

Some thoughts from a family lawyer

Family Law is *always* emotional and *always* tough but is it really to your advantage to have a lawyer who follows suit? In over 18 years at Caldwell Martin Cox our Family Law partner Bill McGookin has seen a lot of different styles and approaches from lawyers.

There are some who:

- bombard you with letters and demands on an almost daily basis;
- always write in a threatening, demanding and aggressive manner;
- litigate early and needlessly complicate matters;
- blindly advocate their client's position without regard to achieving a fair and proper outcome.

There are others who:

- are intuitive enough to know that there are 2 sides to every story (and that the truth often lies in between);
- realise that there is an initial period of turmoil that follows every separation while new routines, living arrangements and emotions are put into place;
- use their experience to guide their clients through the roller-coaster of a separation and to eventually get them back on a level track;
- value the non-financial benefits that a fair and amicable outcome brings to clients and especially to their children.

Whilst it is true that we lawyers know the law and know our way around a courtroom, is that what *really* makes a good lawyer? Considering that about 96% of family law cases are resolved by negotiation without a court hearing, it seems to me that the true skills that might be useful to a client include:

- an awareness and insight into people;
- effective negotiation skills and a willingness to look for creative outcomes;
- compassion and understanding;
- a willingness to treat a client as a partner in the process;
- the desire to actually help get the client out of the darkness of separation and back into the light of moving life forward;
- the ability to give the client realistic expectations rather than false hopes;

- a belief in the importance of treating people with respect and in the way you would want to be treated;
- the strength to tell a client the things they may not want to hear.

We can fight as hard as anyone and we can write letters dripping with criticism and venom, but there is a time and place for everything. Do you believe that would be the best way to *start* a family law matter? Would it help or hinder? It would certainly increase the chances of litigation and it would certainly destroy any hope of an amicable future for the kids.

There are of course some matters where the common courtesies can't or won't apply. Whilst we are more than able to stand up for our clients and pursue their rights in court, my underlying philosophy, and the one I try to instill at Caldwell Martin Cox, is to try to get our clients' entitlements in the most sensitive, cost effective and least destructive way possible. Great care needs to go into the selection of your family lawyer. Their personality and approach to their job will completely shape the direction of your matter, your fees – and the direction of your future.

Bill McGookin

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Work Licences in NSW

Staff at each of our offices receive numerous calls every week from people charged with drink driving offences, and many of those callers ask us about the possibility of applying for a 'work licence' at Court. Although people charged with drink driving offences were, in years gone by, able to apply for a restricted driver's licence which allowed them to drive to and from work (only), these types of licences were removed many years ago in NSW. They are still in place in some other states and so many people presume that we can apply for them here as well.

Instead, NSW drivers will generally be ordered to spend some time off the road after being charged with a drink driving offence, with no concessions which allow them to drive to and from work. The maximum and minimum penalties vary significantly depending on the alcohol concentration at the time of the offence, the driver's previous traffic record and the submissions made at your sentencing hearing, so contact one of our experienced criminal law solicitors at any of our 4 offices and let us assist you in obtaining the best possible Court result if you've been charged with one of these offences.

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The Partners and staff of CMC wish all of their clients a happy and safe Christmas and New Year– our offices will close at 5 pm on 22 December 2009 and re-open on Monday 11 January 2010

When can the estate be distributed?

Once Probate has been granted, it is the Executor's role to collect in the assets of the Estate, pay all debts (including tax, funeral and testamentary expenses) and, finally, to distribute the Estate. So what happens to any late claims on the Estate?

There may be claims for payment of goods and services or other debts that you as the Executor are not aware of. How can you be protected when making a final distribution of the Estate?

There is no general rule of law that you are liable only for those debts of which you have notice as an Executor. You will be liable to pay any debts to the extent of the assets which have passed through your hands, even if you have acted in good faith and distributed the assets to the beneficiaries without having any prior notice of the debts.

The mere fact that the debt in question has not crystallised at the date of death (eg. a guarantee given by the deceased, or a potential liability as a lessee under a Lease which has been assigned) again gives no defence to personal representatives who are unable to meet a subsequent claim because the Estate has been distributed.

Before statutory protection became available, personal representatives who wished to protect themselves against such liabilities had to:

- (a) obtain indemnities from beneficiaries to whom they distributed
- (b) distribute under Order of the Court in an administration suit, or
- (c) retain funds to meet possible liabilities.

These alternatives were not always practical or convenient. Protection is now at hand in Section 92 of the *Probate & Administration Act* which provides that an Executor of an Estate may distribute the assets to the people entitled to them if the assets are distributed at least 6 months after the deceased's death and the Executor has given at least 30 days' notice of this occurring in the right form and that 30 day period has passed. The Executor should publish the notice in a newspaper circulating in the district in which the deceased resided or in a Sydney daily newspaper.

After that time, an Executor who distributes the assets of the Estate is not liable in relation to those assets to any person who has a claim, unless the Executor had notice of the claim at the time of the distribution. Distribution of the Estate should not be made until provision has been made for all claims of which you have notice.

If you lack the protection of section 92 then people "harmed" by a wrong distribution are normally required to exhaust their claims against you first before proceeding against the incorrectly paid beneficiaries.

If you are the Executor of an Estate, you should be aware of these and other legal obligations imposed upon you. Angus

Cox, Partner in charge of our Picton office, is a Law Society Accredited Specialist in Wills and Estates and would be happy to assist you in this role.

Angus Cox

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Contractual Arrangements – Have you got what you bargained for?

Our firm recently acted for a purchaser in a significant commercial transaction. A written agreement was entered into between the parties after negotiations had been completed. The vendor's personal circumstances changed prior to the completion of the contract and they tried to amend the agreement to obtain more money from our client. We were able to successfully enforce the agreement in its original form. The lack of a written contract would have been disastrous and may have cost our client over \$250,000!

When negotiations are completed in a commercial matter and both parties are comfortable with the agreement reached, they sometimes think that it is unnecessary to formalise their agreement in writing. However, circumstances may change for one of the parties, and this may result in a situation where they no longer wish to enter into the agreement or, if they do, only on substantially different terms. It is also common for each party to have a different recollection or interpretation of what was actually agreed between them. In these situations costly and uncertain disputes usually arise.

How can this be avoided to ensure that what you get is what you have bargained for?

Quite simply, it is critical that a written contract is prepared by a legal representative and that both sides are advised independently before they sign anything. This will ensure that both parties understand their rights and obligations and that they are obliged to perform the necessary steps to give effect to their agreement. Even if the relationship deteriorates between the parties, each still has a legally enforceable right to insist upon the terms of the agreement reached. A formal agreement also provides each party with documentary evidence of the transaction, which is necessary for taxation purposes.

If you would like to know more about commercial agreements, please contact Dianne Miller at our Camden office.

Dianne Miller

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Law Council warns parties to “make sure pre-nups are legally binding”

The Australian Law Council has issued a warning to couples to ensure that any financial agreements (“prenups”) they enter into are legally binding. The Council is warning that the do-it-yourself kits currently being promoted may initially appear cost-effective but could come at a great cost down the track because both parties must have legal advice for an agreement to be enforceable.

“People should not be fooled into thinking that agreements they have drafted themselves can be legally enforced if they have been entered into without the appropriate legal advice,” Law Council President John Corcoran said. “They are very important documents and the need to obtain independent legal advice is there for very good reasons.”

Mr Corcoran said that, by entering into a financial agreement, couples give up their rights to have a court determine disputes about the financial matters covered in the agreement. A binding agreement can only be set aside in very limited circumstances.

“When financial agreements or pre-nuptial agreements operate smoothly, they are an effective means of allowing couples to avoid or settle a dispute without having to enter the courtroom. This is beneficial to both the individuals involved and the court system,” Mr Corcoran said. “Independent legal advice is critical so that each person understands the commitments they are making, the consequences of the agreement, and the effect of the agreement on their legal rights,” he said.

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Negotiating a Lease

There is a common perception that all lease documents are standard. The tenant tends to make sure that the rent and the term of the lease are acceptable but takes no notice of the “standard” clauses. There is no such thing as a “standard lease”. The lease document only ever becomes important if there is a dispute between the Landlord and the Tenant. Unfortunately there is plenty to argue about and you are sent rushing to find a copy of your lease. By then it may be all too late.

Do not commit yourself until you have read all of the lease terms otherwise you will put the Landlord in a much stronger bargaining position.

Here are some tips when you are negotiating a lease:

- 1 Term - the tenant is still responsible for the rent for the whole of the lease term. If your business does not succeed and you want to get out of the lease you must ensure that the lease allows you to transfer the lease to someone else.
- 2 Rent - negotiating a good rental in the first year is important. However the lease may contain a clause that the rent be reviewed each year. Check to see that the rent reviews are limited to CPI increases and there is no review to market rent until at least the end of the third year of the lease.
- 3 Guarantees - if you are taking the lease in the name of your company, they will want personal guarantees, usually by the directors of the company. This is a good reason for not having your spouse involved in the company, especially if he or she is not playing an active role.
- 4 Repairs - you may think that the Landlord is responsible but that isn't necessarily so. Some leases require the tenant to restore the premises to “as new” condition. Yes,

even older buildings. Thoroughly inspect the premises before you sign the lease.

- 5 Use of Premises - The lease will limit your use of the premises to certain activities. Make sure it covers your needs.

Read the lease. Have the lease explained to you by a solicitor. Those two steps can go a long way to avoiding costly mistakes.

Chris Paul

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Uncollected goods cluttering your business?

If you are in the business of providing a service where customers' goods are left with you, then you are likely to have experienced situations where items have been left uncollected by your customers. Even if you have an agreement already in place with your customers covering the disposal of these items, you still have obligations to fulfill before you can actually dispose of them. New South Wales state legislation contains rules regarding notices about the goods, as well as timeframes which must be complied with before you can dispose of the goods. It is also essential that you keep records of the disposal.

If you don't have an agreement in place with your customers regarding uncollected goods, your responsibilities are even stricter. You should also be aware that the legislation imposes different obligations depending on the value of the goods. Whether you have an agreement or not, we can help guide you through your obligations.

Kristy Faida

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CMC welcomes Chanda Poch



CMC would like to welcome the latest addition to its legal team, Chanda Poch. Chanda has joined the firm as an Associate Solicitor and will be practising from our Narellan office in the areas of criminal law, traffic law, family law, estate planning and conveyancing. Chanda has worked in the legal profession for a number of years and was admitted as a solicitor in 2007. Chanda is fluent in the Khmer language.

Don't be caught out!

When you sell a motor vehicle, ensure you visit the RTA in person or via the internet as soon as possible to complete a Notice of Disposal form. This will mean that any fines or infringements incurred by the new owner will be referred to them and not to you in the event the paperwork transferring the vehicle's registration has not been lodged by them promptly. Take steps to protect yourself against potential fines!

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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	Bill McGookin	Angus Cox Jillaine Duve	Kristy Faida
Family Law	Sarah Reid	Bill McGookin	Jillaine Duve	
Commercial Leases	Chris Paul		Angus Cox Leanne Anderson	
Leases, Sale and Purchase of Businesses	Chris Paul Dianne Miller		Angus Cox Leanne Anderson	
Court Matters /Damages	Geoff Lloyd Chanda Poch		Jillaine Duve	
Criminal Law	Geoff Lloyd Chanda Poch		Jillaine Duve	
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 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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