

# Newsletter

## Providing For Your Spouse And Child Under Your Will

In a previous newsletter we discussed the importance of making a Will and in doing so, how you can ensure that the people of your choice take the share of your estate which you leave them. Taking advice on how to reduce the risk of disputes and claims against your estate is also critical to ensure your estate is distributed in a timely and efficient manner.

Even though a will is valid, it can be challenged if you have not made adequate provision for your spouse, child or a dependent person. What is adequate provision will be the subject of another newsletter article but in this article we discuss the meaning of the terms spouse and child.

### Spouse

The word "spouse" is defined in the Queensland Law, as a husband, wife or de facto partner. The definition can include dependant former spouses. The definition of a de facto partner is also defined as two people living together as a couple who are not married but are living in a domestic type relationship. The gender of the persons living together is not relevant.

To determine whether two people are living in a de facto relationship under the law, there are several factors to consider. Some of these factors include:-

- the nature and extent of the living arrangements,
- the length of the relationship,
- whether or not the relationship is a sexual relationship,
- financial dependence or interdependence within the relationship,
- acquisition of property,
- degree of commitment to a shared life together,
- performance of household duties, and
- care and support of any children involved in the relationship.

These factors are not exhaustive and there may be other circumstances to be taken into consideration when determining whether a de facto relationship exists.



### Child

The Succession Act 1981 (Qld), defines "child" as any child, stepchild or adopted child of the deceased person. At the time of your death, for a child to be considered your stepchild, they must be the child of your spouse and the relationship of stepchild and step-parent must not have ceased to exist as a result of divorce.

Your duty to provide for the maintenance and support of your stepchildren stops when you become divorced from the stepchild's parent ("your spouse"). However, this duty does not stop merely because the stepchild's parent died before you. Your duty will continue as long as you were still married to your spouse at the time of their death. The relationship of stepchild and step-parent also continues even if you remarry after your spouse's death, as long as you were still married to the stepchild's parent at the time they died.

### Conclusion

Even though you have a duty to provide for your spouse or child, you may decide not to make any such provision. However if you do not make adequate provision for your spouse or child, you risk a claim being made on your estate.

If you have any concerns about someone disputing your will or believe that you may be eligible to apply for provision from an estate then you would contact Judy Smith or Juliet Hall for advice.



## Real Estate Contracts (Part 3)

This article continues the series on real estate contracts which we have written about in previous newsletters. This article deals with Conditions of Sale

### Conditions of Sale

There are two types of conditions written into a residential house/land contract – the Standard Terms of Contract (which are the standard terms for every sale), and Special Conditions (which are written into the contract by the seller and the buyer and are specific to the property being sold).

### Standard Terms

Some of the Standard Terms in a residential house/land contract are -

- Purchase price includes GST
- Requirement to adjust rates, water charges and rents payable on the property
- Subject to obtaining satisfactory finance approval
- Subject to satisfactory building and pest inspections
- Time is of the essence of the contract
- Right to conduct survey of land
- Warranties by seller about the property
- Risk of the property passing to the buyer on signing the contract

It is important that if you are a seller who is registered for GST, that you ask your accountant whether or not GST is applicable to the sale of the residential property. In some cases it can be, and the standard contract terms state that the price is inclusive of GST.

If the property is not your principal place of residence, capital gains tax may also be an issue. You should discuss this with your accountant.

When deciding on a date for satisfaction of finance approval and/or building and pest inspections of the property, you must make sure that sufficient time is allowed. Banks in particular need at least a couple of weeks to process a loan application after the contract is signed.

Throughout the life of the contract, there is a requirement that "time is of the essence". Simply put, this means that if a condition has to be satisfied by a certain date, and it is not satisfied, the contract can be terminated. The date can be varied – but only by written agreement. In some circumstances this may lead to a default under the terms

of the contract, and the non-defaulting party may have rights to claim for damages, eg legal fees, loss of profit on the sale, forfeiture of deposit.

When the seller signs a contract, they are providing warranties to the buyer on various matters, eg that the land is not listed as being contaminated under the Environmental Protection Act; that the property is not affected by the Queensland Heritage Act; that no Notices have been issued by a Statutory Authority requiring work to be carried out; if a home unit – there are no matters involving the Body Corporate which could impact on a proposed buyer. If a seller is unsure on any of these matters, it is imperative that searches be conducted prior to the seller signing the contract so that accurate disclosure is made to the buyer, so as to avoid the buyer having a right to terminate the contract owing to failure by the seller to disclose information.

Another important standard term of the contract is that after the seller has signed the contract, the risk of the property, ie the obligation to insure, passes to the buyer and the buyer only has until 5 pm on the next business day to arrange insurance cover. It is important that a buyer attend to insurance as soon as the contract is signed, because if there is any damage to the house (other than caused by the seller's negligence), the buyer might still have to complete the purchase and would then have to claim on their insurance to rectify.

There are other standard terms in the contract that are important to be aware of, particularly relating to requirements for completing settlement, and these will be discussed in our next article.

### Special Conditions

In addition to the standard terms of contract, it is sometimes necessary to include other conditions relevant to the individual circumstances of sale, eg completion by the buyer of the sale of another property, final building approvals to be obtained by the seller, or building repair work to be carried out by the seller.

It is important when writing special conditions into a contract that they are checked by your lawyer before you sign the contract, to ensure that the wording of the condition adequately protects your interests.

If you need to sell your own house before you can complete the purchase of the new one, any special condition written into the contract must be wide enough to cover this, and that it covers what happens if the condition is not fulfilled.

It's not enough to say your purchase is subject to your obtaining a contract for the sale of your house. It must also be subject to completion of the contract for the sale. There also needs to be definite timeframes within which to obtain the contract and complete the sale, and consequences that if the timeframes are not met, the contract must be able to be terminated by either the buyer or the seller.

Likewise, if your purchase is subject to the seller finishing off some building repairs, the condition needs to state a definite date by which the repairs are to be completed, that the repairs must be carried out in a workmanlike manner and, depending on the type of work done, maybe a provision that the buyer can have a building inspector check the work is satisfactory, otherwise the buyer has the right to terminate the contract.

We often find that the special conditions in a contract are ambiguous, and then it is necessary for further agreement to be reached between the parties on what was intended. It is better to get it right the first time to avoid a dispute about the interpretation to be given to the condition.

If you have any concerns about conditions or special conditions in a contract, please contact Catherine McKenzie or Leslie Wood for advice.



*“people you  
can talk to”*

**S M I T H & STANTON**  
LAWYERS



In a previous newsletter we talked about one of our clients, Brisbane Cruises Pty Ltd and its purchase of the Kookaburra Queens. In this edition we would like to share with you the history, business and vision of another one of our clients, Barry's the Home Improvers.

Barry's began as Mad Barry's over 35 years ago. It was famous for low price, high volume items including hardware, paint and plumbing. Millions of dollars were spent every year on advertising Mad Barry's products on radio, TV and newspapers.

Mad Barry's Queensland and Mad Barry's NSW grew very rapidly and became one of the biggest and most powerful retailers in the 80s.

Elvio and Claire DiZane purchased Barry's, The Home Improvers Queensland Franchise in September 1999 and even though the name changed from Mad Barry's in 1996, the brand heritage that remains even today is quite outstanding.

Over the last 10 years, Elvio and Claire have worked hard to re-engineer the Group and adopt a product and service offering that targets all consumers who may need a "Cabinet" for their home.

In new houses, Barry's sell wardrobe inserts, storage systems and Out-door Kitchens. In existing homes, Barry's sell new Barry's kitchens, Barry's bathrooms, Barry's Laundries, Barry's wardrobes and Barry's storage systems.

With the recent introduction of the Barry's "Online Shop", Barry's can now market to every person in Queensland & throughout Australia who owns a residential or investment property. Barry's can supply outlying areas with products that were previously not feasible to have delivered due to cost.

Barry's has always been a well-loved and respected Queensland Icon. It is great to see that many of their dedicated and happy customers, who remember accompanying their parents as kids when they shopped with Barry's many years ago, are now themselves returning to shop with them with their children.

From the Front Door to the Outdoor, Barry's has you covered.

[www.barrys.com.au](http://www.barrys.com.au)

## Smith & Stanton News

### Our New Lawyer

By the time this newsletter is produced, our trainee lawyer Juliet Hall will be admitted as a Legal Practitioner. Juliet has degrees in Psychology and Law and has been working at the firm for nearly three years. Judy Smith moved her admission in a ceremony at the Supreme Court on Monday, 7 September. Juliet will continue to provide the excellent service to clients in the areas of Wills, Enduring Power of Attorneys, Retirement Village work and Estates.



Bruce Smith, Juliet Hall, Judy Smith

### Weddings

We have two weddings in November to celebrate. Firstly, Amanda Hofstetter our Conveyancing Paralegal will marry Matthew on 7 November. Keeping things in the family, Juliet Hall will marry Bruce and Judy's son Matthew at the end of November.

### Welcome Back

We welcome back Angela Magann who has recently recommenced her employment with us after 7 years living in Dalby. Angela worked for Bruce many years ago and is now assisting Amanda in the conveyancing area and Lesley Woods in Commercial/Property area of the practice.

## You Shouldn't Take What Isn't Yours: Bratz V Barbie

Mattel, maker of the popular Barbie fashion doll, has won a major legal battle against its chief competitor, Bratz, after a jury ruled the rival doll had been designed by a Mattel employee in breach of contract with the toy giant.

A jury decided Bratz design drawings, prototypes and sculptures were created by a doll designer while employed by Mattel.

Mattel's employment agreement gave the toy maker ownership of anything the employee created during his employment there. This is a fairly standard provision in this type of agreement.

However, while he was still at Mattel, the employee, Mr Bryant, entered into a contract with California-based MGA company, which has the license to manufacture Bratz. That was in September 2000. Mr Bryant left Mattel for MGA in October of the same year.

A month later, MGA showed Bratz prototypes for the first time and in January 2001 exhibited Bratz at the Hong Kong Toy Fair. Bratz dolls hit shop shelves in June 2001.

Mattel sued Bratz and the jury awarded Mattel \$100 million for copyright infringement and breach of contract. Bratz was ordered to withdraw its dolls from sale in 2009.

The underlying principle has been a simple one – you shouldn't take what isn't yours.

The decision affected MGA but not Mr Bryant, who reached an out-of-court settlement with Mattel in May, less than two weeks before the trial began.

FOOTNOTE: In 2007 the sales of Bratz dolls in US alone was \$4.8 billion.



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