



## Précis Paper

### Granny Flat Interests

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## Précis Paper

### Granny Flat Interests

1. In this edition of BenchTV, Richard McCullagh and Darryl Browne discuss the recent NSW Supreme Court decision in *Spink v Flourentzou* [2019] NSWSC 256 and the implications of granny flat arrangements.

#### Spink v Flourentzou [2019] NSWSC 256

2. The facts of the case involved a mother moving in with her daughter and son in law.
3. The mother contributed the sum of \$147,000.00 at around the time of the acquisition of the subject property and about \$18,000.00 at a later date for renovations.
4. The mother was not noted on title, only the daughter and son-in-law were.
5. There was a falling out between the mother and her daughter and son in law and the mother was asked to move out.
6. His Honour, Justice Robb found that in relation to the contributions, there was a conditional gift understood by all the parties whereby the money paid by the mother, was given but subject to the restraint that it was accompanied by a personal right to remain in occupation of the subject house until the mother died or wanted to leave and in the case of death. It was also found that had the mother died, half the value of her contribution would be paid to another daughter.
7. As the result, his Honour found her original payment should be refunded with interest and that she should be able to have a charge on the title to make sure that the money is returned to her.

#### Why was the money repayable?

8. The arrangement between the mother and her daughter and son in law was a completely undocumented arrangement; it was all based on oral assurances and agreement.
9. When recreating the series of events, His Honour noted that the difference between 'gifting' and 'giving' is significant, however in the current case he could not determine on evidence, which term was exactly used.
10. His Honour further noted that in some circumstances, there is a resulting trust which means that the money will be paid back, whilst in other instances, there is a presumption of advancement.
11. One of the most significant factors in this case was that it was paid to both the daughter and the son-in-law. His Honour noted that the presumption of advancement

would usually only apply between mothers and daughters and not mothers and daughters and sons in law.

12. His Honour found it best not to find a presumption of advancement if one of the donees in effect was an in-law not just a child.
13. He further found that there was an intention on the part of the mother, that the payment of money constituted a conditional gift.
14. That is, that she was happy to part with the money, as long as she could stay where she was for as long as she wanted and that there would be a bequest to her other daughter upon her death.
15. In this case, the daughter and son-in-law ended up having to pay the costs.

### What is a Granny Flat?

16. There are minor renovation granny flats, however often there are major renovation granny flats, being separate, and standalone secondary dwellings erected on the land.
17. In NSW, the Local Government rules are flexible, they more or less provide that they must approve a secondary dwelling provided that there are certain set back requirements satisfied.
18. There are also types of pop up granny flats on wheels which can be driven away.
19. The Australian Reform Commission in their recent report had suggested that 'Family Agreement' may be a better term for 'Granny Flat' however this is arguably too generic.
20. The term, Inter-generational Family Accommodation Agreement was suggested by Richard McCullagh in a Law Society Journal Article in November 2015 however this never caught on.
21. The Australian Treasurer has deferred the issue of Granny Flats and GST aspects to the Board of Taxation and the Treasurer was happy to use the expression, Granny Flats.

### Implications of Granny Flats

22. The most common examples of granny flat arrangements is where there is a submarket or nil consideration transfer by the parent. For example they may transfer the title of their current house to the child and the child and family move in or they may buy a house in the child's name and they all live together.
23. In the matter of *Spink v Flourentzou* [2019] NSWSC 256, there was a payment for renovation, as well as a lump sum payment by the mother to the daughter and son-in-law and she was not in title.

24. In most cases of familial granny flat arrangements, a parent has made a significant contribution of money or title to real estate and they are not recorded on the title.
25. Morally, from the outset, granny flats are usually viewed as good family arrangements where legal assistance at the outset is usually seen to be superfluous.
26. This is because generally, there are familial expectations and mutual respect at the time the arrangement is entered into. It involves a pooling of resources between a parent who tends to be asset rich, income poor as opposed to children who have successful incomes but do not have much in the way of equity.
27. However, when any of the ordinary vicissitudes of life happen, such as family disagreement, illness, need for higher care accommodation, the issues can very hard to untangle unless the parent or child seeks legal assistance at the outset.

### Seeking Legal Advice

28. It is imperative that in these types of arrangements the parent, child and any other interested parties seek solicitor advice from the outset.
29. As granny flat interests can be complicated, it is generally advisable for a solicitor to make it clear that they will only be able to act for one interested party.
30. At the conclusion of the meeting, it is necessary for a solicitor to inform the other parties to seek independent legal advice.
31. A solicitor needs to know if the parent is a pensioner as depending on how they enter into an arrangement, it could affect their pension.
32. A solicitor also needs to know what the contemplated gift is, i.e. money or real estate. As well as what rights the parties want to protect for themselves, whether they wish to be co-owner of the property or protect their right of occupation via lease.
33. It is also necessary to know whether the property will be subject to a mortgage as some mortgagees will not allow particular property structures.
34. For example a mortgagee is unlikely to consent to a registered lease to allow a parent to stay there as it impedes the mortgagee's ability to deal with the asset should they need to in the case of a default.
35. In regard to being on title as tenants in common, mortgagees often do not want the odium of evicting an older person and will not consent to tenants in common.
36. Sometimes, a parent and child will enter into ownership of a property as joint tenants. Statistically however, it is likely that a parent will decease before their child, in which case the child, by survivorship will own the entire property. This could affect the inheritance of other children.
37. Ideally, all older persons should have an enduring power of attorney. In a Granny Flat situation, it is not recommended to appoint a child who has received the house for low or no consideration as the attorney as this could cause almost instant conflict.

38. It is also important for a solicitor to identify what the parent is going to get and what the child is going to get and what each are going to give in return.
39. This includes things like who cooks the meals, who contributes to rates, taxes, other holding costs, who takes care of the grandkids etc. All of these arrangements need to be documented so that all parties understand what the expectations are at the outset.

### Pension arrangements

40. In regard to the pension, a person's interest in their principal home is exempt. Further, if a granny flat interest is created, the exemption is preserved.
41. A good way of preserving the pension is for the parties to go in as tenants in common in proportion to their financial contributions.
42. If parties are tenants in common not in proportion to financial contributions, it can be a problem from the Centrelink's point of view.
43. For example, if a mother is on title for 25% but paid the market value of 50%, even though she owns 25% the additional 25% she paid can be deemed to be a gift by Centrelink and will be calculated as an asset in its own right or as a financial asset generating deemed income.
44. A Granny Flat interest arises where someone provides a lump sum of money or transfers their house to a child for minimal consideration or buys the child a house. Provided that the party retains a right of residence for life, Centrelink treats it as a principal residence.
45. Although the person does not own it and effectively gave it away, it still displaces Centrelink's usual asset deprivation rules.
46. This is one of the common motivations to pursue a granny flat arrangement.
47. A legal advisor might suggest one way to protect their interest in the property is by of a loan, ie the parent transfers a \$600,000.00 house with a loan set up, so that anytime they wish to go, they will get the \$600,000.00 back.
48. However, from Centrelink's point of view a financial asset has been reintroduced because the outstanding balance of a loan owing to a pensioner, is an assessable financial asset.
49. Even if a lease is unable to be registered, it is necessary to have at least, a lease drawn up and the equitable interest recorded by placing a caveat on title referring to the lease.
50. Becoming a joint tenant on title has the same issue from a gifting point as tenants in common as Centrelink takes the view as if the parent pays in more than 50%, that surplus would also be counted for pension purposes.
51. This is because even though the parent is an owner of the house, the fact that they paid more than the market value where they are recorded as being a 50% owner in

effect (as that is what joint tenancy becomes upon severance), it can have adverse pension consequences.

52. If there is a self-funded retiree and no mortgagee on title, there is much more flexibility to engage these basic property laws to become active in the case of unemployment, incapacity, retirement village, aged care etc and these types of things can be dealt with in a more orderly and cheaply.
53. The four ways from the very outset of how a granny flat interest may occur, that is 1) transferring title of the house for nil consideration, 2) buying a house for the child, 3) Doing renovations or 4) paying a lump sum. If the parent does any one of those things, a granny flat interest can be created.
54. The first port of call for pensioners is a Financial Information Services Officer at Centrelink.
55. There are also financial planners who specialise in aged pension considerations.

#### How are granny flat arrangements viewed?

56. A constructive trust seems to be the most common result of a granny flat arrangement. That is to say, that in normal circumstances it is found that the child holds the property on trust for the parent, to the extent of the gifting.
57. The basal endeavor in these equity proceedings is to return the original financial contributions to the parties.
58. This might be augmented by subsequent payments such as in *Spink v Flourentzou* [2019] NSWSC 256 where the children attended to all the mortgage repayments.
59. In *Spink v Flourentzou* [2019] NSWSC 256 situation, the judge had to decide whether it was more fair for Mrs Spinks to walk away with her financial contribution returning to her and a charge on title ensuring she gets it or whether she should be afforded a proprietary share in the property according to her contribution to the market value of the property at the time of acquisition.
60. He decided on the former.

#### Making a claim in the Supreme Court

61. In *Spink v Flourentzou* [2019] NSWSC 256, Mrs Spinks was asked to leave by the daughter and son in law and left on 28th October, 2016.
62. The proceedings were started June 2017 and the matter came on for a 3 day hearing in December 2018 with the final orders made on 14 March 2019.
63. This case shows that if matters go to the Supreme Court, they are not going to be resolved quickly.

64. The carriage of a Supreme Court case is such a detailed, thorough affair, affidavit evidence is needed, corroborating documentary evidence, affidavits from other contemporaneous witnesses. It is an expensive and time consuming exercise.
65. A matter involving a dispute in regard to an undocumented granny flat interest goes to the Supreme Court for determination as it is the equity jurisdiction and determines matters in which there are no common law rights, such as a contract or loan governing the interest.

### Statutory Remedy

66. There is also one possible statutory type of remedy under the *Property (Relationships) Act 1984* (NSW).
67. This act is a codification of the constructive trust and it seeks to return to the parties their respective contributions, looking at what was put in initially and what was put in over time.
68. It can apply to cohabiting people providing personal care whether or not they are related by family and if the parties are related, it still comes within the jurisdiction of the Act.

## **BIOGRAPHY**

### **Richard McCullagh**

Solicitor, Retirement Villiage Lawyer - Gosford

Richard McCullagh is a legal director of Patrick McHugh & Co on the Central Coast of NSW, an adjunct lecturer in Elder Law at the College of Law, a member of the Law Society Elder Law Capacity and Succession Committee and author of Australian Elder Law (Thomson Reuters 2018), Chapter 8 of which deals with granny flats.

### **Darryl Browne**

Principal, BROWNE. Linkenbach Legal Services - Leura

Darryl Browne Accred Spec (Wills and estates), TEP, FAICD is the principal of BROWNE. Linkenbach Legal Services, Leura, chairs the Law Society of NSW's Elder Law, Capacity and Succession Committee. Darryl is chair of the Law Council of Australia's Elder Law and Succession Committee.

He is a Councillor of the Law Society of NSW. He is a member of the Law Society's Accredited Specialist Board and Future Committee. He is a member of the State government's Steering Committee on preventing and responding to elder abuse. Darryl is also a director of Lawcover and a member of the Legal Aid Commission Board.

Darryl is a keen writer of legal articles, writing monthly Case Notes on wills and estates for the Law Society Journal. The April 2019 LSJ contained an article by Darryl on derivative actions for deceased estates.

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