

AGING AND THE LAW SERIES

What Every Professional Needs to Know

PRIVATE CARE ARRANGEMENTS

Faculty: Laura Watts, LL.B., National Director, CCEL

Introduction

What is a private care arrangement?

(also referred to as a “private care agreement”)

- A private care arrangement (PCA) involves the transfer of significant property asset (usually the family home) to a friend or family member in exchange for the promise of care and support
- PCAs are commonly made informally and without legal advice, and the law regarding the enforcement of such agreements is unclear



The 'Whys' of PCAs



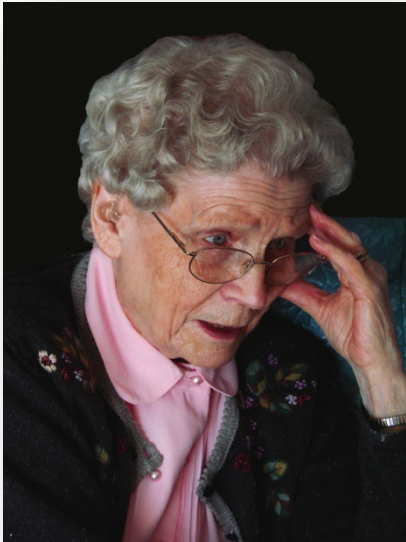
- Many older adults want to remain at home, even after independent living becomes difficult or unsafe
- Many older adults wish to avoid moving or having to change their lifestyle
- Fear of institutional care is also a motivation for older adults who choose PCAs

The 'Whys' of PCAs

- Some older adults may be concerned about the costs of professional home care
- An older adult may prefer to have a friend or family member providing care and support, rather than a stranger
- Older adults may be unaware of available community supports or have negative perceptions about other housing alternatives
- Many older adults would like to help younger family members and PCAs may seem ideal by providing security for the caregiver while also providing for the needs of the older adult



Negative Consequences



- Older adults may not receive the care promised in the agreement
 - They may lose their homes if the living relationship breaks down
 - They might find themselves living in an unhappy or even abusive care giving relationships
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- Caregivers also are vulnerable where an older adult's deteriorating health places increased demands on the caregiver beyond what was originally expected

Risks for Both Parties



- For an older adult whose only significant asset is the family home, the older adult may face impoverishment if the PCA breaks down
- Caregivers are also vulnerable to loss of compensation, for example, where the transfer of property is challenged upon the death of the older adult, after the caregiver has provided years of care and has given up other opportunities to do so.

PCA Scenario - "Stan and Maude"



Lack of Precision

The Majority of PCAs are *informal* or undocumented agreements

- Informal PCAs have usually been made without legal advice
- Informal PCAs often include a broad promise to “care for life”, and *fail to provide for change*
- The special and intimate relationship between the older adult and the caregiver, such as a parent-child relationship or an intimate friendship, may increase the likelihood that future developments and changes will not be adequately provided

Problems Associated with PCAs



- There is increased potential for family disagreement or dissension where the family home is the only significant asset of the older adult's estate
- Relationships may deteriorate
- The up front payment in the form of the property transfer provides a disincentive to provide quality care
- An older adult's increasing care needs may place demands on the caregiver far beyond the original expectations of the parties to the agreement

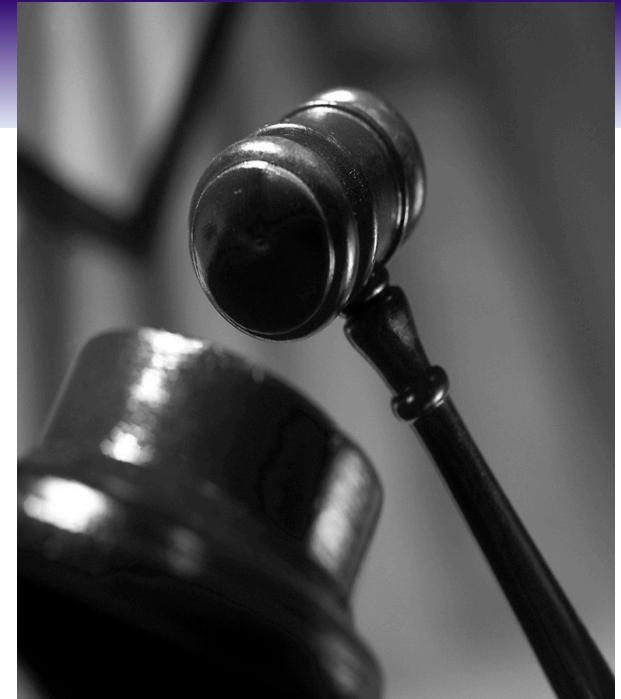
Problems Associated with PCAs



- Caregivers might lack the skills and abilities necessary to provide adequate care, particularly where the needs of the older adult increase over time
- PCAs are not inherently a form of exploitation or financial abuse of an older adult
- Despite initial intentions, however, PCAs can degenerate into abusive relationships due to any number of factors and unforeseen circumstances

The Law Governing PCAs

The common law is unclear and inconsistent with respect to its treatment of PCAs.



Two main areas of the common law come into play with PCAs :

- Contract
- Gift

Common Law : Contract



- The transfer of property in exchange for a promise of care and support can form the basis of a valid contract
- If a care contract can be established, the common law rules of contract will apply with respect to the interpretation and enforcement of the PCA
- Where a contract is established and a term of the contract is not performed, the party claiming a breach can bring an action for breach of contract

Common Law : Contract

Remedies in the case of a breach of contract might include:

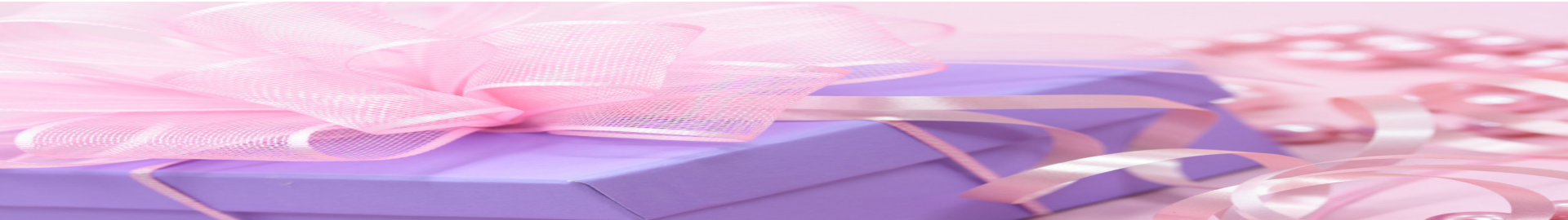
- If the breached term is deemed a *condition* of the contract, the party claiming a breach can treat the contract as ended
- If a term is not a condition, the party claiming a breach can seek *damages*
- If damages are insufficient, a court *may* order the other party to do what was promised (*specific performance*), depending on whether such a remedy is suitable in the individual case

Due to the informality of most PCAs, it may be difficult to show that a binding contract was intended by both parties, particularly where that parties are related (ex. Parent-Child)

Common Law : Gifts

A care agreement may be interpreted as a gift

- If a care agreement is interpreted as a gift rather than a contract, the person to whom the property is transferred owes no obligations to the “giver” of the property
- Upon the break down of a care relationship, the interpretation of the PCA as a gift could have serious unfair consequences for the older adult



Common Law : Gifts

Possible remedies for an older adult facing an unfair outcome as a result of the interpretation of a PCA as a gift include:

1. Have gift set aside on basis of *undue influence*
2. Have gift set aside on basis of *unconscionability*
3. Have gift set aside on basis of a *resulting trust*
4. Compensation on the basis of *unjust enrichment*

Best Practices for PCAs



Recognizing the Hidden PCA



- Even in the case of informal PCAs, the actual transfer of property is usually a formal process involving a third party such as a lawyer or a notary
- Where the parties have arranged the PCA informally / orally between themselves, the transaction will be presented to the third party as a simple transfer of the house from "A" to "B", or a "gift", without any discussion of the terms of the agreement and no formal contract

Recognizing the Hidden PCA



- It is important to be aware of “hidden” informal agreements behind apparent “gift” transfers and to discuss the implications
- Know the key questions to ask in order to ensure clients are clear in their intentions, are aware of the implications of their decision and know where to seek further advice

What to Ask: The What-Ifs

- What if the caregiver predeceases the senior?
- What if the caregiver becomes ill, or disabled, and cannot look after the senior properly?
- Is the caregiver really prepared for the changes, which may occur as the senior ages? Is the caregiver prepared for possible personality changes, and increased dependency?
- What if the senior (70 at the time of the conveyance) lives for another 30 years / is the caregiver prepared for that event? What of the caregiver's own increasing age, and ability to continue in a care giving role?



What to Ask: The What-Ifs

- What is the effect if a senior enters a care facility?
- Who makes the decision about when the caregiver can no longer provide adequate care, and admission to a facility becomes necessary? Will this be a subjective decision to be made by the caregiver or the senior, or an objective decision to be made by a doctor?
- Does the promise to care require the caregiver to personally perform care giving services? Who would pay for homecare or other professional services, the senior (who may have few assets, having disposed of the property under the care agreement) or the caregiver?



What to Ask: the What-Ifs



- What if the caregiver or the senior marries or enters a marriage-like relationship after the agreement is made? What if the senior or caregiver, married at the time of the transfer, is later divorced, or widowed?
- A caregiver's financial difficulties may result in serious problems for the senior : what if the caregiver loses what (is now) his or her own home, leaving the senior with no place to live and no means of support?
- What if the caregiver needs to relocate? Does the senior expect that the promise of care will include remaining in the "family home"?

What to Ask: the What-Ifs

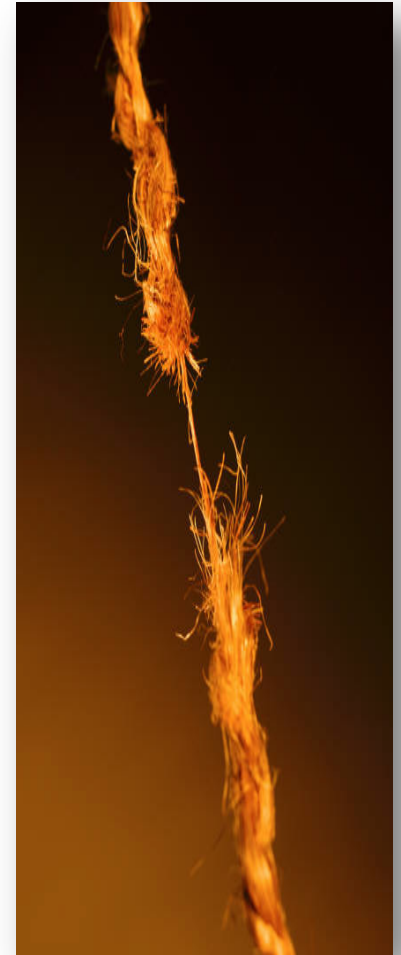


- Does the promise to provide care include nursing-type services, or is it limited to the provision of food and lodging?
- What is the *level* of care expected?
Misunderstandings about what the caregiver has promised to do may trigger problems in the relationship, where expectations have not been clearly stated.



General Notes

- Always advise clients to document agreements in writing and to retain copies
- Ensure that clients are well versed in the implications of their care arrangements
- Discuss “worst-case scenarios” to create awareness of potential risk (especially where loss of family home is possible)
- Advise clients on potential interpretations of their PCA-Contract vs. Gift



Summary

THANK YOU!

For more information, please contact us at:

Email: info@agefriendlybusiness.com

Telephone: 1-877-272-9066

Fax: 604-648-9647

Mailing Address:

Age Friendly Business
907-6540 Hastings Street,
Burnaby, British Columbia,
Canada, V5B 4Z5



Additional Resources

For information about how you can become a Certified Professional Consultant on Aging (CPCA) visit us at our website www.agefriendlybusiness.com

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