

WHAT ROLE FOR REAL PROPERTY IN COMBATTING FINANCIAL ELDER ABUSE THROUGH ASSETS FOR CARE ARRANGEMENTS?

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This paper examines a particular type of transaction between older people and their adult children: the 'Assets for Care' or 'Family Accommodation' arrangements. Its aim is twofold:

- a. to provide an update of recent legal consideration of this type of transaction and;*
- b. to provide new and novel suggestions from equity and property law that may assist in regulating Assets for Care arrangements.*

The authors are not under any illusion as to how complex these arrangements can be. Any one scenario – not matter how outwardly simple – can give rise to a number of contentious, and at times competing legal issues. What is clear, however, is that the existing Australian property law regime is inadequate to protect the rights of older persons who enter into property and financial arrangements with family members.

There has been much discussion about the inadequacy of the present legal regime regarding Assets for Care arrangements. This paper proposes several legal responses to safeguard the interest of an older person entering into such a transaction. Although there have been discussions in relation to contract law and equity – and obviously this remains relevant – the paper will focus on the potential for real property law to better protect older people entering in such relationships. In this respect, the paper will concentrate on principles of indefeasibility, including the possible 'tweaking' of the exceptions to indefeasibility to better protect Seniors entering into Assets for Care arrangements.

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One of the most frightening scenarios for an elder person is the possibility of financial ruin ... Losing assets accumulated over a lifetime, often through hard work and deprivation, can be devastating, with significant practical and psychological consequences ... Financial abuse can have as significant an adverse impact for an elder person as a violent crime ... or physical abuse.¹

On 24 February 2016, Australia's Commonwealth Attorney-General, George Brandis, announced an inquiry into laws and frameworks to safeguard older Australians from abuse.² In summary, the Australian Law Reform Commission (ALRC) will assess the existing legal regimen and assist the federal government to identify the best way to protect older Australians, while promoting respect for their rights.³

The inquiry will be broad in scope and consider regulation of areas of federal jurisdiction such as financial institutions, superannuation, social security, aged care and health. As many laws affecting older people come within the purview of the states and territories – for example the regulation of powers of attorney, wills, and estates – the inquiry will also examine how federal laws interact with relevant state and territory laws.⁴

One area of the law that is conspicuous by its absence in the inquiry's terms of reference is the role of real property law. Yet, a significant proportion of matters involving elder abuse, particularly elder financial abuse, directly or indirectly involve land. For example, an older person may be deprived of their real property through identity theft, misuse of an enduring power of attorney and/or an unauthorised sale or mortgage of real property. Although less egregious at first glance, older people can also experience financial disadvantage through using real property to assist another, usually an adult child, by entering into an "assets for care" arrangement.⁵

Assets for care arrangements are difficult to define. The essence is that an older person's family (usually an adult child) receives a financial benefit in exchange for a promise to provide accommodation for, and in some cases

1 Shelly L. Jackson, Thomas L. Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response*, February 2011, The U.S. Department of Justice <www.ncjrs.gov>.

2 Senator George Brandis, Attorney General for Australia, "Safeguarding Older Australians" (press release, 24 February 2016) Melbourne <www.attorneygeneral.gov.au>.

3 It is anticipated that the inquiry will report in May 2017. Elder abuse was also the subject of discussion in the recent Victorian Royal Commission on Family Violence: State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16) <www.rcfv.com.au>.

4 Eileen Webb, What is elder abuse and why do we need an inquiry into it? 25 February 2016 The Conversation <theconversation.com>.

5 See generally, Teresa Somes and Eileen Webb "What role for the law in regulating older peoples' property and financial arrangements with adult children? The case of family accommodation arrangements" in Reubner, Do and Taylor (eds) *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, USA, 2015).

care of, the older person as he or she ages.⁶ These arrangements may include the adult child moving in with the older person; a gift of the older person's home to the child; the purchase of a new home to accommodate a larger household; renovations to an existing home; the construction of an ancillary dwelling (granny flat) or where the older person simply occupies a room in an existing house. The common denominator is that the older person has made a financial contribution – in exchange for accommodation and care for life.⁷ The number of these largely unregulated transactions has increased and, to date, there is a paucity of analysis of the legal ramifications and appropriate responses when these types of arrangements fail.⁸

This paper will consider whether assets for care arrangements can be assimilated within the existing Australian real property framework. It also examines whether real property law is an appropriate vehicle to adjudicate these transactions or would doing so unacceptably undermine the rationale of the Torrens system.

To this end, the discussion will be approached in two parts. First, we will examine the shortcomings of present legal landscape in “two party” situations, that is, available actions in equity that could be commenced by an older party against an adult child, in order to obtain a proprietary remedy. It will be demonstrated that not only are the present causes of action “ill-fitted” to the assets for care scenario, but that (in the absence of undue influence or unconscionable conduct), the remedies awarded rarely allow for a return of the older party's property, or for a proprietary remedy. Whilst we acknowledge that not every failed assets for care scenario ought to result in a proprietary outcome, it appears that the inadequacy of the available causes of action, along with what appears to be an entrenched attitude amongst judges in assuming a benevolent intention of parents towards their children, operates against the interests of the older party. This is in turn reflected in the final remedial award. In response to the shortcomings that are identified, we make a number of alternative suggestions as to how recognised principles of property law may be reconsidered in order to strengthen an older party's legal position, considering both preventative and remedial measures.

The second part of the paper is concerned with “three party” situations where an interest in land that is involved in an assets for care arrangement is mortgaged or transferred to a third party. This additional step is likely to further undermine the position of an older person in an assets for care arrangement because the third party will, in most cases, obtain an indefeasible interest pursuant to the mortgage or the transfer. The paper will make recommendations to safeguard the older person's interest by recommending preventative measures including utilising the caveat system or by introducing procedures to note such interests on the title. In circumstances where the third party has obtained a registered interest, the paper will consider the

6 Webb, above n 4.

7 Or in some cases when a higher standard of care is required.

8 Somes and Webb, above n 5.

circumstances – albeit rare – where the transaction could be set aside or postponed.

Several of our recommendations are controversial but, in our view, can be justified on public policy, financial and legal grounds. Financial and psychological abuse are the most common forms of elder abuse and the intergenerational nature of elder abuse differentiates it from other forms of family violence.⁹ This, combined with many older people having considerable assets due to the rising value of real estate and the accumulation of superannuation over several decades, can lead to an “impatience” on the part of families to receive inheritances or make an older person an attractive and convenient party to act as a guarantor or otherwise assist younger relatives financially.¹⁰

Moreover, the current approach fails to recognise the particular dynamics at play when parents enter into arrangements concerning property with their children. Private law assumes autonomy of the parties to an agreement. Commercial principles that are founded on individualism and neoliberal principles operate against development where factors such as unequal emotional bargaining power, or the obligation a parent may feel toward a child, have any impact on the outcome.¹¹ Even de facto disputes can be distinguished on the basis they lack the particular dynamic of the parent child relationship, which can result in decisions being made that are influenced by a mixture of obligation, affection, familial responsibility or even guilt, rather than commercial or personal gain.

With housing affordability declining and an ageing population, family arrangements involving shared property and/or pooled resources are commonplace and will become more so. This is not to be discouraged; the benefits of multi-generational living arrangements are many and include the provision of companionship, mutual support, and financial and housing security. Furthermore, budgetary constraints in the aged care and health sectors mean the provision of accommodation and care for older people in a family environment is an attractive option for both society and government. The problem is that, when such arrangements break down, there is a lack of legal recourse for the older person that will see a person almost invariably left without funds, accommodation and care. These costs would then fall on the public purse.

9 Older women are twice as likely to be victims of abuse: Rae Kaspiew, Rachel Carson and Helen Rhoades “Elder abuse, understanding issues, frameworks and responses”, Research Report No. 35 — February 2016 Australian Institute of Family Studies, Canberra <aifs.gov.au>; see also Ben Travia and Eileen Webb “Housing vulnerability and homelessness in an ageing Australia: Australian law’s neglect of security of tenure for older women” (2015) 33(2) *Law in Context* 52.

10 A sense of entitlement to older people’s real and personal property may see some adult children accessing their parents’ assets through “tactics” ranging from emotional pleas to overt pressure to fraud: Somes and Webb, above n 5.

11 Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press, UK, 1997) cited in Juliet Cummins “Relationship Debt and the Aged: Welfare v Commerce in the Law of Guarantees” (2002) 27 (2) *Alt LJ* 63, 64.

In our view, real property law can accommodate recognition, and protection, of assets for care arrangements. At present, equitable doctrines provide little practical assistance and the realities of seeking recourse make pursuing a failed assets for care arrangement lengthy, expensive and, in many cases, ultimately futile.¹² Many assets for care arrangements lead to an older person being deprived of what he or she regards – and morality would suggest – as an “interest” in the land.¹³ It is not apposite to suggest that real property law provide for solutions, or at the least, safeguards. The Torrens system is based upon the registration of dealings but unregistered and equitable interests are accommodated.¹⁴ Furthermore, at present there is provision made for the deposit of declarations of trust with the Registrar¹⁵ and the availability of the caveat system to protect unregistered or equitable interests.

By recognizing the distinctive characteristics of these transactions and the risks for older people, real property law needs to acknowledge assets for care arrangements and respond either by adapting existing principles, or through legislative amendments.

I. TWO PARTY TRANSACTIONS: PARENT AND ADULT CHILD

The transaction which is impugned by the plaintiff is a very significant transaction. The family home was by far the most significant asset which Mrs Roma Anderson owned. By the transfer she gave it away. There was no protection for her – she retained no right to reside in what had been her home for most of her life.¹⁶

This section of the paper will focus on an older person who, having owned their own home, has either:

- (i) Transferred that property to an adult child pursuant to a family accommodation arrangement;¹⁷ or
- (ii) Sold the home, and has used the proceeds to purchase,¹⁸ or contribute significantly¹⁹ to the purchase or construction of a

12 See the discussion in relation to the imposition of a third-party interest below.

13 We acknowledge that in many cases this “interest” will not be recognised by the present law as having legal recognition.

14 *Barry v Heider* (1914) 19 CLR 197.

15 With the exception of Tasmania (s 132), trusts cannot be recorded in the Register but provision is made for the deposit of declarations of trust: Torrens statutes - NSW s 282; Vic s37; ACT s124; Qld s 109–110; SA s162; WA s 55.

16 *Anderson v Anderson* [2013] QSC 8, [61] (Dalton J).

17 *Thelma Langford v Deva and Diane Reddy* [2012] NSWSC 289; *Swettenham v Wild* [2005] QCA 264

18 *Pobjoy v Reynolds* [2013] NSWSC 885.

19 *Mainieri v Cirillo* [2014] VSCA 227; *Marlow v Boyd* [2012] QSC 331

property, an extension of an existing home or the construction of an ancillary dwelling (a granny flat). The land is registered in the name of the adult child.²⁰

A. The Present Law

A dispute involving a family accommodation arrangement can potentially raise an array of legal issues potentially involving contract law, family law, land law and equity and trusts law. At present, an older party wishing to commence an action to recover property in a failed asset for care arrangement would need to pursue an equitable cause of action, which is in turn dictated by the particular circumstances giving rise to the dispute. For instance, a transaction entered into pursuant to undue influence²¹ or the unconscionable conduct²² of the defendant, may be set aside by the court. Although these doctrines provide a degree of protection to vulnerable individuals against exploitation, the onus still remains upon the older party to commence the action and prove the elements of the equitable claim. In circumstances where an older party has been the victim of such exploitative conduct, it is not surprising that there have been very few instances of success.²³

In the case of a transfer of title from the older party to the adult child, or the purchase of property in the name of the adult child, the equitable rules concerning resulting trusts rarely offer satisfactory relief. Prima facie, resulting trusts arise where money is provided by one party for the purchase of property in another's name.²⁴ However, in the case of a parent purchasing property that is placed wholly or partly in the name of their child, the presumption of advancement will apply, meaning the property is presumed to be a gift from the parent to the child.²⁵ Although this presumption can be rebutted by contrary evidence, intention is determined at the time the transfer was made.²⁶ In the case of voluntary transfers of land, the rules applying in each State are not uniform. In New South Wales, Northern Territory, Queensland, Victoria and Western Australia, legislation provides that no resulting trust will arise on the conveyance of land despite an absence of consideration.²⁷ In other States and Territories, the presumption of advancement applies between

20 In these scenarios, the child is considered a volunteer, assuming a court would not find the promise of care to be consideration. In most States, a volunteer still obtains indefeasible title. See below.

21 *Johnson v Buttress* (1936) 56 CLR 113; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474 (Deane J); *Janos v Janson* [2007] NSWSC 1344.

22 *Blomley v Ryan* (1956) 99 CLR 362; *Johnson v Smith* [2010] NSWCA 306.

23 Fiona Burns "Undue influence Intervivos and the Elderly" (2002) 26 MULR 499.

24 *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ); *Allen v Snyder* [1977] 2 NSWLR 685, 689-90; *Muschinski v Dodds* (1985) 160 CLR 583, 589-90 (Gibbs CJ), 612-614 (Deane J).

25 *Nelson v Nelson* (1995) 184 CLR 538.

26 *Buffrey v Buffrey* [2006] NSWSC 1349 [14].

27 Conveyancing Act 1919 (NSW) s44; Law of Property Act (NT) s6; Property Law Act 1974 (Qld) s 7; Property Law Act 1958 (Vic) s 19A; Property Law Act 1969 (WA) ss38, 39.

parent and child. In both these cases, evidence may be provided that, at the time of transfer, a gift was not intended. Yet, in an assets for care arrangement, at the time of the transfer the older party did in fact intend a gift but on the understanding that care and accommodation would be provided. However, the rather traditional rules concerning resulting trusts do not recognise the corresponding arrangement, only the intention at the time of the transfer.

In the absence of any vitiating conduct on the part of the older child, assets for care disputes can be challenged on the grounds of estoppel, or the “failed joint venture” doctrine established in *Muschinski v Dodds*.²⁸ Estoppel may be argued where an owner of property encourages an elder party to alter their position, either by expending money on property, improving or building on property, in the expectation that the elder party will obtain a proprietary interest. To successfully make out an estoppel claim, the claimant must establish that there was a representation made by the defendant, who created an expectation in the claimant, who relied on that representation to their detriment, and the defendant knew of this reliance.²⁹ Yet many assets for care arrangements will not conform to this sequence of events, nor is it common for the older party to expect a proprietary interest. More commonly, assets for care situations are resolved relying on the concept of the “failed joint endeavour” principle. This principle, which is derived from the landmark case of *Muschinski v Dodds*, states that:³⁰

[T]he principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.

The “failed joint venture” or “windfall equity” principle was originally developed in the context of failed de facto relationships, and has been extended by analogy to failed assets for care arrangements. Barkehall-Thomas identifies a number of shortcomings of this approach.³¹ First, while the asset for care arrangement can be viewed broadly as a joint venture between the parties, it does not fall neatly into the concept of the parties “pooling their

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

29 *Giumelli v Giumelli* (1998) 196 CLR 101; *Delaforce v Simpson Cook* [2010] NSWCA 84.

30 *Muschinski v Dodds* above n 28 at 619-20 (Deane J).

31 Susan Barkehall-Thomas “Families Behaving Badly: What happens when grandma gets kicked out of the granny flat?” (2008) 15 (2) APLJ 154.

resources” for the benefit of the joint venture, and there is no expectation of a beneficial ownership in the property. Secondly, on the breakdown of a joint venture, a constructive trust is the usual remedy, awarded over the property in proportion to the parties’ contributions. However, an older party is rarely awarded a proprietary interest pursuant to a constructive trust; courts have adopted the view that the “minimum equity” should be awarded, based on a restitutionary analysis.³² This, coupled with the proposition that the parties had only envisaged the parents receive a life interest,³³ rather than a share in the property, has a significant impact on the remedy awarded by the courts. There are similarities with an estoppel claim in that the approach fails to recognise the agreement of a life interest is premised on the continuation of the arrangement until the death of the older party, rather than the parties contemplating what should occur if the arrangement is discontinued. The shortcomings of both these causes of action place the older party in an uncertain position; the remedy is largely determined by the facts existing and the state of mind of the parties when they assumed the arrangement would continue without incident.

B. Entrenched Judicial Attitudes

Despite the availability of legal remedies, older people face a number of challenges if they intend pursuing legal avenues in the face of financial abuse. They must first possess the emotional and financial resources to undertake litigation, and then be subject to the prospect of an uncertain and often insufficient award to enable them to “start again”.³⁴ Further, when undertaking any of the above equitable actions, it must be remembered that each element of the cause of action must be proven; mere “unfairness” or indeed “unconscionable conduct” on the part of the defendant is not sufficient basis to allow equity to intervene.³⁵ The diverse form and nature of individual family accommodation arrangements often do not fit neatly within available equitable causes of action, despite there being clear wrongful conduct on the

32 At 10-11.

33 In Victoria, if the older party can establish they have a life interest rather than a personal right to reside in the property, 42(2)(e) of the Transfer of Land Act 1958 (Vic) confers a proprietary right in the property, and as such is enforceable against third parties, and may allow the older party to remain in the property: see *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373[19].

34 Council on the Ageing SA, *Submission No 77*, 8 cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, September 2007 (Standing Committee Report), [2.63]; Scott Johnson “Elder Abuse: The Need for Law reform: Enduring Powers of Attorney & Family Agreements”, Paper prepared for the Department of Attorney General of Western Australia 27 April 2010, 25 cited in 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* 4.

35 *Muschinski v Dodds*, above n 28 (Deane J).

part of the adult child.³⁶ In addition to the shortcomings of the present law, the view that parents will often transfer their property to their children out of love and affection, whilst not incorrect, should perhaps be scrutinised more closely in the light of recent statistics regarding elder financial abuse. Recently Ormiston JA stated that:³⁷

It would be a sad state of affairs if courts interfered as of course with gifts and beneficial transactions effected in favour of children in circumstances where it could truly be said that they were entered into “in consideration of the natural love and affection” that parents have for their offspring. Every day of the week, indeed far more frequently, parents make gifts to children though they might be disadvantageous to themselves. On other occasions, as was the case here, children and their parents arrange to employ their funds, primarily the parents’ funds, to build “granny flats” and the like attached to new and old houses, in circumstances where it is more than apparent that the principal benefit will be received by the children either in the short or in the long term. Such demonstrations of natural generosity are not to be discouraged by the law ...

Although we would agree that the law should not discourage the natural generosity a parent feels for their child, we would argue that the law should have adequate safeguards to recognise and provide appropriate remedies for elder financial abuse. The requirement that gifts must *truly* be said to be a transaction entered into “in consideration of natural love and affection”, begs the question as to how should this be determined, and who should bear the onus of proving it? It is proposed that the difficulties faced by older people in bringing actions and obtaining remedies in failed assets for care situations could be strengthened to some degree by rethinking property law principles.

C. Improving the Older Party’s Legal Position in ‘Two Party’ Situations

We believe that, in view of the recognition of elder abuse as a significant social problem, and the growing evidence that older people are being deprived of property through failed assets for care arrangements, it is imperative

36 In this context the ‘wrongful’ conduct may be morally repugnant but not translate into a legal wrong.

37 *Mitchell v 700 Young Street* [2003] VSCA 42, 42 (Ormiston JA) See also Higgins CJ and Crispin J who observed that: “... the real vulnerability of parents usually stems not from a failure to comprehend the nature of the transactions in which they have been asked to participate or from insufficient information concerning their implications. It stems from their love of their children. Their desire to help and protect them, to advance their interests, to maintain a close relationship, to avoid causing disappointment, hurt or distress, to maintain the relationship may all make it difficult to say ‘no.’” *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7.

that the law develop responses to assist and improve an older party's legal position. We stress that the suggestions we make are aimed at addressing the inadequacy of appropriate legal opportunities for recovering property, and do not propose to "tip the balance" so far to assume every incident should result in restitution of title to an older party. Rather, the aim is to redress the perceived imbalance and allow for greater opportunities for older parties to challenge the legal title held by the adult child.

1. Preventative measures

The clearest way to protect an interest in property when entering into a family accommodation arrangement is for the older party to ensure they are included on the title deeds as either a joint tenant or a tenant in common. A joint tenancy agreement has the advantage of the older party maintaining an interest in the property whilst alive, while allowing the interest to pass to the other joint tenant upon their death. In a successful assets for care arrangement, this would be a mutually beneficial outcome, however this arrangement can lead to difficulties. In *Kriezis v Kriezis*³⁸ an elderly couple sold their home and contributed the proceeds towards a larger house which was purchased with their son and daughter in law as joint tenants. The arrangement was that the older couple would live rent free and be cared for, and on their death, the property would pass by survivorship to their son and his wife. The father died, however, the son then died prematurely, leaving the mother and daughter-in-law holding the property as joint tenants. The relationship broke down, and the court was required to calculate the equitable interest held by each party based on contributions to the purchase price and amounts subsequently expended on the property.

In such a case, ensuring an interest as a tenant in common would have the advantage of the parties deciding from the outset what proportion each is entitled to, and would allow the older party to bequeath their interest in the property according to their will, rather than have the interest pass to the joint tenant. Whilst on its face this may appear the simplest way to protect an interest in property should the relationship fail, there are a number of reasons why families choose not to go down this path. First, parties simply do not anticipate the failing of private arrangement between family members. A lack of planning for such a contingency, coupled with the perceived expense associated with formalising title means that families rarely contemplate separate title. Secondly, assets for care arrangements are often entered into at a time of crisis: the sudden onset of ill-health, financial difficulty, or the death of a spouse often means arrangements are not scrutinised in the manner one would normally expect when there is a transfer of substantial assets.³⁹ Under these conditions, agreements are made in haste, without due diligence or contemplation of a course of action should unexpected events occur.

38 *Kriezis v Kriezis* [2004] NSWSC 167.

39 Rosslyn Munro "Family Agreements All with the Best of Intentions" (2002) 27 Alt LJ 68, 69.

Rather than have separate titleholding, parties may enter into a formal family accommodation agreement.⁴⁰ This agreement aims to set out the respective rights and obligations of each party, including what will occur if the arrangement breaks down. This would allow the adult child to retain legal title but parties would be contractually bound to honour the terms of the agreement on the termination of the arrangement, and ideally there would be provision for contingencies such as the need for specialised care, what happens on the death of any of the parties to the agreement, marital breakdown, bankruptcy and so on. Assuming the agreement itself is not tainted by undue influence, it can provide a degree of protection for the older party. Yet the protection offered may only be between the older party and the adult child, and may not bind any third parties should the property be sold or mortgaged.⁴¹ There is also the added complication that “Granny Flat Interests” are recognised by Centrelink for the purposes of assessing an older person’s right to social security.⁴²

Furthermore, care must be taken in the drafting of the agreement in light of the recent decision of the Victorian Court of Appeal in *Mainieri v Cirillo*.⁴³ In that case, the parties entered into an oral agreement whereby Mrs Cirillo provided \$240,000 from the sale of her home to reduce her son’s mortgage, in exchange for accommodation with her son and his partner indefinitely. At a later stage, a written agreement was entered into where it was stated that the parties agreed in consideration of the gift of \$240,000, Mrs Cirillo would be allowed to reside in the home, and be looked after “for the rest of her life in a manner that is just and appropriate in all the circumstances”.⁴⁴ The relationship subsequently broke down, and Mrs Cirillo was unable to remain in the home. Her son alleged the money provided to him was a gift, and there was no obligation to repay it. Mrs Cirillo commenced proceedings arguing she was entitled to a constructive trust over the property proportionate to her contribution, or an equitable lien. Her son, however, alleged that the intention of the parties was that the written document was to encompass the entirety of their agreement, and that document omitted to state that the money was to be applied in reduction of the mortgage. In doing so he relied on the parol evidence rule, which provides that oral evidence will not be admitted which seeks to add, vary or contradict the terms of a written contract. Hence, it was alleged that Mrs Cirillo could not rely on the conversations between the

40 See Brian Herd “Family agreements: a collision between love and the law” (2002) 81 *Australian Law Reform Commission Reform Journal* 23. Parties of course may choose to include agreements regarding title holding within the written document.

41 Unless the facts were analogous to *Bahr v Nicolay* (1988) 164 CLR 604.

42 See below.

43 *Mainieri v Cirillo* [2014] VSCA 227. It is interesting to note that this case was conducted under a pro bono scheme, and Mrs Cirillo’s liability to pay her solicitors was contingent on there being either a settlement which included payment of costs, or a costs order being made in her favour. It can be assumed therefore that in the absence of this scheme, the plaintiff may have been unable to finance the litigation.

44 At [5].

parties agreeing that the money would be used to reduce the mortgage, and thus was unable to claim a proprietary interest in the property. Fortunately for Mrs Cirillo, both the Court at first instance and the Court of Appeal were prepared to find that the agreement was partly oral and partly written, the Court of Appeal awarding an equitable lien over the property. However, the admission of oral evidence is determined objectively on the facts of the case,⁴⁵ and parties entering into a formal assets for care agreement would need to be advised that, *prima facie*, the document encompasses the whole agreement, and does not include informal conversations that “supplement” the written agreement. This highlights the importance of older parties receiving independent legal advice, which in turn may discourage people because of increased costs.⁴⁶

An alternative to the above suggestions is for amendments to be made to the relevant real property legislation allowing assets for care agreements to be registerable interests.⁴⁷ The advantage of this arrangement is that the title holder and subsequent parties dealing with the property would do so subject to the interest of the older party. However, this would still require the parties to formalise their agreements beforehand, and the reasons mentioned above would still operate to discourage parties from doing so.

2. Remedial responses

In the absence of any of the arrangements discussed above,⁴⁸ the adult child has indefeasible title to the property. Therefore, in order to come under one of the “exceptions”⁴⁹ to indefeasibility, an older party would need to allege either fraud, or come within a recognised “*in personam*” exception to indefeasibility.

Equitable causes of action, namely resulting trust, undue influence, unconscionable conduct, estoppel and failed joint ventures, may constitute an *in personam* exception. These are claims “founded in ... equity” within the Privy Council’s definition in *Frazer v Walker*.⁵⁰ On proof of the cause of action, a court *may* order property be transferred to the older party, or be held on constructive trust. However, these actions do not *always* constitute an exception to indefeasibility, as the remedies are discretionary. It is always open to the courts to order a lesser remedy, particularly when third party

45 At [13].

46 Mrs Cirillo was unable to argue breach of contract. As she had left the home voluntarily, her son had not repudiated the agreement and therefore was not in breach.

47 See this and further discussion, below (recognising and protecting the interest).

48 That is, joint tenancy or tenancy in common, or a registered interest.

49 Various commentators have discussed the theoretical underpinnings of so-called exceptions to indefeasibility, commenting that they are not “true” exceptions at all: see Kelvin F K Low “The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities” (2009) 33 MULR 205, 210; Lyria Bennett Moses and Brendan Edgeworth “Taking it Personally; Ebb and Flow in the Torrens System’s *In Personam* Exception to Indefeasibility” (2013) 1 Syd LR 107.

50 *Frazer v Walker* [1967] 1 AC 569.

interests are affected.⁵¹ Therefore whether these actions amount to an *in personam* exception to indefeasibility largely depends of the relief granted by the court. If compensation is awarded, then title to the property remains unaffected. If granted, the remedy of a constructive trust⁵² may allow for the plaintiff to call for the property to be transferred to them. Alternatively, a constructive trust may only impose a life interest in the property or a joint interest, which although would not require property to be transferred, still impeaches the title of the registered proprietor. The award of a constructive trust would not, however, survive or be enforceable against a bona fide purchaser of that property, leaving the plaintiff only with a personal claim against the constructive trustee.⁵³ In any case, each of the equitable causes of action set a high bar of proof, and the complexity of the claims, coupled with the time and expense, act as a significant disincentive to an older party to commence action.

If we accept that the present causes of action available to an older party may constitute an *in personam* exception, and also acknowledging that these actions are rarely undertaken, is it possible that these existing principles could be modified in order to better address the difficulties faced by an older person wishing to claim a proprietary interest? The concept of indefeasible title is closely guarded in property circles, and there is reluctance by many to allow an erosion of the fundamental principles that underpin the system. Robert Chambers has warned that:⁵⁴

There is a strong desire to turn to the *in personam* exception when there is no real exception to indefeasibility and the outcome seems unfair. However hardship and perceived unfairness do not give the courts authority to create *new* rights in new ways to overcome perceived deficiencies of a Torrens system. The creators of the system knew that people would lose property rights because of it and created an assurance fund to compensate them.

51 See *Giumelli v Giumelli* (1998) 196 CLR 101; *Sidhu v Van Dyke* [2014] HCA 19. See also Carruthers and Skead “Exploring the fundamentals: Indefeasibility, in personam, proprietary estoppel and *Van Dyke v Sidhu*” (2014) 22 APLJ 187.

52 Constructive trusts are uncommon, and the courts will find other remedies to “quell the controversy”: *Bathurst City Council v PWC Properties Pty Ltd* 195 CLR 566, 585.

53 In these circumstances, it would be advisable to place a caveat on the property. If a constructive trust of the entire property has been declared, the claimant’s equitable title would still be vulnerable to a claim by a bona fide purchaser until the property is called for and registered in the name of the claimant.

54 Robert Chambers *An Introduction to Property Law in Australia* (3rd ed, Thomson Reuters, NSW, 2013) 578. In a similar vein, Jonathon Moore states that:

A vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system. This is precisely the reason why the courts have insisted that a personal equity must be founded upon a recognised legal or equitable cause of action.

Others have warned against taking a “wide” view of the *in personam* exception, warning that introducing new causes of action as *in personam* exceptions will destabilise the foundations of the Torrens system, creating uncertainty.⁵⁵ The role of law reform is, however, to reconcile the tension between uncertainty of the law, and allowing the law to respond to overriding policy concerns. Taking too narrow a view restricts the development of the law in situations that have evolved through changing social or economic conditions, or indeed have achieved growing recognition in such areas as elder financial abuse. However, proposed reforms must strike a balance between the two objectives.

- (a) Reinterpreting the *in personam* exception: expanding the definition of fraud?

Expanding the definition of fraud to include unconscionable denial of an interest could be one way to capture the conduct of the adult child and allow a more direct avenue for an older party to challenge the legal title. Rather than the claimant having to prove one of the recognised equitable causes of action (which may or may not amount to an exception to indefeasibility), redefining the conduct of the child in specific fact circumstances as fraud would allow an immediate exception to indefeasibility. The difficulty with this approach is twofold; first, as Moore and Chambers have suggested, introducing a wider definition destabilises the sanctity of the Torrens system, and, second, the complexities of defining the boundaries of “unconscionable conduct” create increased uncertainty and potentially expand the exception to unworkable proportions.

Section 42 (1) Real Property Act 1900 (NSW) states that:

Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded ...

Fraud is not defined in the legislation, and Courts have found the action by the registered proprietor must amount to “personal dishonesty or moral turpitude”.⁵⁶ Further, it has been described as “dishonesty of some sort, not what is called constructive or equitable fraud ...”⁵⁷ Any proposal to expand

55 Lynden Griggs “The Tectonic Plate of Equity — Establishing a Fault Line in Our Torrens Landscape” (2003) 10 APLJ 78.

56 *Butler v Fairclough* (1917) 23 CLR 80, 90 (Griffith CJ).

57 *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210.

the reach of the fraud exception has not been taken up. For instance, Mason CJ and Dawson J in *Bahr v Nicolay*⁵⁸ determined the definition could include unconscionable conduct by the registered proprietor subsequent to registration, however, this view was not adopted by the majority. Therefore, whilst actual fraud, such as forgery, is clearly within the reach of the section, conduct that is morally ambiguous is more difficult to bring within the exception. Currently, the weight of authority suggests that there must be a degree of dishonesty⁵⁹ on the part of the registered proprietor. In the context of assets for care scenarios, the paradigm example of the adult child accepting the transfer of property and subsequently failing to undertake care or accommodate their parent owing to a breakdown in the relationship, whilst arguably morally wrong, would not, without something further, constitute fraud. We would suggest, however, that an acceptable application of the fraud exception would be to a situation where it could be shown that the adult child accepted the transfer of the property with knowledge of the older person's expectation of care, and it could be shown that the promise for care was never intended.⁶⁰

(b) Expanding the known causes of action in equity

The *in personam* exception is confined to known legal and equitable causes of action against the registered proprietor.⁶¹ As explained above, this restricts the older party to relying primarily on the equitable causes of action such as undue influence, unconscionable conduct, failed joint venture and estoppel.⁶² As explained above, there are significant shortcomings in the present law. Absent a statutory scheme, we suggest that, if courts were willing to recognise the position of an older party in an assets for care scenario, a suitable cause of action could be fashioned to allow an older party to plead a specific cause of action in relation to elder abuse, rather than analogise from *de facto* or commercial situations. Equity has always responded to new and novel circumstances in order to provide a just outcome. Justice Kirby has stated that:⁶³

58 *Bahr v Nicolay* (1988) 164 CLR 604 (Mason CJ, Dawson J).

59 Failure to make inquiries on the part of the registered proprietor will not amount to fraud, but "wilful blindness" may: see *Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd* [1998] 1 VR 188; *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202. For further discussion see below.

60 Examples of such behaviour have been documented in interviews involving older people in Western Australia: A Freilich, P Levine, B Travia and E Webb, *Security of tenure for the ageing population in Western Australia – Does current housing legislation support Seniors' ongoing housing needs?* November 2014 COTA Western Australia <www.cotawa.org.au>.

61 *Butler v Fairclough* (1917) 23 CLR 80, 90 (Griffith CJ). *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202.

62 And, arguably, common intention constructive trust, although this is rare, as parties rarely have an intention to share the property, rather there is an agreement for care and to provide accommodation.

63 The Hon Justice Michael Kirby "Overcoming Equity's Australian Isolationism" (2009) 3 J Eq 1.

The vitality of equity in Australia is necessarily dependent on the readiness of our courts to develop equitable principles to respond to modern conditions and needs ... [T]he categories of equity are never closed. All lawyers have responsibilities to play in the ongoing renewal of equity's doctrines and remedies.

Indeed, the High Court during the Mason era saw the failed joint venture principle adapted to de facto situations in *Muschinski v Dodds*⁶⁴ and *Baumgartner v Baumgartner*,⁶⁵ confirming that in Australia, the constructive trust had moved away from traditional English principles. Similarly, the courts have recognised a “special wives’ equity” in response to particular situations where wives have “agreed” to guarantee their husband’s debts.⁶⁶ This “special equity” is based on the principle that a relationship of trust and confidence exists between the guarantor and the borrower, and the creditor has knowledge of this relationship.

It is not heretical, therefore, to suggest equity respond to the recognised phenomena of elder financial abuse, as a matter of policy and principle. To create a new, or at least an adapted cause of action, in circumstances where an arrangement has been made where assets are transferred in exchange for the promise of care and/or accommodation and that promise is not fulfilled, would eliminate the doctrinal issues surrounding the application of traditional principles. It would allow an older party to challenge the title of the adult child, and place the onus on the child as registered proprietor to justify the retention of the title. The wrong that would found the cause of action would be the unfulfilled condition subsequent to the transfer of the assets, namely the provision of care and accommodation. Any change to the law is, however, dependent on the willpower of courts to develop a new cause of action in response to these growing situations. In light of the inherent conservatism of courts to take these steps, the best way forward may be to develop a legislative response.

(c) Legislative amendments

Given the increasing recognition that elder financial abuse requires measures to address the legal imbalance currently experienced by older people, we suggest that a preferable solution would be to amend relevant state legislation to include a provision stating that property transferred pursuant to an asset for care arrangement amounts to an exception to indefeasibility. This approach has a number of advantages for the older party; first, it effectively allows a statutory cause of action, providing an alternative to the convoluted

64 *Muschinski v Dodds*, above n 28.

65 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

66 *Yerkey v Jones* (1938) 63 CLR 649, affirmed in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. The “special position” of the wife is born out of her lack of understanding and the absence of any benefit derived from the transaction.

equitable actions outlined above. Secondly, the older party would have an added protection if the property were sold to a third party. Finding whether an asset for care arrangement does exist would be the first challenge, although we suggest that, in many cases, it is not disputed. One approach would be to allow a court to determine the existence of an asset for care arrangement based on certain indicia, such as the intention of the parties, the living arrangements, the transfer of a primary residence (as opposed to an investment property) and transfer of property for little or no consideration. Analogous provisions can be found in s 4AA(2) Family Law Act 1975 (Cth), where a court, determining whether a *de facto* relationship exists for the purposes of the Act, may consider any or all of a number of circumstances⁶⁷ in making a decision.

Once the court finds an asset for care arrangement exists, the onus would then fall on the adult child to justify the retention of the property, and would allow the court to make findings allowing, if necessary, the retransfer of property to the older party.⁶⁸ Alternatively, a simpler solution would be a clause providing that any transfer by a parent to an adult child of real property, in the absence of valuable consideration, can be reversed by the Registrar General unless the adult child can prove the property was a gift, or care and accommodation was been provided.

The status of the adult child as volunteer may have further bearing on the proposal that the adult child should bear the onus of justifying their title to the property. The present controversy surrounding volunteers is more applicable to third party scenarios, and whether the title obtained by a volunteer (C) should be indefeasible, or subject to equities enforceable *in personam* against the transferor (B) by (A). In both Victoria and South Australia, indefeasibility is only given to purchasers for value, and volunteers are not given protection.⁶⁹ The Northern Territory and Queensland have provisions that expressly confer indefeasibility upon volunteers.⁷⁰ Similarly, in NSW, *Bogdanovic v Koteff*⁷¹ found that volunteers were entitled to the benefit of immediate indefeasibility, although the court did not express an opinion whether the protection would extend to the volunteer if he or she was to have notice of the prior interest. The position in *Bogdanovic* was subsequently approved in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁷² although the High Court's observations on that point were obiter. The relevance of the debate in the context of a two-party dispute between a parent and adult child hinges on the knowledge the adult child has of the older party's position. We argue that, even in the light of the

67 s 4AA (3), (4) Family Law Act 1975 (Cth).

68 Or appropriate remedies less than a proprietary remedy, for instance, if the care arrangement has existed for some time and subsequently becomes unworkable. For instance, if care has been provided for a period of time, the adult child could not be found to be a volunteer.

69 See *Biggs v McEllister* (1880) 14 SALR 86; *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613.

70 Land Title Act 2000 (NT), s 183; Land Title Act 1994 (Qld), s 180.

71 *Bogdanovic v Koteff* (1988) 12 NSWLR 472.

72 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

NSW authority, the failure to provide adequate consideration for the transfer of property, together with the clear knowledge of the older party's position justifies the conclusion that the child's title be defeasible.

We suggest that a legislative amendment to s 42 Real Property Act (NSW) and its equivalent State counterparts would be justified on the grounds of the recognition of the potential vulnerability of older people with respect to assets for care arrangements, particularly involving the transfer of their primary residence to an adult child. These types of policy-based reforms are clearly not without precedent. Recent legislative amendments have been made on policy grounds, for instance, changes to s 56C Real Property Act (NSW), stating that unless a mortgagee takes reasonable steps to check the identity of the mortgagor, the Registrar General may cancel any recordings on the register.⁷³

If the property transferred was the older party's primary residence, there would be a presumption that the transfer of a substantial asset would only be on the basis that the older party would require something in return. The onus would then fall on the adult child to produce evidence rebutting the presumption that the transfer was improvident, and that either the transfer was made in the absence of any promise to provide accommodation and care, that is, that it was a gift, or that there are other circumstances that mean the title should not be amended. This statutory provision would go further than the amendments enacted in Maine in the United States. Under these reforms, a presumption of undue influence will arise when an elderly dependant person has transferred assets (either real or personal property, or money) for less than full consideration to either a family member, or a person in a fiduciary position.⁷⁴ Burns finds that the effect of the legislation widens the reach of undue influence to protect older people in certain circumstances, without undermining its fundamental doctrinal features.⁷⁵ Nevertheless, while the effect of legislative reform of equitable doctrine allows for a larger class of people to successfully challenge transfers of assets, the reforms do little to eliminate the social, physical, financial and emotional impediments to commencing litigation,⁷⁶ and the older person is still required to pursue remedies through traditional equitable causes of action.

We argue that these amendments do not go far enough; the provision we are suggesting requires the adult child to prove that they did not renege on an arrangement to provide care and accommodation in exchange for the transfer, which in turn strengthens the older party's position.

An added advantage of placing the onus on the adult child is that in future it may encourage adult children to seek advice regarding having Family

73 Similarly, in Queensland s 185(1A) Land Title Act 1994 (Qld) requires mortgagees to verify the identity of persons executing registerable mortgages. A mortgagee who does not take 'reasonable steps' (as defined in the Land Titles Practice manual) will be denied the benefits of indefeasibility. The mortgagor bears the onus of establishing such compliance (s 185(5)).

74 33 ME REV STAT ANN (West) s 1022(1) (2001).

75 Fiona Burns "Undue Influence Inter Vivos and the Elderly" (2002) 26 (3) MULR 499.

76 Cheryl Tilse, Deborah Setterlund, Jill Wilson, Brian Herd "Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice" (2002) 1 *Elder Law Review* 1.

Accommodation Agreements in place before commencing transfers that potentially may be reversed at the discretion of the Registrar General. The amendments would, in turn, have the effect of reversing the common law presumption of advancement in these particular fact scenarios.

A proposal to further erode the sanctity of the Register by adding another exception to indefeasibility may be viewed by some as unacceptable, and we acknowledge the reasons behind those arguments. However, decisions such as these are made on policy grounds, and we argue that older parties are subject to particular vulnerabilities, along with the consequence for them of losing their homes when an undertaking to be cared for and housed is not honoured.

II. ONE STEP BEYOND – ASSETS FOR CARE ARRANGEMENTS AND THIRD PARTIES

We sold our house as it was getting too much to maintain. We built a granny flat in the back of our daughter's yard and gave them some money to reduce their mortgage. Everything was going well for a while but their marriage broke up. They are selling the house. All our money has gone and we will have nowhere to live. We will probably have to rent with our daughter and grandchildren.⁷⁷

This section of the paper examines assets for care scenarios where the facts extend beyond the initial parties to include a third-party purchaser or mortgagee. In so doing, we must keep in mind that each such agreement is unique and, therefore, a diverse number of proprietary and non-proprietary interests can arise under the umbrella term of an assets for care arrangement. Depending on the circumstances, the older person could possess one or more interests. First, an older person could have a legal interest in the land through being noted as a joint tenant or tenant in common or where there is a registered life estate or lease for life. However, as discussed earlier in this article, it is unusual for the older person to take a registered interest in the property in these transactions. Therefore, we will focus on circumstances where the older person does not, or cannot, have a registered interest. In such cases, the interest could be a form of tenancy (ranging from a mere right to occupy to a lease, in some cases for life)⁷⁸ or may arise from the nature of the assets for care arrangement itself (for example, a constructive trust or equitable lien). In more egregious circumstances, the older person may have an interest as a result of an abuse of the assets for care arrangement, such as a

⁷⁷ Freilich et al, above n 60.

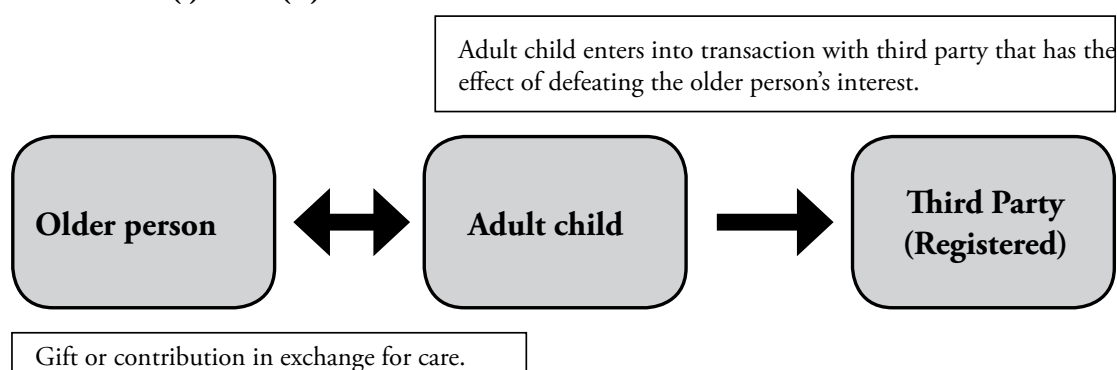
⁷⁸ Section 42(2)(e) TLA (Victoria).

right to have a transaction set aside for fraud or pursuant to the *in personam* exception.

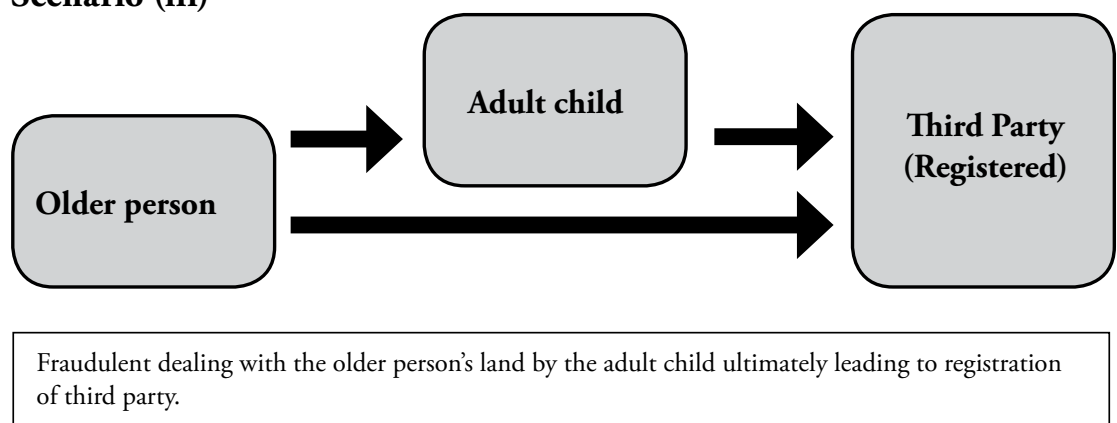
At issue is whether these interests (however they are classified) can withstand a competing interest held by a third-party mortgagee or purchaser. This discussion will consider three scenarios, two of which mirror those discussed above in Part 1 of this paper.

- (i). Transfer of property to an adult child pursuant to a family accommodation arrangement.
- (ii). The older person has sold his or her home, and has used the proceeds to purchase,⁷⁹ or contribute significantly⁸⁰ to the purchase or construction of a property, an extension of an existing home or the construction of an ancillary dwelling (a granny flat).

Scenarios (i) and (ii)



Scenario (iii)



- (iii). The adult child fraudulently deals with the older person's land. The third scenario is not a typical assets for care scenario, in that these events could occur whether the adult child had entered into an assets for care arrangement or not. However, fraudulent use of an older person's property is a significant form of elder financial abuse and is often enabled by living

79 *Pobjoy v Reynolds* [2013] NSWSC 885.

80 *Mainieri v Cirillo* above n 43; *Marlow v Boyd* [2012] QSC 331.

in close proximity to an ageing parent. Here the older person retains title to the land but the adult child fraudulently uses the land as security for a loan or a guarantee, or sells the property.⁸¹

A. The Present Law

The assets for care arrangement is between the adult child and the older person; almost invariably the third party has no connection with the agreement. A registered mortgage or transfer to a third party is indefeasible unless an exception applies. Theoretically, an assets for care scenario could give rise to several of the exceptions although the likelihood of rendering the third party's title defeasible is remote.

1. Fraud

As outlined in the discussion regarding two party transactions, to set aside a mortgage or transfer pursuant to the fraud exception, the older person must establish that there has been actual fraud brought home to the registered proprietor (the third party), or his or her agent. Mere notice of the older person's interest – for example during a valuation or inspection – will not, without more, amount to fraud. Even where there is actual fraud on the part of the adult child, the issue for the older person is that the fraud must be that of the registered proprietor, the third party.

In Scenarios (i) and (ii) the adult child is dealing with his or her own property and, despite any agreement with the older person, can pass good title to a third party. The only (rare) exception to this is where the third party was party to the fraudulent scheme.⁸²

Scenario (iii) provides more scope for the older person to set a transaction aside but, in most cases, the mortgage or transfer to a third party would survive. Such mortgage or transfer to a third party could only be set aside where the third party is implicated in the child's fraud.⁸³

(a) Implicating the third party in the adult child's fraud

In most cases, there will not be the necessary link to the third-party financier or purchaser to establish fraud. If the fraud by the agent is within the scope of the agent's actual or apparent authority, ordinary agency principles will apply and the fraud will bind the registered proprietor. This is the case

81 For example, an adult child may obtain the duplicate certificate of title and forge the older person's signature on the relevant documents; an older person may be "tricked" into executing documents or an Enduring Power of Attorney misused.

82 In such a case, if the third party was tainted with the adult child's fraud the transaction could be set aside.

83 Even if the third party's title is unassailable, in these circumstances, the older person may still be able to seek compensation from the Assurance Fund.

even if the registered proprietor had no knowledge of the agent's behaviour and the agent was acting for his or her own fraudulent purpose.⁸⁴

However, Australian courts are reluctant to set aside transactions where the registered proprietor has not been directly implicated in the fraudulent activity.⁸⁵ For example, there are many cases where a bank exhibited "less than meticulous practice"⁸⁶ in relation to identification and execution procedures but such carelessness did not amount to fraud such that the mortgage would be set aside.⁸⁷ The mere fact that a person may have discovered the fraud if they had made further inquiries does not, of itself, establish fraud.⁸⁸

The New Zealand courts have taken a different approach that demonstrates, in our view, a more realistic approach that encourages banks to take more care when entering into transactions involving parents and children. In *Dollars & Sense Finance Ltd v Nathan*⁸⁹ a son obtained a loan from Dollars & Sense (D&S) on condition that his parents granted a mortgage over their land. There was no direct contact at any stage between D&S or its solicitor and the Nathans'. D&S's solicitor only dealt with the son regarding the property's details, obtaining the duplicate CT and the execution of the documents. Mrs Nathan's signature was a forgery and there were anomalies regarding the witnessing of the mortgage.⁹⁰

The mortgage was registered, the son defaulted and D&S sought to exercise its power of sale.⁹¹

The court held that, due to the actions of the mortgagee and its representatives in not contacting the Nathans directly and relying on their son as a conduit, the son was acting as an agent for D&S for the purpose of procuring Mrs Nathan's signature and the son's actions were held to be within the course of the agency.⁹² It followed that the mortgagee did not have indefeasible title.⁹³

84 *Russo v Bendigo Bank Ltd* [1999] 3 VR 376; however, where the agent's fraud is not within the actual authority the registered proprietor will be unaffected by the fraud and retain indefeasible title: *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (NSW) (Pt 1) 529.

85 *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529. See generally P O'Connor *Immediate Indefeasibility for Mortgagees: A Moral Hazard?* (2009) 21 Bond LR 133; P Watts *Imputed Knowledge in Agency Law: Excising the Fraud Exception* (2001) 117 LQR 300.

86 *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202, 217. Compare *Beatty v Australia and New Zealand Banking Group Ltd* [1995] 2 VR 301,314; *Russo v Bendigo Bank Ltd* [1999] 3 VR 376

87 See generally Rodrick, Sharon *Forgeries, False Attestations and Impostors: Torrens System Mortgages and the Fraud Exception to Indefeasibility* (2002) 7(1) Deakin Law Review 97; Wallace, McCrimmon, and Weir *Real Property Law in Queensland* (4th ed) at [10.240].

88 *Assets Co Ltd v Mere Roihi* [1905] AC 176; *Pyramid Building Society v Scorpion Hotel* [1998] 1 VR 188, 196; *Young v Hoger* [2001] QCA 453; *AGC v De Jager* [1984] VR 483, 485.

89 *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.

90 Mr Nathan did sign the mortgage but was suffering from a terminal illness at the time and was put under pressure from his son to do so.

91 Mr Nathan had passed away by the time the matter proceeded to court.

92 *Dollars & Sense Finance Ltd v Nathan*, above n 89, at [43]–[46].

93 At [50].

2. The *in personam* exception

Similarly, utilising the *in personam* exception is unlikely to assist an older person in Scenarios (i)-(iii). Although the facts in *Bahr v Nicolay (No 2)*⁹⁴ could be superimposed on an assets for care arrangement – and if the facts were on point it seems the exception will apply – this would be a rare occurrence. In that case, a repurchase provision benefitting the Bahrs was included in a contract of sale between Nicolay and the third party, the Thomsons. In the circumstances, it was held that the third-party purchasers of the land were obliged to comply with the agreement.⁹⁵ However, it is unlikely a bank would ever agree to such an arrangement. In the case of a sale, purchasers would be reluctant to “burden” their property by including such a term.

3. Short leases

In Scenarios (i) and (ii), if an assets for care arrangement was held to be a short term lease, the older person could resist the purchaser or mortgagee as an exception to indefeasibility. Obviously, if it was a longer lease it could be regarded as equitable but, depending on the circumstances, may not be binding on third parties.⁹⁶ In relation to Scenario (iii), if the third party was not implicated in the fraud, the lease would stand, at least temporarily.⁹⁷

There could be some difficulty in establishing that an assets for care arrangement is a lease. Leases require the elements of exclusive possession⁹⁸ and certainly of term.⁹⁹ Exclusive possession may be established in, for example, a separate granny flat, but is unlikely in an arrangement where the older person shares the house. Furthermore, the undefined duration of the arrangement may give rise to concerns regarding certainty of term.¹⁰⁰

If there was found to be a lease, each jurisdiction provides for an exception to indefeasibility with respect to short leases. Such leases do not have to be registered to create a legal interest in land and the terms of the statutory protection range between one and five years.¹⁰¹ In Victoria, however, s 42(2) (e) TLA provides that all tenancies are exceptions to indefeasibility and does

94 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

95 Although rare, one could envisage circumstances where, as a condition of sale, the older person retained a right to remain on the land. For example, in case studies for Freilich et al, above n 60, an older person built a separate dwelling on an adult child’s rural land. Incoming purchasers agreed as a condition of sale that the older person could remain in her home.

96 See for example *Chan v Creden Pty Ltd* (1989) 168 CLR 242.

97 Depending on what jurisdiction the parties are in.

98 *Radaich v Smith* (1959) 101 CLR 209.

99 *Lace v Chantler* [1944] KB 368;

100 *Berrisford v Maxfield Housing Cooperative Ltd* [2012] 1 AC 955.

101 Real Property Act 1900 (NSW) s42(1)(d); Real Property Act 1886 (SA) s69(h), s119; Land Title Act 1994 (Qld) s185(1)(b); Land Title Act i(NT) s189(1)(b); Transfer of Land Act 1893 (WA) s68; Land Titles Act 1980 (*Tas*) s40(3); Land Titles Act 1925 (ACT) s58(d).

not stipulate a time limitation.¹⁰² There has been a series of decisions which suggest that s 42(2)(e) will encompass the interest of a life tenant in possession of land.¹⁰³ On the basis of such decisions, it has been argued that if an assets for care agreement was found to be a lease for life it would withstand a third party interest.¹⁰⁴ Recently, such leases have been recognised in relation to sale and rent back agreements affecting older people.¹⁰⁵

4. Licences

In our view, at the very least, most assets for care arrangements could be described as a licence. A licence is, of course, a mere personal right and does not lead to a proprietary interest in the land.¹⁰⁶ Nor is a licence an express exception to indefeasibility. In some circumstances, it could be argued that a proprietary estoppel can arise, such that a licence that is actionable against third parties.¹⁰⁷ There are some examples from English law where third parties have had to take their interests subject to what resembles an AFC arrangement¹⁰⁸ but it seems the concept of an “estoppel licence” would not be binding in such circumstances in Australia.¹⁰⁹

5. Equitable interests arising pursuant to estoppel or via a constructive trust

These interests are discussed above in relation to two party transactions. In the absence of third party involvement, such interests will not survive a priorities dispute with a registered interest. If the older person’s interest was an equitable one, for example a constructive trust, it will be classified as, at best, an equitable interest or more likely a mere equity.¹¹⁰ Such interests are unlikely to withstand the rights of a subsequent registered mortgage or transfer unless the registered proprietor has, in some way, undertaken to be bound by the interest.¹¹¹

102 Transfer of Land Act 1958(Vic) s42(2)(e); See the discussion of Per Gibbs ACJ in *Barba v Gas and Fuel Corporation* (1976) 136 CLR 120,140 and cases cited therein particularly *Black v Poole* (1895) 16 A.L.T. 155 See too *Calderone v Perpetual Trustees Victoria Ltd* [2008] VSC 373 at para 21. An effort to utilise these principles was recently pursued in *Phillips v Southage Pty Ltd* [2014] VSCA 17; see generally Seniors’ Rights Victoria, *Assets for Care: A guide for lawyers to assist older clients at risk of financial abuse*: (2014), Seniors Rights Victoria, Melbourne <www.seniorsrights.org.au>.

103 Ibid.

104 Barkall Thomas, above n 32.

105 *Haslam v Money for Living (Australia) Pty Ltd* (2008) 172 FCR 301.

106 The effect of the licence as a “mere equity” is discussed above.

107 *Radaich v Smith* 91959) 101 CLR 209.

108 See the discussion above in relation to two party transactions.

109 *Inwards v Baker* (1965) 2 QB 29.

110 See the discussion above in relation to two party transactions.

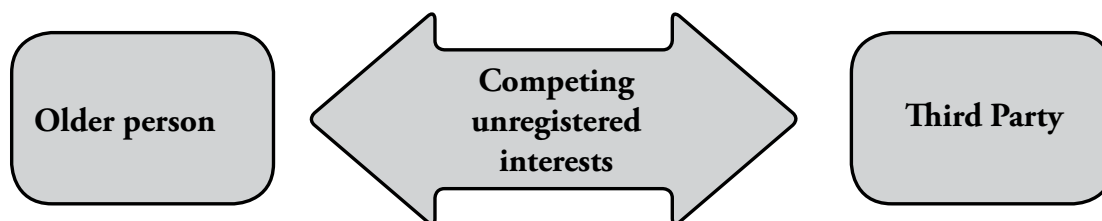
111 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

6. Applying property law principles to Scenarios (i) – (iii)

A person perusing this article will have concluded already that, in most of the above cases, there will be little an older person can do to, depending on the circumstances, retrieve his or her contribution or interest in the land, or have the assets for care arrangement prioritised over a subsequent registered mortgage or transfer.¹¹² This conclusion fits snugly with the tenets of the Torrens system.¹¹³ The indefeasible nature of the title will “ward off most attacks”¹¹⁴ but can, of course, be defeated if a recognised exception to indefeasibility is applicable to the circumstances.¹¹⁵ It seems that the focus on preserving the registered title under Torrens, and only permitting exceptions in rare circumstances, will work against the interests of older people who have experienced financial abuse through deprivation of an interest as a result of entering into an assets for care arrangement.

B. Unregistered Dealings

All the scenarios would be affected by circumstances where the subsequent transaction was discovered after the mortgage or purchase was entered into but before registration.



1. What type of interest (if any) does the older person have in the land?

While the potential mortgagee or purchaser is likely to have an equitable interest pursuant to the mortgage agreement or the contract of sale,¹¹⁶ the interest of the older person could range from a personal equity to a mere equity to an equitable interest. Furthermore, if there was a short-term lease, the interest would have a legal character. The classification will be crucial, especially where the circumstances require an assessment of competing interests.

If an arrangement was a lease that did not come within the short lease exception, the older person may have an equitable interest that would be pitted against the equitable interest of the third party.¹¹⁷ The issue would be decided on the basis of whether the third party had notice of the older person's

112 This is also relevant to unregistered mortgage or transfer as a priorities dispute will arise with regard to the older person's interest and the subsequent interest.

113 See generally A Bradbrook, S MacCallum, A Moore and S Gratten, *Australian Real Property Law* (5th ed, Lawbook Co, Sydney, 2011) at [4.100].

114 D J Whalan *The Torrens System In Australia* (Law Book Co, Australia, 1982) at 296.

115 Bradbrook, above, n 113.

116 Assuming there is a specifically enforceable agreement.

117 *Walsh v Lonsdale* (1882) 21 Ch D 9.

interest¹¹⁸ and whether the older person had engaged in any disintitling conduct.¹¹⁹

In most cases the older person will possess, at best, a personal or mere equity. And, if the older person's interest is categorised as such it is unlikely to survive a priorities dispute. Pursuant to the rule in *Rice v Rice*,¹²⁰ if the equities are equal, the first in time prevails. However, in determining whether the interests are equal, the nature of the equities and, if necessary, the conduct of the parties is considered.¹²¹ If the older person's interest is not a "full" equitable interest, for example, a mere equity, it will be defeated in a priorities dispute against the third party.¹²²

However, the classification of interests in accordance with a hierarchy of equities has not been consistently applied by the Australian courts and there is some disquiet regarding these ill-defined categories. Indeed, in many cases the courts do not make the distinction and assess the interests on their merits.¹²³

2. Is there a caveatable interest?

Related to this discussion is whether the older person has a caveatable interest. If an older person discovered that the property was being mortgaged or transferred, the obvious thing to do would be to try to lodge a caveat forbidding registration of the interest. However, the question arises whether an interest under an assets for care arrangement is caveatable.

A caveatable interest does not have to be a registerable interest, so long as it is one that equity will give specific relief against the land.¹²⁴ Mere personal rights are not caveatable and there is debate as to the status of a range of interests that, in many cases, would be applicable to an assets for care arrangement. For example, the interest of a person claiming a constructive or resulting trust arising from contributions made to the purchase price of the property can be caveatable, although there are questions whether this is the case with a remedial constructive trust.¹²⁵

118 *Moffett v Dillon* (1999) 2 VR 280.

119 *Rice v Rice* 61 ER 646.

120 *Rice v Rice*, above n 119.

121 *Rice v Rice*, above n 119.

122 *Latec Investments Pty Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

123 For example, in *Breskvar v Wall* (1971) 126 CLR 376, the High Court did not make this distinction despite the fact that the Breskvars' equitable interest was a right to set aside the transfer because of the registered proprietor's fraud. The interest appeared to be treated as an equitable interest – the mere equity distinction was not made – and priority determined on the basis of the Breskvars' disintitling conduct. In many instances, courts do not seem to make the distinction and decide on the merits.

124 S Boyle *Caveatable Interests – The Common Law Distinguished* (1993) Murdoch University E-Journal 8.

125 See *Morling v Morling* (1992) 16 Fam LR 161; BC9201570; compare that a remedial constructive trust might not constitute such an interest until a court remedy has been granted: see *Lydon v Ryding* [2002] WASC 308; BC200207693 at [20].

Although these interests may result in a proprietary interest, counterintuitively it is not caveatable until such times as the interest is established.¹²⁶ However, in practice, caveats that are procedurally correct will be accepted by the Registrar. Given the urgency surrounding the pending registration of the third parties interest, it would seem appropriate to lodge the caveat until such time as the court assesses the interests of the parties.

C. What Can We Do to Protect the Interests of an Older Person (And Third Parties) With Regard to Assets for Care Arrangements? Some Recommendations

As can be seen, in most cases, the older person's interest will be defeated by the presence of a registered or unregistered third party mortgagee or purchaser. However, even if the older person did challenge the rights of the third party, any victory may be pyrrhic indeed. The reality is that, even if the older person's occupation of the premises was preserved through an exception to indefeasibility, the basis of the arrangement – care and companionship in old age – would be destroyed. For example, if the sale was set aside for fraud, what would become of the relationship with the older person and their family, even if the third party was no longer in the picture? Similarly, in relation to the *in personam* exception or a short-term lease, the older person may be able to stay in the property but what if the family had departed and the property was registered in the name of a third party? Therefore, the next step is to make recommendations to protect the older person's interest under an asset for care arrangement. In other words, to encourage preventative measures to better recognise and protect the arrangement before things go awry.

(a) Education of older people regarding assets for care arrangements

While we are not suggesting that education is a panacea to prevent older people entering into assets for care arrangements, it is important that there is more public awareness – from the older person and his or her family – as to the nature, responsibilities and risks of the transactions. In our view, more information should be available – including a targeted media campaign.

(b) Recognising and protecting the interest

Assets for care arrangements are commonplace and there is a lack of legal protection – from real property law and elsewhere – for older people in these circumstances. The next step is to determine whether the law can formally recognise assets for care arrangements and protect the interests of the older person. This could be achieved by:

- (1) Finding a way to capture and identify assets for care arrangements;
- (2) Recognising assets for care arrangements as caveatable interests;
- (3) Creating a method of noting the existence of an assets for care arrangement on the title;

¹²⁶ *Valerica Pty Ltd v Global Minerals Australia Pty Ltd* (2000) 10 BPR 18,463; *Re Piles Caveats* [1981] QdR 81.

(4) Recognising that it is appropriate in some circumstances to recognise such rights of occupation against third parties.

(1) Written Family Agreements are a first step towards documenting an assets for care arrangement and are to be encouraged.¹²⁷ However, such documentation is rare in that many people do not consider recording the terms of what they regard as a private family agreement.

As many such transactions will not be recorded in writing, in our view it would be open to equity to recognise an equitable agreement through sufficient acts of part performance. The elements of a granny flat interest recognised by Centrelink could be used as a guide and capture the basic elements of these many and varied transactions. Centrelink¹²⁸ recognises “Granny Flat Interests” (GFI) for the purpose of assessing an older person’s right to social security payments.¹²⁹ A GFI is created when an older person pays for the right to live in accommodation in a private residence for the duration of their life and the accommodation is their principal home.¹³⁰ An older person may pay for a GFI via money or assets and a written agreement is not necessary.¹³¹

(2) Recognising assets for care arrangements as caveatable interests.

Permitting a caveat to be lodged, or a notation on the title to provide notice of an assets for care interest would provide a method of protecting many of these interests and prevent some of the circumstances discussed above from occurring in the first place. Although the ability to caveat such an arrangement may be questionable, debate continues whether how far an “interest” could extend beyond a proprietary interest and whether claims in the nature of a claim *in personam* – a mere personal right – are caveatable interests.¹³² Indeed, Boyle notes:

The interest may arise through the application of legal rules and principles, or it may arise because a specific equitable remedy exists to protect it. To limit the right to caveat only to interests classified as proprietary in nature is to deny a chief purpose of caveats.

127 Although note discussion above concerning *Mainieri v Cirrilo*, above n 43.

128 The Department of Veterans Affairs also recognised GFIs.

129 GFIs protect Centrelink benefits that may otherwise be lost if an older person sells their home.

130 Australian Government, Department of Human Services “Granny flats - features, rights and interests” <www.humanservices.govt.au>.

131 Australian Government, Department of Social Services “Accommodation Choices for Older Australians and their Families” <www.dss.gov.au>.

132 Boyle “Caveatable Interests” (1995) 69 ALJ 237.

In our view, the caveat system is an ideal vehicle to protect the interest of older people in assets for care arrangements. A mechanism to lodge a caveat on the title upon entering into an assets for care arrangement would provide a notice function to alert any potential third parties of the existence of the agreement.¹³³ Furthermore, such lodgement would provide some protection in the event of a priorities dispute as the failure to lodge a caveat on the part of the party first in time can be regarded as disentitling conduct.

Finally, even if a caveat is not lodged upon entry into the agreement, it is important for older people to have the right to protect their interest via caveat to prevent the registration of a competing third party interest.

(3) Creating a method of noting the existence of an assets for care arrangement on the title.

Obviously, the best way to note the existence of an assets for care arrangement is on the title. In our view this could be achieved by:

- Creating a registerable interest;
- Utilising an existing registerable interest if circumstances permit; or
- Providing for an ability to make a notation on the Register that notifies those reviewing the title as to the existence of the agreement

Although controversial, an assets for care interest could be created and registered on the title. Obviously if circumstances permit, if the assets for care arrangement was in the form of an existing registerable interest, that medium could be utilised. At the very least, the possibility to note the existence of the agreement on the title is overdue.

(4) Recognising the right to occupy

As noted above, whatever form the assets for care arrangement takes – leaving aside for the moment other potential arrangements¹³⁴ – at its root is an agreement to occupy the premises. At best this would make it a mere licence and the precarious nature of the interest has been discussed. However, McFarlane notes that in some (albeit rare) cases the “needs of practical convenience”¹³⁵ may make it appropriate to recognise some contractual agreements as binding upon third parties.¹³⁶ In our view, assets for care arrangements would be an appropriate transaction about which to consider such reform. Obviously, we are not advocating a situation where every licence could bind third parties but suggest that it is necessary for a more formal recognition of assets for care arrangements.

133 Debate ensues as to whether caveats are an administrative tool or a serve a notice function.

134 Such as a notation on the Certificate of Title.

135 In crafting such a right, we will utilise McFarlane’s framework. It should be noted that we are proposing venturing further than we consider McFarlane to be positing: Ben McFarlane *The Structure of Property Law* (Hart Publishing, Oxford, 2008) at 522.

136 At 522.

Using McFarlane's discussion, it would be first necessary to examine the nature of B's (the older person's) right and isolate the situation where B (the older person) was in need of protection. It is noted that the occupation of a home is "especially worthy" and thus would warrant recognition against third parties in the absence of another interest. This is especially the case where the third party is aware of the older person's occupation.¹³⁷ Furthermore, exceptions are developed in relation to unregistered interests so as to ensure that the interests of those benefitting from the agreement are not undermined.¹³⁸

D. The Interest in the Third Party Is Created

1. Assets for care arrangements as exceptions to indefeasibility

If the third party does obtain a registered interest, as discussed, the position of the older person is precarious.

Given that it will only be in relatively rare circumstances that the existing exceptions to indefeasibility can be utilised by the older person, a potential – albeit contentious approach could be to make assets for care arrangements an exception to indefeasibility. This was discussed in relation to two party transactions and would be equally – or more – relevant in relation to third party transactions.

2. Delay the transaction

This is extremely important in circumstances where an innocent registered proprietor has been defrauded of his or her title, particularly in scenario (iii) above. Where immediate indefeasibility is adopted, a fraudulent party who becomes registered is recognised as the registered proprietor (although the interest will be defeasible because of the fraud). If the fraudulent party sells the property to an innocent party and that innocent party becomes registered, his or her title is sound. On the other hand, deferred indefeasibility would see indefeasibility delayed until the property is transferred to a party *completely* removed from the fraudulent transaction.

The consequences of immediate, as compared to deferred, indefeasibility are obvious. In the case of deferred indefeasibility, indefeasibility would be delayed until the property passed to a person untainted by the original fraudulent transaction. Therefore, even though the mortgagee/purchaser of the property may be innocent, the property was obtained through fraudulent activity and the title was obtained pursuant to a forged contract of sale and transfer form. It would not be until the property was sold to another party who was completely removed from the tainted transaction that the purchaser's

137 Note that, in the United Kingdom, knowledge of such occupation can be regarded as an "overriding interest". The Torrens legislation in Australia and the irrelevance of notice would tell against this being a factor in Australia.

138 For example, trusts and restrictive covenants.

interest would be infeasible. In this respect, deferred infeasibility would benefit an older person because infeasibility attaching to a registered proprietor is deferred until the property passes to a third party untainted by the fraud.

3. Enhance responsibilities on banks and financial institutions regarding guarantees and mortgages

Given the rise in the awareness of elder financial abuse, it is appropriate that transactions involving older people should require a heightened degree of scrutiny on the part of bank employees. The National Consumer Credit Protection Act 2009 (Cth) introduced enhanced responsible lending obligations on financial institutions¹³⁹ and, since 2014, Australian bank employees have been the subject of comprehensive in-house education campaigns with a view to identifying suspected elder financial abuse.¹⁴⁰ Furthermore, assets for care arrangements have been recognised for some time as a likely source of such abuse.¹⁴¹

In our view, Australian courts need to reconsider the traditional reluctance to find titles infeasible despite a considerable degree of carelessness on the part of a financier.¹⁴² Several states now provide for stringent processes regarding mortgagor identification. In a new era of responsible lending it seems anomalous that safeguards put in place to ensure appropriate levels of bank behaviour would be ignored where the end result of the conduct is the loss of a person's title.

Indeed, several academic commentators and the Canadian courts have suggested that deferred rather than immediate infeasibility should be

139 F Gibson and F Rochford "Emerging Consumer Credit Issues for Older Australians" (2008) University of Western Sydney Law Review 73; Eileen Webb, "Extending responsible lending to small business - a 'consumer' categorization?" in T Wilson (ed) *International Responses to Crisis - Credit, Over-indebtedness and Insolvency* (Ashgate, UK, 2013); Eileen Webb "The Response of the Australian Courts to Real Property Mortgages Involving Predatory Lending Practices" Chapter 6 in Edgeworth, Moses & Sherry *Property and Securities: Selected Essays* (Thomson, Sydney 2010).

140 Frielich et al, above n 60.

141 Recommendations 30-33 House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry, *Older people and the Law*, 2007 <www.aph.gov.au>.

142 Several jurisdictions have adopted various approaches in relation to mortgage fraud. For example, in Queensland, the Land Title Act 1994 (Qld)(LTA) requires mortgagees to verify the identity of persons executing registrable mortgages. A mortgagee who does not take reasonable steps to confirm the identity of the person signing as mortgagor will be denied the benefits of infeasibility should the mortgagor's signature turn out to be forged. The mortgagee bears the onus of establishing such compliance, and if the mortgagee fails to do so, he or she is not entitled to compensation. NSW and Victoria have also adopted such legislation.

preferred in instances where a bank has not taken the appropriate amount of care to check the bona fides of the mortgagor and the transaction.¹⁴³

III. CONCLUSIONS

The ALRC inquiry will see elder abuse receive overdue public, governmental and legal scrutiny. Indeed, the inquiry could provide a cornerstone for a new, national response to what has been, for too long, a creeping, yet relatively unacknowledged quandary.

Responses to elder financial abuse – a problem likely to increase in the face of an uncertain economic outlook and declining housing affordability – will require an expansive approach through diverse social, educative, economic and legal strategies.

Financial abuse through failed assets for care arrangements is only one aspect of the broader elder abuse conundrum. The complexities raised by this form of abuse are evident; upon the failure of the agreement, the older person has little to no realistic legal recourse.¹⁴⁴ In our view, real property law has a unique opportunity to operate proactively (to recognise and protect an older person's interest) rather than reactively (when money and/or property have been lost). As discussed, effective solutions may necessitate either the reinterpretation of existing principles, or indeed, in some cases, specific legislative intervention. Such suggestions may also incur the wrath of some

143 In *Lawrence v Maple Trust Co* (2007) 278 DLR (4th) 698, an unidentified forger transferred the title of Ms Lawrence's home to Thomas Wright. The fraudster, claiming to be Wright, then mortgaged the property to Maple Trust Co. The court imposed a requirement on the mortgagee that it must undertake due diligence. Interestingly, the "cheaper cost avoider" analysis utilised was consistent with deferred indefeasibility. Furthermore, Pamela O'Connor has noted that:

The process of institutional reform must extend to review of legal rules which allow transacting parties to internalise gains and externalise losses. Of prime concern are rules of the Torrens system which allow mortgage lenders to omit reasonable precautions to ensure that the borrower is the registered owner, and shift the risk of losses through identity fraud to persons who are external to the transaction. P O'Connor *Immediate Indefeasibility for Mortgagees: A Moral Hazard?* (2009) 21 Bond LR 133.

See too the reference to Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*, (Yale University Press, New Haven, 1970). Calabresi's conception is widely used in the scholarship of law and economics: Cento Veljanovski *Economic Principles of Law* (Cambridge University Press, Cambridge, 2007) 5-6, 52. See too Pamela O'Connor "Registration of Invalid Dispositions: Who Gets the Property?" in E Cooke (ed), *Modern Studies in Property Law Vol 3* (Hart Publishing, Oxford, 2005), 45, 61. The ways in which the law sets inadequate standards for mortgagees are detailed in Sharon Rodrick, "Forgeries, False Attestation and Imposters: Torrens System Mortgages and the Fraud Exception to Indefeasibility" (2002) 7 Deakin L R 97. Toomey first posited a causal link between immediate indefeasibility and the incidence of forged mortgages: Elizabeth Toomey "Fraud and Forgery in the 1990s: Can our Adherence to *Frazer v Walker* Survive the Strain?" (1994) 5 Canta LR 424.

144 Put simply, even if the older person could afford to pursue matter in the courts it is rare for an older person to commence proceedings against a child. Also, the emotional and physical impact of such a course is better avoided.

who believe such safeguards would come at too great a cost to the certainty of the Torrens system. We believe, however, that it is imperative that the law responds in such a way as to afford better protection to older people entering into these transactions, the number of which is likely to accelerate in the future. The significance placed on housing and financial security in one's later life means that exploring mechanisms to address this type of abuse proves beneficial not only to older people, but the public generally.¹⁴⁵ As such we are obliged to question existing principles in order that this be achieved in a principled and timely fashion.

145 For example, there is an established correlation between housing security and enhanced physical and mental health: Freilich et al, above n 60.