlawful discrimination. The prohibited ground of discrimination relevant in *Attorney General v Spencer*[1277] was 'Family status', which is outlined under section 21(1)(l)(iv), which provides:

> For the purposes of this Act, the prohibited grounds of discrimination are … Family status, which means-
>
> (i) Having the responsibility for the part-time care or full-time care of children or other dependants; or
>
> (ii) Having no responsibility for the care of children or other dependants; or
>
> (iii) Being married to, or being in a civil union or de facto relationship with a particular person; or
>
> (iv) Being a relative of a particular person.

Under section 2 of the HRA, 'relative' of a particular person is defined to mean any other person who:

[1277] [2015] NZCA 143.

(a) is related to the person by blood, marriage, civil union, de facto relationship, affinity, or adoption; or

(b) is wholly or mainly dependent on the person; or

(c) is a member of the person's household.

Similarly, in *Spencer v Attorney General*,[1278] Margaret Spencer successfully challenged policies of the Ministry of Health that specifically excluded family members of people who are eligible under Ministry policies for disability support services from receiving payment for their care. Ms Spencer argued that excluding a person from payment for provision of such services on the basis of their family relation to the care recipient contravened the HRA. At the time of the decision, Mrs Spencer had provided care to her (then) 48-year-old son, Paul, who had Downs Syndrome.

Following *Ministry of Health v Atkinson and others*, the Ministry of Health consulted the public on how it should respond and, subsequently, reform to the family care policy occurred.[1279] The New Zealand Government has recently made changes to Funded Family Care, which will take effect in April 2020. Under these latest changes, the more qualified a funded family carer is, the more they may get paid.[1280] This is likely to encourage and motivate family carers to get upskilled and training, which will ultimately

[1278] [2013] NCHC 2580.

[1279] See New Zealand Public Health and Disability Amendment Bill (No 2).

[1280] Ministry of Health, 'Changes to Funded Family Care funded by Disability Support Services' 14 <https://www.health.govt.nz/system/files/documents/pages/easy-read-translation-dss-funded-family-care-16-january2020.pdf> accessed 29 March 2020.

have better outcomes for the care recipient. This is an initiative which could be implemented in other jurisdictions, like Australia and England.

According to the Ministry of Health, there was considerable criticism on the Ministry Funded Family Care policy as it required disabled people to be the employer of their family member. Under the new changes, this will no longer be required, and Family Funded Care will be implemented through employment by providers and personal budgets. In a statement issued by the Right Honourable Jacinda Ardern and the Honourable Julie Anne Genter commented:

> We … heard from families about the need to remove the requirement for an employment relationship between a disabled person and their family member. Health Ministers will consider alternative options which do not place unreasonable expectations on disabled people, their family or whānau.[1281]

In light of the new policy regime in New Zealand, the current policy in England and Australia excluding family carers from receiving government funding (other than carer's allowance or a carer's pension) does not reflect family realities. That is, that many close relatives are caring for their older loved ones within the home. If the goal of Family Agreements is to financially compensate the caregiving adult child for their care, then that can ultimately be achieved by allowing adult children, and relatives, to be eligible to receive government funding for their care services that can financially support them while they provide long-term, and often full-time, care to their older parent(s) and/or to

[1281] New Zealand Government, 'Government restores fairness for family carers' (7 July 2019) <https://www.beehive.govt.nz/release/government-restores-fairness-family-carers> accessed 29 March 2020.

supplement (or attempt to supplement) the income they may have foregone to provide such care.

In the absence of such a regime in Australia, many families are entering into Family Agreements, which are breaking down behind closed doors and leaving older people and their caregiving adult children vulnerable to harmful outcomes. Until the legislation recognises close relatives as eligible carers and/or service providers, aggrieved parties to a Family Agreement are forced to turn to contract law as a solution to enforce their rights. However, given the majority of Family Agreements will not be enforceable as a contract, a dispute concerning the validity of such an agreement will give rise to a confusing amalgam of legal issues. Therefore, in order to protect older people and caregiving adult children, the common law needs to respond to the realities of family life and recognise agreements of this nature.

If the Family Agreement concerns the purchase or transfer of land, that is likely to be considered a contract for the disposition of land and therefore comes with s 59 of the Property Law Act 1974 (Qld).[1282] However, in circumstances where the Family Agreement relates to vague and oral promises of care for life, that have not been reduced to writing, it is unlikely to be held to be a valid contract under contract law, which forces many people to resort to equity to enforce the agreement, which, as *Etchison* demonstrates, is not a lay down misere. As Treitel commented:

> The rights arising under a binding contract are fixed at its formation and not subject to such variation in the light of the court's approval or disapproval of the subsequent

[1282] *Riches v Hogben* [1986] 1 Qd R 315.

> conduct of one of the parties. For this reason, and because proprietary estoppel may be revocable, it will generally be more advantageous to a party to show the existence of a binding contract (if he can) than to rely on proprietary estoppel.[1283]

Therefore, the common law presumption that there is no intention to create legal relations between close relatives, and in particular in relation to personal services, needs to be re-considered. The judiciary needs to (i) be more open-minded and sympathetic towards Family Agreements, (ii) recognise and apply current societal realities to such agreements, and (iii) accept that family carers may need to be remunerated for their care work. As Kirby P said, why should:

> … [those] who have provided 'women's work' over their adult lifetime … be told condescendingly, by a mostly male judiciary, that their services must be regarded as 'freely given labour' only… .[1284]

Further, as outlined above,[1285] it is unjustified that the current law treats certain fiduciaries differently to an attorney/carer relationship. The law governing certain fiduciaries such as guardians, administrators, personal representatives and trustees allows and/or entitles them to reimbursement for reasonable expenses and/or all expenses reasonable incurred in the exercise of a power. Yet, the law does not allow and/or entitle an attorney to be a paid caregiver, nor receive remuneration or reimbursement for their services or time. If the

---

[1283] Edwin Peel and G. H. Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) [3-152] (citations omitted).

[1284] *Bryson v Bryant* (1992) 29 NSWLR 188, 204 per Kirby P.

[1285] See discussion under heading 'Fiduciaries vs Carers: Way Forward?', chapter 7, section 7.12 at page 233 above.

caregiving adult child kept accurate records, similar to those obligations imposed on trustees, for the time they spent on caring for their older parent and/or for all expenses incurred on the older parent's behalf there is arguably no reason why they ought to be precluded from being reimbursed for these expenses either during the parent's life or post their parent's death.[1286] The problem will, however, be if the older parent, or their estate, cannot afford to reimburse the adult child for their care or, in addition to the caregiving adult's claim against the estate, there is competing claim made by an eligible applicant under family provision laws. This scenario is why there is merit in extending the direct payment scheme to include close relatives in the definition of approved care providers so as to ensure the adult child is protected from harmful outcomes, such as being left with significant debts from caring for their parent(s) in circumstances where they made significant sacrifices to care for their parent(s).

As mentioned above,[1287] family provision legislation could assist in compensating an adult child for their care in recognising carers as claimants, however, under the current law, the carer would need to satisfy the 'jurisdictional question', namely that they have 'been left without adequate provision for his or her proper maintenance, education and advancement in life'.[1288] This will include an assessment of their individual assets and liabilities, which includes their partner. In circumstances where the adult child has been left adequate provision, or is financially stable with no future need, then their family

---

[1286] See the discussion of *Etchison v ANZ Executors and Trustee Company Ltd* [2005] QSC 363 under heading 'Quantum under Family Agreements', chapter 7, section 7.11, commencing at page 226 onwards.

[1287] See discussion under the heading 'Fiduciaries vs Carers: Way Forward?', chapter 7, section 7.12 at page 233 and also under the heading 'Post-Death Family Feuds', chapter 8, commencing at page 240.

[1288] *Singer v Berghouse* (1994) 181 CLR 201, 208 - 210.

provision application is bound to fail and they would, therefore, have no claim against their parent's estate. An alternative to this is for the courts to recognise care work within succession law as being a ground for seeking further provision without having to satisfy the jurisdictional question. In support of this approach, Herring[1289] has argued that an adult child who provided care to the deceased would have the 'strongest'[1290] family provision claim and, therefore, the use of legislation, such as the Inheritance (Provision for Family and Dependants) Act 1975, 'is an effective tool to encourage the care of older people and the best way of ensuring compensation for the costs of that care'.[1291]

Although there is merit in retrospectively assessing the value of care that the adult child provided to their older parent(s), unless thorough and accurate records were kept by the caregiving adult child (which is unlikely) determining the appropriate amount of provision would be difficult. Furthermore, as discussed in the preceding paragraph, this relief also relies on the older parent's estate being large enough to satisfy this debt whilst ensuring competing claimants are also provided for.

A further solution to ensure caregiving adult children are financially remunerated for their care is to enable them to render an account to their parent's estate for the 'going rate' for their care services on the death of their parent, rather than to enforce the agreement during their lifetime. This is what the plaintiff sought to do in *Etchison v ANZ Executors*

[1289] Jonathan Herring, 'Will-substitutes and the claims of family members and carers' in Braun, A. and Rothel, A. (ed.) *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart, Oxford 2016).

[1290] ibid 297.

[1291] ibid 302

and Trustee Company Ltd,[1292] as outlined in detail above.[1293] Not only does this avoid close relatives having to contract with one another during the older parent's lifetime, but it also by-passes the (i) family provision laws, and therefore the 'jurisdictional question', and (ii) automatic revocation of an enduring power of attorney under section 59 of the Powers of Attorney Act 1998 (Qld) when an older parent pays their attorney child for care. However, as discussed above, this also depends upon the parent's estate being large enough to afford such a debt, which is another reason why broadening direct payment schemes to include adult children in the definition of an approved provider offers more protection to the caregiving adult child.

This thesis has been completed during the global pandemic, COVID-19. The importance of family care work is, arguably, now more important than ever before. This thesis has demonstrated that the starting point to any change is for the law to (i) recognise and value the care work that adult children provide to their older parent(s), and (ii) understand that family caregivers ought to be remunerated for such services if that is what is so required. Globally, the law is at a critical turning point[1294] and policy makers have the opportunity to explore and develop the law for the benefit of older people and the many caregiving family members who care for them.

[1292] [2005] QSC 363.

[1293] See the discussion of *Etchison v ANZ Executors and Trustee Company Ltd* [2005] QSC 363 under heading 'Quantum under Family Agreements', chapter 7, section 7.11, commencing at page 226 onwards.

[1294] Carol T. Kulik, Susan Ryan, Sarah Harper and Gerard George, 'From the Editors: Aging Populations and Management' (2014) 57(4) Academy of Management Journal 929, 934.

BIBLIOGRAPHY

Aboderin I, ‘‘Conditionality’ and ‘Limits’ of Filial Obligation’ Working Paper Number WP205 Conceptual Levers for Developing a Better Understanding of the Motivational Basis and Societal Shifts or Patterns in Old Age Family Support (2005) 2.

Age UK, ‘Personal budgets and direct payments in social care: Factsheet 24 (2019) <https://www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs24_personal_budgets_and_direct_payments_in_social_care_fcs.pdf> accessed on 22 April 2020; Carers UK, ‘Direct Payments’ <https://www.carersuk.org/help-and-advice/practical-support/getting-care-and-support/direct-payments#sec6> accessed 22 April 2020.

Alzheimer’s Australia, Submission No. 55 to the Parliament of Australia House of Representatives Inquiry into Older People and the Law (2006) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

Alzheimer’s Disease International, ‘World Alzheimer Report 2015, The Global Impact of Dementia: An Analysis of Prevalence, Incidence, Cost and Trends’ (2015) <https://www.alz.co.uk/research/WorldAlzheimerReport2015.pdf> accessed 21 April 2020.

Alzheimer’s Society, ‘Facts for the media’ (2020) <http://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=535&pageNumber=2> accessed 21 April 2020.

Alzheimer’s Society, ‘What is dementia?’ (2017) <https://www.alzheimers.org.uk/download/downloads/id/3416/what_is_dementia.pdf> accessed 21 April 2020.

Arksey H, Baxter K, ‘Exploring the Temporal Aspects of Direct Payments’ (2012) 42 1(1) The British Journal of Social Work 147.

Ashall V (ed), *Tolley's National Insurance Contributions 2018-19* (LexisNexis 2018).

Australian Bureau of Statistics, ‘Disability, Ageing and Carers, Australia: Summary of Findings, 2009’ (2010) <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4430.0Main%20Features22009?opendocument&tabname=Summary&prodno=4430.0&issue=2009&num=&view> accessed 22 April 2020.

Australian Bureau of Statistics, ‘Life Tables, States, Territories and Australia, 2016-2018’ (2019) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3302.0.55.001> accessed 21 April 2020.

Australian Bureau of Statistics, ‘Reflecting a Nation: Stories from the 2011 Census, 2012-2013’ (2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features602012-2013> accessed on 21 April 2020.

Australian Government, Aged Care Quality and Safety Commission, ‘Becoming an approve aged care provider’ <https://www.agedcarequality.gov.au/providers/becoming-approved-aged-care-provider> accessed on 29 March 2020.

Australian Government, Australian Institute of Health and Welfare, ‘Older Australia at a glance’ (2018) <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile> accessed 21 April 2020.

Australian Government, Australian Law Reform Commission, ‘Elder abuse’ (2017) <https://www.alrc.gov.au/inquiries/elder-abuse> accessed 10 April 2018.

Australian Government, Australian Law Reform Commission, 'Elder Abuse— A National Legal Response: Final Report’ (2017) <https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/> accessed 22 April 2020.

Australian Government, Department of Home Affairs, ‘Carer visa (subclass 116) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/carer-116> accessed 22 April 2020.

Australian Government, ‘House of Representatives Standing Committee on Legal and Constitutional Affairs Older People and the Law Government Response’ (2009)

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=laca/reports.htm> accessed 21 April 2020.

Australian Government, My Aged Care, 'Apply for an assessment' <https://www.myagedcare.gov.au/eligibility-and-assessment/how-assessment-works> accessed 22 April 2020.

Australian Government, My Aged Care, 'Your guide to Commonwealth Home Support Programme services' (2019) 5 <https://www.myagedcare.gov.au/sites/default/files/2019-07/your-guide-to-commonwealth-home-support-programme-services.pdf> accessed 22 April 2020 .

Australian Government, My Aged Care, 'Your guide to Home Care Package service' (2019) 2 <https://www.myagedcare.gov.au/sites/default/files/2019-06/your-guide-to-home-care-package-services-march-2019.pdf> accessed 22 April 2020.

Bagshaw D, Adams V, Zannettino L and Wendt S, 'Elder Mediation and the Financial Abuse of Older People by a Family Member' (2015) 32(4) Conflict Resolution Quarterly 443.

Bagshaw D, Wendt S, Zannettino L and Adams V, 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members' (2013) 66(1) Australian Social Work 86.

Bagshaw D, Wendt S and Zannettino L, 'Preventing the Abuse of Older People by their Family Members' Stakeholder Paper 7, Domestic Violence Clearing House (2009) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.843.2682&rep=rep1&type=pdf> accessed 22 April 2020.

Beatson J, Burrows A, and Cartwright J, *Anson's Law of Contract* (30th edn, Oxford University Press 2016).

Bloy M, 'The 1601 Elizabethan Poor Law' (The Victorian Web 2002) <http://www.victorianweb.org/history/poorlaw/elizpl.html> accessed 22 April 2020.

Brammer A and Biggs S, 'Defining Elder Abuse' (1998) 20(3) Journal of Social Welfare and Family Law 285.

Brammer A, ‘Elder Abuse in the UK: A New Jurisdiction?’ (1997) 8(2) Journal of Elder Abuse & Neglect 33.

British Columbia Law Institute, Committee on Legal Issues Affecting Seniors, ‘Private Care Agreements Between Older Adults and Friends of Family Members’ Report No. 18 (2002) <http://www.bcli.org/sites/default/files/Private_Care_Agreements_Between_Older_Adults_and_Friends_or_Family_Members.pdf> accessed 21 April 2020.

Brown L, Hansnata E and Anh La H, Report Prepared for Alzheimer’s Australia, ‘Economic Cost of Dementia in Australia: 2016-2056’ (2017) <https://www.dementia.org.au/files/NATIONAL/documents/The-economic-cost-of-dementia-in-Australia-2016-to-2056.pdf> accessed 21 April 2020.

Brown S L and Lin I-F, ‘The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990-2010’ (2012) 67(6) The Journals of Gerontology Psychological Sciences & Social Sciences <http://psychsocgerontology.oxfordjournals.org/content/early/2012/10/09/geronb.gbs089.full> accessed on 21 April 2020.

Buckner L and Yeandle S, ‘Valuing Carers 2015: The rising value of carers’ support’ (Carers UK, 2015) <www.carersuk.org/for-professionals/policy/policy-library/valuing-carers-2015> accessed 21 April 2020.

Bullmore H and Lawton-Smith S, Mental Health Foundation, ‘Personalising social care for people living with dementia’ (2012) Elder Law Journal 97.

Burns F, ‘Protecting elders: Regulating intergenerationally transmitted debt in Australia’ (2005) 28 International Journal of Law and Psychiatry 300.

Burns F R, ‘The elderly and undue influence inter vivos’ (2003) 23 Legal Studies 251.

Burns F, ‘Undue Influence Inter Vivos And The Elderly’ (2002) 26(3) Melbourne University Law Review 499.

Burridge S J, ‘A Metric Measurement of the Chancellor’s Foot’ (1982) 41 (2) Cambridge Law Journal 290.

Callahan J J, ‘Elder Abuse: Some Questions for Policymakers’ (1988) 28(4) The Gerontological Society of America 453.

Carers UK, ‘Caring and Family Finances Inquiry: UK Report’ (2014) 6 <http://www.carersuk.org/for-professionals/policy/policy-library/caring-family-finances-inquiry> accessed 21 April 2020.

Carers UK, ‘Direct Payments’ <https://www.carersuk.org/help-and-advice/practical-support/getting-care-and-support/direct-payments#sec6> accessed 22 April 2020.

Carrick D, ABC Radio National, ‘Law Report: Elderly People and the Law’ (2003) <http://www.abc.net.au/radionational/programs/lawreport/elderly-people-and-the-law/3545598#transcript> accessed 22 April 2020.

Carter J W, *Carter on Contract* (LexisNexis, 2001).

Chambers R, *Resulting Trusts* (Oxford: Clarendon 1997) 31.

Chen-Wishart M, *Contract Law (*6th edn, Oxford University Press 2018).

Chen-Wishart M, *Contract Law* (5th edn, 2012).

Chitty J, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015).

Chitty J, *Chitty on Contracts*, vol 2 (32nd edn, Sweet & Maxwell 2015).

City of London, ‘Assessment: Financial crime against vulnerable adults’ (Social Care Institute for Excellence, 2011).

Clements L, ‘Individual Budgets and Irrational Exuberance’ (2008) 11 Community Care Law Review 413.

Cockburn T, ‘Equitable relief to enforce family agreements’ (2008) 86 Precedent 41.

Cockburn T and Hamilton B, ‘Equitable remedies for elder financial abuse in inter vivos transactions’ (2011) 31(2) The Queensland Lawyer 1.

Commonwealth of Australia, Official Committee Hansard, ‘House of Representatives Standing Committee on Legal and Constitutional Affairs’ (23 March 2007) Canberra

<https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10091/toc_pdf/5349-2.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10091/0000%22> accessed 22 April 2020.

Commonwealth of Australia, Official Committee Hansard, 'House of Representatives Standing Committee on Legal and Constitutional Affairs' (16 July 2007) Brisbane 4 <https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/10368/toc_pdf/5569-1.pdf;fileType=application%2Fpdf#search=%22committees/commrep/10368/0000%22> accessed 21 April 2020.

Crosby G, Clark A, Hayes R, Jones K and Lievesley N, 'The Financial Abuse of Older People: A review of the literature carried out by the Centre for Policy on Ageing on behalf of Help the Aged' (Help The Aged, 2007) <http://www.cpa.org.uk/information/reviews/financialabuse240408%5B1%5D.pdf> accessed 22 April 2020.

Darzins P, Lowndes G, Wainer J, Owada K and Mihaljic T, *Financial Abuse of Elders: A Review of the Evidence* (Melbourne, Monash University 2009) <https://www.statetrustees.com.au/wp-content/uploads/2015/05/Financial-elder-abuse-report-1-review-of-evidence.pdf> accessed 22 April 2020.

de Groot J, *Wills, Probate & Administration Practice (Queensland)* (Release 19).

De Vaus D, 'Children's Responsibilities to Elderly Parents' (1996) 45 Family Matters, Australian Institute of Family Studies <https://aifs.gov.au/sites/default/files/fm45dd.pdf> accessed 21 April 2020.

Deloitte Access Economic, 'The economic value of informal care in Australia in 2015' (Carers Australia, 2015) <http://www.carersaustralia.com.au/storage/Access%20Economics%20Report.pdf> accessed 21 April 2020.

Dementia Australia, 'Dementia statistics' (2020) <https://www.dementia.org.au/statistics> accessed 21 April 2020.

Doron I and Gal I, 'The Emergence of Legal Prevention in Old Age: Findings from an Israeli Exploratory Study' (2006) 21 Journal of Cross Cultural Gerontology 41.

Doron I and Soden A M, *Beyond Elder Law: New Directions in Law and Aging* (Springer-Verlag Berlin Heidelberg 2012).

Duncan S, Phillips M, Roseneil S, Carter J and Stoilova M, 'Living Apart Together: uncoupling intimacy and co-residence' <https://www.natcen.ac.uk/media/28546/living-apart-together.pdf> accessed on 21 April 2020.

Emir A, *Selwyn's Law of Employment* (17th edn, Oxford University Press 2012).

Explanatory Memorandum to the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, <http://www.legislation.gov.uk/uksi/2009/1887/pdfs/uksiem_20091887_en.pdf> accessed 22 April 2020.

Ferguson L, 'The Parental Support Obligation' contribution to Nicholas Bala, Martha Shaffer, Lucinda Ferguson, 'Family Law for the Older Canadian' in Ann Soden (ed), *Advising the Older Client* (Toronto, Ont.: Butterworths 2005) 1.

Field S, 'Issues Facing Older Australians: Legal, Financial and Societal' (2005) 1 Journal of International Aging Law and Policy 95.

Ford & Lee, *Principles of the Law of Trusts* (Looseleaf, 3rd edn, Law Book Co 1995).

Freeman M, 'Contracting in the Haven: Balfour v Balfour Revisited' in R Halson (ed), Exploring the Boundaries of Contract (Dartmouth 1996) 68.

Fredman S and Spencer S (eds.), *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart Publishing 2003).

Furmston M, Mik E and Tolhurst GJ, 'Formation of Contracts' in Michael Furmston (ed). *Common Law Series: The Law of Contract* (5th ed, LexisNexis 2015).

Glendinning C, 'Increasing Choice and Control for Older and Disabled People: A Critical Review of New Developments in England' (2008) 42(5) Social Policy and Administration 451.

Green Taylor Partners, 'Elder Abuse – Can you Recognise the Signs?' (2017) <https://greentaylor.com.au/blog/elder-abuse-can-recognise-signs/> accessed 22 April 2020, citing the definition of the Elder Abuse Prevention Unit.

Grootegoed E, Knijn T and Da Roit B, 'Relatives as paid care-givers: how family carers experience payments for care' (2010) 30(3) Ageing and Society 467.

Grubb A and Furmston M (eds), Butterworths Common Law Series: *The Law of Contract* (4th edn, LexisNexis 2010).

Hall M, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 Reform 29.

Hall M I, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

Halsbury's Laws of England, 'Gifts made between living persons: Introduction' Forms of gifts inter vivos in *Gifts* (Volume 52, 2014).

Halsbury's Laws of England, 'Gifts made in contemplation of death' Gifts made in contemplation of death in *Gifts* (Volume 52, 2014).

Hamilton B, 'Be Nice to your Parents or Else!' (2006) 8(4) Elder Law Review <http://www.austlii.edu.au/au/journals/ElderLawRw/2006/8.html> accessed 22 April 2020.

Hamilton B J and Cockburn T L C, 'Equity in Australian estate litigation' (2014) 20(5) Trusts & Trustees 437.

Hamilton B and Cockburn T, 'Sale of property gifted under a will by an attorney acting under an enduring power of attorney: Does the gift adeem and what is the attorney's duty?' (2011) 13(9) Retirement and Estate Planning Bulletin 417.

Hansard, Guardianship and Administration and Other Legislation Amendment Bill (26 March 2019) <https://www.parliament.qld.gov.au/documents/hansard/2019/2019_03_26_WEEKLY.pdf> accessed 19 April 2020.

Haskey J and Lewis J, 'Living-apart-together in Britain: context and meaning' (2006) 2(1) International Journal of Law in Context 37.

Herd B, 'Sample Family Agreement' (Senior Rights Victoria, 2013) <http://www.seniorsrights.org.au/assetsforcare/sample-family-agreement/> accessed on 22 April 2020.

Herd B, 'The family agreement – a collision between love and the law?' (2002b) 81 Reform 23.

Herd B, 'The Family Agreement: Legal good sense or social bad taste for the aged?' (2002a) 27(2) Alternative Law Journal 72.

Herring J, *Caring and the Law* (Hart Publishing 2013).

Herring J, *Family Law* (7th edn, Pearson 2015).

Herring J, *Family Law* (6th edn, Pearson 2013).

Herring J, *Older People in Law and Society* (OUP 2009).

Herring J, 'The Disability Critique of Care' (2014) 8 Elder Law Review 1.

Herring J, 'Together Forever? The Rights and Responsibilities of Adult Children and their Parents' in Jo Bridgeman, Heather Keating and Craig Lind, Responsibility (eds), *Law and the Family* (Ashgate Publishing Group 2008).

Herring J, 'Will-substitutes and the claims of family members and carers' 297 in Braun, A. and Rothel, A. (ed.) *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart, Oxford 2016).

Herring J, Probert R and Gilmore S, *Great Debates in Family Law* (2nd edn, Palgrave Macmillan 2015).

Heydon J D, *Heydon on Contract* (Law Book Co 2019).

Holzhausen E, 'News: Without carers, health and social systems would collapse' (NHS England 2015) <http://www.england.nhs.uk/2015/10/01/emily-holzhausen/> accessed 21 April 2020.

House of Commons Health Committee, 'Elder Abuse: Second Report of Session 2003-04 Volume 1' (2004) <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhealth/111/111.pdf> accessed 22 April 2020.

House of Lords, Select Committee on Public Service and Demographic Change, Report of Session 2012 – 13, 'Ready for Ageing?' (2013) <http://www.cpahq.org/cpahq/cpadocs/UK%20Parliament%20HOL%20Ready%20for%20the%20Ageing.pdf> accessed 21 April 2020.

House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Media Release: Inquiry into Older People and the Law' (2006) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/media.htm> accessed 21 April 2020.

Houtte J V and Breda J, 'Maintenance of the Aged by Their Adult Children: The Family as a Residual Agency in the Solution of Poverty in Belgium' (1978) 12(4) Law & Society Review 645.

Humphries R, Thorlby R, Holder H, Hall P, and Charles A, 'Social care for older people: home truths' (The King's Fund and Nuffield Trust, London 2016) <https://www.nuffieldtrust.org.uk/research/social-care-for-older-people-home-truths> accessed 22 April 2020.

Izuhara M, 'Negotiating Family Support? The 'Generational Contract' between long-term Care and Inheritance' (2004) 33(4) Journal of Social Policy 649.

Izuhara M, 'Residential Property, Cultural Practices and the 'Generational Contract' in England and Japan' (2005) 29(2) International Journal of Urban and Regional Research 327.

Johnson S, 'Elder Abuse: The Need for Law Reform Enduring Powers of Attorney & Family Agreements' (2010).

Jones G, *Specific Performance of a Contract of Services?* The Cambridge Law Journal Vol. 46 No 1 (March 1987).

Kahn-Freund, ‘Inconsistencies and Injustices in the Law of Husband and Wife’ (1952) 15 MLR 133.

Keyes M and Burns K, ‘Contract and the Family: Whither Intention?’ (2002) 26 Melbourne University Law Review 577.

Kline T A, ‘A Rational Role for Filial Responsibility Laws in Modern Society?’ (1992) 26(3) Family Law Quarterly 195.

Knowles E and Knowler J, ‘The Presumption of Undue Influence: Elderly Parents, their Adult Children and Transactions Between Them’ (2014) 22 Restitution Law Review 35.

Kulik C, Ryan S, Harper S and George G, ‘From the Editors: Aging Populations and Management’ (2014) 57(4) Academy of Management Journal 929.

Kurrle S, ‘Elder Abuse’ (2004) 33(1) Australian Family Physician 807.

Kyle L, ‘Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People’ (2013) 7(4) Elder Law Review 1.

Lacey W, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 Sydney Law Review 99.

Langan J and Means R, ‘Financial Management and Elderly People with Dementia in the U.K.: As Much a Question of Confusion as Abuse?’ (1996) 16(3) Ageing & Society 287.

Leeson G, ‘Increasing Longevity and the New Demography of Death’ (2014) International Journal of Population Research.

Lewis R, *Elder Law in Australia* (LexisNexis Butterworths 2004) 260.

Mable, Formerly Better Caring, NDIS cap rates: what all disability support workers should know (9 December 2019) <https://blog.mable.com.au/blog/care-workers/ndis-cap-rates-support-workers/> accessed on 29 March 2020.

Macdonald M and Lang A, ‘Applying Risk Society Theory to findings of a scoping review on caregiver safety’ (2014) 22(2) Health and Social Care in the Community 124.

Manthorpe J, Moriarty J, Cornes M, 'Keeping it in the family? People with learning disabilities and families employing their own care and support workers: Findings from a scoping review of the literature' (2011) 15(3) J Intellect Disabil 195.

McCawley A, Tilse C, Wilson J, Rosenman L and Setterlund D, 'Access to assets: Older people with impaired capacity and financial abuse' (2006) 8(1) Journal of Adult Protection 20.

McDowell B, 'Contracts in the Family' (1965) 45 Boston University Law Review 43.

McGhee J, *Snell's Equity* (33rd edn Sweet & Maxwell 2015).

McKendrick E, *Contract Law: Text, Cases, and Materials* (18th edn, Oxford University Press 2018).

Milligan C and Passey D, 'Ageing and the Use of the Internet: Current Engagement and Future Needs' (Nominet Trust, 2011) <https://pdfs.semanticscholar.org/442a/944b986752993a7063ba52e092146c5bb09f.pdf?_ga=2.69281808.140943205.1587733876-2079421668.1587733876> accessed 22 April 2020.

Ministry of Health, 'Changes to Funded Family Care funded by Disability Support Services' 14 <https://www.health.govt.nz/system/files/documents/pages/easy-read-translation-dss-funded-family-care-16-january2020.pdf> accessed 29 March 2020.

Monro R, 'Family agreements all with the best of intentions' (2002) 27(2) Alternative Law Journal 68.

National Aged Care Alliance, 'Aged Care Reform Information Sheet: Dementia and Aged Care Reform' <https://www.cotasa.org.au/cms_resources/Documents/dementia_aged_care_reform.pdf> accessed on 21 April 2020.

New Zealand Government, 'Government restores fairness for family carers' (7 July 2019) <https://www.beehive.govt.nz/release/government-restores-fairness-family-carers> accessed 29 March 2020.

NDIS, ‘Module 2 — Self-directing my NDIS plan’ (2016) [1.1] <http://www.hdn.org.au/wp-content/uploads/2017/07/Self-managing-plan-module.pdf> accessed 22 April 2020.

NDIS Price Guide 2019-20 at NDIS, Price guides and pricing (30 March 2020) <https://www.ndis.gov.au/providers/price-guides-and-pricing> accessed on 30 March 2020.

NDIS, ‘The NDIS for people aged 65 and over’ <http://ndis.nsw.gov.au/ndis-resources/fact-sheets/fact-sheet-the-ndis-for-people-aged-65-and-over/> accessed 22 April 2020.

Offer J, ‘Dead Theorists and Older People: Spencer, Idealist Social Thought and Divergent Prescriptions For Care’ (2004) 38(5) Sociology 891.

Office for National Statistics, ‘National life tables, UK: 2016 to 2018’ (2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/bulletins/nationallifetablesunitedkingdom/2016to2018> accessed 21 April 2020.

Office for National Statistics, ‘Overview of the UK population: July 2017’ (2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/july2017> accessed 21 April 2020.

Office for National Statistics, ‘The number of people age 60 and over getting divorced has risen since the 1990s’ (2013) <http://www.ons.gov.uk/ons/rel/family-demography/older-people-divorcing/2011/sty-divorce.html> accessed on 21 April 2020.

Office of the Public Advocate (Qld) and Queensland Law Society, ‘Elder Abuse: How well does the law in Queensland cope?’ (2010) 8 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/54691/elder-abuse_issues-paper.pdf> accessed 21 April 2020.

Paterson J, Robertson A and Duke A, *Principles of Contract Law* (3rd edn, Thomson Reuters).

Pearson P, 'Direct Payments: Policy development across the UK (second draft)' (2004) <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/2011/10/draft-policy-development-paper.pdf> accessed 22 April 2020.

Peel E and Treitel G H, *The Law of Contract* (14th edn, Sweet & Maxwell 2015).

Pezzin L E, Pollak R A and Schone B S, 'Efficiency in Family Bargaining: Living Arrangements and Caregiving Decisions of Adult Children and Disabled Elderly Parents' (2007) 53(1) CESifo Economic Studies 69.

Pickard L, 'A growing care gap? The supply of unpaid care for older people by their adult children in England to 2032' (2015) 35(1) Ageing and Society 96.

Plant N, 'Financial Abuse' in Christopher Whitehouse and others (eds), *Finance and Law for the Older Client* (LexisNexis 2015).

Pollock Principles of Contract (1st edn, 1876); Anson's Law of Contract (1st edn, 1879).

Postigo J M L and Honrubia R L, 'The Co-Residence of Elderly People with Their Children and Grandchildren' (2010) 36(4) Educational Gerontology 330.

Preece A A, Lee's Manual of Queensland Succession Law (7th edn) Thomson Reuters.

Preece A A, 'The Impact of the Law of Inheritance on the Family', A Paper delivered at the 7th Australian Institute of Family Studies Conference Sydney Convention and Exhibition Centre, Darling Harbour Sydney, 24 - 26 July 2000.

QCAT, Queensland Civil and Administrative Tribunal, 'Frequently asked questions' <https://www.qcat.qld.gov.au/matter-types/administration-for-adults-matters/appointed-administrator-section/FAQs> accessed on 29 March 2020.

QCAT, Queensland Civil and Administrative Tribunal, GAA Bill 2018 <https://www.qcat.qld.gov.au/matter-types/gaa-bill-2018> accessed on 29 March 2020.

Queensland Government, 'Power of Attorney' (2017) <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/power-of-attorney/> accessed on 22 April 2020.

Queensland Government, 'Power of Attorney and Advance Health Directive' (2020) <https://publications.qld.gov.au/dataset/power-of-attorney-and-advance-health-directive> accessed 22 April 2020.

Queensland Law Reform Commission, A Review of the *Trusts Act 1973* (Qld): Discussion Paper (December 2012) <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0004/372028/WP70.pdf> accessed on 29 March 2020.

Queensland Law Reform Commission, Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General, Report No 65 (2009) vol 3.

Reece H, 'Leaping Without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014).

Reimondos A, Evans A and Gray E, 'Living-apart-together (LAT) relationships in Australia' (2011) 87 Family Matters <https://aifs.gov.au/publications/family-matters/issue-87/living-apart-together-lat-relationships-australia> accessed on 21 April 2020.

Ross A E, 'Taking Care of Our Caretakers: Using filial responsibility laws to support the elderly beyond the government's assistance' (2008) 16 Elder Law Journal 167.

Sabatino C P, 'Death in the Legislature: Inventing Legal Tools for Autonomy' (1992) 19(2) New York University Review of Law and Social Change 309.

Sanders L, 'Financial Abuse of Older People: A Queensland Perspective' (Elder Abuse Prevention Unit, 2005) <http://www.eapu.com.au/uploads/research_resources/Financial_Abuse_QLD_SEP_2005-EAPU.pdf> accessed 21 April 2020.

Secretary of State for Health, 'Government Response to the House of Lords Select Committee on Public Service and Demographic Change Report of Session 2012-13: 'Ready for Ageing?'' (2013) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236036/8677.pdf> accessed on 21 April 2020.

Seddon N C and Ellinghause M P, *Cheshire and Fifoot's Law of Contract* (9th edn) LexisNexis Butterworths.

Sloan B, *Informal Carers and Private Law* (Hart Publishing, 2013).

Solkoff S, 'Personal Service Contracts for the Elderly: Revisited' (2004) <https://www.elderlawanswers.com/Documents/SolkoffArticle.pdf> accessed 22 April 2020; Margaret Isabel Hall, 'Care for Life: Private care agreements between older adults and friends or family members' (2003) 2 Elder Law Review 1.

Somes T and Webb E, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33 Law Context: A Socio-Legal Journal 24.

Stephen Hedley, 'Keeping Contract in its Place—Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 5(3) Oxford Journal of Legal Studies 391.

Stewart A et al, *Creighton & Stewart's Labour Law* (6th edn, The Federation Press 2016).

Stoljar S, 'Enforcing Benevolent Promises' (1989) 12 Sydney Law Review 17.

Stuifbergen M C, Van Delden J J M, 'Filial obligations to elderly parents: a duty to care?' (2011) 14 Medicine, Health Care and Philosophy 63.

Tate J C, 'Caregiving and the Case for Testamentary Freedom' (2008) 42 University of California, Davis Law Review 129.

The Health Foundation, 'Improvement in Practice: The Personal Touch, The Dutch experience of personal health budges (2011) <https://www.health.org.uk/sites/health/files/ThePersonalTouchDutchExperienceOfPersonalHealthBudgets.pdf> accessed on 22 April 2020.

The Parliament of the Commonwealth of Australia, Department of the Parliamentary Library, 'International Year of the Family 1994'(1993) <http://www.aph.gov.au/binaries/library/pubs/bp/1993/93bp16.pdf> accessed 21 April 2020.

The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law' (2007) <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm> accessed 21 April 2020.

The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Older People and the Law Submissions' <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/subs.htm> accessed 21 April 2020.

The United Nations, 'The Universal Declaration of Human Rights', <https://www.un.org/en/universal-declaration-human-rights/> accessed 21 April 2020.

Tilse C, Setterlund D, Wilson J and Rosenman L, 'Minding the money: a growing responsibility for informal carers' (2005) 25(2) Ageing and Society 215.

Tilse C, Wilson J, White B, Rosenman L and Feeney R, 'Review of Public Trustee Files - Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia, (2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808922> accessed 22 April 2020.

Ting G and Woo J, 'Elder care: is legislation of family responsibility the solution?' (2009) 4 Asian Journal of Gerontology & Geriatrics 72.

Treitel G H, *Remedies for Breach of Contract: A Comparative Account* (1998) (Clarendon Press, Oxford).

Ungerson C, 'Care, work and feeling' (2005) 53 The Sociological Review 188.

Ungerson C, 'Social Politics and the Commodification of Care' (1997) 4 (3) Social Politics 362.

Ungerson C, 'Whose empowerment and independence? A cross-national perspective on "cash for care" schemes' (2004) 24 Ageing & Society 189.

United Nations Digital Library, 'International Year of the Family: resolution (1990) <https://digitallibrary.un.org/record/82451?ln=en> accessed 21 April 2020.

United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Ageing 2015 (2015) <https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf> accessed 21 April 2020.

United Nations, Department of Economic and Social Affairs, Population Division, 'World Population Prospects: The 2017 Revision' (2017) <https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf> accessed 21 April 2020.

United Nations, 'Economic and Social Affairs: World Population Ageing' (United Nations, New York, 2013) <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf> accessed 21 April 2020.

United Nations, 'Experiences Concerning Population and Development Strategies and Programmes' (1994) UN. Doc. A/CONF.171/4, 1994 <https://www.unfpa.org/sites/default/files/resource-pdf/A_CONF.171_4_Exp._Concerning_Pop._Dev.pdf> accessed 21 April 2020.

United Nations, 'Political Declaration and Madrid International Plan of Action on Ageing: Second World Assembly on Ageing, Madrid, Spain 8 – 12 April 2002' (United Nations, New York, 2002) <http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf> accessed 22 April 2020.

WHO/INPEA, 'Missing voices: views of older persons on elder abuse' (Geneva, WHO, 2002) <http://apps.who.int/iris/bitstream/10665/67371/1/WHO_NMH_VIP_02.1.pdf> accessed 22 April 2020.

Wittenberg R, Hu B, Barraza-Araiza L, Rehill A, Care Policy and Evaluation Centre, 'Projections of older people with dementia and costs of dementia care in the United Kingdom, 2019-2040' (2019) 3 <https://www.alzheimers.org.uk/sites/default/files/2019-11/cpec_report_november_2019.pdf> accessed on 21 April 2020.

World Health Organization (WHO), 'A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main

Report' (2008) 6 <http://www.who.int/ageing/publications/ELDER_DocAugust08.pdf> accessed 22 April 2020.

Wuth N, 'Enduring Powers of Attorney with Limited Remedies – It's Time to Face the Facts!' [2013] 7(3) Elder Law Review 1.