



AGEING, CARING & THE LAW



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The Caring Centuries

- 19th Century – no care required
- 20th Century (early) – family care
- 20th Century (later) – Institutional care
- 21st Century (early) – de institutional care
- 21st Century (later) – family care!!!!!!!!!!!!

Caring Concatenation

- Living longer with disabilities
- Dementia dimension
- Death is a process not an event
- Rationing of subsidised aged care
- Cost of outsourced in-home care
- Fewer spouses to care for spouses
- Fewer children to care for parents
- Confluence of affluence and influence

The Caring Certainty

- The Age of Dependency
- The new Age of Aquarius
- Caring for the elderly will overtake childcare as our biggest social dilemma
- Institutional aged care will not cope

The Law of Family (not family law)

- The dependency wave will focus policy makers on the family's role in caring
- The family's duty to care (not the duty of care)
- When a parent's duty to support a child becomes a child's duty to support a parent

The Law of Family (not family law)

- If we accept the inexorable trend of family caring:
 - What and how can the law change to meet the trend
 - What if family are reluctant or unwilling to care
 - What incentives do we need in the law

The Willing Family

- Discourage the oral shadowland arrangements
- The consequences of the oral care arrangement
- Change the feudal laws about parents transferring assets to children
 - The presumption of advancement
- Encourage families to document caring arrangements – the Family Agreement

The Family Agreement

- What are they?
 - Written agreements between members of a family in which an older member pays money or transfers property to another member of the family in exchange for a promise to care for life

An Example

- 83 year old widow
- Living independently in high rise unit
- Self funded retiree
- Needs some assistance in daily living activities
- Signs of early on set dementia
- 4 adult children

A Daughter's Proposal

- Sell the unit
- Use part of proceeds to build extension to her home
- Mum moves into the extension
- Daughter promises to look after Mum for the rest of her life
- Other children – very suspicious!

Family Aspirations

- Mum did not want to move into an ACF and kids did not want it either
- All wanted to consider an 'in house' solution
- Wanted to ensure no significant financial downsides
- Wanted a clear picture of how the arrangement would work now and in future
- Harness the joint aspirations and collaborate and communicate

The Written Agreement

- Background and purpose
- The agreement
- Legal advice
- Dealing with the property
- The loan
- The unit
- Licence to occupy
- Mum's Care
- Acknowledgement of services
- Payment of outgoings
- Holidays, absences and respite
- Security
- Ending of agreement
- Disputes
- Incapacity
- Binding of estates
- Costs
- Monitor appointed

Documenting Advantages

- Creates a binding contract
- Agreed transparent agenda for the entire family
- Allays suspicions and fears
- Resolves a potential family conflict
- Reduces prospects of abuse
- Keeps mum out of aged care facility
- The process addresses the 'WHAT IFS' of the relationship
- Document creates clear basis for financial advice

Tax

- Is the relationship between mum and daughter one of employer/employee or a contract for personal services with all the implications that distinction has?
- Money received for care by daughter (albeit by amortisation of a debt) – is it income or notional repayment of a debt?
- Should mum withhold tax?
- What are the CGT implications if there was a transfer of assets from mum to daughter

The Unwilling Family

- Focuses us on the responsibility for caring
- What role does the law play?
- Whose responsibility is it to care:
 - Families
 - Society
 - Individual

The Law of Filial Support or Family Duty

- Derived from England's Poor Law Act 1601
 - The father, grandfather, mother, grandmother & children of “*every poor, old, lame and impotent person*” is required to support their indigent relative to the extent of their ability
 - Only people in need who had no family members to support them were eligible for public assistance

The Law of Family Duty (cont'd)

- Underpinning philosophy
 - Religious teaching
 - ‘Honour thy father and thy mother’
 - Ethical notion
 - Reciprocity
 - Parents support their children when they are young and the young owe same obligation to parents as they age

Family Duty - China

- It is a criminal offence if a child fails to support or take care of their parents
- Maximum penalty of 5 years in prison
- Takes the weight off the State

Family Duty - China (cont'd)

- Shanghai neighborhood committees have public shaming
 - anyone who doesn't visit their parents once every 3 months has their name placed on a community shaming notice board
- Another neighborhood committee imposed fines of \$5 on children if they didn't invite their parents home for Chinese New Year
- Some communities run a "Best (Adult) Child of the Year" contest

Family Duty - Spain

- Where it is found that children or relatives have failed to adequately care for a parent, then those children or relatives will, under the law, be disinherited from their parents estate even if their parent provided for them in their Will

Family Duty - USA

- California Family Code sec 4400 & 4403
 - *“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”*
 - *“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”*

Laws on Family Duty - USA

- 30 USA States have laws of '*filial responsibility*'
- Used by nursing homes to force families to pay unpaid nursing home fees
- More often used to put pressure on families
- Some States also make it a criminal offence and even extend the duty to grandchildren



AUSTRALIA?

The Law of Care in Australia

- No statutory or civil laws like the overseas filial responsibility laws
- Acknowledged in limited way in Centrelink 'granny flat' rules
- Obsolete criminal laws

Qld – Criminal Code

- S.285 – Duty to Provide Necessaries

- *“It is the duty of every person having the charge of another who is unable by reason of age, sickness, unsoundness of mind.... And who is unable to provide himself... with the necessaries of life, ...to provide for that other person the necessaries of life”*

Never been used to prosecute a child for failing to care for a parent only for a parent failing to care for a child

Where to from Here?

- Government's role
 - Reluctant to keep dropping buckets of money into the bottomless pit of aged care
 - Reaching their 'No Go Zone' for exponential subsidised care
 - Believe (but won't admit) that family are best to care and ought to
 - Economic imperatives demand delegation of care to the family
 - Opportunity to align prudent public policy with pervasive family values

Privatisation of Aged Care

- The family is the future of care
- Cannot force family to care
- How to encourage them to
- Some ideas????????????

Idea No 1 - Tax

- Create tax incentives for families
 - Give tax exemptions to carers for money received for caring from the elder
 - Give tax deductions for money paid for care by the elder
 - Tax rebates for children who pay for or fund their parents care
 - accomodation bond

Idea No 2 - Superannuation

- Death benefits from super paid to a spouse, infant child and dependent are tax free
- BUT death benefits paid to adult children are taxed up to 31.5%
- Include family carers in the list of tax free death benefit recipients

Idea No 3 – Family Agreements

- Adopt the family law principles of nuptial agreements for family caring
- Require all family care arrangements to be documented and approved by a Tribunal
- Amend the Family Law Act to require the court to take into account a spouse's present or future obligation to care for a parent in any matrimonial property proceedings

Idea No 4 – Employment

- Currently limited provisions for carer's leave in industrial awards
- Have employer contribute to the cost of home care for an employee's parent as part of a salary package
- Make it exempt from fringe benefits tax
- Could give employer a competitive advantage

Idea No 5 – Workplace

- Introduce respite care in the workplace
- Create facility at workplace for employees to bring parents for respite
- Meets a growing future employer conundrum – shortage of workers and demand for care

Idea No 6 – Care Law

- Introduce family ‘duty to care’ law or filial responsibility law
- Along with tax incentives
- Apply it to children and grandchildren who are able to provide support and for parents who are in need of support

Idea No 7 – Insurance

- No real interest in this country in long term care insurance
- Redefine life insurance and introduce a care cost element
- Allow it to be accessed before death for the cost of care
- It is an advance on what is payable inevitably

Idea No 8 – Aged Care Levy

- Just like the Medicare levy
- All Australians contribute as soon as start work
- Form of compulsory saving
- An individual's accrued levy over their working life then used to either pay for their residential, community care or family care or refunded to their estate if have never used care

Idea No 9 – Dependency Duties

- A variation on the now defunct Death Duties
- Legislate to allow the Government to take from a person's estate on their death, the amount of subsidy paid by the Government for that person's aged care when they were alive
- Analogous to HECS debt for tertiary students
- Great incentive for family to care!

FINAL WORD

IF YOU DON'T LIVE IN THE
FUTURE TODAY
YOU WILL LIVE IN THE PAST
TOMORROW