

Website postings can cost you money

A Perth resident recently received \$20,000 in damages after taking legal action against a person who posted “highly uncomplimentary” comments about him on a stockmarket website. The postings related to a technology company and its chairman, and were posted by a person using a fake name on the blog section of the website. A request by the chairman to the website owners to reveal the identity of the blogger was refused so he took Court action to force the site to provide the information. That application was successful. The chairman was eventually able to track down the blogger and he then brought defamation proceedings against him. The matter was settled, with the blogger agreeing to pay the chairman \$20,000 in damages plus his legal fees. He has also agreed that he won't post any more defamatory comments.

All users of the internet should be aware that comments posted on blogging sites, anonymous or otherwise, can be regarded as defamatory and legal action can certainly be taken by people who believe their reputations have been injured as a result. The comments are in the public domain and can result in reputations being tarnished, with subsequent financial impact. Contact one of our experienced solicitors if you find yourself in this situation.

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Changes to Employment Lawagain

The beginning of this year heralded more changes to Employment Law in Australia which will impact nearly every employer. It is essential that businesses take the necessary steps to ensure that they comply with the new regime.

The changes came into effect on 1 January and the most significant impact is the commencement of the National Employment Standards (NES). These standards introduce three novel features:

- Flexible Working Arrangements
- Community Service Leave
- Redundancy Provisions

From the commencement of the NES, an employer is obliged to consider a request by an employee in certain circumstances for Flexible Working Arrangements. It is important to note there is no obligation for an employer to agree to the request, but there is an obligation on the employer to show that any request has at least been properly considered. The NES set out the basis upon which employers should make their decisions.

The Community Service Leave change allows for employees to take time off work to do such things as attend jury duty, fight bush fires or assist with other natural disasters.

The Redundancy provisions have been extended to a number of employers who previously were not subject to them.

1 January also marked the commencement of “Modern Awards”. These will largely replace all current awards, both Federal and State. There are transitional arrangements providing for changes in wages, loadings and penalty rates to be phased in from 1 July 2010 but many other provisions are already in existence. It is essential that all employers check their employment arrangements to ensure they are complying with the relevant Modern Award.

It is possible to contract out of Modern Awards in some cases by way of Enterprise Agreements, and some highly paid employees may not be covered by them in certain circumstances.

These were not the only changes to Employment Law to have taken place recently so, to ensure your compliance in this increasingly complex area, please contact Geoff Lloyd of our Camden office to get expert advice.

Geoff Lloyd

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What our clients are saying:

“I found all the staff (from receptionist through to solicitor) very friendly, understanding and helpful. I don't believe I have ever had better service elsewhere.”

“Professional & helpful staff - thank you Leanne & Kristin.”

“Excellent communication and professionalism.”



Caldwell
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Solicitors



Caldwell Martin Cox welcomes the return of Belinda Dunkley, Licensed Conveyancer, to our Picton office after the safe arrival of her second child.

I don't have a Will – so what?

On 1 March 2010 new laws came into effect specifying how your assets are to be divided between your family if you die intestate (without a Will).

The changes are complex and cover many situations including sharing your assets between multiple partners, spouses, de factos and children.

One example of how the new laws would apply in a common situation is set out below:

Richard and Jane have lived together in a de facto relationship for 5 years. They have each been previously married and divorced. They each have children from their previous relationships but do not have any children together. Richard dies without a Will. His Estate consists of the home he shared with Jane (which is in Richard's sole name) with a value of \$400,000 and other assets totalling \$47,000.

Under the new laws, Jane would receive:

- (a) Richard's personal effects
- (b) \$350,000, and
- (c) half of the remainder of Richard's estate, being \$48,500.

The remainder of Richard's estate would be shared between Richard's children.

This formula has no regard for how long Richard and Jane lived together or what assets or money they each contributed. For very little expense, Richard could have taken control over how his assets would be shared between his family simply by having made a Will. The cost of addressing these legal issues after his death is far greater and could cause much heartache and conflict for the ones left behind. Take control, be responsible and make a Will!

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Separated but can't agree about your kids?

When you hear the words "Equal Shared Parental Responsibility" do you hear "Equal time" or "Week about"? If you do then you are not hearing correctly.

"Equal Shared Parental Responsibility" gives separated parents equal **responsibility** to make decisions about their children and to perform the duties of a parent. It gives them no rights to equal time. In most cases the Family Court presumes that parents have Equal Shared Parental Responsibility and, if a parent alleges that this should not be the case, they need to prove it.

If the Court finds that parents have Equal Shared Parental Responsibility for a child, it must then consider whether spending "equal time" with each parent is in the best interests of the child and if it is practical for them to do so. If it is, then a Court must consider making an equal time order but is not obliged to do so. If it isn't, the Court must then consider whether spending "substantial and significant time" with the other parent is in the best interests of the child and if it is practical for them. If it is, then a Court must consider making such an order but, once again, is not obliged to do so.

"Substantial and significant time" **must** include weekends, non-weekends, holidays and days that are of special significance to the child and the parent. Under the current law most parents get to spend time with their children on alternate weekends, for half of holidays, on a weekday evening and on special occasions.

When deciding what is in a child's "best interests", the Court **must** consider a variety of factors that are set out in the *Family Law Act*. The main consideration of the Court is to try to achieve arrangements that allow a child to have a safe and positive relationship with both parents. Some of the factors that the Court must look at are: the wishes of the child, the positive or negative attitudes and behaviours of both parents, religious and cultural matters and practical considerations.

If you need help finding out what is in the best interests of your children, contact our Family Law Team for assistance.

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A further complication – Family Provision Claims

What happens when an Executor of a deceased's Estate distributes that Estate and then someone makes an unexpected claim for a share of it?

The *Succession Act* allows "eligible persons" to bring a claim against an Estate. The list of eligible persons includes: a spouse, a de facto spouse, a former spouse, a child of the deceased, a dependant grandchild of the deceased, persons who were a member of the deceased's household, a dependant on the deceased or a person living in a close personal relationship with the deceased. Any claim must be brought within 12 months of the deceased's death although it is possible to claim outside that period with the special permission of the Supreme Court.

In Estates where the deceased has died before 1 March 2009, if the Executor distributes the Estate prior to expiry of the 12 month limitation period, they do so at their own risk - even though they may have had no notice of the claim and had published the required newspaper notices under the legislation. The NSW Supreme Court has been particularly critical of Executors who prematurely distribute Estates.

On 1 March 2009, amendments were made to the *Succession Act* which provide protection to an Executor who distributes the Estate after 6 months provided that the Executor had not had any notice of an intended claim and if the Executor had published the correct newspaper notices.

In many cases there is no risk in distributing early, but in others a risk might exist. For example, the risk might be greater if the deceased had a former spouse or children from an earlier relationship. If you don't comply strictly with the legislation then you may be personally at risk and may be required to reinstate the assets to the Estate together with interest.

Being appointed an Executor is an important role. You should seek legal advice to ensure that you comply with the complicated legislative requirements and don't end up personally liable to a potential beneficiary. 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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Did you know?

That the penalties for supervising a Learner Driver when the supervisor is over the legal blood alcohol limit are the same as if the supervisor was themselves the driver of the vehicle. If you supervise Learner Drivers, it is essential that you are under the 0.05 legal blood alcohol limit at the time.

What's all the fuss about AVO's?

An Apprehended Violence Order (AVO) is an order made by a Court prohibiting certain behaviour and is designed to protect the "person in need of protection" (PINOP) from violence or non physical abuse such as harassment, intimidation or damage to property. An AVO is usually made between people involved in a prior or current domestic relationship, but it can also involve unrelated people such as neighbours.

An AVO is not a criminal conviction and, if one is made, the defendant does not gain a criminal record. However, the imposition of an AVO has significant consequences on the defendant. For example, the defendant will have any weapons licence suspended or revoked, and no further licence will be issued within ten years of the making of the AVO. This will have a major impact on a Defendant who might require a weapons licence for work, for example.

A defendant who breaches any of the terms of the AVO may be arrested and charged by the police with Contravening an Apprehended Violence Order. The maximum penalty for this is two years' imprisonment, a fine of \$5,500, or both. If the contravention consists of an act of violence and the defendant is at least 18 years old, it is likely that a gaol term will be imposed. A breach of an AVO is a criminal offence and will result in a criminal record.

If an AVO is sought against you, there may be a temptation to simply consent to the Order. After all, you don't intend to go anywhere near the person again! Be aware, however, that you will then face much more serious consequences if a breach is alleged against you. It is important that you seek proper legal advice if faced with an AVO. For further assistance please contact one of our experienced Criminal Law solicitors.

Chanda Poch

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CMC welcomes Sarah Reid

Sarah Reid joined the firm as an Associate Solicitor in our Camden office in November 2009.

With over 10 years of legal experience, Sarah has worked predominantly in Family Law and has a particular interest and expertise in parenting matters.

Sarah grew up in the Macarthur area, was admitted as a solicitor in 2004 and successfully completed her Masters in Applied Law (Family Law) in 2009. She is committed to achieving the best possible result for all of her clients in the areas of Family Law, General Litigation and Wills.

We are happy to welcome Jessie Sargent-Smith and Renee London to the Caldwell Martin Cox team.

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Who's where and what do they do?

Area of Law	Camden	Narellan	Picton	Tahmoor
Conveyancing	Chris Paul	Bill McGookin	Angus Cox Leanne Anderson	Kristy Faida
Estate Planning	Chris Paul Sarah Reid	Bill McGookin Chanda Poch	Angus Cox Jillaine Duve	Kristy Faida
Family Law	Sarah Reid	Bill McGookin	Jillaine Duve	
Commercial Leases	Chris Paul		Angus Cox Belinda Dunkley Leanne Anderson	
Leases, Sale and Purchase of Businesses	Chris Paul		Angus Cox Belinda Dunkley Leanne Anderson	
Court Matters/Damages	Geoff Lloyd Chanda Poch		Jillaine Duve	
Criminal Law	Geoff Lloyd Chanda Poch		Jillaine Duve	
Debt Recovery	Geoff Lloyd Chanda Poch			
Bankruptcy/Insolvency	Geoff Lloyd			
Unfair Dismissal/ Employment Law	Geoff Lloyd			
Family Provisions (challenging wills)	Angus Cox			
Personal Injury	Geoff Lloyd			
Workers Compensation	Geoff Lloyd			
Medical Negligence	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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