

# THE FAMILY AGREEMENT

## A COLLISION BETWEEN LOVE AND THE LAW?

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Love and the law, so it is said, do not make good bedfellows.

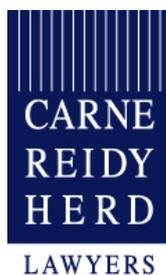
Documenting, in a written agreement, a loving, caring or supportive personal relationship, for example, is probably anathema to many Australians.

Australian Family Law however, is now challenging this cultural aversion by its recent acknowledgement of, and legislative support for, Financial Agreements between spouses in the form of Prenuptial agreements and, more particularly, Cohabitation Agreements, namely, arrangements regulating the financial relationships between perfectly happy spouses. Even in the area of defacto relationships, Queensland has also created a mirror regime of financial agreements.

This article is not about Family Law, however, but rather, the Law of Families.

It relates to the age old social duty of families caring for older or infirmed members within the family unit and:

- ◆ Whether we, as members of a family and as a community, can afford to continue to assign this issue to the subterranean ethos of uncompensated love and duty; and
- ◆ Whether it deserves to be recognised in the form of a formalised agreement that both addresses the contingencies of such care and adequately compensates those who provide the care; and
- ◆ Whether, in light of our demographic destiny, we really have any choice.



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## **The Genesis of the Family Agreement**

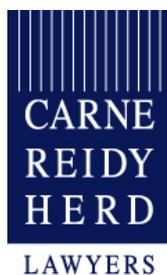
Until after the second world war, most families had no alternative but to make what ever arrangements were necessary to care for ageing parents or relatives with the resources available in the family. Moving in with an adult child and their family, for example, was a common solution.

In those days, life expectancy for older people was lower and female adult children were mostly traditional homemakers, not part of the fulltime workforce, and notionally ‘freed up’ for the duties of caring for elderly parents.

From the 1950’s on, led by the Church and Charitable sector, institutional care in ‘convalescent homes’, as they were then known, became more available as an option for care. In addition, as females started to return to the fulltime workforce, the ability of families to provide the caring role diminished which, in itself, encouraged the further development of aged care facilities.

In the new millennium, however, with our ageing demographics, limited available places in aged care facilities, our general distaste for the ‘homelike’ environment of institutional care, rationed community care packages and a Government encouraging people to stay at home as they age, new pressures are arising for families to retain the caring role within the family once again in circumstances where adult children may have to give up their job or their business to do so.

This is the genesis of the family agreement – the transformation of a cultural duty into a compensatable, contractual obligation of care.



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## What are Family Agreements?

Family Agreements have been described by various commentators as:

- Independent Care Agreements;
- Personal Services Contracts; and
- Lifetime Care Contracts.

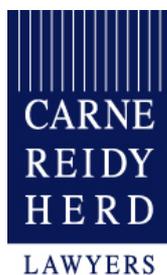
They are arrangements in which (usually) older people transfer property, or pay compensation to, someone in exchange for a promise of "care for life".

A Family Agreement is one form of such an arrangement where the older person and the carer are members of the same family, namely an elder parent and an adult child. The arrangement may involve, for example, the transfer of the elder's home to the adult child in exchange for care in the later years of the parent's life.

Some of us may have been exposed to a derivative of the Family Agreement in the not uncommon 'granny flat' arrangement, which even our Social Security legislation now recognises. Other mechanisms have included contracts to make a Will in which a person agrees to bequeath an asset or provide some other financial largesse to someone in recognition of services rendered during the person's life.

This paper, however, does not address those specific issues but rather the ubiquitous and little discussed practice of family caring involving members of a family providing care in return for compensation or a transfer of assets during a person's life.

For most of us perhaps, the thought of a care agreement with a family member is, at best, curious and at worst, spurious. Children are expected to look after their parents for free, aren't they and, if they're not prepared to, then they must be, by definition,



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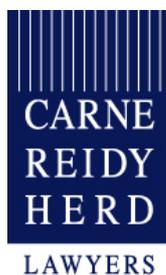
the obnoxious and ungrateful child who is not fit to do so. Caring for parents is a cultural duty, not a contractual obligation!

Today, however, the realities are that many adult children are highly leveraged, servicing significant personal debts, with little in savings and simply cannot afford to limit their working hours or even to give up their job to look after ageing parents without compensation, especially where they have their own children to raise. Even if they are eligible for social security to perform the task, such as the Carer's Payment or Allowance, this is invariably inadequate compensation especially where the adult child has to give up a career or jeopardise a successful business.

The inexorable trend for many families, over time, is that the parent/child relationship rotates, roles reverse and the child can become the carer and the parent, the dependent.

Added to this are the features of our contemporary ageing landscape which act as an incentive to retain the caring role within the family, including:

- Our general aversion to the 'institutional' care of aged care facilities, such as nursing homes and hostels;
- The lack of such facilities (where they become essential) or, at least, of any more sympathetic and empathetic alternatives;
- People are living longer and, as a result, living longer with disabilities;
- Our fixation in later life to preserve assets (e.g., the icon of the family home) for succeeding generations;
- Our consequent reluctance to dissipate assets (especially the family home) to pay any premium for assisted care, such as an Accommodation Bond in a hostel; and
- Our predilection for 'impoverishing' ourselves in order to obtain and maintain social security entitlements and to reduce the tax impact of ageing.



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Overlaying these mores is our understandable preference to be cared for by family rather than some unconnected, albeit well-intentioned, professional care provider whenever this becomes necessary.

It is in this context that the Family Agreement becomes a potential lynchpin both to maintain our independence as we age and become frail, but also to sustain our familiar and familial environment which can be such an important ingredient for happiness for most older people. Even Government recognises and encourages this in its support for 'ageing in place' in providing incentives to people to stay at home as they age.

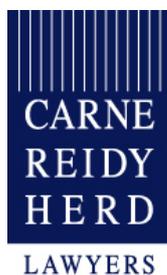
### **A Family Scenario**

Let me give you an example of a typical scenario in this context in which I was recently involved.

It concerns an 83 year old woman who has four adult children. She has been living independently in a high rise unit. She is starting to become physically more frail and unable to cope on her own. She needs assistance in some daily living activities.

Like many people in her position, she has reached a care crossroads. She and her family are confronted by the necessity to consider an aged care facility (such as a nursing home or hostel), community care or the family itself as the vehicle for her ongoing care. This is a common conundrum facing people in her position in having to choose between the facility or the family solution.

For this family and the mother, however, there is really no choice. The children do not want their mother to be placed into a facility (even if there was one available) but prefer to explore what solutions are available within the confines of the family unit to



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help her in her later years. The mother herself does not want to give up her independence but wants to 'keep it in the family'.

My initial involvement was to resolve, essentially, a family conflict. One of the daughters had suggested that her mother should sell her unit and use the proceeds, in part, to build an extension to the daughter's home to accommodate the mother. The daughter, who was working from home and had her own children, proposed that she would also provide the necessary daily care for her mother.

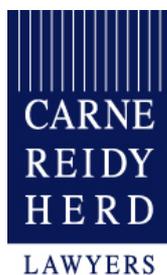
The other children were anxious about the idea as, subliminally, they could see a part of their inheritance potentially being consumed to bolster the value of an asset of their sister.

The problem for the family is how to accommodate everyone's wishes to care for the mother within the family but at the same time not feel as if one of them is taking advantage of the situation to the detriment of the others and the mother.

What was crucial to the resolution of the matter was ensuring that, with the mother's consent, we involved all members of the family in the discussion and decision making process and this has been addressed in 2 meetings with all members of the family.

It is now proposed to be resolved by way of a written Family Agreement. It will provide essentially as follows:

- The mother's unit would be sold.
- Part of the proceeds would then be used to build the extension to the daughter's home where the mother would live.



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- The monies used by the mother in improving the daughter's property would then become a debt due by the daughter to the estate of the mother on her death or transfer to an aged care facility.
- The debt, however, would be amortised over time by the comparable community care rate in recognition of the care provided by the daughter.
- These care services to be provided by the daughter were set out in detail in the agreement.
- The mother would pay for her own personal expenses and a proportion of the household expenses.
- A mutually agreed person (not a member of the family) was appointed as a monitor of the agreement to ensure that the agreement was complied with and also to settle any disputes that might arise during the course of the arrangement.
- If the daughter breached the agreement, the debt would become immediately due and payable together with interest.

As a self-funded independent retiree, the arrangement would have no impact on any pension entitlements of the mother although it does have income tax implications for the daughter<sup>1</sup>. As well, consideration has to be given to the nature of the legal relationship created by the agreement. Is it in the nature of an employer/employee relationship or is the daughter an independent contractor with all the ramifications in terms of tax, insurance and workers compensation?

The documentation of the arrangement has several advantages however:

- It acts as an agreed, transparent agenda for the family as a whole and the mother in particular, setting out as it does, the specifications for the care obligations and the financial arrangements;



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- It allays suspicions and appeases the other family members' fears for their inheritance and natural concerns about the daughter's potential 'unjust enrichment'.
- It resolves a conflict which had the potential to corrode at best, and implode, at worst, the family relationship;
- It provides a legally enforceable guarantee of personalised, responsive and quality care in a family environment;
- It achieves what all of them wanted, including the mother, namely not to darken the doors of a hostel or nursing home; and
- Most importantly, it gives peace of mind to the mother at a time in her life when she desperately craves for it.

What is particularly therapeutic about the arrangement is the preliminary process of discussion that has taken place between all concerned. It has forced the family to address the issues in an open and frank way and focus their concerns on the dynamics of their mother's welfare. It is an intelligent adaptation of latter day 'family planning'.

### **Are Family Agreements Happening?**

There is little statistical or empirical evidence in Australia of families systematically formalising or documenting any such agreements.

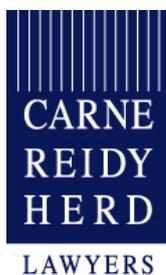
We do know from the 1996 Census that:

- There were 2.3 million older people, i.e. aged 65 and over, in Australia (12% of the population).
- 77% of older people lived in private dwellings.

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<sup>1</sup> The tax implications are interesting. On one view, payment for the services to the daughter is income upon which tax is payable. On the other hand, the reduction in the debt is on one view the repayment of a private debt on which, arguably, no tax is payable.

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- 20% of those in private dwellings above lived in family households with their children, relatives or friends.
- Only 6% of older people lived in assisted accommodation such as hostels and nursing homes.

It is the 20% of older people living with family, relatives or friends referred to above which forms the core basis upon which Family Agreements may be happening and can be expected to increase as the years go by.

Anecdotal evidence in comparable societies, such as Canada<sup>2</sup>, suggests that people are undoubtedly forming these arrangements but generally, on an informal or oral basis. As well, they are usually only discovered when it all goes wrong and there is a breakdown in the family arrangement or relationship. There is every reason to believe that the same dynamics are operating here.

A woman in her 60's and in poor health came to see me last year. Some time before that she had reached a family law property settlement with her former husband. She received \$80,000.00 as part of the property settlement. Her daughter had offered to care for the mother in her home on the basis that the mother deposit the \$80,000.00 into a bank account held by the daughter. On the surface it appeared a strange proposal and the woman was particularly coy about discussing its rationale. I suspected it was an attempt to avoid the strictures of the Social Security Act.

In any event, as often happens, the relationship between the daughter and the mother broke down and the mother was literally evicted from the home. That's when the mother turned up in my office.

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<sup>2</sup> Margaret Isobel Hall "Family Law-The Family Agreement (A Canadian Perspective)" presented to the Annual Conference of the National Academy of Elder Law Attorneys of America in Vancouver, April 2001.

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She had asked for the \$80,000.00 to be returned but the daughter had refused, asserting that it was a "gift". The case raised all the usual hoary chestnuts about the presumption of advancement and resulting trusts. The daughter's assertion of a gift was somewhat implausible, however, given the fact that the \$80,000 was the sum total of the mother's assets, she was on a social security benefit, had two other adult children who would have expected to benefit from her estate and indeed, had only lived with the daughter in question for no more than 3 months.

Nevertheless, we became involved in highly charged and destructive litigation that could have been easily avoided if the parties had sat down, set out and agreed upon the terms of their financial and familial relationship.

### **Implications**

In my view, various factors suggest that Family Agreements, be they formal or informal, will increase in frequency in the near future.

The factors suggesting this are:

1. The preference of older people to remain in a familial and familiar environment.
2. The increasing financial independence of older people leading to greater financial choices in terms of how and who provides the care.
3. The increasing inability of the aged care industry, hamstrung by, and historically dependent on, Government funding, to accommodate and meet the demands of high quality care and, at the same time, remain viable.
4. The increasing reluctance of Government to pour money into what it sees as the bottomless pit of aged care.



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5. The Government's preference no doubt to transpose responsibility further from itself to the family to ease the pressure both financially and from the relentless 'bad press' perspective it has had to confront.<sup>3</sup>

Ultimately, the aged care provider's biggest challenge in the future will come from an unlikely source, namely, the family. I anticipate older people and their families will resort more and more to collective decisions about internalising care as opposed to externalising it. Older people will turn their backs on traditional aged care preferring instead to de-institutionalise their arrangements and place them within the privatised hands of their family.

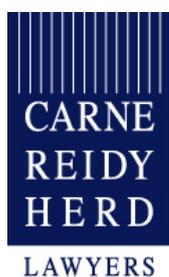
The Government, as well, will identify the benefits of this trend. It already encourages us to save for our independence in retirement through superannuation but it is not yet encouraging us to save for our dependence in aged care. While, as a community, we still resist the call of long term care insurance, the Government would no doubt prefer to have the self-funded retiree pupate into the self-funded aged care recipient.

The Government then may also see the advantage of the privatisation of care within the family unit as a way of reducing the financial burden on consolidated revenue and the passing of responsibility (and the bad press) to the family rather than the Government.

This could lead to the Government recognising the economic benefit of delegating this important function to the family and then seeking to encourage it by giving, for example, financial incentives to the family to assume the caring role.

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<sup>3</sup> See, for example, the public imbroglio over the Riverside Nursing Home.



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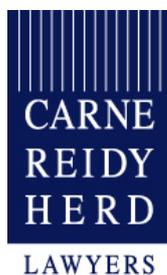
One of the down sides of Family Agreements is that there are, potentially, significant income tax and social security implications in the transfer of assets or payment of compensation from a parent to an adult child in return for care. In order to encourage such arrangements, however, the Government may very well see the benefits of discounting these implications and providing incentives by way of tax benefits to family members willing to take on this responsibility.

Ultimately, however, the economic imperatives may well cause a cultural shift to occur in this country. As Government increasingly approaches its 'no go zone' for further funding, be it for residential or community care, there may simply be no alternative but for Australian families to 'familiarise' their responsibilities and for other members of the family to assume the extended family caring role more and more.

There is a need, as well, to raise our consciousness about these family dynamics and the consequences of the failure of these informal arrangements with a view to preventing the quiet and undiagnosed anguish that is caused by their breakdown and the resultant stress on our aged care system.

It is understandably difficult for older people to discuss with their children and to descend into what may be seen as the tawdry details of the promise to "care for life". The older person might think that, in doing so, their children may perceive a lack of trust on their part. Some older people will prefer to cross their fingers and avoid any detailed discussion with their son or daughter and will live in hope that it will simply 'work out' because, after all, my son or daughter would never do the wrong thing by me!

But, in my experience, if the family does not confront the vagaries and uncertainties of the care for life promise upfront, the harsh reality is that this failure will usually



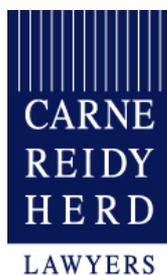
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lead to divergent expectations bubbling to the surface after the event which will ultimately be the source of personal bitterness and family implosion.

Families must at least be encouraged to think through the ramifications of what the care for life promise embodies. It could well be, for example, that, after proper and thorough discussion and consideration of the issues, and what the "care for life" agreement entails, the parties may very well decide not to proceed with the idea. This would be an infinitely preferable result to having to unravel vague and uncertain oral arrangements when they almost inevitably disintegrate.

If they do wish to proceed with the arrangement, they should at least have the opportunity to consider, clarify and set out expectations and obligations and make provision for future contingencies. This may very well mean suspending our cultural cringe at the thought of confronting these issues and documenting the arrangement in a legally enforceable agreement.

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