



By Tina Cockburn

# Equitable relief to enforce family agreements

'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.'<sup>1</sup> >>



**E**lder law is a growing area of legal practice, due to the increasing proportion of Australian society made up of older people.<sup>2</sup> In September 2007, the report of the inquiry into Older People and the Law<sup>3</sup> was tabled in parliament. It covered a broad range of legal issues affecting older people, such as fraud and financial abuse (chapter 2), substitute decision-making (chapter 3), family agreements (chapter 4), barriers to older people accessing legal services (chapter 5), discrimination (chapter 6) and retirement villages (chapter 7). This article contains a brief overview of the legal issues that arise in the context of family agreements and the circumstances in which equitable doctrines and remedies may provide relief to vulnerable older people in the event of family disagreements.

### FAMILY AGREEMENTS

Family agreements have been described as follows:

'Family agreements generally involve an arrangement between an older person and another party or parties (usually family members or carers) whereby the older person provides a benefit 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.'<sup>4</sup>

In its submission to the inquiry into Older People and the Law, the Human Rights and Equal Opportunity Commission (HREOC) quoted a number of factors that have combined to give rise to family agreements. These are:

- a general aversion to 'institutional' residential aged care;
- limited access to residential aged-care places;
- a preference by older people and their families to remain in the community;
- difficulties in 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;
- a desire by older people to arrange their assets and incomes so as to maintain eligibility for social security benefits such as the age pension; 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 care for parents.<sup>5</sup>

### ENFORCING FAMILY AGREEMENTS

Many people have a psychological barrier to formalising care arrangements, and so many family agreements are informal and, thus, difficult to enforce:

'in general, family agreements are often nothing more than a vague and very general promise to take care of the other person for the rest of their life which have been made either verbally or in writing'.<sup>6</sup>

Accordingly, a contractual remedy may not be available

unless intention to create a legal relationship and other requirements for valid contract are present.<sup>7</sup> Careful attention should therefore be given to proper documentation:

'the documenting of these arrangements by what we call a family agreement can, firstly, serve the purpose of both forcing the parties to confront the "what ifs" of family caring, secondly, clearly set out the rights and obligations of the parties and, finally, enable the parent in particular a clear exit strategy'.<sup>8</sup>

### EQUITABLE RELIEF TO ENFORCE FAMILY AGREEMENTS FOLLOWING FAMILY DISAGREEMENTS

In the absence of legislative intervention, equitable doctrines and remedies play an important role in providing relief where a parent contributes money or property to an adult child – on the understanding that s/he will be cared for in old age – but the family relationship breaks down, the adult child refuses to acknowledge the parent's contribution and there is no clear agreement as to the legal consequences in that event. In such circumstances, equity may intervene and provide relief by recognising the contributions made by the elderly parent and imposing a resulting or constructive trust over the property where appropriate, or awarding equitable compensation secured by an equitable lien over the property.<sup>9</sup>

Generally, where a person transfers his or her property to another without consideration, or pays the purchase price to acquire a property on behalf of another person, a presumption of resulting trust arises for the benefit of the person who transferred the property or provided the purchase money.<sup>10</sup> However, when the transaction involves a parent transferring money or property to his or her child, a presumption of advancement arises whereby equity presumes that the parent's intention was to benefit his or her child, and not to retain a beneficial interest.<sup>11</sup> Presumptions may be rebutted by evidence of contrary intention; therefore, in many family agreement cases it will be necessary to prove affirmatively that the money or property was not advanced as a gift.

Alternatively, a constructive trust may be imposed, irrespective of the parties' intentions,<sup>12</sup> in cases where there is a dispute over the beneficial entitlement to property, to recognise both financial and non-financial contributions that have been made pursuant to some specific relationship or endeavour (failed joint endeavour cases).<sup>13</sup> In such cases, equity will intervene to prevent a party from asserting or retaining the benefit of an interest in property to the extent that it would be unconscionable to do so. In *Muschinski v Dodds*,<sup>14</sup> Deane J observed that:

'where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it ... equity will not permit that other party to

In the absence of a legally enforceable agreement, equitable doctrines and remedies may provide relief to vulnerable older people following family disagreements.

assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.<sup>15</sup> Three recent Queensland decisions, *Sweetenham v Wild*,<sup>16</sup> *Simpson v Simpson*,<sup>17</sup> and *Field v Loh*,<sup>18</sup> provide excellent illustrations of how equitable doctrines and remedies can resolve the issues that arise in the event of the breakdown of a family relationship where older people have made contributions of money or property under a family agreement, and the interest of the older person is denied following a family disagreement.

#### ***Sweetenham v Wild***

In *Sweetenham v Wild*, Len, an 82-year-old widower, sold his house in Victoria and moved to Queensland to be with his daughter, Rose. Len told Rose that he wanted to buy her a house and, in return, he would live in a granny flat on the property and she would care for him. Len bought a house at Nerang, paid \$235,000 cash and borrowed \$55,000. Rose was to make the loan repayments. In June 2000 Rose and her family moved into the house and Len moved into the granny flat. In June 2002, Len transferred the Nerang house to Rose, who borrowed funds to pay out the mortgage. The transfer was registered in January 2003. In February 2003, there was a serious family disagreement, which resulted in a complete breakdown of the family relationship. Len moved out. In October 2004, Len borrowed \$105,000, which was secured against his son's house, to buy a unit in a retirement village to live in. Len then sought a declaration that he held an equitable interest in the Nerang house.

The trial judge held that Len had an equitable interest in the property, which was limited to an entitlement to equitable compensation (secured by an equitable charge), and calculated on the basis of the cost of residing in similar accommodation for the rest of his life (assessed at \$45,000).

On appeal, it was held that there was an agreement between Len and Rose that he would be entitled to reside in the granny flat and to receive care and support from Rose, in exchange for providing the property.<sup>19</sup> This joint endeavour failed, and it was considered to be unconscionable for Rose to deny Len's beneficial interest in the property. The court ordered that a constructive trust should be imposed to reflect Len's proportion of the capital contribution to the property. However, as he had claimed only the return of

his original contribution plus interest since the breakdown of the relationship, the award was limited to his claim of \$213,760.<sup>20</sup>

#### ***Simpson v Simpson***

In *Simpson v Simpson*, Barbara and John, the mother and adoptive father of Antoyne (the male defendant), decided to sell their house in New Zealand and move to the Gold Coast to be near Antoyne and their other children and grandchildren. They moved in with Antoyne and his wife Caryn (the female defendant) and agreed to share household expenses. Barbara and John paid \$170,000 to Antoyne on the understanding that the money was to be used to build an extension and improvement on Antoyne's house to provide a place for them to live on a permanent basis. Antoyne took the payment to be a gift and used most of the money to purchase and improve a boat. When the relationship between the parties broke down, Barbara and John moved out, and successfully claimed recovery of the \$170,000 plus interest. It was held that the payment was not a gift, and the defendants were estopped from resiling from their agreement to grant the plaintiffs an interest in their house. As the minimum equity to do justice in the case could be satisfied by an order for monetary compensation, it was not necessary to award a constructive trust or equitable lien in the property.

#### ***Field v Loh***

In *Field v Loh*, Mrs Field (the plaintiff), was a widow aged 76, who had some difficulties understanding English (her native language was Cantonese), and was legally blind. She had recently been asked to leave her daughter's house, and started living with Mr and Mrs Loh (the defendants) in May 2005. Mrs Field met the Lohs through their common attendance at the World Harvest Church at Bald Hills. In July 2005, Mrs Field paid the Lohs \$184,000 to assist them to buy a house. Mrs Field continued to live with the Lohs until mid-October 2005, when she was asked to leave by Mr Loh. She then moved back in with her own children. Mrs Field sought a declaration that a resulting or constructive trust arose in her favour over the land to the extent of her contributions plus interest at 10 per cent for two-and-a-quarter years, and an order for the appointment of a trustee for sale. In the alternative, she sought equitable compensation.

Douglas J found that the payment was not a gift, but was given in the expectation that Mrs Field would continue to live with the defendants indefinitely, and receive their support and the 'comfort of living in a family environment' as she aged and approached death.<sup>21</sup> This was so even though she had signed a document that purported to be a statutory declaration, to the effect that the money was a 'non-refundable gift' (for the purposes of a finance application).<sup>22</sup> In these circumstances, it would be unconscionable for the Lohs to assert and retain a beneficial interest in the property and deny Mrs Field's entitlement.<sup>23</sup> Further, given that the money paid by Mrs Field could be characterised as a direct contribution to the purchase price of the property, >>



a presumption of a resulting trust arose proportionate to that contribution.<sup>24</sup> In any event, even if the money could be described as a gift, the evidence indicating that Mrs Field was under a special disadvantage (her age, defective vision, poor language skills and emotional dependence on the Lohs arising out of her need for accommodation) and had been exploited (in that the defendants had knowingly taken advantage of her) made it unconscionable for the Lohs to rely on the statutory declaration and take the money as a gift in the absence of independent advice.<sup>25</sup>

Further, it was noted that although the doctrines of unconscionable bargains and undue influence are closely related, they are distinct.<sup>26</sup> In this case, the facts did not support a finding of undue influence. There was no special relationship of influence as is usually required to establish such a finding (the Lohs were merely fellow parishioners and not, for example, Mrs Field's spiritual adviser), nor was there any evidence that her will had been overborne.<sup>27</sup> In the circumstances, Douglas J considered that the appropriate relief was a declaration that a constructive trust existed subject to an offset in respect of the accommodation costs of the plaintiff with the defendants.<sup>28</sup> In addition, under s38 *Property Law Act (Queensland) 1974*, a trustee for sale was appointed.<sup>29</sup>

### RECOMMENDATIONS OF THE OLDER PEOPLE AND THE LAW REPORT

The Older People and the Law Report made the following recommendations in relation to family agreements:

- Recommendation 30 (para 4.45): investigate legislation to regulate family agreements.
- Recommendation 31 (para 4.47): Australian government to provide family dispute resolution services for family agreement disputants.
- Recommendation 32 (para 4.52): Family Law Council or other appropriate body to investigate and develop guidelines, model provisions regarding advice on formalising family agreements, taxation and welfare implications, relevant legislation.
- Recommendation 33 (para 4.61): Family Law Council or other appropriate body to investigate and develop educational material regarding family agreements.
- Recommendation 34 (para 4.69): the Australian Institute of Family Studies to investigate the desirability and feasibility of implementing legislation in Australia compelling the performance of filial obligations.<sup>30</sup>

### CONCLUSION

In its submission to the inquiry into Older People and the Law, the Victorian government said:

'the major problems stem from lack of education and awareness of legal rights, reluctance to take action when rights are affected, and unwillingness to place pressure on family relationships by clearly setting out the terms of care and property agreements in advance'.<sup>31</sup>

For the future, there is a need to focus on education so as to improve access to justice, promote the early resolution of disputes concerning family agreements through mediation,

and give careful consideration as to whether it is necessary to legislate. For now, if the relationship between parties to family agreements changes, and shared accommodation arrangements become intolerable, and there is no formal or legally enforceable agreement, the equitable doctrines of undue influence, unconscionable bargains, resulting and constructive trusts, and particularly the failed joint endeavour cases, may provide appropriate relief for aggrieved older people following family disagreements. ■

**Notes:** **1** *Bennett v Horgan*, unreported, Supreme Court of New South Wales, Bryson J, No. 4056 of 1991, 3 June 1994.  
**2** The population of Australia aged 65 and over is expected to increase from 12% in 1998 to 26% in 2051, with the proportion aged over 85 almost quadrupling: Australian Bureau of Statistics, 2000. See, generally, the University of Western Sydney Centre for Elder Law, <http://www.uws.edu.au/law/elderlaw/>; and R Lewis, *Elder Law in Australia*, Lexis Nexis, 2004. **3** *Older people and the Law*, Report of House of Representatives Standing Committee on Legal and Constitutional Affairs, <http://www.aph.gov.au/house/committee/LACA/olderpeople/report/fullreport.pdf> (*Older People and the Law Report*). **4** *Ibid.*, para 4.2. **5** *Ibid.*, para [4.4] HREOC, *Submission No. 92*, pp34-5. **6** *Ibid.*, para 4.6. **7** *Ibid.*, para 4.15. **8** *Ibid.*, para 4.41, Brian Herd, evidence. **9** See, generally, Dal Pont and Cockburn, *Equity and Trusts in Principle*, Thomson LawBook Co, 2005, chapter 36; Dal Pont and Chalmers, *Equity and Trusts in Australia*, 4th ed, Thomson LawBook Co, 2007, chapter 38. **10** *Calverley v Green* (1984) 155 CLR 242. **11** *Nelson v Nelson* (1994) 184 CLR 538. **12** *Allen v Snyder* [1977] 2 NSWLR 685 at 692, 699. **13** *Muschinski v Dodds* (1985) 160 CLR 583 per Deane J at 613; *Baumgartner v Baumgartner* (1987) 164 CLR 137 per Mason Wilson and Deane JJ at 148. **14** (1985) 160 CLR 583. **15** Above, note 13, at 620. **16** [2005] QCA 264; discussed in T Cockburn, 'Constructive Trust Recognising A Parent's Property Interest after the Family Relationship Breaks Down', (2005) 8(3) *Retirement and Estate Planning Bulletin*, 33. **17** [2006] QDC 83. **18** [2007] QSC 350. **19** *Sweetenham v Wild* at [42] per Atkinson J. **20** *Ibid.*, at [45]-[46]. **21** *Field v Loh*, above note 18, at [14]. **22** *Ibid.*, at [23]. **23** *Ibid.*, at [27]-[29] citing *Sweetenham v Wild* [2005] QCA 264 and *Muschinski v Dodds* (1985) 160 CLR 583; see also [32]; [35]. **24** *Field v Loh*, above note 18, at [35] citing *Calverley v Green* (1984) 155 CLR 242 at 246. **25** *Ibid.*, at [24]-[26], [31] citing *Louth v Diprose* (1992) 175 CLR 621 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. For an overview of the doctrine of unconscionable bargains, see Dal Pont and Cockburn, *Equity and Trusts in Principle*, Thomson LawBook Co, 2005, chapter 9; Dal Pont and Chalmers, *Equity and Trusts in Australia*, 4th ed, Thomson LawBook Co, 2007, chapter 9. **26** *Ibid.*, at [29], citing *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 per Deane J at 474-5. For an overview of the doctrine of undue influence, see Dal Pont and Cockburn, *Equity and Trusts in Principle*, Thomson LawBook Co, 2005, chapter 7; Dal Pont and Chalmers, *Equity and Trusts in Australia*, 4th ed, Thomson LawBook Co, 2007, chapter 7. **27** *Field v Loh*, above note 18, at [33]. **28** *Ibid.*, at [36]. **29** *Ibid.*, at [37]. **30** In Australia, unlike in some jurisdictions, such as California, there is no legislation that imposes legal duties on adult children to support their parents in certain circumstances, although it may be that criminal liability may arise in circumstances where an adult child has charge of an incapacitated parent, fails to provide necessities of life and this is shown to have adversely affected the parent's life or health (s285 *Criminal Code (Queensland) 1899*); discussed in the *Report of the Inquiry into Older People and the Law*, paras [4.62]-[4.66]. **31** Victorian government, *Submission Inquiry into Older People and the Law*, p3.

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