

Who has the rights to arrange a funeral?

This vexed question arises from time to time and, although there are Court cases about it dating as far back as 1614, Parliament has never passed any legislation to decide the issue.

In Haynes Case in 1614, an English Court held that there was no property (ownership) in a dead body. There has been no challenge to this proposition for the past 400 years.

In 1997 His Honour Justice Young in Smith v Tamworth City Council set out a summary of the Law in New South Wales regarding the order in which various persons have the right to arrange a funeral.

- 1 *If a person has named an Executor in their Will, and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as Executor has the right to do so.*
- 2 *Apart from appointing an Executor, and apart from any applicable statute dealing with the disposal of parts of a body, a person has no right to dictate what will happen to his or her body.*
- 3 *A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so.*
- 4 *Where no Executor is named, the person with the highest right to apply for "Administration" of the estate takes on the right to arrange the burial.*
- 5 *The right of the surviving spouse or de facto spouse will be preferred to the right of children if a dispute arises.*
- 6 *Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.*
- 7 *If a person dies in a situation where there is no competent person willing to bury the body, the householder where the death occurs has the responsibility for burying the body.*
- 8 *Cremation is nowadays equivalent to burial.*
9. *A person who expends funds to bury a body has the right to recover his or her reasonable costs and expenses.*
10. *A Right of Burial is irrevocable once a body has been buried in the licensed plot.*

11. *The cemetery authority is able to make reasonable by-laws as to the maintenance of the appearance of the cemetery.*
12. *Subject to such by-laws, the holder of the Right of Burial has the power to decide on the appearance of the grave and headstone.*
13. *The reasonable cost of a reasonable headstone is recoverable from the deceased's estate.*
14. *The holder of the Right of Burial cannot use his or her right in such a way as to exclude friends and relatives of the deceased expressing their affection for the deceased in a reasonable and appropriate manner such as by placing flowers on the grave.*
15. *After the death of the Executor or Administrator, the right to control the grave passes to the legal personal representative of the original deceased, not the legal personal representative of the holder of the Right of Burial.*

In the event of disagreement between various parties as to entitlements to arrange burial, it falls to the Supreme Court to decide the issue. It is possible for these cases to be brought before the Court quite quickly for a decision, however the cost of a Supreme Court case is usually prohibitive and parties are encouraged to negotiate a mutually acceptable solution.

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Changes to demerit points scheme from 1 July 2009

On 1 July 2009, changes were made to the demerit point system for drivers in New South Wales so that the following penalties now apply:

Unrestricted licence holders - light vehicles

- 1-10 km/h over the speed limit - one demerit point and an \$84 fine (previously 1-15 km/h over the speed limit resulted in three demerit points and a \$79 fine);
- 11-20km/h over the speed limit - three demerit points and a \$197 fine;



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- 21-30km/h over the speed limit - four demerit points and a \$338 fine (previously 16-30 km/h over the speed limit resulted in three demerit points and a \$238 fine);
- 31-45km/h over the speed limit - three month suspension, five demerit points and a \$647 fine (previously 31-45 km/h over the speed limit resulted in four demerit points and a \$609 fine);
- Over 45km/h over the speed limit - six month suspension, six demerit points and a \$1,744 fine (previously over 45 km/h over the speed limit resulted in six demerit points and a \$1,642 fine).

Please note that higher fines apply for school zone offences and "passing school bus at speed" offences.

Provisional drivers

- P2 drivers caught speeding from 1-30km/h over the limit will lose an additional demerit point from 1 July 2009. This means that P2 drivers will lose their licence on their second speeding offence.
- P1 drivers will continue to lose their licence for just one offence.

License suspension

The number of points resulting in a licence suspension varies for different licence types.

- Full unrestricted licence holders - 12 demerit points in a three-year period
- Provisional P2 licence - 7 points
- Provisional P1 licence - 4 points
- Unrestricted licence with a good behaviour period - 2 points within the term of the good behaviour period.

Note: Provisional drivers should be aware that any demerit points for offences committed that do not result in suspension of their provisional driver licence may be considered for suspension of a later issued unrestricted licence.

We can assist with advice on all driving offences and associated Court matters. Call any of our offices for more information.

Geoff Lloyd

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Sale of a jointly owned home of a bankrupt

A commonly asked question is "if my husband/wife goes bankrupt, can they sell our jointly owned home?" The short answer is, one way or another, the home can be sold.

From the moment a person becomes bankrupt, his/her assets (including his/her share of a jointly owned home) "vests" in the bankruptcy trustee. The bankrupt can no longer be involved in any sale of his/her property from the time he/she has been declared bankrupt.

If a property is jointly owned the trustee has three choices:

- 1 Offer the non-bankrupt owner the opportunity to buy out the bankrupt share, at market value.
- 2 Ask the non-bankrupt owner to agree to the sale of the property on the basis that the Trustee will take the bankrupt's share of the sale and the joint owner will take his/her share of the sale.
- 3 If the joint owner does not wish to purchase the bankrupt's share or refuses to join in a sale of the property, the Trustee can apply to the Supreme Court to appoint a Statutory Trustee for Sale. This forces the sale of the jointly owned property.

There are serious downsides to becoming bankrupt. It is always wise to seek proper advice early and not to bury your head in the sand if facing financial difficulties.

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Minding pre-school children – beware of prosecution

We were recently consulted by a client who had been informally minding the pre school aged children of a number of friends at her home. Apparently as a result of a complaint, officers from the Department of Community Services attended her premises and advised her that by doing this she ran the risk of incurring a fine of \$22,000.

The *Children and Young Persons (Care and Protection) Act 1998* provides that a 'children's service' (a service that provides care for pre school aged children) is required to be licensed unless it is a babysitting, playgroup or child minding service organised informally by parents of the children, or if it provides a service for less than 5 children and the service is provided at a venue at which at least one of the children live. Our client was not able to show compliance with these two provisions and is now required to take steps to obtain a licence.

If you know anybody who may be in this situation you may wish to advise them of the risk they run by doing so. The care of children, particularly pre school aged children, is increasingly regulated and our firm has extensive experience in this area.

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Caldwell Martin Cox supports a Community Bank Branch at Picton

Angus Cox has joined with other local residents and business people in discussions with Bendigo Bank with a view to establishing a Community Bank® branch at Picton. This follows the announcement of further withdrawals of banking services from Picton.

Under the Bendigo Bank model, the community would, in effect, own and benefit from the earnings of the Community Bank® branch.

Key benefits of a Community Bank® branch include:

- The potential to generate an ongoing funding stream for community and charitable projects.
- The potential for local traders to increase their business because people buy, shop and bank with a full service bank locally.
- A local bank manager with a first-hand knowledge of his or her client's business affairs and a commitment to establishing long-term relationships with all customers and the community.
- Longer trading hours to suit the needs of the local community – including Saturday mornings.
- Distribution of branch profits to local shareholders, and community projects.
- Its own ATM.

Angus is part of the working committee to start the process to see if the community will support the idea of a Community Bank®. It requires the local community to purchase shares in the local bank which would be run by a local, voluntary Board of Directors, who would be voted in by the local shareholders.

If you would like more information or wish to get involved, contact Angus Cox on 02 4677 1292.

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Have you considered making a Testamentary Trust part of your Will?

A testamentary trust in your will is another way of leaving your assets when you die, and can have many benefits over those offered by a standard will.

Rather than leaving assets so that they are gifted outright to a person after your death, the assets go into a trust. A trust is an arrangement whereby a trustee is appointed to manage assets for the benefit of a group of people – the beneficiaries.

A major benefit of a testamentary trust is that it can offer protection for assets passing to your children against the risk of bankruptcy or divorce. If you leave a gift outright to a beneficiary who is experiencing financial difficulty or going through divorce at the time of your death, the gift may be claimed by the Trustee in bankruptcy or be divided by the Family Court.

If you have adult children who are facing these risks, it makes good sense to consider incorporating a testamentary trust into your will.

Testamentary trusts are also a popular way of minimising the taxation payable on income received by children less than 18 years of age, who you wish to benefit in your will. This includes the children of your adult children – your grandchildren. A testamentary trust could be established for each child and managed on their behalf until they are old enough to take control of the assets themselves.

If you would like to know more about testamentary trusts contact Angus Cox at our Picton office, or Caroline Holt at our Camden office. We will consider your individual circumstances and provide you with advice as to whether a testamentary trust is appropriate for you.

Caroline Holt

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Same-Sex Law reforms

The Australian Human Rights Commission recently undertook an audit of all Commonwealth legislation in an attempt to locate and remove discrimination against same-sex couples and their children. The reforms proposed by the Commission amended 84 different Commonwealth laws in a wide range of areas, including family law, taxation, superannuation, child support, social security, immigration and educational assistance, amongst many others.

Many changes to the legislation dealing with family law property and parenting matters came into effect on 1 March 2009 and significantly impact on the rights and entitlements of same-sex couples and their children. Same-sex defacto relationships have been accorded the same standing as opposite sex partnerships, which allows the parties to deal with relationship breakdown and the future arrangements for their children in the same manner as the rest of the community. Further changes which occurred on 1 July 2009 to the child support laws also mean that parentage laws have been specifically updated to taken into account same-sex unions, with the consequent recognition of both parties as 'parents' and the flow-on effect that this then has on child support obligations for separating parents.

Contact one of our experienced family law solicitors for further information and advice.

Jillaine Duve

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Did you know?

A defendant who has an Apprehended Violence Order made against them, even with their consent, is disqualified from serving on a jury for the duration of the AVO.

Spring 2009

Who's where and what do they do?

| Area of Law | Camden | Narellan | Picton | Tahmoor |
|--|--|---------------|------------------------------|--------------|
| Conveyancing | Chris Paul Lyn Harrison | Bill McGookin | Angus Cox Leanne Anderson | Kristy Faida |
| Estate Planning | Chris Paul Caroline Holt | Bill McGookin | Angus Cox Jillaine Duve | Kristy Faida |
| Family Law | Caroline Holt | Bill McGookin | Jillaine Duve | Kristy Faida |
| Commercial Leases | Chris Paul Dianne Miller | | Angus Cox | |
| Leases, Sale and Purchase of Businesses | Chris Paul, Dianne Miller Caroline Holt | | Angus Cox | |
| Court Matters /Damages | Geoff Lloyd Caroline Holt | | Jillaine Duve | Kristy Faida |
| Criminal Law | Geoff Lloyd Caroline Holt | | Jillaine Duve | Kristy Faida |
| Debt Recovery | Geoff Lloyd | | Jillaine Duve | Kristy Faida |
| Bankruptcy/Insolvency | Geoff Lloyd | | | |
| Unfair Dismissal/ Employment Law | All enquiries to Chris Paul or Geoff Lloyd | | | |
| Family Provisions (challenging wills) | All enquiries to Angus Cox, Caroline Holt or Geoff Lloyd | | | |
| Personal Injury | All enquiries to Geoff Lloyd | | | |
| Workers Compensation | All enquiries to Geoff Lloyd | | | |
| Medical Negligence | All enquiries to Geoff Lloyd | | | |

Our services include:

- wills and estate planning
- family law
- property law and conveyancing
- retail/commercial leases
- business law
- criminal law
- civil litigation
- employment law
- mediation and dispute resolution

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