

Creating Exceptional Outcomes

Elder Law

Ageing Parents – the Underbelly for Families and their Business

/ March 2021

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 HopgoodGanim
LAWYERS







Abusing power of attorney?

We navigate
complicated situations.



- Disputes in the family
- Granny flats
- Will disputes





The Workshop

- **Session 1**
 - What is Elder law
 - The landscape
 - The marketplace
- **Session 2**
 - Some law
 - Its impact on families and businesses
- **Session 3**
 - Case studies

But First – Paint a Picture

- **Business is stable**
 - Got your business and strategic plans in place
 - Good risk management systems
 - Coming through Covid
 - Low staff turnover
 - Agreements in place with partners or shareholders
 - Health is good
 - Top legal and financial advice (albeit expensive)
 - Future looks good
- **You're comfortable**

And

- **Family life is stable**

- Longstanding and resilient marriage
- Kids in high school who haven't yet sinned
- Relationship with siblings and spouse's siblings fail
- Low leverage debts
- Good income and good things in life
- Parents are getting on and some health issues
- Parents-in-law the same
- Haven't raised with them anything about their personal risk management because it's not yours to be concerned about and don't want to be seen to be interfering

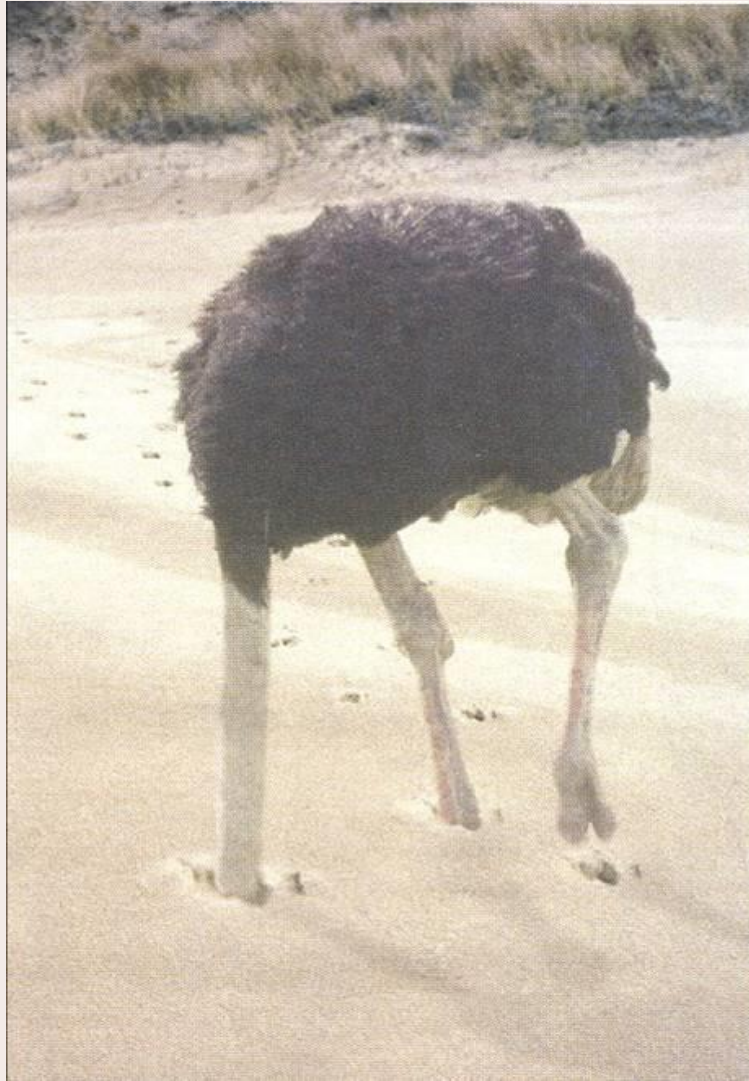
So?

Nothing to see here

It's all good

Right?









Some Thoughts on our Clients

- **Which client response would be the longest?**
 - The Professional Advisers Mantra
 - “How’s business?”*
 - Alternative Mantra
 - “How are your parents?”*
 - or even better
 - “How are your parents and parents-in-law?”*

Back to Basics - The Light Bulb Idea of Elder Law

- Personal Experience
- Luck
- Demographic diaspora
- Overseas experiences
- The family landscape
- The legal landscape

The Bulb (cont..)

- **Personal Experience**
 - My own ageing
 - My parents
 - My friends
 - More ‘something has changed about them’
 - More bedside vigils
 - More funerals than weddings
 - More BBQ stoppers

The Bulb (cont.)

- **Luck – The year 2000**
 - The ‘Bowel Book’
 - The ‘Stool Tool’
- **Professional life changing event**
 - Dimension of life never seen or experienced before
 - Sowed the seeds of possibilities
 - Embarked on an expedition

The Bulb (cont.)

- **Demographic Destiny**
 - Living longer – 30 years or more of retirement
 - Living longer with disabilities
 - Retirement and ageing are a process not an event
 - Confluence of affluence and influence
 - Complexity of lives and lifestyles
 - The ‘Pig in the Python’

The Bulb (cont.)

- **Overseas Experiences**

- National Academy of Elder Law Attorneys of America (NAELA)
- Over 8,000 specialist lawyers in elder law
- Passionate
- Market presence
- “Say” the cat

“Being an elder lawyer means people know who we are and how far we’ll go, which is helpful when acting for older people.”

The Family Landscape

- **Age of Aquarius**
 - The ‘family’ as the client
 - Lots of adult children (baby boomers)
 - Repressed enmities rivalries and jealousies
 - Inter-family financial dealings
 - Geographically diverse
 - Martyr children
 - Family caring
 - Family decision makers
 - Generational sandwiches
 - The early inheritance syndrome

The Facts of Being Old

- **It's not what it used to be**
 - More of the 'old old'
 - More widows than widowers
 - More divorces
 - More re-partnering
 - More 'claytons' separations
 - More singlehood
 - More loneliness
 - More complex family and business succession
 - More incapacity and frailty creep

Legal Landscape

- **21st Century – a bigger financial world**
 - Demise of the strip shopping centre
 - ‘Start ups’ start up
 - Crypto
 - Virtual business
 - Big private companies
 - Going public
 - Specialisation and boutique

Legal Landscape (cont.)

- **21st Century – a bigger family world**
 - Privatisation of decision making
 - Aged care and supported living
 - Family caring agreements
 - Matriarchs and patriarchs
 - Inter vivos transactions
 - Tyranny of distance
 - Blendeds

Legal Landscape (cont.)

- **21st Century – a bigger family world (cont.)**
 - Superannuation
 - Social security and impoverishment planning
 - New wave of trusts e.g. special disability trusts
 - Statutory Wills
 - Notional estates
 - Love ‘rats’

A New law

The '*Law of Family*'
(not family law)

The Life and Death Legacy

*“Ageing populations and rising levels of dementia in the western world, combined with a huge transfer of wealth from parents to their baby bomber offspring, make it inevitable that more families than ever will fight over the family jewels. With trillions of dollars worldwide expected to flow down the inheritance line over the next 30 years, new and old generations, siblings, divorced partners and blended families are set to struggle over **Wills and Enduring Powers of Attorneys.**”**

*Money Matters Magazine

The Theme

- **The Workshop Theme**

- What happens to our ageing parents (and in-laws) will impact significantly on the future success of our family and the family business.
- This dynamic cannot be ignored or swept under the carpet.
- To do so will imperil everything we have worked for
- It is a crisis currently happening, or waiting to happen

We need ‘family planning’ as a part of ‘business planning’

The Theme

Don't believe me?

The Sad Saga of the Sole Trader

The Elder Market Analysis

- **What's going on 'out there':**
 - Old age used to be brief & homogenous
 - Now it is a diverse continuum
 - Pre-retired ('the young old')
 - Retired ('the mid old')
 - Very retired ('the old old')

AND

- Their looming blooming 'booming' children

AND

- That breeds a smorgasbord of 'issues'

Market Professionals & Relationships

- **Strategic Alliances:**
 - Financial Planners
 - Accountants
 - Social Workers
 - Service providers
 - Health Professionals
 - Trustee companies
 - Peak Bodies
 - Families!!!

The Satisfaction Curve

- We're useful
- We can confidently predict a lot about a family's future
- Clients are prepared to pay for insight
- This is not just a pensioner practice
- It can alleviate family failure and business failure
- It gives me a good reason not to retire

‘Successful families party at Christmas – failed families ponder’

Doing nothing

Doing Nothing

- **The Basics**

- No Will
- No Enduring Power of Attorney
- No Advance Health Directive
- No business succession

- **The Niche**

- Dependency planning
- Family dysfunction
- Business succession
- Aged relationships

Doing Something – The Start

- **Motivation**
 - Presentations
 - Publications
 - Products

But First - Market What?

DEATH!



Are you kidding me?

PORTER



HULETT

SOLICITORS

Jon Hulett

Geoff Porter

Had an Accident?

Obtain fair compensation. We will act on a no win, no fee basis in most cases (conditions apply).

Separating?

Assert your rights in property settlement and make appropriate arrangements for children.

Going to Die?

Ensure your wishes are provided for in your Will.

Consult **JON HULETT** of Morningside's longest established firm of Solicitors,

PORTER HULETT

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Tel: 3399 7500 Fax: 3899 2573

Marketing

- **Presentation titles:**
 - “Doing Nothing”
 - “New Twists on Family Planning”
 - “Ready Steady Retire”
 - “You, your choices and your decisions”
 - “RIP – Retire in Peace”
 - “Meet the Future”
 - “You, your family and your business”
 - “Ageing, Caring & the Law”

Marketing (cont.)

- **Products**
 - Your Life Portfolio
 - Good Will/Bad Will
 - So you're an Enduring Power of Attorney
 - Later Lifestyle options
 - Later Life Relationships
 - What will happen to my Business?
 - Family Care Arrangements and Agreements
 - Single, Sane and Septuagenarian
 - Loans or Gifts to Children

But what are the biggest drivers?
(the elephant in our families)

**Incapacity
&
Dependency**

The biggest driver (cont.)

- **Incapacity**

- Has become a de-facto death
- Has given a whole new meaning to ‘estate’ disputes
- Has created new jurisprudence - e.g. the ‘martyr child’
- Has enlivened Dickensian laws - e.g. presumptions of law
- Has challenged and disrupted centuries old law - e.g. trusts
- Requires a lot of time and ‘work’ for adult children – e.g. the club sandwich
- Can make retirement or later life a nightmare not a dream
- Can destroy businesses and marriages

Elder Law and Wills

- **Impact**
 - Mum and Dad Wills
 - Statutory Wills
 - Statements of Wishes
 - Jumping generations
 - ‘Macarthur’ spouses

Elder Law and Wills

- **Impact (cont.)**
 - From carers to companions to
 - Martyr child
 - Notional estates
 - Ken and Barbie syndrome
 - Marriage, capacity and Wills
 - Explosion in challenges to Wills

Elder Law and Wills

- **The ‘Mum and Dad’ Will**

- Question - What’s wrong with

- “I give everything to my loving spouse and, in the event of his/her prior demise, to my loving children”?*

- Answer – Aged care spectre

- It could make aged care much more expensive for the surviving spouse

- Centrelink’s assessment of assets and income

Elder Law and Wills

- **What else is wrong about the ‘Mum and Dad’ Will**

- Question – What if I have given various and different amounts of monies to my children over my life and a Will which says:

“I give everything to my loving spouse and, in the event of his/her prior demise, to my loving children”?

- Answer – Family implosion

- It won’t reflect your wishes to treat them equally in death because you’ve already treated them unequally in life

- Litigation flows

Elder Law and Wills

- **Statutory Wills**

- A court can make or change a person's Will where they have lost capacity and before their death
- An example of the bringing forward of death issues before death
- Is it a Will the person would have made is the question if they had the opportunity to do so
- Can be used to improve the quality of a Will
 - e.g. inserting provisions for testamentary trusts

Elder Law and Wills

- **Statement of Wishes**

- An elderly parent may decide to provide for children unequally in their Will in deference to their efforts in the family business or in the care provided to them in later life by a particular child
- Invites a challenge
- Anticipate with an explanation set out in a statement of wishes
- Should never be in the Will
- Can be done digitally

Elder Law and Wills

- **Jumping Generations**

- A trend in elderly will-making
- Provide for grandchildren in Will along with children at the same time
- Make parents trustees of grandchildren's legacy - ugly
- Philosophy is reasoned and logical
- Can lead to unseemly disputes between parents and their children
 - E.g. The mother and her 4 year old child

Elder Law and Wills

- **‘Macarthur’ Spouses**

- Previously divorced couples resume cohabitation
- One to support and care for a former spouse
- Opaque financial and legal status
- Needs ‘agreement’ comparable to a pre-nuptial agreement
- Problematic ability to challenge will – not as a spouse but as a de-facto

Elder Law and Wills

- **From carer to companion to...**
 - Trend for private carers to provide care services that mutate
 - Fill the needs of lonely isolated older people
 - Exacerbated by geographical spread of adult children
 - Children go from manic to panic
 - Can create all the hallmarks of a de-facto relationship

Elder Law and Wills

- **The ‘Martyr’ Child**

- The child who volunteers to look after mum or dad in later years
- Often well intentioned, sometimes not
- Parents can acknowledge it in their Will but can often too late to
- Giving rise to a claim for better provision from mum or dad’s estate
- Could also give rise to application for statutory Will

Elder Law and Wills

- **Notional estates**

- The estate you have when you don't have an estate
- Adult giving away assets in later life to someone to acknowledge their assistance or to deplete their estate
- Court can order that the gifts be restored to the estate if made within certain time before death
 - Similar to bankruptcy relation back transactions to avoid creditors
- Only the law in NSW at the moment
- Could be coming to a state near you soon

Elder Law and Wills

The Ken and Barbie Syndrome

Elder Law and Wills

The Will Contract

Elder Law and Wills

- **Will challenges**

- Most people who die each day are old
- Biggest growth area in court litigation
 - Incapacity
 - Better provision
 - Undue influence
 - Suspicious circumstances
- Has led also to dynamic growth in alternative dispute resolution

Elder Law and Decision Making

- **Privatisation of Incapacity**

- Since about the turn of this century, the benevolent bureaucrats who used to be appointed to manage the affairs of the incapable are gone
- Now we have a plethora of private decision makers for the incapable
- It is a morass bred from our federal system of law
- Each state and territory and the Commonwealth have their own regime for decision makers and they're all different

The Incapacity Power Matrix

- Advance Health Directive
- Guardian
- Administrator
- Enduring Power of Attorney
- Statutory Health Attorney
- Public Guardian
- Queensland Civil and Administrative Tribunal (QCAT)
- Supreme Court
- Mental Health Regime

The Matrix (cont.)

- Nominees (*Social Security Act*)
- Representative (*Aged Care Act*)
- Authorised signatory (banks)
- Public Advocate
- Informal Decision Makers
- Public Trustee
- Trustee Companies
- Litigation Guardians (Civil courts)
- Case Guardians (Family Court)
- Nominee (NDIS)
- Representative (*Privacy Act*)

Elder Law and Decision Making

Doing nothing about an Enduring Power of Attorney?

Elder Law and Decision Making

An urban myth
(the next of kin)

Elder Law and Decision Making

The Myth and the Matriarch

A family and business tragedy

Elder Law and Decision Making

- **The Trouble with an EPOA**
 - It's a government form
 - Given little respect for its power and ambit
 - A box ticking exercise
 - Takes no account of what it could be used for
 - No careful consideration given to who to appoint or to how to appoint
 - No cognisance of the effect on a business

Elder Law and Decision Making

- **The EPOA Power**

- Applying for a divorce or property settlement
- Applying for a statutory will
- Severing joint tenancies
- Changing or making superannuation death benefits
- Becoming a director of a corporate trustee of an SMSF or family trust
- Taking control of shares in a family company or corporate trustee
- Replacing an appointor of a Trust
- Controlling affairs of the heart and head

Elder Law and Decision Making

- **EPOA - issues to consider**
 - Conflict transactions
 - Control of family entities e.g. Partnerships
 - Superannuation control
 - Shareholders agreement
 - Share holding control

Elder Law and Decision Making

- **EPOA – more issues to consider**
 - Blended families
 - Calling in loans
 - Calling in UPI's
 - Adeeming assets in a Will
 - Power over life and death

Elder Law and Decision Making

- **EPOA litigation**

- Booming
- Failure to draft the document like a crystal ball
- In Qld legal recourses to sue EPOA's for what they did or didn't do before the principal dies and after they die
- Use of investigative power of bureaucrats e.g. Public Guardian
- Clear evidence that many EPOA's suffer from the 'Peter Principle'
 - Don't appreciate the work involved or the responsibility
 - Other family members will start circling the wagon
 - Failure to appreciate the importance of obtaining advice

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Later Life Lifestyles and Caring



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Lifestyles Agenda

- **Topics**
 - The setting
 - Independent living
 - Dependant living
 - Family living

The Setting - Telling Tales

The Setting

33% of all men and 50% of all women who reach the age of 65 will live in some form of aged care in later life

In the history of the world, 75% of all people who lived to 65 are alive today

The Setting - Elder Lifestyles

- **Options**
 - Stay at home
 - Retirement Village
 - Manufactured Home Park
 - Pensioner rentals
 - Assisted / Supported living
 - Residential aged care
 - Tiny houses

The Setting - Elder Lifestyles (cont.)

- **Options (cont.)**
 - Share house
 - Home care
 - Family care
 - Granny Flats
 - Uber care
 - ‘Norcs’

Elder Relationships

- **The Masculinity Index**
- **Diversity of aged relationships**
 - Re-single
 - Re-marry
 - Re-partner (de-factos)
 - Re-family
 - Companion (compactos)
 - Same sex
 - Multiple spouses
 - LGBTI(Q)

Independent Living

Independent Living

- **Options**
 - Retirement Village
 - Manufactured Home Park
 - Share housing
 - ‘NORC’s’
 - Hub housing
 - Company care

Independent Aged Care (cont.)

- **Retirement Village**
 - **Legal Structure (Qld)**
 - Mostly 99 year leases
 - ‘Ingoing contribution’ (price) on entry
 - Two residents hold as ‘joint tenants’
 - Survivor (or estate) entitled to ‘exit entitlement’ (net sale price) on resale
 - Can’t bequeath unit but can exit entitlement
 - But QLD RV Act permits ‘relative’ to continue to reside on death of last resident

Independent Aged Care (cont.)

- **Retirement Village**
 - **Second relationships in RV's**
 - Example
 - Will footnote (see next slide)
 - **Care in RV's**
 - Amortisation of exit entitlement
 - **Relatives' rights (s70B Qld RV Act 1999)**
 - exit entitlement is asset of estate of resident
 - but 'relative' satisfies criteria to continue to live in unit
 - effect on testamentary intentions?

Independent Aged Care (cont.)

- **Scenario - Second relationships in RV's**
 - Merv - single resident remarries
 - New spouse Molly moves in
 - Merv's lease terminated and new lease with both Molly and Merv as lessees
 - Molly pays nothing
 - Merv dies
 - Molly now sole lessee and entitled to exit entitlement when leaves or dies
 - But Merv had done some interesting things to overcome effect of survivorship



3.

- (a) IF MY WIFE [REDACTED] survives me, then I GIVE all my estate and interest in all the furniture and other articles and effects of domestic, household or garden use or ornament in or about our joint matrimonial (leasehold) property described as [REDACTED] [REDACTED], including the motor vehicle (if any) which I own at the time of my death, and including items specifically bequeathed under clause 6, to my trustees UPON TRUST for the use and benefit of [REDACTED] during the term of the lease of the said unit.
- (b) During the term interest created by clause 3(a), my trustees must pay the general services charge and maintenance reserve fund contribution payable under the lease of the said unit until the lease is surrendered or otherwise terminated and, subject to clause 3(d), all insurance

¹ The legal title to the unit lease itself, which is held as joint tenants, will pass to [REDACTED] to be held by her for so long as she shall wish, or until her death, following which the full beneficial entitlement under the lease, including title to all money payable on surrender, passes to my estate to be dealt with under this will. This is by virtue of a deed dated [REDACTED] held by my solicitors, [REDACTED]

[REDACTED]

Testator

SHEET NO 1.

[REDACTED]

Witnesses



Independent Aged Care (cont.)

- **Manufactured Home Park**

- **Legal Structure**

- Buy (or build) a home in the Park and own it
 - Lease land underneath home from operator
 - Pay separately for services
 - Two or more residents own as ‘tenants in common’
 - Home is asset but not land below
 - Lease can only be assigned with consent of operator

Independent Aged Care (cont.)

- **‘NORC’s**
 - **Naturally Occurring Retirement Communities**
 - Older people gathering in suburban enclaves and supporting each other
 - **Issues**
 - Creation of inter-dependent relationships
 - Super death benefit now in play

Dependent Living

Dependent Living

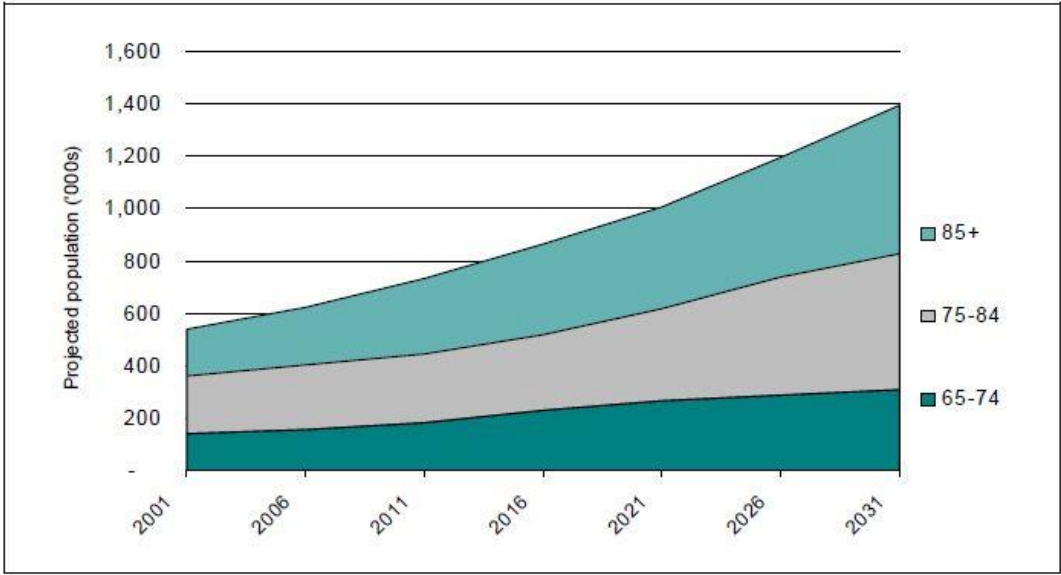
- **Diversity of aged relationships**
 - Re-single
 - Re-marry
 - Re-partner (de-factos)
 - Re-family
 - Companion (compactos)
 - Same sex
 - Multiple spouses
 - LGBTI(Q)
 - Variations of Separation

Family Care Agreements
&
Granny Flat Agreements

Another Tale

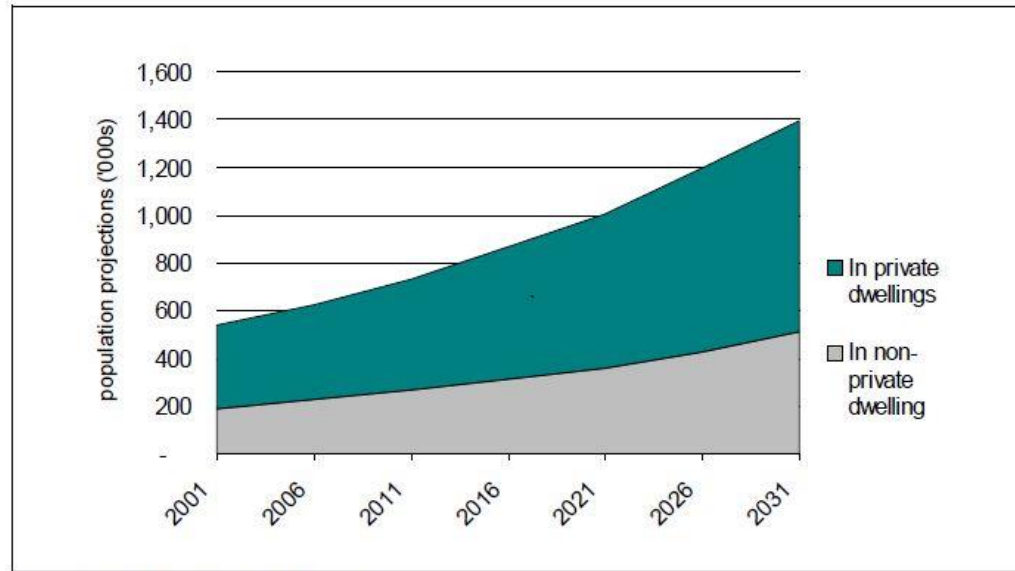
- **Gateway Credit Union – Survey**
 - 33% of homeowners
 - considering granny flat addition
 - 22% of homeowners
 - will consider it in the future
 - Reason?
 - To house an ageing parent

Persons with profound disability



Data source: NATSEM simulated projections

Their living arrangements



Data source: NATSEM simulated projections

Statistics

- **Summary***
 - Majority of 'older' people live with partner or alone
 - 8.2% of over 65's living with children or relatives
 - 12.2% of over 85's living with children or relatives
 - Above figures will grow inexorably & inevitably

- *Australian Law Reform Commission Report

Family Agreements & Granny Flats

- **What are they?**
 - ‘Assets for care’ (and potentially compensation)
 - Transfer of assets in return for promise to care
- **Types**
 - Parent transfers home to daughter who moves in and promises to care
 - Parent pays for construction of a home or flat on existing property in return for a promise to care
 - Parent transfers assets and money to caring child

Family Care Agreements & Granny Flats

What's the Difference?

Family Agreements

- **Issues**

- Documenting them
- Not documenting them
- Centrelink implications
- Estate implications

Documenting

- **Contract/Agreement**
- **Issues**
 - Presumption families don't intend to enter into legal binding arrangements
 - Balfour v Balfour (1919) 2 KB 571
 - Capacity of parties
 - Conflicts of Interest
 - Winners and losers
 - What to put in the document

Documenting

Terms

- Background and purpose
- The agreement
- Legal Advice
- Dealing with the property
- The consideration
- The Unit.
- Licence to Occupy
- Mum's Care
- Monitor

Documenting

Terms (cont.)

- Acknowledgement of services
- Payment of outgoings
- Holidays, absences and respite
- Security
- Ending of agreement
- Disputes
- Incapacity
- Binding of estates
- Costs

Issues

1. Parties to the Agreement
2. Consideration
3. Valuing the care
4. Long/Short life
5. Security of Tenure
6. What ifs
7. Other family
8. Testamentary effects
9. Substitute decision makers
10. Legal status of parties
11. Insurance
12. Termination
13. Centrelink

Example

- 47 year old woman
- Horrific motor vehicle accident
- Needs 24 hour “supervisory” care
- Still has normal life expectancy
- \$6.5m settlement fund
- Administered by Trustee
- In de-facto relationship (18 months)
- Arose before the accident
- De-facto wants compensation to care
- Community carers ‘shown the door’
- Interesting interplay between care agreement and a Family law financial agreement!

What Ifs

- **Intervening events in care for life promise**
 - Increasing care demands
 - Carer marriage breakdown
 - Financial stress
 - Relationship breakdown
- **Termination of agreement**
 - Funding aged care transition

Testamentary Effects

- **Elder's Will needs to be reviewed**
- **Complex hotch-potch impacts**
 - Short/long term care
- **How to provide for other children**
- **Real danger of family provision claims**
 - Family Agreement can act like a de-facto Statement of Wishes

Centrelink

- **Not an issue if elder is self funded retiree**
- **For pension recipients – issues!**
 - Gifting
 - Deprivation
- **Special exemption**
 - Granny flat rules
 - But beware ATO Tax ruling 2006/14
- **For carer**
 - Eligibility for carers allowance/pension
 - How to offset against ‘consideration’ in family agreement

Oral Caring Arrangements

- 73 year-old recent divorcee in ill health
- \$100,000 in cash from property settlement
- Daughter suggests move in to her place
- Unstated promise to care for life
- Convinces mother to put money into an account in daughter's name
- Probably to avoid social security issues
- Mother evicted after 3 months
- Wants her money back but daughter says was a gift

Oral Arrangements

- Disaster
- Mother without a home and money
- Aggravated ill health
- Legal Proceedings
- Social Security hovering with intent
- Family implosion
- Irrevocable breakdown of relationships
- Mother dies – Executor continues claim

Oral Arrangements

- **Enter the field of judicial divide**
- **Two lines of thought have emerged**
 - Joint venture - constructive trust
 - *Swettenham v Wild (2005) QCA 264*
 - Share in beneficial interest
 - Restitution – equitable compensation
 - *Henderson v Miles (2005) NSWSC 710*
 - Compensation for expenditure (also known as ‘minimum equity’)

Trends and Predictions

- **Later Life Family sharing and caring**
 - the ingredients of a distinct legal speciality
- **Will result in**
 - Post death litigation
 - See *Pinter v Pinter* (2016) QSC 314 & *Borthistle v Kanaef & Ors* (2016) QSC 182
 - More FPA's for compo for care
 - Disputes over family agreements
 - More statutory will applications
- **The wrong advice**
 - consequences to you from the client and particularly their families

The New Paradigm of Planning

- **Aged care in whatever form is expensive**
 - Cost more to care for our parents than raise our children!
- **No tradition of planning for it**
- **No long term care insurance**
- **Requires a readjustment & restructuring of our assets**
- **Failure to plan will result in increased litigation**
 - Statutory wills
 - FPA's
 - Rectification
 - Families as creditors
 - Actions against Enduring Attorneys and financial advisers
 - Exposure of lawyers to negligence e.g. anticipating ademption

'Home' Aged Care

Aged Care at 'Home'

- **Few older people can stay at home without assistance**
- **Who provides it**
 - Spouse/Partner
 - Home care organisations
 - Families
- **Effect on estates?**

Aged Care at 'Home'

- **Scenario**
 - Widow (79) homeowner remarries
 - New husband moves in
 - Agree to keep assets separate
 - Wills giving everything to respective families
 - She has stroke shortly after marriage
 - He cares for her for 9 years till dies
 - He in precarious position
 - Challenges Will
 - Some estate planning solutions?

Aged Care at 'Home'

- **Scenario**

- Cyril & Cynthia early 80's & second marriage
- Move in with Cynthia's daughter - undocumented
- They pay \$200,000
- Wills give everything to respective families
- Cynthia dies
- Cyril wants to stay but daughter wants him out
- Asks for the money back
- Estate planning issues?

Aged Care at 'Home'

- **Scenario**

- Bob & Alice – Fred & Fiona – 2 'couples in their 70s'
- Bob and Fiona also have respective spouses
- Spouses with dementia and either at home or in ACF
 - 'separated by illness'
- Bob and Fiona don't want to divorce but don't want to be martyrs
 - All accepting – except guess who?
- Interesting testamentary implications
 - Should Bob and Fiona do Wills excluding their respective spouses?

Aged Care at 'Home'

- **Scenario (Close to home)**
 - 84 year old - single all her life and born in her home
 - No children or relatives (thoroughly single)
 - Home (\$1.4m) savings \$700k
 - I her EPOA
 - Wants Will giving home to neighbours & rest to cat charities
 - Wants to stay at home passionately
 - Currently paying \$7k a month in home care
 - Estate planning issues?

Independent Aged Care (cont.)

- **Scenario**

- 2nd marriage
- Hold as tenants in common
- Give life interest to each other
- Operator concerned
- Children of first to die will be co-owners
- Operator suggests convert ownership to joint tenants

Independent Aged Care (cont.)

- **Scenario**

- Mum has 3 adult children
- Enters MHP with one child who says will care
- Mum and daughter own home (but mum paid)
- Only mum leases the land
- Breakdown
- Eviction – yuk!
- How to change Will?

'Dependent' Aged Care

Dependent Aged Care

- **Residential Aged Care**

- Post 1 July 2014 major changes
- No low or high care
- Accommodation bonds superseded by RAD's, DAP's or RAC's & DAC's
 - Payable for all types of care
 - RAD's up to \$550,000 (or more if approved e.g. \$4m)
- Accommodation bonds still exist for pre 1 July 2014 residents

Dependent Aged Care (cont.)

Issues

- **Aged Care Act requires bond balance or RAD to be repaid to resident or their estate**
 - not the person who may have actually paid it
- **If money paid by family member or spouse**
 - Will not be paid to them by nursing home but to resident's estate
- **How to deal with this in estate planning?**

Dependent Aged Care (cont.)

- **Scenario**

- Accommodation payment part RAD (\$200K) part DAP
- Second husband advances \$200k to spouse for RAD
- Documented in loan agreement with spouse through her EPA
- Unsecured
- Care fees are deducted from RAD over time (clever EPA)
- RAD is being whittled away
- Estate planning implications?

Dependent Aged Care (cont.)

- **Scenario**

- Both in their 80”s
 - 10 year second marriage
- Children from both previous marriages
- Property kept separate – he rich she poor
- She enters aged care – he stays at home
 - Bond of \$300k due – interest

accrues at 6.5%

- She can't pay - he can but refuses (after getting legal advice)
- Her children (EPA's) apoplectic
- Aged care facility apply to QCAT to have EPA's sacked
- Should children be applying for family law property orders?
 - Too late – he dies

Dependent Aged Care (cont.)

- **Scenario**
 - Elderly woman enters aged care
 - De-facto 'friend' pays \$250k bond
 - undocumented
 - Woman meets 'lothario' in facility
 - Steal away one day and get married
 - Woman dies intestate with children
 - Problems for de-facto
 - Capacity to consent to marriage
 - Fate of the bond

Dependent Aged Care (cont.)

- **Scenario**
 - Elderly second marriage
 - Tenants in common of home
 - Each made Will giving life interest of share in home to other
 - Residue to respective families
 - She enters aged care
 - RAD can't be paid without sale of home
 - He agrees to sell (cause it's luv)
 - Where does that leave him when she dies?

Substitute Decision Makers

- **Issues for them in estate planning**

- May have to deplete principal's assets to pay for aged care
- Exposes EPOA's personally
 - Particularly if have not obtained legal and financial advice
 - See section 107 Qld Enduring Powers of Attorney Act
- Highly advised to obtain copy of principal's Will
 - QLS advises they entitled to a copy not the original
- May need to consider Statutory Will application
- Should EPOA's insure for PI?
- Should lawyer for estate investigate actions of EPOA as part of duties?

Family (cont.)

- **Example**

- Elderly widow pays \$300,000 for granny flat interest to a daughter in her home
- Will gives everything equally to 3 children
- Solicitor drafts agreement
- Fails to advise on reviewing estate plan
- Other 2 children apoplectic when mother dies just 7 months after agreement signed

*“If you don’t live in
the future today
you will live in the
past tomorrow”*

Thank you



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Elder Law services

How can we help you?

The issues confronting you in retirement are becoming more complex. Many seniors feel frustrated at the difficulty in obtaining and understanding information about the issues affecting them in retirement.

To make informed choices and decisions, you need information which is clear, simple and easy to understand.

You also need to know that your lawyer is attuned to the social and medical aspects of ageing as well as the legal issues that may affect you now and into the future.

We focus on providing the practical information you need to make informed decisions about the lifestyle decisions affecting you now and into the future.

When is it important to talk to us?

Before you make any important decision!

Information from friends and family is helpful but you may need some objective advice to ensure you've got it right.

There is generally no allowance given for the 'oops' moment or 'I wish I hadn't done that'. Good information and advice is essential for wise decisions.

We are Elder Law experts

Our experienced team has been advising on the full spectrum of legal issues affecting older Australians for many years and has the expertise to help you bring all the pieces of the puzzle together.

Importantly, we understand the dynamics of modern families and work with you and your family to involve them as much as possible in your decisions.

We offer expert advice and practical strategies for dealing with issues such as:

- dementia and incapacity;
- the Guardianship regime;
- family disputes and mediation;
- estate disputes;
- options for later life living;
- becoming 'single' again;
- social security and pension entitlements;
- making your Will, Enduring Power of Attorney and Advance Health Directive; and
- moving in with the family,

There may also be times when you make decisions which, through honest mistake or simply the wrong advice, could adversely

affect you and your family. We can help you find resolutions to these issues.

Accessing support services

Being familiar with the array of services from government and other support organisations, we can give you reliable and safe referrals for appropriate issues.

Making it a good experience

We believe the key to good relationships is communication. Often older people find dealing with a lawyer to be an intimidating or confusing experience.

For this reason we recommend asking your lawyer five key questions at your first meeting:

1. Do I have a legal problem?
2. Is there some other way to resolve it?
3. Explain the issues to me in simple English!
4. What will it cost me?
5. How long will it take to resolve it?

By asking the right questions up front, you can ensure your relationship with your lawyer is a positive one that will ease the stress and give you a good outcome.

Our Elder Law services

- Elder abuse
- QCAT Applications
- QCAT Guardianship representation
- Disputing Wills and EPOA's
- Family Disputes
- Gifts or loans to, or from, your children
- Retirement Villages/Aged Care
- Making good planning documents
- Enduring Powers of Attorney
- Wills
- Advance Health Directives
- Blended families
- Superannuation troubles
- Problems with other professionals
- Downsizing your life and home
- Becoming single again

Key contacts



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