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Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M Report

Editorial

by John Mullins

We wish all of you a very happy Christmas with lots of success in the new year.

In this edition of our newsletter we deal with a broad spectrum of matters which we hope will be of interest to you. I strongly recommend that you read the article on the Guardianship Act. This is not to do with appointing guardians under your Wills. This is an important change in the way various people will be treated in the State of Queensland.

We deal with the ongoing contentious issue of dismissal from work and the strong environmental issue of the preservation of streetscape. There is a short article on surviving Christmas, which if it wasn't so serious could be regarded as a light-hearted article.

Last week we launched our Web site. This has been a culmination of a considerable amount of work. We have sought to develop a Web site which is consistent with our values and consistent with the elements which sets this firm apart from others.

The Web site will give you the opportunity to know more about our firm, our practice groups, the partners and all of our professional staff. You will be able to access the "Report", "At Work" and "Sport" newsletters on the Web and search for articles of interest from previous newsletters. An exciting part of the site will be the "Hot Off The Press" section where we intend to frequently update matters of interest to you on changing laws and legal issues.

We consistently seek and receive feedback on our newsletters and would encourage you to E-mail us with your comments in relation to our Web site. We see the Web site as a powerful communication tool for our firm with our clients and we wish to tailor this to meet your needs and expectations.

The office will be closed over the Christmas break to enable all of us to spend time with our family and friends. As always the partners are available to you for urgent matters over this time.

Happy Christmas

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Who's looking after you?

By Michael Klatt

The Guardianship and Administration Act 2000 commenced on 1 July 2000. The Act provides for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity in Queensland. The Act establishes the Guardianship and Administration Tribunal. Applications may be made to this Tribunal for the appointment of guardians for personal matters and administrators for financial matters.

Personal matters include a person's residency, who they live with and employment, education and domestic issues such as food and clothing.

The Tribunal must be satisfied that the adult has impaired capacity. There must be a need for a decision, or that it is likely that the adult might do something which would involve a risk to their health, welfare or property. Without the appointment, the adult's needs will not be adequately protected.

The person making the Application must be an "interested person" who has a sufficient and continuing interest in the adult. A concerned relative may make the application or even a friend. The Adult Guardian, a person appointed to protect the interests of all adults with impaired capacity, may investigate actions of Attorneys appointed under a Power of Attorney or a guardian or administrator appointed by the Tribunal and make an application to the Tribunal.

The Tribunal may appoint a guardian or administrator notwithstanding that an Attorney has been appointed by the adult under an Enduring Power of Attorney.

Where the Tribunal makes the appointment with knowledge of the existence of the Power of Attorney, the Attorney can only exercise the power to the extent that the Tribunal authorises.

Scheme for Health Care and Special Health Care

The Act allows for the administering of urgent health care, without consent, if the health care provider is of the view that the adult is unable to make decisions concerning a particular health matter and treatment must be carried out urgently to meet an imminent risk to the adult's life or health. That treatment can be carried out unless the health care provider knows that an Advance Health Directive (AHD) has been given by the adult, which covers wishes in serious health situations.

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Who's looking after you?

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Where treatment is necessary to prevent significant pain or distress, and it is not reasonably practical to get the consent of an appointed Attorney, the treatment can be carried out. It cannot be carried out if the adult objects to the health care, unless there is minimal or no understanding of what the treatment involves, why it is required and the treatment is likely to cause nil or temporary distress, which is outweighed by the benefit.

Special health care includes the removal of tissue whilst the adult is alive, sterilisation, termination of pregnancy, participation by the adult in special medical research or experimental health care, and withholding or withdrawal of special life sustaining measures.

The Tribunal may consent to special health care for an adult. The Tribunal may only consent to sterilisation of an adult if satisfied that it is medically necessary, or the adult is likely to be sexually active and there is no method of contraception that could reasonably be expected to be successfully used, or where the adult is female and has problems with menstruation which cannot be otherwise treated. The Tribunal may also consent to the termination of a pregnancy if satisfied that the termination is necessary to preserve the adult from serious danger to life or physical or mental health.

Normally, there is a hierarchy for dealing with health matters. If an AHD has been made treatment is to be administered in accordance with it. If there is no AHD, but one or more guardian/s are appointed by the Tribunal in relation to health matters, then the guardian/s will make decisions. If neither of these apply, but there is an Attorney appointed under Enduring Power of Attorney, the Attorney or Statutory Health Attorney makes decisions.

The Statutory Health Attorney is the person's spouse or a carer over the age of 18 or a close friend or relation of the adult. If no Statutory Health Attorney is available to make decisions, then the Adult Guardian does so.

The Act recognises the right of an adult with impaired capacity to be involved in decisions that affect their life and, accordingly, consent given by a guardian, attorney or another for a health matter is generally ineffective if the adult objects to the health care.

Dismissals – Going

By Sam Kane

Most employers, managers and employees today are aware of the ever developing laws in relation to unfair dismissal. For many however, there is often uncertainty about these requirements and their application.

How many warnings do I have to give or be given?

Contrary to popular belief, there is no rule of law which requires an employer to give three written warnings to an employee before dismissing them. In fact, the law does not specify how many warnings must be given, or whether they are to be written or verbal. The law simply states that a dismissal will be found to be unfair if it is "harsh, unjust or unreasonable" or if it is for an invalid reason. An invalid reason would include dismissal for a discriminatory reason or because of trade union membership.

What is "harsh, unjust or unreasonable" depends on the circumstances of every case. The *Industrial Relations Act 1999 (Qld)* sets out what the Queensland Industrial Relations Commission must consider in deciding if a dismissal was harsh, unjust or unreasonable. They include whether an employee was given an opportunity to respond to allegations about his or her conduct, capacity or performance, whether he or she had been warned about the performance or conduct issues and whether an employee was told of the reason for the dismissal.

Some practical advice

In practical terms, what must an employer do if an employee is not performing satisfactorily? These are some general guidelines:

1. Employers should ensure that a fair and reasonable process is followed in dealing with an employee at all times and that issues relating to an employee's conduct or performance have been properly recorded. For example, if an employee is repeatedly late for work, ensure that arrival times and dates have been recorded in order to give examples of lateness to the employee. Employers should ensure that they are able to prove actions of misconduct have occurred, for example, by obtaining statements from other workers or witnesses;
2. Employers should advise an employee in writing what concerns they may have about their conduct or performance, providing them with an opportunity to respond or explain. Alternatively, they may wish to call a meeting with the employee to discuss in detail the performance issues in question;
3. If a meeting is called with an employee, the employer should advise the employee what the meeting will be about, and that they are entitled to have an independent support person present with them;
4. At any meeting, the employer should ensure that an independent person (for example, someone from human resources) attends to take notes and to verify what was said by each party;
5. If the employer believes that the employee can provide no reasonable explanation for

Preservation of Str

By Anthony O'Dwyer

It has become increasingly common in suburban streets for houses to be removed or demolished to make way for new housing taking advantage of the increasing value of inner city and near city suburban land. Changes in policy at a town planning level and changes in demand from the market have allowed property developers to "cut up" suburban lots to accommodate a higher density use of the land. Where there was once one old house, there is likely now to be room for two new houses.

The trend to make greater use of already developed land within Brisbane will continue. Demands on services provided by local governments in ever expanding cities have dictated that making use of existing services within the

the right way about it

their misconduct or poor performance, they may be issued with a warning. This may be either verbal or in writing. The employee should be told how long the warning shall remain in place, and of the consequences (for example, dismissal or further warning) which may follow if they repeat the behaviour, or do not improve their performance. Using the example of the late employee, the employer should advise that they will be monitoring the employee's attendance for the next month. If no improvement is seen at the end of that time, the employer should meet with the employee again to review the performance and issue a further warning or provide notice of termination of employment if there has been no improvement; and

6. It is vital to ensure that all dealings with the employee, including notes of meetings, letters or memos to employees and responses from the employee are recorded by the employer and retained on the employee's file. Employees should also keep their own records of any meetings or discussions. Employees should also ensure that, if they do not agree with a warning or a performance issue raised, a written response to the issues is provided to the employer to be retained on the employee's file.

In some instances of course, an employee may be dismissed summarily, that is, without notice. This applies where an employee is guilty of "gross misconduct". Examples include stealing or dishonesty, intoxication, or refusal to follow a reasonable and lawful instruction from an employer or assaulting a co-worker. An employer should ensure however that they are able to prove that such gross misconduct occurred. An employee should still be told of the reason for their dismissal and, if appropriate, be given the opportunity to explain their actions.

Employers, employees and their actions can differ widely from case to case and for that reason it is important to remember this information is offered as a guideline only. It is always advisable for an employer to seek professional advice before taking steps to discipline or terminate an employee's employment, and for employee's being disciplined or dismissed to seek assistance or advice immediately.

eetscape

city is often preferable to opening up more land for residential subdivisions. The key however is in achieving the balance between economical use of land and socially appropriate use of land.

The preservation of the character of suburbs may be at risk from this sort of development. Most town plans recognise that there is some value in the preservation of a streetscape. Applications to remove or demolish a building will only be approved by the Council if it would be unlikely to adversely affect the visual character and amenity of the streetscape. The protection given to streetscape is different where the buildings are heritage buildings.

Streetscape is all of the visible components within a street. This will include the general layout of the land and vegetation, the configuration of the street itself and its size, the shapes and sizes of the properties and, importantly, the housing types and sizes. The circumstances of each street are particular to that street and what may be appropriate in one street may be inappropriate across town. The opportunity is there for interested persons to ensure that changes being made in the suburbs occur within the physical context of the neighbourhood so that the changes are not detrimental to the amenity of the area.

In a recent decision the Planning and Environment Court allowed a developer's proposal for the removal of two houses for the redevelopment of the land to a car sales yard. The houses were on busy Gympie Road. The Council had refused the application and argued that the removal of the houses would detract from the character of that part of the road that consisted of 9 houses. The Court did not accept that the Council had properly considered the streetscape which was predominantly characterised by a very busy road with little consistency of development.

The balance in favour of development would obviously be different in the context of a quiet suburban street. However, the removal or demolition must be shown to have the adverse impact on the streetscape if it is to be refused. The challenge is to find where the balance lies.

Often neighbours find out about changes in the street when the work is being done. Attention may not be given to signs and advertisements, there may be confusion about what is to happen or because the proposal may not have been advertised. Delay in taking action will often be to the detriment of the person complaining that the changes should not be made.

In a case before the Planning and Environment Court, the Court found that although there was a serious question to be determined concerning whether a house having heritage value could be removed, the Court would not stop that removal. The Court concluded that because the removal was well underway and stopping the removal would result in the deterioration of the house, the removal should not be brought to a halt.

Superannuation in separation

By Catherine Abercrombie

What about the super ?

Clients consulting a solicitor following marriage breakdown commonly ask this question.

A large number of people have become aware, either through friends or the media, that there are changes afoot regarding the Family Court's approach to dealing with benefits payable under a superannuation policy held in the name of a party to the marriage.

It has now been over a decade since the Australian government made it compulsory for employers to contribute to a superannuation fund on behalf of an employee. The level of this mandatory contribution has risen to the point it is now 8% of the employee's income. Prior to the compulsory scheme, both State and Federal governments, together with various large companies have had some type of superannuation policy in place for their employees.

The result is that there is an increasing incidence of significant balances of superannuation funds for one or both spouses at the time of marriage breakdown.

In April 2000, the Family Law Amendment (Superannuation) Bill was introduced to the House of Representatives. The Bill was referred to a Senate Select Committee on Superannuation and Financial Services on 10 May 2000, for the preparation of a report, originally due on 14 August 2000, but later extended to 31 October, 2000.

The intent of the proposed legislation is to enable separating spouses to reach agreements, and the Family Court of Australia to make orders, which provide for a division of superannuation interests.

At present, the Family Court can take account of superannuation interests held by the parties in determining how to divide the assets of the parties, however it cannot make an order which provides for the division of a preserved benefit under a superannuation fund.

Once passed, the proposed changes will be further delayed as the government intends to provide a twelve month period for the superannuation industry to prepare for the effect of the legislation.

Change is afoot, however there are a number of steps to take before we will see the benefit of the changes.

Don't wait until it's too late

By Cameron Seymour & Michael Simpson

There is no straight "across the board" time limit in Queensland or Australia to commence a legal action. Although Queensland's Limitation of Actions Act sets out various limitation periods applying to various types of actions, other legislation can prescribe its own limitation period.

The Limitation of Actions Act prescribes limitation periods for commercial litigation, personal injuries actions, and contribution proceedings, just to name a few examples. Interestingly, in each of those examples a different limitation period applies. Depending on the personal circumstances of the person who may be suing, there may be some years to run before the limitation period even commences.

The 3 year "rule of thumb"limitation period for personal injuries in Queensland is varied in certain circumstances by the WorkCover Queensland Act and the Motor Accident Insurance Act (which relate to work accidents and motor vehicle accidents respectively). Shorter limitation periods apply for injuries suffered in the course of air travel (Civil Aviation (Carriers Liability) Act) or on certain ships (Navigation Act).

Limitation periods under the Trade Practices Act range from 2 years to 10 years, depending on the type of action brought. The limitation period commences on the date the cause of action accrues, and identifying the date a cause of action accrues can cause its own problems.

Persons travelling interstate or overseas may be subject to other peculiar limitation periods.

With the myriad of different limitation periods applying in respect of various actions, it is vital that you take legal advice as soon as possible after circumstances arise giving you the option of pursuing a legal remedy. A right to a remedy is a precious thing. You should ensure you do not lose that right for want of obtaining timely legal advice.

The do's & don'ts of the office christmas party

By Cameron Seymour & Kristina Powrie

The festive season means the office Christmas party is just around the corner. While staff parties can be lots of fun, the mixture of alcohol and high spirits can be an accident waiting to happen.

Things Not to Do:

- If you are hosting the party, do not continue to supply alcohol to grossly intoxicated guests. In a recent much publicised decision of the Queensland Supreme Court, the Chevron Hotel on the Gold Coast was found liable for continuing to supply a patron with alcohol in circumstances where it was reasonably foreseeable that to do so would cause danger to the intoxicated person.

  In that case the Plaintiff alleged that he had been drinking at the Hotel for a long period of time, and on leaving the Hotel, suffered serious injuries when he was hit by a passing car on his way home, because of his intoxicated state.
- Do not allow festive pranks or high jinks to get out of control. The host employer may find themselves liable for damages if a staff member is injured as a result. In another much publicised recent decision (currently under appeal), a home owner was found liable when a guest at a party became intoxicated and jumped off a fence into a canal. The home owner was found liable for not taking adequate steps to prevent the guest injuring himself.
- In a party atmosphere, staff are bound to be merry, and perhaps a little tipsy. While staff socialising is to be encouraged, some behaviour or jokes can go too far. Sexual harassment and anti-discrimination laws are not suspended during the staff party. Employers should be careful to ensure staff members are aware of their company policies on these topics and watchful to ensure that what is considered good natured fun by one, is not considered offensive by another.

Things To Do:

- Do not allow staff members to become overly intoxicated.
- Be mindful of the location and physical layout of the party venue. Try to avoid potentially dangerous activities or situations eg. water, heights and alcohol do not mix!
- Make sure staff members are familiar with office policies and understand that these continue to apply in all situations.

But after all that, try not to be a Wowser! Merry Christmas.

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