

Trevor Todd



Seniors: Beware Care-for-Life Agreements

I was recently retained by a senior who advanced over \$400,000 to his son and daughter-in-law. He did so on the understanding they would purchase a home in which all three would live; the couple would care for the senior for the rest of his life.

The house was purchased in the couple's name. The senior lived downstairs in the home until four years later, when his son met an untimely death. Title to the house was then transferred to the widow as surviving joint tenant, whereupon she immediately evicted her father-in-law. She sold the home, pocketed the monies, and departed—leaving the senior penniless. In only four short years, my client went from having control of his life and finances to being a destitute and broken person.

Variations on this devastating fact pattern are happening all too frequently. As our population continues to age, more of these informal family arrangements will certainly be made. The typical scenario will involve a senior transferring property in exchange for a promise of lifetime care. Most often the property will be the family home, which will be transferred outright or into joint tenancy with the caregiver.

Such arrangements typically will be made between a parent and one of their adult children or with another relative or trusted friend. Caregiver children will range from those that have never left home to the black sheep who returns after a long absence and winds up with the house.

Such arrangements are often entered with the best of intentions; the parties, however, are naïve as to the careful thought and discussion required. Such agreements are usually oral and accordingly vague. They are likely done without any legal advice. The formalization of such agreements is usually non-existent.

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From the senior's perspective, the care agreement is perceived to be a simple solution to allow him or her to stay in the home until death. Many seniors may fear finishing their days, isolated, in a nursing home or other institution. From their perspective, transferring the property to the caregiver, in return for continued care, may seem an ideal solution. They often look upon their prospective caregiver through "rose-coloured glasses," and naïvely look forward to a harmonious life surrounded by loving family or friends who are grateful for the substantial financial benefit bestowed upon them.

There is often an incentive for both sides to enter such an arrangement. Many seniors of modest means purchased homes years ago. Those homes have now greatly appreciated in value. Potential caregivers are often relative newcomers to the real estate market and in the absence of some financial assistance, could not

afford to buy such a home.

Thus the demographics of our ageing population, the high cost of real estate, and the increasingly uncertain economic conditions will combine to ensure the future proliferation of such arrangements. Just as certainly, there will be a boom in related litigation when such arrangements fail.

When they fail, such informal agreements leave disastrous legal problems for the parties. The results may be especially serious for the senior. The outcome is often the outright loss of the home, leaving the senior in an extremely vulnerable position. On the other hand, after many years' service, the caregiver may become embroiled in litigation with rival siblings who suspect undue influence is being exerted on the parent.

There are many legal pitfalls to informal care-for-life agreements. Invariably the parties give scant consideration to the innumerable hypothetical questions that should be asked before concluding such an arrangement. Myriad potential problems may thwart the success of such arrangements. They include control issues, unforeseen longevity or early death, incompatibility, depression, hospitalization, divorce, or the financial ruin of the caregiver. Perhaps the worst case may involve the caregiver hastening the death of the senior to obtain the property, free of all further obligations.

A review of case law indicates that most care-for-life arrangements fail because of the breakdown of the

relationship between the parties. Individual expectations are rarely discussed in advance, let alone reduced to writing. Such breakdowns may mean the senior loses his or her home and financial security, without receiving the security of the promised long-term care. Needless to say, such a loss will render a senior financially and psychologically insecure.

A carefully drafted care agreement prepared by a lawyer will usually provide better protection to both seniors and caregivers. It is, however, a simple fact that many people will continue to make informal arrangements on their own. There are a number of motives for avoiding the use of legal experts, ranging from a false sense of economy to a preference to follow “a wish and a prayer” that things will work out. Indeed some seniors are even reluctant to mention the care agreement when providing legal instructions to transfer the property to a child or friend.

From a practice point of view, a Notary or lawyer should always make

detailed inquiries to determine the reasons a substantial asset is being transferred for little or no consideration. If the underlying facts indicate that a “care-for-life arrangement” exists, then written advice is essential, urging the client to protect himself or herself by properly documenting the agreement in writing.

Another equitable remedy available in such litigation is that of “resulting trust.”

A detailed written agreement may also help minimize future family conflict. It can assist in explaining the arrangement to other family members who might otherwise challenge the land transfer after the senior’s death. At the very least, where the home or other real property is to be transferred to the caregiver, *the legal adviser should urge the senior to register a life interest against the title.*

Legal Discussion

Almost invariably, the informality of care-for-life arrangements will create difficulties for courts charged with interpreting the actual terms of the agreement. A review of current case law indicates the challenge to courts faced with litigation involving such arrangements. It seems the courts are pulled between handling such matters as contract cases or treating such transfers as gifts.

While such agreements may appear to be contracts, the courts often presume that family members are relying on mutual trust and affection, and do not intend to create legal relations in their arrangements. Thus, the most recent cases tend to treat such informal care agreements as gifts, rather than contracts.

If the courts conclude the care agreement amounted to a contract, they are then expected to interpret the contract, and determine any damages payable for breach of that contract.

From the senior’s perspective, contract law may be applied by the

courts in a somewhat harsh manner. The courts view that it is the parties that make their own bargain, and unless it is unconscionable, the courts may well enforce what may be a poor bargain between the senior and the caregiver.

As previously stated, most courts tend to view the transfer by the senior as a gift. In *Peter v Beblow* 1993 1 S.C.R., the court defined a gift as “the intentional giving to another without expectation of remuneration.”

In such litigation, undue influence is commonly alleged. Such an allegation is tantamount to alleging equitable fraud. This can be difficult to prove, as there are rarely witnesses available as to any influence exerted. The court, however, will investigate any suspicious circumstances surrounding the transaction. A transfer of land for little consideration, to any person in a special relationship with the senior, will be presumed to have been made under undue influence. Such a presumption, however, may be rebutted by evidence to the contrary.

Another equitable remedy available in such litigation is that of “resulting trust.” When there has been a transfer of title for little or no consideration, the court may find the transferor intended to retain the beneficial interest, and therefore an implied trust was created. The courts of equity presume a bargain, and the courts may presume the property to be held in trust for the transferor or his or her estate. This presumption can be rebutted by evidence showing that the transfer was intended to be a gift.

In reviewing the law, it can be a challenge to find the appropriate index titles. For example, case law in this area may be reported under several different headings, such as “undue influence.” It is likely not referenced to litigation involving “care-for-life” agreements.

Conclusion

Clearly the proliferation of these care arrangements will lead to an increase in litigation in this area. The BC Law Institute (formerly the Law reform Commission) is currently undertaking a project to investigate these agreements,

and determine what, if anything, should be done about them. For example, the State of Alabama has enacted a statute that provides “any conveyance of realty wherein a material part of the consideration is the agreement of the grantee (the caregiver) to support the grantor (the senior) during life is void at the option of the grantor (senior).”

It is important to understand the disastrous problems that can occur when these arrangements do not work out. All parties, particularly seniors, need to be educated about these pitfalls, and encouraged to reduce the contract to writing, preferably with legal assistance.

Practitioners need to be educated to ask the right questions when home transfers are occurring for little or no monetary consideration. If the practitioner fails to take adequate steps to protect the rights of the seniors in these situations, then ultimately they may be met with allegations of professional negligence.

Acknowledgment

I would like to thank Professor Margaret Hall of the University of British Columbia, who has done extensive work involving the Law Institute’s project on legal issues affecting seniors. Margaret provided me with her consultation paper and background materials, which were very helpful in the preparation of this article. ▲

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