

Macrossan & Amiet Solicitors

news update

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Co-habitation Agreements Set Aside for Duress and Unconscionability

By Heather Smith

Co-habitation Agreements (more commonly known as Pre-nuptial Agreements) are becoming increasingly popular with de facto couples who are in a committed relationship, share finances and assets but are not wanting to get married just yet, if at all. The Agreements are increasingly being used between couples prior to tying the knot.

Pre-Nuptial Agreements are a great way to safeguard assets, heirlooms or and other items of personal or monetary value, should a couple ever separate. They are however, not absolute. There are many factors that can result in the Court setting aside the Agreement. The *Family Law Act* now governs legal aspects of both de facto and marital relationships.

The case of *Balckmore -v- Webber* [2009] FMCAfam 154 the Court contemplated whether a pre-nuptial agreement entered into by the



Heather Smith

parties could be set aside on the basis of duress and unconscionability by the husband.

The Facts

The couple separated in 2007 having executed a pre-nuptial agreement. The wife argued that the agreement should be void for duress or unconscionability for the husband's failure to disclose all financial material under the pre-nuptial agreement. The husband's counter argument was that the pre-nuptial agreement was not made in duress as he had not deliberately sought to gain an

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Local people. Local expertise. Industry leaders.

What's your will for your Will?

By Catherine Manderson

As solicitors, we are well-known for harping on about the importance of making a Will and keeping it up-to-date.

Older folk would remember days when Wills were made without things like full stops and other punctuation, when rules regarding Wills, in general, were much stricter.

One example is the old "Codicils" which were addendums to Wills used to modify the terms of the Will. In the past, if you wanted to change your Will, the solicitor would simply prepare an additional page which would set out what the changes were. This would be attached to the original Will and both documents would effectively operate together, the latter "Codicils" amending or overriding the terms of the original Will, where they conflicted.

Today, if you want to change your Will, we simply prepare a whole new Will as each validly made Will revokes any prior Wills made by the Testator or Testatrix (person who made the Will).

These days, both the Courts and the *Succession Act* have become more relaxed in their approach towards Wills that do not strictly meet the restrictive requirements of a valid Will. For example, a Will that has not

been witnessed correctly may, in some cases, still take effect.

Nevertheless, it is very important to ensure that you:-

- (a) have a Will; and
- (b) revise it regularly.

Even though the law in Queensland may uphold a Will that has not been correctly made, this is not always the case and a valid and properly made Will gives you certainty that your wishes will be carried out if anything were to happen to you. It also, removes a lot of hassle, cost and distress which may be caused to your friends and your family (at a time when they are already distressed) if they have to go through lengthy Court processes to prove your intentions and who your beneficiaries should be.

You should also remember that, if you do not have a Will at the date of your death, the Queensland "rules of intestacy" as set out in the *Succession Act* will take effect and they may not provide for the people you want to provide for.

If your estate is small, a validly made Will is important because the estate may not have sufficient assets to fund lengthy court proceedings and if your estate is large, it is important because there is more for your intended beneficiaries to lose through the court process (and as the pessimist would say,



Catherine Manderson

there is also more for the beneficiaries to fight over!).

I know at least one of the Macrossan & Amiet directors tells clients that they should pick a date each year when they will pull out their last Will and consider whether it requires any changes. Obviously the key times to change your Will are if you are contemplating marriage, you have children, something happens to one of your executors or beneficiaries or when your children reach 18 years. As a bride-to-be, my fiancé and I will be ensuring that we prepare Wills "in contemplation" of our marriage before we say "I do"! And yes, that is possible!

Even if none of those events apply to you, you should consider your Will annually because our intentions and lives change over time and even a Will made a year ago may not reflect your intentions today.

So I encourage you, have a look through your records, read through your Will and if your wishes have changed, give us a bell and we'll be happy to help you update it!

Family Law - Mediation a process for problem solving

By Kylie Davies

Mediation is a buzz word in the arena of Family Law. In fact, parents are unable to initiate proceedings in the Family Court for parenting orders without first having attended mediation.

But, what is mediation?

Mediation is a process for problem solving.

devil and Michael was placed in danger when with Peter. In addition, Peter became very angry and abusive towards her new partner Ralph in front of Michael.

Peter expressed his concern that he would not play a part in his son's life unless he and



Kylie Davies

1. How can the child be protected when participating in activities with Peter?
2. How can lines of communications be improved between Peter and Linda?
3. How can changeover times be improved for the child Michael?



Peter and Linda had one child Michael. Michael lived with Linda. Peter wanted the child to spend each alternate weekend with him. Linda was resisting Michael's involvement with the child. Michael sought legal advice. Peter and Linda had to attend mediation.

The mediator invited both parties to speak about their concerns. Linda was concerned Peter was a dare

Linda could come to some agreement. The common ground between Peter and Linda was their love for their child Michael. This was the building block upon which the mediation could progress.

The mediator was able to use this common ground and convert the concerns of both parties into positive questions. Peter and Linda could then discuss solutions.

The mediator encouraged Peter and Linda to talk to one another.

"What if I purchased some good protective motor cycle gear for Michael, would that make you feel better?" Linda responded, *"That would certainly relieve a lot of my concern"*. **Progress.**

The issue of Ralph and his involvement certainly created difficulties for the parties. It was apparent that any contact between Peter and Ralph, either face to face or on the phone, resulted in argument. This argument impacted on the child.

"Let's talk about the changeover times". The mediator had moved the parties to look at the question.

"What is the problem at changeovers?" Linda was quick to point out that Peter would become aggressive towards Ralph in front of Michael. Michael would become upset.

"What if Ralph did not come to the changeover and changeover was at some neutral point?"

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feature

Nick Ross

By Andrew Telford

Nick was born in Britain in 1941 during World War II. Nick recalls having a happy childhood but he didn't like school. He remembers seeing an advertisement for the Navy so he sat an entrance exam. Next thing, he was on a train joining the Navy at the age of fifteen. Nick worked as an apprentice ordinance artificer, which is an engineer. After ten years, Nick decided that he wanted to be a helicopter pilot. He does not know why this was the case but the idea fascinated him and he applied and was accepted.

At one stage, Nick spent two years on "loan" to the Australian Navy and lived for two years at Nowra and on the HMAS Melbourne. He was, at this stage, flying anti-submarine choppers and fell in love with Australia. When Nick finished in the Navy in 1975 he wanted to come to Australia but he wasn't successful in his application to come here so instead, he went and worked in Iran for five years. Nick recalls being in Iran before, during and after the Islamic revolution that took place there in the late 1970's. It was whilst working in Iran that Nick became recognised as one of the few chopper pilots who could fly at high altitude and has in fact flown a chopper at 20,000 feet.

Much of Nick's work involved the construction of power lines,



Nick Ross

which is very specialised work requiring heavy loads to be lifted at high altitudes in mountainous regions. After this, Nick worked in Hong Kong, again, on the construction of power lines, this time in the new territories. This work was dangerous and he recalls that there were several fatal accidents, during this specialised heli-flying job.

After this time, Nick was headhunted to come and work for a company operating out of Darwin which required him to fly a large 20-seat Puma chopper. There was no one in Australia, at the time, who could fly these helicopters and this type of chopper was one that he flew whilst working in Iran.

In the time that followed, Nick lived in Darwin, Wyndham in Western Australia and Victoria. He ultimately settled in Sydney and started working freelance for television stations, in particular Channel Nine. Nick was flying a twin-engine squirrel

and he had an all weather instrument licence which few pilots had. Nick ended up working in conjunction with live TV hook-ups and he became the full-time chief pilot for Channel Nine. Also, because of Nick's background in the Navy and his considerable experience, he was often called upon to fly members of the Royal Family when they were in Australia.

It was whilst working at Channel Nine that Nick became great friends with the TV station's owner, Kerry Packer. When, in the late 1980's, Mr Packer sold Channel Nine to Alan Bond Nick remarked to Mr Packer that he had now lost his helicopter and his pilot but perhaps Mr Packer should take Nick with him. Nick says that he thought Kerry had ignored this suggestion but a couple of weeks later he received a phone call from Mr Packer who said that he'd been thinking about things and had decided that he did want Nick to come with him.

It was at this time that Mr Packer told Nick about his dream to establish a polo centre on his 85,000-acre property north of Scone in the Upper Hunter Valley. Nick was based at the property and he became involved in its development. Nick lived on the property and established an aviation division for Mr Packer's business and he was required to fly Mr Packer backwards and forwards from Sydney.

Over the next ten years Nick travelled with Mr Packer to England each year where he flew him around Europe and no doubt shared many adventures. In the late 1990's when Nick and Mr Packer were in England Kerry became very ill and that is when Nick learned that he had a severe kidney problem. Nick points out that, at this stage, Mr Packer already only had one kidney. Nick impulsively put his hand up and said that if there was anything he could do he would help.

Nick says that the process that followed before he donated a kidney to Mr Packer was exhaustive. Many medical and psychological tests were undertaken. His resolve to help his mate never faltered.

Although Nick was somewhat concerned about the fact that Mr Packer didn't drink alcohol when Nick, on the other hand, did have a tendency to enjoy a good drop of red wine.

Nick recalls that he and Kerry never really discussed the transplant until just prior to the day of the operation. Nick called Mr Packer to suggest that perhaps they should have a bit of a chat about things. Nick says that he went to Kerry's

house and mentioned to him that he had just gone to Western Australia for a holiday and that he had been diving with and feeding sharks at 35 metre depth. Nick recalls that Kerry quickly retorted saying that "It's a good thing I'm getting your kidney and not your brain".

At the time that the transplant was undertaken, Nick believes that Mr Packer only had a few days to live. The transplant was kept very secret however, during the course of the stay in hospital it became public knowledge and he said that the publicity that followed was amazing.

Nick recalls that many of his mates that he had known years ago when in the Navy contacted him as a result of the publicity. It gave him a great opportunity to re-establish many friendships.

When I asked Nick how it was that he came to live in the Whitsundays and he said that he came up to Hamilton Island with one of his old Navy mates who had contacted him after the publicity of the transplant. That is when he decided that he wanted to live in the Whitsundays as he believed there to be no other place like it in the world.

In the time that followed the transplant, Nick and Mr Packer participated in an episode of "Australian Story". Nick recalls being contacted by the ABC about the possibility of doing a story but he immediately said no. After mentioning the approach to Mr Packer he was surprised when his friend told him that he thought it was a

good idea and that he should do it. Nick was very surprised by Mr Packer's response given his usual guarded approach to his private life.

Mr Packer made it clear that he thought it was a good idea to do the story to promote organ donation which the story very much did. Nick says that in the week after the story there were 65,000 phone calls made to the Australian Donor Register.

By sharing such a private story in such a public way it did achieve the outcome of generating much interest in organ donation and it was again for that reason that Nick has agreed for me to write this article.

Nick has a strong belief in organ donation and asks that everyone at least consider becoming an organ donor.

Nick continued to work for Mr Packer for a few years after the operation but he soon stopped flying and then worked as the general manager of aviation for Mr Packer. Nick has eased into retirement living on Hamilton Island for a couple of years, then Brisbane and now he is living in Airlie Beach. Nick says that the Whitsundays remind him of the Virgin Islands except they have not yet been spoilt by too many tourists.

Nick is in the process of buying a new boat and hopes to continue to enjoy the wonderful lifestyle of the Whitsundays for many years to come.

The Australian Donor Register can be reached on telephone number 1800 777 203.

news

You and your lawyer: Help us do a good job!

By Georgina Paterson

Working with a lawyer to help with a legal problem can be a confusing or even intimidating at times. As a trainee solicitor, the chances that I am feeling nervous and the situation intimidating at times is admittedly commonly high. Knowing how to work well with your lawyer, and for me knowing how to communicate and work well with my clients, can certainly make the legal process easier and successful for both parties.

Here are a few tips on how you can help me to assist you in the most efficient and effective way.

(a) Giving your lawyer full and clear instructions about the history of your matter, and let us know what you are trying to achieve.

One way to do this is to write down the major points of your case before you first meet with your lawyer, and bring your notes to each meeting. Do not try to hide details for fear of embarrassment; it is important for us to know all details upfront, rather than being surprised by a revelation in court. In order for us to give you accurate advice it is important for your lawyer to be fully aware

of the circumstances of your matter. Remember your communications with us are always confidential.

(b) Don't hesitate to draw or demonstrate.

Particularly for personal injury incidents, providing a drawing or photo of the work site or demonstrating what your doing at the time of the incident will do wonders to help join the dots between reality and imagination.

(c) Let your lawyer know if your circumstances change.

This is either factual information to do with your matter, as well as contact details.



Georgina Paterson

(d) Show us any documents you think may be relevant to your matter, and even one's that aren't!

If you are not sure whether a document is relevant, let your lawyer decide. It is better for your lawyer to see too much documentation that to see a selected range and maybe miss out on the most important document.

(e) Let us know if you do not understand our advice.

Please let us know if you do not understand what is being said to you, particularly if we use unfamiliar legal words.

(f) Keep notes of your meeting.

Keep notes of your meeting with your lawyer in case you have a question later or you need to review the details of your meeting.

(g) Keep all correspondence and documents you receive from your lawyer.

Keeping a folder is a great way to keep all your correspondence together.

Co-habitation Agreements Set Aside for Duress and Unconscionability

Continued from page 1

advantage from not disclosing the information, and therefore no fraudulent claim should stand. The wife claimed that she was under duress when she signed the agreement and the agreement should be set aside for unconscionability.

The husband told the wife that he would not marry her unless she signed a pre-nuptial agreement. The wife reluctantly agreed. The wife at all times told the husband that she did not believe in pre-nuptial agreements. The wife was on a fiancé visa in which she was required to marry the husband in January 2005 or face return to Thailand. The wife was also pregnant with

the husband's child. She reluctantly signed the pre-nuptial agreement five days before their marriage.

The Finding

It was held in *Balckmore -v- Webber* that the husband knew that the wife did not want to have a child out of wedlock and knew that he and the wife must marry before January 2005 or she would be forced to return to Thailand. The husband used this as leverage to have the pre-nuptial agreement signed by the wife and that the wife was therefore under duress when signing the Agreement. The Magistrate held that the



agreement should also be set aside for reasons of unconscionability.

The findings in *Balckmore -v- Webber* illustrates that both parties must be in absolute Agreement before entering into a pre-nuptial agreement. It is wise that both parties to an Agreement seek independent legal advice before signing anything.

Family Law - Mediation a process for problem solving

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I would feel a lot better about that", said Peter.

"But why shouldn't I bring somebody with me?" said Linda. Both Michael and Linda went back and forth about this issue.

It was decided Linda could drop Michael off to Linda's mother and Peter could pick Michael up

from her place. This avoided potential for conflict. **Progress.**

Finally, it was agreed that Peter spend each alternate weekend with Michael and that Michael would telephone his father rather than the other way round avoiding accidental contact with Ralph

This was a very successful

mediation. Both parties had their concerns addressed and acknowledged. An agreement had been reached in the interests of Michael.

Not all mediations are as successful as this one but with goodwill and effort, positive outcomes can be achieved through mediation.

last word



Kylie Davies

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S O L I C I T O R S

State Government's First Home Owner's Grant expires soon

Time is ticking away... 30th September 2009 will be (at the time of printing) the expiration of the State Government's boost to the First Home Owner's Grant. After 30th September the boost will be halved for those people who sign a contract for the purchase of a new home, the construction of a new home or the purchase of an existing home.

What does this mean?

If you're looking to buy/build, then you have just under two months to find your dream home.

If you're building a new home, not only are you required sign a contract for the purchase of land, but the construction contract must also be signed before the September deadline. There is also talk on the grapevine that interest rates may also be starting to rise, so there is no time like the present to buy that new home, and of course, we're more than happy to assist with your conveyancing needs.

Until next month,
Kylie.



If you have any queries about any of the articles in this newsletter, please feel free to [email mac@macamiet.com.au](mailto:mac@macamiet.com.au) or [phone 4944 0333 \(Mackay\)](tel:0749440333) or [4948 4500 \(Whitsundays\)](tel:0749484500) to speak directly with the author of the article.