

Private Care Agreements Between Older Adults and Friends or Family Members

A Report prepared for the British Columbia Law Institute
by its Committee on Legal Issues Affecting Seniors

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- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,

(b) promote improvement of the administration of justice and respect for the rule of law,
and

(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

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I. Introduction

A. The Project Committee on Legal Issues Affecting Seniors: Mandate from the British Columbia Law Institute

The British Columbia Law Institute ("the Institute") was created in 1997 as the successor organisation to the Law Reform Commission of British Columbia. The Institute is an independent, non-profit society working for the improvement and modernisation of the law, and to facilitate legal access. Achieving these objectives may involve research and education in addition to recommendations for legislative change.

When the Institute's program of law reform was initially developed, "Family Law and the Protection of Vulnerable Persons" was identified as a focus area. A project addressing legal issues that particularly affect older adults falls into this area, and the Institute formed the Project Committee on Legal Issues Affecting Seniors in August, 2000. The Committee includes seniors' advocates, legal practitioners, and academics from the disciplines of law and gerontology, bringing together a range of viewpoints and expertise.

The long term objective of the Institute and the Project Committee is to carry out a series of discrete projects under the "Legal Issues Affecting Seniors" umbrella. "Private Care Agreements Between Older Adults and Friends or Family Members" is the first discrete project undertaken by the Project Committee.

B. The Reasons for the Project

A private care agreement involves a senior's transfer of property (usually the family home) to a friend or family member in exchange for a promise of care and support in the home. These arrangements are almost always made orally and without legal advice, and the law regarding their enforcement is unclear. Private care agreements may be attractive to seniors as a means of staying in the family home, but can have very negative consequences for seniors and for caregivers. Seniors may lose their homes where the living relationship breaks down, or continue to live in unhappy or even abusive caregiving relationships. Caregivers are also vulnerable, where a senior's deteriorating health places increased demands on the caregiver far beyond original expectations, for example, or where the transfer is challenged by the estate after the death of the senior (where the caregiver has provided years of care). The severity of the problems associated with private care agreements is a primary reason for the Project.

C. The Purpose and Scope of the Project

Seniors and caregivers are currently using care agreements to arrange for care and support in the community. The purpose of this Project is not to recommend or endorse private care agreements, but to protect seniors from potentially harmful outcomes in a way that is fair to caregivers.

The Committee considered limiting the study to "family agreements," private care agreements between family members. That limitation was ultimately rejected as both artificial and unworkable. Would an informally "adopted" daughter or son qualify as a family member for example, or a sister-in-law, or a partner's daughter? Seniors, like others, may develop their own circle of "family" irrespective of blood tie. Widening the scope of the Project to include agreements in which a friend takes on the caregiving role provides for this reality. The pre-existing intimate relationship between the senior and non-professional caregiver, the hallmark of the private care agreement, may be present between friends as between family members, and a distinction between "family" and others in this context is artificial. The law does treat family members differently for some purposes, however; these areas are discussed in the "Summary of the Current Law."

D. The Committee's Process of Research and Consultation

The Project has three underlying objectives:

- to compile an information resource
- to raise awareness around the issues associated with private care agreements
- to generate recommendations for decreasing or mitigating the problems associated with care agreements

1. Compiling an Information Resource

The Report on Private Care Agreements Between Older Adults and Friends and Family Members, together with a lengthy and detailed "Background Paper" (available through the Institute's website at <http://www.bcli.org>), is the first information resource dealing with this subject to be compiled in North

America, to the knowledge of the Committee. Indeed, the Project is (to the knowledge of the Committee) the first work in Canada to identify and name this phenomenon, and to bring together the relevant case law, legislation, and analysis.

2. Raising Awareness

A Consultation Paper was published in July 2001, summarising the issues and a set of tentative proposals for reducing or mitigating the problems associated with private care agreements. The Consultation Paper was widely circulated to legal and other professionals working with seniors and to seniors organisations. The Project Reporter has gone out into the community to talk about private care agreements with lawyers, estate planning councils, notaries, seniors organisations, seniors' counsellors and advisory committees. The Project and the issue have also been profiled in the media, to reach the widest possible audience.

The purpose of the consultation process was twofold. The Committee wanted to hear back from the community about the issue, and about the proposals set out in the Paper. The recommendations set out in this Final Report reflect what has been learned through this very comprehensive consultation process.

The consultation process was also developed and carried out as a means of raising awareness about care agreements and their characteristic pitfalls. Raising awareness about the issue among professionals carrying out property transactions was one priority. Raising awareness among the general community, and seniors in particular, about the problems associated with private care agreements has been another key objective of the consultation process. The importance of increasing general awareness was also emphasised by many of those contacted during the consultation process, who identified raising awareness as the most effective way of decreasing or eliminating those problems.

Educational outreach has continued beyond the formal conclusion of consultation. Publication and circulation of the Final Report is another step in this process of education and awareness raising.

3. Generating Recommendations

The Final Report sets out the Committee's recommendations for decreasing and mitigating the harms associated with private care agreements. These recommendations are informed by the knowledge and experiences of the Committee members, by research carried out over the course of the Project, and by what the Committee has learned through the consultation process.

II. The Private Care Agreement

A. Introduction

Seniors may find the private care agreement attractive for a number of reasons. Private care agreements appear to resolve many needs and desires simultaneously: the need for support, the desire to stay in the

home, the desire to help others with one's available resources, the desire to preserve an irreplaceable asset for a loved one. Private care agreements will be most attractive to those without significant alternative assets, and will usually be made informally, without documentation and without legal input. These patterns- who makes private care agreements and why- increase the risk of unfairness to caregivers, and may be downright dangerous for seniors.

B. What is a Private Care Agreement?

A private care agreement involves a transfer of property (usually the family home) to a friend or family member in exchange for a promise of care and support. Sometimes, the senior will put the property in both names, with the survivor taking full ownership when the other dies. The parties to the agreement may contemplate that the senior and caregiver will live together in the family home.

Seniors are not the only people who can make a care agreement transfer, of course, but older people are more likely than other adults to consider a private care agreement. The "classic" care agreement involves a transferor with a significant property asset, who can no longer live independently but who strongly desires to stay in the home, and who wishes to provide security for a family member or close friend. Older adults are most likely to fit into this profile, and so to consider the private care agreement as a workable option for meeting their needs.

Consider the story of Stan and Maud.¹

Maud, a 75 year old widow, has lived in the same house in Kitsilano for 50 years. She has put down deep roots in this community, and cannot imagine living anywhere else. Those 50 years have seen a lot of changes, though. The modest bungalow she and her husband purchased in 1950 is now worth half a million dollars.

Maud has always been a very independent woman, and is proud of her self-reliance. But lately she finds that she gets tired easily, and just can't do all the things she used to. The house is starting to look run down. Maud can't take care of everything all by herself anymore, but she can't afford to pay a handyman. She has very little income, just her pension. She worries about home invasions. But she doesn't want to move. Anyway, where would she go? She doesn't even want to think about living in an old folks home with all those strangers.

Maud comes up with a plan. Her son, Stan, will come and live with her, take care of the house and garden and contribute to household expenses. With Stan to look after her, Maud can stay in her house until she dies.

Stan wants to help his mother, but is reluctant to reorganise his life as dramatically as Maud suggests. Stan has struggled with addictions in the past but now, with the recent purchase of a small condominium in Burnaby and a steady job in a nearby office supplies store, Stan feels like his life is on track. Stan is also a bit worried about how his sister Susan, who lives in Toronto, will react. Stan knows that Susan regards him as a bit of a loser and scam artist.

Maud is insistent, however. She tells Stan that she will give him the house if he moves in with her, and Susan won't be able to do anything about it. Stan says ok. He puts his condo on the market, and moves in with Maud.

Maud looks up "lawyers" in the yellow pages and finds one who specialises in real estate transactions. At the lawyer's office, Maud tells him that she wants to "give" the house to Stan. It doesn't occur to her, or to Stan, to mention anything about Maud staying on in the house. None of that seems relevant to what they want the lawyer to do- which is to transfer the house. Ownership of the house is transferred to Stan.

Within a month, it is clear that things are not working out as expected. Stan doesn't take care of things in the same way that Maud always did. Maud is dismayed by Stan's housekeeping standards, and complains that he has let the garden and the exterior of the house get scruffy looking. Stan feels like Maud is watching him critically all the time, and he feels like he can't bring any friends over to what is, after all, his own house, without his mother complaining about people smoking or making noise. Maud, for her part, doesn't like Stan's friends, and doesn't like the way they hang around the house all the time.

Soon after Stan moves in, Maud falls and breaks her hip. Maud is bedridden for months, during which time Stan takes care of her (bathing her, helping her with the exercises recommended by her doctor, bringing her meals, etc.), and does all the housework. Stan has to cut back his hours at work. Maud is eventually able to get about with a cane, but remains more dependent than previously, and Stan must spend more and more time at home caring for her. The expenses associated with the house are greater than Stan expected, and his debts are starting to pile up.

Stan tells Maud that he wants to sell the house, buy a smaller place, and settle his debts. There will not be room for Maud, but Stan can't take care of her properly any more anyway, and it is time for her to move into a nursing home. Maud protests, but Stan says its his house and he can do as he likes. Anyway, he's earned it, taking care of Maud all this time. She would have gone into a nursing home long ago if not for him.

Maud tells Stan that she has every right to stay in her house for as long as she wants, and that furthermore she doesn't want Stan living there anymore. Kay, a new friend from church, has promised to move in and look after her. When Stan protests that the house is his, Maud becomes very upset, and says she's going to phone Susan in Toronto.

In any event, bitterness and recriminations have destroyed the family relationship.

The story of Stan and Maud helps us to understand both the attractions of the private care agreement, and some of the reasons why they can be so dangerous for the individuals involved in spite of the best intentions of both.

Seniors and caregivers may be uncomfortable about formalising their relationship and explicitly detailing and valuing services to be provided, but both parties must realise that informal and/or overly general care agreements are in themselves the cause of significant harm to family relationships (between seniors and caregivers and between caregivers and other family members).

C. The Social Context

Escalating property values in urban centres such as Vancouver have created a context which is conducive to private care agreements, and we may expect to see their use increase. Rising housing prices make it more likely that younger adults will find it difficult to break into the market, increasing the likelihood of assistance from older family members and friends. At the same time, this property market has dramatically increased the "house wealth" of seniors who, otherwise, have few assets and low income. The now extremely valuable family home is an irreplaceable once-in-a-lifetime windfall, courtesy of market forces few would have foreseen. The senior who is house rich but cash poor may be attracted to a scheme to purchase needed care with non-liquidised property, "saving" the house for the senior (while alive) and for the caregiver (the transfer as quasi-inheritance). The market context may also fuel intense passions around the family home, raising the stakes and making family disagreement more likely, especially after the death of the senior.

All kinds of care arrangements, including private care agreements, will become more common as the 85 plus age cohort increases. Those looking for care options will tend to fall into this age group; most seniors under 85 live independently in the community. This demographic profile has important implications. Issues related to health changes (most relevant to this age group) are a significant source of problems within private care agreements, especially where those issues have not been anticipated and provided for in the agreement. Advanced age may also have legal implications related to the question of capacity, or where the senior (or estate) argues that the transfer should be set aside on the basis of unconscionability or undue influence.

During consultation, some individuals expressed distaste for the very idea of a care agreement between family members, especially, or between an older adult and a "true" friend, on the grounds that caregiving should not require compensation (or it becomes a form of exploitation). "Free" care will not be a realistic option for many, however, in the current social and economic context. Historically, most care has been provided by female family members, but this pool of daughters and daughters-in-law available to provide "free" in-home care has dried up significantly under the pressure to contribute financially to the family (a development associated with the increasing expense of housing). The demands of paid employment may make it impossible for the friend or family member to assume a caregiving role without compensation; having mom move in will not be a feasible reality for the adult child who is living in a condominium, for example, working full time to make mortgage or rental payments and to support his or her own children. Many people cannot afford to reduce working hours to look after others without some form of compensation.

Ongoing social and demographic developments make "traditional" family caregiving less possible, although seniors and their families and friends may continue to value and desire that kind of intimate care.

D. Who Makes Private Care Agreements, and Why?

It is important to understand and respect the attractions that private care agreements hold, especially for

seniors (who have the most to lose). Seniors choose private care agreements because the perceived benefits are significant, especially where potential drawbacks or pitfalls are neither realised nor discussed.

Staying at home is a priority for many seniors, even after truly independent living becomes difficult, unsafe, or uncomfortable. "Downsizing" may involve moving to a different neighbourhood, or other changes in lifestyle that the senior wishes to avoid. Fear of institutional care- the "nursing home"- is certainly a significant motivation for seniors seeking out private care agreements with family members or friends. Some seniors will be concerned about the costs associated with professional home care, especially where preserving assets for the family is a concern. The senior may prefer to live in caregiver for reasons of companionship and security, although regular home care visits might be objectively sufficient. The senior may also prefer to have a friend or family member providing care and support, rather than a stranger. On the other hand, seniors may not be aware of the available community supports, or have unrealistically negative perceptions about housing alternatives ("supported housing" developments, for example).

Helping younger family members and friends is also a priority for many seniors,² and the private care agreement appears to provide security for the caregiver while (at the same time) providing for the senior's own needs. This motive is legitimate and needs to be respected, and it is crucial to understanding why seniors choose private care agreements over alternative arrangements. Where this dynamic drives the choice of caregiver, however, the implications of that choice can have very negative consequences for the future of the caregiving relationship. The son or daughter (for example) most in need of help is usually not the person most capable of and suited for what may turn out to be a very demanding and stressful caregiving role.

The senior with significant income or other assets will be in a position to pay for services (professional or "private")³ without the necessity of selling his or her home or depleting a hard won nest egg. The wealthier senior who wants to help a friend or family member can do so by drawing on other assets. There may be less pressure to hang on to the family home as a "windfall" asset where the home is not the only significant asset or source of wealth. Wealthier families (or friends) may be able to reduce working hours to care for another, or afford to pay for a third person to provide needed care.

This profile- who is more likely to arrange a private care agreement and why- has important, and potentially dangerous, implications. Where the family home is the senior's only significant asset, the senior faces impoverishment if the care agreement breaks down; the stakes are very high. Seniors without significant income or assets (other than the home) are less likely to use lawyers and more likely to make their own (informal) arrangements wherever possible. Seniors unfamiliar with the law may not realise that legal options exist after the property has been transferred into the "name" of another. Some simply walk away; others will continue to live in unsatisfactory situations. If legal assistance is sought out after the care agreement breaks down, it is more likely to be sought from legal services centres or through seniors' centres than from lawyers in private practice (and this analysis was borne out during the consultation process).

The potential for family disagreement- and potential vulnerability for the caregiver if the transfer is challenged- is heightened where the home comprises the only significant asset of the senior and/or the senior's estate. The caregiver's vulnerability (like the senior's) is much greater where the true nature of the agreement has not been documented. Loss of compensation can be extremely unfair where the caregiver has provided years of care, foregoing other opportunities.

E. Problems Associated With Private Care Agreements

1. Relationship to Financial Abuse

Private care agreements are not inherently a form of financial abuse or exploitation. There are cases of abuse in which seniors have been tricked into conveying property by friends or family members promising care they have no intention of ever providing. These are not care agreements but examples of fraud or theft, and they are not within the scope of this project. Where in fact abuse or exploitation is taking place, seniors or third parties with genuine concerns may contact the Public Guardian and Trustee.

It is important to make this distinction clear for a number of reasons. The mistaken assumption that care agreements are a form of exploitation or financial abuse is extremely unfair to caregivers, who may have given up significant opportunities in order to provide services of real value to their older friends or relatives. Many care agreements are in fact initiated by seniors anxious to stay in their homes.

Associating problems arising from private care agreements with abuse discourages seniors from documenting and getting advice about their own arrangements. If "abuse" is the peril, safeguards are only necessary if the person you are dealing with (e.g. your son) is an abuser. Obtaining advice and formalising the agreement then becomes an indication of suspicion or lack of confidence, and a senior may hesitate to obtain advice out of concern not to hurt a caregiver's feelings (especially where the caregiver is the senior's child).

Private care agreements clearly have a potential to *degenerate* into abusive relationships, however, despite initial intentions. The stresses on caregivers can be intense, especially where needs increase in ways that neither party has foreseen or made provision for. The structure of private care agreements in which property is transferred up front (where care follows the *inter vivos* transfer of property or creation of joint tenancy)⁴ has been described as giving rise to an "incentive to hurry death," which is exacerbated where the senior lives longer than expected. The upfront payment also provides a disincentive to provide quality care. This structure makes the care agreement a high risk choice. Alternate arrangements, as where monthly payments of equity are staged (as with a mortgage) would give the senior more control than a "lump sum" transfer, and avoid negative incentives.⁵

Caregiving relationships can become unhealthy for seniors where caregivers are unable to provide adequate care. Private caregivers may lack the necessary skills and abilities, especially where the senior's needs increase over the life of the agreement; fearing to break the bargain a caregiver may feel there is no option but to struggle on, with dangerous consequences for the senior who receives inadequate care. A caregiver's illness or other problems may also compromise the ability to provide adequate care over the life of the agreement.

Our evidence suggests that most private care agreements which fail or become unworkable do so because of relationship breakdowns, and the psycho-dynamics of the care agreement are conducive to a number of "triggering" events. The senior may resent a caregiver's assertion of control in the caregiving relationship (an

appropriate restriction of the senior's driving, for example). Where the caregiver is an adult son or daughter, issues related to control may be especially divisive. The senior may find it difficult to treat the family home as really belonging to someone else despite the legal effect of the conveyance, becoming resentful when the caregiver deals with the property as his or her own. Especially where senior and caregiver are parent and child, both parties may enter the relationship with unrealistic and emotionally charged expectations of how the living relationship will play out. When expectations are not met, relationships can deteriorate and become unhappy and unhealthy for both parties, who may not see a way out.

2. Failure to Provide for Change

Problems associated with the failure to provide for change are, of course, most likely to arise where a care agreement is informal- a broad, oral promise of "care for life." As the majority of private care agreements *are* informal, the failure to provide for change is a significant source of problems. A carefully drawn contract can provide for change and prevent disagreements and discord, but cannot provide explicitly for every conceivable future development within a long term caregiving relationship.

The intimate relationship between the senior and the caregiver may make it more likely that future developments and changes will not be adequately provided for. The emotional relationship between the parties can result in a failure to consider the range of "what ifs," especially where the parties arrive at the agreement between themselves without the input of an objective third party. Mother does not think about her son pre-deceasing her, for example, or developing chronic depression which prevents him from adequately carrying out his caregiving role. The son does not think about his mother having a stroke in two years, and he doesn't know how draining and difficult his caregiving task will become after this event. Neither thinks about the possibility that each may find the other difficult to live with. Education is necessary to raise public awareness about these "what ifs"- future possibilities that, unprovided for, can seriously undermine the caregiving relationship.

3. Family Dissension

The effect of a private care agreement may be to take the senior's most valuable asset out of the senior's estate. Where there are other children (other than a caregiving child), or where the caregiver is a friend, the result can be bitterness and litigation before or after the senior's death.

Disappointed heirs are not necessarily greedy. Significant legal interests are at stake where one family member, or a friend, has been favoured over others. Where adult children have not been close to a parent or aware of the parent's personal arrangements they may be suspicious about the true nature of the arrangement. Detailed contracts specifying and valuing services relative to the market value of the property exchanged can *explain* the agreement to other family members, who will tend to be more suspicious of an alleged oral agreement discovered after the death of their parent.

The detailed agreement may not be able to overcome the potent combination of intimate relationships and valuable property, however, and those contemplating a private care agreement need to consider the effect on family relationships. Parents, especially, need to be realistic about the potential consequences of "choosing" one family member over another, or excluding adult children in favour of a friend. The senior

may not perceive a care agreement in terms of "choosing" or "excluding" - but a would be heir may do so regardless, resulting in family dissension and difficulties for the caregiver.

III. Summary of the Current Law

A. Introduction

The common law is neither clear nor consistent in its treatment of private care agreements. Outcomes may be unsatisfactory in practical terms, given the special and intimate relationship at the centre of the legal construct. The unpredictability, cost and stress of bringing legal action must also be taken into account.

A promise to provide care and support in exchange for property can form the basis of a valid contract. Where a care contract can be established, the common law rules about the interpretation and enforcement of contracts will apply.

Private care agreements are not ordinary commercial contracts, however, and their particular characteristics may result in their not being treated as contracts at all. The informality of most private care agreements can make it difficult to show that a contract was intended by both parties. Where the parties are related, the rules of the common law make it less likely that a contract will be found. The filial responsibility legislation contained in the *Family Relations Act*⁶ will also be a consideration where transferor and caregiver are parent and child.

Where the care agreement is not characterised as a contract, it may be interpreted as a gift, meaning that the person taking the property takes it with no obligations owed to the giver (the senior) whatsoever. This outcome can be very unfair to the "giver" if the arrangement breaks down, although it may be possible for the senior to have the "gift" set aside on the basis of undue influence, unconscionability, or a resulting trust, or where the senior can show imperfect knowledge of the gift (that there was no intention to transfer full ownership). A "gift" interpretation may also make the caregiver more vulnerable where the transfer is challenged by the senior or by the estate. A remedy for the caregiver on the basis of "unjust enrichment" in these circumstances is unpredictable.

A brief outline of the legal rules and equitable principles relevant to the interpretation of care agreements is provided here. Those seeking greater detail on this subject may wish to review the Background Paper written by Margaret Hall.⁷

B. Rules of Contract

A contract is an agreement that the law will enforce. An oral agreement between two individuals (without the input of a lawyer) can exist as a legal contract, although a written contract will of course provide better evidence of the parties' *intentions*. If it can be shown that an informal or oral agreement possesses the essential elements of a contract, the common law rules applying to contracts will come into play.

1. Intention

A contract requires a "meeting of the minds" between the contracting parties about the subject matter of the contract and about its legally binding effect. The law assumes an intention to create legal relationships where the agreement is clearly commercial in nature but, unless explicitly articulated as such, private care agreements do not fall into this category.

Special rules regarding intention will come into play where the parties are related. The law presumes that family members do *not* intend to create legally binding obligations between them, but "intend to rely solely on family ties of mutual trust and affection."⁸ Where parties to a private care agreement are (for example) parent and child, it may therefore be difficult to establish that a legally binding contract was intended by the parties in the absence of a written document to that effect. The presumption may be rebutted where the evidence shows that the ordinary man or woman in such circumstances would have intended to create a legally binding agreement.⁹

2. Consideration

A contract is a bargain, in which each party receives something of value- "consideration"- from the other. Consideration can take forms other than money, and may comprise "some right, interest, profit or benefit, accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."¹⁰ The care agreement's construction as a contract depends on whether or not the care promised and provided is assigned value and treated as consideration. The law is not generally concerned with the adequacy of consideration (see the discussion of "unconscionability" below).

Where the promise of care and support has been valued it can constitute adequate consideration for a transfer of property.¹¹ Cultural expectations make it less likely that courts will place a value on caregiving provided to a family member, however. Transfers are often described and treated as gifts, even where an exchange (property for care) is clearly discernible in the factual background of the dispute. Non-recognition of caregiving as valuable exchange may be rooted in the belief that adult children have a prior moral obligation to provide care to their parents, although the modern context has made this obligation extremely difficult for many. Legislated filial responsibility, moreover, may be understood to have transformed that moral obligation into a legal one (see the discussion below).¹²

3. Terms

The *terms* of the contract set out the obligations of each party. Terms can be either written or oral, although it will of course be easier to establish the existence of written terms (as it is easier to establish the existence of a contract where it has been documented). Where a term has been specifically mentioned and agreed to, it is an *express* term. Additional terms will be implied where the court determines that the parties "reasonably expected" such a term to be included within the contract, although it was not specifically mentioned or agreed to when the contract was entered into.

Where the promise to provide care and support is stated very broadly (as in a promise to "care for life") there may be disagreement about whether or not a certain term should be implied. The senior may assert that remaining in the old family home was an implied term of the contract, for example, should the caregiver wish to move (continuing the caregiving relationship in the new location). The caregiver might argue that the promise was only to provide care in the home, wherever that home might be.

Where these issues have been discussed, agreed upon and documented as express terms in a formal contract, disagreements will be prevented. Moreover, senior and caregiver may discover *before the transfer of property* that they have very different expectations about (for example) staying in the "family home" and so decide not to proceed. Making these discoveries prior to the transaction is both easier and healthier for intimate relationships than where mis-understandings and mis-matched expectations are realised after the fact.

Formal contracts making use of detailed terms are more common in the United States, where they have developed in response to Medicaid rules regarding "impoverishment." Those rules provide that voluntary impoverishment through the giving away of property or other assets will result in Medicaid ineligibility. A "gift" for these purposes includes any transfer in exchange for less than fair market value. If the senior wants to ensure Medicaid eligibility, the private care agreement must therefore set out the fair market value of the exchange. These "Medicaid-proof" contracts contain considerable detail about services to be provided and their valuation, the term of the contract, including an assessment of the senior's life expectancy (going to fair market value), and other matters.¹³

These detailed contracts may be, in large part, motivated by the particular demands of the American medical system, but they do work to establish the essential fairness of the bargain. This is useful for several reasons. Itemising and assigning value to caregiving services ensures their valuation for the purposes of the contract, and the fairness of the bargain (important in the event the transaction is challenged as unconscionable or for reasons of undue influence; see the discussion below). Caregivers may be surprised to discover the true cost of the care they were prepared to promise, and may wish to reconsider the arrangement or scale back the services they will be obliged to provide. Serious problems can be avoided where adjustments are made before the agreement gets underway. Going through the itemisation process will also force parties to discuss their expectations in detail, revealing inconsistent expectations and potential conflicts. Explicitly setting out the services to be provided as terms of the contract will, of course, make it easier to determine when the contract has been breached.

4. Remedies

If a term of the contract is not performed, the aggrieved party can bring an action for breach of contract. If the term is sufficiently important to the existence of the contract (if the term is a *condition*) the aggrieved party may ask to treat the contract as ended. If a term is not a condition, the aggrieved party can ask for monetary compensation (damages) or, if damages would not be adequate in the situation, a court may order the other party to do what was promised (specific performance). Specific performance will not be available where it would be unsuitable in the individual case, or where the contract belongs to a particular class, such as a contract for personal services.¹⁴ The court will not order specific performance where the contract is vague, or ambiguous or uncertain, or where hardship would be imposed on the party asked to perform.¹⁵

Remedy for breach of contract depends very much on the interpretation of the terms of the contract, express and implied. The decision in *Folia v. Trelinski*¹⁶ provides an example of one possible outcome where the court treats a private care agreement as a valid contract. Following a breakdown in the living relationship, the plaintiff (the mother) brought a legal action against the defendants (her daughter and son-in-law) asking to have the transaction set aside on the bases of unconscionability and undue influence (these arguments were ultimately unsuccessful). The defendants asked the plaintiff to move out of the house for the duration of the legal action. The plaintiff now alleged that, by asking her to leave the house, the defendants had breached a fundamental term (a condition) of the care contract.

The court did not agree. The plaintiff had not been permanently evicted, and the defendants had made it clear that she was welcome to return after the legal action was concluded. The plaintiff was owed damages for the period she was absent from the home as, under the terms of the agreement (interpreted as a contract) the defendants were obliged to provide for her care. Having failed to have the transaction set aside, the plaintiff was free to return (or not) to the defendants' home to resume the caregiving relationship.

C. Filial Responsibility Legislation: the *Family Relations Act*

Every Canadian province has legislation creating a legal obligation for adult children to maintain and support a parent in need (there is no such obligation at common law). British Columbia's filial responsibility legislation is set out in the *Family Relations Act*.¹⁷ The scope of this legislated responsibility is important because a pre-existing legal obligation to provide care would make the promise to do so worthless (as consideration for a contract).

Section 90 of the *Act* provides that an adult child is liable to "maintain and support a parent having regard to his or her other responsibilities and liabilities." "Parent" for the purposes of the section is defined as a mother or father dependent on the child by reason of age, illness, infirmity or economic circumstances. The *Adult Guardianship Act*¹⁸ provides that a "designated agency" may apply to the court for a support and maintenance order under the *Family Relations Act* where it has determined that an adult is in need of "support and assistance."

The scope of the statutory obligation has yet to be defined, but the case law indicates that it does not include caregiving as provided for in a private care agreement.¹⁹ The few cases interpreting section 90 have considered claims for financial support, and there is no authority for the proposition that the legislated obligation includes the provision of caregiving or other services.²⁰ Other cases have found that a child's promise of care and support will comprise good consideration for a care contract with no mention of the *Family Relations Act* obligation.²¹ Compensation has been awarded to children in respect of care provided to a parent on the basis of unjust enrichment, again suggesting that the section 90 responsibility does not extend to caregiving.²² Filial responsibility legislation will be a relevant consideration where a parent and adult child make a private care agreement, but does not seem to preclude the legal validity of such an agreement.

D. Rules Relating to Gifts

If an agreement was not intended to create a legally binding contract, or where there is insufficient evidence to prove such intentions, the conveyance nevertheless stands as a legal act with undeniably legal consequences: the transfer of ownership. Where no "contract" or exchange is established, the transfer may be characterised as a gift²³ (the "resulting trust" doctrine may also come into play; see the discussion below).

The recipient of a gift is under no obligation of any kind to the gift giver, an outcome which may be terribly unfair to the senior who expected to receive something very valuable (the promise of care) in exchange for the transfer of a very valuable asset (the family home). On the other hand, the tests for setting aside a gift (as opposed to a transfer made pursuant to a contract) work to the benefit of the senior who wishes to have the transfer set aside.

If the senior can show that the property was transferred with the understanding of a continuing entitlement to "use" the property or "get it back" under certain conditions, it may be possible to show that the apparent "gift" was made under a mistake, and should be recalled.²⁴ A valid gift requires "perfect knowledge," that the giver intend to transfer "all attributes of ownership, including the amount of the beneficial interest divested, and the full legal effect of the gift."²⁵ Gifts may also be subject to *conditions*, which must be performed either before the gift can take effect, or afterwards (if a condition *subsequent* is not performed the gift will come to an end).

The senior who has "given" property to another with the expectation of being cared for and continuing to live in the property may be able to rely on these rules if care and maintenance are not forthcoming or come to an end. The rules applying to gifts under the doctrine of undue influence may also work to the advantage of a senior who asks to have the transaction set aside and the property returned.

E. Undue Influence

A person entering into a contract or making a gift under the "undue influence" of the other party or gift taker has not freely and voluntarily *consented* to the transaction, and the transaction may be set aside. "Undue influence" (together with unconscionability) is sometimes referred to as a form of equitable fraud, although no blameworthiness or intent is required on the part of the influence-er.

Undue influence is established through a "two step" test.²⁶ For both gifts and contracts, the first step is to show whether there is an inherent potential for domination in the nature of the relationship between the parties. In the case of a commercial transaction or contract, the plaintiff must then show that the contract was substantially unfair. In the case of a gift or bequest, however, once the "inherent potential for domination" has been established by the plaintiff (step one) a *presumption* of undue influence is raised, and the onus is on the defendant to rebut that presumption.

The nature of private care agreements will tend to involve an "inherent potential for domination," whether or not that potential is ever realised. Disparity in age is a relevant (although not determinative) factor, especially where the older adult is also the less literate or sophisticated.²⁷ A pre-existing intimate relationship, whether as friends or family members, may also indicate an inherent potential for domination. The chosen caregiver may be a child or friend who has already been providing some degree of support to the senior, for example,

with the care agreement taking that relationship to the next level as the senior's needs increase. Any help and assistance provided prior to the transfer may be taken to signify a relationship of dependency and dominance.²⁸ This analysis can seem very unfair, especially where the estate seeks to have the transfer set aside on the basis of undue influence after the death of the care recipient. Establishing and documenting fair market exchange in a written contract would help to prevent this outcome.

F. Unconscionable Transactions

Foolish decision making, or regret, are not good causes of legal action. Older adults, like other capable adults, are free to make their own bad bargains, and inadequacy of consideration is generally irrelevant. An exception to this rule is made where the contract is "unconscionable." Unconscionability is generally applied to "bargains," but may also pertain to gifts.²⁹ Unconscionability is most relevant in the care agreement context where some other compensation has been given in addition to a promise of care. Where the promise to care is not valued the money payment will stand alone as (inadequate) consideration.

Unconscionable transactions involve exploitation and the abuse of power, where it would be inequitable to allow the transaction to stand. There must be an imbalance of power between the parties, arising out of ignorance, distress, or incapacity, and the weaker party must be in the power of the stronger. The transaction must also be substantially unfair. A presumption of unconscionability arises where these elements are shown; the defendant can rebut the presumption by showing that the bargain was indeed fair, just and reasonable.³⁰

The principles of unconscionability involve an analysis of power and dependency in relationships which may be particularly appropriate where a purported "care agreement" is inherently unfair or exploitative.³¹ *Bona fide* caregivers may be unfairly vulnerable to these rules, however, where their caregiving services are not explicitly valued.

G. Resulting Trust

When A transfers legal title of a property to B but intends to retain a "beneficial interest" in that property, A remains the "beneficial owner" of the property despite the legal ownership of B. B then holds the property *on trust* for A. This kind of trust is called a resulting trust.

If A has transferred the legal title of the property to B *gratuitously*- receiving no compensation- a presumption arises that B holds the property on a resulting trust for A. The taker (B) can rebut the presumption by showing that a gift was truly intended at the time that it was given. An exception to the presumption of resulting trust is made where a father gives to a child; in this case the law presumes that a gift was truly intended unless it can be shown otherwise (this is the "presumption of advancement").

The "giver" who intends to keep living in and "enjoying" the property following the transfer of legal title may be able to establish an intention to retain a "beneficial interest" following the transfer (not a "true gift").³² The resulting trust doctrine may also benefit a senior seeking the return of property where the value of caregiving services has not been documented or otherwise acknowledged.

H. Unjust Enrichment

The resulting trust doctrine and rules pertaining to gifts may work to the benefit of the senior who wishes to have property returned, or to the benefit of the estate after the senior's death. A caregiver who loses the property may be entitled to compensation on the basis of *unjust enrichment* (the doctrine of unjust enrichment may apply where there is no contract regulating the relationship).³³

Caregiving can give rise to a claim for unjust enrichment if the caregiver provided services with an expectation of compensation, and where there is no juristic or legal reason obliging the caregiver to provide those services (filial responsibility legislation imposing an obligation on the adult child to provide caregiving services might prevent recovery on the basis of unjust enrichment, for example). Love, affection and family relationship are not in themselves juristic reasons obliging the provision of care and support.³⁴

I. Conclusion

Formal written agreements may provide better protection than oral or vaguely documented arrangements for seniors and for caregivers, bringing them within the common law rules of contract. Those rules may yield outcomes that are neither appropriate nor realistic in the context of a private care agreement, however, as where both parties are instructed to carry on with the arrangement after a relationship has soured (although a suitably detailed contract may provide for that event). Furthermore, there will always be those individuals who choose to proceed with an informal agreement: because of unfamiliarity with lawyers and a fear of expense or because, psychologically, they are uncomfortable with formalising the relationship. Informal agreements pose special problems of interpretation, and are especially conducive to family discord. Legislation may be particularly useful with regard to informal agreements.

IV. Responses to Consultation

The Consultation Paper on Private Care Agreements Between Older Adults and Friends or Family Members was widely circulated, to legal professionals and seniors organisations and other professionals working with seniors, and to individuals requesting copies in response to media coverage of the Project. The paper was written to provide a succinct overview of the issue, and was intended to serve as an educational tool in addition to eliciting comments and suggestions regarding the "Possible Solutions" set out at the end of the document (information and education; identification of important matters to be considered in a private care agreement; legislation).

As an educational tool, the Consultation Paper and wider consultation process have been extremely successful. There was significant interest in this issue and demand for the Consultation Paper, which went into a second printing. The Consultation Paper, along with the Background Paper, were also made available through the British Columbia Law Institute website. We learned that private care agreements were very much a "live" issue in the community, and that the work of the Project Committee in naming and discussing this issue was important and appreciated. Relatively few (relative to the demand for information) *responses*

were received, in terms of suggestions about the "Possible Solutions" listed in the Paper.

Among responses received, there was strong support for continuing efforts in the area of education. Education of the general public, as well as seniors, was identified as important. Respondents suggested raising awareness among health care providers and Community Response Networks. The provision of information and education to staff and counsellors working on the "front line" with seniors was also identified as a helpful approach to the problems associated with care agreements. Lawyers and notaries also supported the need for information on this issue, and there was considerable interest in the identification of important matters to be considered in a care agreement. Respondents also identified a need for education and information for estate planners, whose current focus might be tax savings rather than the client's overall interests. This feedback has been incorporated into the "Outcomes and Recommendations" discussed below.

Comments and opinions received during the consultation process regarding the legislative options set out in the Consultation Paper have also been incorporated into the legislative recommendation set out below. Interestingly, despite the problems associated with them, there was no support for outlawing private care agreements altogether (as one respondent noted, "like anything else prohibited there is the potential for 'black market' knock offs which will only make matters worse"). Respondents also emphasised respecting the older adult's right to choose a private arrangement of this kind; the rights of seniors to "make their own decisions about how to structure their lives."

V. Outcomes and Recommendations

A. Recommendations for Good Practice

The "Good Practice" recommendations are given to provide guidance for professionals where circumstances indicate that a private care agreement is intended.

The guidelines are not intended to form the basis of any formal requirements.

1. Identifying the hidden care agreement

Even where the agreement is informal, the actual transfer of property is usually accomplished formally and by a professional third person (a lawyer or notary). Where the parties have arranged the agreement between themselves (generally orally and in the broadest and most general of terms) the transaction will be presented to the professional as, simply, "I give the house to B" (a "gift" in the colloquial sense of the word, if not the legal one). Where the transfer is presented as a "gift" there will be no opportunity to discuss the terms of the agreement, and no formal contract. Raising awareness among professionals about the incidence of "hidden" informal agreements behind apparent "gift" transfers will help professionals to recognise when a care agreement is intended, and allow for a considered discussion of the implications.

Thorough and advised discussion of the "what ifs," available alternatives, and legal implications of the

transfer may cause people to alter or abandon (rather than regret) a planned care agreement. If the parties do decide to proceed with the agreement, they can provide for "what ifs" in the terms of the care contract (the consequences of hospitalisation or admittance to a care facility, for example). Detailed terms will also clarify mutual expectations for both caregiver and senior, minimising conflicts that can devastate relationships.

Raising public and professional awareness about care agreements is not intended to promote them. The professional who chooses to advise clients against private care agreements will need to be aware of the client's true intentions, however, and preventing informal care agreements will often require a pro-active approach (where information about the plan has not been volunteered, but circumstances suggest a care agreement in the background). Alternative arrangements may be discussed where the care agreement has been brought to the surface, and the client's needs identified. Parties to a private care agreement will also need accurate information and advice about the tax implications of going through with a private care agreement.

Some seniors and caregivers may choose not to discuss the agreement with a professional, "hiding" the agreement and presenting the transfer as a simple gift, in order to minimise legal fees. Avoiding probate may also be a factor. The Committee hopes that increasing awareness about the serious problems that can arise as a result of informal agreements will enable seniors and caregivers to make more informed, and safer decisions. The reality of this behaviour, however, and the "hidden" care agreement, makes it important for professionals to be aware of these patterns and the circumstances in which pro-active questioning will be helpful.

Legal advice provides important protection, and the true worth of advice is measured against the risks of informality. Savings obtained here are not worth the risks of an informal agreement which may result in the senior losing his or her home, or expensive and emotionally draining litigation where the transfer is challenged by the senior or by the estate after the senior's death.

Recommendation #1

Guidelines for Good Practice

1. Where

(a) a transfer of property is made in exchange for no consideration or, in the opinion of the professional facilitating the transfer, consideration which is inadequate with regard to the value of the property, and

(b) the circumstances and relationship of the transferor and transferee suggest an ongoing relationship following the transfer,

The professional asked to effect the transfer should establish whether

(c) the transferor and transferee expect to live together following the transfer,

or

(d) a private care agreement of any kind underlies the transfer.

The "Good Practice" formulation set out above does not refer specifically to seniors; indeed, private care agreements are not specific to older adults.

The Committee considered whether to recommend a professional ethical obligation for lawyers and notaries to inquire into the existence of an underlying private care agreement where asked to carry out property transfers in defined situations. The obligation would be justified by the professional's situation as "gatekeeper," and as such able to prevent informal care agreements from proceeding to the point of transfer.

A formal ethical obligation raises numerous issues and complications of its own, however, outweighing its potential for resolving existing problems. What defined situations would trigger the obligation? Would the ethical obligation arise with regard to all property transactions involving seniors? Seniors and family members? Where inadequate consideration was exchanged (involving, in turn, an assessment of "adequacy")? What would be the consequence of a failure to meet the obligation? Would the failure to inquire go to the validity of the transfer? The Committee concluded that a formal professional obligation was inappropriate, and that the Guidelines for Good Practice were a more suitable approach.

Inquiries in this situation may, of course, establish that no private care agreement is intended to flow from the transfer- in which case, no harm is done.

Independent Legal Advice

Recommendation #2

Guidelines for Good Practice

2. Where a private care agreement is intended to form the whole or part of the consideration given in exchange for a transfer of property, the professional asked to effect that transfer should recommend that the party for whom he or she is not acting obtain legal advice.

The Committee agreed that a requirement of independent legal advice was not realistic, and would have the effect of rendering otherwise fair agreements invalid (where the parties did not receive independent legal advice). The requirement would be particularly inappropriate given the occurrence of informal agreements (which would certainly not meet a requirement of independent legal advice). It is expected that education and increased awareness among professionals and the wider community will make informal agreements less likely- but informal agreements will not disappear altogether. Some people will always prefer to keep the "real" nature of their transaction private.

Retention of Documents

Recommendation #3

Guidelines for Good Practice

3. Where a private care agreement is intended to form the whole or part of the consideration given in exchange for a transfer of property, the professional asked to effect that transfer should retain notes and documents pertaining to the transfer as in the case of a will.

Members of the Committee noted that the transfer made pursuant to a care agreement shared important characteristics with wills and that a "wills approach" to document retention is appropriate in this context. Certainly, the potential for disputes involving the estate are a point of similarity, and the retention of documents may assist in the event of such disputes.

Conclusion

The Committee recommends that professionals refer to the following "Guidelines for Good Practice" in situations where a private care agreement is indicated.

Guidelines for Good Practice

1. Where

(a) a transfer of property is made in exchange for no consideration or, in the opinion of the professional facilitating the transfer, consideration which is inadequate with regard to the value of the property, and

(b) the circumstances and relationship of the transferor and transferee suggest an ongoing relationship following the transfer,

The professional asked to effect the transfer should establish whether

(c) the transferor and transferee expect to live together following the transfer,
or

(d) a private care agreement of any kind underlies the transfer.

2. Where a private care agreement is intended to form the whole or part of the consideration given in exchange for a transfer of property, the professional asked to effect that transfer should recommend that the party for whom he or she is not acting obtain legal advice.

3. Where a private care agreement is intended to form the whole or part of the consideration given in exchange for a transfer of property, the professional asked to effect that transfer should retain notes and

documents pertaining to the transfer as in the case of a will.

B. The Care Contract

The Committee has chosen not to draft a "model contract" or to compile a traditional "checklist" of matters to be considered and provided for in a private care agreement. The Committee concluded that a "model contract" may be interpreted as an endorsement of private care agreements. The Committee does not endorse or advocate the use of private care agreements, with or without a formal contract; private care agreements do exist, however, and are not illegal.

The Committee also agreed that a model care contract would be potentially misleading, given the special nature of the agreement's subject. A model contract or checklist could be interpreted as setting out a finite list of matters to be addressed and included. The personal nature of private care agreements means that the list of matters to be considered and included in a given case will be particular to the individuals involved.

The Committee acknowledged that some sort of list would be a useful tool for professionals, however (a point made during consultation). The decision was made that a representative (non-inclusive) list of "what ifs" would be the best approach, providing a useful resource for professionals while avoiding the problems of a model. The "what if" language also expresses the personal and individual character of private care agreements, and the need to draft agreements to reflect the particular situations and expectations of the individuals involved.

A "what if" list is also appropriately cautionary, for both professionals and individuals who are themselves thinking of entering into a private care agreement, and provides useful information without appearing to endorse the arrangement. Would-be parties to private care agreements need to be aware of the "what ifs" listed here, and to seriously consider the personal and individual "what ifs" that will be relevant to their own lives. Discussion of the "what ifs" may well lead people to consider alternate arrangements. The Committee hopes to reproduce the "what ifs" in the form of an educational brochure, for distribution to seniors centres and to seniors counsellors and advocates (see "Education").

Private Care Agreements: "What Ifs" and Expectations You Need to Consider

- What if the caregiver pre-deceases the senior?
- What if the caregiver becomes ill, or disabled, and cannot look after the senior properly?
- Is the caregiver really prepared for the changes which may occur as the senior ages? Is the caregiver prepared for possible personality changes, and increased dependency?
- What if the senior (70 at the time of the conveyance) lives for another 30 years? Is the caregiver prepared for that event? What of the caregiver's own increasing age, and ability to continue in a caregiving role?
- What is the effect if a senior enters a care facility?
- Who makes the decision about when the caregiver can no longer provide adequate care, and admission to a facility becomes necessary? Will this be a subjective decision to be made by the caregiver or the senior, or an objective decision to be made by a doctor?
- Does the promise to care require the caregiver to personally perform caregiving services?

Who would pay for homecare or other professional services, the senior (who may have few assets, having disposed of the property under the care agreement) or the caregiver?

- What if the caregiver or the senior marries or enters a marriage-like relationship after the agreement is made? What if the senior or caregiver, married at the time of the transfer, is later divorced, or widowed?
- A caregiver's financial difficulties may result in serious problems for the senior: what if the caregiver loses what (is now) his or her own home, leaving the senior with no place to live and no means of support?
- What if the caregiver needs to relocate? Does the senior expect that the promise of care will include remaining in the "family home"?
- Does the promise to provide care include nursing-type services, or is it limited to the provision of food and lodging?
- What is the *level* of care expected? Mis-understandings about what the caregiver has promised to do may trigger problems in the relationship, where expectations have not been clearly stated. Expected services and level of care should be itemised and valued.

C. Education

Awareness is crucial to the prevention of potentially dangerous informal and/or overly broad agreements, and education is a key objective of the Project. All aspects of the Project- the Report, Background Paper, and consultation process and community outreach- further this objective, targeting audiences from across a wide community spectrum. Community outreach is ongoing and will continue following publication of the Final Report, to "get the word out" and facilitate broad based awareness. The community needs to hear that taking precautions makes it more likely that these arrangements will work and so *protects* family relationships, including relationships between a senior's children (where one child is a caregiver).

The Committee also hopes to produce an educational brochure summarising the issue and reproducing the "what ifs" for general distribution, to include seniors organisations, Community Response Networks and health care providers.

D. Legislation

One approach to the problems associated with private care agreements would be to make them illegal. The Committee rejected that option as a source of additional problems, outweighing any benefits it might produce. This conclusion was echoed in responses received during consultation. There will always be those people who choose not to make formal agreements, and the interpretation and resolution of informal agreements would be greatly complicated by illegality. Moreover, illegality is an extreme restriction on the individual's freedom to contract.

Private care agreements are unlike ordinary commercial contracts, however, and their special character and qualities justify legislation which would empower courts to intervene or set them aside. Respondents during consultation agreed that legislation in this area would be useful, especially as the majority of private care agreements are not governed by carefully drawn contracts.

The Committee considered two alternative approaches to legislation. The first, based on a provision of Alabama's State Code, would give the transferor (the senior) a personal right to revoke the conveyance at any time following the transfer, for any reason.³⁵ The estate would not be able to sue on the basis of that provision, the right to revoke dying with the senior. The Committee was concerned that the Alabama approach might invite mischief, a concern shared by some respondents to consultation. The right to revoke might be exercised capriciously or unfairly, leading to hardship and unfairness for caregivers (although case law decided under the Alabama statute recognises the caregiver's right to compensation on the basis of unjust enrichment). This potential for mischief would be a particular concern where the senior was not capable and the right was exercised by a legal representative. While a personal right to revoke appeared to offer a quick and easy resolution, the Committee felt that the potential for misuse outweighed any such advantage.

The Committee preferred the approach taken in the New Brunswick *Judicature Act*, granting the court a power to set aside or vary private care agreements.³⁶ The recommendation set out below is modelled on the New Brunswick approach, with the addition of enumerated factors to guide the court in the exercise of its discretion. The Committee also considered it necessary to differentiate between the transferor (senior) and transferee (caregiver) for the purposes of relief; the concern was that the caregiver not be able to use the provision to obtain further compensation (beyond the original bargain). The provision stipulating that a caregiver is not entitled to compensation above and beyond the value of the property was also included for the protection of the senior.

The Committee recommends that the legislation given below be incorporated as a section of the *Law and Equity Act*,³⁷ perhaps in the context of sections 59 ("Enforceability of contracts") and 60 ("Spousal capacity and property").

Recommendation # 4

Legislation

1. Where the consideration for a disposition of property³⁸ of any kind is, in whole or in part, the provision of services for the care of the transferor, the Court may, on the application of the transferor or, if provision of the services is not practicable, on the application of the transferor or the transferee, grant such relief as is appropriate in the circumstances including an order that,

- (a) the disposition be set aside,
- (b) the transferee pay to the transferor an amount not to exceed the value of the property at the time the order is made,
- (c) the transferor pay compensation to the transferee for care provided to the transferor, in an amount not to exceed the value of the property at the time the order is made,
- (d) any obligation of the transferee under an agreement to provide care, or any other obligation of the transferee promised in consideration of the disposition, is terminated and is

no longer enforceable by the transferor,

(e) security be provided for any payment ordered under this section.

2. Any order under section 1 must be made on such terms as appear fair having regard first to the interests of the transferor.

3. In exercising its discretion under this section, the Court must consider all of the circumstances including:

- (a) the circumstances in which the agreement was made;
- (b) the nature of the relationship between the transferor and transferee;
- (c) the state of the relationship between the transferor and transferee;
- (e) the nature of the care required by the transferor;
- (f) the health of the transferee;
- (g) the nature of the care provided by the transferee;
- (h) the duration of any care provided;
- (i) the value of the care that has been provided;
- (j) any expenses incurred by the transferee;
- (k) the ability, including the financial ability, of the transferee to continue to provide the care required by the transferor;
- (l) the value of property at the time of the disposition and at the time of the hearing; and
- (m) the terms of any agreement between the parties and the reasonableness of those terms.

4. For the purposes of sections 1 through 3, the provision of "care" includes the provision of assistance and support.

The Committee agreed that only the transferor or the transferee should be empowered to bring an application (the New Brunswick formulation allows for "any interested party" to do so). This power would die with the transferor, and not be available to the estate (the rules of the common law and equity would continue to apply after the death of the senior). Permitting third parties to apply seemed an invitation to mischief, and an unreasonable impairment of the parties' freedom to contract; on what basis should a third party be allowed to interfere in the private arrangements of another? During consultation it was suggested that the legislation provide for a third party to apply to the Court for permission to bring an action, but in the opinion of the Committee third party interference should only be permitted where a senior was incapable, in which case a guardian, committee, attorney under a power or attorney or representative under the *Representation Agreement Act* is already empowered to bring an action.

The provision is age neutral, with no reference to "the senior." Private care agreements are a "legal issue affecting seniors" not because seniors are the only people who can or do enter into them, but because, in fact, seniors are more likely than other people to do so.

VI. Conclusion

Private care agreements are generally informal arrangements between friends or family members, made orally and without legal input. For this reason, it is impossible to put together hard figures about how common they are, and whether their use is increasing, although demographic shifts and property market patterns strongly suggest that the private care agreement will become an increasingly attractive option for many. Certainly, consultation has indicated that many people are considering or have considered private care agreements as a personal choice.

We do know that unsuccessful care agreements can have very serious and damaging consequences, whatever the statistics. Some seniors simply walk away from the family home they have striven to keep, having received very little of the caregiving they bargained for. Others continue to live in unhappy or even abusive caregiving relationships. Seniors may not realise that options exist, or may be discouraged from accessing legal help for reasons of expense, unfamiliarity, fear of damaging relationships, or shame and demoralisation (especially where the failed care agreement involves a son or daughter).

Unsuccessful or disputed care agreements may also have harsh and unfair consequences for caregivers. Family relationships have been destroyed where a conveyance made pursuant to a care agreement is challenged by the estate after the death of the senior, and the caregiver may go without compensation after providing years of care at great personal expense.

Legal action is expensive and stressful, and has potentially devastating consequences for the personal relationship between the parties and the wider circle of family. Seniors, especially, are unlikely to access the law when private care agreements fail to work out as hoped for. Prevention is, therefore, particularly important.

Prevention requires education of the general community and seniors and seniors' advisors in particular, and for the facilitators (lawyers and notaries) effecting the transfer of property at the centre of the private care agreement. A senior may be competent to transfer property but may be doing so on the basis of an agreement the full implications of which have not been considered. Appropriate inquiries at the point of transfer can establish whether or not a private care agreement underlies the apparent gift or transfer in exchange for inadequate compensation (where a low money payment plus the promise of care are really intended to make up the total payment), and create the opportunity for explanation and advice about that agreement. If the parties decide to proceed they will do so with a better agreement than the vague oral promise they began with.

The Committee hopes that the work of the project will make dysfunctional agreements less common, but there will always be a need for fair and consistent rules where the arrangement does not work out as hoped for. People change; relationships change; situations change, and a formal contract may not provide for every eventuality to everyone's satisfaction. In any event, there will always be those people who choose not to make formal agreements, out of a desire to keep the arrangement "private" or a reluctance to formalise intimate relationships. Legislation is necessary to provide for fair, workable and consistent outcomes, especially where agreements have not been formalised.

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Footnotes

1

Stan and Maud's story is hypothetical, drawn from the case law and the experiences of people working with seniors and seniors' issues

2

See C. Spencer (1996) *Diminishing Returns: An Examination of Financial Abuse Among Seniors*, Gerontology Research Centre, Simon Fraser University.

3

In this context, "private" refers to care provided by a non-professional intimate such as a family member or friend.

4

Staged payments are one alternative to the upfront transfer; see discussion in the "Background Paper."

5

This scheme is set out by Patricia Jo Wilkinson in "Uses, Terms and Provisions of Lifecare Contracts for Elders" a paper presented at the 1996 NAELA Symposium, at 3.

6

R.S.B.C. 1996, c. 128.

7

Available through the BCLI website at http://www.bcli.org/pages/projects/elderly/BP_Care_Agreements.html.

8

Jones v. Padavatton, [1969] 2 All E.R. 616 (C.A.), per Salmon L.J.; see Balfour v. Balfour, [1919] 2 K.B. 571 (C.A.).

9

Padavatton, Ibid.

10

Currie v. Misa (1875), L.R. 10 Exch. 153.

11

See Re Madryk (1980), 6 E.T.R. 104 (Sask. Q.B.).

12

Prior obligations cannot comprise fresh- and therefore good- consideration. One case involving a purported "will contract" has suggested that a promise to provide care would not comprise consideration because of the pre-existing statutory obligation, although the will contract alleged failed for other reasons; Hammond v. Hammond, [1995] B.C.J. No. 1153 (S.C.).

13

Readers seeking a more detailed discussion of these contracts, may wish to access the Background Paper prepared by Margaret Hall at http://www.bcli.org/pages/projects/elderly/BP_Care_Agreements.html

14

Warner Bros. Pictures Inc. v. Nelson, [1937] 1 K.B. 209.

15

Patel v. Ali, [1984] 1 All E.R. 978.

16

[1996] B.C.J. No. 2135; add. reasons [1997] B.C.J. No. 2417 (B.C.S.C.).

17

R.S.B.C. 1996, c. 128.

18

R.S.B.C. 1996 c. 6, section 51(1)(f).

19

But see Hammond v. Hammond, supra note 12, regarding "will contracts."

20

See Rex v. Skilling, [1935] 1 W.W.R. 183; Hua v. Lam (1985), 49 R.F.L. (2d) 6; Newson v. Newson, [1998] B.C.J. No. 2906 (C.A.); Nevill v. Nevill, [1998] B.C.J. No. 280 (S.C.); Anderson v. Anderson, [2000] B.C.J. No. 2694 (S.C.).

21

See Folia v. Trelinski, supra note 16.

22

See *Wilcox v. Wilcox*, [1999] B.C.J. No. 598 (S.C.); [2000] B.C.J. No. 1809 (C.A.).

23

The "intentional giving to another without expectation of remuneration" (*Peter v. Beblow*, [1993] 1 S.C.R.).

24

See E.L.G. Tyler and N.E. Palmer, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1972) at 301-302.

25

Howard v. Fingall (1853), 22 L.T.O. 12; *Canadian Aids Society v. Ontario*, [1995] O.J. No. 2361(Ont. T.D.); appeal dismissed 31 O.R. (3d) 789 (C.A.); [1997] S.C.C.A. No. 33.

26

As set out in *Goodman v. Geffen Estate*, [1991] 2 S.C.R. 353.

27

See *Zed v. Zed* (1980), 28 N.B.R. (2d) 580 (N.S.Q.B.).

28

See *Kits Estate v. Peterson*, [1994] A.J. No. 802 (Q.B.); also *Gammon v. Steeves*, [1987] N.B.J. No. 1046 (C.A.).

29

See *Snell's Equity* (29th ed.) at 559.

30

See *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A.). And see *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757.

31

See *McKay v. Clow*, [1941] S.C.R. 643.

32

See *Kalmacoff v. Konkin*, [1993] B.C.J. No. 2425 (S.C.). But see also, *Romaine Estate v. Romaine* (2001) B.C.C.A. 509.

33

See *Kim v. De Camillis Estate*, [1999] B.C.J. No. 442 (S.C.); *Kovach v. Beardsley*, [1991] A.J. No. 671.

34

See *Wilcox v. Wilcox*, [1999] B.C.J. No. 598 (B.C.S.C.); [2000] B.C.J. No. 1809 (B.C.C.A.).

35

"Any conveyance of realty wherein a material part of the consideration is the agreement of the grantee to support the grantor during life, is void at the option of the grantor, except as to bona fide purchaser for value, lienees, and mortgagees without notice, if, during the life of the grantor, he takes proceedings to annul such conveyance." 8-9-12 Ala. Code 1975.

36

"The Court may, on such terms as appear just, set aside or vary at the instance of an interested party any conveyance or transfer of property, the consideration for which, in whole or in part, whether expressed in the instrument of conveyance or in a collateral agreement, is the maintenance and support of any person; but nothing done hereunder affects the title of a bona fide purchaser for value." Section 24, Judicature Act, R.S.N.B. 1973, c.J-2.

37

R.S.B.C. 1996, c. 253.

38

The meaning of these terms is as defined in section 29 of the Interpretation Act, R.S.B.C. 1996, c. 238, wherein "'dispose' means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things"; "'property' includes any right, title, interest, estate or claim to or in property."