What is a family agreement?

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compass GUIDING ACTION ON ELDER ABUSE an EAAA project

Summary

> *A family agreement is an arrangement between an older person and someone else (usually a family member, friend or carer) regarding care and living arrangements. Often called an 'assets for care' arrangement, it involves the older person exchanging their property or assets in return for housing and/or care as they age.*

The agreement should be mutually beneficial. For the older person it might mean no longer living alone as they age, being closer to grandchildren, and avoiding moving into residential aged care. For the family member (usually a child of the older person) the benefits might be the financial boost, remaining close to their parent(s) and the related peace of mind, and having help with childcare and domestic work.

Some common family agreement situations include:

- purchasing a property and sharing a home
- building an extension or granny flat on a family member's property
- an older person transferring ownership of their property but continuing to reside there
- making financial agreements such as loans, gifts and home loan guarantor arrangements.

Family agreements don't always involve the direct transfer of assets for care. They can include any agreement within a family about intergenerational living and care arrangements, such as an older person offering housing and care to an adult child in need, or parents migrating to be closer to their children and help with their grandchildren.

Issues can arise with family agreements when the potential consequences of the arrangements have not been thought through or an unexpected change occurs. Most people trust their family members and believe they'll do the right thing by them should the arrangements not work out. Unfortunately, this can mean people don't seek the independent legal advice that might protect their rights and finances when things go wrong.

Having safeguards in place is particularly important for older people, who are usually on low or fixed incomes during retirement. Elder abuse can sometimes occur in the context of family agreements, with devastating personal and financial consequences for the older person.

Elder abuse includes an older person being pressured into making a family agreement or deliberately being taken advantage of by the arrangements that are made. It can occur when the promised care or housing doesn't eventuate or when circumstances change to the detriment of the older person.

Where a family agreement has broken down, there are some legal and civil options available to help people resolve the dispute. The older person has a better chance of seeking redress and recovering financial contributions if the arrangements have been formally documented.

Older people should always seek independent legal and financial advice before entering a family agreement, because often it affects their tax, age pension or ability to pay for aged care services.

What is a family agreement?

> *'Family agreement' is an umbrella term for any arrangement between an older person and someone else (usually a family member, friend or carer) regarding care and living arrangements.*

Often called an 'assets for care' arrangement, it involves the older person exchanging their property or assets for housing and/or care as they age. This might be by sharing accommodation, co-purchasing property, making loans or cash gifts, providing child care or aged care, and more.

A family agreement is often informal and verbal, entered into in the spirit of care and mutual benefit. However, a lack of documentation or any record of shared expectations can cause problems if the relationship breaks down or one of the parties does not fulfil their promises. For this reason, all family agreements should be documented, so that they become a 'formal' family agreement.

There is no Commonwealth or state-based legislation governing these family agreements (other than that relating to general contracts), and they can take a number of forms, including (among others):

- co-ownership agreements
- granny flat agreements
- loan agreements
- deeds of family arrangement.

If the agreement is formalised by being documented (following legal advice), there is a better chance that what has been agreed on by the parties can be enforced or that an older person's contributions can be recouped if the arrangement ends.

Sometimes family agreements are entered into in bad faith by family members who wish to benefit from the older person's desire for care. Documenting a family agreement, even those that are potentially disadvantageous to the older person, can help the older person seek redress if the arrangements become abusive.

When might a family agreement be entered into?

A family agreement should be considered over a period of time so that everyone involved can be sure it's the best thing for each of them.

Later life can be a time of great change and the decision to enter into a family agreement may come after a crisis or upheaval for the older person, such as the loss of a partner, age-related illness or increased frailty, financial pressures after retirement, or a period of extended loneliness or stress.

Most people want to remain as independent as possible and live at home as they age. While there are many that can give support for daily activities such as meals, cleaning and personal care, they aren't quite the same thing as help from willing family members or friends.

> *"But even with the most helpful and available family, many older people can feel like their increased needs make them a burden. Some people may believe that making a financial contribution to their family in return for care alleviates this feeling."*

In addition, it gives them the opportunity to make a tangible impact by sharing the wealth that they have acquired over their lifetime and intend to pass on when they die. For many people, a family agreement is a way of distributing their estate at an earlier point, when they feel their children can most use it.

There is much joy that can come from multiple generations of a family living together: closer relationships across the generations, more hands on deck to help out, and a sharing of resources that might allow everyone to live comfortably.

There is one important way that all happy families are alike: they think that they will always be happy, and because they harbour genuine good intentions, they often don't plan for the possibility of things going wrong. But even for families who have no history of disagreement or conflict, a formal documented family agreement (and the discussions necessary to get there) can be beneficial.

Before taking the leap, everything should be on the table for discussion—finances, care arrangements, future changes, potential relationship breakdown, child care expectations.

Overall, family agreements, particularly 'assets for care' arrangements, can be a good way for older people and their children to address the challenges both parties might be facing at this point in their lives.

However, they work best if everyone considers whether the arrangement meets all their needs, now and in the future, and ensures that it is formalised in a way that can help avoid, or resolve, future disputes.

How does a family agreement relate to elder abuse?

An older person contributing their assets to their family in return for care and housing as they age is not, in itself, elder abuse. But sometimes elder abuse will arise within the context of a family agreement, and the effects can be devastating on a personal and financial level.

When family agreements go wrong, older people can be left without a home and financial security. Depending on the financial arrangements, the fallout may affect their age pension entitlements, tax and aged care options.

Most devastatingly, when an agreement breaks down, older people risk losing relationships that are important to them (including with grandchildren) and feel ashamed about what has happened, which leads to further stress, anxiety and depression.

Elder abuse in the context of family agreements can take many forms. The promised care might not eventuate, resulting in neglect. Family conflict or violence might make the arrangements untenable, or the older person might have been pressured to take part and feel trapped.

Alternatively, unexpected circumstances might arise that change everyone's plans, and elder abuse can occur if the older person is expected to take the brunt of the difficulties or when they try to assert their rights.

Elder abuse services in each state and territory provide information and support for people to address the abuse and remain safe. Civil litigation and dispute resolution services can offer a way forward when the arrangements have broken down, but this can be a difficult and costly process that may not deliver the outcomes desired.

In order to avoid being the victim of elder abuse, the older person is encouraged to carefully consider the proposed agreement, discuss it with family and others, and seek independent financial and legal advice.

"Family members contemplating entering into a family agreement with an older person should make every effort to ensure the arrangements are mutually beneficial and that consideration has been given to the older person's future needs should the circumstances change or the agreement dissolve."

What situations require a family agreement?

These are some of the most common scenarios in which family members of different generations (often, ageing parents and their adult child/ren) might come to a family agreement over living arrangements, care, assets and support.

While many families might think a verbal or informal agreement is enough, a formal, or documented, family agreement is always beneficial, particularly if the arrangements later change or fail.

Co-purchasing property

> *"Where an older person sells their house and puts the proceeds towards purchasing or building a new property to live in with a family member. While both the older person and the family member might be on the property title, it is common for the house to be only in the name of the family member."*

A common scenario is when an older person puts the proceeds of the sale of their home towards purchasing or building a new property with another family member (often one of their adult children). This scenario often comes about when an older person wants to help their child get into the property market, while also avoiding having to move into aged care.

The new property might be a single house that everyone lives in together, or it might have a self-contained flat or separate dwelling for the older person.

Part of the arrangements might be an understanding that the family member will provide care for the older person as they age. It may also be agreed that the older person will provide child care for their grandchildren or domestic help around the shared house.

The house may be purchased in the name of one or all people involved. Some different purchasing arrangements include:

- the land being purchased by one person and the build financed by another
- the older person providing the majority of the purchase funds, with the family member taking out a mortgage for the remainder and being the sole owner on title
- both the older person and the family member being owners on the title (in this case, even if the family member has agreed to be responsible for the mortgage repayments, the older person may find themselves required to step in if the repayments aren't made)
- the older person being listed on the title as a 'joint tenant' (which means that upon death, their share goes to the remaining title holders and does not form part of their estate)
- the older person being listed on the title as a 'tenant in common' (in which case their share reflects their contribution and, upon their death, will become part of their estate and be distributed as per their will).

Regardless of the particular details, it is important for everyone involved to be clear on what the new arrangements mean for them, both now and in the future, and for a formal agreement to document them. Formally documenting the agreement may also help to ensure transparency about the arrangements with other family members and avoid future disputes (for example, between siblings).

Whether the older person and family member are both on the property title, or only one of them is, a formal family agreement could detail each party's contribution at the point of purchase and decisions about proportional ownership, which can be useful if the property needs to be sold and the proceeds divided at a later time.

A formal agreement can also record any decisions about upkeep, access and use of the shared property, and other expectations about the new living arrangements.

If only the family member (and not the older person) is on the property title, Centrelink's 'granny flat interest' rules may apply to the older person's age pension asset test. (The term refers to the living arrangement—making a cash contribution to live in someone else's home—rather than the type of accommodation known as a 'granny flat'.)

Case Study

When she was 69 years old, Elif decided to be proactive about planning for her later life. After talking it over with her family, Elif sold her unit for $640,000 and contributed $500,000 to her son Adem, who used the money to build a 4-bedroom house with a self-contained unit on the lower floor. Elif was excited to spend the rest of her life with her son's family, watching her grandchildren grow up.

Elif picked up the children from school 4 days a week and cooked the family meals every second night. She enjoyed spending her days visiting friends and going to the local Turkish club. Elif saw less of the grandchildren when they were in high school, but she was happy to be close by.

When Adem's wife Sara started a new job, Elif helped out more with household chores, but she soon found she was unable to keep up with Adem and Sara's expectations. In time, Adem refused to drive Elif to her club until she had completed the household tasks and he started to lock the door connecting her unit to the family home so she could not drop in to see her grandchildren.

After ten years, Adem and Sara told Elif she had to leave because they needed more room for their growing boys and it was selfish of her to take up so much space. They claimed that the arrangements were only ever meant to be temporary. When Elif argued with them, they told her she must be having problems with her memory and that the money she had put into the house was a gift—it did not mean she could stay for ever.

Elif reluctantly decided to move into aged care. However, when she enquired, she found that because she had no assets, she could not afford the aged care facility where some of her friends were. Instead she had to move to a facility further away, where everything was unfamiliar.

Building an extension or granny flat

> *"When an older person sells their home and contributes most of the proceeds to their family member to build a unit or extension for the older person to live in as they age."*

Another common scenario is when the older person's assets (or proceeds from the sale of their home) are used to build an extension or self-contained flat—sometimes called a 'granny flat'—on a family member's property.

In this case, even if the older person has paid all expenses, the extension or granny flat belongs to the property owner. This ruling even applies to units that are fully self-contained and have separate access, unless they were built under a separate title or ownership. This is an important consideration in case the older person ever needs to move elsewhere.

Local councils may have different requirements and allowances for granny flats. Some may only allow the flat to be used by 'dependent persons' and not as rental accommodation, which will give it a lower value than expected (perhaps even less than it cost to build) if the property is sold in the future.

When an older person contributes money to a family member in return for care and accommodation, Centrelink's 'granny flat interest' rules may apply, ensuring that the older person's age pension is not affected.

However, if the amount contributed by the older person is more than the amount that Centrelink considers reasonable for the arrangements, the older person's pension entitlement may be affected. People considering this type of accommodation arrangement should contact Centrelink to confirm the policies that will apply to their own circumstances.

For an extension or granny flat build, a formal family agreement documenting the older person's contribution and expectations is important in case the property needs to be sold in the future.

Case Study

Phuong and Lily were having trouble making their mortgage repayments after Phuong hurt his back and could no longer work. After discussing options with their son, Yen, they sold their home, paid off their loan and used $150,000 of the proceeds to build a unit in Yen's yard.

After Phuong and Lily had lived there for 8 years, Yen told them his family had outgrown the home and wanted to buy something bigger. When the house sold, Yen returned the $150,000 to his parents and used the remaining proceeds from the sale to buy a new, larger house for his family.

Despite the unit improving the value of the property, Phuong and Lily did not receive any higher return on their contribution and had to move into a private rental because they did not have savings to buy a new home.

Property transfer

> *"When an older person transfers their property to a family member with the understanding that they can continue living there until they die or enter aged care."*

Sometimes an older person may transfer ownership of their property to their family member, with the understanding that the older person can keep living in the property for the rest of their life (this is sometimes called the 'right to reside').

Often the transfer might be instigated by the family member, who wants the security of the house for a loan. It might also come about when the older person is trying to minimise the assets that will be considered when they have to pay for aged care.

Something to consider with a property transfer is that it can create conflict with other family members (particularly those who stood to inherit from the older person). Additionally, depending on the time frame of the transaction, the transfer may still be assessable as a gift in relation to aged care, tax or the age pension. There might also be stamp duty and other tax implications.

However, one of the biggest risks is that if the family member decides to sell the property, or if they default on their loan and the bank seizes the house, the older person has no recourse.

Case Study

Angelo was determined to remain living at home as long as he could. His son, Stephen, supported him in this and organised some extra care services to help maintain Angelo's independence. When Stephen asked if he could use Angelo's house to secure a loan for his new business, Angelo was happy to oblige. He was confident that his son's business would be a success.

Six years later, Angelo was confused about why Stephen kept pressuring him to move into aged care when he was happy where he was. Eventually, Stephen had to confess that the house was to be seized by the bank as his business had failed. Angelo was devastated to find out he had no choice but to move into residential aged care.

Financial agreement (loans and gifts)

> *"When an older person lends or gifts money to a family member, including being guarantor on a home loan."*

An older person might gift or lend money to a family member, commonly in the form of cash, money for a house deposit, or contributions to a mortgage. It is always best to be clear about whether and when the money should be repaid, otherwise the family member might assume that it is a gift, particularly when it's from an older person to their child.

Gifting money can have an impact on the older person's age pension entitlements, their tax and their ability to afford aged care support.

If the money is a gift given with the expectation that the older person will receive care and accommodation in return, it is best referred to as a 'contribution' and a formal family agreement should be documented.

Sometimes an older person is asked to use the equity in their home as a guarantee to assist a family member taking out a home loan. Although no money changes hands, being a guarantor can affect a person's own borrowing power and make them responsible for the debt if the family member is not be able to repay the loan.

Intergenerational households

There are other living arrangements that can be considered family agreements. As they may be short-term and often do not involve a financial contribution or exchange, they are more likely to be informal and undocumented.

Sharing a home with an adult child

> *"Adult children sometimes return home to their parent(s) for housing, financial and other support. A family agreement can help ensure expectations and contributions for these arrangements are made clear from the beginning."*

There are many reasons why multiple generations of a family might live together for long or short periods. Most examples of these arrangements focus on situations that have come about because the older person is in need of care and support as they age. But in many instances, it is in fact the older person providing the care and support.

When things go wrong, it is not unusual for adult children to return to their parents' home. This might happen when the adult child:

- has recently separated
- has been the perpetrator or victim of family violence
- is struggling with health issues, mental illness or substance abuse
- is experiencing financial stress or unemployment
- is saving for a house
- has returned from overseas, particularly during the COVID-19 pandemic.

While it is rare in these situations for a formal family agreement to be drawn up, it's wise to have discussions and make a written agreement to ensure everyone has the same expectations of the situation. These might cover how long the family member is planning on staying, what financial contributions they will make to household costs, and what tasks are expected of them.

Problems can occur when a family member overstays their welcome, becomes abusive or does not keep their end of the agreement. These problems may be easier to resolve if some ground rules have been set at the beginning.

Contributory Parent visas

> *"Sometimes people migrate to Australia to live with and assist their children and grandchildren. The visa and housing decisions can be similar to those of family agreements and involve a merging of finances, living arrangements and housing."*

Some older people decide to migrate to Australia to be closer to their children and grandchildren. The most common way to do this is on a Contributory Parent visa, which allows the older person to live permanently in Australia. One of the conditions of this visa is that the family in Australia have to provide an 'Assurance of Support', which is similar to a bond, for their parent.

Because of these sometimes complicated financial arrangements and the arrangements made between different generations of the family about housing, accommodation and care, a Contributory Parent visa can be seen as a form of a family agreement. And like other family agreements, all parties can benefit from having open discussions and documenting contributions and expectations.

While all families hope for a positive experience, unforeseen circumstances, including family violence, can lead to arrangements breaking down. When this happens, the older person, who is relatively new to the country and may have limited assets, is in a vulnerable position.

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