

# WHEN FAMILY TIES UNRAVEL

Practitioners need to be wary when acting for family members in asset transfers.

The LPLC has seen a substantial increase in claims arising out of intra-family transfer of assets, reinforcing the need for practitioners to be careful when acting in such matters, especially if representing multiple parties or any party is unrepresented.

Typically, when a practitioner is consulted about a proposed intra-family transfer, the family members know what they want and get along well. They have rarely turned their minds to unpleasant possibilities such as souring of relations, the arrangement not working out as planned or something more sinister such as fraud. The family members may not appreciate that their respective interests are potentially different and the risks the arrangement may hold.

## Granny flat spat

A grandmother who had a falling out with all her children agreed to gift \$300,000 to her favourite granddaughter to buy a new property. The conditions of the gift were that the grandmother be allowed to build her own granny flat on the property and have a right to live there, close to her granddaughter.

The practitioner met with the granddaughter and her husband. The couple explained that the property they intended to buy would be funded by the sale of their current home, a mortgage and the gift from the wife's grandmother. They asked for a document that clearly stated the money was a gift and did not need to be repaid. They also said the granny flat would be built on the property.

The practitioner then met with the grandmother who explained she wanted to gift the money to remove it from her estate as she did not want her children to have it when she

died. While she seemed very capable and sure of what she wanted, she was 89, partially deaf and blind and had suffered three strokes.

The practitioner prepared an agreement that provided:

- the \$300,000 was a gift to the granddaughter and her husband;
- the grandmother could build a granny flat on the property and have access to it and the rest of the property save for her granddaughter's house;
- the granny flat was to be removed on the grandmother's death and form part of her estate;
- the grandmother would have an equitable interest in the property and could lodge a caveat accordingly;
- the agreement ended on the grandmother's death.

Minor amendments were made under instruction from the grandmother and agreed by the granddaughter and her husband.

After the agreement was executed, the property was purchased and the parties moved into the house pending construction of the granny flat. Before long, they had a falling out and the grandmother moved out and demanded her gift back.

The grandmother issued proceedings against the couple. After the matter failed to settle at mediation, the practitioner was joined.

The allegations against the practitioner were that he:

- failed to advise the grandmother to seek independent advice about the agreement;
- failed to properly explain the agreement and its consequences to the grandmother;
- knew or should have known there was a conflict of interest and the grandmother was vulnerable.

## Managing the risks

These allegations are common in claims relating to intra-family transfers. The caveatable interest went some way to protect the grandmother's interest from the owners further mortgaging the property or selling it. However, it did not take account of a falling out and the need to unwind the arrangement.

The most effective way for the practitioner to manage his risk would have been to insist that one of the parties obtain independent advice. The next best course of action would have been to ensure the parties were provided with detailed advice in writing about their respective risks and options.

It can be difficult to manage expectations and risks when advising on such matters. The family members appear to be in heated agreement about what they want to do and how it will best work. There can be strong emotions behind decisions such as wanting to keep money out of family members' hands or wanting to be close to a particular family member for care.

It can be uncomfortable for family members to consider the possibility of the arrangement no longer working if, for example, relations deteriorate or failure to repay a loan results in them being forced out of a mortgaged property. Practitioners need to consider the potential vulnerability of the parties.

Family members can also struggle to understand why one of them should have to go elsewhere for advice, especially if the practitioner has been their family solicitor for some time. ●

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