

8. Family Agreements

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Summary

8.1 A specific type of financial abuse of older people has been recognised in the context of family agreements. A 'family agreement', also known as an 'assets for care' arrangement, has a number of forms but is typically made between an older person and a family member. The older person transfers title to their property, or proceeds from the sale of their property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. These agreements are typically not put in writing. Where they are written, family agreements may be prepared by one of the parties to the agreement, without legal advice, and the agreement generally does not provide for what happens if there is a breakdown of the relationship.

8.2 While such arrangements can fulfil a useful social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled or the relationship otherwise breaks down. It may be difficult to establish that a contract was intended, and what its terms were. The other party is likely the registered proprietor of the property, and it may be difficult to establish a specific interest in the land. The older person may be left without money or even a place to live, a situation identified by many stakeholders as financial abuse.

8.3 The ALRC proposes that tribunals be given jurisdiction over disputes within families with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal provides a low cost and less formal forum for dispute resolution—in addition to the existing avenues of seeking legal and equitable remedies through the courts.

Challenges posed by family agreements

8.4 The majority of older people either live with their spouse or alone. Nevertheless, ABS statistics show that, in 2011, 8.2% of people aged 65 years and over were living with their children or other relatives (usually a sibling). Only 1.7% were living privately with non-relatives. Of those aged 85 years and over, 12.2% were living with their children or other relatives and 0.9% were living privately with one or more persons who were not a relative. Women across the three age groups of 65–74, 75–84 and 85+, were much more likely than men to live with children or other relatives. Of women aged over 85, 14.8% were living with their children or other relative.¹ The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, a number of stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.²

8.5 Family agreements can take many forms, but typically involve a transfer of an older person's home or other assets to a trusted family member in exchange for a promise of long term care and support. The proceeds may be used to extend a house or build a 'granny flat'.³ Alternatively, the trusted family member may use the proceeds from the sale of the older person's home to purchase a new property for everyone to live in together.

8.6 Family agreements are popular in Australia for many reasons including, as Brian Herd suggests:

- our general aversion to the 'institutional' care of aged care facilities, such as nursing homes and hostels;
- the lack of such facilities (where they become essential) or, at least, of any more sympathetic and empathetic alternatives;
- people are living longer and, as a result, living longer with disabilities;
- our fixation in later life to preserve assets (eg, the icon of the family home) for succeeding generations;
- our consequent reluctance to dissipate assets (especially the family home) to pay any premium for assisted care, such as an accommodation bond in a hostel; and
- our predilection for 'impoverishing' ourselves in order to obtain and maintain social security entitlements and to reduce the tax impact of ageing.

Overlaying these mores is our understandable preference to be cared for by family rather than some unconnected, albeit well-intentioned, professional care provider whenever this becomes necessary.⁴

1 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia's Older People Live?*, Cat No 2071.0 (2013).

2 Australian Research Network on Law and Ageing, *Submission 90*; Justice Connect, *Submission 182*.

3 The Macquarie Dictionary defines 'granny flat' as 'a self-contained extension to or section of a house, designed either for a relative of the family, as a grandmother, to live in, or to be rented.'

4 Brian Herd, 'The Family Agreement: A Collision Between Love and the Law?' (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 25.

8.7 The making of family agreements is, in many cases, highly beneficial for the older person and not inherently a form of elder abuse. Senior Rights Victoria (SRV) have previously expressed concern that making an association between family agreements and elder abuse may discourage older people from getting advice to formalise their agreement, on the basis that only those older people with abusive children need advice.⁵

8.8 A key issue with family agreements is that they are often made orally, without legal advice and without any consideration of what might happen if things go wrong.⁶ Consistent with the literature, stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense.⁷ The Federation of Ethnic Communities' Councils (FECCA) suggested that older persons from CALD communities may be more likely to suffer from the breakdown of these agreements as inter-generational care is common in some communities.⁸

8.9 When things go wrong, the absence of a clear written agreement, may mean that the arrangement is unenforceable and the older person may find themselves homeless and having lost the proceeds of their family home, which they invested under the family agreement.

8.10 Properly documented family agreements, with all parties to the agreement receiving independent legal advice, may avoid the difficulties faced by older people in enforcing their interests under these agreements. The ALRC commends the work of a broad range of stakeholders including elder abuse hotlines, community legal centres (CLCs) and other welfare groups, who provide encouragement, advice and support to older people to get legal advice and properly document their family agreement. SRV, for example, has produced *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, in recognition of the role that lawyers can play in helping prevent the financial abuse of older Australians. The guide includes a checklist of points to consider when drafting an agreement. SRV also includes a sample family agreement on its website which lawyers are permitted to use.⁹

8.11 Notwithstanding this important work, because the arrangements are typically made within families, it is unlikely that all, or even a significant majority of older people, can be encouraged to get independent legal advice and assistance in putting in place an appropriate written agreement. As Herd has noted '[d]ocumenting, in a written agreement, a loving, caring or supportive personal relationship, for example, is probably anathema to many Australians.'¹⁰

5 Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1.

6 Ibid.

7 See, eg, Macarthur Legal Centre, *Submission 110*; Older Women's Network NSW, *Submission 136*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

8 FECCA, *Submission 21*.

9 Louise Kyle, 'Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse' (Seniors Rights Victoria, 2012).

10 Herd, above n 4, 25.

8.12 Hervey Bay Seniors Legal and Support Service explained that there are also many individuals who are likely to be deterred by the perceived cost of legal advice and the preparation of documentation.¹¹

Access to justice

8.13 The main form of redress when a family agreement goes wrong is currently by way of civil litigation. As the Law Council stated, where parties are able to access the courts, they are effective in resolving complex cases.¹² Doctrines and remedies, particularly in equity, have developed over many centuries to respond to the varied circumstances in which individuals may suffer loss.

8.14 Nevertheless, pursuing litigation in these cases can be prohibitively costly, unsatisfactorily lengthy, and stressful for the older person. Proof, presumptions and remedies pose significant issues in such cases. The access to justice issues were highlighted by the Australian Research Network on Law and Ageing (ARNLA):

Recovery of property via equitable action is rarely undertaken. The proceedings must commence in the Supreme Court (or sometimes District). They are expensive, time consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.¹³

8.15 As the Victorian Law Reform Commission (VLRC) reported, action in the superior courts of the states and territories costs tens of thousands of dollars in legal fees and even if successful only a fraction of those costs are recoverable.¹⁴

8.16 In many of the examples of family agreements gone wrong, set out in submissions, the older person had lost their principal asset—their family home—and typically had limited other assets.¹⁵ For those unable to afford a lawyer, disputes involving family agreements do not generally fall into the type of matter for which there is public funding.¹⁶ Specifically, Community Law Australia have noted that older people ‘being financially abused by their carer or family, will often find it extremely difficult to access free ongoing legal help if they can’t afford a lawyer.’¹⁷

8.17 Another important challenge regarding action in the Supreme Court is that such actions are lengthy processes that may take many years to be resolved. Where an older person has lost their home and has limited funds, they need access to a remedy quickly. In addition, older people may be put off, given their advanced years, by the prospect of lengthy and protracted civil litigation.

11 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

12 Law Council of Australia, *Submission 61*.

13 Australian Research Network on Law and Ageing, *Submission 102*.

14 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

15 Seniors Rights Victoria, *Submission 171*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

16 Public funding for legal advice is limited to family law (restricted to matters under the *Family Law Act 1975* (Cth)) and criminal law. Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (2012) 4.

17 *Ibid* 3.

8.18 Older people may also be fearful of the social and emotional costs of litigation given the family context of the dispute. Litigation may exacerbate family breakdown, or lead to a loss of access to grandchildren, which may result in the older person being reluctant to take legal action.¹⁸

8.19 The ALRC received a number of case studies that highlight the access to justice issues faced by older people when family agreements go wrong. The following was provided by Legal Aid ACT:

Barry, an eighty five year old man transferred his unencumbered home in the ACT to one of his adult children, Angela. Angela had promised to build a granny flat for Barry and take care of him until his death. There was no written agreement, however Barry had been living in his granny flat on Angela's property for approximately 5 years.

Angela remarried and advised Barry that the arrangement could not continue and demanded he leave his home. Barry was devastated by Angela's actions, however was able to go live with another child, Stephanie and did not want to seek any legal recourse against Angela as he was 'too old and it was too hard' and he felt so ashamed about what had happened to him.¹⁹

Challenges in seeking an equitable remedy

8.20 Property law in Australia is defined by the Torrens system of title, the core principle of which is the indefeasibility of title—once registered, title is conclusive. The objective of this system is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of the current proprietor's title, and satisfy themselves of its validity.²⁰ While the Torrens system of title protects purchasers from claims by non-registered individuals who assert an interest in the property,²¹ the Torrens system maintains the right of plaintiffs to bring personal claims founded in law or equity against the registered proprietor.²²

8.21 The key problem underpinning many family agreements is that the older person is typically giving up the certainty of registered legal title in one property (usually the family home) in exchange for rights in relation to a new property and/or expectations of care and support. Those rights and expectations are often not explicitly discussed and agreed precisely within the family. The older person's rights with respect to the new property are typically not recorded on the title. As a result, the situation is one where the older person has forgone legal title in one property and may or may not have certain rights in contract or equity in the new property.

18 Northern Territory Anti-Discrimination Commission, *Submission 93*.

19 Legal Aid ACT, *Submission 58*.

20 Kelvin Low, 'Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205.

21 Brendan Edgeworth et al, *Australian Property Law* (LexisNexis Butterworths, 2013) vol 9, ch 5.

22 The so called 'in personam' exception to indefeasibility see *Ibid*.

8.22 Where a family agreement breaks down, the equitable remedies available to an older party in an ‘assets for care’ dispute will depend on the nature and circumstances of the original arrangement, what evidence is available to confirm the nature of the arrangements, as well as the circumstances and facts of the breakdown of the agreement. Whether the older party is on the title for the relevant property and whether the family agreement was in any way reduced to writing will be important issues, not just in terms of the evidence of the arrangement, but the precise remedies that may be available. The available equitable actions include:

- resulting trust;
- undue influence;
- unconscionable conduct;
- failed joint ventures; and
- equitable estoppel.

Resulting trust

8.23 If an older person contributes money towards the purchase of a property and this is not reflected on the title, they may be able to claim that the property is held on resulting trust for them in proportion to their contributions. However, where the arrangement is between a parent and their child, the law starts with the presumption that the contribution was a gift: the ‘presumption of advancement’.²³ This presumption may be rebutted, but it places the evidentiary burden on the older person to prove that their payment was not a gift but a contribution to the property. Justice Connect observed that the ‘application of the presumption of advancement has the effect of imposing an evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented.’²⁴

8.24 Accordingly, there may be difficulties for older persons in asserting that their contribution to the purchase of a property was not a gift but was to be held by their child on resulting trust.²⁵ No resulting trust will apply where the older person simply transfers their home into the name of their child.²⁶

23 Equitable doctrine recognises that contributions between parties with a special relationship, such as parents and their children may be presumed to be a gift (the presumption of advancement): Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014).

24 Justice Connect, *Submission 182*.

25 Susan Barkehall-Thomas, ‘Parent to Child Transfers: Gift or Resulting Trust?’ (2010) 18 *Australian Property Law Journal* 75, 3.

26 In most Australian jurisdictions, this transaction will be treated as a gift and there will be no legal possibility of asserting the existence of a resulting trust. *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6; *Property Law Act 1974* (Qld) s 7; *Property Law Act 1958* (Vic) s 19A; *Property Law Act 1969* (WA) ss 38–39. See *Smith v Glegg* [2005] 1 Qd R 561. See also *Daher v Doulaveras* [2008] NSWSC 583. Transactions involving voluntary transfers of land can only be set aside on the basis of other equitable doctrines.

Undue influence

8.25 Where an older person has been pressured into a family agreement another relevant equitable doctrine is the doctrine of undue influence.²⁷ However, this is likely to be of use only where the older person has not benefited from the family agreement and either there was a relationship of dependency when the agreement was made or actual unfair pressure was applied on the older person to agree to the family agreement.

8.26 In the case studies provided by stakeholders, the family agreement was often, at least initially, mutually beneficial and there was no pressure applied on the older person to enter into the family agreement. Instead, problems arose subsequently when relationships broke down or unforeseen events changed the dynamics.²⁸ In these cases the equitable doctrine of undue influence would not apply.

Unconscionable conduct

8.27 Where an older person is denied promised care and support or is excluded from their home, another ground for seeking to uphold the family agreement in equity is on the basis that the older person was in a position of 'special disadvantage' and that the other person knew of this. In such a case, it may be 'unconscionable' for the other person to deny the agreement.²⁹

8.28 In many family agreement situations, there is no dependency or special disadvantage at the time the agreement was made.³⁰ In addition, at the time the agreement breaks down, it may be that neither party contemplated what would happen if things went wrong, rather than any intent by the other family member to deceive or take advantage of the older person. Accordingly, unconscionable conduct may be relevant only in a small number of cases.

Failed joint ventures

8.29 Academics note that the failed joint venture is the most common equitable doctrine relied on in assets for care arrangements.³¹ A failed joint venture action is designed to ensure that where both parties have contributed to a property and only one is recorded on the legal title, the latter is not unfairly advantaged at the expense of the former.³²

27 Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 501 [15-005]. See also Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499, 514.

28 See, eg, Relationships Australia, Victoria, *Submission 125*.

29 Fiona Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Older person only in Australia' (2003) 29 *Monash Law Review* 336, 351-352.

30 Eileen Webb and Teresa Somes, 'What Role for the Law in Regulating Older Persons' Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements in Australia' in *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333, 34.

31 Webb and Somes, above n 30.

32 *Muschinski v Dodds* (1985) 160 CLR 583.

8.30 The primary disadvantage of the failed joint venture doctrine, from the perspective of the older person, is that if successful the available remedy is the imposition of an equitable lien to the value of the contribution rather than compensation for the loss of expectation of care and support.³³ Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.

Equitable estoppel

8.31 A claim of estoppel can result in the enforcement of an expectation in equity.³⁴ This is the most suitable remedy in family agreement cases.

8.32 In order to succeed in an equitable claim, the older person must show that:

- the defendant made a representation, either by conduct or acquiescence, creating the expectation that the older person would gain an interest in property;
- the older person relied on this representation to their detriment; and
- the defendant knew that the older person was relying on the representation.³⁵

8.33 Many of the cases highlighted in submissions, give rise to potential claims of estoppel.³⁶ In many cases, there is a promise—whether explicit or based on acquiescence—that the older person will be able to live in the property for the duration of their life. The older person has made a financial contribution to the property in reliance on that representation, which, if the relationship breaks down and the older person is no longer able to live in the property, is to their detriment. By conduct, it should be possible to establish that the defendant knew of this reliance by the older person. An example of where equitable estoppel may be an appropriate remedy is in the case study example above regarding ‘Barry’ at paragraph 8.19.

8.34 The available remedy in an equitable estoppel action is likely to be compensation to the full value of the promise forgone, particularly in family agreement arrangements where the breach of promise has significant consequences for the older person.³⁷

Summary

8.35 Accordingly, there are a range of potential legal actions available to an older person who has suffered financial loss on the breakdown of a family agreement and their success will depend on the extent to which the facts of their particular situation

33 Barkehall-Thomas, above n 25, 155.

34 Note some members of the High Court have considered that there is one unified form of estoppel: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

35 Barkehall-Thomas, above n 25, 168. *Sullivan v Sullivan* (2006) ANZ ConvR 54, [2]-[3] (Handley JA).

36 *Advocare Inc (WA)*, *Submission 86*; *Hervey Bay Seniors Legal and Support Service*, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

37 Barkehall-Thomas, above n 25, 155.

can meet the required tests in law and equity. The fact that the older person has suffered significant financial loss may not be sufficient. An older person has to weigh up the strength of their case in the context of unwritten agreements and conduct that may be evidence of a range of intentions. This assessment must be made with an understanding of the considerable costs of equity litigation.

Low cost options to resolve disputes

Proposal 8-1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

8.36 Tribunals should be given jurisdiction over disputes with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal offers a low cost and less formal forum for dispute resolution, in addition to the existing avenues of seeking legal and equitable remedies through the courts. Tribunals are able to resolve disputes in a non-legalistic fashion without regard to formal pleadings and affidavits. This proposal seeks to provide an alternative avenue for dispute resolution and would otherwise not disturb existing legal and equitable doctrines.

8.37 The tribunal, consistent with the approach in Victoria (see below), would consider the general law of property, but would have a broader jurisdiction to award compensation having regard to contributions of both parties made under the ‘assets for care’ arrangement. In particular, the tribunal would consider the care and support provided by all parties under an ‘assets for care’ arrangements as well as the financial contribution to the property.

8.38 Where the tribunal is satisfied that a party has suffered loss as a consequence of a breakdown of a family agreement, the tribunal should award compensation that is just and fair having regard to the financial and non-financial contribution of the parties.

8.39 Consistent with the tribunal’s role to provide a quick, simple and informal forum for dispute resolution, the proposal is limited to disputes over residential property. The proposal specifically excludes disputes involving family businesses and farms, and focuses on domestic disputes involving residential property under assets for care arrangements. The more commercial arrangements are better suited to formal adjudication through the courts.

8.40 Often a failed family agreement may involve an older person, their child and their child’s partner. Where the child and their partner are separated and seeking to resolve a property dispute under the *Family Law Act 1975* (Cth), the older person may seek to protect their interest in the property by joining proceedings under the *Family Law Act 1975* (Cth). This proposal does not seek to interfere with this jurisdiction.

The Victorian approach

8.41 The proposal builds on, in part, amendments to the *Property Law Act* (1958) (Vic) (PLA) in 2006, which gave VCAT a statutory jurisdiction to resolve disputes between co-owners of land and goods. Under the PLA, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.³⁸ The tribunal's jurisdiction over property disputes between co-owners has an uncapped monetary value.

8.42 Notwithstanding the flexibility to make any order that the tribunal considers 'just and fair,' VCAT does not ignore the general law of property (which is outlined above). As Senior Member Riegler explained:

Although the Act does not expressly state that the Tribunal's discretion is to be applied in accordance with the general law, I am of the opinion that to simply determine the issues based on what the Tribunal may, from time to time, consider to be just and fair without having regard to the general law is not an outcome that I consider to be just and fair. The public expect decisions of the Tribunal to be consistent, in terms of applying the law to the facts as found. To disregard the general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.³⁹

8.43 VCAT has confirmed that the PLA gives it jurisdiction to make orders with respect to equitable, as well as legal, co-owners.⁴⁰ The broad statutory mandate gives VCAT considerable flexibility to arrive at a just and fair sale of the land and a division of the proceeds and/or division of land. Justice Connect observed that:

VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owner's individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.⁴¹

8.44 One of the particular advantages of VCAT having this jurisdiction, is that it gives the parties access to alternative dispute resolution without going through a number of pre-trial steps, which may be required in the Supreme Courts. VCAT may seek to resolve disputes through mediation or compulsory conferences.⁴² Compulsory conferences are similar to mediations in that they are pre-trial, confidential, and without prejudice facilitated discussions, designed to assist the parties to resolve their dispute.⁴³ Unlike mediation, compulsory conferences are only conducted by tribunal members and the role of the tribunal member is to actively assist the parties to reach settlement. As set out in a VCAT Practice Note

38 *Property Law Act 1958* (Vic) s 228.

39 *Davies v Johnston (Revised)* (Real Property) [2014] VCAT 512 (5 May 2014), [27].

40 *Garnett v Jessop (Real Property)* [2012] VCAT 156 (13 February 2012).

41 Justice Connect, *Submission 182*.

42 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 83, 88.

43 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 4 — Alternative Dispute Resolution* (2014) 3.

at a compulsory conference the Tribunal Member may express an opinion on the parties' prospects in the case, or on relative strengths and weaknesses of a party's case. The Member will exercise this power if the Member considers it to be of assistance in promoting settlement.⁴⁴

8.45 This more interventionist approach is better suited to disputes regarding family agreements, where there is often a significant power imbalance between the parties. SRV stressed the value of the tribunal's ADR processes in providing a forum in which family members are required to sit down and resolve disputes. Their submission highlighted the extent to which these disputes may be resolved through ADR without needing to be adjudicated by the tribunal.⁴⁵

Support for dispute resolution by a tribunal

8.46 CLCs and elder abuse advice services, including those with experience of the Victorian approach, support tribunals having jurisdiction over disputes following the breakdown of family agreements.⁴⁶ ARNLA, for example, noted that a 'tribunal may be a preferable forum to hear and determine disputes about family agreements as tribunals are considered to be less expensive, more expedient, and less formal than courts.'⁴⁷

8.47 Similarly, Senior Rights Service suggested that:

It would be beneficial to have a forum other than the Supreme Court, such as the NSW Civil and Administrative Tribunal, for property orders to be made in relation to family agreements to reduce time, cost, and stress for older people in bringing proceedings against family members.⁴⁸

8.48 SRV highlighted the value of a tribunal process in assisting older people to resolve failed family agreements:

This jurisdictional change [in Victoria] has provided 'co-owners' with a much greater ability to institute proceedings to resolve disputes though less expensive and onerous processes than previously existed for Supreme Court matters. This has also provided a significant benefit to older people where Assets for Care situations have failed, and they seek to recover their financial contribution to the purchase of a property in conjunction with other family members.⁴⁹

8.49 Justice Connect also noted that tribunal processes offer a number of benefits including that 'the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse...'⁵⁰

44 Ibid 5.

45 Seniors Rights Victoria, *Submission 171*.

46 See, eg. Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Australian Association of Social Workers, *Submission 153*; Older Women's Network NSW, *Submission 136*; Australian Research Network on Law and Ageing, *Submission 102*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Legal Aid ACT, *Submission 58*; University of Newcastle Legal Centre, *Submission 44*.

47 Australian Research Network on Law and Ageing, *Submission 90*.

48 Seniors Rights Service, *Submission 169*.

49 Seniors Rights Victoria, *Submission 171*.

50 Justice Connect, *Submission 182*.

Defining the tribunal's jurisdiction

8.50 Some submissions, which supported tribunals having jurisdiction over failed family agreements, suggested that the tribunal's jurisdiction should be capped at certain monetary value.⁵¹ At this stage, the ALRC is not proposing that the jurisdiction be capped at a certain monetary value, noting that VCAT's jurisdiction is unlimited and there does not seem to be concern amongst submitters from Victoria that this is a problem.

8.51 One of the key limitations of the Victorian model is that it is restricted to co-owners of land in law and equity. However, it may well be that, in a majority of family agreement disputes, the older person has no property interest as co-owner unless established through, for example, equitable estoppel. If they do have an interest in property, that interest may be a life interest, an equitable lien or licence to reside in the property.⁵² The ALRC proposes that the tribunal's jurisdiction encompass any type of equitable interest an older person may have in their current or former principal place of residence. The tribunal's jurisdiction should be even broader than property interests and allow the tribunal to consider the respective contributions, financial and non-financial, under the family agreement. This approach is consistent with the recommendation from the Seniors Legal and Support Service Hervey Bay that:

There be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.⁵³

8.52 By focusing on contributions, the tribunal would be able to fully consider the care and support provided by the parties to each other. This addresses a principal criticism that the law of equity in relation to family agreements only considers the asset side of 'assets for care' and not the care side. That is, the law of equity as applied to family agreements is focused on financial contributions towards the purchase of property or renovations of property and not on the non-financial contribution of care and support provided.

8.53 Some stakeholders suggested that the presumption of advancement should not apply in the case of older persons and their adult children.⁵⁴ Given the breadth of the tribunal's jurisdiction as proposed, the ALRC considers that this change is not necessary. Moreover, the ALRC is concerned that altering equitable doctrines may have broader ramifications outside the context of elder financial abuse.

51 Caxton Legal Centre, *Submission 174* 11.

52 Kyle, above n 9, 42.

53 Hervey Bay Seniors Legal and Support Service, *Submission 75*.

54 See, eg, Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*.

How to define family?

Question 8-1 How should ‘family’ be defined for the purposes ‘assets for care’ matters?

8.54 The tribunal’s jurisdiction could be defined by the relationship of the parties, that is, a familial relationship. This would enable a tribunal to easily confirm its jurisdiction by ascertaining the nature of the relationship between the parties to the proceedings.

8.55 Defining the jurisdiction of the tribunal on the basis of family relationship may be considered novel, given that this has previously only been done in relation to married couples and, more recently, de-facto relationships under the *Family Law Act 1975* (Cth).

8.56 The approach would exclude from the tribunal’s jurisdiction disputes between friends as well as older persons and their carers. However, as outlined above, few older people are living with non-relatives outside of residential aged care. Older people are ten times more likely to be living with a child or family member than a non-family member.⁵⁵ Another reason for defining the tribunal’s jurisdiction in this way is that it is the very nature of familial relationships, which are grounded in trust, that are more likely to produce informal and unwritten arrangements.

8.57 The key issue is then how widely ‘family’ should be defined for the purposes of the tribunal’s jurisdiction. Individuals living in non-traditional families should not be excluded. The ALRC suggests including de-facto relationships as defined in s 4AA of the *Family Law Act 1975*. This definition includes same sex de-facto relationships. The definition of family should be broad enough to cover situations where one partner in a de-facto relationship passes away and the surviving spouse may wish to enter into a family agreement with their deceased partner’s child or niece/nephew. Similar arrangements may be put in place where one spouse has gone into residential aged care.

8.58 The ALRC welcomes submissions on how broadly ‘family’ should be defined for the purposes of determining the jurisdiction of the tribunals in assets for care arrangements.

55 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia’s Older People Live?*, Cat No 2071.0 (2013).

