



Précis Paper

Accommodation Options for the Elderly

A discussion of the accommodation options for the elderly, and the basic pros and cons of each option.

Discussion Includes

- Downsizing
- Moving to a retirement village
- Moving to a manufactured home park
- Moving in with family in a granny flat arrangement
- Moving to a residential aged care facility

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Video Title

1. In this edition of BenchTV, Richard McCullagh (Solicitor – Patrick McHugh & Co, Central Coast) and Jennifer McMillan (Legal Practice Consultant – Lawcover, Sydney) discuss the different accommodation options available to the elderly, and the pros and cons of each in terms of:
 - the effect on pension entitlements
 - costs of moving in
 - security of tenure
 - ongoing costs of staying
 - costs of moving out
 - effects on testamentary intentions (particularly with blended families).

Downsizing

2. The great Australian dream is to own and stay in your own home, but as you age your circumstances may change. One of the most common options in dealing with such an issue is to downsize your home. Many people wish to stay at home because it is an effort to move in the first place, and there are a lot of advantages in doing so:
 - Many people will have fee simple title to their home
 - If you're a pensioner, the market value of your home will be fully exempt from the age pension
 - You will have the ability to borrow against the house by way of a reverse mortgage.
 - If you're a pensioner, you can participate in the pension loan scheme, effectively topping up your part pension to a full pension.
3. All of the advantages mentioned above rely upon an unencumbered title - you provide a mortgage either to the Commonwealth, or the pension loan scheme, or to a commercial lender for a reverse mortgage, but you are able to stay in your home and you may have access to some additional funds that you would not have otherwise had access to. Effectively, if you part with some equity in your asset you are able to stay within that home.
4. The same concepts apply to downsizing, assuming the elderly person goes to another fee simple situation. However, one difference may be that if you downsize to not only a smaller home, but a cheaper home, any surplus from the sale of the original home will be treated as an asset for pension purposes. In contrast, if you chose a reverse mortgage or the pension loan scheme, any surplus is exempt for pension purposes. However, it is important to note

that reverse mortgages can become very expensive and may deplete the estate considerably overtime.

5. Clients need to be encouraged to review their wills regularly, particularly any time they are making an important decision such as taking out a reverse mortgage, or moving house. In these circumstances it is necessary to consider whether the scheme in place in the will is robust enough to withstand the financial changes that are being made.
6. In blended family situations, it can be quite difficult to come up with a proposal for an estate plan that is going to be fair to everybody and not heighten the risk of someone bringing a family provision claim. There is no one solution option that will suit every family, so you must understand the objectives of the will maker. If the property is held as a joint tenancy, the property will pass by survivorship to the co-owner. However, in New South Wales, jointly held property can be designated as notional estate therefore becoming available to meet family provision claims by family members. Often when estate planning for blended families, it becomes a balancing act of trying to work out what provision should be made for the surviving spouse and for the children from an earlier relationship.
7. Clients will sometimes wish to explore the possibilities around life interests or rights of residence. This may arise in situations where you are not tenants in common, but perhaps one party owns the property, or the parties own the property as tenants in common. In these situations they may become interested in the idea of a life tenancy or a right of residence, but it is important the client is aware of the advantages and disadvantages of each, for example the possibility of the property becoming unsuitable for the life tenants.
8. Statistically, 4 out of 5 Australians aged 65 or over are full or part pensioners, and nearly own their own home, or fully own their own home, unencumbered. When pensioners make a move through any of the accommodation options discussed here, it is essential to remember any capital gain has the potential to factor into their pension entitlements. There are quite clear asset limits for pension entitlements. For example, if a single person receives any more than \$250,000 from a sale and puts this money in the bank, this will begin to erode their pension entitlements. It is essential to sit down and project what the impact is going to be if you are relying on the pension for your income.

Moving to a retirement village

9. There are various reasons that retirement villages are an attractive option for elderly individuals. Some of the most common advantages of moving into a retirement village are that it is still a principal residence, the market value is exempt for the aged pension and for

capital gains tax purposes, and you can still get home care packages. However, it is not possible to borrow against a home within a retirement village.

10. From a psychological point of view, rather than financial, retirement villages are sometimes a great option as many people enjoy the company of people of a similar age, and for a lot of extended family there is comfort in knowing their loved ones are within a community environment.
11. Compared to staying in your own home and having to pay rates, insurance, maintenance, etc., in most retirement villages these sorts of costs are largely collectivized and tend to be cheaper. In terms of moving in to a retirement village, typically the purchase price or the incoming contribution for a village is less than a comparable dwelling within the same locality. Also, if you are selling your main residence you should be eligible for an exemption from capital gains tax, and you would maintain this capital gains tax exemption for your interest in the retirement village, should you decide to move in.
12. A minor downside of a retirement village appears in terms of security of ownership. The standard version of ownership in a retirement village is a registered lease, which is not as ideal as fee simple title. In these circumstances it is essential to do a title search, and if there is a mortgagee on title, you must get consent to the registration to ensure priority is accorded. Victoria is the only state in Australia where this type of interest is already guaranteed pursuant to the *Retirement Villages Act 1986* (VIC). In other states, it is therefore important to ensure your client's registered lease is superior to that of a mortgagee, usually obtained by virtue of consent.
13. In *Willmott Growers Group Inc v Willmott Forests Limited (Receivers & Managers Appointed) (In Liquidation)* [2013] HCA 51, the High Court ruled that a liquidator of a corporate entity is entitled to disclaim leases. The difference between the circumstances in this case and a retirement village is that in a retirement village, even if the operator is in some financial difficulty, the residents will still be under a legal obligation to contribute to recurrent charges. In these circumstances, it would be possible to take comfort in knowing the liquidator would continue the retirement village as an ongoing asset until a buyer is found. However, you can never be absolutely certain that a buyer will be found. If the village under consideration was regional, small or perhaps a standalone ownership or only partly occupied, these risk factors may influence the fate of the retirement village and therefore your client's interest.
14. When acting for a client you should always check the audited accounts of recurrent charges, looking for things such as whether there are any deficits, or whether there is evidence of recurrent operator subsidies. In New South Wales, there has to be disclosure in the mandatory disclosure statement about whether an administrator has been appointed.

However, it is still important to conduct your own inquiries as seen in *Edwards v Anderson* [2009] NSWSC 373. In this case, and affirmed on appeal in *Anderson v Edwards* [2009] NSWCA 375, an operator became insolvent quite soon after the resident moved in, but on the mandatory disclosure statement it said 'to be advised' in regards to whether there was a deficit or surplus in recurrent charges. The judge held that it was up to the resident to conduct further inquiries to determine the state of affairs.

15. The records discussed above should be readily available if requested. Operators New South Wales are under a mandatory obligation to provide audited accounts to any prospective resident who asks for the records, and these records must be provided to current residents, or their committee.
16. The major cost of retirement villages is the cost on leaving. There is a departure fee and the capital gains sharing which are hefty fees, but this cost may not be that different from pursuing home equity. Capital gains tax is also not likely to be an issue when you are departing a retirement village because you are not likely to be experiencing a capital gain. The village industry is fairly transparent in saying that moving into a retirement village is not a financial investment.
17. If you are moving into a retirement village, it would be a good time to review your will and consider whether the provisions of your will need to be changed at the time of making an important change in your assets.
18. If it is a couple moving into a retirement village together, there is no principle reason why the couple would have to move in as joint tenants over moving as tenants in common, or vice versa, but a lot of operators tend to insist on joint tenancy for any two persons of the same name, mostly because they prefer to distance themselves from any potential family conflicts that may arise.
19. However, in NSW, joint tenancy does not mean that the property will be beyond the realm of a family provision claim by a child of the deceased. If the couple are under the lease as tenants in common, there will be a share that falls into the estate that will be available for family provision claims. Whereas in joint tenancy, the relevant event happens on the death of the first joint tenant as the interest passes to the surviving joint tenant. Therefore at least one half of the value in the property is likely to be available for family provision claims if the court considers that it should designate an interest in the lease, etc. as notional estate. In terms of notional estate, the *Succession Act 2006* (NSW) sets out that if there has been a transfer not for valuable consideration at a time when there should have been some family provision concerns, it may be that 1 year prior to death is the relevant period, or it may be 3

years prior to death that is the relevant period for relation back. The case of *Manning v Matson* [2015] NSWSC 1801 illustrates this point.

Moving to a manufactured home park

20. Manufactured home parks are an unusual arrangement in the sense that you have the unusual combination of the owning of the chattel, the dwelling in which you live, and a lease of the land upon which it sits. In NSW, this arrangement is fairly good security of tenure, it is very difficult for the park owner to remove you from the park. However, tenure in other states in manufactured home parks is less ideal. In other states there is a change of ownership if a mortgagee comes into possession, or even if the fixed term of the lease has expired. In this situation there are long periods of notice that must be given, but essentially at that point you do not have security of tenure.
21. Manufactured home parks are usually significantly cheaper to move into, compared to a house in the suburbs or a retirement village, but one downside of a manufactured home park is that the rent is the main source of revenue for the park owner. Compared to recurrent charges in retirement villages, particularly in NSW, ACT and QLD, rent in a manufactured park estate is largely market determined, meaning it is not very regulated and you could be in for steep and unexpected increases.
22. In a mobile home park, you get the same recognition of home ownership for Centrelink purposes as you would in a regular home. In some of the accommodation options, if there is a certain maximum you can pay for your accommodation (i.e. a lump sum), beyond this sum you will not receive rent assistance. In retirement villages, you won't receive rent assistance unless you're in a service department with a lesser entry price. However, in a manufactured home park it does not matter how much you paid as your lump sum, you will still be able to receive rent assistance. You are also still able to receive home care in a manufactured home park.

Moving in with family in a granny flat arrangement

23. When considering whether moving into a granny flat arrangement with family is a suitable option, a few questions must be asked. First it must be considered whether the elderly person is a pensioner? This is because you must be careful to structure the arrangement in a way that will not adversely affect the individual's pension entitlements. Next you must consider whether there is a mortgage over the property you are contemplating involving in the granny flat arrangement. Finally, for testamentary purposes, it is essential to consider whether you have any other children. This final consideration is important because if you have intermingled finances with one of three children, but you really want to treat the three of them equally in your will, how you craft a will to achieve that objective is fairly complex. In

this situation, if there has been a loan arrangement between the testator and one of their children, you may approach this by including a reference to the loan in the will, and a confirmation that that loan is to be taken into account in the division of the estate.

24. If you are co-owners of a property, preferably as tenants in common (so you can extricate if needed), there is no issue if ownership is in proportion to the financial contributions to the purchase price of the property. This is because the elder/pensioner is owning part of their principal residence, and their financial contribution has not been in excess of market value, meaning it is therefore it is not a gift.
25. Given the nature of family relationships, the potential for things to go awry in granny flat arrangements is enormous. Litigation relating to granny flats compared to retirement villages is significantly more common. Courts of equity attempt to look at the respective contributions to the situation and decide things on that basis in an attempt to keep things as fair and equitable as possible.
26. There are particular situations that arise where it is incumbent on the lawyer to point out to their client the likelihood of something potentially going wrong in a granny flat arrangement. It is recommended that for someone contemplating a granny flat arrangement, that they document what the financial outcomes will be for each party if there is a falling out.
27. Some extra protections that are worth thinking about are If it is a case of tenants in common, in proportion to the respective financial contributions, it may be a good idea to have a clause in the agreement stating that the parent can, but the child cannot, apply for an order under section 66G of the *Conveyancing Act 1919* (NSW) to force a sale. This may be appropriate in circumstances where the elderly need to move for whatever reason, but the child refuses to sell. It also protects the elderly from the reverse situation, where the child attempts to sell the property without the consent of the elderly party.
28. Another potential protection is through a caveat. Where the parent's only protection is to have a caveat referring to their entitlement to stay in the granny flat with a right of residence, or to have money repaid, the caveat is the only protection on title. A clause should also be included stating that the child cannot lodge a lapsing notice, or otherwise seek to have the caveat removed.
29. In some instances, other children may be happy to see their parent move in with their sibling, and they may even be prepared to release their family provision rights, possible under s 95 of the *Succession Act 2006* (NSW).

30. When advising on granny flat arrangements between family members, it's important to encourage the parties to the arrangement to seek separate legal advice to ensure all parties are being fairly heard and represented.

Moving to a residential aged care facility

31. When a care package is not sufficient to ensure the person is safe and properly looked after in their own home, the only option may be a residential aged care facility. The primary issue for this type of accommodation is finding somewhere that is appealing that offers all of the necessary facilities.
32. One major issue with aged care facilities is that most people have to pay a lump sum called a 'refundable accommodation deposit' (RAD), the cost of which is largely market determined. A RAD is a lump sum, which makes up part of what is referred to as an accommodation payment. In some instances, an individual may not have to pay the full RAD, but may have to pay by way of daily accommodation payment (DAP) which is a lower fee with interest attached, or the individual may pay a combination of both the RAD and the DAP.
33. If an individual is looking at going into an aged care facility, but they do not have the means to pay the full RAD, the provider is obliged to allow the individual to pay at least part of the payment by daily accommodation payments, but the question then becomes whether the individual has the financial capacity to do this.
34. For example, \$550,000 is the maximum price at which a care provider can charge without having to get approval from Canberra to charge more. Therefore the care provider may ask the individual for this fee payable either by a refundable accommodation deposit (RAD), or through daily accommodation payments (DAP), or a combination of both. However the resident must ensure they have enough financial means to cover the accommodation payment, broken up into the RAD and the DAP, otherwise the care provider does have the ability to refuse entry of the elderly person into the facility. Care providers are quite happy nowadays to accept DAP payments because they receive more money than they would from a lump sum RAD payment due to the interest on DAP payments. Having paid whatever can be paid as the lump sum RAD, this refundable deposit can be eroded at the election of the resident to pay any of the ongoing fees that they do not have other resources to meet.
35. However, it is important to note that if your assets, having paid the lump sum RAD are less than a certain figure, for example \$47,000, you cannot be charged the RAD. In those circumstances, individuals may be allowed to join the aged care facility on a concessional basis. Care providers have an incentive to accept residents on a concessional basis, as they

are entitled to a full subsidy, among other things, if their facility has a certain minimum proportion of residents that are concessional (meaning they pay a reduced amount for their RAD).

36. In the situation where the elderly individual's house is retained, and the accommodation payment for the aged care facility is made by, for example, a child of the elderly person, this may eventually affect the elderly person's pension entitlements. If the house is retained, the house will be exempt for pension purposes for two years, regardless of whether the house is vacant, rented out, etc. After the two year mark, if that house is vacant, it becomes a fully assessable asset for the point of view of the pensions assets test.
37. Essentially, in the most common scenario presented, as a lawyer you are advising on the legal and financial consequences of a particular course of action, and the most important thing is ensuring that the client is making an informed decision.
38. If a family member pays the RAD for the elderly person, problems may arise once that elderly person passes away. A prudent care provider will pay the refund of the RAD to the estate, regardless of who actually paid the deposit. What may be advised is that a deed of loan, or some sort of assignment may be preferable to ensure the money finds its way back to the actual funder of the RAD.
39. Another important factor to consider when moving an elderly person into an aged care facility is the issue of capacity. At the point of a person having to move into a care facility, their capacity may be in doubt. In situations where the testator lacks capacity and their current will is likely to cause a lot of problems, it is incumbent on lawyers to advise the family about the possibility of applying for a court ordered will or a statutory will. If all affected parties are sui juris and are able to support the application, it may be a relatively inexpensive exercise. However, if it is a contested application, you can expect that it will be timely and costly.
40. In sum, there can be clear advantages and disadvantages to taking one course of action compared to another. All accommodation options have large implications relating to pension entitlements, security of tenure and the ability to make sure the parent can get their money out of any given situation and chose another avenue. The best thing that can be done is to receive legal advice before making any major legal or financial decisions.

BIOGRAPHY

Richard McCullagh

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Richard McCullagh has practised law since 1985, mostly in the area of retirement village law, and has been an adjunct lecturer in Elder Law at the College of Law in Sydney since 2013. This covers areas such as decision-making agency, accommodation and remedies for elders. He regularly presents seminars, and publishes articles in the Law Society Journal, about developments in elder law. His textbook, "Retirement Village Law in NSW" was published by Thomson Reuters in 2013. Richard is a legal director of a suburban legal practice on the Central Coast of NSW, Patrick McHugh & Co, in close proximity to a multitude of aged care facilities, retirement villages and an elderly clientele.

Jennifer McMillan

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Jen McMillan was admitted to legal practice in New South Wales in 1989 and in Western Australia in 1992. She is a Law Society of New South Wales accredited specialist in wills and estates, with extensive experience in this area in private practice as well as with a trustee company and as the Practice Leader – Wills and Estates in the College of Law's LLM (Applied Law) program. Jen is a member of the Law Society of New South Wales Elder Law and Succession Committee and a member of the Society of Trust and Estate Practitioners. She is a Legal Practice Consultant with Lawcover and is also a part-time Senior Member (Legal) in the Guardianship Division of the NSW Civil and Administrative Tribunal.

BIBLIOGRAPHY

Cases

Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation) [2013] HCA 51

Manning v Matson [2015] NSWSC 1801

Edwards v Anderson [2009] NSWSC 373; *Anderson v Edwards* [2009] NSWCA 375

Legislation

Succession Act 2006 (NSW), s 95

Conveyancing Act 1919 (NSW) s 66G,

Retirement Villages Act 1986 (VIC)