



What should a family agreement include?

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Summary

“While any agreement about care, living arrangements and assets within a family might be considered a family agreement, a formal family agreement is the written documentation (drafted by a lawyer) detailing what has been agreed.”

This can help prevent the older person being taken advantage of before entering into the agreement, as well as provide direction and safeguard assets should the agreement break down, which could happen for any number of unforeseen reasons.

The process of writing down and formalising the agreement encourages families to discuss what the arrangements mean for each party and what the expectations of each other are, both at the time of signing and in the future.

While a formal family agreement does not have to record every aspect of the arrangements, any documentation can help with resolving disputes in the future, so the more detail included in the family agreement, the better.



What is a ‘formal’ family agreement?

While any agreement about care, living arrangements and assets within a family might be considered a family agreement, a *formal* family agreement is the written documentation (drafted by a lawyer) detailing what has been agreed.

Having a formal—or written-down—family agreement makes sure the arrangements are understood and agreed to by everyone. The process of writing it down can help families have the necessary conversations to ensure everyone is happy with the plan and that they intend to comply with it. Having a formal family agreement can also make it easier to resolve a dispute if things do go wrong and the arrangements break down.

Is there a need for a formal family agreement?

Most people assume that there is no need for a formal document: as family, they trust each other and believe that if a problem arises they will be able to negotiate a solution. But every family will benefit from formalising a family agreement.

Insisting on a formal family agreement can discourage unscrupulous family members from taking advantage of the older person. It also encourages the entire family to be aware of the agreed arrangements, so they don't become a point of conflict later.

If the agreement breaks down, the older person's options will depend on what the arrangements were (what was promised, discussed and understood), what evidence there is that this family agreement was in place, and the circumstance and nature of the breakdown (what went wrong).

“Without a formal agreement or documentation, it can be difficult for the older person to enforce an interest they have in a property or recover any money they have contributed. This can make a person very financially vulnerable (particularly if they have limited income) when it comes to affording a new place to live.”

There is no single template or type of formal family agreement. It may be a co-ownership agreement, a granny flat agreement, a loan agreement or a deed of family arrangement, among others. It is always important to get legal assistance to prepare a document that both parties expect to be binding. A written agreement may be no better than a verbal one if it is not properly drafted by a lawyer.



What circumstances might change?

“Family agreements are usually entered into with a positive mindset and genuine intentions of mutually beneficial arrangements. Because of this, the possibility of things going wrong is often overlooked and, therefore, not planned for. As a result, conflict can arise if the arrangements end and each party has a different idea about what their contribution entitles them to.”

Unfortunately, life has a habit of throwing up unexpected challenges. Some things that might go wrong include:

- **the breakdown of the relationship between the parties.** Sometimes, despite promising beginnings, the arrangements just do not work out and there is so much conflict between the older person and the family that one or the other party seeks to end the agreement.
- **the breakdown of other family relationships.** The family that the older person is living with may experience their own conflict or breakdown and decide to separate.
- **people not doing as they promised.** Examples include the family member not providing the care promised to the older person, such as taking them to appointments or providing meals. It may also include the family member being overprotective of the older person, taking over their decision-making and deciding what social activities they can participate in.
- **age-related illness and disability.** The older person might require more care and assistance than the family members are able to give, or may no longer be able to provide the child care and domestic support that they previously did.
- **unexpected death or illness.** The family member may predecease the older person.
- **financial stress.** The family member may need to borrow against their mortgage, sell their assets to access cash, or relocate for employment opportunities.
- **changes in circumstances.** The grandchildren may no longer need the care or supervision provided by the older person, and the family might cease to see any benefit in the older person being around.
- **new relationships.** The older person might meet a new partner and wish to live with them, or the family member may start a new relationship and wish to move away.



Case Study

Six months after being widowed at 75, Conrad suffered a heart attack and was in hospital for two weeks. While he quickly recovered his strength and looked forward to getting back into his routine, he found when he returned home that he had lost his confidence. He was anxious about experiencing another heart attack while living alone and he did not like to keep calling his daughters to ask for their help.

When his daughter Alicja suggested he sell his house and use the money to build a granny flat in her backyard, he happily agreed, relieved that he would have someone nearby for the rest of his life.

Six years later, Alicja remarried and her new husband, having paid off Alicja's mortgage, wanted to rent out the granny flat to provide Airbnb income. Conrad was distraught but felt he had no choice—he did not want Alicja to be unhappy.

While he was frustrated that Alicja had gone back on her word, he did not want to fight with her, so he unhappily went to live with his other daughter, Louisa.

What type of things should a family agreement include?

“A family agreement should include everyone’s contributions, what they expect in return, and what should happen if the agreement ends.”

A lawyer will be able to advise on the different options available to each party, but the following list gives an understanding of the range of things a family agreement could cover, and what a family should discuss.

The list presents some questions to prompt discussions about the details of the arrangements. It may not be necessary to incorporate every point into the formal agreement, but it is important to consider them before making a commitment.

The financial contribution

- What has each party contributed?
- Are the contributions a gift or a loan? If a loan, what are the payment terms?
- What is each party's ongoing commitment?

In many cases, the older person will contribute a lump sum payment. Some of this usually goes towards renovations, the construction of a self-contained unit or the deposit for a property. The rest is made as a contribution in return for future care.

This is an important part of the formal agreement because it shows that the older person is not simply making a cash gift to help out a family member, but is making a contribution beyond the immediate financial need with the expectation of receiving something in return.

“ Most commonly, the older person may contribute a lump sum payment or deposit and not be named on the title, and the family member will be responsible for servicing the loan. Sometimes the older person will be named on the property title and if so, and if there is a mortgage attached to the property, they will be named on the home loan and responsible for its ongoing payments.”

Another arrangement might be that the older person discharges their family member's mortgage in return for the right to reside in the property.

It is always important to be clear about whether any contributions are expected to be repaid. If so, the payment terms should be clear, including what action will be taken if the terms are not met. The older person should consider the financial consequences for themselves if the family member, despite their best intentions, is not able to repay a loan.

Licence to occupy

- Does the older person have the right to reside in the property as long as they live?
- Are there any circumstances in which they would give up this right (such as remarrying or enter a relationship with a new partner)?
- What happens to this right if the property has to be sold?

Making a financial contribution and receiving a right to accommodation for life or a life interest in the family member's home ensures the arrangements meet the criteria for a granny flat interest. A granny flat interest makes this type of arrangement more common than that of the older person being a co-owner on the property title.

The granny flat interest means the Centrelink asset deprivation rules do not apply and the older person's age pension is not affected. The older person should always contact Centrelink prior to making a commitment to confirm this.

Voluntary ending of agreement

- What happens if the older person is hospitalised?
- What happens if the older person needs more care than can be provided at home and must move to residential aged care?
- What happens if the family member's circumstances change, such as their partner relationship ending?
- What happens if the arrangements simply do not work out and everyone amicably decides to end it?

While the arrangements may have been made with the intention of lasting for the rest of the older person's life, situations can arise where all involved may agree to end the agreement. These might include hospitalisation or increased care needs of the older person or a change in the family member's ability to provide care, such as needing to move interstate.

To provide for such instances, the agreement could include a clause in which the family agrees to make all efforts to find the older person alternative accommodation or care. Including clauses specific to the financial contributions may become important if the agreement ends earlier than anticipated and the older person would like to access money for residential aged care.





Involuntary ending of agreement

- What happens to each person's housing and financial situation if the property needs to be sold?
- How should disputes be resolved?
- What happens if the family member's partner relationship ends and they need to move out, or the property needs to be sold?
- What happens if either the older person or the family member dies?
- What happens if either party defaults on what was agreed—for example, by not providing the promised care?

Provision should be made for the agreement ending, regardless of whose fault it might be. It is very important that the older person considers whether they will be able to afford to support themselves if the arrangements end and whether they will be able to access the financial contribution that was intended to provide them with care until the end of their life.

If the family member's relationship ends and family law proceedings are involved to decide property settlement, the older person should seek legal advice about joining these proceedings to ensure their contribution is recognised.

"The formal agreement might state that dispute resolution or mediation services should be used if a conflict arises that might end the agreed arrangements. This provision can assist in giving shape to a resolution and engaging unwilling parties."

Other family support

- Do other family members endorse the arrangements?
- Does the financial contribution affect the older person's will or estate?
- What happens if the agreement ends prematurely?

The older person should consider what their other family members will make of the loan or contribution and whether they are supportive of the care arrangements. This might also be included in a written family agreement as an endorsement from the other adult children.

“Having a whole-family discussion about future care arrangements might discourage unscrupulous behaviours, particularly amongst siblings who are in conflict. The decision of how to proceed ultimately lies with the older person and the family member they enter into the agreement with, but transparency in proceedings is likely to be beneficial to everyone, particularly in preventing conflict over inheritance.”

The older person should consider how the agreement will affect their will and estate. In particular, if the older person dies shortly into the arrangements, does their financial contribution remain with the family member, or should a proportion of it be redistributed as part of their estate?



The older person's care

- What care does the family member promise to provide? Will some care be provided by other members of the household (such as son- or daughter-in-law or grandchildren?)
- What happens if the older person's care needs increase?
- What happens when the family member cannot provide the promised care for a short or long-term period?

The older person may not need much care when the agreement is made, but it is important for everyone to be clear about what is expected of them now and in the future. It is helpful to put a value (daily or hourly) on the care provided so that as time passes, the family member 'earns out' the older person's contribution. This can help prevent disputes should the agreement end prematurely due to illness or death.

There should be discussion about how the older person's care might be provided in situations where the family member is unable to fulfil their promise—for example, if they became seriously ill and the older person needed to pay for external formal care.

Discussion about whether all members of the household are to assist with providing care as necessary will help ensure that there is no confusion about responsibilities or expectations in the future.

Care needs to consider include:

- **personal care.** Will the family members provide all care, or will the older person purchase some formal care?
- **meals, cleaning and laundry.** Will the older person take care of this for themselves until they are unable?
- **shopping.** If the family member is assisting with shopping, how will bills be paid and banking managed?
- **transport to appointments.** Will the older person have their own car or be reliant on others for transport?
- **arranging social or community services.** Will the family member assist with arranging services?

Case Study

Randa was getting older and did not want to live alone. She wanted to be close to her grandchildren and be able to see them often. After talking to her son, Hasan, and his wife, Zahra, she decided to sell her home and move in with them. Randa made a \$500,000 contribution with the understanding that Hasan and Zahra would look after her until she died. Randa's younger son, Darius, was happy with this arrangement as he did not feel he was in a position to provide care for his mother.

Sadly, Randa suddenly became ill not long after the move and passed away soon after. Hasan and Zahra decided to pass on half of Randa's contribution to Hasan's brother, Darius, as they felt they had not provided care for long enough to justify keeping the money.



Child care

- Is the older person expected to provide child care or school pick-ups? How often?
- How much privacy will the older person have in the home, and will there be an expectation that the children can be left in their care whenever the older person is home?
- What happens when the older person is no longer able to provide care or the grandchildren no longer need it?

It may not be necessary to formalise the level of child care to be provided, but it is very important to have a conversation about it. If the older person is expected to be at home after school every day to supervise their grandchildren until the parents return, it will have an impact on their lifestyle and commitments.

When the older person is migrating from another country to live in Australia and help bring up their grandchildren, their ability to provide child care—and the need for the child care—is an integral part of the arrangements. Therefore, it is important to discuss what will happen if the older person is too ill or frail to provide care and when the children no longer need supervision.

Domestic tasks

- Who will be responsible for cleaning and maintaining the older person's spaces?
- Can the older person make decisions about, and changes to, the garden?
- Can the older person have a pet?

It may not be necessary to document all possible issues, but it's important to discuss them. Will any of the regular domestic tasks (cooking, cleaning and gardening) be shared? Will the older person be expected to look after the family pet when the family is away? In particular, the responsibilities of upkeep and renovation of the older person's space, which may become a point of conflict if the arrangements end early, should be documented.



Holidays, absences and respite

- What happens when the older person goes on extended holiday?
- What happens when the family member goes on holiday?

Holidays and absences might need to be discussed so that everyone's expectations are clear. For example, will the family be planning on holidaying together? In particular, the formal agreement should document how the necessary care for the older person will be provided if the family is away for an extended period.

Additionally, the older person may not need much care and assistance at the beginning of the agreement, but it is likely that in years to come they will need more. Have provisions been made for somebody else to supply the necessary level of care or supervision when the family member is unable to do so?

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