Civil Litigation for Dummies

Posted onAuthorMatthew Bridger

Part 1

What is Litigation?

Civil litigation is a legal dispute between two or more parties that, usually, seek economic damages or specific performance[1], rather than criminal sanctions.
Lawyers specialising in civil litigation are known as 'litigators'. Litigators represent parties in federal, state and local courts, tribunals, arbitrations and mediations. Litigation begins the moment someone decides to formally enforce or defend their legal rights.

Certain areas of litigation have evolved to become specialised, such as environmental law, family law, criminal law and personal injuries law.

Civil litigation and how it works

Civil claims arise out of disputes between two or more legal entities such as people, companies, governments etc. These claims usually follow certain steps, such as making a demand to pay money, fulfil a promise or rectify a broken agreement. If the demand is not met, a claimant usually proceeds with litigating a matter in a court or tribunal.

Court litigation generally follows certain steps. Therefore, if a matter is going to proceed through a court it generally starts with one party filing either a claim or an application. An application is usually filed when there is only a question of law that needs to be determined, whereas a claim is filed when the facts of a particular case need to be established before the question of law is discussed.

Who can be a party to civil litigation?

Deciding on jurisdiction
Court Claims
Responding to the claim
What happens if the claim is ignored?
Getting more details - request for further and better particulars of facts pleaded
Disclosure of relevant documents or 'discovery'
Expert witnesses
Asking questions before a hearing – 'interrogatories'
Notice to Admit
Setting the Court hearing date

Going to Court – Part 2 Civil Litigation for Dummies

For more information please contact:
p: +61 2 6206 1300 | e: Info@elringtons.com.au

[1] Sometimes a party may want to insist that the other party complies strictly with the contract that has been made. This is called requiring specific performance. (https://www.lawhandbook.org.au/2019_07_04_05_court_remedies/)

Civil Litigation for dummies – Part2

Posted onAuthorMatthew Bridger

Hearings/trials

At the hearing parties present evidence in support of their case to a magistrate or judge. Witnesses may be cross examined and each party then prepares submissions stating their case based on the evidence presented. Sometimes, not all witnesses are called, but they may provide written statements only, which are then used as evidence.

Costs awarded and offers of settlement

Costs are usually given to the party that wins. Most costs awarded are in accordance with relevant courts' scales, which in effect may give the party about half of the real costs.

One way to get more costs is to make an early offer of settlement. This is because, if the offer has been rejected and the offeror gets the same or better result at the trial, the offeror can then ask the Court to give an order for the payment of all of its reasonable legal costs associated with the Court action. Naturally, timing of the offers is important and depends on circumstances.

Interim applications/motions

The parties may during the proceedings apply to the Court for specific orders. For example, the parties may seek clarification or resolution of procedural disputes between the parties.

Applications can also be used by either party to end the proceeding earlier. Thus, the plaintiff may apply for summary judgment, which gives the plaintiff an early judgment if the plaintiff can prove that the defendant's defence is so weak that there is no need to go a trial, but the matter can be decided earlier in the plaintiff's favour. Defendant can also request that the Court dismiss part or all of the plaintiff's case.

Settling a claim

Parties can stop the Court proceedings by settling at any time. This approach is encouraged by courts. Thus, parties may be ordered to attend a settlement conference or mediation to try to resolve the dispute between the parties before proceeding further with the Court action.

Most lawyers seek commercially viable solutions in early stages of their clients' disputes, in order to avoid exposing their clients to prolonged and often costly court actions without guarantee of an outcome. Consequently, most cases settle before reaching the final stage. This is because, the majority of lawyers are in a good position to advise their clients about the strength of their legal position before the trial.

Mediation

While mediation is usually a voluntary process, it may also be ordered by a court. During the process an independent mediator, assists the parties to resolve the dispute. These discussions are usually confidential and the parties may sign a written agreement to confirm their terms of settlement, if any.

Arbitration
Arbitration is a process in which the parties engage a neutral third party, called an arbitrator, to resolve their dispute. The arbitrator is usually a person who has an extensive legal background. During the process, the parties present their case to the arbitrator, who then decides which party wins. The process is less formal than a trial. The decision is usually final and the parties cannot appeal it. An advantage of this is that the procedure is relatively quick and cost effective.

Teamwork
A positive result in litigation is nearly always the product of teamwork between lawyers and their clients. If both parties are committed to the proceeding the chances of success are better. This is especially important in civil proceedings, which is often governed by strict timetables (for each step in the proceeding) imposed on the parties either by the relevant court or rules. If for example, a client does not provide the solicitor with timely response to the solicitor's request for the client's documents, this can prejudice the client's position as the solicitor may not have enough time to prepare required documents to comply with the required timetable. Additionally, this may result in additional work and costs to clients. Therefore, being well organised and working together with solicitors may increase clients' chances of success and reduce their legal expenses.

Conclusion
Whilst civil litigation proceedings usually follow a certain pattern or rules, there may be variables that may affect each step in the proceedings. These variables may also affect time and the costs of the proceedings. This may be due to new evidence or facts that a solicitor was not aware of at the time. Therefore, it is very important that when a legal advice is sought the solicitor is advised of all relevant facts and presented with all evidence as soon as possible

If you have any questions in relation to the above article or need our assistance in relation to your civil dispute, please do not hesitate to contact us. We shall be more than happy to assist you in any way we can.

Please contact our litigation department on (02) 6206 1300 in the ACT or (02) 6128 1200 in NSW.
p: +61 2 6206 1300 | e: Info@elringtons.com.au

Wills for minors or the impaired – Statutory Wills

Posted onAuthorKerin Cotchett
By Kerin Cotchett

 In order to make a Will, a person must have "testamentary capacity" – that is, they must be of sound mind, memory and understanding and they must be over the age of eighteen years.

A person intending to make a Will should:

1. Understand the nature and effect of a Will;
2. Understand the nature and extent of their property;
3. Comprehend and appreciate the claims to which they ought to give effect;
4. Not be suffering from any mental disorder or delusion that would result in them making an unwanted disposition.

According to this test, a person who is, for example, in a coma or suffering from dementia, is unable to create or amend their Will. Without a valid Will, that person's property will be distributed according to a predetermined court formula with no regard for that person's wishes. Property may even be claimed by the State or Territory as "*bona vacantia*" (property owned by no-one).

If you know someone in such circumstances, you are able to make an application to the Supreme Court of your State or Territory for a Court Ordered Will or "Statutory Will". Special leave must be sought from the Court to make such an application. **The Court must also be satisfied that the Will being proposed is one that the person would have made if he or she had testamentary capacity.**

Generally, the Court will only consider such applications in special circumstances. Examples of situations where the Courts have approved Statutory Wills in the past include:

1. *Re* "*Charles*" [*2009*] *NSWSC 530*. A New South Wales case involving an 11 year old child who had suffered severe and permanent brain injury as a result of physical abuse from his parents. The child received victim's compensation of $50,000.00 as a result of these injuries. The NSW Supreme Court approved an application made by the Minister for Community Services for a new Will on behalf of "Charles" to avoid this money being inherited by his parents following his death.
2. *De Gois v Korp* [2005] VSC 326. A Victorian case in which the Court approved a new Will on behalf of Mrs Korp. Mrs Korp had been assaulted by her husband, resulting in severe brain damage. A Will was approved removing Mrs Korp's husband as executor and beneficiary of her estate.
3. *Re DH: Application by JE and SM* [2011] ATSC 69. An Australian Capital Territory case concerning Mr DH, who had suffered a heart attack many years prior and suffered permanent brain damage. At the time of the heart attack, Mr DH was in a relationship with a woman who, along with her daughter, acted as his carer for the next twelve years. In light of evidence that Mr DH had no living relatives who would otherwise be entitled to the estate, a new Will was approved leaving Mr DH's estate to his carer and her daughter.

For more information please contact our Wills and Estate Team:

e: info@elringtons.com.au | p: 02 6206 1300

Surrogacy Agreements and Parentage Orders

Posted onAuthorAnya Aidman

By Anya Aidman

Earlier this month, surrogacy was thrown into the national spotlight again after a surrogacy agreement in Queensland went sour.

Surrogacy laws in each state and territory differ, and would-be parents, surrogates and other participants face an often complex labyrinth in their pursuit of clear answers about the legal framework within which they are embarking upon their journey.

Before you proceed with a surrogacy journey, we recommend that you take the time to discuss your plans in detail and to seek advice from professionals. An overview of what you can expect to undertake is as follows:

1. **Informal discussions and interim agreements**

Before you seek legal advice, we recommend that you take the time to fully and frankly discuss your surrogacy arrangement with the prospective participants in your arrangements. Discuss the detail: what, when, how. Think of contingencies, and think broadly. For example:

- Do you have a shared understanding of how you wish to conduct the fertility treatment (for example, hormones and so on)?
- Do you have a shared understanding of whether and how to discuss and explain your arrangements to others? What about your family (and current children, should the birth parents have any)?

2. **Medical Enquiries**

You may have already approached a fertility clinic for a preliminary consultation. But as you move forward, you may be starting to have more extended consultations, undergo various testing for the intended birth mother and also procedures with respect to the embryo. The intended parents may have already undergone an IVF procedure previously that resulted in the creation of an embryo which is stored; or otherwise there may be procedures underway to create the embryo.

3. **Legal Advice**

Contemporaneously with making your medical enquiries, you should be obtaining independent legal advice.

The surrogate parents and the birth parents cannot share the same lawyer.

4. **Counseling**

Before any transfer procedure is undertaken, both the birth parents and commissioning parents are required to undergo counseling from an appropriately qualified counselor. This is generally to occur prior to entering into a Surrogacy Agreement.

5. **Drafting the Surrogacy Agreement**

The most common legal avenue through which non commercial surrogacy arrangements are documented is a Surrogacy Agreement

A Surrogacy Agreement is not legally binding in the way that, say, a contract is. But the Agreement may be admissible as evidence of the arrangement entered into.

A Surrogacy Agreement will generally express your shared intention that the surrogate parents relinquish any child born to the intended parents.

Surrogate parents and intended parents must agree on the terms of the surrogacy arrangement, including who will pay the legal and other costs. Commercial surrogacy, and therefore financial reward, are prohibited. However, intended parents can pay all reasonable costs associated with a surrogacy arrangement to the surrogate parents.

6. **IVF Procedure and pregnancy**

Upon completion of counseling, and having obtained independent legal advice and executed an Agreement, a fertility clinic will generally permit parties to effect a transfer of embryo.

The surrogate, or birth mother, is presumed to be the parent of a child she carries, until such time that the child is at least 6 weeks old and a parentage order can be made (considered in greater detail below). This means that the birth mother can determine how she conducts her pregnancy, and that the birth mother can make medical decision with respect to herself and the child during this time. It is important for both surrogate and intended parents to have discussed how they propose to manage the pregnancy to avoid tension, confusion or otherwise.

For example, have you discussed medical termination and gained an understanding of each other's views about the circumstances in which this would be likely?

7. **Register the birth**

In the ACT, the birth parents must register the baby's birth with the Registry of Births, Deaths and Marriages within 4 weeks of the baby being born.

8. **Parentage Order**

To actually give the surrogacy agreement, both sets of parents need to apply to the ACT Supreme Court for a parentage order.

A Parentage Order may be made in respect of a child conceived in the ACT. The Application must be made within six (6) months after the birth of the child but not within six (6) weeks of the birth. The substitute parents (and the child) must reside in the ACT at the time of the Application. The Supreme Court in deciding whether to make a Parentage Order must consider:

- whether the child's home is, and was at the time of the application, with both substitute parents;
- whether both substitute parents are at least 18 years old;
- if only 1 of the child's substitute parents has applied for the order, and the other substitute parent is alive at the time of the application, whether:
- the other substitute parent freely, and with a full understanding of what is involved, agrees to the making of the order in favour of the applicant substitute parent; or
- the applicant substitute parent cannot contact the other substitute parent to obtain his or her agreement under subparagraph (i);
- whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents, or either of the child's birth parents, for or in consideration of—
- the making of the order; or
- the requirement that both birth parents freely, and with a full understanding of what is involved, agree to the making of the order; or
- the handing over of the child to the substitute parents; or
- the making of any arrangements with a view to the making of the order;
- whether both birth parents and both substitute parents have received appropriate counselling and assessment from an independent counselling service; and
- if a birth parent is dead or incapacitated or can not be contacted – any evidence before the Court that the birth parent no longer intended or intends the substitute parents to obtain a Parentage Order about the child.

The Supreme Court may take into consideration any other relevant matter.

If you would like to discuss your surrogacy journey, you can speak to Anya Aidman, one of our senior solicitors specialising in surrogacy.
e: **aaidman@elringtons.com.au** | p: +61 2 6206 1300
CategoriesFamily Law, News & Events, SurrogacyTagsFamily Law, Surrogacy

Will the Court listen to my child's wishes?

Posted onAuthorAnya Aidman
By Anya Aidman
When it comes to parenting matters, I regularly have clients come to me and say "**will the Court care about what my child thinks?**" and "**do they get a say in what happens?**". Children do not give evidence in family law disputes. However, section 60CC(3)(a) of the Family Law Act requires that the Court considering a dispute involving a child must take into account the child's wishes and any factors such as the child's level of maturity and understanding. So, how does the Court ascertain what are the wishes of a child? There are various means available to the Court.

The Independent Children's Lawyer
Section 68L of the *Family Law Act* enables the Court to appoint an Independent Children's Lawyer. This is a lawyer who acts independently from the other parties to a matter and whose role it is to represent your child and their interests.
Child-Inclusive Conference
The Court can order that the parties attend a Child Inclusive Conference ("CIC"). Generally, but not always, the Court will order a CIC when parenting matters involve older children.
A CIC includes a court appointed officer, parents or other relevant care givers, and the child or children who are the subject of the proceedings.

"Wishes" Report
The Court can order that a 'wishes report' be prepared. A wishes report can in general terms be described as a psycho-social assessment of a child, generally by a psychologist or child specialist.
The report will be based on an interview or interviews and present the child's views and experiences, as well as observations and analysis of the child's views and behaviour in the context of the parenting matter at hand.

Family Report or Memorandum
Section 11F of the Family Law Act enables the Court to order that the parties attend upon a Family Consultant.
This Consultant will interview each party, sometimes with the child or children in question, and prepare a memorandum with respect to their observations and findings.

Section 62G enables the Court to order a Family Consultant to prepare a report to assist the Court.

It is mandatory for a Family Consultant in preparing such a report to:

1. ascertain the views of the child in relation to that matter; and
2. include the views of the child on that matter in the report.

The findings or reports produced through any of the above processes are not binding on the Court but can be relied upon by the Court in reaching any determination.

Why Should I Get a Parenting Plan?

Posted onAuthorCarlos Turini

By Carlos Turini – Accredited Family Law Specialist
Parents involved in a family law dispute about a child are required, pursuant to Part Vii of the Family Law Act, to attempt to resolve the dispute via counselling /mediation. This is a

compulsory requirement. Parties are encouraged to enter into an agreement in writing about the future care of their children, a "parenting plan".

As part of major reforms to the Family Law Act in 2006, a new Division 4[1] was added to Part VII of the Act entitled "Parenting Plans". A very large stake was placed in "**parenting plans**" to help implement the intended reforms. An obligation was imposed by law on "advisers" to inform their clients about parenting plans and about where they may get further assistance to negotiate a parenting plan. [2]

The Objectives of Parenting Plans (Division 4 of the Family Law Act)

The objectives of the plans are :

"The parents of a child are encouraged:

1. to agree about matters concerning the child;
2. to take responsibility for their parenting arrangements and for resolving parental conflict;
3. to use the legal system as a last resort rather than a first resort;
4. to minimise the possibility of present and future conflict by using or reaching an agreement; and
5. in reaching their agreement, to regard the best interests of the child as the paramount consideration." [3]

What a Parenting Plan May Cover

Formal Requirements of a Parenting Plan

A Parenting Plan is Not Legally Enforceable

What is the point of entering into a Parenting Plan if it is not enforceable?

I like Parenting Plans

Avoiding Children being exposed to marital conflict

Should I get Legal Advice?

95% of Family Law matters settle out of court, however the statistics include some matters which settle at the end of the journey, right at the steps of the Court, when all the emotional energy and legal costs involved in the litigation have been spent.

Negotiating a sound and sustainable parenting plan at the outset of your legal journey may help you **avoid the lengthy, acrimonious and expensive, process of commencing court proceedings** and driving the dispute all the way to a final hearing.

For more information, contact Carlos Turini

p: +61 2 6206 1300 | e: cturini@elringtons.com.au

[1] Family Law Amendment Act 2006

[2] Section 63DA of the Act

[3] Section 63B of the Act

[4] Section 63C(2) of the Act

[5] See Article 95% of Family Law Matters settle out of Court.

[6] Section 63C(1) of the Act

[7] See Article 95% of Family Law Matters settle out of Court.

[8] Children's responses to separation and parental conflict

Selling a House in NSW

Posted onAuthorShalini Sree

Contract Preparation

When you instruct us to act for you on the sale of your property, we will open a file and write to you to confirm that we are acting on your behalf.

Applying for searches
We will request the sum of $550.00 from you to be deposited in our trust account. We will use these funds to obtain the property searches and enquiries which are mandatory inclusions in a NSW Contract for Sale. These include title search plus the deposited plan and any other relevant title documents, Section 149 Certificate, Sewerage Diagram, Land Tax Certificate.

When the funds have cleared through our trust account, we will apply for the requisite property searches.
Depending on the particular local council involved, it can take between 5-10 working days for us to receive the property searches, specifically the Council documents

We cannot predict the exact cost of these searches and enquiries as the cost is dependent on the number of documents that we need to obtain. If there is a balance remaining from the $550.00 it will be used as a credit towards part of our professional fees.

Survey, Building Certificate etc
We ask that you provide us with copies of any building certificates, survey documents etc you may have in your possession. If you do not have these documents, copies can be obtained by any prospective Purchaser (at their expense) from the local council.

Tenanted Property
If your property is sold subject to an existing tenancy agreement, we will require a copy of the Tenancy Agreement as it must be attached to the Contract for Sale.

Marketing Contract

When we receive the searches and any other documents required for the Contract, we will prepare a Marketing Contract which will be sent to your Agent. We will also send you a copy for your records. At that time, the Agent will be in a position to advertise the property for sale. It is illegal to market a property for sale without a Marketing Contract.

Building and Pest Inspections

These are not mandatory inclusions in NSW Contracts for Sale. If a prospective Purchaser wishes to do so, they can arrange these at their own expense.

Sales Instructions

When “offer and acceptance” has been achieved between you and a Purchaser, the Agent will fax to us Sales Instructions. Sales Instructions contain details of the Purchaser, the Purchaser’s lawyer, the sale price, property inclusions (such as carpets, curtains, light fittings), settlement time frame etc. When we receive the Sales Instructions, we will prepare a formal Contract for Sale. The Contract is prepared in duplicate; we retain one copy for your signature and the duplicate Contract is sent to the Purchaser’s lawyer for the Purchaser’s signature.

Appointment

We will contact you to arrange an appointment to:
Review and sign the Contract for Sale
Sign the Transfer. This document is required on settlement and is lodged after settlement with the NSW Land Titles Office (formerly the Registrar General’s Office). It notes the change of ownership on the title deeds.
Complete and sign a Discharge of Mortgage Authority (if applicable)
Hand the title deed to us (if there is no mortgage).
Once the Contract is signed, we will contact the Purchaser’s solicitors and let them know we are ready to “exchange”.

Exchange

Exchange of Contracts takes place when you and the Purchaser are satisfied with the terms of the Contract, when you have both signed your respective copies of the Contract and when the Purchaser’s finance has been approved in writing.
The Purchaser then pays the agreed deposit (usually a cheque payable to the Real Estate Agent’s Trust Account). The deposit cheque is usually handed to us on exchange and we forward it to the Agent following exchange. It is then held in the Agent’s Trust Account until settlement has occurred. If there is no Agent, the deposit will be held in our Trust Account.
During the exchange process, both Contracts (one signed by the Purchaser, the other signed by you) are checked to ensure that their contents are identical. The documents are then dated and physically exchanged (swapped) – we receive the Contract signed by the Purchaser and the Purchaser’s lawyer receives the Contract signed by you. Once Contracts are exchanged, the Vendor and Purchaser are both locked into the transaction. On exchange, the Purchaser’s lawyer will provide us with a Section 66W Certificate waiving the Purchaser’s right to any ‘cooling off’ period.
We will phone you following exchange to advise that exchange has occurred, and we will then confirm exchange in writing. We will also write to your Discharging Mortgagee (if applicable) to notify them of the date for settlement and request preparation of discharge documents and a payout figure in readiness for settlement.

Insurance

PLEASE NOTE: In NSW the insurance risk remains with the Vendor until completion. Therefore, you must keep all insurances in place until settlement has been confirmed.

Leading up to settlement

- As the settlement date draws near, the Purchaser's lawyer will provide us with copies of up-to-date rates notices. (If you receive rates notices following exchange, please notify us and provide us with a copy. We suggest that you do not make any instalments on your rates accounts after exchange without contacting us first.)
- You should advise us if you make any changes to your financial arrangements, such as using the sale property as security for borrowings over another property, or if you refinance your loan.
- We will prepare and provide you with a detailed Settlement Statement setting out adjustments for rates, deposit paid, payout figures, legal fees etc.
- If the property is sold subject to existing tenancy, adjustments for rent are usually attended to by the Managing Agent.

Discharge of Mortgage

We will contact your Discharging Mortgagee to 'book in' settlement. A day or two prior to settlement, the Mortgagee will provide us with a payout figure sufficient to discharge the mortgage. Once we receive that figure, we can finalise details and payees of the settlement cheques in accordance with your instructions. You may decide to instruct your Mortgagee to receive all sale proceeds on settlement, and have the Mortgagee deposit the balance owing to you into your nominated account. Such deposits usually occur overnight.

Pre-settlement inspection

Prior to the settlement date, the Purchaser has the right to carry out a pre-settlement inspection of the property with the Agent. This inspection is usually done on the morning of settlement. When you vacate your property, it should be left in a clean and tidy state and in the same state as at the time of the exchange. There is a possibility that settlement will be delayed by the Purchaser if the pre-settlement inspection is unsatisfactory (or funds may be withheld from the deposit pending resolution).

Settlement

Settlements usually take place in Canberra between 2:30 pm – 4:00 pm Monday to Thursday and 1:00 pm – 4:00 pm on Friday.

Keys

Before settlement, we ask that you provide us or the agent with the keys to hand to the Purchaser's lawyer on settlement. Keys should be delivered to our office before 12 noon on the day of settlement.

Your sale proceeds

- We will phone you when the settlement has taken place.
  If you would like us to bank your sale proceeds following settlement, please provide written instructions, including the name of your Bank, the BSB and account numbers, account name and account type. While every effort is made by us to bank settlement cheques on the same day as the settlement, please understand that we cannot guarantee this will happen. In some circumstances, we may not be able to deposit sale proceeds until the next working day following settlement.

- You may elect to collect your cheque/s from our office on the afternoon of settlement.
- Release of Deposit: On settlement, we will receive a letter from the Purchaser's lawyer addressed to the Agent confirming that settlement has occurred and authorising the Agent to release the deposit held in its trust account to you. This letter is called an 'Order on the Agent'. It is standard procedure for us to fax or email the Order on the Agent when we return to our office after settlement. The Agent will deduct the agreed commission from the deposit held and pay the balance of deposit to you, usually by sending you a cheque. If you wish to collect the cheque from the Agent, please make your own arrangements with the Agent for collection. If you wish the Agent to place the balance of the deposit into your nominated bank account, you must provide that information directly to the Agent, preferably in writing.

If the deposit is held in our trust account, the letter of authority to release the deposit will be addressed to us. We cannot release the deposit without the Purchaser's Lawyers' written authority, which will be received by us on settlement. We will obtain your instructions prior to settlement in relation to how you wish the deposit to be paid to you (eg. Collect a cheque from our office, direct deposit into your nominated bank account etc).

Electricity, gas and telephone connections

The cancellation of these services is your responsibility.

Rates and Water

The local council will be notified of the change in ownership of the property by the NSW Land Titles Office following registration of the Transfer into the Purchaser's name. Once this occurs, rates notices will issue directly to the new owner.

Important Note: Sales or value over $2,000,000.00

Australian residents who are selling a taxable Australian property with a market value of $2,000,000.00 or more need to obtain a clearance certificate from the ATO to confirm that a 10% withholding amount does not need to be withheld. The vendor needs to provide a clearance certificate to the purchaser at settlement or the purchaser will be required to withhold 10% of the price and pass it to the ATO.

After settlement

Following settlement, we will write to you to confirm that the sale has been finalised and we will provide you with a detailed Settlement Statement, our Tax invoice, the original Contract and any other relevant documentation.

Please contact one of our experienced property lawyers or conveyancers to make an appointment on +61 2 6206 1300, or by email on info@elringtons.com.au

Children's Wishes: How the view and interests of the child can be

determined and heard in Family Law matters

Posted onAuthorAnya Aidman

By Anya Aidman
When it comes to parenting matters, I regularly have client's come to me and say "will the Court care about what my child thinks?" and "do they get a say in what happens?".

There are a number of vehicles and processes in the family law litigation and dispute resolution landscape that identify your child's interests and that let your child's voice be heard.

A child's expressed wishes will always be considered by the court. The weight the court will give to those expressed wishes may vary from case to case and the age and maturity of the child. On the other hand, a court will not force a child to express a wish in a family law dispute.

The Independent Children's Lawyer
Section 68L of the *Family Law Act 1975* enables the Court to appoint an Independent Children's Lawyer. This is a lawyer who acts independently from the other parties to a matter and whose role it is to represent your child and their interests.
Child-Inclusive Conference
The Court can order that the parties attend a Child Inclusive Conference ("CIC"). Generally, but not always, the Court will order a CIC when parenting matters involve older children.

A CIC includes a court appointed officer, parents or other relevant care givers, and the child or children who are the subject of the proceedings.

"Wishes" Report
The Court can order that a 'wishes report' be prepared. A wishes report can in general terms be described as a psycho-social assessment of a child, generally by a psychologist or child specialist.

The report will be based on an interview or interviews and present the child's views and experiences, as well as observations and analysis of the child's views and behaviour in the context of the parenting matter at hand.

Family Report
Section 11F of the *Family Law Act 1975* enables the Court to order that the parties attend upon a Family Consultant. This Consultant will interview each party, sometimes with the child or children in question, and prepare a report with respect to their observations and findings.
The findings or reports produced through any of the above processes are not binding on the Court but can be relied upon by the Court in reaching any determination.

If you wish to discuss your family law matter, you can contact Anya Aidman or any of our other experienced family law team.
e: **aaidman@elringtons.com.au** | p: +61 2 6206 1300

Development Management Agreements: a win-win for everybody

Posted onAuthorShalini Sree
Do you currently have a substantial portion of your family's wealth tied up in real property assets that are not generating the income that you had once hoped?
Are you looking to boost your superannuation or cash flow position leading into retirement?
It is becoming increasingly common for owners of substantial rural or semi-rural land parcels, particularly on the fringes of high priced capital cities, to be entering into development arrangements with experienced and well-resourced developers in order to subdivide and on sell rural land parcels in a cost effective and timely manner that would not have been possible if the landowner were to undertake the project themselves.

This type of arrangement is becoming particularly popular in metropolitan centres where "urban sprawl" is rife, and young first homebuyers are being forced to the more affordable outer suburbs of cities in order to secure their first homes.

The benefits of a Development Management Agreement (DMA) mean that landowners who have little to no property development experience, and also have minimal working capital available to cover the upfront costs of undertaking such a development, can outsource these responsibilities to a party who has both the financial resources to undertake the initial stages of the development, and also has the experience of working closely with local councils, planners, surveyors and marketing agents in order to speedily develop the land and bring it to market
The results? The landowner is able to develop their previously stagnating asset without investing significant upfront costs and time into the project, while the developer is able to use their financial resources, skill set and professional network to develop a parcel of land which they are not fortunate enough to own themselves. The outcomes therefore of a well drafted DMA mean that both parties are able to pool their resources together in order to bring about a mutually beneficial arrangement for both parties to the agreement.
If it sounds like this type of commercial arrangement would suit your circumstances, please contact our office to make an appointment with one of our experienced property and

commercial lawyers to discuss your options. Our lawyers have extensive experience working alongside both landowners and developers in achieving cost effective and timely results for both parties to a Development Management Agreement.

Contact Jacob Powell
p: +61 2 6206 1300 | e: jpowell@elringtons.com.au

Getting Redundancy Right – A guide for Employers

Posted onAuthorMatthew Bridger

Most employers are aware what redundancy is. However, time and time again, employers do not understand or do not implement the proper process for making a position redundant.

1. **What is redundancy?**

Practically speaking, redundancy occurs when an employer no longer requires an employee's job to be performed by anyone. Common examples of redundancy include the introduction of new technology, a downsizing of a business due to decreased sales or production, restricting following a merger or business takeover, or the employer decides to relocate the business overseas.

1. **What is <u>not</u> redundancy?**

- the dismissal of an employee on the basis that the employer no longer requires or wants that specific employee, rather than no longer requiring that position to be performed;
- the transfer of an employee's duties to another employee, rather than a distribution of an employee's duties to a number of other employees; or
- the replacement of an employee by a more qualified or experienced person.

3. **What do employers need to pay someone who they have made redundant?**

Most employers are aware that they must pay to an employee at the end of their employment, be it by way of dismissal or redundancy, their salary or wages up until and including their last day of employment, as well as all accrued leave entitlements, including annual leave and any long service leave. However, an employer is not required to pay to an employee at the end of the employment relationship any accrued sick leave entitlements, unless otherwise provided for.

It is too often the case that employers disregard other entitlements that need to be paid when making a person redundant. Most importantly, employers **<u>must</u>** pay redundancy pay in accordance with a modern award, enterprise agreement or pursuant to the provisions of the National Employment Standards (NES). In most cases, but not all, an award or enterprise agreement will reflect the NES.

Another entitlement that most employers overlook is the requirement that if an employee is made redundant effectively immediately, that is they are not provided with notice that their position is being made redundant, an employer must also pay to the employee payment in lieu of notice. Most awards or enterprise agreements would provide for the amount of pay in lieu of notice is required, but is usually again a reflection of the NES.

It is also important that an employer be aware that if an employee is over 45 years of age and has completed 2 years of continuous service with an employer, that employee must also be provided with 1 week additional payment in lieu of notice.

Note: if an employee in the ACT has served for 5 or more years and they are made redundant, an employer will also be obliged to pay to the employee their *pro rata* long service leave entitlement.

For more information please contact Matthew Bridger
p: +61 2 6206 1300 | e: mbridger@elringtons.com.au

What can you do when an executor isn’t doing their job?

Posted onAuthorMitchell Evelyn

By Mitch Evelyn

Being an executor of an estate is a position of great trust and responsibility which many people are not necessarily suited to. When an executor is neglectful of their duties, slow, or even fraudulent, beneficiaries can often take action to force an executors hand and ensure the estate is properly and efficiently administered.

What can I do?

There are a number of cost efficient steps you can take without ever needing to fight the executor head-on in Court. You may be able to:

1. Have the executor voluntarily renounce Probate. If the executor renounces and there is a substitute or alternative executor in the Will, that alternative executor can then administer the estate. If not, another interested person can apply to the Court to administer the estate.
2. File a Notice or Citation with the Court, requiring the person to obtain probate of the Will within a certain period or have their rights as executor removed by the Court.
3. Make your own application for administration on the basis of the executor's delay.

What if they won't tell me what is in the estate?

Where an executor is not just delaying, but being actively hostile or even defrauding the estate, you may be able to take more aggressive steps or force the executor to file accounts with the Court to prove that all estate funds have been properly used.

Am I entitled to see the Will?

As a beneficiary, you are entitled to inspect a copy of a Will. You can also apply to the Court to see a copy of the documents which the executor has filed if they are getting a grant of probate.

Can I get the estate to pay for this?

In **some** circumstances, you may be able to obtain a reimbursement for costs incurred in pursuing an executor paid by the Estate.

If you are a beneficiary faced with a hostile executor, call us now to see how our experienced Estate team can help you:

p: +61 2 62061300 | e: info@elringtons.com.au

Making an Employee Redundant?

Posted onAuthorMatthew Bridger

What should an Employer Do Before and After Starting the Redundancy Process?

1. **I have made that person redundant; why have they lodged an unfair dismissal application?**

Properly making an employee redundant is not as simple as deciding that the employee's position is no longer required, even if there are strong business grounds indicating that is the case. This is because terminating an employee due to the position no longer being required is and of itself not a defence to an unfair dismissal claim. Rather, it must be shown that the redundancy was a "genuine redundancy" within the meaning of the *Fair Work Act* for an employer to protect themselves from an unfair dismissal claim.

A "genuine redundancy" is defined in the *Fair Work Act* as follows:

- a person's employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

Further, that section also provides that the termination of an employee is not a case of genuine redundancy if it would have been reasonable, in all the circumstances, for the person to be redeployed within:

- the employer's enterprise; or
- the enterprise of an associated entity of the employer.

Failure to adhere to even one of the above steps is likely to render a termination **not** a genuine redundancy, despite the satisfaction of all the other required steps.

2. **What are changes in the operational requirements of my enterprise?**

Generally speaking, a change in the operational requirements of an employer's enterprise would be, for example, the introduction of machinery, downturn in business, outsourcing or the business being moved overseas.

3. **Can I make someone redundant even if some of that person's duties are being performed by other employees?**

Yes. A "genuine redundancy" will occur if a person's "job" is no longer required, rather than the duties or tasks of that job no longer being. For instance, the Commission has found that there will be a genuine redundancy if an employee is terminated and the associated duties are assigned to other employees for the employer.

4. **What is my obligation to consult before I make someone redundant?**

An employer is required to consult only if a modern award or enterprise agreement contains a requirement to consult about redundancy. It should be said though that nearly all modern awards and enterprise agreements contain a requirement to consult in relation to redundancy or the more generic "major workplace change", in which redundancy would almost certainly fall within. In any event, if an employer is unsure about whether they need to consult, it is always best practice to consult with effected employees prior to making any decision to make redundancies.

It is crucial that an employer makes sure they properly follow the consultation clause in the applicable modern award or enterprise agreement, as the consultation clause may vary between instruments. Generally though, there is an obligation to notify an employee of a major workplace change, such as looking at making redundancies, and an obligation to discuss the redundancy with the affected employee(s) before an irreversible decision is made

to make an employee(s) redundant. Consultation should occur in order to allow the effected employee(s) to an opportunity to be heard about the proposals before a decision is finalised.

5. **When will it be reasonable to redeploy an employee to another part of my business?**

In our experience, sometimes employers fail to consider redeploying an employee in other parts of their business before making them redundant. Therefore, consideration is never given as to whether it would be reasonable to redeploy the redundant employee to perform another job in the business.

Far too often, employers fatally presume that a redundant employee will not accept a lower paid, lower responsibility job or lower hour job, and therefore do not offer the redundant employee redeployment into that position.

1. **I can just select whoever I want to make redundant, right?**

No, even in circumstances where there is only 1 position out of 10 being made redundant. Some lawful, logical, sound or defensible selection process must be relied on by the employer in making a decision as to whom should be made redundant. If the selection process is not lawful, it may give rise to a claim by an employee for a breach of a general protection or a claim under an anti-discrimination law.

Conclusion

Before embarking on making an employee redundant, an employer must implement a proper procedure in order to minimise exposure to litigation in the form of an unfair dismissal claim, as well as consider all entitlements that will need to be paid to an employee on redundancy. However, if you need assistance in relation to conducting the redundancy process, contact our lawyers who have expertise in employment law.

For more information please contact Matthew Bridger
p: +61 2 6206 1300 | e: mbridger@elringtons.com.au

What if my ex is taking drugs?

Posted onAuthorAnya Aidman

By Anya Aidman

Sometimes, parties involved in Family Law parenting disputes about a child, raise allegations of a risk to the child presented by a parent or by another person. **One of the most common allegations relates to the use of illegal drugs or substance abuse.**

The Court treats very seriously any risk presented to the child by any person using illicit substances particularly whilst a child is in their care.

When a concern has been raised by any of the parties involved it is common for the Courts to make orders for either or both parties to submit to drug testing. The parties may, by consent, agree to drug testing or it may be imposed on them by the Court.

The two most common ways in which drug testing may be undertaken is through urinalysis drug testing and hair follicle drug testing.
Urinalysis drug testing may usually be undertaken at a local pathology centre. The testing generally carries a cost, so you should always check with your local pathology centre about their scale of costs. Prices do vary from service to service. On occasions, a grant of legal aid is made to a party to help pay for any drug testing.
The urinalysis test itself, involves submitting in a controlled setting a sample of urine which is thereafter tested for various substances. A pathology report is subsequently provided to the parties. The parties or their solicitors will then disclose or exchange results of such reports. Urinalysis testing is usually helpful to give a snapshot of current use, or lack thereof, and can give a window of anywhere between one and several days.

Hair follicle testing on the other hand is used to provide a longer stock take on previous and historic drug use. Hair follicle testing is usually undertaken to show periods of use of three months, six months, nine months or twelve months. Generally, hair follicle testing is not successfully undertaken for use beyond twelve months.
The hair follicle test itself is quite straight forward, namely a relevant officer will snip a small sample of hair from the person to be tested. This sample of hair is then subjected to various treatments, and a report is produced thereafter. These types of reports are more expensive, with costs ranging from $300.00 to $1,500.00 depending on the period for which a test is being conducted. These tests are not routinely ordered but are very important for both complainants and accused persons with respect to drug use. These tests are viewed as providing a more comprehensive picture of whether or not and when a party or person has been using illicit substances over a period of some time.

Other tests, including blood tests, can be used to detect substance abuse such as alcoholism.
Ultimately, it is at the discretion of the Court to determine whether and what testing might be appropriate in a matter.

What a Court makes of a positive (or a negative) result will vary from matter to matter. The use of illicit drugs is not in itself a disqualifying factor regarding the capability of a person to parent a child. What is relevant is whether the use of illicit drugs presents a direct or indirect risk to the child.

If you wish to discuss concerns about risk in Family Law parenting matters, please don't hesitate to contact one of our experienced Family Law solicitors.
e: **aaidman@elringtons.com.au** | p: +61 2 6206 1300

Bankruptcy and Family Law

Posted onAuthorAnya Aidman

By Anya Aidman

We have recently had an increase in family law clients coming to us for advice in cases where their former spouse has been declared bankrupt. **A common misconception is that if a spouse/partner is bankrupt[1], the other has no recourse in the family law jurisdiction**. The good news is: bankruptcy does not prevent the non-bankrupt spouse in such circumstances from pursuing an adjustment to property interests under the *Family Law Act.* The Family Court has comprehensive powers to deal with proceedings for property settlement and spousal maintenance in circumstances where a bankruptcy trustee[2] has been appointed, and property of the bankrupt spouse/partner has been vested in the trustee under the Bankruptcy Act 1966. Family courts have sweeping powers to interfere with the interests and rights of third parties, including Trustees and creditors in the context of bankruptcy. **The *Bankruptcy and Family Law Legislation Amendment Act* 2005 ("BFLAA") provides the non-bankrupt spouse with protection of his/her interest in matrimonial or jointly owned property and even the opportunity to obtain a share in the bankrupt spouse's vested assets for the benefit of the non-bankrupt and his/her dependents.** Moreover, it is not a prerequisite of the proceedings that the spouses be separated with the amendments applying whether the marriage is intact or not[3].

This is by no means to suggest that pursuing family law matters in the context of bankruptcy is an easy task.

Unfortunately, if somebody has been declared bankrupt, it is extremely likely that his/her spouse may need to commence legal proceedings in Court to protect his/her, interest in matrimonial assets. Once a bankruptcy order has been made – whether voluntary or forced – the bankrupt's financial affairs effectively become managed by the Trustee and the other spouse's ability to negotiate with the bankrupt directly is very limited.

Every case is different and in a limited number of matters it may be that a Trustee administering the bankrupt's estate has some power and willingness to reach a negotiated settlement that is advantageous to his/her spouse.

Most commonly, however, it will be necessary to commence proceedings in the Federal Circuit Court or the Family Court.

The family courts have the power under section 79 of the *Family Law Act* to adjust property interests between the spouses whatever the legal title might say about an asset or liability, the Court can interfere and reapportion this.

The most common example is regarding the matrimonial home. Even in circumstances where the registered title to the property is in the bankrupt's name, the Court may conclude that it is a joint matrimonial property and the non-bankrupt's interest in the property must be protected from the bankruptcy. The Court has the power to make various possible orders, for example, to require the property's sale and the distribution of proceeds to one or the other spouse.

In making any order adjusting property interests, the Court considers several factors under section 79 (4) *Family Law Act*, including the contributions (financial and non-financial) each spouse made to the relationship and the future needs of the non-bankrupt (whether that spouse is caring for children, what is his/her employment status and prospects, health and so on).
A bankruptcy does not mean that the non-bankrupt spouse is without recourse in the family law jurisdiction. However, careful consideration needs to be given to each case and it is important to act quickly to ensure that the Trustee administering the bankrupt's estate does not start disposing of matrimonial assets.

If you would like to discuss your matter involving bankruptcy or any other family law matter, you may contact Anya Aidman one of our senior solicitors experienced in these types of matters or any other of our experienced family law team.
e: **aaidman@elringtons.com.au** | p: 02 6206 1300

---

[1] Bankrupt – (see Section 5 of the Bankruptcy Act 1966) – a person:
(a) against whose estate a sequestration order has been made, or

(b) who has become a bankrupt because of a debtor's petition.

[2] Trustee (in bankruptcy) – the trustee is the person who administers the estate of the bankrupt.
[3] see *Stanford v Stanford* (2012) HCA, 15/11/2012.

Step by Step: Does a step-parent have to pay child support?

Posted onAuthorCarlos Turini
The biological parents of a child have the primary legal obligation to financially support their child under the *Child Support (Assessment) Act* ("CS(A)A"). The CS(A)A places no obligation on anyone else other than the biological parents.
In some appropriate cases, however, the duty to financially support a child may be imposed on a step parent by an order of a Court under the Family Law Act ("FLA")[1]. The "maintenance liability" imposed on the step parent may then be registered with the Child Support Agency [2] which will then collect child support from the step parent. The step parent's duty to maintain a step child is always secondary to the obligation of the biological parents and does not remove the responsibility of the biological parents.[3]
When may the legal liability on a step parent arise?
The Court must consider various matters including:

1. the attempts made by the applicant to obtain financial support from the other biological parent;
2. whether there are circumstances why the applicant may be exempted from seeking child support from the other biological parent;

3. the length and circumstances of the relationship between the applicant and the step-parent;
4. the relationship that has existed between the step-parent and the child;
5. the arrangements that have existed for the maintenance of the child; and
6. any special circumstances which, if not considered in the particular case, would result in injustice or undue hardship to any person.

If you are a step-parent and want to learn more about your rights and obligations, or if you are a parent wanting to seek payment from a former partner or spouse, you can contact one of our experienced family law team to discuss your matter further.
e: info@elringtons.com.au | p: | 02 6206 1300

---

[1] Sections 66D and 66M of the Family Law Act 1975.
[2] Pursuant to the Child Support (Registration and Collection) Act 1988
[3] Section 66D of the Family Law Act.

Parenting Orders, Step Parents and other concerned adults

Posted onAuthorCarlos Turini

By Carlos Turini – Accredited Family Law Specialist

Sometimes persons other than the parents of a child become involved in a family law dispute about a child. The Family Law Act allows grandparents to apply for parenting orders with regard to their grandchildren.[1] Other persons, including step parents, may also apply for parenting orders provided that the Court finds that they are "concerned with the care, welfare or development of the child".[2]

Step parents may apply to the court to seek "parenting orders" in relation to a step child, that is:

1. **for a step child to live with them;**
2. **to be able to spend time with a step child; or**
3. **to have some parental responsibilities for that child.[3]**

When the Applicant is not a biological parent of a child or a grandparent, the Applicant must satisfy a threshold test, a preliminary matter, namely, the court must make a finding that the Applicant has an appropriate degree or *"nexus or concern with the care, welfare or development of the child in the particular case".* **[4]**

In the case of **Tran & Ngo,[5]** Judge Scarlett dealt with a case where two young children were living with their aunt. Their father was deceased and their mother had left the country. Judge Scarlett had no difficulty to find that the Applicant passed the threshold test and he made orders that:

- the children live with the aunt; and

- that she have specific parental responsibility orders namely about:
  1. "Making decisions about enrolling the children in school and other aspects of the children's education;
  2. Making decisions about the hospitalisation and other medical or dental treatment of the children; and
  3. All other aspects of parental responsibility for the children.

On the other hand, in the case of **R & M**[6] , Federal Magistrate Driver dismissed an application by a friend of the recently-deceased father of a child as the Federal Magistrate found that the Applicant had had no prior involvement with the care, welfare or development of the child and therefore had no standing to bring the application.

In **Re J and M: Residence Application** [7], an application was made for a parenting order by the biological mother and her partner in a same sex relationship. FM Walters found that both Applicants could apply for a parenting order. They were both involved in all aspects of the care of the children and they considered themselves the joint parents of the children.

Judge Neville dealt with the case of a four year old child in **Harris & Calvert [2013] FCCA 955 (26 July 2013).** The Applicant (not a biological parent) and the Respondent (the biological mother of the child) had been in a same sex relationship, they had been separated for some time and the Applicant sought orders that to enable her to re-kindle her relationship, and spend regular time, with the child. She has not seen or spent any time with him for some two years. His Honour dismissed the application. He found that: *"The evidence makes clear that while [the Applicant] certainly was once so engaged in X's life, she has not been so occupied for a very significant period of time. Accordingly, she does not meet or satisfy the requirements of s.65C(c)."*

In **Musgrove & Panshin [2014] FCCA 1680 (31 July 2014),** the Applicant was the step parent of a 14 year old child. The biological father of the child had had no involvement with the child since the child was one year old and he was not part of the court case. The relationship between the Applicant and the child's mother commenced when the child was three years old. The parties separated when the child was 12 years old. In the two years since the parties had separated, the Applicant had had no contact with the child apart from sending the child birthday cards. The Applicant did not know where the Respondent and the child were and the Respondent wished that information to remain secret. The Respondent described a relationship where she was the victim of domestic violence perpetrated by the Applicant which included physical and mental abuse some of which was witnessed by the child. The violence was also perpetrated on the parties' pets. The Respondent described that the Applicant exhibited controlling behaviour towards her. The Respondent described that the Applicant and the child were not close and that the child has stated that she wanted the Applicant out of her life. The Judge indicated that he found this a troubling case but concluded that the Applicant had passed the threshold or preliminary test and the case should be properly heard on its merits.

If you are a step-parent, or someone who wishes to continue be involved in the upbringing of a child after a relationship breakup and want to learn more about your rights and obligations, or if you are a parent wanting to seek payment from a former partner or spouse please contact Carlos Turini.

p: +61 2 6206 1300 | e: cturini@elringtons.com.au

---

[1] Section 65C (ba) of the FLA.
[2] Section 65C (c) of the FLA.

[3] See the definition of a “parenting order” according to section 62B(2)(a),(b) and (c) of the Family Law Act 1975 (“FLA”).
[4] Goodall & Anor & Kearns & Anor [2015] FCCA 2946 (30 September 2015)
[5] [2012] FMCAfam 1352
[6] [2002] FMCAfam 279
[7] [2004] FMCAfam 656; (2005) 32 Fam LR 668
CategoriesFamily Law, News & Events, Parenting DisputesTagsParenting Orders

Choosing and Refusing Medical Treatment

Posted onAuthorTom Maling
By Tom Maling

In what circumstances can I refuse medical treatment?

What a person can and cannot do with their body in relation to medical treatment is a topical issue. Euthanasia and assisted dying, a child’s right to gender re-assignment therapy and organ donation are all topics which frequently arise in the media.

At the heart of all medical and health treatment is a fundamental concept: consent. **The common law (law made by Courts) recognises that a competent adult has a right to control their own body.** At a fundamental level, you may give permission to someone to touch your body, or refuse it. This applies to medical treatment. You may choose whether or not to undergo treatment. Even if your refusal will cause you further injury or may lead to your death, or your refusal may seem irrational or incomprehensible to others, the decision is yours. If treatment were to be provided to you without your consent, this would constitute a battery at civil law.
There are some circumstances were the state may override a person’s wishes. Common law has recognised that the State (government) has a public interest to protect and preserve the life and health of its citizens. Governments across Australia have broad powers to make laws about issues which impact on a person’s right to control their body in the health context:

- Guardianship laws have been enacted to assist decision making for people who have lost, or never had, capacity to make competent decisions.
- Children are in a special category, and there are limitations on what a child or their parent on their behalf may decide.
- Health providers may provide treatment in some circumstances where it is considered necessary and consent cannot be obtained (for example, a person is unconscious when they arrive in an Emergency Department).

The recent article published 17th May 2017 in the Canberra Times, NSW assisted dying laws would leave ACT isolated, NSW MPs warn, discusses the restrictions territory governments have to enact similar laws.

If the proposed NSW laws are passed, then it would enable a person who is a resident of NSW to access medically assisted euthanasia. This would not apply to an ACT resident. However, if the ACT resident were an adult and considered to be competent, that resident is entitled to make a decision to refuse medical treatment which may be essential to prolong their life. While they are not being medically assisted, the end result may be their death. **A law legalising euthanasia is not required for a competent adult to be able to refuse medical treatment.**

In a South Australian case called *H Ltd v J* [2010] SASC 176, a person decided to refuse medical treatment. In this matter, a resident in an aged care facility had notified the facility that, at some point in the future, she would cease eating, drinking and taking essential medication. This would cause her death. The Court determined that the resident was able to make that decision, and that "*a competent adult is not under a duty to take life sustaining medication*".

The law in relation to consent has many exceptions and is complex (like many areas of law). Often, there are moral and ethical issues which are raised.

elringtons Lawyers has particular expertise in health law issues which enable us to provide accurate, timely and considered advice to consumers and professionals.

Please do not hesitate to contact Matthew Bridger or Tom Maling to discuss any consent issues you may have.

p: +61 2 6206 1300 | e: Info@elringtons.com.au

End of life and the law – Myths and Misconceptions

Posted onAuthorMitchell Evelyn

By Mitch Evelyn

Talking about death with a spouse, parent, child or next-of-kin can be difficult or might seem like a morbid and faraway topic. It is for these reasons that it is sadly common for people to put-off thinking about their end-of-life plan until a crisis occurs – at which point it may be too late to put a much-needed plan into action.

Because the subject of dying can be grim or remote to think about, many people operate off incorrect assumptions about what will happen if they should become terminally-ill or lose capacity to make decisions about their own care.

In this article we examine a few of the most common misconceptions about the law in end-of-life scenarios.

Myth: My family can take care of my affairs if I can't.
Fact: Your spouse or next of kin doesn't have an automatic right to make decisions about your finances or healthcare if you cannot.
Many people put-off appointing a **power of attorney**[1] or a **guardian** [2] because they believe that their partner or next-of-kin automatically has the power to make decisions for them if they cannot do so – for instance, if they should be so ill that they cannot communicate their own decisions, or if they lack the mental capacity to make their own decisions.
The reality is that only a properly appointed Attorney or Guardian can make these decisions. If you do not have legally binding Power of Attorney and/or Enduring Guardian documents in place (the form of which is determined by the state or territory you live in) then:

- Your spouse or next-of-kin CANNOT give healthcare instructions – your doctor will do anything they can to improve your health or prolong your life, even in cases of terminal illness, coma, or vegetative state and even if you have told your spouse or next-of-kin that you do not wish for your life to be sustained through life-support when there is no chance that you will recover.
- Your spouse or next-of-kin CANNOT deal with your finances, unless they are held jointly. Your spouse or next-of-kin will not be able to deal with your real estate, even if it is jointly owned. They might also be unable to conduct other financial matters on your behalf, such as lodge your tax returns or deal with any other accounts (such as superannuation) in your name.

Myth: I shouldn't appoint an Attorney or Guardian until I am sick, because they might do things I don't agree with.
Fact: You decide when your attorney can make property or finance decisions for you. Your doctor decides when you are unable to make healthcare decisions for yourself.
If you appoint an Attorney through a legally valid Power of Attorney document, you can put any restrictions or limitations on the appointment that you want. You can control when the power comes into effect for your property and financial affairs.

Only a doctor can decide when your guardian's healthcare powers come into effect, and this will only be when you cannot make decisions for yourself.

Myth: My family can decide whether to withdraw life support if there is no chance of me getting better.
Fact: The only person who can make this direction is your chosen Guardian, and even then you need to specifically document that intention.
Your doctor will do whatever is necessary to prolong your life or improve your health, even if it is not something you would want.

You need to give clear, written directions **to someone who cares about you** – either in a valid and enforceable Power of Attorney or Appointment of Enduring Guardianship document, or advance directive, to ensure that your wishes are respected.
Myth: I don't need a Will because I have a "living Will"
Fact: A Power of Attorney, Advance Directive or Appointment of Enduring Guardian does NOT remove the need for a Will.
Some people believe that their Power of Attorney, Advance Directive or Guardianship documents (sometimes called a "living Will") mean that their Attorney or Guardian will be able to take care of their affairs once they have died. In reality:

- Your Attorney or Guardian will not have any authority to deal with any of your affairs after you have passed away because the documents which give them power to manage your affairs are no longer valid after you die. Instead, after you die your executors – if appointed in a legally valid Will – then become the most important people in the eyes of the law and will be the only persons able to manage your assets.
- Your Attorney cannot decide where your assets will go – this must be done in a legally valid Will.
- Your Attorney or Guardian cannot make a Will for you, this can only be done by you while you have the decision-making capacity to do so.

Myth: I can appoint myself as attorney or guardian for my spouse, parent or child.
Fact: ONLY a person with adequate decision-making capacity can appoint someone as their attorney or guardian. Otherwise the appointment can only be made by the relevant Guardianship Tribunal of each state or territory.
If you do not appoint an attorney or guardian to make decisions for you, in the correct form and while you are well-enough to do so, then someone will need to apply to either the ACT Civil and Administrative Tribunal (ACAT) or the NSW Guardianship Tribunal to be appointed on your behalf. This can be a stressful and time-consuming process, **particularly if all members of your family do not agree on the person who is applying.**
The Guardianship Tribunal may also put limits on the powers of the person they appoint – such as arduous reporting requirements and requiring proof of suitability. **They might even appoint a person who you would not want appointed.**
elringtons' experienced estate planning solicitors are here to make sure that your estate planning framework is correct, comprehensive and suitable for your needs. While looking into your Power of Attorney and/or Appointment of Enduring Guardian, we will also strongly recommend that you provide your us with instructions to draft or **update your Will**.
For more information or to make an appointment in either our Canberra or Queanbeyan office contact one of our Wills and Estate team:
p: +61 6206 1300 | e: info@elringtons.com.au

[1] An **Attorney** is a person who can make decisions about your property and financial affairs.
[2] A **Guardian** is a person who can make decisions about your healthcare and personal care if you cannot.
In the ACT, these are made in the same document (A Power of Attorney), but in NSW, these powers are divided into two documents – A Power of Attorney for financial affairs, and an Appointment of Enduring Guardians for healthcare and personal care.

How much will my Family Law Case cost?

Posted onAuthorCarlos Turini

When a client first meets a family lawyer, high among his/her considerations is the question of costs: How much will it cost me? Clients are entitled to know from their lawyer the likely cost of their case. [1]. The lawyer's obligation goes beyond disclosing his/her hourly rate or

the fees for such things as photocopies, facsimiles and other disbursements. The lawyer must provide a total estimate of costs.

In the initial contact between a prospective client and a family lawyer, we at **elringtons** provide estimates of costs which we then confirm in writing. Family law matters have clear stages or "Court events" and we confirm in writing the total estimate of costs for each estimate, namely:

1. **An early agreement before court proceedings commence** including the paperwork required to formalise the family law agreement legally. This stage may include pre-nuptial agreements and other form of family law financial agreements;
2. **Compulsory mediation after Court proceedings commenced** – In the event that no agreement is reached and court proceedings must be commenced, the Court requires early in the life of the proceedings that the parties attend a compulsory mediation session. Often matters settle at the conclusion of the mediation/ counselling stage and we include in our written estimate the estimate to complete the paperwork required to formalise the family law agreement legally.
3. **Costs of interim hearings** – Sometimes, during court proceedings one or both parties seek interim orders. Normally, these are urgent applications, for example, to stop a party disposing of assets before the final hearing. Interim hearings add to the overall cost of a family law matter. Our written estimate of costs will include information about the costs of interim hearings.
4. **The final hearing** – the number of days of the hearing, barrister's fees, expert's fees (psychologists, forensic accountants etc.)

Damage Control Exercise – We advise our clients very early in the negotiations process of a family law matter to make a reasonable offer of settlement in writing regarding all outstanding matters in dispute. This is known as a "Calderbank offer" [2]**,** that is, an offer by Party A to settle a dispute which puts Party B on notice that if the ultimate outcome of the court proceedings is similar to the offer or less favourable to Party B, Party A will rely on the original offer to ask that Party B pay his legal costs and disbursements of having to pursue the case.

Clients in control about costs – Throughout the life of their case, we invite our clients to communicate with us frequently about the up to date work in progress to ensure that the client is at all times making informed decisions including about the costs related to their case.

For more information, contact Carlos Turini **or another of our family law solicitors in either our Canberra or Queanbeyan offices**.

e: cturini@elringtons.com.au | p: 02 6206 1300

[1] The *Legal Profession Act (ACT) 2006* ("the Act), imposes on lawyers in the Australian Capital Territory definite obligations about disclosure regarding their legal fees and expenses. Similar obligations are imposed on lawyers in New South Wales pursuant to the *Legal Profession Uniform Law (NSW) which was enacted in July 2015*. The obligation on the part of a lawyer to make such a disclosure is found in Part 3.2 of the Act and is entitled *"Costs Disclosure and Assessment"*.

[2] In reference to the High Court decision in a family law matter named **Calderbank** v **Calderbank** [1975] 3 All ER 333 (EWCA).

Do Country Hospitals Have the Same Duty of Care as City Hospitals?

Posted onAuthorTom Maling

By Tom Maling

Country hospitals have far less services available than city hospitals. Will this excuse professional misconduct or negligence by a doctor or nurse? Does the law say that people

who go to hospitals in Batemans Bay, Bega or Cooma can receive a lesser standard of care? Well, the answer is no (thankfully).

On 1 June 2017, the NSW Civil and Administrative Tribunal made a decision in *Health Care Complaints Commission v Simonson*. Dr Simonson was a doctor who practiced at the Bega District Hospital. Several complaints were made against him including failing to transfer a paediatric patient to a more acute hospital setting when needed, failing to adequately document care, and failing to adequately document a not for resuscitation (NFR) request or even advise the patient's power of attorney (their son) of the request. Ultimately the Tribunal made out numerous complaints and found the doctor guilty of professional misconduct.
As part of the hearing, the doctor argued that the context of working in a country hospital meant that some requirements, such as adequate note taking, could not be complied with. Experts argued that the undoubted difficulties of being a doctor in a country area should excuse some failures to comply with ordinary standards. This was rejected by the Tribunal, who stated:

"the same general standards of conduct apply to practitioners in regional and rural areas as apply to practitioners in metropolitan areas. Obviously, inability to have ready access to sophisticated diagnostic equipment or specialist assistance will impact upon the way in which they practice medicine, but the underlying general standard remains the same. Indeed, it is sometimes said that practitioners in regional and rural areas are expected to be able to provide a greater range of medical knowledge and services because of limitations in ready access to specialist services and tertiary hospitals."
Obviously isolation from specialist services may, at times, have an impact on the care that someone in a country area may access, but **elringtons** whole-heartedly endorses the Tribunal's comments – just because you live in areas such as Bateman's Bay, Bega, Cooma, Goulburn or Yass, does not mean you should get a lesser standard of care by doctors and nurses.
elringtons has expertise in medical negligence cases.
Please do not hesitate to contact Tom Maling to discuss any concerns you have about the treatment you have received.
p: +61 2 6206 1300 | e: Info@elringtons.com.au

Consenting to Health and Medical Treatment

Posted onAuthorTom Maling

By Tom Maling
Consent is a fundamental part of health and medical treatment. Without it, treatment is unlawful and a person may be able to claim compensation.

In this article, we cover basic ideas about consent and what the consequences may be if a health professional provides treatment without first obtaining consent from their patient. We also talk about **battery claims**, which enable a person to claim **compensation** for treatment not lawfully provided to them.

What is consent?

Who may consent?

What does the law require?

Emergency treatment

Battery claims

Examples of battery cases

elringtons can help

Battery claims are not as frequent as medical negligence claims, but this does not mean that they do not arise frequently. Rather, these types of claims are not widely known about in the community. **We are passionate about health law issues affecting consumers, and have expertise in treatment disputes**. This expertise means we approach treatment disputes without a blinkered focus on medical negligence.

Matt Bridger and Tom Maling represent clients in treatment dispute claims. Matt has over 25 years of experience representing people in treatment dispute matters, including small claims right up to multimillion dollar catastrophic injury claims. Tom trained as a Registered Nurse and has experience in hospitals and nursing homes, and is works with Matt on all medical negligence and battery claims. We are passionate about helping people who have had treatment which did not go to plan, or when they did not consent to it.

If you have had medical treatment with you did not agree to, or did not go to plan, please feel free to contact us to discuss your treatment and book an initial consultation (at not cost).

Please do not hesitate to contact Matthew Bridger or Tom Maling to discuss any consent issues you may have.

Further information:

- Children's capacity to consent to treatment
- Refusing medical treatment

For more information or to make an appointment in either our Canberra or Queanbeyan office:

p: +61 2 6206 1300 | e: Info@elringtons.com.au

Epilepsy and Bipolar Disorder medications linked to birth defects

Posted onAuthorTom Maling

By Tom Maling 

The medications Sodium Valproate (aka Eplilim, Valprease, Valpro) and Topiramate (aka Epiramax, Tamate, Topamax) have been linked to causing birth defects such as Spina Bifida. Doctors who prescribe these medications to women without telling them of the risks may be liable to pay compensation due to medical negligence.

Court claims have been commenced in France and the United States in relation to women being prescribed sodium valproate to treat epilepsy or bipolar disorder while pregnant, without being told of the risks.

Overseas experience

A French study has found that sodium valproate caused severe birth defects in up to 4,100 French children since the 1960s, when it was first introduced. Women who took the drug were found to be 4 times more likely to give birth to children with birth defects, including spina bifida. There was also a higher risk of autism attributed to taking the drug while pregnant. Sadly, the risk of birth defects had been known since the 1980s. Court claims have been made by families to seek compensation.

In the United States, the risks associated with sodium valproate during pregnancy are well known and as of June 2017, almost 700 court claims are pending. In June 2017, the maker of a drug called Depakote was ordered to pay a 10-year-old boy with spina bifida $15 million. His mother had taken depakote to manage her bipolar disorder during her pregnancy, and it was found that she was not adequately warned of the risks of birth defects which may be caused by the drug. Depakote is not sold in Australia, however it is turned into sodium valproate in the body after it is taken. Therefore it has the same risk of birth defects.

Australian experience

The Royal Melbourne Hospital Neuroscience Foundation maintains a voluntary register for pregnant women who take antiepileptic drugs such as sodium valproate. Data has been used to assess the risks of birth defects associated with sodium valproate and other antiepileptic drugs such as topiramate. In addition to sodium valproate, the Foundation has found evidence of an increased risk of birth defects caused by topiramate. The evidence has also showed increased risks of abortions due to birth defects caused by these medications.

As at June 2017, there are no published court cases in Australia involving claims for compensation for injuries caused by these medications. However, this does not mean that there are no Australian women and children who may be eligible for compensation for injuries they have received. Certainly this is the case in France and the United States, with many claims now being made.

Doctors must tell you of the risks
Doctors and nurses are required by law to provide you with information about the risks involved with taking a medication. Women taking sodium valproate or topiramate must be warned about the risk of birth defects when trying to become pregnant and when they become pregnant.

If you have been required to have an abortion because of birth defects, or have given birth to a child with birth defects, then you may be eligible for compensation to cover things like past and future care costs, medical treatment, loss of wages due to time off work, and any pain and suffering you or your child has experienced.

If you have concerns about your current medical treatment you should speak with your GP. Alternatively, the following resources provide good information in this area:

- Epilepsy Action Australia: epilepsy.org.au/about-epilepsy/living-with-epilepsy/women-issues.
- Mothersafe: http://www.mothersafe.org.au/.

If you are an ACT or NSW resident, please do not hesitate to contact Matthew Bridger or Tom Maling to discuss any this issue further. We have experience in conducting complex medical negligence claims involving medications which have caused catastrophic injuries.
p: +61 2 6206 1300 | e: Info@elringtons.com.au
Further reading: Elringtons Lawyers secures $12 million settlement for client

What Duty of Care Does a Nursing Home Have?

Posted onAuthorTom Maling11 Comments

By Tom Maling
The treatment of residents in nursing homes is receiving frequent media attention at the moment. It's a sad fact that preventable deaths of residents are occurring. A recent study by Monash University published 29 May 2017 Premature deaths of nursing home residents: an epidemiological analysis identified alarming statistics on premature deaths for nursing home residents.
The researchers found that from July 2000 to June 2013, 3289 people had been reported as dying from falls, choking and other potentially preventable causes of death. This equates to one person dying from a potentially preventable cause every 1.4 days.

There are growing calls for further regulation and investigation into the funding and provision of nursing home services. In this context, we examine what exactly is a nursing home provider's responsibility to their residents.

Does a nursing home owe a duty of care to residents?

Nursing homes are regulated by the *Aged Care Act 1997*. This establishes the funding regime for nursing homes and promotes quality care, including establishing a set of Quality Care Principles. These identify particular services to be provided by a nursing home and set minimum standards required under the Act. Breach of one of the Principles has consequences under by the Act, but the Act excludes the breach from giving rise to a claim for breach of statutory duty**. However, where the breach would give rise to a claim under tort law (negligence, battery) or contract law, the Act does not exclude those actions being pursued.**

Very few claims involving nursing homes have received consideration from Courts. However, the South Australian case of *Chan v Barter & Barter T/A The Pembroke Nursing Home* recognised that a nursing home has a duty of care just like that of a hospital. The Court stated that a nursing home is to provide a standard of care reasonably expected of a nursing home of an equivalent size and type. This is necessarily broad, as it takes into account whether the nursing home provides high or low care, secure dementia care, or respite services.

The Court said a nursing home's staff are required to show care and skill ordinarily expected of a reasonably competent nursing home worker. What is required from an Assistant in Nursing and a Registered Nurse will be different.

The key point is, **nursing homes do have a duty of care which if breached, could give rise to a claim in negligence.**

What must a nursing home do?

Having established that a nursing home does owe its residents a duty of care, the next step is to consider what they are required to do. As previously stated, the duty is necessarily broad in order to encompass the broad range of services that a nursing home may provide. These services include:

- Assisting with activities of daily living;
- Providing facilities to live such as bedding and shelter;
- Providing and using specialist equipment for care such as transfers and pressure area care;
- Providing access to nursing and other treatment as necessary;
- Providing meals; and
- Providing emotional support and recreational facilities.

The facility is also required to provide competent staff, safe equipment and safe premises.

What did Monash University find?

The researchers reported that 2679 people had died from falls, 261 from choking, and 34 from resident-to-resident assaults from July 2000 to June 2013. The results were similar to other studies in other developed countries. Of particular concern, they found that the occurrence of these types of death had not reduced over the past 12 years.

What can I do if I have concerns?

The vast majority of nursing homes provide excellent services and staff. It is a difficult and scarcely resourced industry. However, there is growing evidence suggesting there are some very poor practices in some facilities.

The starting point in most cases would be to talk to the facility. Ordinarily there will be a clinical director, who is usually a highly trained Registered Nurse, responsible for the coordination of services.

If you are uncomfortable with talking to the facility or are unsatisfied by their response, the *Aged Care Act* establishes the position of Aged Care Complaints Commissioner. The Commissioner may investigate complaints and work with the parties to resolve the dispute. However, a recent Australian Law Reform Commission report has highlighted the need for a further scheme to investigate serious incidents, other than the Commissioner.
You could also talk to one of our lawyers, as **elringtons** has health law expertise on issues such as negligent treatment and substituted decision-making. We have staff who have worked in the aged care sector. Apart from providing compensation to a person affected by mistreatment, negligence and battery claims have historically played an important role in highlighting poor practices and driving reform.
If you have concerns about the services you are receiving or the services that are being provided to a loved one, feel free to contact Matthew Bridger or Tom Maling.
p: +61 2 6206 1300 | e: Info@elringtons.com.au
Further reading:
New Laws on Physical and Chemical Restraints in Nursing Homes
New Aged Care Laws on Physical and Chemical restraints are Inadequate
Read more …..
Was this information useful?

(+**5** rating, **2** votes)

CategoriesArticles, Health Law, Litigation and Dispute Resolution, News & EventsTagsAged Care, Medical Negligence, Personal Injuries

Post navigation

← PreviousPrevious post:Epilepsy and Bipolar Disorder medications linked to birth defects

Next →Next post:Who can make decisions about your health?

11 Replies to “What Duty of Care Does a Nursing Home Have?”

1.  *Tom Maling* says:
21, July 2020 at 12:31 pm

We are sorry to hear about your partner’s falls. We hope they have been recovering well. There can be issues with using devices as a form of physical restraint. There are now more strict laws applying to aged care facilities in relation to use of restraints, such as bedrails.

They must be a last resort and can only be used after alternatives have been trialled. However, the overriding responsibility is the safety and wellbeing of the resident. In some circumstances, physical restraint will be lawful.
Please feel free to contact us directly to discuss the particular circumstances of your partner.

2.  *Janice Hamilton* says:
6, July 2020 at 4:39 pm

My partner has been admitted to a nursing home after mutiple falls and being in hospital for a number of weeks. Whilst in hospital when he was in bed they had the rails up on his bed as he is also impulsive and will think he can get out of bed himself without these, resulting in a fall. The nursing home will not use the rails as they have said that this is legislation. I have made an appeal to the nursing director but she has told me that the issue is out of their hands. He has had 2 falls from the bed within 5 days.
Is there any way that this can be over ridden

Who can make decisions about your health?

Posted onAuthorMitchell Evelyn
By Mitchell Evelyn
In many ways, the appointment of a Power of Attorney or Enduring Guardian is one of the most important decisions you could ever make. You are potentially giving a person complete control over your health and your lifestyle. For this reason, it is critical that you appoint a person (or, ideally, more than one person) who you trust to act in your best interests.

The words used to describe the appointment vary across States and Territories, however we can summarise the functions which you are able to delegate to another person into two categories:

- **Attorney Functions**, which include your property and financial affairs; and
- **Guardian Functions**, which include your personal care and health care affairs, and (in the ACT), the new "medical research" function.

For the purposes of this article, we will focus primarily on Health based powers, and will describe any person who can exercise the Guardian Functions listed above as an "Enduring Guardian" (though they would be called an Attorney in the ACT).

What does "Enduring" mean?
An Enduring Guardian's powers will only come into effect if you lose the ability to make decisions for yourself – for example, if you were unconscious, mentally ill (to the extent that you couldn't give instructions to your doctor), in a coma or vegetative state, or you were otherwise incapable of making a decision.

You cannot revoke an appointment of an Enduring Guardian at any time where you do not have capacity. This means that if should be in the advanced stages of conditions like Alzheimer's Disease or Dementia, **you might no longer be able to revoke the appointment**. This is another reason why it is critical that you carefully consider who to appoint.

How do I appoint an Enduring Guardian?

In NSW, you appoint a Guardian through an *Appointment of Enduring Guardian* form made under the *Guardianship Act* 1987. This is a different document to the one where you appoint someone with Attorney Functions.

In the ACT, you appoint an Enduring Guardian (though this person is called an Attorney in the ACT) through an *Enduring Power of Attorney* form made under the *Powers of Attorney Act 2006*. This is the same document where you also appoint someone with Attorney Functions in the ACT.

If you are unable to appoint a Guardian, because you are incapable of doing so, then someone will need to apply to the NSW Guardianship Tribunal or to the ACT Civil and Administrative Tribunal for these functions to be granted to them.

What can my Guardian do?

You are able to choose to give your Guardian the power to make any of the following decisions:

- Personal Care decisions – including where you live, and what kinds of personal services you receive;
- Health Care decisions – including consenting to medical and dental treatment on your behalf;
- Medical Research Participation (ACT Only) – including participation in certain research, provided that the research will not cause you any harm or change your treatment, but including experimental medical treatment.

At elringtons, we also incorporate the Health Direction provisions under the *Medical Treatment (Health Directions) Act 2006* (ACT) into our Power of Attorney forms for ACT residents. We also incorporate similar Advance Care Directives into our Appointment of Enduring Guardian forms for NSW residents. If you instruct us to include these in your Enduring Guardian documents, you are able to direct the withdrawal of medical treatment in cases where you are in a permanent coma, persistent vegetative state, terminally ill, or would otherwise be unable to survive without permanent life support.

It is a very good idea to include these Health Directions in your Power of Attorney or Appointment of Enduring Guardian document under the supervision of a solicitor, as there are specific formal requirements involved in preparing and witnessing your directions. Legal advice is also a good idea because **your doctor is legally prohibited from following these directions if they are uncertain whether they strictly comply with the legislation.**

When appointing an Enduring Guardian, it is also common to appoint an Attorney to make property and financial decisions for you if you are unable to do so. It is also a good idea to take the opportunity to revisit your Will.

When should I change my will?
Appointing an Enduring Guardian and Enduring Power of Attorney

This article has been prepared in the context of NSW and ACT law. It may not apply to residents of other Australian States or Territories.

For more information or if you wish to make an appointment to discuss your queries, please contact our Wills and Estate Planning team:
p: 6206 1300| e: info@elringtons.com.au

How much do Retirement Villages really cost?

Posted onAuthorMitchell Evelyn
By Mitchell Evelyn
Retirement Villages have recently received a lot of recent negative media attention following a recent joint investigation by Four Corners and Fairfax, who have criticised some agreements as heavily favouring the villages, encouraging a "churn" of residents, and incorporating massive exit fees. This is not to say that Retirement Villages should be avoided, or that they are all bad. However, like any other large financial transaction, it is very important that you read and understand the agreement very carefully, and seek the advice of a qualified legal professional before committing to anything.

What are you buying?
It is important to understand exactly what you are buying, as this will have a significant effect on what happens when you vacate your unit. Depending on the Village, you may actually be buying the unit you reside in, otherwise you may simply be buying a long term lease or licence to occupy.

How much is this really costing me (or my children?)
The Retirement Village industry is unique, in that it makes a very large proportion of its profit not by providing you with a service or selling you a unit, but through fees charged

when you leave. These fees (called **exit fees** or **departure fees**) are a large, one-time fee paid in addition to other costs you might pay while living in the Village. They may be deducted from a substantial **Accommodation Bond** you paid upon entering the village, which are often financed by selling your primary home. This bond (less any fees) is generally repaid either to you (or, if you have died, your Estate) when moving out of the Village.
These fees are determined both by the contents of the Residency Agreement, and the Retirement Villages Legislation in your state or territory. Generally, an exit fee is calculated as a fixed percentage of your initial contribution per year that you reside in the Village. Depending on this amount and the length of your stay, **an Exit Fee can potentially enter into the hundreds of thousands of dollars.**
This fee is payable if you move out of the Village, or if you die, but is probably not the only fee you (or your Estate) needs to pay. Each provider has its own Agreement, and may put in place different fee arrangements. These can include:

- Monthly service charges to maintain the Village facilities
- Maintenance fees
- Refurbishment and cleaning fees (upon vacating the unit)
- Marketing fees (to find a new resident for your unit after you have vacated or died)
- The Village Operator's legal costs of preparing your Residency Agreement

When will my bond be repaid?
Your Accommodation Bond is often not refundable until a new resident is found to take your unit. In the meantime, **any other fees may continue to be charged and may be deducted from your Accommodation Bond when the unit is eventually sold**. If you have lived in the Unit for a very long time, and the unit is also on the market for a very long time, the majority of your Bond could be consumed in fees.
What about the Capital Gain on the unit?
If your unit is eventually resold at a higher price than when you bought it, it is very important to pay attention to who can claim the Capital Gain on the unit. It may not necessarily all go to you (or your Estate).

What will my lawyer do?
elringtons have expertise in reviewing and advising on Retirement Village Agreements. Having operated in the ACT and NSW region for more than a century, we are familiar with most of the standard agreements offered by the local retirement villages in the region and are able to provide comprehensive advice on their operation, as well as guide the matter to settlement on your behalf.
We encourage clients to take a holistic approach to their affairs when preparing to transition into a retirement village. We offer services in a broad range of legal areas, and are also able to assist you in the sale of your current residence, as well as review your Will, Power of Attorney, and Guardianship documents.

Appointing an Enduring Guardian and Enduring Power of Attorney
When should I change my will?
What happens if I exclude someone from my will?
For more information or if you wish to make an appointment to discuss your queries, please contact our Property and Commercial team:
p: 6206 1300| e: info@elringtons.com.au
CategoriesNews & Events, Property LawTagsProperty Law

What is Medical Negligence?

Posted onAuthorTom Maling

By Tom Maling

A doctor owes you a 'duty of care' and breach of that duty which causes you an injury entitles you to compensation for your losses.

What does that all mean? In this article we explain what negligence and 'duty of care' mean, as well as what you can do if you have been victim of negligent treatment.

Take the first step — Call us and get expert legal advice on your rights, no risk or obligation!

FREE INITIAL CONSULATION— Give us a call, come in and have a chat or request a call back

What is negligence?

What is 'duty of care'?
Was my treatment negligent?
Can I Sue a Hospital?
Medications and Medical Negligence
What Duty of Care Does a Nursing Home Have?
Other special medical negligence topics
Compensation

Canberra Medical Negligence Lawyers

Medical negligence is not just another type of personal injury. Just as you would see a specialist for complex health conditions, you should see a specialist for a medical negligence claim.

For Canberra, Queanbeyan and South East NSW, we are your health and medical law firm specialising in medical negligence claims. We are different from other law firms because we have:

- Inside knowledge about the health industry;
- University acquired knowledge about injuries and disease; and
- An understanding of how healthcare should be provided;

We have a proud history of success for clients in the Canberra, Queanbeyan, Bega, Cooma, Batemans Bay, Merimbula and other South-Eastern NSW areas. **We were the only ACT law firm to provide submissions to the ACT Select Committee of End of Life Choices**.

For more information see our Medical Negligence page or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Matthew Bridger or Thomas Maling:

p: +61 2 6206 1300 | e: Info@elringtons.com.au

What are my rights in relation to my health and medical records?

Posted onAuthorTom Maling

Information about health or medical treatment can be highly sensitive and it is important that it is handled appropriately by health services providers. Â At **elringtons**, we can provide advice on your rights and help you obtain access to your health and medical records.

How is my information protected?

Personal information held by health service providers is **protected** by privacy law, including the *Health Records (Privacy and Access) Act 1997* in the ACT and the *Health Records and Information Privacy Act 2002* in NSW. The Commonwealth *Privacy Act 1982* may also apply.

These laws set out binding principles for health providers, including rules about:

- what health information they may collect and how they may collect it, including who it may be collected from;
- the circumstances when health information may be used by the provider or disclosed to a third party;
- what they must inform individuals about how information will be handled;
- ensuring that information is stored securely and protected from unlawful access, misuse, interference or loss; and
- ensuring that information is relevant, correct and up to date.

When you visit a health services provider such as a doctor or physiotherapist for the first time, they should provide you with details about how your information will be handled by them. This information might be provided to you on a form, may be on display in their office or their website, or it could be discussed with you during the course of your visit. Â Â You can ask for this information at any time.

How can I access my information?
Privacy laws also provide a right for individuals to request **access** to, and **correction** of, their records held by their health provider. Â The methods for requesting records varies, depending on what State you are in and what legislation applies. Â
In **NSW**, a request for access to health information held by a health provider must:

- be in writing;
- state the name and address of the individual making the request;
- identify the health information to which access is sought; and
- specify the form in which the individual wishes the information to be provided.

In **NSW**, individuals may also request that their information be amended by making a request:

- in writing;
- stating their name and address;
- identifying the health information concerned;
- specifying how they claim the information is inaccurate, out of date, irrelevant, incomplete or misleading; and
- (if out of date or incomplete) providing any relevant information necessary to complete the information or bring it up to date.

In the **ACT**, a request for access to health information held by a health provider must:

- state the name and address of the individual;
- identify the health record to which access is sought; and
- specify the form in which the individual wishes the information to be provided.

In certain circumstances, a request must be in writing, including where the health provider requests that the individual makes the request in writing. Â

In both **NSW** and the **ACT**, health providers may charge for access to the records.
In some circumstances, health providers may refuse access to the information, including where they are required to by law or where providing access would pose a serious threat or significant risk to the life or health of the individual or any other person. If access is refused because of that risk to life or health, the individual may request that the information be provided to a nominated registered medical practitioner instead.

Feel free to contact us if you have questions about accessing your health information, or any other health law issues.
p: +61 2 6206 1300 | e: Info@elringtons.com.au

Comcare and Psychological Injuries

Posted onAuthorTom Maling
by Tom Maling

Given the amount of time we spend at work and the high rate of Australians who experience a mental illness each year (approximately 4 million), it's hardly surprising that work often causes a mental illness, or makes someone's mental illness worse.

There are special laws in the Comcare system limiting the circumstances when an employer is liable to pay you compensation for a psychological injury. If you think you may have received a psychological injury from work, it's very important you understand the law prior to making a claim.

Psychological injuries

Psychological injuries caused by work include Post Traumatic Stress Disorder (PTSD), Adjustment Disorders, Anxiety and Depression. However, those who already have a diagnosis of a mental illness may also be eligible for compensation where work has made their illness worse. This is because the law says that **compensation may be paid where an illness is aggravated by someone's work**.

What is the law?

The relevant law for Comcare matters is the *Safety, Rehabilitation and Compensation Act 1988* ('the Act'). Under the Act, injuries which are caused by an employer's "***reasonable administrative action***" are **not eligible for compensation**.

The big issue for workers here is that if a cause of the psychological injury is a reasonable administrative action, the whole claim will fail. So, if work has made your PTSD symptoms worse and one of the reasons is a reasonable administrative action, then your claim fails. Even if it's only a 10% cause, you are not eligible for compensation.

Often workers battle on for a long time after they receive their psychological injury, or don't seek help straight away. The final straw may be an action by the employer which is later considered to have been a reasonable administrative action. Unfortunately, these workers are then excluded from compensation for medical treatment and time off work.

What is a reasonable administrative action?

Some key points are:

1. The **action must be related to the conditions of your employment and not your everyday tasks**. So, giving you tasks to complete or telling you how to complete your work are generally not administrative actions. However, performance appraisals, discussing your pay and conditions, or directing someone to not come to work until they are certified as being fit, are administrative actions.
2. The administrative action **must be taken in a reasonable manner**. This takes into account the actual action, how it was taken, the facts surrounding the action and how it impacts you. Basically, everything. However, just because there was more than one way of doing the action does not mean it was not taken reasonably.

Get advice

As you can see, the reasonable administrative action rule provides a defence for employers when a worker suffers a psychological injury. Given the very wide scope of the rule, it is imperative that claims are made at the right time, as the consequences for a worker are very harsh.

Therefore, before you make a claim for a psychological injury, you should seek legal advice and not delay. Often, a claim which is appropriately made can show that a reasonable administrative action actually had no bearing on the injury, or that an action was not reasonably taken. Alternatively, a claim can be made before the employer can say it was caused by a reasonable administrative action.

Matthew Bridger is an experienced Canberra Comcare lawyer. He is assisted by Thomas Maling, who has a particular interest in mental health issues and workplace psychological injury claims. Please feel free to contact us to discuss your circumstances and how we can help.

IMPORTANT: If you (or someone you know) are experiencing symptoms of a mental illness you should seek help from your GP immediately. Alternatively, other resources you may access include:

1. ACT Mental Health Crisis and Assessment Team 1800 629 354
2. Lifeline 13 11 14

Further Reading:

Workplace Psychological Injuries

p: +61 2 6206 1300 | e: Info@elringtons.com.au

elringtons health law update – faulty aortic valve replacement devices

Posted onAuthorTom Maling

Update by Tom Maling

Australians who have had aortic valve replacement surgery since 2010 may have been fitted with a faulty replacement valve.

On 3 May 2017, the UK Government issued a medical device alert for **Mitroflow LX (sizes 19mm and 21mm)** devices, which are biological aortic valve replacement devices. It was issued after research revealed they were prone to early structural deterioration, leading to potentially serious health consequences.

On 10 July 2017, the Australian Therapeutic Goods Administration (TGA) forwarded the UK alert as part of its medical device update for July 2017. The TGA had considered risks posed by the Mitroflow devices in March 2016, but no action was taken. The devices were approved for use in Australia in June 2010, and the TGA acknowledges that the device was implanted into Australians prior to its cancellation of sale in 2016.

The UK is requiring doctors to follow up with patients, particularly younger patients, who have had this device implanted. While there is no current requirement in place in Australia, **we recommend you follow up with your doctor urgently if you may have had this valve implanted**.

If you have experienced problems following aortic valve replacement surgery please do not hesitate to contact us for assistance.

p: +61 2 6206 1300 | e: Info@elringtons.com.au

CategoriesHealth Law, Health Law Updates, Litigation and Dispute Resolution, Medical Negligence, News & EventsTagsMedical Negligence

A Simple Guide to Divorce

Posted onAuthorCarlos Turini

Fixed Fee Simple Divorce

elringtons Lawyers are now offering a **fixed fee** 'Simple Divorce' service priced at $500 **plus GST** plus disbursements.[1]

elringtons' specialist family law team have developed a streamlined divorce process designed to minimise costs and inconvenience to the client whilst delivering high quality professional service and advice. Our fixed fee 'Simple Divorce' promises clients a smooth transition into the next phase of their lives free from the burden of unforeseen legal costs.

Who can apply for a divorce?

In Australia a married person may apply for divorce if either spouse:

- Is an Australian citizen;
- Considers Australia to be their home or intend to live in Australia indefinitely, or
- Has lived in Australia for 12 months immediately before filing for divorce.

A divorce application can be made where a married couple have separated and there is no reasonable likelihood of reconciliation.

When can I apply for a divorce?

In order to satisfy the Court that your marriage has broken down irretrievably, you must have been separated for a continuous period of 12 months and one day immediately prior to filing the application for divorce.

If you and your spouse resumed cohabitation for a period of up to 3 months following your initial separation, you are not required to re-set the continuous 12 months separation period. However, you must have lived separately for a period of at least 12 months in total.

What do I need to prove to be granted a divorce?
To prove the marriage a copy of the marriage certificate must be filed with the application for divorce. If the marriage certificate is not available, an affidavit will need to be filed explaining why it cannot be found.

Australian law only recognises one ground for divorce: that is that the marriage has "irretrievably broken down." Irretrievable breakdown must be evidenced by at least 12 months of separation.

Separation is established where:

1. There is an intention by one or both spouses to end the marriage;
2. The spouse or spouses have acted as though the relationship has ended; and
3. Where only one spouse considers the relationship to be at an end, that person has communicated this intention to the other.

You do not need to physically live apart to prove that you consider your marriage to be at an end. However, the Court must be satisfied that you have separated. If you are separated but are living under the same roof, you will be required to provide additional information to the Court. Separation under one roof is not necessarily easy to prove and may require evidence from at least one corroborating witness contained in a sworn affidavit.

What does a divorce application involve?
To begin the process, an Application for Divorce must be filed with the Federal Circuit Court. The application can be made jointly or solely and a filing fee must be paid to the Court at the time of the filing of the documents. Your lawyer can prepare the application on your behalf, or you can lodge the application online.
Upon filing of the application a hearing date will be set. If the application is made by one spouse only, it must then be served on the other spouse. You will need to prove that you have served your former spouse and file an affidavit to prove this to the Court.

On the hearing date your application will be considered, and if successful, a divorce order will be granted.

The divorce order will automatically take effect one month after the order is granted, thought the court may abridge the period to nil in exceptional circumstances.

How do I serve the application on my spouse?
If you have not filed a joint application, you will need to serve the following documents on the other party:

- A sealed copy of the Application for Divorce ('sealed' means a copy that has been stamped by the Court);
- A copy of the Family Court Brochure *'Marriage, Families and Separation';*
- An Acknowledgement of Service Form; and
- A stamped self-addressed envelope for return of the Acknowledgement of Service.

If your spouse then returns the signed Acknowledgement of Service to you, it must be attached to an Affidavit of Service which will need to be filed with the Court along with an Affidavit of Proof of Signature.

Service must take place 28 days prior to the date of the hearing if service is being effected within Australia. If the application is to be served outside of Australia, it must be effected 42 clear days prior to the hearing date.

If the application has not been served on your spouse 28 clear days before the hearing date, the matter may be 'adjourned', meaning that it will be re-listed for a later date. In order to prevent the matter being adjourned you may ask your spouse to indicate his or her agreement to 'abridge' service by signing an Acknowledgement that includes a comment to that effect, that is, that he/she consents to the abridgment of time. Service is 'abridged' where the prescribed 28-day period is shortened by the Court on the basis of the parties' consent.

Service is commonly performed by a process server but may be done by hand by any adult other than the person making the application, or by post. The person effecting service must swear an Affidavit of Service to satisfy the Court that service has taken place.

What if my spouse cannot be found?

If your spouse cannot be located, you may apply to the Court for substituted service (allowing the documents to be served on a third person who the Court is satisfied will bring it to the attention of your spouse) or for service to be dispensed with altogether. To do this you must file an affidavit setting out in detail, the measures you have taken to effect service by ordinary means.

Do I need to attend the final hearing?

If you have made a joint application or there are no children of the marriage under the age of 18, you are not required to attend the hearing.

If you have made a sole application and there are children of the marriage you must attend Court. Your 'hearing' will be before a Registrar of the Court and you may be asked some questions about your application.

Do I need to attend counselling?

If you have been married for less than two years, the law requires you to have attempted reconciliation with the assistance of a counsellor prior to making an application for divorce.

If you have not attended counselling, you must seek permission from the court in order to apply for a divorce.

What about our children and property?
A divorce order will not affect your property interests or parenting rights and responsibilities.

Property settlement applications must be made within 12 months of a divorce order taking effect. There are narrow circumstances in which you can obtain 'leave' from the Court to file out of time, but we strongly recommend you do not leave this to chance. You should consider attending to property orders as soon as you can, if you have not already done so, to ensure that you protect your existing assets from future claim or otherwise seek to have matrimonial assets divided.

You should also speak to a solicitor about formalising any parenting arrangements that you may have or wish to establish.

If you would like more information about 'Simple Divorce' or wish to discuss any other family law matter please contact our family law team in either our Canberra or Queanbeyan office.
e: cturini@elringtons.com.au | p: +61 2 6206 1300
[1]Please note: **Fixed fees only apply to the application for divorce**. They do not apply to children or property matters. Please see "What about our children and property?"

Medications and Medical Negligence

Posted onAuthorTom Maling

By Tom Maling

For anyone considering whether they have a medical negligence claim as a result of a medication error, here are some **key points**:

1. A doctor owes their patient a **duty of care** when giving **advice** about medications and when **prescribing** them.
2. A doctor must **review how you respond** to a medication and **monitor** you **for side effects**.
3. A doctor must **warn about side effects** which a reasonable patient would find significant, OR risks which because of your individual circumstances a reasonable doctor would think that you would find significant.
4. **Medical negligence claims** can be about a **failure to warn about a side effect** which or because a medication was **incorrectly prescribed**.

Doctor's duty of care

Medications and medical negligence
Medication side effects
Duty to warn about side effects
Incorrectly prescribed medications
Compensation

Elrington's health law

Matt Bridger and Tom Maling represent clients in medical negligence claims. We act for Canberra and the surrounding regions including NSW residents from Queanbeyan, Batemans Bay, Goulburn, Yass, Cooma, Bega and Merimbula areas, in both ACT and NSW claims. Matt is an Accredited Specialist in Personal Injury Law and has over 25 years of experience representing people in medical negligence matters, including small claims right up to multimillion dollar catastrophic injury claims. He has great medical knowledge across a whole range of areas and has conducted cases in general surgical, birth and obstetrics, dental, orthopaedics, pharmacological and cardiology negligence. Tom completed training as a Registered Nurse and has experience in hospitals and nursing homes. He also represents our clients on all medical negligence and treatment dispute claims. Our experience means we have insight into health issues, health service delivery, and most importantly our client's experiences.

Please contact Matt Bridger and Tom Maling if you wish to discuss your circumstances and how we can help.

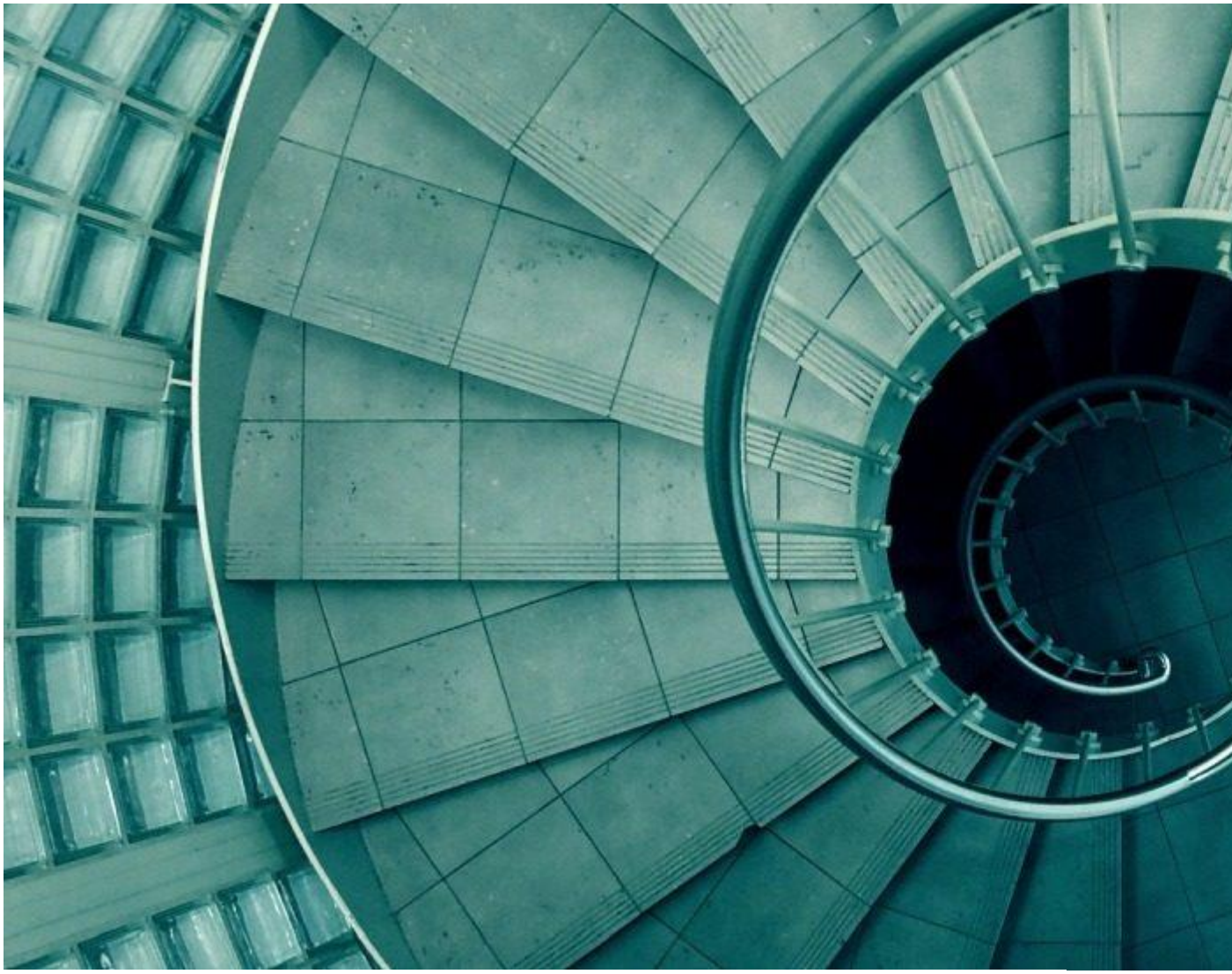
Further reading:

- What is Medical Negligence?
- elringtons Lawyers secures $12 million settlement for client
- Epilepsy and Bipolar Disorder medications linked to birth defects
- Epilepsy and Bipolar Medications may have effected 20000 UK Children
- elringtons health law update – adverse effects from Implanon and Mirena

To contact Matt or Tom or to make an appointment in either our Canberra or Queanbeyan office:

p: +61 2 6206 1300 | e: Info@elringtons.com.au

CategoriesArticles, Health Law, Litigation and Dispute Resolution, Medical Negligence, News & Events, Personal injuryTagsCompensation, Medica



The many stages in your family law matter

Posted onAuthorAnya Aidman

Are you going to Court?

The many stages in your family law matter

A number of clients start off their initial appointment with me saying something like:

"I definitely don't want this to end up in Court."

And what I like to impress upon them is this:

"Keeping your matter out of Court is absolutely our objective. The optimum outcome is when parties resolve their dispute without going to Court."

About ninety-five per cent (95%) of all family law matters settle. That number of settlements includes matters settling at different stages of the case including, sometimes, after court proceedings have commenced. Sometimes, matters settle "at the steps of the Court" on the day of the final hearing

Going to Court /why parties commence Court proceedings?
There are many reasons why parties commence Court proceedings. Normally, parties do so reluctantly when other methods to resolve a dispute have failed. Sometimes, parties commence proceedings as a strategic move to force the other party to end the dispute. In our experience the most common reasons why our clients decide to commence proceedings are:

- The other party is refusing to engage in negotiations, for example, ignoring correspondence, failing to respond to requests for disclosure, failing to engage a solicitor;
- Where mediation/counselling has been attempted and was unsuccessful, with limited signs of ability to resolve any practical issues;
- Due to urgency, for example, relocation or removal of children, in circumstances of dire financial hardship and property matters and so-on.

The Different Stages in a Family Law Matter
The initial appointment

Communicating with the other party (The "Discovery Process")
Informal mediation/counselling without going to Court
Formalising an agreement legally without commencing Court proceedings
Children's Dispute and the Obligation to attempt Mediation/counselling
Initiating proceedings in Court
Court Event No 1 - The First Return Date
Court Event No. 2 (in Property Matters) the "Conciliation Conference"
Court Event No. 2 (in Children's matters) / "Counselling"
After Court Event No. 2
Court Event No. 3/ Directions Hearing
Court Event No. 4 / the Final Hearing

We welcome you enquires with our Family Law Team. We are committed to resolving your matter at the earliest stage possible in your Family Law dispute. We will work with you to develop solutions to your problem, and do our utmost to ensure that we do so in a timely and cost effective manner.

We aim to resolve your matter amicably and through alternative dispute resolution, without the need to resort to costly and time consuming litigation. In the event that we do need to engage in litigation for you, we are experienced and well equipped to defend your interests and progress your matter successfully through the Court system.
E: **aaidman@elringtons.com.au** | p: 02 6206 1300
e: **cturini@elringtons.com.au** | p: 02 6206 1300
Categories Alternative Dispute Resolution (ADR), Divorce, Family Law, News & Events Tags court, Divorce, Family Law

elringtons health law update – evidence growing on the serious side effects of a common reflux drug

Posted on Author Tom Maling
Update by Tom Maling
New research shows that common reflux drugs can increase your risk of premature death.

If you take drugs such as **Nexium or Somac or Pariet**, then you are taking a proton-pump inhibitor (PPI). PPIs are medications used to treat reflux. A whopping 19 million prescriptions were written in Australia in 2012-2013. While these medications are widely used, there is growing evidence that they are linked with increased risks of kidney disease, dementia and bone fractures in people with osteoporosis.
Now a US study has observed a 25% increased risk of death among people taking PPIs. The longer a PPI was taken, the greater the risk.

The prescribing practices for PPIs, like many other medications, is under frequent review. NPS MedicineWise, an Australian not-for-profit aimed at promoting quality use of medications, has recommended review of long term PPI use.

If you're taking a PPI, and have been for a long time, you should make sure you have discussed your long-term use with your doctor. Medications are generally safe, however when things go wrong, they can have catastrophic consequences. Limit the possibility of this happening to you by keeping yourself informed about what medications you take and the risks and benefits.
Further information:

- Medications and Medical Negligence
- What is medical negligence?
- US Study – Drugs to curb excess stomach acid may be linked to heightened risk of death
- NPS MedicineWIse

Categories Articles, Health Law, Health Law Updates, Litigation and Dispute Resolution, Medical Negligence, News & Events, Personal injury Tags Compensation, Medical Negligence

Workplace Psychological Injuries

Posted onAuthorTom Maling

by Tom Maling

Whether you work for a private employer or the public sector (Federal and State) in the ACT or NSW, there are laws which mean **you can claim compensation** for workplace psychological injuries **covering treatment, lost wages** and **permanent injuries**.

In this article we discuss:

1. What psychological injuries are.
2. The exclusionary reasonable administrative action rule.
3. Causes of psychological injuries.

Summary

- Even if you had a mental illness before starting work, you may still be able to claim compensation if work has made it worse.
- There is a special rule for psychological injury claims limiting when you will be eligible for compensation. This is the reasonable administrative action rule.
- Psychological injuries are not just related to bullying and harassment, and you may be able to claim for an injury even if your work did not do something wrong.
- You may be able to claim compensation for medical treatment, loss of wages, and a permanent injury, and in some case domestic care and for your pain and suffering.
- We are **experts** in **ACT**, **NSW** and **Comcare** workplace psychological injury claims.

Psychological injuries

ACT, NSW and Commonwealth laws have different workers compensation schemes. Common to each though is a recognition that workers who get psychological injuries (also called mental injuries) caused by work are eligible for compensation. This includes illnesses such as Anxiety, Major Depression, an Adjustment Reaction and Post Traumatic Stress Disorder (PTSD).

If you already had a diagnosed mental illness before starting your work, you too may receive compensation if work has made your symptoms worse. **Aggravation of a pre-existing mental illness** may entitle you to compensation, providing work has caused the aggravation. There are special rules relating to pre-existing illnesses, which are aimed at ensuring that work actually caused a worsening of symptoms, rather than the symptoms naturally progressing or getting worse. So just because you already have Bipolar Disorder or PTSD, does not mean you may not be entitled to workers compensation.

Exclusionary rule

Commonwealth, ACT and NSW laws all contain a special rule excluding some psychological injuries from being entitled to compensation. There are differences between each, but the general concept is that a psychological injury caused by a **reasonable administrative action** is not entitled to compensation. So, if your employer reasonably does something such as performance management, counselling about performance, disciplining you, transferring you, or even demoting you, and this causes a psychological injury, then you may not be entitled to workers compensation such as lost wages and medical treatment.

In ACT and NSW workers compensation laws, the reasonable administrative action must be "*the whole or predominant cause*" of the injury. Under the Comcare system, the action only need be "*a*" cause, regardless of how small, for the exclusion to apply. The other key point is that the employer's action must be reasonable in the circumstances, and taken reasonably. **Workers need to be very careful about when and how they make claims**.

Causes of psychological injuries

Often people think they can only make a claim where they have been bullied, or work has done something wrong. This is wrong! While we have clients who have received a psychological injury following bullying and harassment at work, psychological injuries can also be **caused by your normal work duties**.
Think about a first responder such as a Paramedic or an Australian Border Force officer who develops a psychological injury as a result of their normal duties. There is no need for their workplace to have done something wrong to them. The same applies for workers such as office workers, public servants, health professionals and tradies: you do not necessarily need to show that your employer did something wrong. If your work brings you into contact with a situation that is shocking or your work is stressful and you are struggling to manage, you may be able to bring a claim.

We can work with you
We are passionate about issues concerning mental health and the law. As experts in workplace psychological injury law, we are experienced in working with clients who have a mental illness. We pride ourselves on developing a rapport with our clients to learn about their experiences and provide outstanding results.

You will work with Matthew Bridger and Thomas Maling. Matt has over 25 years' experience as a workers compensation lawyer. Tom initially trained as a Registered Nurse and worked in mental health, and has maintained a keen interest in this area as a lawyer. Both Matt and Tom work with clients in ACT, NSW and Comcare psychological injury claims. Please feel free to contact us to discuss your claim.
IMPORTANT: If you (or someone you know) are experiencing symptoms of a mental illness you should seek help from your GP immediately. Alternatively, other resources you may access include:
1. ACT Mental Health Crisis and Assessment Team 1800 629 354
2. Lifeline 13 11 14

Further Reading:

Comcare and Psychological Injuries
p: +61 2 6206 1300 | e: Info@elringtons.com.au

elringtons health law update – serious risks from coronary artery stent

Posted onAuthorTom Maling
Update by Tom Maling
The government agency responsible for regulating medicines and therapeutic goods, the Therapeutic Goods Administration (TGA), issued a hazard alert in May 2017 for the Absorb Bioresorbable Vascular Scaffold (BVS) System. This is a **stent inserted into blocked arteries during coronary angioplasty surgery**.

All stock has been recalled, and consumers who have had this device implanted during coronary angioplasty surgery were **advised to contact their doctor**. The TGA has also removed this device from the register, meaning it is not approved for use at this time.
The reason for the alert is growing evidence of **increased risks** of major cardiac events such as heart attack and blood clots in patients who have this stent. Patients have had to undergo further treatment in order to re-open the affected artery and mitigate the increased risks. In its advice to consumers, the TGA advised:
If you experience any new cardiac-related symptoms, such as irregular heartbeats, chest pain, or shortness of breath, seek immediate medical attention.
It is imperative that consumers who believe they may have had this stent implanted contact their doctor. For more information on the alert please see the below links. You can also contact **elringtons** lawyers and speak to a health lawyer to discuss your options if you or a loved one has been affected by this stent.
Further reading:

- TGA Safety Alert
- TGA Hazard Alert
- Absorb Bioresorbable Vascular Scaffold system recalled over heart attack fears

More articles by Tom Maling …

CategoriesArticles, Health Law, Health Law Updates, Medical Negligence, News & Events

elringtons health law update – dentist breaches nursing homes residents' human rights

Posted onAuthorTom Maling

By Tom Maling

The NSW Civil and Administrative Tribunal has found that a dentist has breached nursing homes residents' human rights by providing dental treatment to without their consent.

In 2011, a NSW dentist attended 6 nursing homes and provided dental treatment to 69 residents. Of these 69 residents, **only 17 were able to consent to the treatment**. It is a **crime** to provide medical treatment when a person has not consented to it, and patients/victims will be entitled to **compensation** for any treatment provided to them without their consent.

On 1 August 2017, the Tribunal made orders prohibiting the dentist from practicing for at least 2 years. In its judgement, the Tribunal also said:

It is hard to imagine a more vulnerable group of patients. ***Those providing services to our elderly citizens have a duty to respect their human rights and dignity****. Those persons lacking in cognitive capacity are deserving of special care from professionals involved in their treatment. So much is clear from Australia's ratification of the United Nations Convention of the Rights of Persons with Disabilities, particularly Article 25 of that Convention which deals with the provision of health services. That* ***respect of human rights and special care was completely absent in the practitioner's treatment of the 69 patients****.*

What about the nursing homes and nurses?

While no nursing homes or nurses were sanctioned in this matter, the Tribunal did state:

… it is indeed ***unfortunate that the facilities also did not take greater care*** *to ensure that informed consents had been obtained from all competent patients, or for the majority of them who were incapable of giving informed consent, the person responsible or guardian, before any treatment occurred ….*

The law plays an essential role in **protecting the human rights, dignity** and **health and wellbeing** of people living in nursing homes. Nursing home residents have rights protected by the *Aged Care Act 1997*. Also, **negligence** and **assault/battery** claims provide compensation for injuries, as well as promote higher standards for future treatment.

Nursing homes and registered nurses have duties of care to nursing home residents. In this matter, **we query how a reasonable nursing home, or a reasonable registered nurse, could permit a dentist to enter a nursing home and provide treatment to vulnerable people** who lack the capacity to consent to the treatment. It is likely that a nursing home has a duty to residents who do not have capacity to consent to treatment, to ensure they are not given treatment which they have not consented to.

The law in this area is developing. We specialise in health law issues affecting nursing home residents such as **negligent** or **unauthorised treatment**, **neglect**, **complaints about health practitioners** and **complaints about nursing homes**.

Please feel free to contact Thomas Maling if you have concerns about the care and treatment a nursing home is providing.

Further reading

- What duty of care does a nursing home have?
- Consenting to Health and Medical Treatment
- Aged Care Complaints Commissioner
- NCAT Case

More articles by Tom Maling …

To contact Tom Maling by phone or to make an appointment in either our Canberra or Queanbeyan office:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
Categories Articles, Health Law, Health Law Updates, Litigation and Dispute Resolution, News & Events Tags Aged Care, Litigation and Dispute Resolution, Medical Negligence

Children and Consent to Medical Procedures

Posted on Author Anya Aidman

Everyday decisions about a child's health and medical care can be made by either a parent of a child, or any other person exercising parental responsibility for a child. Major long-term medical decisions in relation to a child must be made in consultation with both parents or all persons who have been granted parental responsibility in relation to the child.

Parental Responsibility

Under section 61C of the *Family Law Act* ("the Act"), each parent of a child shares joint parental responsibility for the child unless that responsibility have been displaced by a court order.

Under s61B of the Act, parental responsibility in relation to a child means *"all the duties, powers, responsibilities and authority, which, by law, parents have in relation to children".*

Parenting orders can be made granting parental responsibility to any other person determined by the court under section 64C of the Act. However, section 65C provides that parenting orders can only be *applied for* by:

1. a) a parent of the child;
2. b) the child;
3. c) a grandparent of the child; or
4. d) any other person concerned with the care, welfare or development of the child.

Parental Responsibility and Consent

Health and medical treatment is illegal unless a patient consents to it. In relation to child, there must be consent from someone with parental responsibility for the child. This differs slightly in life threatening situation, where limited treatment may be provided when it is not possible to obtain consent beforehand. For example, a car accident involving both parents and a child, where the parents are unable to consent to treatment for the child.

In the event that two or more people hold parental responsibility, they will need to consent to a medical procedure. If parties are not able to agree, they may need to seek that a court make a determination on the issue.

However, there are some major medical procedures which cannot be performed on a child without first obtaining the consent of a court, regardless of whether the parents and medical practitioners have consented to the procedure.

Situations where Court involvement may be required

There are many different circumstances which require the Court to become involved in relation to consent and children's medical procedures.

If parents, or those with parental responsibility, disagree with each other in regard to medical procedures or treatment, the court may need to decide on the treatment. This can range from less invasive procedures such as orthodontic treatment to something as serious as deciding whether to keep a person's life support on.

In cases where the child is considered mature enough to make decisions regarding their own medical treatment, the child may be considered to be '*Gillick* competent.' This means that the child has reached a level of understanding and intelligence required to make their own decisions in relation to their medical treatment.

In instances where a hospital or medical practitioner's views on treatment differ to the parents', a court order again may be necessary. In the case of *Director Clinical Service, Child & Adolescent Health Services & Kiszko & Anor* an order was made requiring a child to undergo chemotherapy treatment against the wishes of both parents.

Similarly, there are certain procedures which require court orders, regardless of whether the parents' consent.

Special medical procedures and Court involvement

There are some medical procedures, known as 'special medical procedures' that require permission from the court in order to be performed on a child.

Some examples of special medical procedures include:

- sterilisation;
- Stage two gender reassignment; or

- Certain other major surgeries.

The reason that court orders are required for such procedures is that they are considered to extend outside of the usual parental powers, meaning they are permanent, irreversible or significantly life-altering. Importantly, the court becomes involved to take into account the best interests of the child.

The orders the court will make varies with the circumstances of each case. In as the case of *Re Marion*, it was found that the performance of a hysterectomy on a 14 year old girl living with severe intellectual and physical disabilities was in the child's best interests. By contrast, in the case of *L & GM & MM* it was found the proposed sterilisation of a 17 year old physically and intellectually disabled girl was not in the child's best interests. Furthermore, some cases require the court to go further than making a simple "yes or no" ruling and may prescribe the particulars of a procedure to be carried out on a child.

In situations where stage 2 gender reassignment treatment is proposed for a child with gender dysphoria, an order must be obtained by a court pursuant to section 67ZC of the Act unless the child is considered to be *Gillick* competent.

If your child or children are facing a medical procedure that may require court involvement or if you simply want to discuss your options in this complex space, you can contact Anya Aidman or another one of our experienced family law solicitors to discuss your matter further. In addition to our experienced family law team, **elringtons** specialises in health law, meaning we have the expertise and experience to resolve complex issues which arise from health and medical treatment.

For more information or to make and appointment in either our Canberra or Queanbeyan office please contact:

e: aaidman@elringtons.com.au | p: 02 6206 1300
e: pryan@elringtons.com.au | p: 02 6206 1300

Further reading:

Consenting to Health and Medical Treatment
Choosing and Refusing Medical Treatment

CategoriesFamily Law, News & Events, Parenting DisputesTagsFamily Law, Health and the Law

elringtons health law update – beware of the consent form

Posted onAuthorTom Maling

By Tom Maling

A recent NSW Court case has highlighted the importance of reading consent forms thoroughly before you sign one.

In *Tinnock v Murrumbidgee Local Health District* [2017] NSWSC 1003, a patient brought a claim against a doctor, saying she did not consent to him operating on her. In the case, the patient had met with a specialist surgeon and consented to the specialist performing surgery on her. She signed a consent form to this effect. However, the surgery was performed by a training surgeon, under the direction of the specialist surgeon. She experienced severe post-surgery consequences and brought battery and medical negligence claims.

The consent in this case included an acknowledgement that she had been told that the surgery may be performed by someone else.

The law says that when you sign a document, you have agreed to its contents and to be bound by its terms, regardless of whether you had actually read the form.
Therefore, the patient had actually agreed to the surgery being performed by someone other than the specialist.

The patient ended up succeeding in a medical negligence claim. However, **the case is a lesson to all people who agree to have treatment: read the consent form**. These forms are evidence of what you have actually consented to. If there is something in the form you have not agreed to, or have not been told about, you should immediately raise this with the doctor so they may discuss this with you. It's important that you know as much as possible about the treatment before you have it, and for the doctor or health practitioner to know about what your goals are, in order to promote the best outcomes for the treatment.
The second aspect of the case is that when you consent to treatment, you do not necessarily consent only to a specific doctor providing the treatment. The Court provided the following example:
"…example where a patient consents to Dr A, a surgeon of ordinary skill and competence, performing an operation, who at the last minute and after the patient is under a general anaesthetic becomes unavailable, so that Dr B, also a surgeon of ordinary skill and competence, steps in, it could not, in my opinion, be said that that circumstance vitiates the plaintiff's consent. The relevant consent is to the nature and character of the act."
This does not mean you cannot consent only to a specific person performing the surgery. If you want this to be the case, you should make sure that is documented.

To understand the law on consent further, please see our article 'Consenting to Health and Medical Treatment', or feel free to contact us.

Further reading

- *Tinnock v Murrumbidgee Local Health District* [2017] NSWSC 1003
- Consenting to Health and Medical Treatment
- What is medical negligence?

For more information or to make an appointment in either our Canberra or Queanbeyan office:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
Categories Articles, Health Law, Health Law Updates, Litigation and Dispute Resolution, Medical Negligence, News & Events

elringtons health law update – bullying and harassment rife in hospitals

Posted on Author Tom Maling
By Tom Maling

A survey of emergency department doctors has found that 49.8% of the 2000 doctors surveyed had been victims of bullying, harassment or discrimination while at work. A quarter of the doctors had experienced these behaviours in the last 6 months.

The Australasian College for Emergency Medicine conducted the survey of its members, and published its results in August 2017. Sadly, the College reported that a significant proportion of its members had been victim of these behaviours more than 20 times.

Every worker has the right to attend work and not be subjected to bullying, harassment and discrimination. The impact these behaviours can have on a person's health and wellbeing can be significant. We act for far too many workers who have received psychological injuries from bullying, harassment and discrimination in the workplace. Bullying, harassment and discrimination at Canberra Hospitals has been well published, and this latest survey is further evidence of a widespread problem. The College noted:

"Recent studies have indicated that high rates of discrimination, bullying, harassment and sexual harassment persist in the health sector, despite clear evidence that these behaviours jeopardise patient safety and negatively impact on victims."
Health practitioners are subject to codes of practice and registration standards. Consumers and practitioners may make complaints to the Australian Health Practitioner Regulation Agency ('AHPRA') about conduct falling below the standard expected by the public, or where the practitioner may not be a suitable person to practice. We suggest that bullying, harassment and discrimination behaviour will likely meet these descriptions, and AHPRA has a role to play in eradicating this culture from the health professions and to promote patient safety.

elringtons has helped many workers who have been victim of these behaviours. We have also assisted people to make complaints to AHPRA about health practitioners. Please do not hesitate to contact us to tell us about your experiences and to see how we may help.

Further reading:

- ABC news article – More than one-third of emergency doctors face work bullying, harassment, survey reveals
- Australasian College for Emergency Medicine
- Workplace Psychological Injuries
- Calvary Hospital chief slams 'boys club' as reach of harassment and bullying revealed
- Review confirms bullying culture among training staff at Canberra Hospital

For more information or to make an appointment in either our Canberra or Queanbeyan office:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
CategoriesArticles, Health Law, Health Law Updates, Litigation and Dispute Resolution, News & Events, Personal injuryTagsHospital Lawyer, Personal

elringtons health law update – hazard alert for Essure contraception implant device

Posted onAuthorTom Maling

By Tom Maling

On 30 August 2017 the Australian Therapeutic Goods Administration (TGA) issues a hazard alert about a permanent contraception implant called Essure.

According to the TGA:

"*It has been identified that some patients who have received the device may not have been fully informed of the possible device and procedure-related risks before choosing to have Essure implanted.*

There have been reports of changes in menstrual bleeding, unintended pregnancy, chronic pain, perforation and migration of the device, allergy/hypersensitivity, or immune-type reactions. Some of these reports were considered serious and resulted in removal of the device, which involved abdominal surgery."

In May 2017 the manufacturer of Essure advised the TGA that it would cease importing the device and there is now a recall for all unused devices. Essure was first approved for use in Australia in July 2010. The TGA provided no indication about the scope of the device's use or the number of people impacted. Simply because of the length of time it has been available it is possible that many Australian women have had an Essure device implanted.

If you think you may have had the device implanted you should follow up with your doctor to obtain information about the. It you are concerned about side effects you should also discuss these with your doctor.

If you have experienced any side effects after having an Essure device implanted, you may be entitled to compensation for the further treatment expenses, pain and suffering and for other losses. There are questions about the safety of Essure's design, it's fitness for use and the warnings about side effects which were provided to doctors and patients.

Please feel free to contact Tom Maling to discuss your concerns or refer to our information on health law and medical negligence.

Further information:

- TGA Hazard Alert for Essure
- What is medical negligence?

For more information or to make an appointment in either our Canberra or Queanbeyan office:

How to make an effective nursing home complaint

Posted onAuthorTom Maling

by Tom Maling

The *Aged Care Act* gives nursing home residents 21 statutory rights. We discuss these on our Nursing Home Abuse home page.

But while this Act gives broad rights, it also removes the ability of residents to directly enforce these rights by way of injunction. So how do you enforce them under the Act? The easiest way is to make a complaint.

The complaints process

Resolution Process
What to put into a complaint
What to ask for

elringtons health lawyers can assist if you're not happy

There are internal review rights for Commissioner decisions. But reviews are not the only option to deal with the issue you have.

At the start of the article we mentioned that the *Aged Care Act* removes a person's right to directly enforce their rights. But as we discuss in our article 'What duty of care does a nursing home have?', **this does not mean the rights are not relevant to other legal remedies**. A breach of a right may also demonstrate a claim for negligence or a battery. It may also show a breach of a contract between the resident and the nursing home (also called an Aged Care Agreement)

If you have a dispute about treatment you may also consider complaints in the ACT to the Human Rights Commissioner or complaints about a nurse or doctor to AHPRA.

We feel that the quality treatment of nursing home residents has not been adequately enforced by the law. Nursing home care is a specialist area and requires creative approaches to resolve matters. We have health law expertise which enable us to approach treatment disputes in a creative fashion.

We can help you to decide what to put into your complaint submissions and provide representation at a resolution process. Our health law expertise also covers treatment issues such as negligence and battery claims. This means we can offer a suite of options to help you to enforce your rights and, in some cases, obtain compensation.

Further information:

- Nursing home abuse
- What duty of care does a nursing home have?
- elringtons health law update – dentist breaches nursing homes residents' human rights
- Medical negligence

- Consenting to Treatment

For more information please do not hesitate to contact Matt Bridger or Tom Maling:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
Categories Articles, Health Law, Litigation and Dispute Resolution, Medical Negligence, News & Events

Can you leave your estranged children out of your Will?

Posted on Author Kerin Cotchett

The *Succession Act* (NSW) and the *Family Provision Act* (ACT) allows for "eligible people" to make a claim upon your estate **should they not receive what they consider to be adequate provision under your Will.** Each case brought before the court is determined on the basis of the facts before the Court and the wishes of the Deceased as shown in their last Will and testament (and previous Wills, if relevant).

In the Supreme Court case of *Underwood v Gaudron** one of four adult children brought a claim against her mother's estate for further provision where she had been left no inheritance. The claimant, Helen Underwood, was hoping to receive an order from the Court that she be provided a share of the modest $350,000 estate, despite the fact she had not spoken to her mother for 20 years before she died.

Helen's case was largely based on the fact that she had a substantial need to be provided for from her late mother's estate because she was a pensioner with no assets.

The Court took the following facts into consideration in making its decision:

- During her lifetime, Helen's mother provided Helen rent-free accommodation in her own residence for two years. While she was living with her in her own home Helen had been verbally and even physically abusive towards her mother.
- Helen's mother asked Helen to leave her home after feeling unsafe, so Helen moved out but after this time did not make any attempts to contact her mother and did not tell her mother where she was living nor did she invite her mother to her wedding.

The Supreme Court dismissed Helen's claim and furthermore, she was also ordered to pay her own legal costs which were estimated to be approximately $40,000.

In 2015 Helen appealed the Supreme Court's decision but her appeal was unsuccessful.

It is important to note, however, that estranged children can also be successful claimants and the Supreme Court has made orders in favour of estranged children to be provided for from their parents Estates.

We recommend contacting one of our Wills and Estate Planning solicitors if:

- you need to review your Will,
- you are worried about your Will being challenged,
- or if you believe you have a claim for provision from a family member's Estate.

Further Reading:

What happens if I leave someone out of my will?
North shore daughter sues sister over mother's will.

For more information please contact our Wills and Estate Team:

e: info@elringtons.com.au | p: +61 2 6206 1300
*[2014] NSWSC 1055
Categories News & Events, Wills & Estate Planning

Who Gets the Dog? Pets in Family Law Matters

Posted on Author Carlos Turini

We love our pets and often they truly are part of the family. So when it comes to the end of a relationship or separation of a family, it can be very important to take a pet into consideration.

In most cases separating parties are able to resolve this issue amicably, as it may be understood from the start which person owns, or is the main caregiver for a particular pet. For others however, a disagreement may arise as to whom certain pets will live with, and even whether the other party can visit to spend time with the pets.

Unfortunately, sometimes the motivation for one party keeping a pet as part of the family law process may be for the wrong reasons. People can feel very close and form long term attachments to animals and one party might try to keep the pet to upset the other party or use it as a weapon. Threats to euthanise the pet to eliminate the issue entirely is particularly upsetting.

Aside from being unfair to the animal, situations such as these are unlikely to end well for either party. Another issue that is sometimes faced, is in cases involving family violence. Often, if the victim of family violence leaves, they may not be able to take their pet in to temporary accommodation or a refuge.[1] This also poses the problem of leaving the pet in an unsafe and hostile environment.

Family law is generally broken into two sections, property and parenting. Determining the ownership of a pet after separation falls under property. **The *Family Law Act* (1975) does not make specific provision for pets**, rather they fall under the category of "chattels" – or simply, property. Most items in the property pool are allocated a value, but how can you place a value on a family pet? If the pet is used for racing or breeding purposes and provides an income of some kind, it may be allocated a financial value. However, as a general rule, a value is not placed on a pet when considering property division in family law.

While pets are considered property, the Court does acknowledge the comforting nature of pets, with Judge Harman in the case of *Downey v Beale* stating that "*one would hope, in this neoliberal world that we have not yet come to the point where even love and affection are commoditised*".

Determining factors considered by the Court when deciding who gets the Pet

Accommodation – Can the pet live at the accommodation, for example rental accommodation?

Who was the main caregiver? – Who registered the dog, who fed it and took it for walks, who took it to the vet for vaccinations etc.?

Was the pet given to one of the parties as a gift?

The court will use the above information when considering which party should keep the pet.

In many cases involving children, the court will decide to give the pet to one parent. However, orders are sometimes made for the pet to accompany the child or children in moving between parents' houses. In other situations, such as in the case of *Poulos v Poulos*, the Court made orders allowing the mother to keep the pet dog, even after the child was ordered to live with the father. The court considered factors such as the mother's stress and her long term bond with the dog. Additionally, the calculation of spousal maintenance took into consideration pet friendly accommodation for the mother.
If you have a dispute that includes a pet, orders can take into consideration future costs and maintenance of the pet. This can include the cost of vaccinations, food and veterinary costs.

Pre-Nuptial Agreements
One preventive measure which can be taken to safeguard against any future dispute, is to enter into a prior agreement. A "prenuptial agreement", also known as a binding financial agreement, can include pets in the property pool. If this is done, it is important to specify the exact details of the pet, or specify how you and your partner plan to purchase a pet and who will keep it should the relationship end. This option could avoid potentially lengthy legal proceedings after separation.
Family law disputes can take their toll on all members of the family, especially when involving a beloved family pet. As acknowledged by Judge Harman, "*dogs are not our whole lives, but they make our lives whole."* At **elringtons** we understand that pets are more than just property and they provide immense happiness and comfort, especially when it is needed most.

Please do not hesitate to contact our Family Law Team if we can help you with a family law matter involving a pet.

For more information or to make an appointment with a Family Law Solicitor contact Carlos Turini:
p: (02) 6206 1300 | e: cturini@elringtons.com.au

---

[1] Useful links if you need to rehome your pet urgently:

http://fosterdogs.org/tess/do-you-need-to-rehome-your-dog/
http://rspca-act.org.au/
https://www.petrescue.com.au/
http://www.tccs.act.gov.au/city-living/pets/dogs/lost-dogs/impounded_dogs
http://www.qcc.nsw.gov.au/Services/Animals/Animals-for-sale/Animals-for-sale

CategoriesFamily Law, News & Events, Property DisputesTagsFamily Dispute Resolution, Family Law

Children Travelling Overseas in Family Law Matters – Conditions and Restrictions

Posted onAuthorCarlos TuriniLeave a comment

By Carlos Turini

In family law matters when one parent wishes to travel overseas with a child the situation arises frequently that the other parent objects. Normally, the purpose of such trips are holidays, however, there are instances where a parent travels with a child , ostensibly for a holiday, and subsequently fails to return the child to Australia.

There may be good reasons why a parent may object even when there is no concern about an abduction in circumstances where, clearly, the purpose of the trip is a holiday. For example, if the intended destination is a dangerous place.

Restraining a Parent from Taking a Child Overseas

Often if a parent suspects that the other parent is intending to travel without their consent, an urgent application is lodged with the Family Court seeking to restrain the other parent from taking a child out of the country. The Family Court takes such applications quite seriously and will regularly make urgent, “ex parte”, orders (that is, in the absence of the other party), to restrain the removal of children from the country.

Once the Court makes such restraining Orders, the Court will then serve a copy with the Australian Federal Police and the children will be placed immediately in the "Family Law Watch List" accessible by officers from the Department of Immigration and Border Protection at every exit point around the country – Police and Family Law
That is a very effective tool to stop children being removed from Australia.
After making the urgent, 'ex parte' orders, the Court will direct that copies of the Orders and the documents filed with the Court be served on the other party and the matter will be adjourned to allow the other party to file material in reply and ultimately to be heard.

The parent who wishes to travel overseas with a child may be able to convince the Court and obtain orders to allow the trip to go ahead even against the wishes of the other parent. The Court, in those circumstances may impose certain conditions on the travelling parent as we discuss below.

May a child travel overseas against the wishes of one parent?
A Court may overrule a parent's objection that a child travel overseas if the Court is satisfied that the child is likely to be safe and return safely to Australia.

The parent who wishes to travel may bring an application with the Family Court seeking orders to permit the child to travel. The Court may allow such an application if it's satisfies, for example, that the travelling parent is very likely to return to Australia with the child, is settled in Australia with a job, has assets, extended family and so on.

The Court may impose conditions on the travelling parent including, for example:

1. A security bond or a fixed monetary payment which must be paid as a surety designed to increase the likelihood that the child is returned to Australia by a certain date;
2. That the travelling parent must provide copies of air flight tickets and notify and provide:
3. A detailed itinerary; and
4. Contact details in order that the parent which stays behind may communicate with the child while the child is overseas.
5. The orders that are made by the Court will specify the amount of days, prior to the date of departure, by when the bond must be paid and the funds cleared. The time period here can vary, in some cases it can be a longer time period such as 14 days or even one calendar month, compared to other instances when the requirement is 7 days prior to departure. If there are numerous travel dates, the orders can provide that the money is paid each time the child travels, a certain amount of days prior to departure. Some orders provide that the child is not to depart unless the bond has been paid.

If the court orders that a security bond be paid:

1. The amount ordered to be paid will depend on the circumstances and risk associated with the proposed travel. Some bonds can be relatively low at $5,000 compared to others reaching $30,000.
2. Sometimes the bond is in the form of real estate.

What you can do if you propose to travel overseas with your child, or indeed if you seek to oppose such travel:

Raise the matter with the other parent in writing

Propose to enter into consent orders
What travel details are provided?

Make up time
Where is the bond deposited and held?
When is the money released? What happens to this money?
If you are planning on travelling overseas with your children, or if your child's other parent is travelling, Carlos Turini or our Family Law Team may assist you in ensuring the appropriate arrangements are in place prior to travel.

For more information or to make an appointment with a Family Law Solicitor contact: Carlos Turini:
p: (02) 6206 1300 | e: cturini@elringtons.com.au
CategoriesFamily Law, News & Events, Parenting DisputesTagsFamily Law

Post navigation

← PreviousPrevious post:Who Gets the Dog? Pets in Family Law Matters

Next →Next post:When is employment discrimination lawful?

Leave a Reply

When is employment discrimination lawful?

Posted onAuthorMatthew Bridger
It is well known that employment is an important factor for individual welfare and economic security. However, it is also well known that people with disabilities, older Australians, people that come from a diverse cultural or ethnic background find it more difficult to obtain jobs.
Employment discrimination can be defined as treating an employee or a group of employees less favourably than another employee or group in the workplace who are in the same or similar circumstances. However, the legislation provides certain exceptions when discriminatory conduct may be lawful. These would be the cases where an employer could have a strong defence in relation to discrimination claims made by a prospective or existing employee. A few examples of situation when an employer may be able to claim that discriminatory actions are justified are as follows:

- The employee cannot perform the inherent requirements of the role
- The employer's ability (or inability) to make adjustments to offer or maintain employment which may result in an unjustifiable hardship for the employer, then it may be lawful for the employer to discriminate against a person with a disability
- The employee has a condition or a disease where discriminating against that person would be seen as 'reasonable' as it would be a matter of protection of public health and safety
- Court orders or compliance with certain legislation that may impose that an employee cannot work in certain environments (for example working with minors where the employee had a conviction relating to indecent assaults against children)

- Discriminatory provisions based on citizenship status.

If you need further advice regarding lawful discrimination in the workplace, please contact Matthew Bridger:

e: mbridger@elringtons.com.au | p: 02 6206 1300.

CategoriesEmployment law, Litigation and Dispute Resolution, News & EventsTagsEmployment, Litigation and Dispute Resolution

Epilepsy and Bipolar Medications may have effected 20000 UK Children

Posted onAuthorTom Maling

by Tom Maling

In June 2017 we detailed the link between birth defects and the medications sodium valproate (Epilim, Valprease, Valpro) and topiramate (Epiramax, Tamate, Topamax) in 'Epilepsy and Bipolar Disorder medications linked to birth defects'. Since this time we have been keeping a close eye on overseas developments.

On 27 September the Guardian newspaper published an article reporting that the risks associated with taking sodium valproate while pregnant could have been made public 40 years ago. According to the article:

"These warnings could have and should have been given in 1974," said Catherine Cox from the Fetal Anti-Convulsant Syndrome Association at a public hearing of the European Medicines Agency, which is conducting a risk assessment of the drug. "However, there was a deliberate decision not to publish them."

Of further concern for young women today, the article referred to a recent survey of 2000 UK women with Epilepsy, with an alarming number (68%) unaware of the risks posed by their medications. The British Parliament has recently heard that up to 20000 UK children may have been effected by drugs such as Epilim since the 1970s, a staggering number. There are calls for a government enquiry in the UK, and the European Medicines Agency has already conducted a public hearing into this issue in 2017.

As we stated earlier in 2017, there are no published court cases in Australia involving **medical negligence** claims for injuries caused by sodium valproate and topiramate. These drugs are commonly used in Australia to treat symptoms of **Epilepsy** and **Bipolar Disorder**. There is no reason why, unfortunately, the international experience has not been replicated in Australia. Just because there are no cases which have been published does not mean there are no people in the Australian community who are entitled to **compensation**.

We are specialist health lawyers who represent people affected by medical negligence. Families affected may be entitled to compensation to pay for the cost of caring for a child who has been affected by one of these drugs. **Compensation can help ease the financial strain on families by funding things such as equipment and care**.

Please feel free to contact Tom Maling for more information on how we may be able to help, or refer to the below articles for further information.

Further information:

- Epilepsy and Bipolar Disorder medications linked to birth defects
- Medical Negligence
- What is medical negligence?
- Medications and medical negligence
- Guardian article
- Up to 20000 children affected in UK

For more information please do not hesitate to contact Matt Bridger or Tom Maling:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
CategoriesHealth Law, Health Law Updates, Medical Negligence, News & Events

Nursing home abuse by residents on other residents

Posted onAuthorTom Maling

On 13 November 2017 a journal article was published which detailed the high rates of abuse by nursing home residents on other residents . The researchers found:

- Over a 14 year period 28 people had died as a result of resident-on-resident violence
- There is likely under-reporting by nursing homes about resident-on-resident violence
- US research had found at least 20% of nursing home residents had experienced resident-on-resident violence

This is just further evidence detailing the dire experiences some Australians are having in some nursing homes. Nursing home care is undoubtedly very complex, and resident-on-resident abuse is no exception, with perpetrators generally having dementia or another form of cognitive impairment. Despite this, all nursing home residents have the right to be safe and free from harm in their nursing home.

elringtons has particular concerns about the emerging evidence of mistreatment. We have previously published on preventable deaths and nursing home abuse Nursing homes owe their residents a duty of care. This is established at common law and by the *Aged Care Act*. Resident-on-resident violence raises questions about:

- How has a nursing home assessed the perpetrator's and the victim's needs?
- Has the nursing home provided appropriate care to the perpetrator?
- What sort of risk assessment has the nursing home conducted?

Nursing home residents are at particular risk of harm and are extremely vulnerable as they are, very often, unable to remove themselves from the sense of danger. **elringtons** has a particular interest in protecting the rights of nursing home residents. We can provide assistance with a range of issues such as:

- Putting in a complaint to the Aged Care Commissioner
- Advocating to nursing homes to resolve complaints and issues
- Obtaining compensation for extra treatment and care following nursing home negligence or misconduct

Please feel free to contact Tom Maling to tell us your story and to see how we can help.

Further resources

- Nursing home abuse
- How to make an effective nursing home complaint?
- What duty of care does a nursing home have?
- Dentist breaches nursing homes residents' human rights

- Charter of Care Recipients' Rights and Responsibilities – Residential Care
- Older Persons Advocacy Network
- Elder Abuse—A National Legal Response

For more information please do not hesitate to contact Matt Bridger or Tom Maling:

p: +61 2 6206 1300 | e: Info@elringtons.com.au

CategoriesHealth Law, Health Law Updates, News & Events

y Tom Maling

Commonwealth and ACT public servants are covered under the Comcare system for workplace injuries. At **Elringtons**, we have the expertise and experience to assist people with Comcare claims, including:

1. Initial claims
2. Psychological injury claims
3. Reconsiderations when Comcare denies a claim
4. Reconsiderations when Comcare ceases entitlements
5. Merits reviews at the Administrative Appeals Tribunal
6. Comcare debts
7. Federal Court Appeals

Injuries and Diseases

You can claim for a frank injury or if your work has made a pre-existing injury or disease worse. The basic qualification is that **your work must cause** your injury or disease. However, there are slightly different causation requirements for an injury and a disease:

1. An injury must arise out of your work
2. A disease must have been contributed to, to a significant degree, by your work

As you will have noticed, the causation test for a disease is more stringent.

The claims process

1. A worker must notify their employer that they are injured as soon as possible after becoming injured.
2. A worker must complete a Comcare claim form with a medical certificate. The form is given to your employer, who must then give it to Comcare.
3. Comcare will consider your claim. They may require you to provide specific information. send you to be examined by an independent medical expert
4. Comcare must accept or reject your claim. Please note, there are no specific timeframes under the *Safety, Rehabilitation and Compensation Act 1988* ('the Act') requiring Comcare to determine your claim within a specific timeframe. Absent a specific timeframe, they must determine your claim within a reasonable timeframe.
5. If Comcare reject your claim, you have 30 days from the day you were notified of the decision to submit a reconsideration request. You may ask Comcare to extend this, but it is up to Comcare whether or not to extend the time.
6. Comcare must affirm or set aside the initial decision. There is no mandated timeframe, but it is their policy to aim for 30 days.
7. If you disagree with the reconsideration decision, you have 60 days to submit a merits review request at the Administrative Appeals Tribunal.

---

8. **Comcare Overpayments or Comcare Debts**
9. There has been recent media attention about Comcare issuing debt notices claiming people have been overpaid. **Just because Comcare has sent you a debt**

letter claiming for an overpayment does not necessarily mean you have been overpaid and owe them money.

10. **Elringtons** is looking for people who have been sent overpayment letters for a new type of Federal Court claim. We want to help people who, through no fault of their own, have been burdened with a debt claim by Comcare in unfair circumstances. For more information see Comcare Overpayments or Comcare Debts.

11. **Psychological Injuries**
12. There are special laws in the Comcare system limiting the circumstances when an employer is liable to pay you compensation for a psychological injury. If you think you may have received a psychological injury from work, it's very important you understand the law prior to making a claim.
13. People who receive a frank psychological injury and those who already have a diagnosis of a mental illness may be eligible for compensation where work has made their illness worse. These types of claims can be quite complex. For more information see our article Comcare and Psychological Injuries.

Tips for workers

We see many workers who have made Comcare claims. Some have done well while others, inadvertently, have dug themselves into a hole. Here are a few tips from our experience to those contemplating a claim:

1. Comcare is a **no fault system**, so you don't need to show that your workplace did something wrong. They may have, but trying to show that work did something wrong may only provide Comcare with more opportunities to deny your claim.
2. **Show that your work caused your injury**. If something other than work has impacted on your injury, you must be honest. However, make sure you do not overstate the impact of a non-work event.
3. **Be careful what you put in writing**, especially with psychological injury claims. See our article Comcare and Psychological Injuries for more information.
4. Make a very good record as soon as possible about what happened when you were injured.

Specialist Comcare Lawyers

Comcare claims are different to other workers compensation claims. This is not just because it involves a different piece of legislation. As Comcare is a government body, their decisions come under a branch of law call 'administrative law'. This differs from ACT and NSW workers compensation systems where decisions are made by private insurance companies. Therefore **you need lawyers with knowledge and experience in administrative law**. We understand administrative decision making and use this to seek remedies for our clients where:

- Comcare has failed to take into account relevant information when making a decision
- Comcare takes into account irrelevant information when making a decision
- Comcare makes a decision which is not based on evidence
- Comcare incorrectly applies law when making a decision
- Comcare makes a decision which is not the correct or preferable decision
- Comcare fails to make a decision when they are required to

We understand the impact a workplace injury has on your life: physically, emotionally, and financially. Matt Bridger's experience enables him to provide expert and timely advice to

assist injured workers. He is assisted on Comcare matters by Tom Maling, who trained as a Registered Nurse and has worked in the ACT Government. Tom uses his health knowledge to understand your injury experience and government experience gives him particular insight on administrative law issues.

How can you protect your business from bullying, harassment and discrimination claims?

Posted onAuthorMatthew Bridger

It should be standard practice for all business, big or small, to have policies in place that deal with workplace discrimination, harassment and bullying. If you do not have such policies in place, it could expose your business to possible claims of discriminatory, bullying and harassing behaviours.

By not managing accordingly the risks, or the possible risks, caused by the workplace discrimination, harassment and bullying, it could give raise to a number of possible claims:

- Your business being liable for the conduct or actions of your employees while employed, or in connection with their employment. That represents vicarious liability.
- In such situations, an employer could be relying on 'all reasonable steps' defence in relation to such a claim. However, the 'all reasonable steps' defence is not defined in the legislation and it applies to employers in different ways depending on the size of the business, number of employees, number of offices, nature of work and other characteristics that may be relevant.
- The perpetrators could be personally liable for their actions even though such actions were taken while at work or in connections with their employment.
- Both you and the employee could be held jointly liable for the actions or behaviors that could amount to discrimination, harassment or bullying.

You can protect your business by implementing and adopting risk management policies. Preventing possible claims from occurring should be done through current and complete policies. Such policies should provide the tools needed by your business (or your HR department) to manage any claims and if possible to prevent them from being referred to external government agencies like anti-discrimination commissions or tribunals.

- As a minimal way of protecting your business, you should consider the following:
- To provide copies of relevant policies to all new employees upon commencement of employment
- To review the policies on regular basis so they reflect any changes in legislation
- To make employees aware of any updates and changes to their policies within a reasonable period of time
- To conduct formal or informal training sessions in relation to discrimination, bullying and harassment
- To make it clear that treating a fellow employee in a discriminatory or harassing way is against the law

- The policies should discuss breaches that could occur through social media even though the social media platform is accessed and used during employee's private time or from employee's personal device (i.e. a mobile phone during a lunch break)
- The policies to identify the relevant acts that deal with such behaviour.

If you would like advice on drafting, reviewing or implementing policies on bullying, harassment or discrimination in your business contact Matthew Bridger:

elringtons health law update – adverse effects from Implanon and Mirena

Posted onAuthorTom Maling

By Tom Maling

A 12 December 2017 ABC investigation report has exposed that Australian women are experiencing serious side effects from the long-acting contraceptive devices **Implanon** and **Mirena**.

The ABC report detailed that Australian women have experienced **chronic pain**, **pelvic inflammatory disease**, **scarring**, **unintended pregnancies** and **depression** following insertion of these devices.

The report is the latest to put a spotlight on a medical device for women that has been found to cause serious side effects. Another well-known example is the **pelvic mesh** device. Another, perhaps lesser known, is the **Essure** device. Earlier in 2017 elringtons lawyers wrote about the side effects that some women experienced after insertion of the **Essure** permanent contraception implant device (see elringtons health law update – hazard alert for Essure contraception implant device).

It goes without saying, if you think you have experienced a side effect from an Implanon or Mirena advice, you should **seek medical help immediately**. For those who have experienced additional costs as a result of a side effect such payment for extra treatment, time off work or even pain and suffering, **compensation may be available**. A **medical negligence** claim can help put you back to where you would have been without the side effect (as much as money can).

We have put together a range of articles to help health consumers understand their rights and remedies following negligent treatment. We hope the following help you understand more about your rights:

- Elringtons Medical Negligence homepage
- What is medical negligence?
- Medications and Medical Negligence
- Consenting to Health and Medical Treatment

Please feel free to contact Tom Maling for further information or to discuss your circumstances.

Further information:

- ABC article Spotlight on Mirena and Implanon
- Elringtons health law update – hazard alert for Essure contraception implant device

Hospital Complications and Medical Negligence

Posted onAuthorTom Maling

By Tom Maling

According to new research from the Grattan Institute, almost 11% of all people hospitalised have a complication while in hospital. This equated to approximately 74,000 people in January 2015, a staggering number. While not all complications (thankfully) will have lasting consequences for patients, in our experience some do.

A **medical negligence** claim can help pay for the cost of picking up the pieces after a hospital complication, such as **paying for further treatment**, **covering loss of wages** and **compensating your pain and suffering**.

Hospital Complications

Hospital/Medical Negligence
Preventing Hospital Complications

elringtons health and medical law

elringtons has represented people injured by hospital complications in medical negligence claims for many years. We are different from other law firms because we have:

- Inside knowledge about the health industry;
- University acquired knowledge about injuries and disease;
- An understanding of how healthcare should be provided; and
- **A proud history of success for clients in the Canberra, Queanbeyan and South East NSW regions**.

We understand the impact of negligence on our clients. We use this knowledge to build a rapport with you, to work with you, and to help you obtain **compensation** for your injuries. Matt Bridger and Tom Maling represent clients in medical negligence claims. We act for Canberra and the surrounding regions including NSW residents from Queanbeyan, Batemans Bay, Goulburn, Yass, Cooma, Bega and Merimbula areas, in both ACT and NSW claims. Matt is an **Accredited Specialist in Personal Injury Law** and has over 25 years of experience representing people in medical negligence matters, including small claims right up to multimillion dollar catastrophic injury claims. He has great medical knowledge across a whole range of areas and has conducted cases in general surgical, birth and obstetrics, dental, orthopaedics, pharmacological and cardiology negligence. Tom completed training as a Registered Nurse and has experience in hospitals and nursing homes. He also represents our clients on all medical negligence and treatment dispute claims. Our experience means we have insight into health issues, health service delivery, and most importantly our client's experiences.

Please contact Tom Maling for further information:

p: +61 2 6206 1300 | e: TWM@elringtons.com.au

Further elringtons articles

- Medical Negligence homepage
- What is medical negligence?
- elringtons lawyers secures $12 million settlement for client
- Epilepsy and Bipolar Disorder medications linked to birth defects

- Do Country Hospitals Have the Same Duty of Care as City Hospitals?
- Medications and medical negligence
- What Duty of Care Does a Nursing Home Have?
- Consenting to Health and Medical Treatment

Other Resources

- Grattan Institute study
- AIHW hospital data
- Harvard University

CategoriesHealth Law, Litigation and Dispute Resolution, Medical Negligence, News & EventsTagsLitigation and Dispute Resolution, Medical Negligence

Family Court consent no longer required for treatment of Gender Dysphoria in Children

Posted onAuthorAnya Aidman

By Anya Aidman

In the judgment of *Re Kelvin* delivered in November 2017, the Full Court of the Family Court held that it was no longer necessary to apply to the Family Court for a determination of whether a child is 'Gillick' competent where Stage 2 treatment of a child for Gender Dysphoria is proposed if:

- The child consents to the treatment;
- The treating medical practitioners agree that the child is Gillick competent to give that consent; and
- The parents of the child do not object to the treatment.

'Gender dysphoria' is a formal diagnosis used by clinicians with respect to children who express a sustained period of discontent regarding their biological sex, assigned gender or both. For a child experiencing Gender Dysphoria, he or she may feel more comfortable dressing as the opposite gender or having a different pronoun used by their parents, friends and school. For the children with Gender Dysphoria and are lucky enough to have the support and understanding of their parents or carers, eventually a child and their support team may seek medical assistance with respect to bringing into line their physical characteristics with their experienced gender identity.

There are 3 stages of medical involvement that can be engaged, as follows:

1. Stage one treatment involved certain hormone blocking drugs known as 'puberty blockers' which can delay development of certain secondary sexual characteristics. Stage one treatments are generally reversible or could be discontinued without significant long term effect on a child.
2. Stage two treatment involves the administration of testosterone or estrogen to a child which can significantly alter their physical development. Stage two treatment is not reversible and may not be able to be discontinued without some long term effects on the child, depending on the volume and duration of treatment administered.
3. Stage three treatment involves surgical intervention such as removal of breasts or the creation or augmentation of sexual organs.

The above treatments have the potential to have a serious and far reaching impact on a child's life. They are not, in our experience, undertaken lightly by children, their parents, or their medical practitioners. It was confirmed by the Courts in 2003 that the Court's consent

was *not* required for Stage 1 treatment. However, an Application to the Court was required for Stage 2 and Stage 3 treatment until November 2017.
The November 2017 Family Court ruling means that an application to the Court to determine whether the child was capable of giving informed consent (known as a finding about '*Gillick* competence') no longer needs to be brought for Stage 2 treatment if the other conditions mentioned above are met.
When children and their supporting loved ones are faced with important decisions such as Gender Dysphoria treatment and transition it is important that you obtain comprehensive medical and legal advice.
If you want to discuss your matter further you can contact Anya Aidman, one of our experienced family law solicitors.
e: **aaidman@elringtons.com.au** | p: 02 6206 1300
CategoriesFamily Law, News & Events, Parenting DisputesTagsFamily Law

Elder Abuse – A Confluence of Rights and Responsibilities

Posted onAuthorKerin Cotchett
In July 2017, the Australian Law Reform Commission released a report into the prevalence of "elder abuse" in Australian society. Elder abuse is defined by the World Health Organisation as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.

The increase in instances of elder abuse in Australia is understood to result from overlapping socio-economic factors including a crisis in housing affordability, rising costs-of-living and increased longevity. In the ACT, approximately 6% of persons surveyed had suffered elder abuse (ACT Elder Abuse Prevention Program Policy June 2012) and according to research presented by the Australian National University this figure has not dropped in the past five years.[i]
The Law Commission's report makes a number of recommendations to address the problem of elder abuse, such as:

- Establishing new laws and modifying existing legislation (e.g. the Aged Care Act 1997 Cth and Crimes Act 1900 NSW) and to allow provision for new serious incident response scheme and new adult safeguarding laws for 'at risk adults' in each state and territory
- Implementing stronger safeguards against the misapplication of Appointments of Power of Attorney and Enduring Guardianships
- Establishing an online register of Power of Attorney and Enduring Guardianships documents that is accessible Australia-wide

It is very important to ensure that your Power of Attorney and Enduring Guardianship documentation is reviewed regularly and updated if necessary to ensure that it is in line with your most recent wishes and that it accords with any changes to the law.
Here at **elringtons** we can assist people in addressing some of the problems associated with elder abuse at an individual and community level. By providing legal advice and assistance in understanding yours and your loved one's rights and responsibilities in relation to estate planning, nursing home accommodation and the role of the law in family relationships and agreements, together we are becoming part of the solution.

If you have questions about Estate Planning matters (your Will and Superannuation, your Appointment of Power of Attorney and Enduring Guardianships), yours or your family member's nursing-home accommodation, or other matters relating to the care and wellbeing of elders, please contact one of our experienced practitioners today.

e: info@elringtons.com.au | p: +61 6206 1300

Further Information:

If you need further information about elder abuse call the NSW Elder Abuse Hotline and Resource Unit on 1800 628 221 (free call) or visit the **NSW Website** now:

In the ACT please call the **Older Persons Abuse Prevention Referral Line 6205 3535 or go to the ACT Community Services website**

For more information about see the **ACT Elder Abuse Program Policy.**

References:

World Health Organisation Elder Abuse,
ACT Elder Abuse Prevention Program Policy, (June 2012),
Aged Care Act 1997 (Cth)
Australian Law Reform Commission report on Elder Abuse (3 July 2017)
Families being torn apart with Gen Y relying on inheritance cash to buy a home (20 August 2017)
Financial abuse of elderly parents on the rise as housing becomes more unaffordable (27 August 2017)
https://www.domain.com.au/news/financial-abuse-of-elderly-parents-on-the-rise-as-housing-becomes-more-unaffordable-20170827-gy33zq/ (27 August 2017)
[i] The signs of elder abuse you could be missing

Categories News & Events, Wills & Estate Planning Tags Enduring Guardianship, Power of Attorney, Wills and Estates

NSW Workers Compensation

Posted on Author Tom Maling

The NSW workers compensation scheme is complex. However, there is a legal aid type scheme to help injured workers in NSW obtain legal assistance, in order to understand their rights and entitlements. **This means you do not pay legal fees**. The scheme is administered by the Workers Compensation Independent Review Office (WIRO). We routinely obtain funding from WIRO to represent NSW workers compensation clients to:

- Investigate claims for **weekly benefits**, **medical treatment** or **permanent impairment**;
- Dispute insurer decisions where **liability is denied**, **treatment is declined** or where **entitlements are ceased**; and
- Commence proceedings at the NSW Workers Compensation Commission.

Obtaining Legal Assistance

WIRO funding covers your legal fees as well as things such as expert reports and clinical records. In order to access this funding, simply contact us to book an initial consultation. In that consultation, we will discuss important facts such as:

- When you were injured and how.
- Whether you have already made a workers compensation claim in relation to your injury, and if so, what was the outcome.
- What assistance you require.

Once we have identified the nature of your claim, and providing we consider you have some prospects of success, we make an application on your behalf to WIRO. The aim of the scheme is to **ensure all NSW workers are fully appraised of their rights and entitlements** following a workplace injury.

Entitlements

An injured worker may be eligible for all or some of the following payments:

- Weekly benefits
- Medical or related treatment
- Occupational rehabilitation services
- Travel expenses to attend appointments for medical and other treatment
- Lump sums for permanent impairment
- Damages under general law
- When the injury results in the death of the worker, the dependent family members may be eligible for death benefits and/or funeral expenses

elringtons can help you

Because of the legal aid type scheme for injured works in NSW, it will cost you nothing to speak to us. We have represented clients to:

- Establish liability for injuries;
- Dispute denial of medical treatment;
- Dispute cessation of weekly benefits;
- Obtain expert opinions about injuries;
- Obtain permanent impairment assessments; and
- Obtain lump sum compensation following a death of a family member.

We understand the impact a workplace injury has on your life: physically, emotionally, and financially. We use this knowledge to build rapport with our client. Matthew Bridger and Tom Maling represent clients in NSW workers compensation matter.

Matt Bridger is an accredited personal injury specialist by the NSW Law Society. He has over 25 years' experience helping injured NSW workers. His experience enables him to provide expert and timely advice to assist injured workers. Tom Maling, who trained as a Registered Nurse and uses his health knowledge to understand your injury experience and advocate on your behalf. Tom also has a particular interest in working with client's who have received a psychological injury at work.

Please do not hesitate to contact Matt Bridger or Tom Maling to discuss your circumstances.

p: +61 2 6206 1300 | e: Info@elringtons.com.au

Further Reading

- Workplace psychological injuries

Categories Litigation and Dispute Resolution, Personal injury Tags Injury, Litigation and Dispute Resolution

Can you legally adopt someone who is over 18?

Posted onAuthorCarlos Turini

Adoption is usually associated with young children, but it is also possible for adults to be adopted. Often, this is the case in particular relationships, such as step parent and children, who wish to legally acknowledge, or formalise an existing familial relationship.

In ACT and NSW, you can be adopted by an individual, or a couple, if you are over 18, providing your circumstances fit the legal requirements.

ACT requirements for adoption

The *Adoption Act 1993* in the ACT requires that applicant parent/s must ordinarily be an ACT resident and that the person to be adopted must be present in the ACT. It is also necessary that the applicant parent/s has brought up, maintained and educated the person. The adoption can still occur, even if the person has previously been adopted in the ACT or elsewhere. The Court requires that the applicant parent/s is reputable and that both parties properly consent to the adoption.

NSW requirements for adoption

In NSW, the *Adoption Act 2000* requires that the person to be adopted must have been cared for, prior to turning 18, by the applicant parent/s. The Act requires both the applicant/s and the person to be in the state of NSW, at least for 3 months immediately before the application is filed. The Court is generally concerned with protecting the best interests of the child and that this will be encouraged from the adoption – but how does this apply when it is an adult being adopted? The answer is, if both the applicant parent/s and the person being adopted

consent, the person being adopted is capable and an application supports the best interests of the person to be adopted.
After a successful application, a new birth certificate can be issued to show the newly adopted parent/s.

When can an adult *not* be adopted?
In order to adopt, your circumstances must fit the legal requirements. For example, in the ACT, someone may not be adopted if the Court believes it is primarily for the purpose of evading Australia's immigration laws. Another reason why the Court might not approve an application in the ACT is if there are concerns regarding consent of the parties; that is consent being fraudulent, improper or obtained under duress. In NSW, an application may be rejected if the relationship does not fit the required criteria, such as if the person was over 18 when they began to be cared for, or if they were never cared for, by the applicant parent/s.

For more information on adoption in ACT or NSW, or to make an appointment to discuss any queries, please do not hesitate to contact our Family Law Team.
p: (02) 6206 1300 | e: cturini@elringtons.com.au
Categories Adoption, Family Law, News & Events Tags Adoption

Minor Wills – Do you have to be over 18 to make a will?

Posted on Author Kerin Cotchett
As well as being "of sound mind" or having testamentary capacity to make a Will, a will-maker (also known as a "testator") must also be an adult. That means your teenager's threat of disinheritance scribbled on a napkin will not be legally binding – phew! But what if you do want to make a Will for a young person?
In special circumstances, a person under the age of eighteen years may be permitted to make a legally enforceable Will. For example, the child may have inherited a large sum of money from a relative, or, the child may have received a personal injury payment.

Legally, the only way to make a Will for a person under the age of eighteen years is to make an application to the Supreme Court under the Succession Act 2006 (NSW).[1] The requirements for making an application to the Supreme Court for a minor Will include:-

1. The will-maker must be under 18 years of age and represented by a legal guardian;
2. The minor will-maker must understand the nature and effect of the proposed Will;
3. There must be reasonable circumstances that would permit the Court to make an order allowing the minor to make a Will, such as:

(a) It would not be appropriate, if the minor was to die without a Will, for their estate to be distributed to those entitled under the usual intestacy laws (e.g. where there is no Will the estate will go to the spouse or children of the deceased first, then to the parents, then siblings, then grandparents, then other relatives); or

(b) There are no living relatives.

4. Those parties affected by the application must be served with notice of the application (i.e. anyone excluded in the minor will-maker's proposed Will who would be entitled to the minor's estate under the intestacy rules must be made aware of the application)

It is also possible for the ACT and NSW Supreme Courts to permit a Will to be made for a minor who does not have testamentary capacity.[2]

If you believe you or a young person under your care requires a Will, **elringtons**, with its team of dedicated lawyers, is here to assist. Please contact one of our friendly solicitors on 02 6206 1300 or info@elringtons.com.au to discuss at your convenience.

---

[1] Section 16 Succession Act 2006 (NSW)

[2] Section 16A Wills Act 1968 (ACT) and Section 18 Succession Act 2006 (NSW)

CategoriesNews & Events, Wills & Estate PlanningTagsWills and Estates

Is it legal to employ only non-smoker workers? What employee attributes are protected under law?

Posted onAuthorMatthew Bridger

An ABC News article on 15 March 2018 highlighted that employers, across a broad range of areas, are advertising specifically for non-smoker employees. While this may appear to be discriminatory, it is not unlawful employment discrimination under Australian laws.

In Australia, anti-discrimination laws protect employees (or prospective employees) against discrimination on the grounds of certain attributes. Smoking is not specifically covered by these laws, so it is not something that an employee is protected against.

What are protected attributes? When is an employer unlawfully discriminating?

Australian anti-discrimination laws differ slightly in each state, but generally, an employee is protected against discrimination on the basis of the following:

- Age, sex or race
- Sexual orientation, gender identity
- Disability (physical or mental)
- Marital status, family or carer responsibilities
- Pregnancy or breastfeeding
- Religion or political opinion

The above attributes protect you from being discriminated against in the recruitment process or during your employment. During employment includes discrimination in consideration of the terms offered as part of your contract, training in your job, a promotion of transfer or dismissed from your job. If your employer threatens or takes any of the following actions against you because of the above attributes, it is considered unlawful discrimination:

- Refuses to employ you
- Dismisses or fires you

- Alters your position in a disadvantageous way
- Discriminates between you and another employee

What is not protected? When is an employer *not* unlawfully discriminating?

There are certain attributes that are not protected, meaning it is not necessarily unlawful to discriminate against an employee, such as in the non-smoker employees example above. If your position has been changed in a way that you feel disadvantages you, but it was due to something such as poor performance, it is not unlawful. Employers may also advertise for applicants with certain attributes, qualification or skills that are an essential requirement for the job. For example, if driving is involved in a job, then the employer can lawfully only consider people with a driver's licence for the position.

Please feel free to contact our **Litigation and Dispute Resolution** team if you think you have been discriminated against at work or wish to discuss any concerns.

Further information:

When is employment discrimination lawful?

How can you protect your business from bullying, harassment and discrimination claims?

e: info@elringtons.com.au | p: +61 2 6206 1300

CategoriesEmployment law, Litigation and Dispute Resolution, News & EventsTagsEmployment, Litigation and Dispute Resolution

TGA warnings on sleeping tablet Belsomra

Posted onAuthorTom Maling

On 20 March 2018 the Therapeutic Goods Administration (TGA) released a warning about prescribing practices of Belsomra (also known as Suvorexant). The TGA stated:

Since registration, the TGA has received a number of reports of adverse events, including sleep paralysis, gait disturbance, hallucination, headache and paraesthesia.
These potential side effects, including next day residual effects, are well communicated in the Product Information, but it is important for patients to be warned of these potential adverse events before they are prescribed suvorexant.

The concern is not the action of the drug, but the warnings (or lack of) given by doctors to patients. As we discuss in our article Medications and Medical Negligence **doctors have a duty to warn you about side effects.** Only after receiving warnings about side effects can a person make an informed decision about whether or not to take a medication.

The risks the TGA reported on can be very severe, particularly if they occur while someone is driving or at work. **This latest TGA warning highlights the importance of asking your doctor about risks and side-effects of medications**. Our advice in our article Hospital Complications and Negligence rings true with prescriptions of Belsomra, or any other medications. In that article we stated:

"*In 2018 the Harvard University recommended 7 questions to ask a doctor when they prescribe a new medication. These are:*

1. *Why do I need this medication, and how does it work?*
2. *What are the risks and benefits?*
3. *Are there side effects?*

4. *How do I take this medication?*
5. *Do I need to avoid anything while taking this new medication?*
6. *How soon will the medication work, and how long will I be taking it?*
7. *When will you review how well this is working for me?*

These are good questions for patients to ask doctors and other health practitioners who administer treatment in hospital. ***Be an informed patient****.* ***It is your body and you have a right to ask about your treatment.*** *In doing so, you may prevent a hospital complication, like being administered the wrong medication, from happening.*"

If you have taken Belsomra, or any other medication, and experienced a side effect or adverse reaction that you were not warned about, you may have a medical negligence claim. For more information see our Medical Negligence homepage or contact us to talk to Matthew Bridger or Tom Maling.

Further resource

- TGA warning

CategoriesHealth Law, Health Law Updates, News & Events

Prisoners and Health Care: Your Rights in the ACT

Posted onAuthorGabby Bridger

A large part of being in prison is being deprived of certain liberties. Despite this, it is important to know that even though your liberties are restricted, you are still entitled to your human rights. Your right to health and proper health care and treatment is protected while you are in prison and you are entitled to the same medical treatment that you would reasonably receive out of prison.

Unfortunately, violations of rights to occur in Australian prisons, including in the ACT. If you believe a family member, friend, or your own right to health has been violated whilst in prison, we can provide you with assistance. Substandard health care is not acceptable.

In the ACT, what are your health related rights in prison?

In the ACT, there are different pieces of legislation that govern your rights in relation to health.

The *Corrections Management Act 2007* regulates correctional facilities (this includes prison) in the ACT. All correctional facilities are under an obligation to comply with this act. If you are in detention in the ACT, the facility must:

- Respect and protect your rights;
- Ensure you are treated humanely and with decency;
- Ensure you are not exposed to punishment (in addition to being detained)
- Ensure your living conditions meet the minimum standards, including having access to suitable health services and facilities.

The *Corrections Management Act* also lists rights you have that are exclusively related to your health;

- In prison, you must receive a standard of care that is the same as what is available to other people in the ACT;
- Arrangements must be made to ensure you receive appropriate health services;

- Your health and wellbeing must be supported by the prison conditions;
- You must have access to regular health checks, hospital care if necessary, quick treatment if necessary and specialist health services as far as possible;
- You may be transferred to an appropriate health facility (this is covered further in this article).

The ACT has the *Human Rights Act 2004*, which is something not all states have. This Act recognises the vulnerability of detainees, who are deprived of certain liberties, and ensures that prisoners are not exposed to further hardship or limitations while in prison. You should be treated humanely and respectfully. Refusing medical attention or failing to address deteriorating health is a violation of this.

You also are entitled to universal human rights, such as those under the *Universal Declaration of Human Rights* which allow an appropriate standard of living for adequate health and wellbeing. This includes medical care.

Where do health related human rights abuses in prison happen?

Unfortunately, the violation of health rights does occasionally occur in Australia. We have sadly seen neglect and even cases of death in custody, due to appropriate care not being given. Unfortunately, even with the above legislation in place, the ACT has seen instances of human rights abuses in relation to health.

At **elringtons**, we have seen situations where a detainee's requests have been denied and the individual has consequently suffered, due to appropriate health care not being provided. Receiving medical care in a timely manner is also a right, meaning that in circumstances where treatment is received but it is too late, it may be a violation of health right

---

In prison, are you entitled to a second opinion or different medical treatment?

In prison, you do not have the same ease and freedom as those out of prison to seek a second opinion or different medical treatment if you have concerns regarding your initial treatment. Communication difficulties are also faced. Additionally, your access to Medicare entitlements are revoked, so with no access to the Medicare system, you are largely at the mercy of the prison and its own health facility.

In the ACT, some medical circumstances, when required, allow you to be transferred to a health facility inside, or outside the prison. If you are to be transferred, an officer can be appointed to escort you to, from or at the health facility. **If your medical condition is worsened due to not receiving appropriate or timely treatment (or further treatment you have requested), there is a likelihood that your rights have been breached.**

Are there any remedies available if your health rights have been violated?

There are currently no reported cases in the ACT of human rights, relating to health, being violated. A large reason for this may be that there is no concrete legal remedy, or damages available if your rights have been violated under the *Human Rights Act 2004*. According to this piece of legislation, the Supreme Court may grant relief it considers to be appropriate, but this excludes being awarded damages. So what is the point?

Simply arguing the principle, with no damages or monetary remedy is not appealing enough for many people to make a claim. **However, if your health rights have been violated under the *Human Rights Act*, then there may be a claim for negligence**. This is because a prison owes a duty of care to inmates, and if the duty is breached and you have received an injury, a

claim in negligence may be made. Negligence claims are run for the purpose of obtaining **compensation** for those injured by the negligence.

What do you do if you think your right to health, or a friend or family member's rights have been abused?
If you are concerned about the health rights of a friend or family member who is in prison, there are options available to you. Similarly, there are options if you believe your own health rights have been violated whilst in prison.

The ACT Human Rights Commission is an organisation that promotes human rights in the ACT that provides a service for a range of complaints. You can contact the Human Rights Commission and make a complaint. Alternatively, **elringtons** can offer legal advice and provide you with a range of options, such as the remedies listed above.

Chemical Restraints in Nursing Homes

Posted onAuthorTom Maling

Nursing home abuse – Medications administered without consent are an assault

People with dementia are being administered medications to control their behaviour, but many may have been victim of an assault because consent was not first obtained.
A report by the *Australian Aging Agenda* on 21 March 2018 highlighted the issue of prescribing medications to people with dementia in order to control behavior. The dangers of prescribing antipsychotic medication have been known for numerous years. The *Australian Aging Agenda* report highlights that while rates of antipsychotic medication prescription have decreased, behaviours are still sought to be controlled by other medications.
Leaving aside whether or not the prescription is appropriate, **the issue of prescribing medications to people with dementia in nursing homes to control their behaviour raises a fundamental issue: is there consent to administer the medication? If not, then an assault has occurred and this may attract criminal and civil consequences.**
What did the article say?

ABC Law Report program
Every person has the right to choose or refuse medical treatment
What about a person with dementia?
Giving medical treatment to someone without decision making capacity
People in nursing homes are not subject to the same protections
No consent = assault = compensation
What is needed for a claim?
How much might a claim be worth?
There have been no reported cases in this area, so it is difficult to anticipate how Courts and Tribunals will respond to claims on this serious issue. Contact us to speak with Matthew

Bridger or Tom Maling to arrange a free initial appointment in order to identify get further information about what a claim may be worth.

Public interest litigation
Claims need to be brought to make nursing homes accountable for breaches of a fundamental right to bodily integrity. In addition to this, claims can raise the awareness of this issue which will hopefully lead to better laws to protect older Australians. **The ABC Law Report program heard that a class action in Ventura County in the US was successfully brought by residents** who were given antipsychotic medications without their consent. The ABC heard that this had a knock-on effect to nursing homes in the surrounding areas by causing an improvement their administration practices for antipsychotic medications.
Elringtons sent two solicitors to the 2018 National Elder Abuse Conference in Sydney. We are specialists in health and medical law. We know that we have an important role in protecting the rights of older Australians. **Contact Matthew Bridger or Tom Maling to discuss your circumstances to see how we can help**.

Elder Abuse: Together making change

Posted onAuthorKerin Cotchett

There are a number of reasons why the subject of elder abuse is gaining more traction with politicians and getting more coverage in the media at the moment. No doubt two of the main reasons Australians are beginning to take notice of this growing problem are: (a) Australia's ageing population means that more and more old people (with more and more wealth) are at risk of abuse; and (b) the legal and social policy gaps in targeting this growing issue are becoming more and more obvious and difficult to ignore.

When I was given the opportunity to attend the 'National Elder Abuse Conference 2018: Together Making Change' I was thrilled for the opportunity, given that the majority of my clients are over the age of 65.

A few of the key *legal* issues in recognising and addressing elder abuse in a solicitor's day-to-day legal practice include:

1. Assessing Capacity
2. Considering Undue Influence
3. Ruling out Conflict of Interest

Any one or all of these potential issues (and more) might arise when faced with taking instructions from clients, often presented by their children, wanting to make Wills or Enduring documents (Power of Attorney and Appointment of Enduring Guardianship).

Estate planning lawyers are obligated to ensure our clients have the mental capacity to give instructions to make a Will or Enduring documents ("testamentary capacity"). [1] In addition, we are encouraged to consider undue influence (even if just to dismiss it).[2] Finally, it is important for us, as it is with any lawyer, to always assess "Who do I represent?" in order to avoid acting in conflict with our client's best interests.[3]

The National Elder Abuse Conference 2018 was comprised predominantly of short presentations and panel discussions about current issues and was geared largely towards social and economic policy development. The main *legal* focus of the conference was on those legislative reforms needed to reduce the occurrence of elder abuse and to better address and punish instances of it when it occurs. Two areas of legislative reform of particular relevance and interest to practising solicitors are:

1. Establishing a National register of Enduring documents; and
2. Criminal law responses to financial and other types of elder abuse.

National Register of Enduring Documents

The idea of a national register for Enduring Documents is one that has been around for some time,[4] and is finally gaining momentum in the legal context. For example, in June 2017 the Australian Law Reform Commission recommended that there should be a three-step process, whereby the enduring appointments made by residents of all Australian states and territories become unified under the following:

1. An agreement on nationally consistent laws governing personally appointed substitute decision makers;
2. A consistent national model of enduring documents; and
3. A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators.[5]

In recent times there has been a strong push from the banking sector, academics and elder rights groups for the establishment of a nation-wide electronic database recording all existing Power of Attorney documents.[6] While it is possible that the changes, once implemented, may mean an increase in administrative tasks for staff in the banking industry, health-care workers and private practitioners, there is no doubt that all Australians would benefit from more effective regulation and policing of the use and abuse of power of attorney documents.

Policing Financial and other Forms of Elder Abuse

During the 2018 Conference The 'Elder Abuse and Policing: What is Best Practice?' Panel invited high-status members of the NSW and Victorian Police force and key community groups to discuss their current practices and limitations in their responses when faced with situations where they suspect abuse of an elderly person.[7] The panel gave a number of examples of elder abuse including situations of neglect, instances of children or carers misusing power of attorney appointments, and other behaviours that fall within a broader definition of abuse than that currently prohibited or protected against under the current criminal law.

In its recent report on elder abuse the Australian Law Reform Commission stated:

In all Australian jurisdictions, there are offences that broadly relate to fraud, deceptive conduct, stealing and other property related offences. In certain circumstances, some of these may be applicable to cases of financial abuse of older people, including in respect of abuse of powers of attorney. In Victoria and Queensland there are a range of offences specifically relating to powers of attorney. The ALRC is unaware of any prosecutions under these provisions. [8]

At the end of the 'Policing: Best Practice' discussion the floor was opened for questions and Queensland Principal Solicitor Brian Heard asked: "Do you think the current level of data and the current legislation does enough to criminalise and target and address the problem of financial elder abuse?" NSW Detective Superintendent Robert Critchlow provided a very eloquent and honest answer (to paraphrase: "No and no") and pointed to the work of one Rodney Lewis, Solicitor.[9] Lewis has had a significant impact in the area of elder law, stating:

Even allowing for the ALRC recommendations there will remain gaps into which victims of elder abuse will continue to fall. We need a coherent statute adopted by States and Territories in a cooperative legislation scheme, to provide a focal point for the victim, their

family, community and government support. It will include remedial and restorative justice measures which are affordable and mandatory when necessary for the perpetrator. Until we criminalise elder abuse in many of its forms, to address the just claims of our vulnerable elders, we cannot without significant legal risk and expense restore financial loss, let alone resolve the residual anguish, especially within the family.[10]
Practising in this area when those well-needed legislative and policy changes come through will be exciting. While it may still be some years away, hopefully following the 2018 conference we will see some positive progress from politicians and eventually the legislature. Elringtons will be at the forefront of addressing those changes when they finally come through.

For more information please contact:
Our Wills and Estate Planning planning team:
p: +61 2 62061300 | e: info@elringtons.com.au

---

[1] Regarding the traditional test for determining testamentary capacity, see *Banks v Goodfellow* (1870) LR 5 QB 549; For comments that legal professionals need to be aware of circumstances which give rise to issues of capacity assessment see *Legal Services Commissioner v Ford*, [2008] QLPT 12, Unreported, Fryberg J, 22 August 2008
[2] *Ryan v Dalton*; *estate of Ryan* [2017] NSWSC 1007 at 107 per Kunc J
[3] *Reilly v Reilly* [2017] NSWSC 1419
[4] Parliament of Australia, House of Representatives, 'Standing Committee on Legal and Constitutional Affairs Report Older people and the law', 2007, ISBN 978-0-642-79014-9 (HTML version) and Keast, Jackie, 'Lack of National Register Leaving Banks Unclear on Power of Attorney', Australian Ageing Agenda, July 24, 2015 https://www.australianageingagenda.com.au/2015/07/24/lack-of-national-register-leaving-banks-unclear-on-power-of-attorney/
[5] Recommendation 5-3, Chapter 5 'Enduring appointments', Australian Law Reform Commission, 'Elder Abuse, *A National Legal Response*, June 2017
[6] University of Western Sydney, Cognitive Decline Partnership Centre, Council on the Ageing (COTA) NSW, "NHMRC Partnership Centre On Dealing With Cognitive And Related Functional Decline In Older People (Cdpc) Final Report: The Policies And Practices Of Financial Institutions Around Substitute Decision Making", Annual Report 2014, https://sydney.edu.au/medicine/cdpc/documents/contact/2014-annual-report-summary.pdf
[7] Video available online at http://togethermakingchange.org.au/videos/ "Elder abuse and policing: what is best practice" (Brian's question is at 44mins)
[8] 'Criminal Justice Responses', ALRC Elder Abusereport 2017, p. 365
[9] Video available online at http://togethermakingchange.org.au/videos/ "Elder abuse and policing: what is best practice" (Brian's question is at approximately 44 mins)
[10] Lewis, R "Fill the gap in elder abuse responses with an Elder Justice Law", National Elder Abuse Conference 2018: Together Making Change, and "Elder Law in Australia", Launch, Parliament House, Sydney, NSW, 4 April 2012 http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bergin/bergin_20120404.pdf
CategoriesNews & Events, Wills & Estate PlanningTagsWills and Estates

Trusts and Increased Taxes in NSW

Posted onAuthorRod Anthes

by Rod Anthes

"You might be Australian but is your Trust a deemed foreign person?"

– If it is you may have to pay a lot more state tax than you thought.

Potentially, a foreign person is liable for **double stamp duty** at the time of purchase. In addition, the foreign person is then liable for **much more land tax** for each year that they own the property. There is no threshold value applied when the tax is calculated so it becomes higher than usual from the start. But then there is also a **surcharge payable annually**. This fluctuates but at the moment if a foreign owner owns residential property worth $1mil the current land tax bill is $36,000 per annum. A non- foreign owner (where it is not principal residence) would be liable for $6,500 per annum.

So who is a foreign person?

The definition of 'foreign person' is such that if **any** actual or **potential** beneficiary **of a trust** is a foreign person then **the trust is deemed to be a foreign person!**

If that trust owns property, land tax ($36,000 p.a. on a property worth $1mil) becomes payable each year.

You may be familiar with the wording in trusts which provides for almost **everybody ever** in a person's family to be a potential beneficiary-even if they are not yet born. A person is foreign if they are not:

- an Australian or New Zealand citizen;
- a permanent-resident;
- on a permanent (Spouse) Visa AND having spent more than 200 of 365 days overseas in the last 12 months.

This means that if one of the actual or potential beneficiaries marries or partners with a foreign person then the extra taxes are payable. For example; this may be a marriage by one of your grandchildren to a foreign person! Possibly even more remote.

Risks if foreign companies are beneficiaries

If a trust deed permits another trust or company to be a potential beneficiary, where that other trust or company is a foreign person under these rules then the **trust also becomes foreign**. Also if another company or trust (even if it is an unrelated third party) owns shares in a corporate beneficiary, then that corporate beneficiary could become a foreign person and then by extension the **trust could again be considered a foreign person**.

It doesn't take much for a company to be considered "foreign". Under these rules – 20% or more share ownership by one foreign shareholder, or a combined 40% or more ownership by multiple shareholders is **sufficient to render a company a foreign person** – and that is sufficient to render a discretionary trust to be a foreign person.

Of course if the trust is deemed to be foreign then the extra (double) stamp duty would also be payable when buying property.

The possibilities are very real and the consequences very expensive.

What can you do?
The risk can be overcome by a variation of the trust deed to exclude the possibility of a foreign person (as defined in the legislation) from ever being eligible to be a beneficiary of the trust.

If you think you need to vary your trust deed, get in touch with us. We will assess your situation and make a recommendation free of charge. If we advise that a variation to the trust deed is necessary, we will give you a clear indication of what it will cost before you are obligated.

p: +61 2 62061300 | e: ranthes@elringtons.com.au
Categories News & Events, Property Law Tags Conveyancing, Property Law

Elringtons Health Law Update: Adverse Effects of Contraceptive Implant Mirena

Posted on Author Tom Maling
We recently wrote about some serious side effects from contraceptive implants, Mirena and Implanon, which had initially been reported by the ABC.
Since then, there has been a case of a woman in QLD who suffered severe blood loss and can no longer have children, due to an issue with the Mirena implant. It is said the Mirena was incorrectly fitted and that this particular woman had a retroverted uterus, which increases the

chances of side effects for a woman who has such a contraceptive device implanted. The surgery found a massive tear to her uterus, which is aligned with the ABC's report that other uterus perforations have resulted from the Mirena.

In this particular case, the woman has said she was not warned of the risks, particularly regarding different uteruses, by her GP prior to having the device implanted. A doctor owes a duty of care to you when prescribing you the right treatment and when giving warnings about the side effects on a treatment. As we say in our article Medications and Medical Negligence:

"*A doctor's duty to warn about side effects extends to* ***a side effect which a reasonable person in the circumstances would think was significant****. This accounts for the severity of a side effect, how often it might occur, and a patient's particular circumstances.*

Take for example the drug sodium valproate (Epilim). It is known to carry a risk of birth defects if taken by women who are pregnant. A doctor should warn a woman trying to get pregnant, or who is pregnant and taking Epilim, of this risk. It is a serious risk. However, a doctor treating a female patient who chooses not to have children or is unable to have children, need not be warned of the risk, as that patient would attach no significance to it.

A ***person's particular circumstances*** *may require a doctor to warn about a side effect which they ordinarily would not be required to warn about. For example, a patient who only has vision in 1 eye would likely place more importance on a slight risk of harm to their vision than someone who has no sight impairment. Another example is where a person asks particular questions of their doctor about risks of harm and side effects.*"

The poor Queensland woman ought to have been warned about the potential side effects. While a doctor owes you a duty of care, one way to help prevent side effects from occurring is to inform yourself of the proposed treatment. We made recommendations in our article Hospital Complications and Negligence about the sort of questions you may ask:

"*In 2018 the Harvard University recommended 7 questions to ask a doctor when they prescribe a new medication. These are:*

- *Why do I need this medication, and how does it work?*
- *What are the risks and benefits?*
- *Are there side effects?*
- *How do I take this medication?*
- *Do I need to avoid anything while taking this new medication?*
- *How soon will the medication work, and how long will I be taking it?*
- *When will you review how well this is working for me?*"

These types of questions can help you know about the treatment and the risks and benefits of the treatment.

If you have a contraceptive implant and have experiences any side effects, you should seek immediate medical advice. If your side effects have led to further medical treatment, time off work, or other pain and suffering, compensation may be available to you. A medical negligence claim can seek damages to help compensate for and suffering experienced.

We have further information available to help you understand your rights and any remedies available to you following medical negligence:

- Elringtons Medical Negligence Information
- What is Medical Negligence?
- Medications and Medical Negligence

- Consenting to Health and Medical Treatment

Please feel free to contact our medical negligence team for further information or to discuss your circumstances.

For similar, or further information, see:

- ABC article on Implanon and Mirena
- 9News article on Mirena and QLD woman
- Elringtons health law update – adverse effects from Implanon and Mirena
- Elringtons health law update – hazard alert for Essure contraception implant device

CategoriesHealth Law, Health Law Updates, News & EventsTagsHealth and the Law

Volunteers and Vicarious Liability

Posted onAuthorKerin Cotchett

Are you a volunteer or an organisation that employs volunteers? Are you and/or your volunteers covered by adequate insurance? Have you considered the important exemptions to public liability protection under your relevant insurance policy? Do you need help deciphering what your insurance policy document means and where your organisation might not be covered?

Under the *Civil Liability Act 2002 (NSW) ("CLA")* if you have arranged for adequate insurance cover for your volunteers, and your volunteers are acting in the best interests of the organisation and not involved in any wrongdoing, they should be protected against any civil claims arising from acts or omissions by them or others during the course of their volunteer activities. This means that if your volunteer was acting within the bounds of their position description and through their own personal negligence caused a third party to injure

themselves, they will most likely be protected from personal liability for the accident *as long as the appropriate insurance cover has been arranged.*
It is important to note that the protection of volunteers from incurring personal liability for their acts or omissions during the course of their duties **does not apply** where:

- The volunteer was not acting in good faith ("good faith" = acting honestly and without fraud);
- The volunteer knew, or ought reasonably to have known, that he or she was acting outside the scope of the activities organised by the community organisation, or contrary to instructions given by the community organisation (section 64 *CLA*);
- The volunteer was engaged in an activity that constitutes a criminal offence (section 65 *CLA*);
- The volunteer's ability to exercise reasonable care and skill when doing the work was significantly impaired by alcohol or drugs voluntarily consumed (whether consumed for medication or not), and volunteer failed to exercise reasonable care and skill when doing the work (section 63 *CLA*);
- The volunteer was engaged in defamatory behaviour; or
- The volunteer incurred liability that would otherwise be covered by third-party insurance under the Motor Accidents Compensation Act 1999 (NSW), that is, a liability for compensation in respect of people who are injured or die as a result of transport accidents

In addition, in certain circumstances (whether a volunteer gains this protection or not) the community organisation may be liable for the volunteer under the legal doctrine of 'vicarious liability'.

If you are running any kind of volunteer organisation, it is important to outline very clearly to your volunteers their roles and responsibilities in instruction manuals and training guides. A written job description and/or volunteer policy document may also state what behaviours or actions are prohibited (for example, the giving of medical advice). These documents may help to define what kind of work or actions are authorised or instructed by the organisation and what volunteer actions might be considered to be outside the scope of their authority or contrary to instructions.

Please contact one of our friendly solicitors if you have any questions in relation to your organisation's insurance policy, legal structure, or if you require advice in relation to a claim against you or your organisation.

For more information please contact:

Health Industry Business Advice

Posted onAuthorShalini Sree
Our commercial team is experienced and equipped with industry knowledge and know-hows having worked closely with various private sector businesses in the healthcare industry.

We assist healthcare providers including among others, medical specialists, dentists, pharmacists, physiotherapists, with:

- Purchase of business
- Sale of business or business interest in a practice
- Pharmacy location rules
- Leasing and property law
- Business structures
- Partnerships
- Funding arrangements
- Franchising
- Regulatory issues

We are committed to finding commercial and practical solutions for our healthcare clients so that our clients may focus on what they do best.

If you would like to discuss your healthcare business query, you can speak to Shalini Sree who specialises in provision of business advice specific to the health and medical industry.
e: ssree@elringtons.com.au | p: +61 2 6206 1300

Assisted Reproductive Technologies and Surrogacy

Posted onAuthorAnya Aidman
Unhindered access to Assisted Reproductive Technologies (ART) in recent years has provided an enormous boost to loving families who have previously found it difficult to navigate the medico-legal restrictions on their decisions to expand their family.

For those entering the ART landscape, as donors, birth parents, surrogates or intended parents, understanding issues around parentage is critical. It is important that before embarking on your journey you obtain legal advice to ensure that you and your loved ones have clarity and comfort as you move forward.

At **elringtons**, our lawyers are expert in advising people on parenting and family law matters, as well as on ART and surrogacy laws.
Elringtons Resources
- Rainbow families: Part I
- Rainbow Families: Part II
- Surrogacy in the ACT
- Surrogacy Agreements and Parentage Orders
- Is a Surrogate a Parent of a Child?

If you would like to discuss your ART or surrogacy journey, you can speak to Anya Aidman, one of our senior solicitors specialising in ART and surrogacy law.
e: aaidman@elringtons.com.au | p: +61 2 6206 1300

Elringtons' submission to ACT Government Committee on End of Life Choices

Posted onAuthorTom Maling

Elringtons lawyers have made a detailed submission on voluntary assisted dying (euthanasia) laws in the ACT, being the only ACT law firm to make a submission.

The ACT Legislative Assembly formed a Committee to inquire into voluntary assisted dying laws in the ACT. **Elringtons has expertise in health and medical law**, and we are proud to share that we made a detailed (20 page) submission to the Committee. This was a substantial pro-bono project by our firm led by Thomas Maling. As members of the ACT Community as well as being Canberra's own specialist health and medical law firm, we wanted to make an important contribution to the community.

A copy of our submission is available on the Committee's webpage.

See also by elringtons

- Refusing medical treatment
- Consenting to treatment
- Elringtons Health and Medical Law

CategoriesHealth Law, News & EventsTagsAged Care

Medical Negligence Lawyers for South East NSW

Posted onAuthorTom Maling

Elringtons is the only South East NSW personal injury law firm specialising in health and medical law, particularly medical negligence claims.

Even though we're based in Queanbeyan and Canberra, **we travel to all areas of South East NSW to see our clients**, including:

- Bega
- Cooma
- Merimbula
- Eden
- Bombala
- Yass
- Goulburn

Medical Negligence Claims and other Health and Medical Law Claims

---

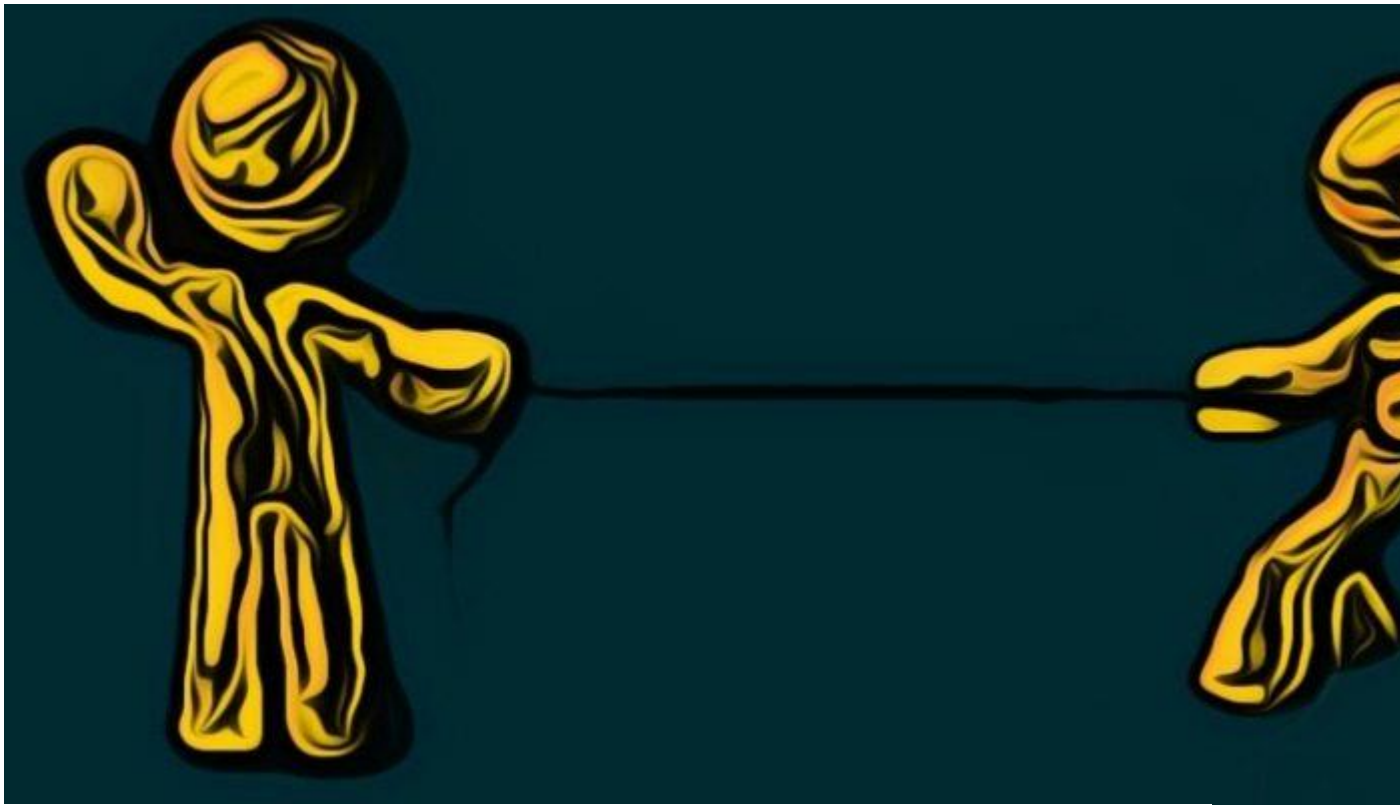
We're a part of your community
Rural Health Expertise
What is the point of a medical negligence claim?
Elringtons Resources
Our Team

For more information or to make an obligation free appointment, please do not hesitate to contact Matt Bridger or Tom Maling:
Other Elringtons Services

- NSW Workers Compensation
- Motor Vehicle Accidents

p: +61 2 6206 1300 | e: Info@elringtons.com.au

https://elringtons.com.au/2018/05/medical-negligence-lawyers-for-south-east-nsw/



Comcare Overpayment or Comcare Debt?

Posted onAuthorTom Maling

Just because Comcare has sent you a debt letter claiming for an overpayment does not necessarily mean you have been overpaid and owe them money.

Elringtons is looking for people who have been sent overpayment letters for a new type of Federal Court claim. **We want to help people** who, through no fault of their own, have been burdened with a debt claim by Comcare in unfair circumstances.

When can Comcare claim a debt for overpayment?

Compensation which should not have been paid
What are my options?
What can Elringtons do to help?
Unlawful Debt Claims by Comcare – Clients for Federal Court Proceedings

About Us

We are specialist Comcare Lawyers. We represent clients in a range of matters involving physical and psychological injuries. Matt Bridger and Tom Maling are our lawyers who work with clients in Comcare matter. For more information about us, please see our Comcare homepage.

For more information or to make an **obligation free appointment**, please do not hesitate to contact Matt Bridger or Tom Maling:

Other Elringtons Articles

- Canberra Comcare Lawyers
- Comcare and Psychological injuries

p: +61 2 6206 1300 | e: Info@elringtons.com.au

CategoriesArticles, Litigation and Dispute Resolution, News & Events, Personal injury

New privacy obligations – the data breach notification scheme

Posted onAuthorMatthew Bridger

Privacy and protection of personal information is riding high in the public eye after a number of high-profile breaches over the past six months. As consumers, it is important to have a good understanding of how your personal information is being handled and we rightfully expect that organisations will look after our personal information with due care. For

businesses, the requirement to protect personal information of your staff, clients and stakeholders is not just a social expectation – there are legal requirements in place to ensure you manage personal information safely and appropriately.

On 22 February 2018, the Notifiable Data Breaches (NDB) scheme came into force in Australia, bringing with it some new obligations for agencies and organisations subject to the *Privacy Act 1988* (Cth) and the Australian Privacy Principles (APPs). The scheme introduces an obligation to notify individuals and the Office of the Australian Information Commissioner (OAIC, the national privacy regulator) when a data breach occurs that carries a risk of serious harm. The notification should include guidance on how to reduce the potential harm of the breach.

Privacy refresh – what are the APPs?

The APPs are a framework of privacy obligations that apply to all Commonwealth government agencies, private sector, not-for-profit organisations with an annual turnover of more than $3 million, all private health service providers and some small businesses (collectively, 'APP entities').

The APPs follow the lifecycle of 'personal information' from collection through to use and disclosure, to eventual destruction or disposal. An overview can be found on the OAIC website.

If an APP entity breaches an APP, this is called an 'interference with the privacy of an individual'. Interferences with privacy can lead to complaints and in some circumstances, compensation may be awarded to the individual. Over recent years, awards of compensation have ranged from $1,000 to over $20,000.

Not sure if the APPs apply to your organisation or if your privacy practices are up to standard? Contact elringtons for assistance and advice on meeting your privacy obligations.

New obligations

The NDB scheme applies to "eligible data breaches", which are breaches that are likely to result in serious harm to an affected individual. Unless an exception applies, the APP entity is required to notify the affected individual(s) and the OAIC that the breach has occurred, so that action can be taken to mitigate any potential harm.

Notifications must include the following information:

- Identity and contact details of the organisation;
- Description of the data breach
- The type or kind of information concerned; and
- Recommendations about steps that individuals should take in response to the breach.

The OAIC has a specific form for notifying the Commissioner of notifiable data breaches.

Breaking it down

A "breach" includes an unauthorised access to, disclosure of or loss of personal information. A breach may be as simple as sending a letter to the wrong person or leaving a memory stick or a briefcase on the train. Although the thought of a "data breach" often conjures up

thoughts of computer hackers or determined criminals, the reality is that they most commonly occur due to simple human error.

Not every breach will require notification. If a breach has occurred, the next question to consider will be whether serious harm is likely to occur as a result. Serious harm includes physical, psychological, emotional, financial or reputational harm. The Privacy Act sets out a number of relevant matters to assist in assessing whether serious harm is likely to occur, including the kind(s) and sensitivity of the information, what other security measures exist (e.g. is the information encrypted), the nature of the harm that may result and the likelihood that a person who could have obtained the information would have the intention of causing harm to any of the individual.

There are some exceptions to the notification requirements, including where the data breach involves more than one entity. In those circumstances, only one entity is required to undertake notification.

Prevention is better than a cure! ***elringtons*** *can provide advice and guidance on best privacy practices, including undertaking privacy impact assessments or delivering training to your staff, to help your organisation manage privacy carefully and responsibly.*
e: ithomas@elringtons.com.au | p: +61 6206 1300

Care and Protection Proceedings in the ACT – Part 1

Posted onAuthorCarlos Turini

Introduction to Care and Protection Jurisdiction

The Children's Court in the Australian Capital Territory deals with matters involving children who may sometimes require protection from their own parents.

The Child and Youth Protection Services (CYPS) is an agency with legislative responsibility under the Children and Young People Act 2008 for the care and protection of children and young people believed to be at risk of harm. If CYPS takes emergency steps in a matter, such as removing children form the care of their parents, the agency must, within a short time, make an application to the Children's Court for appropriate orders and directions.

The jurisdiction may be described as the "welfare jurisdiction" and is to be distinguished from the "family law jurisdiction" which the Family Court has, under the Family Law Act (1975) (Cth), (a federal piece of legislation) to deal with parents' disputes about their children.

The process and legislation

When a child is removed from a parent or a care giver, the emergency steps taken by the agency may be to place the child in the care of a family member or into emergency foster care. In the application which the CYPS must file with the Court, it must outline the reasons for removal and what orders they are seeking with respect to the child.

Parents and family members are afforded the opportunity to file their own material with the Court. Parents and family members may agree or disagree with the reasons for removal and to the orders that CYPS seek. The Court is solely focused on making any orders that they deem to be in the child's best interests and has duty to ensure that a child is not at risk of abuse or neglect.

Initially the Court will hear the emergency action application and has to determine whether interim care and protection orders should be put in place. If it is found that a child is in need of care and protection, an interim order may be made and the child may then be placed under the parental responsibility of the Director General until such time that the matter is finalised.

Although the Children and Young People Act 2008 is primarily concerned with the child's best interests, **elringtons** understands the importance of being heard and putting forward your case. A previous client has commented "*I really appreciate all the effort put into the case. You have helped me and my family to be able to start to build a relationship. For this I am forever grateful to you*".
If you or a family member find yourselves in a situation where a child has been removed from their parents, please do not hesitate to contact us. At **elringtons** we have a range of experience in acting for either parent (mother or father), independently for the child and even for grandparents in care and protection proceedings.
For more information please contact our family law team
e: cturini@elringtons.com.au | p: +61 2 6206 1300

Care and Protection Proceedings in the ACT – Part 2

Posted onAuthorCarlos Turini
The child's best interests
In Care and Protection proceedings the Court must always consider the best interests of a child as the paramount consideration[1] when it is making any orders or determination for interim and long term placement and parental responsibility.
Primary consideration of the Court – The child's best interests
Section 349 of the Children and Young People Act 2008 ("the Act") set outs the care principles to be considered by the Court in order to make a determination about of what is in the best interest of a child in a particular case..
The Court must consider the following matters when determining what is in the child's best interests:

- Need to ensure the child is not at risk of abuse or neglect;
- Any views, wishes or attitudes expressed by the child;
- Nature of relationship between the child and the parents;
- The likely effect of changes to the child's circumstances
- Practicalities of the child maintaining contact with each parent and anyone else;
- Capacity of the child's parents or anyone else to provide for the emotional and intellectual needs of the child;
- The importance pf the child to be settled, stable and have permanent living arrangements;

- For Aboriginal or Torres Strait Islander children it is a high priority to protect and promote their cultural and spiritual identity and development;
- Need to ensure that any decision regarding placement is about safety, support and a stable environment;
- Any abuse of neglect of the child or a family member;
- Any court order applicable to the child or a family member
- Any other fact or circumstances the decision make considers relevant

The Court has an obligation under the Act to ensure that all family members to care proceedings understand what the decision making process and what decision is going to be made. Parents and family members are given the opportunity to be heard and have their views and wishes expressed to the Court prior to any determination being made. The Director General also has an obligation and function under the Act to provide and assist strengthening and supporting families in relation to the wellbeing and care of children in care proceedings.

Our lawyers ~~can~~ may assist you with communicating with CYPS, the preparation of court documentation and providing you legal representation at court. If you or a family member find yourselves in a situation where a child has been removed from their parent's care, please do not hesitate to contact us. We are able to give you legal advice in relation to this area of law.

Care and Protection Proceedings in the ACT – Part 1

---

[1] Section 8 in Part 1.2 of the Children and Young People Act 2008 entitled Objects, Principles and Considerations

What is a caveat and how may it be used to protect real estate in family law?

Posted onAuthorGabby Bridger

By Gabby Bridger

When parties separate, sometimes one or the other must take steps to protect the assets before a family law property settlement is formalised. **One tool that is available to protect the matrimonial assets is the lodgement of a caveat on the tile to real property.**

What is a caveat?

A caveat is a notice at large that is recorded on the title of real property to protect the interest which the caveator may have on the real property. Any third party who may seek to deal with the real property is placed on notice about the caveator's claim by the existence of the caveat.

When may a caveat be used in family law?

Sometimes in a relationship, both parties have an interest in a property but only one party's name is on the title. This may be for a range of reasons, such as one party bought the property prior to the relationship or for tax purposes. Even if the property is just in one party's name, the other party ***may*** still have a caveatable interest. For example, if both parties have

contributed to paying the mortgage on a house or one party made other financial or non-financial contributions throughout the relationship. However, not everyone will have a caveatable interest, so legal advice should be sought to determine whether you have an interest.
If you share a property with your spouse or partner, but the property is solely in your spouse's name, he/she may have the ability to deal with that property without your consent. This may become a problem in family law matters, if the property should form part of the overall property pool, yet the person on title sells it, uses the equity, transfers a share to someone else or uses the property as security to raise a loan. A caveat may prevent your spouse dealing with the property before the Court may deal with the family law dispute. .

How may a caveat help protect you?
In a family law property dispute, lodging a caveat on a property protects your interest in it. This will stop the other party, who is on title, dealing with the property in a way that could detriment you. A caveat also acts as a warning for anyone else who does a search of the property; they would see that someone else has an interest in the property. In order to sell or deal with the property, the caveat would need to be removed.
Proceed with caution! Are there any risks in lodging a caveat?
Whether a party has a caveatable interest in a property in a family law matter is a complex question on law that must be considered on its own facts.
There are risks associated with lodging a caveat if you do not have a caveatable interest in the property. **If you lodge a caveat without having an interest in the property and financial loss is then suffered by the person on title, you may be liable to pay compensation.** Therefore, it is important to seek legal advice to determine your interest in a property and whether it is appropriate to lodge a caveat.
We can help you work out whether you have an interest in the property that allows you to safely lodge a caveat.

To speak to one of our family lawyers about how to protect your property, or to find out what you are entitled to or to make an appointment at either our Canberra or Queanbeyan office, contact us on:
info@elringtons.com.au| p: 02 6206 1300
For more information:
Elringtons Family Law
Family Law: Property Disputes and Settlements
CategoriesFamily Law, News & Events, Property Disputes, Property Settlement

HIV medication linked to serious birth defects

Posted onAuthorTom Maling
by Tom Maling
On 31 May 2018 the Therapeutic Goods Administration (TGA), who is responsible for medication approvals and safety in Australia, issued a safety alert for the drug Dolutegravir, which is used to treat HIV. The drug is also as Tivicay is found in the medication Triumeq.

Unfortunately new research has shown an increased risk of neural tube defects in babies who were conceived while their mothers were taking the medication. Neural tube defects may lead to serious health issues for babies, including Spina Bifida. The TGA alert recommended that doctors do not prescribe female patients who are looking to become pregnant with any medication containing the drug Dolutegravir.

Medication Side Effects
This is another example of serious consequences some medications can have. There are already investigations in the United States for lawsuits against the manufacturer. Doctors in Australia are now on notice of the potential risk and so should have stopped prescribing it to those at risk of harm.

Medications save lives, however when they are incorrectly prescribed the side effects can have serious consequences. **Elringtons** has unfortunately seen this first hand recently, acting for a person who was rendered a quadriplegic after a medication administration error. For more information see Elringtons Secures $12million for client. For more information on Medication errors and medical negligence see our article Medications and Medical Negligence.
To help protect yourself from the risk of medication errors here's some advice taken from our Hospital Negligence page:
"*In 2018 the Harvard University recommended 7 questions to ask a doctor when they prescribe a new medication. These are:*

1. *Why do I need this medication, and how does it work?*
2. *What are the risks and benefits?*
3. *Are there side effects?*
4. *How do I take this medication?*
5. *Do I need to avoid anything while taking this new medication?*
6. *How soon will the medication work, and how long will I be taking it?*
7. *When will you review how well this is working for me?*

These are good questions for patients to ask doctors and other health practitioners who administer treatment in hospital.
Be an informed patient. It is your body and you have a right to ask about your treatment. *In doing so, you may prevent a hospital complication, like being administered the wrong medication, from happening.*"
For further information on the TGA alert see Dolutegravir. To speak to one of our specialist nedical negligence lawyers call 02 6206 1300 or email Info@elringtons.com.au
e: info@elringtons.com.au | p: +61 2 6206 1300
CategoriesArticles, Health Law, News & Events

Psychiatric side effects of common Asthma medication

Posted onAuthorTom Maling
By Tom Maling

The Therapeutic Goods Administration (TGA), who is responsible for medication approvals and safety in Australia, has issued an update about the need for warnings about psychiatric side effects of the asthma drug Montelukast, used in the medication Singulair.

For some time now, Montelukast has been linked with psychiatric side effects such as agitation, outbursts, depression and even suicidal thoughts. In 2016 the ABC reported on these serious side effects and their impact on young children taking the medication. At the time, investigations to confirm the link between the psychiatric side effects and Montelukast were still being investigated and there were no plans for further warnings to be made to patients. This has now changed.
The TGA conducted a review of the evidence and reported in July 2018 that it had:

1. "*Written to State and Territory health departments, NPS MedicineWise, Health Direct and Therapeutic Guidelines to formally request inclusion of advice regarding montelukast and neuropsychiatric events in relevant clinical guidelines and educational activities.*
2. *written to all sponsors of montelukast to request inclusion of the CMI in the packaging with information regarding potential neuropsychiatric events*
3. *contacted the Australian Paediatric Surveillance Unit about potentially including montelukast and neuropsychiatric events in their monthly survey of clinicians.*"

Warnings about side effects

Being made aware of the possible side effects before agreeing to take a medication is a fundamental right of all patients. We discuss this further in our article Consenting to Health and Medical Treatment. Everyone has the right to know about the treatment that a doctor has prescribed, including the risks of the treatment and side effects. We discussed a doctor's duty of care specifically in relation to medications in our article Medications and Medical Negligence. The key points on a doctor's duty of care were:

1. "*A doctor owes their patient a duty of care when giving advice about medications and when prescribing them.*
2. *A doctor must review how you respond to a medication and monitor you for side effects.*
3. *A doctor must warn about side effects which a reasonable patient would find significant, OR risks which because of your individual circumstances a reasonable doctor would think that you would find significant.*"

It is only fair that a person considering taking Montelukast, or a parent considering whether their child will take it, has been put on notice about the risk psychiatric side effects of the drug. Only then can they make an informed decision on whether or not they wish to take it.

Click here for more information on the TGA alert.
For more information on medical negligence see our homepage or call 02 6206 1300 and ask to speak to Tom Maling.
e: info@elringtons.com.au | p: +61 2 6206 1300

'Undue influence' in Estate Planning

Posted onAuthorKerin Cotchett

Your Will is a crucial element of your overall estate planning. "Estate planning" refers to all those important documents and decisions that you make to govern what happens to your body

and your belongings if you lose the capacity to manage for yourself including after your death. Estate planning can also include Power of Attorney and Guardian appointments, business succession agreements and superannuation binding nominations.

When you create a Will it is **very important** that you exercise **free choice**. After all, it is **your** wishes being recorded. Recording your wishes in a Will involves naming who you want to be in charge of your assets (your "executor") and who you want to receive your assets (your "beneficiaries") after your death. Having a valid Will is the best way to ensure your final wishes are appropriately carried out.
Your Will can be disputed if an interested party (a relative, close friend or carer for example) suspects that you (the "Will-maker" or "testator") was under 'undue influence' at the time you gave your instructions for the Will to be drafted.

What is 'undue influence'?
Undue influence refers to situations where a testator is under pressure to write a document (e.g. a Will or Power of Attorney document) in a way that actually goes against their true wishes. Manipulative behaviour such as blackmail, threats, lies and flattery may be used to unduly influence a Will-maker.

The primary purpose for someone to use undue influence in relation to Wills is so that they can gain more benefit from the testator's estate. This is often at the expense of other beneficiaries, which may lead to family provisions claims (link to other **elringtons** articles re: FPA claims) by those unfairly treated family members of the deceased person.
For example, a deceitful child might make false claims about certain siblings to convince parents to leave their brothers and sisters out of an inheritance or disproportionately favour themselves. In other circumstances a new neighbour may befriend an elderly person and charm them in order to become a beneficiary of their Will in place of relatives in need of provision from the testator's estate.

If a deceased person has left their whole estate to a single person, particularly if that beneficiary is a new acquaintance or unknown to other friends and family, this might be a sign that undue influence has occurred.

The Courts can determine that a Will is invalid if it is proved that undue influence has occurred. But how can someone prove that their loved one was coerced to make their Will?

How do you prove undue influence?
It is not an easy task to prove that a person was under pressure to write, sign or give instructions for their Will. Claiming that undue influence occurred is a serious allegation and the job of proving that it occurred is up to the person making the claim.

Witnesses to the production or signing of the Will may be able to provide evidence that the testator was coerced by someone who stood to benefit.

Other important evidence might come from the previous Wills of the deceased person. If the last Will is markedly different to previous Wills or differs greatly from their verbally stated intentions, the previous Wills might be used as evidence of the deceased person's actual intentions.

There is no guarantee that any one of these factors will sway a judge, so please seek legal advice from a Wills and Estate Planning lawyer and let us help you make your case.

Contact **elringtons** Lawyers if you believe a friend or family member was under undue influence when making estate-planning decisions.
For more information or to make an appointment contact: Kerin Cotchett
e: kcotchett@elringtons.com.au | p: 02 6206 1300
CategoriesNews & Events, Wills & Estate PlanningTagsWills and Estates

Medical Misdiagnosis

Posted onAuthorTom Maling
When doctors don't reach the right answer

A doctor's duty of care covers diagnosing health conditions and for many conditions such as cancer, infectious disease and medication side effects, a timely diagnosis is critical to receiving the right treatment.

When a doctor diagnoses the wrong condition or fails to diagnose anything at all there has been a misdiagnosis. Health conditions are often very complex and the task of diagnosing conditions can be very difficult for a doctor. However sometimes, unfortunately, a doctor's failure is so bad that they cause the condition to get worse. This is when a medical negligence claim may arise.

What is a medical misdiagnosis?

What are examples of medical misdiagnoses?
Do I have a medical negligence claim?
What compensation for my losses can I receive?
Why should I talk to elringtons about my medical negligence claim?
To see more about our expertise on medical negligence check out our health and medical law blog. No other firm in Canberra or Queanbeyan matches our expertise in this area.
For more information see our Medical Negligence page **or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact** Matthew Bridger **or** Thomas Maling:
p: +61 2 6206 1300 | e: Info@elringtons.com.au
CategoriesArticles, Health Law, News & Events

Surgical Errors

Posted onAuthorTom Maling
Surgical errors include cutting of arteries or nerves, performing the wrong procedures, improperly inserting a medical device, leaving instruments in bodies or even not providing sufficient or any analgesia. Understandably the consequences can be severe and devastating for a patient and their family.

As surgeries pose serious risks, even when performed competently, working out whether a surgical error is due to negligence is often very complicated. Is the error an inherent risk of the surgery or is it because a doctor or nurse did something wrong? Surgical procedures are often completed by teams of surgeons, anesthetists and highly trained nurses, and determining who is exactly at fault and what precisely went wrong is a complicated task.

At **elringtons**, we specialise in medical negligence claims and are experts in health and medical law.

 Take the first step — Call us and get expert legal advice on your rights, no risk or obligation!

FREE INITIAL CONSULTATION— Give us a call, come in and have a chat or request a call back

Surgical error or just a risk of surgery?

Examples of surgical errors
Can you sue a doctor for a surgical error?
What compensation for my losses can I receive?
Battery Claims
Why should I talk to elringtons about my medical negligence claim?
To see more about our expertise on medical negligence check out our health and medical law blog. No other firm in Canberra or Queanbeyan matches our expertise in this area.

Surgical error or just a risk of surgery?
Before you have surgery you should be told of the risks of the surgery. Depending on what the precise procedure is, common risks are bleeding, pain and damage to nerves. By agreeing to have the surgery, the law presumes that you have accepted these risks. They are called inherent risks. If an inherent risk of the procedure happens, the law states a doctor or hospital is not at fault. It is just an unfortunate risk of a surgery that has occurred.

A **surgical error** on the other hand is something which is not an inherent risk of the surgery. It is something that should not occur if the surgeon performed the surgery competently. It is when a surgical error takes place that you may have a **medical negligence claim**.

Examples of surgical errors

1. Operating on the wrong body part
2. Accidently cutting an artery or nerve
3. Incorrectly inserting a medical device
4. Breaking a tooth during a dental extraction
5. Failing to give adequate analgesia or sedation
6. Failing to monitor a person's condition during surgery and missing a deterioration or complication
7. Leaving a surgical instrument in a patient

Can you sue a doctor for a surgical error?
To help you consider whether you have received negligent treatment, here's a few things to ask yourself:

1. Have I got what I expected from the treatment?
2. What did my doctor tell me to expect would happen?
3. Has the treatment caused me further injury?
4. What has the doctor done afterwards?
5. These are the sorts of questions a lawyer will ask you.

6. **Point 3 above is really important**. In medical negligence claims you must show that the doctor caused you further injury. This is called causation. You will not be successful in a claim if you only show that the doctor was negligent, but did not actually cause you any further injury.

What compensation for my losses can I receive?
The types of compensation that may be awarded are:

1. Previous lost wages for your time off work;
2. If your injuries will affect your ability to work in the future, then your future lost wages;
3. The cost of treatment, medications, disability aids and pain relief in the past and future;
4. Care and assistance provided to you by family and friends;
5. Pain and suffering; and
6. Loss of enjoyment of life.

Battery Claims
Sometimes a doctor operates when they didn't have consent to do the surgery. When this happens a doctor has committed a battery. Not many people are aware of these types of claims. Because of our expertise in medical negligence claims, we are alert to the possibility of running battery claims.

For more information see:

- Consenting to Health and Medical Treatment
- Beware of the Consent form

Why should I talk to elringtons about my medical negligence claim?
Medical negligence claims are not just another type of personal injury claim. Just as you would see a specialist for complex health conditions, you should see a specialist for a medical negligence claim. The best way to quickly find out whether you may have a claim is to talk to an expert. We have expertise in health and medical law and for Canberra, Queanbeyan and South East NSW, Matthew Bridger and Thomas Maling are the specialists in medical negligence claims.
We have:

- Inside knowledge about the health industry (one of our lawyers was a Registered Nurse);
- University acquired knowledge about injuries and disease; and

- An understanding of how healthcare should be provided.

Why your bank is making you see a lawyer!

Posted onAuthorMitchell Evelyn

By Mitch Evelyn

The banks are under increasing scrutiny and stringent regulations these days to ensure that they practice responsible lending. To meet these obligations, and to comply with the National Credit Code, your bank will often require you to have loan or guarantee documents reviewed by a lawyer, and insist that your lawyer provide a certificate confirming that they have given this advice. This means that a bank can lend to you, or accept a personal guarantee, confident that you understand exactly what your obligations are.

What will my lawyer do?

We often get enquiries from people saying that they just need a lawyer "to witness something" or "to sign off on some forms". A lot of people are annoyed or upset when they show up at their lawyer's office, documents in hand, to find that their lawyer is refusing to sign them – at least right away.

It is important to bear in mind that your lawyer is not just witnessing your signature on these documents – they are certifying that they have given you legal advice. This means that your lawyer needs to:

- Read the documents
- Understand the documents in context – who is borrowing, who is guaranteeing, and why
- Understand the key players – for instance, is the borrower a family member, a family trust, or a company?
- Understand the protections afforded to you by law and how these might affect the documents you are signing
- Review the security being provided and what could happen to you or to your family if that security is called upon
- Comply with the additional regulations placed on lawyers when providing this specific service
- Meet with you in person to explain the documents and their effect to you

What can I do to speed up the process?

Chances are that you – or someone you care about – are in the middle of a large, exciting, or time sensitive transaction when you need one of these certificates signed.

Here is what you can do to help your lawyer give you fast, and accurate legal advice:

· Get the documents to your lawyer as quickly as possible so that they can review them. Keep in mind that these are often long, and complicated documents – they may take a few hours to review, especially if you are not using a bank whose standard forms your lawyer is familiar with. Often your lawyer will also need to prepare additional documents which we are legally required to retain on file.

· Make an appointment – do not walk in and expect a lawyer to drop what they are doing. Remember, they are not only witnessing your signature, they are certifying that they have given you legal advice. You should allow your lawyer at least two or three days to review everything.

· Provide all relevant background and related documents as soon as you can. Often, the bundle of documents your bank provides will have all related documents in it, such as copies of trust deeds, or registered mortgage terms. If they do not, then your lawyer may ask to see these.

· Make sure your lawyer knows who they are advising. If there are multiple guarantors, make sure your lawyer knows whether they are advising only you, or whether they are also advising other guarantors. This is very important, as your lawyer needs to ensure they comply with additional regulations that may apply when asked to advise multiple guarantors at the same time.

· Make sure that you have everything your bank asks for. Some smaller banks will have very onerous identification requirements – make sure that you bring copies of all relevant ID, and check that none of the documents have expired.

What does it cost?
Legal costs will vary depending on the complexity of the documents, the number of people involved, and the banks requirements. You should send a copy of your documents through to your lawyer so that they can ascertain how much time will be involved, and provide you with an estimate of what their fees will be.

If you need someone to provide independent advice on documents provided by your bank, contact us at either our Canberra or Queanbeyan office and ask to speak to one of our experienced commercial or property lawyers. Please bear in mind that your lawyer will need to meet with you in person at least once in order to provide you with this advice.
p: +61 2 6206 1300 | e: info@elringtons.com.au

Can nursing homes prevent a person with dementia from leaving the facility?

Posted onAuthorTom Maling

by Tom Maling and Mitch Evelyn

We recently received a question in response to our article What Duty of Care does a Nursing Home Have? It was a good question:

Have you considered the duty of care not to release a person with dementia, unable to decide for themselves, into the care of another without the consent of the person with power of guardianship?

This raises 2 equally important issues:

1. What is the scope of a nursing home's duty of care in this instance?
2. What does the power of guardianship allow?

What is the scope of a nursing home's duty of care in this instance?

A nursing home has a duty of care to reduce or eliminate foreseeable risks of harm to a resident. For this example we are assuming that the person with dementia has no decision-making capacity.

While nursing homes have an obligation to ensure the physical safety of residents with dementia, whether they can prevent a resident from being visited or released into the care of another person is not entirely straight forward. **All people have a right to freedom of movement**. This does not change if you have dementia. If that freedom is infringed by a nursing home they would likely to liable for false imprisonment, a claim under civil law. However, If the nursing home is aware that allowing a resident with dementia to be released into the care of another may create a foreseeable risk of harm to the resident, then it is probable their duty of care would extend to not allowing the resident to leave the facility. For example, a nursing home's duty of care would require them to not allow a stranger or a family member who had abused or mistreated that person to remove the resident from the facility.

We have had enquiries from families where because of a family dispute, one family member does not want another to be able to have access to a person in a nursing home. In those circumstances, there is no risk of harm to the resident and the nursing home has no authority to restrict the movement of the resident. In that case, the nursing home would be liable for a false imprisonment claim and possibly assault/battery if they prevented the resident from visiting the family member.

In summary:

1. A nursing home has a duty of care to prevent or eliminate foreseeable risks of harm.
2. If allowing a resident who does not have decision-making capacity to leave with someone creates a risk of harm, then their duty of care likely requires them to prevent the resident from leaving.
3. If there is no known risk of harm and a nursing home prevents a resident from leaving, or restricts their freedom of movement, they have committed false imprisonment.

What does the power of guardianship allow?

Every State and Territory has different laws about this, however there are some general principles which generally appear, in one form or another, across the country.

In both the *Guardianship Act 1987* (the NSW Act) and the *Powers of Attorney Act 2006* (the ACT Act), people are appointed as guardians with certain "functions", and required to exercise their functions in line with some general "principles".

- A "function" is a power which the guardian has – such as deciding where someone lives, what services they receive, and what healthcare they receive (what a guardian **can** do);
- A "principle" is something which the guardian needs to take into account when they exercise a function (how a guardian decides what they actually **will** do).

These general principles include:

- limiting the freedom of action and freedom of decision of the person as little as possible;
- taking into account the persons wishes as much as possible and allowing them to participate in decisions that affect them;
- preserving the family relationships and cultural and linguistic environments of the person; and
- protecting the person from neglect, abuse or exploitation.

Applying these principles is not always black and white. Sometimes, the principles might conflict with each other. For example, it would be irresponsible to allow even a close family member to be left unsupervised in the presence of a vulnerable person if there are genuine reasons to believe that there is abuse or exploitation taking place. It could also be very hard to

tell how much limitation on a person's freedom is appropriate, or for the person to communicate their wishes.

Importantly, the guardian must keep in mind at all times that they are a guardian, not a gaoler. The guardian's role is to help the person to do what they want to do (or would want to do, if they were able to communicate their wishes), as best as possible. This may mean empowering the person to make and carry out decisions which the guardian does not agree with, or associate with people who the guardian does not like.

It also bears keeping in mind that if a person is able to make their own decisions, they are perfectly entitled to overrule the decisions of their guardian, or the nursing home staff. **A nursing home is a home, not a prison**.
This is why it is very important to only appoint a guardian who is trusted implicitly, and who knows and understands your needs and desires, and who cares about your happiness and dignity, as well as your health.

If a guardian breaches these principles, then they may be committing elder abuse, or neglect. These are grounds to bring the matter before the appropriate Tribunal – the guardian may have their guardianship reviewed, have reporting requirements placed on them, or even have their appointment terminated.

Can nursing homes prevent a person with dementia from leaving the facility?
The answer is simply it depends on the circumstances. If there is a risk of harm to the resident, and the nursing home has been put on notice of the risk of harm, then the nursing home must do what is reasonable to eliminate or reduce that risk. It is entirely plausible that if the risk of harm arises from being in the presence of a particular person, then a duty falls on the nursing to do what is reasonable. This may be:

1. Contacting the guardian or power of attorney to identify the issue with them;
2. Contacting the police in cases of emergencies;
3. Preventing the resident from being removed from the premises in the least restrictive way (and contacting the police) for the least amount of time;
4. Supervising the interaction between the resident and the person.

What is clear is that a nursing home cannot turn a blind eye. It would not, in our opinion, be sufficient for a nursing home to not intervene in any fashion once they are aware of a risk of harm, particular to residents who may be vulnerable due to physical or mental disabilities.

About Elringtons

Elringtons is a South-Eastern NSW law firm based in Canberra and Queanbeyan. We cater for all areas of Southern NSW. We have particular expertise in health and medical law and elder law, as well as a range of other services.
For more information on our nursing home expertise see our below articles:

- What duty of care does a nursing home have?
- Chemical restraints in nursing homes
- Nursing home abuse
- How to make an effective nursing home complaint

- Elder abuse: together making change
- Elder Abuse – A Confluence of Rights and Responsibilities
- Who can make decisions about your health?
- Appointing an Enduring Guardian and Enduring Power of Attorney

For more information or to make an appointment with a Solicitor in either our Canberra or Queanbeyan office contact:
e: info@elringtons.com.au | p: +61 2 6206 1300
CategoriesArticles, Health Law, News & EventsTagsAged Care, Health and the Law

Top Tips for Estate Planning

Posted onAuthorMitchell Evelyn
By Mitch Evelyn
Our team helps hundreds of people each year put together their plans for death or incapacity. Our role is to understand what your wishes are and ensure these are reflected in your Will. We often see well planned sensible Wills – however, we are also often instructed to prepare Wills (against our advice) which miss the mark and create headaches for friends and family after death.

Here are some of our top tips for making a good Will.

Keep it general

Talk to your family and ask them what they would want
Don't put too many people in charge
You can't plan for everything
Don't rule from the grave
Beware of gifts which carry obligations
We encourage you to think carefully over your Will and, if appropriate, discuss it with your family. When you are satisfied that you know what your Will should look like, call **elringtons** and ask to speak to one of our experienced Estate Planning lawyers at either our Canberra or Queanbeyan office.
e: info@elringtons.com.au | p: +61 2 6206 1300
CategoriesNews & Events, Wills & Estate Planning

Royal Commission into Aged Care must cause legal change on chemical restraints

Posted onAuthorTom MalingLeave a comment

Nursing home residents are currently discriminated against when it comes to laws regulating use of medications to control behaviour. Put simply, there are no laws that do so. The Royal Commission into Aged Care must ensure this changes.

Chemical restraints

The right to choose or refuse medical treatment
The importance of laws to reduce risk of harm
New laws are needed now
About Elringtons
For more information or to make an appointment with a Solicitor in either our Canberra or Queanbeyan office contact:

e: info@elringtons.com.au | p: +61 2 6206 1300

CategoriesArticles, Health Law, News & EventsTagsAged Care, Health and the Law

Royal Commission into Aged Care must cause legal change on chemical restraints

Posted onAuthorTom MalingLeave a comment

Nursing home residents are currently discriminated against when it comes to laws regulating use of medications to control behaviour. Put simply, there are no laws that do so. The Royal Commission into Aged Care must ensure this changes.

Chemical restraints

The right to choose or refuse medical treatment

The importance of laws to reduce risk of harm

The law has a pivotal role to play in reducing the risk of harm to nursing home residents. Laws are needed to ensure medications are only provided to a person to control their behaviour in limited circumstances.

It is highly likely that medications to control behaviour have been given to nursing home residents unlawfully. In the ACT, unless the person made a health care directive specifying

they would consent to taking these medications, or a person empowered under an Enduring Power of Attorney consented to the treatment, then it is unlikely there is legal authority for the medication to be given.

Nursing home residents have legal remedies available to them if medications have been given without their consent. Police can be called. A civil claim can be made seeking to restrain the continued administration of the medications and for damages. These appear to be used infrequently, if at all.

Laws specifying the circumstances when a medication can be administered as a form of chemical restraint will reduce the serious risks of harm to nursing home residents. It is clear that leaving it up to individual nursing homes and doctors is not effectively ensuring the appropriate use of potentially harmful medications. On a more fundamental level, the rights of nursing home residents are potentially being ignored.

The ACT's *Mental Health Act* ensures that a specialist doctor has consulted medication before a medication can be given. There is appropriate oversight to ensure that medications are given only as permitted by the Act. Similar laws should be made which apply specifically to nursing homes.

Royal Commission into Aged Care must cause legal change on chemical restraints

Posted onAuthorTom MalingLeave a comment

Nursing home residents are currently discriminated against when it comes to laws regulating use of medications to control behaviour. Put simply, there are no laws that do so. The Royal Commission into Aged Care must ensure this changes.

Chemical restraints

The right to choose or refuse medical treatment

The importance of laws to reduce risk of harm

New laws are needed now

Uniform nation-wide nursing home laws should be made to ensure that chemical restraints are only given after a resident has had specialist medical assessment. Any law should ensure that chemical restraints are only used as a last resort. It should also permit only certain specialist doctors to be able to prescribe these types of medications.

Regulation of the use of chemical restraints will add another layer of red-tape to the aged care sector. Issues such as the availability of specialists to assess the needs of nursing home residents in rural areas, as well as staffing ratios, will likely be important considerations. But when we consider the risks posed by leaving this important issue totally unregulated, the rights of nursing home residents must prevail. There is no justification for the total absence of law regulating this serious issue, particularly when we have robust laws in mental health and disability sectors across the country.

Let's hope the Royal Commission in Aged Care leads to uniform laws aimed at combating this serious issue. Better still, seeing as we already know about this serious issue, let's fix the problem now. We already have laws designed at doing this in other areas, so why make nursing home residents wait?

Psychological injury because of death to family member

Posted onAuthorTom Maling

Can you sue someone because death of a family member has caused you a psychological injury? Yes.

The law recognises that if a person's **negligence** caused the death of another person, then certain people who develop a mental illness because of the death may be able to claim for compensation for medical treatment, loss of wages and their pain and suffering. These claims are called **mental harm claims**.

Take the first step — Call us and get expert legal advice on your rights, no risk or obligation!

FREE INITIAL CONSULTATION— Give us a call, come in and have a chat or request a call back

What is a mental harm claim?

What must I show in a mental harm claim?
What does duty of care mean?
What is normal fortitude?
What are examples of mental harm claims?
What compensation for my injuries can I receive?
Mental harm claims are special claims
About Elringtons
For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Matthew Bridger or Thomas Maling:
p: +61 2 6206 1300 | e: info@elringtons.com.au

What is a mental harm claim?
A mental harm claim is a claim for a mental illness which has been caused by another person. The injury must be a diagnosed mental illness, such as an Adjustment Disorder, Major Depression or Anxiety.

Grief and sorrow, unless they are part of a diagnosed mental illness, are not classified as mental or psychological injuries. Quite often, it is not until quite some time after the death that a person might be diagnosed with a mental illness. So you do not have to immediately be injured.

Mental harm claims do not only arise because of deaths. A person can claim for a mental injury even if they have not witnessed a death, or had a family member die because of another person's **negligence**. However, quite often mental claims arise because of deaths.

What must I show in a mental harm claim?
Each State or Territory has their own laws on when a person can make a mental harm claim. There are some common aspects however to these laws.

To make a claim you must show:

1. A person owed you a **duty of care** to take reasonable steps not to cause you mental harm.
2. That you are a person of **normal fortitude**.
3. The person who owed you a **duty of care** breached their duty to you.
4. Because of the breached duty of care, you received a psychological injury.

In the ACT, if you satisfy these criteria, there are other aspects which a Court must look at to see whether you are eligible for compensation for your injury. These are:

1. Did you receive a sudden shock which caused the injury?
2. Did you witness a person being killed, injured or put in peril? If you did, what was your relationship with the person? Were they your parent, partner or child?

3. What sort of relationship you might have had with the person who caused the death of your family member.

You do not have to prove each of these points. However, they are relevant in the ACT in determining whether or not a person owed you a duty of care. **The law in NSW is very similar**.

What does duty of care mean?

Duty of care refers to the duty a person owes another to avoid foreseeable risks of harm. It is a complicated concept. If a person breaches their duty of care they have been **negligent**.

What is normal fortitude?

The concept of **normal fortitude** is offensive and stigmatising in today's world. It perpetuates stigmatising ideas of 'normal' and 'not-normal' with mental illness. Nonetheless, the law requires this concept be considered.

Normal fortitude looks at whether the person who breached their duty of care should be responsible for the way the person who is injured has responded. For example, a Court case from NSW saw a person attempt to sue a pool operator for a psychological injury. As a child, the injured person had cut their toe in a pool which apparently impacted on his football career. A big issue in the case was whether he was a person of **normal fortitude**. It was argued that he was not, and that he had particular mental vulnerabilities which effected the way he perceived what happened. It was argued that a person of **normal fortitude** would not have responded in the way he did. The Court agreed, saying the person's response was out of all proportion to what might reasonably have been anticipated. Therefore, the pool owed no duty of care to him.

Unfortunately, the law discriminates for psychological injuries. For physical injuries, the law states that 'you must take the person as you find them'. This is called the **egg-shell skull rule**. What this means is that if you negligently injure a person with brittle bones, for example, you are still liable for the injury. Even if what you did would not injure a person with 'normal' bones, you are still liable for their injury. Unfortunately, the law removes this rule for mental injuries.

What are examples of mental harm claims?

One example is when a person dies because of **medical negligence**. A doctor owes a duty of care to the spouse of a patient. It is a foreseeable for a doctor that if they negligently treat the patient and cause them death, then the spouse will likely experience emotional distress which may lead to a mental illness.

Another example is seen in **employment relationships**. On 9 October 2018 the ABC reported that Dreamworld staff in Queensland were suing Dreamworld for psychological injuries caused by the river raft failure in 2016 which killed 4 people. As an employer, Dreamworld owed its employees a duty of care to operate and maintain rides so that the risk of serious injury to a person was avoided or reduced. It is a foreseeable risk that staff who witness traumatic injury and death may receive a psychological injury as a result. Therefore, Dreamworld owes the staff a duty of care to avoid or reduce that risk of happening.

We have run many mental harm claims for people in the ACT and NSW. Additionally, the significant majority of our medical negligence, motor vehicle accident and workplace injury claims have a psychological injury aspect. These claims do not necessary come under the category of a mental harm claim though.

What compensation for my injuries can I receive?
The types of compensation that may be awarded are:

1. Previous lost wages for your time off work;
2. If your injuries will affect your ability to work in the future, then your future lost wages;
3. The cost of treatment, medications, disability aids and pain relief in the past and future;
4. Care and assistance provided to you by family and friends;
5. Pain and suffering; and
6. Loss of enjoyment of life.

Mental harm claims are special claims
Mental harm claims need to be run be specialist lawyers, such as **Elringtons**. This is because the law is complex, but also because of the complex nature of the facts. Claims involving deaths are traumatic and need to be handled with care and compassion.
Sometimes claims involve a person who already had a mental illness. Having a mental illness does not stop a person from making a claim as it does not mean that person was not of **normal fortitude**. However, insurance companies will take any chance they can to avoid being liable for compensation. Therefore, we must get an accurate history of a person's symptoms and obtain the right evidence to show the injury. **Elringtons** are experts in doing this.

Can I sue a nursing home for the death of a person?

Posted onAuthorTom Maling2 Comments
On 5 October 2018 a visitor to our website posted a question to us in our 'What Duty of Care does a Nursing Home Have?' article. The person asked:
"*What if an aged care facility has admitted administering an overdose of medication by an incompetent staff member, that I strongly believe exasperated her early demise?*"
So, can a person sue a nursing home because they caused a death? Yes. A nursing home can be sued if their negligence has caused the death. They can also be sued for a psychological injury caused to a person because of the death.
For more information on the **duty of care** owed by a nursing home, see our article 'What Duty of Care does a Nursing Home Have?
When can a nursing home be liable for a death?

The nursing home must cause the death

Just because the nursing home has breached its duty of care does not mean it will be liable for the death. **The breach must cause the death**. This is called **causation**.
If the breach of duty causes the death, then a **claim for negligence** may be brought.

Who can make the claim for negligence?

When a person has died because of negligence, a claim can be made by the **executor of their estate**. A family member can also make a type of claim called a **compensative to relatives claim**.

Negligence claims as a way of seeing justice

Negligence claims are a way of holding the negligent person (or nursing home) accountable for what they have done. The law states that the end result of a negligence claim is **compensation**. Compensation is awarded for the losses and costs received because of the negligence. By having an economic consequence to the negligence, this 'penalty' is a way of coercing the nursing home to ensure it doesn't happen again. The saying 'hit them where it hurt: the back pocket' applies here.
However, the law currently discriminates against elderly people when it comes to these claims. You will see why after reading further.

Current laws discriminate against nursing home residents

Laws in the ACT and NSW make it uncommercial for **compensation to relatives** and **estate claims** to be run because the categories of compensation which can be claimed are narrow.
Negligence claims are complex and costly because to prove negligence you must get **expert evidence** to show:

1. The nursing home breached their duty of care.
2. Because of the breach the nursing home caused the death.

Because the classes of compensation which can be claimed are so restrictive, the costs of running a claim would likely outweigh the compensation, even though **a nursing home would have to pay legal costs**.

The current laws, whether inadvertently or not, place little value on the suffering of nursing home residents.

Claims can be made for psychological injuries

Unfortunately, quite often after a traumatic death of a family member, relatives can experience emotional distress to the extent they develop a mental illness. **A nursing home will owe family members of residents a duty of care not to cause them a psychological injury**. This is because:

1. The nursing home owes a resident a duty of care;
2. If the nursing home breaches this duty of care, they know that it could cause emotional distress to a family member; so
3. **The nursing home also owes the family member a duty of care not to cause them a psychological injury**.

This type of claim is called a **mental harm** claim. For more information see our article Psychological injury because of death to a family member.

Further articles by elringtons

For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Matthew Bridger or Thomas Maling:

What you need to know about selling your business!

Posted onAuthorMitchell Evelyn

Selling a business can be a very complicated affair. You are doing much more than simply selling an asset – you could be severing or transferring a multitude of contracts to the buyer, transferring both tangible property (for instance, stock or equipment) and intangible property (such as Intellectual Property, goodwill, or even social media accounts), and extricating yourself from the complex network of promises, personal guarantees, and personal business relationships.

Selling a business – and doing it properly – involves taking each of the small components which together make your business run, and transferring them to someone new. Most of these will not follow the business automatically. Some of the most common considerations which need to be taken into account in any sale of business are listed below:

Your Premises Lease

Equipment Leases or Service Contracts
Employees
Goodwill
Securities
Personal Guarantees
Apportionment of Purchase Price
And many more things
You may also be interested in our article – What to know before you buy a business.
For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Shalini Sree or Mitchell Evelyn:
+61 2 6206 1300 | e: info@elringtons.com.au
(No Ratings Yet)

CategoriesBusiness Services, News & Events, Property Law
Your Premises Lease
is probably one of the most important parts of your business. In addition to a sale of business agreement, you may need to enter a new agreement with either (or both) the buyer and your landlord to transfer or terminate ("surrender") your lease.

Equipment Leases or Service Contracts
need to be either terminated or transferred to the buyer, depending on the agreed arrangements between the parties. Many businesses lease some of their more expensive equipment – such as coffee machines or heavy machinery. Unless these leases are properly dealt with, you could still be liable for them after selling the business!

Employees
will need to either be terminated (often to be rehired by the new employer), or their employment contracts assigned to the buyer. The approach taken with the employees will determine how employee entitlements, such as annual or long service leave, are to be addressed. If the buyer does not wish to re-employ an employee of your business, the employee will become redundant as there is no business for the employee to work in. This termination will trigger all the ordinary entitlements that an employee has in cases of genuine redundancy.

Goodwill
the general term for the overall value of the business created by its reputation, brand, and identity in the community, is an intangible asset, but often one of the most important ones transferred in a sale.

Securities

will need to be discharged – for example, your bank might have registered a charge over your business (or your business assets) to secure a business overdraft or other loan. They will often register this interest on a public register, which means that the buyer will usually be aware if your business is encumbered and require evidence that it is discharged before they buy from you.

Personal Guarantees
given by you may need to be released. If your business is being run by a company, then it is almost certain that you have given a personal guarantee to at least one person during the course of your business. It is important to make sure that your guarantees are discharged, or you might end up being sued by someone in the future for something that the buyer did after the sale was complete!

Apportionment of Purchase Price
refers to the way the purchase price is broken down between the business goodwill, and the various business assets also being purchased. The value given to each of the business assets can have important accounting and taxation consequences for both vendor and the purchaser.

And many more things
could apply, depending on the nature of your business. These can include obligations under franchise agreements, licenses, or contracts with customers or clients (particularly ones which are partially complete).

You may also be interested in our article – What to know before you buy a business.
For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Shalini Sree or Mitchell Evelyn:
+61 2 6206 1300 | e: info@elringtons.com.au

What to know before you buy a business!

Posted onAuthorMitchell Evelyn
When you buy a business, you are often doing much more than purchasing some business stock or equipment. You are placing yourself in the heart of a complicated network of business and legal relationships with customers, employees, suppliers, and many more.

Buying a business means not just transferring business assets, but ensuring that you are buying what you believe is required to continue the running of the business. This means that a comprehensive due diligence process is an absolute must before you commit to anything.

Some of the considerations to take into account in any purchase of a business include:

Reviewing the sale contract

Identify the Intellectual Property
Checking equipment
Transferring a Lease to you
Employees
Making sure there is a "clean break"
Transferring other agreements
Price apportionment
And many more matters
If you are buying a business, it is very important to only do so with quality professional advice from both your lawyer and your accountant. Elringtons' Commercial Law team have assisted in the purchase of countless businesses ranging from small family-owned businesses right up to large commercial enterprises in both the ACT and NSW. Different complications and considerations arise apply to the various types of businesses. We can help guide you through this complicated legal process.

You may also be interested in our article – What to know before you sell a business.
For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Shalini Sree or Mitchell Evelyn:
+61 2 6206 1300 | e: info@elringtons.com.au

Reviewing the sale contract
to make sure that it is fair, and ensure that it properly covers your interests. This often means negotiating to add additional protections into the contract – for instance, to stop the seller from immediately competing with you and eroding your goodwill, or trying to poach customers or staff after the sale. Your lawyer could assist with identifying any unusual or onerous terms and you may decide to instruct your lawyer to assist with suggesting amendments to ensure you have a more purchaser-friendly contract before you bind yourself to a set of terms.

Identify the Intellectual Property
you are purchasing. There may be trademarks, copyrights, software, designs or other intellectual property which will need to be included in the purchase.

Checking equipment
to make sure that there are no charges or securities registered over them. If there are, and they are not discharged as part of the sale, then the Seller's suppliers may be entitled to repossess them even after you have paid for them!

Transferring a Lease to you

to make sure that the business you are buying has somewhere to operate, or helping you put in place a new lease with your landlord.

Employees
entitlements are set out in the Fair Work Act 2009 (Cth). If the employment agreements are to be assigned to you, you should ensure that the Vendor has complied with the requirements of the legislation and any applicable modern award in order to avoid potential disputes. If you have chosen to re-employ some transferring employees, you are required by law to recognise certain previous entitlements of the employees. In this instance, you should ensure that adjustments to the purchase price is made to take into account employee entitlement obligations you are taking on from the vendor.

Making sure there is a "clean break"
between the Seller and you. You need to make sure that by taking over the business, you are also not taking responsibility for the liabilities of the business before you bought it – for example, a worker's compensation claim for an injury that happened before you purchased the business, or defective work carried out by the seller before the sale.

Transferring other agreements
such as supplier agreements, equipment leases, marketing contracts, or services, which directly relate to the daily operation of the business.

Price apportionment
particularly with reference to plant and equipment, as this may have depreciation or capital gains tax implications

---

And many more matters
which might be unique to your position or the business – such as franchise agreements, specific licenses or permits required to operate your business, and so on.

If you are buying a business, it is very important to only do so with quality professional advice from both your lawyer and your accountant. Elringtons' Commercial Law team have assisted in the purchase of countless businesses ranging from small family-owned businesses right up to large commercial enterprises in both the ACT and NSW. Different complications and considerations arise apply to the various types of businesses. We can help guide you through this complicated legal process.

You may also be interested in our article – What to know before you sell a business.

Family Law Dispute Resolution

Posted onAuthorCarlos Turini

Resolving family disputes without going to court!

Parties involved in a family law disputes are encouraged to attempt to negotiate a solution to parenting arrangements and property settlements between themselves without resorting to taking their matter to court. This process is called **Family dispute resolution** **("FDR").**

FDR, before parties commence court proceedings, may take many forms:

1. Parties negotiating by themselves;
2. Parties negotiating with the assistance of a mediator;
3. Parties negotiating with the assistance of their lawyers and a mediator;
4. Parties negotiating with the assistance of their lawyers without a mediator ("four-way meeting");
5. Parties engaging on collaborative law;
6. Parties engaging an arbitrator to rule on their dispute.

In all cases, parties should obtain legal advice about their rights, obligations and prospects before they embark on the **FDR** process.

Is Family Law Dispute Resolution compulsory?

Whilst it is not compulsory for parties to engage in **FDR** before people commence family law property proceedings in court, **it is compulsory to do so for parenting matters before starting court proceedings** unless the matter falls under some specific exceptions as, for example, in urgent cases or domestic violence cases. It is also a requirement for those seeking changes to an existing parenting order.

Dispute resolution has many advantages and it's a better method to resolve family law disputes because it is normally:

- Cheaper
- Quicker;
- More flexible
- The range of outcomes available to parties in **FDR** is wider ranging than what a court may do
- Parties involved in FDR are only limited by their own imagination with regard to the possible outcomes that may be achieved

Two of our solicitors at **elringtons'** Lawyers, Carlos Turini, Director and Anya Aidman, Associate, are specialist family lawyers and are also accredited as mediators by the Resolution Institute under the National Mediator Accreditation Standards (NMAS). Carlos and Anya are experienced litigators and court advocates. They engage in the **FDR** process at times as mediators and at times advising their clients and representing them in the process. They find the discipline of dispute resolution satisfying as practitioners as they are able to assist their clients to advise them and represent them and to devise together with their clients tactical and strategic considerations during the dispute resolution process.

Court should become the last resort for resolving family parenting and property disputes!

Posted onAuthorCarlos TuriniLeave a comment

The Crisis in the Family Court System

There are numerous media reports about the fact that the Family Court system is in a state of crisis. There are long delays in the resolution of parties' disputes by the Court and this causes much angst for the parties and their children often resulting in mental health issues for all involved but is especially concerning in children. One recent article on the topic is from Katherine Gregory entitled ***Judges go public: Family Court shouldn't be 'making do'*** . Fingers are pointed in various directions to cast blame depending on who you listen to including that there is a chronic lack of funding and resources, that the aggressive attitude of some lawyers is to blame and so on.

As a significant measure, in an attempt to address the existing crisis in the Family Court System, the Federal Attorney General announced some months ago, quite unexpectedly and without much apparent consultation, the merger of the Family Court with the Federal Court. There has been substantial criticism about this measure, for example by the Law Council of Australia President, Morry Bailes who stated:

"Our current understanding is the Australian Government will not make any new appointments of judges to the specialised Division 1 of the new court, meaning the quality of the family law justice system would reduce under this change. Australians may no longer have access to a court that specialises in family law."

The message from various Judges and other people involved in the Family Court system is that a Court having to resolve a family law dispute should be the last resort.**[1]**

Alternative Dispute Resolution

Former Federal Circuit Court Judge, now barrister, Stephen Scarlett suggested that alternative dispute-resolution methods, like mediation and arbitration should be more prevalent so only matters needing a judicial decision made it to court in the first place:

"Only those that can't be resolved that way should go to a hearing." [2]

This would not only reduce the load on the courts but offer faster and often more effective means to achieve suitable outcomes for the parties in dispute. ***Alternative dispute resolution offers many ways to resolve family matters quickly, fairly and inexpensively through mediation and negotiation.***

What is Alternative Dispute Resolution?

What are the advantages of ADR?

The different types of Alternative Dispute Resolution

In some circumstances the ADR process cannot be applied:

- There always must be a level playing field between the parties involved in the process.
- Sometimes, the parties are not suitable.
- There may be a history of domestic violence in a case which makes the prospect of parties having to negotiate via an ADR process inappropriate.

However, in the clear majority of cases, about ninety-five per cent (95%) parties want to resolve their dispute and they manage to resolve their family law dispute before the matter reaches a final hearing. [7]
The family lawyers at **elringtons** are committed to following all avenues of negotiation and mediation before suggesting court proceedings. **Elringtons** has two family lawyers, Carlos and Anya, who are nationally accredited mediators , Carlos is also a NSW Family Law Accredited Specialist.

Charitable Gifts in Wills

Posted onAuthorMitchell EvelynLeave a comment
By Mitchell Evelyn
Leaving a gift to a charity in your Will can be a great way to provide generous support which might ordinarily be outside your financial means. As with any other gift in your Will, it is important to make sure that any charitable gift is clear, well considered and carefully drafted to ensure that your wishes are carried out after you have died.

Here are some of the key issues that you may wish to consider:

Why give to a charity in your Will?

Which charity to choose?
Purpose of donation
Recommended clauses
Family Provision Claims
Elringtons Lawyers are big believers in giving back to our local community, so if you are considering leaving a gift to a charity in your Will, call **elringtons** experienced Estate Planning team on (02) 6206 1300 and make an appointment today. For information about **elringtons'** partner charities, see our community page.
For more information or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Mitchell Evelyn or Kerin Cotchett:

10 useful tips for your Family Court Appearance

Posted onAuthorCarlos Turini
Going to court can be stressful and unnerving for those who have not experienced it before.

Here are 10 useful tips which may help you on the first appearance in Court:
Alternative dispute resolution

Personal safety
Be prepared

Online court portal
Security
Entering the court room and addressing the Judge
Wait your turn and be respectful
Adjournments
Children
No violence
For more information see:
Federal Circuit Court
Family Courts of Australia

Alternative dispute resolution
mediation may be a useful and effective tool for assisting to resolve matters which are disputed. If you think that there is a possibility of the parties attending mediation to try and resolve issues, then this may be suggested as a course of action. The courts are certainly receptive to any parties that try to resolve matters outside of the court room.

Personal safety
if you are concerned about your safety in any way you can contact the court prior to put in place a safety plan. Alternatively, discuss your concerns with your lawyer so that they can assist you in devising a safety plan as well. There are separate conference and meeting rooms which are available to any person to use to provide safe spaces as well as to ensure individuals confidentiality.

Be prepared
you and your solicitor should have discussed what the agenda is with regard to the Court attendance. You must have a clear idea about what you are seeking as discussed with your lawyer before the day. It is also useful to have a copy of all court documents with you so that they can be referred to if necessary. A useful suggestion is that you take a note pad and pen with you, so that you can make notes and what happens inside the court room.

Online court portal
The Family Court and the Federal Circuit Court have a Court Portal which you may access once you register. This will allow you to access the Court documents filed in your case and Court orders made

Security
At the entrance to the Federal Circuit Court and Family Court of Australia there are security check points. This is just a preventative measure to ensure everyone’s

safety. Make sure that you don't have any mistaken sharp objects on you or liquids for example deodorant.

Entering the court room and addressing the Judge

If court is already in session when you enter the court room, it is proper to bow in the direction of the Judge as a sign of respect. When addressing or speaking to the Judge, you must stand up and address him/her as "Your Honour". You will often see lawyers or individuals take prompts from the Judge. It is important to listen to what the Judge is saying to the party and to respond accordingly.

Wait your turn and be respectful

On any given day each Judge could have up to 20 or 30 matters listed on a "duty day" which need to be dealt with. You may need to wait some hours before your matter is heard. Normally, you should allow the full day to be available as the Judge ultimately decides when the matter will be heard during the day. Usually matters are listed in alphabetical order and then get heard as the Judge works down the list.

When your matter is eventually called, the Judge will ensure that both parties are given the opportunity to have their say (personally or via their solicitors) and address the issues that they believe need to be addressed. Each party will be given the opportunity to express their version of events or state opposing submissions. Unless you are called to give evidence in the witness box or you are self-represented, your solicitor would normally do all the talking.

You will quite possibly hear things from the opposing solicitor or the opposing party with which you do not agree. It's important that you do not gesture, roll your eyes or express yourself loudly. Instead, you should have a notebook and be ready to pass on messages to your solicitor if necessary.

Adjournments

Normally, matters will not be finalised the first time a matter is heard by a Judge or Registrar. Sometimes, the parties and their respective solicitors are ready and willing to negotiate while they are all present in the Court premises waiting to be heard and may perhaps settle the case.

There are normally various appearances that must be made before a Judge or Registrar in the lifetime of a court case. These are called "court events". The usual practice after the initial appearance before the Court is that the matter will then be adjourned or delayed to another "Court event" some weeks later.

During the initial appearance, the Court may make some procedural orders, for example, to refer parties to attend mediation or (in children's disputes) to a counsellor to meet the parties and the child or children. The counsellor will prepare a written assessment for the Court which will be available at the next Court event.

Children
Ordinarily the courts are not a place to take children. It is suggested that you arrange prior child care and or private care arrangements for your children for the day that the matter is listed. There is of course an exception to this if you have been ordered by the court to bring the children for example to be involved in family consultant interviews. In this instance you should make every effort to ensure the children are available at the time and day that you have been advised.

No violence
there is a strict “no violence” policy within the courts. Remember this and avoid outwardly displaying aggressive behaviour or becoming violent towards others. Physical or verbal violence and abuse will not be tolerated. There are security guards present to ensure safety.

Will a Restrictive Covenant Prevent Your Development?

Posted onAuthorRod Anthes
Quite possibly the answer is- no!
The case of *Harrington v Greenwood Grove Estate Pty Ltd [2011] NSWSC 833,* is very instructive with respect to both a local Council’s ability to override covenants and the circumstances in which an owner can have contractual provisions declared unenforceable. The case decides that where a Council has requested a restrictive covenant or design guidelines be included in a subdivision and these are carried forward in the contract special conditions (even if not contained in a s88B instrument) then the contractual provisions are enforceable against an owner. However, if Council didn’t make the request and subsequently approves a development contrary to the contract, then the contract is not enforceable against the owner-even though the owner was a party to the contract. **This is because of the power of councils to ignore a covenant if they are approving a lawful development.**
S 3.16 of the Environmental Planning and Assessment Act (formerly s28) provides the legislative authority and most councils today have a provision in their Local Environmental Plans consistent with s 28 or the later s 3.16. The only condition is that the Governor or Minister’s consent is required for the LEP provision, which would not be there if consent had not been granted.

Adoption News

Posted onAuthorCarlos Turini

Adoption has been in the news recently with changes to the NSW adoption laws and recommendations for a national adoption law.

Currently the laws for Adoption in Australia vary from state to state rather than an Australia wide law that is easily navigated. The adoption system as it stands in Australia does not guarantee a stable healthy environment for the more than 47,000[1] children living in out-of-home care.
Adopting a child is a very sensitive topic; there are many reasons why a child could be in "out of home care" and may become available for adoption. The situation can be very stressful for both birth parents and those wishing to adopt.

Changes to NSW Adoption Laws
Recently the NSW government changed the adoption laws **to allow Adoption without parental consent**. The changes impose two-year deadlines on permanency decisions and narrow the grounds for these decisions to be varied or challenged.
The changes are outlined below.

Children and Young Persons (Care and Protection) Amendment Bill 2018
The changes to the Adoption laws were approved by the NSW Government on Thursday 22nd November amidst amongst much consternation from community organisations. Aboriginal leaders and community members say the changes will lead to another stolen generation. Aboriginal children and young people make up almost 40% of those in the out-of-home care system.[3]

Federal Parliamentary Committee [4]
An Inquiry into local adoption was opened in March 2018 by the Commonwealth Social Policy and Legal Affairs Committee. Its report was released today the 26th Nov 2018. **The Committee has recommended the Federal Government work with the States and Territories to enact a national adoption law**, after committing to a national adoption framework. "The system, as we currently have it in Australia, is trapping many of these children into an unhealthy cycle," Julia Banks the Liberal MP said while launching the report in Canberra on Monday.[5]
A national adoption law would make the current state-based system less complex, more consistent and lead to more adoptions.

At **elringtons** we have significant experience in adoptions for children under 18, adults and all other family matters regarding parenting issues. If you would like legal advice on any of these issues please contact our family law team.
For more information on or to make an appointment in either our Canberra or Queanbeyan office please do not hesitate to contact Carlos Turini**:**
+61 2 6206 1300 | e: info@elringtons.com.au

---

[1] https://www.sbs.com.au/news/committee-recommends-establishing-national-adoption-law
[2] https://legislation.nsw.gov.au/#/view/bill/8b9dcb7d-133a-4db3-ad71-fe82fb7d6111
[3] https://www.theguardian.com/australia-news/2018/nov/23/adoption-without-parental-consent-legalised-in-nsw
[4]https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Localadoption
[5] https://www.sbs.com.au/news/committee-recommends-establishing-national-adoption-law
CategoriesAdoption, Family Law, News & EventsTagsFamily Law

What is a cohabitation agreement and why should I get one?

Posted onAuthorCarlos Turini
What are "financial agreements", "binding financial agreements" or "BFAs"?
The terms "financial agreement", "binding financial agreement" or "BFA" are often used loosely by lawyers and non-lawyers alike in reference to contractual agreements which parties may enter under the Family Law Act (1975). When using these terms, maybe one specific meaning is intended. However, there are various alternative agreements which may be entered under the Act.

In this article we look at one specific type of BFAs: “cohabitation agreements”.

Cohabitation agreements
A cohabitation agreement may be defined as a contract between two parties which makes provision about how to divide their assets if they separate in the future.

Parties to a cohabitation agreement are contracting out of the provisions under the Family Law Act which would otherwise give them rights and entitlements against each other for a property settlement. Instead, they wish for their contract to provide what are their rights and entitlements against each other.

A cohabitation agreement may cover all assets of the parties or some of their assets.

Pre-Nuptial Agreements and Other Cohabitation Agreements

Why enter into a cohabitation agreement?
What makes a good cohabitation agreement?
When should you enter into a cohabitation agreement?
Pitfalls and Challenges of a Cohabitation Agreement
Why Do Courts Set Aside Cohabitation Agreements?
If you would like more information or to make an appointment in either our Canberra or Queanbeyan office please contact Carlos Turini:
+61 2 6206 1300 | e: cturini@elringtons.com.au
Was this information helpful?
(No Ratings Yet)

---

[1] https://elringtons.com.au/2011/03/prenuptial-agreement/
[2] Frequently, parties agree to a clause in the agreement that if they acquire real property jointly, they will own it as tenants in common (not joint tenants) and each party’s entitlement to the real property under the BFA will be equivalent to the share of title they have – 30%, 40% etc;
[3] Thorne v Kennedy [2017] HCA 49 (8 November 2017) at Paragraph 56;
[4] Thorne v Kennedy [2017] HCA 49 (8 November 2017) was a case where the Trial Judge declared a pre-nuptial agreement void and set it aside as she concluded that the husband applied undue influence on the wife to sign it. The Judge described, among other things: the wife’s “…emotional preparation for marriage, and the publicness of her upcoming marriage.” Significantly, the High Court sided with the Trial Judge decision and, in the process, overruled the Full Court of the Family Court which would have allowed the cohabitation agreement to stand;
[5] Family Law Amendment Act 2000 (which took effect from 27 December 2000);
[6] See Thorne v Kennedy [2017] HCA 49 (8 November 2017) referred to in (2) above; see also Wallace & Stelzer and Anor [2013] FamCAFC 199 (‘the pole dancer case’);
[7] See section 90G and section 90UJ of the Act;
[8] See section 90K and section 90UM.

Categories Articles, Binding Financial Agreements, Cohabitation Agreement, Family Law, News & Events Tags Cohabitation Agreement, Financial Agreements

inancial Agreements

Posted onAuthorCarlos Turini

Binding Financial Agreements (BFAs)

AN INTRODUCTION

The terms "financial agreement", "binding financial agreement" or "BFA" are often used loosely by lawyers and non-lawyers alike in reference to contractual agreements which parties may enter under the Family Law Act (1975) and other legislation such as the Child Support Assessment Act (1989).

As described below, there are maybe ten different variations of BFAs which parties may sign up to.

Among the most popular BFAs, there are two categories:

1. **Cohabitation agreements** – where parties make a contract **about the future** regarding their property and how it may be divided if they separate;
2. **Property settlements** – where parties have already separated and wish to formalise legally the division of their assets.

A definition of a BFA

Ten Alternative Versions of BFAs
Why sign up to a BFA?
Requirements for a BFA to be valid
Cut and Paste Jobs and Templates
If you are considering singing up into a BFA and would like more information or to make an appointment in either our Canberra or Queanbeyan office please contact Carlos Turini:

p: +61 2 6206 1300 | e: cturini@elringtons.com.au

Was this information helpful?

(No Ratings Yet)

CategoriesArticles, Binding Financial Agreements, Family Law, News & EventsTagsFamily Law, Financial Agreements

A definition of a BFA

A possible, general, definition of a BFA is:

A private deed or a contract that parties enter into in writing under the Family Law Act (1975) or the Child Support (Assessment) Act (1989) to formalise an agreement about their property or child support, either because:

1. they are about to marry or commence a de facto relationship and they want to make provision about how their assets will be divided between then if they separate;
2. they are in a marriage or a de facto relationship and they want to make provision about how their assets will be divided between then if they separate;
3. they separated, and they wish to formalise a property settlement for the division of their assets;

4. they are separated, and they wish to make provision for child support for their children as an alternative to an assessment for periodic payments under the Child Support (Assessment) Act (1989).

However, the above definition does not do justice to all the various alternative BFAs that parties may sign between themselves. For example, parties may enter a BFA about:

1. Spousal maintenance;
2. Superannuation;
3. A relationship which is not a marriage or a de facto relationship but a "domestic relationship" as understood under the Domestic Relationships Act (1984). This may include, for example:
4. two persons in a personal relationship although they are not living together; or
5. a carer and a patient such as a daughter and her mother or persons who are not related.

Ten Alternative Versions of BFAs

I counted ten possible variations of BFAs which parties may sign up to:

1. A "pre-nuptial" agreement, that is, an agreement between two parties **before their marriage** in contemplation of their marriage about how they will divide their assets in future if they separate;
2. An agreement between two parties **before they commence to live together in a de facto relationship**, in contemplation of their relationship, about how they will divide their assets in future if they separate;
3. An agreement between two parties **after they marry** about how they will divide their assets in future if they separate;
4. An agreement between two parties **after they commence their de facto relationship** about how they will divide their assets in future if they separate;
5. A private agreement, **after a married couple have separated** for a property settlement, instead of consent orders to be made by a court, that provides how their assets must be divided between them;
6. A private agreement **after a de facto couple have separated** for a property settlement, instead of consent orders to be made by a court, that provides how their assets must be divided between them;
7. A **spousal maintenance agreement** – a private agreement which parties sometimes enter into after they separated (whether they were married or in a de facto relationship) normally **in addition to a property settlement** which makes provision about future periodic payments or lump sum spousal maintenance which one party will pay to the other;
8. A **superannuation agreement** is a private agreement for a property settlement which parties sometimes sign up to after they separated (whether they were married or in a de facto relationship) making provision about how to split their combined superannuation entitlements between them;
9. A **Child Support Agreement** – an agreement which parties may enter under the Child Support Assessment Act (1989) about child support for their children including for periodic payments and such other things as child care fees, school fees, medical expenses, orthodontal expenses etc;
10. A **domestic relationship agreement** – an agreement which parties to a "domestic relationship" may enter between themselves under the Domestic Relationships Act 1984 (ACT).

Why sign up to a BFA?

There are many reasons why people choose to enter BFAs.

When it comes to a property settlement, parties have **no choice** but to formalise legally their agreement for division of their assets. Parties may do this by signing a BFA or consent orders. There are two main reasons why their property settlement must be formalised legally:

1. A BFA will end the parties' financial relationship, and neither will have a claim against the other under the Family Law act in future;
2. There are various exemptions in relation to stamp duty fees for the transfer of title to real property, shares and motor vehicles if parties may produce a BFA which reflects their property settlement. There is also roll over relief regarding capital gains tax which otherwise may be payable by a party.

With regard to cohabitation agreements the most common reason why parties choose to sign a BFA is to ensure clarity and certainty about the division of their assets in the event that they separate in the future.

Requirements for a BFA to be valid

There are various specific requirements under the Family Law Act which must be followed for a BFA to be valid.

In every case, for a BFA to be valid and enforceable:

a) It must be made in writing;

b) It must be signed by all parties;

c) Each party must obtain independent legal advice from his/her solicitor and:

i) Each solicitor must sign a statement or certificate of legal advice;
ii) The solicitors' certificates must be exchanged between the parties and normally they are attached to the BFA.

In drafting the agreement, the lawyers and the parties must be aware that BFAs are sometimes challenged in court in the future after parties separated if one of party no longer wishes to abide by the agreement. The Family Law Act lists various reasons why a BFA may be set aside including:

a) If it was obtained by fraud;

b) If the agreement was created to defraud or defeat a creditor or another person;

c) If circumstances have changed since the BFA was signed:

i) relating to the care, welfare and development of a child of the parties and hardship would be caused to a party as a result and, as a result of the change, the child or, if the applicant has caring responsibility for the child or

ii) and it has become impracticable for the agreement to be carried out.

Cut and Paste Jobs and Templates

Far too frequently, BFAs which parties have entered into are subsequently challenged in court and set aside by the courts for various reasons, sometimes because basic errors have been made by the drafter and/or the clients.

Parties' motivation to sign a BFA in the first place is often sound and it is a good idea to have a contract between themselves about their joint assets if they were to separate is a good idea and it normally ensures that there will be clarity and certainly when they separate and a BFA avoids future disputes in Court.

However, it is important for the parties and their lawyers to have a healthy respect for the necessary process to draft a good BFA. The errors which are sometimes made relate to the fact that the drafter did a cut and paste job and the agreement was not adjusted and refined to address the needs of the parties.

Precedents and templates (some which may be obtained in the internet) may be dangerous unless used wisely and carefully and adapted to the parties' needs. There is a need for the parties and the lawyers themselves to apply themselves to the task of drafting a comprehensive agreement, in particular, about cohabitation agreements.

Obviously, there are many uncertainties about the future. It is impossible to predict all possible vicissitudes of life. However, it is important to reflect about all **likely** future events and to address those between the parties and the lawyers and make appropriate provision in the cohabitation agreement including, for example:

- one party is likely to survive the other;
- one or both parties may not have the capacity to make decisions about their affairs at some stage before death;
- the children of the party who lost capacity may wish to make decisions which affect the other party adversely;
- should the cohabitation agreement make provision for the surviving party to have the right to live in the other's property for live if he/she survives the other?

These are matters which may be addressed simply by the original drafter applying appropriate care and precision.