

Legalquotes

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CHANGES TO FAMILY LAW THAT COULD AFFECT YOUR FAMILY!

**RANKIN
NATHAN**
lawyers

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On 1 July 2006, the Family Law Act 1975, was substantially amended by the introduction of the Family Law Amendment (Shared Parental Responsibility) Act 2006.

The most striking change under the new legislation is that when making an Order about children, the Court must apply a presumption that the parents of a child have equal shared parental responsibility for that child except where there is:

- Child abuse, either of the subject child or another child within the family;
- Family violence;
- Where the Court thinks that applying the presumption would not be appropriate in the circumstances; or
- Where the application of the presumption would on



the evidence not be in the best interests of the child.

There has never been a presumption of this type in Family Law in Australia before now.

The application of the presumption represents a substantial shift in the ideology of parental responsibility in Family Law in Australia. Prior to the changes, orders in relation to children were made by the Courts on a discretionary basis, having regard to what is in the best interests of the child. In the Orders the Court makes, the Court **must**

now consider taking into account the circumstances of that child's life.

Where the presumption of equal parental responsibility is to form part of the Orders the Court makes, the Court **must** now consider making Orders requiring the child to spend an equal amount of time in each parent's household where such Orders are considered to be:

- In the best interests of the child; and
- Reasonably practicable in the circumstances of the child's life.

RANKIN NATHAN MOVES OFFICE

On 28 April 2006 Rankin Nathan Lawyers, Newcastle office, moved to its new premises at 47 Bolton Street in Newcastle. The building Rankin Nathan now occupies was once known as "Steels Garage" and has been completely renovated inside. Along with the renovations the old

"Steels Garage" has also been given a new name, "Rankin Nathan House".



FINALLY, SOME STAMP DUTIES RELIEF!

On 20 June 2006, the Duties Amendment (Abolition of State Taxes) Act 2006 was enacted. The effect of the new Act is to legislate a program of abolition of certain NSW stamp duties as set out in the chart provided.

While the program of abolitions stretches over several years, this is good news for business as the Act abolishes many of the “nuisance taxes” that businesses have been lobbying to have removed for years.

NSW Stamp Duties	Dates
Hire of Goods	1 July 2007
Leases	1 January 2008
Unlisted marketable securities	1 January 2009
Mortgages	Rate halved from 1 January 2010 and abolished from 1 January 2011
Business assets other than land	1 July 2012

PURCHASER SHOULD HAVE TRIED TO REDUCE ITS LOSS.

A recent decision of the NSW Court of Appeal (Castle Constructions Pty Limited v Fekala & Ors) highlights the importance of ensuring that a person suffering damage from the breach of a contract undertakes all reasonable steps to mitigate (reduce) his or her loss.

The case involved the purchase of a commercial property, formerly a private hospital, by a developer, Castle Constructions (Castle). Castle purchased the property at auction for a purchase price of \$3 million with the intention of obtaining development consent to the redevelopment of the property with a view to onselling it for a profit. There were twenty-seven (27) Vendors who were the mortgagees in possession of the property, exercising their power of sale.

Following exchange of contracts, Castle became aware that it may become embroiled in litigation between the owners of the property and the Vendors and this caused Castle to

question the financial viability of the project. Castle then sought agreement from the Vendors to rescind the contract. However, the Vendors refused to rescind the Contract.

Ultimately, the Vendors failed to complete the Contract and settle the sale at the appointed time because they were unable to provide Castle’s solicitors on settlement with a duly executed Transfer signed by all of the twenty-seven Vendors. Castle served a Notice of Termination. Several weeks later, the Vendors were in a position to complete, having obtained all the required signatures, but Castle refused to complete and relied on its notice of termination.

Castle sought orders from the Court that the termination had been valid and sought an award of damages for loss of profits arising from the Vendors’ breach. The Vendors filed a cross-claim seeking orders from the Court forcing Castle to complete.

The question for the Court of Appeal was whether Castle was entitled to damages for loss of profits alleged to have been suffered by it because of the Vendors’ failure to complete at the appointed time.

The Court held that the Purchaser, Castle, had validly terminated the Contract, but was not able to recover damages for loss of profits because it had failed to take all reasonable steps to mitigate its loss. The Court held the loss suffered by Castle did flow from the Vendors’ breach but that Castle could have reduced its losses by completing the contract when the Vendors offered to settle when all the signatures to the Transfer had been obtained.

Castle Constructions Pty Limited v Fekala & Ors
[2006] NSWCA 133

“This case gives important guidance to developers when considering property for purchase/development.”

-Simon Cotterill



NEW LAWS ABOUT MAKING A WILL.

As part of a proposal to enact uniform (or nearly uniform) succession laws across Australia, the NSW Government introduced the Succession Bill 2006 into the NSW Parliament on 19 September 2006. This Bill has now received Royal Assent. However, the proposed Succession Act 2006 is not expected to commence operation until it is proclaimed some time in 2007.

The object of the Act, as stated in the explanatory note accompanying the Bill is:-

“...to restate, with amendments, the law relating to Wills in New South Wales in order to implement (with modifications) the

recommendations of the National Committee for Uniform Succession Laws regarding the law of Wills contained in its final report to the Standing Committee of Attorneys – General in December 1997. Those recommendations were endorsed by the NSW Law Reform Commission in Report 85 (1998) Uniform Succession Laws: The Law of Wills.”

The effect of the changes to the law of Wills proposed to be enacted by the Act include:-

- The introduction of Court authorised Wills for people who lack testamentary capacity.
- The provision of statutory guidance in relation to the

matters to be taken into consideration by the Court in authorising a minor to make a Will.

- New rules about beneficiaries who witness Wills.
- New rules about survivorship.
- Revision of the law relating to foreign Wills to bring NSW Law relating to choice of law issues into line with the law in other jurisdictions.
- New provisions about who is entitled to see a Will on the death of a testator or testatrix.
- New provision for the deposit of Wills.
- Provisions relating to the admission of limited evidence to aid in interpretation of Wills.



“Not enough Australians have Wills. The proposed changes will help to ensure that the process of making a Will is simplified. “

-Simon Cotterill

STOPPING A FORMER EMPLOYEE FROM TAKING CLIENTS.

The Supreme Court of NSW has recently handed down a useful decision regarding trade restraints against an employee who accepted a position with a competitor (Koops Martin v. Dean Reeves). The Court held that the employee could not approach or accept instructions from former clients. However, he could not be restrained from soliciting customers he had not serviced while in his former employment or customers of other divisions of the employer company.

Dean Reeves, the employee (a financial planner), was employed by Koops Martin Financial Services Pty Limited under the terms of a letter containing a confidentiality clause and trade restraints.

The trade restraints were to the effect that upon termination of his employment, Mr Reeves could not accept any instructions from any clients of Koops Martin for a period of 12 months. The restraints covered instructions to act for such clients but did not restrain the employee from working for a similar business.

Reeves resigned and accepted a position with a competitor, MBT Financial Services Pty Limited which was the same type of business as his former employer and located in the same area. After changing employment, Reeves accepted instructions (within the 12 month period) from some of about 30 former clients of Koops Martin who

had approached him. He himself had not approached any clients of Koops Martin.

Koops Martin, the former employer, instituted proceedings in the Supreme Court of NSW claiming injunctive relief in accordance with the trade restraint contained in Reeves' former contract of employment. Reeves counter claimed that the restraint was invalid. The Court upheld the restraint as to time and area. However, the restraint was held to be too wide (and hence invalid) in two respects:-

-By including customers who the employee has not serviced; and

-By including customers of other divisions of the former employer other than the financial services division.

The lesson to take away from this case is that restraints included in contracts of employment need to be much more carefully drafted and restricted than those restraints often found in Sale of Business Contracts between Vendors and Purchasers of businesses. Employment restraints should cover such topics as employment within the same industry, canvassing or soliciting existing customers and confidential information. It may also be useful to draft the restraint so that parts of the restraint clause are severable in a cascading fashion.



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