

## FAMILY LAW

# Do women always get custody of the children?

**Child custody is one of the most emotionally fraught issues in Family Law. The obligation imposed on the Family Court of Australia is to ensure the best interests of children are met and children are protected from physical and psychological harm. However, does that mean that mothers will always get custody of the children?**

### **Babies and infant children**

Biology dictates that women give birth and can breastfeed babies. It is also a socially accepted practice that mothers take time off from their employment to care and nurture babies and young infants. In most cases, both the father and mother agree that this is in the child's best interests.

Clinical psychologists believe that until two years of age, the mother/child bond is of primary importance to human psychological wellbeing. Unless there is a proven

history of substance abuse or significant mental health issues, it is rare for custody not to be awarded to the mother. At this young age, psychologists also believe that overnight stays with anyone other than the mother are unsettling and are generally disallowed.

### **Toddlers and preschool-aged children**

In 2006, the Family Law Act was amended to introduce the notion of "shared care" which was adopted by the Family Court of Australia. In the intervening period, psychologists have come to see this practice as disruptive. Moving weekly or on a mid-week rotational basis has proved to be psychologically unsettling for children who are forced to move between two homes on a regular basis.

Today, there is a change in the philosophy of the Family Court. Children now have a designated primary home – with access to the other parent on a less frequent basis. As such, if the father has a job with

some flexibility or has employment where he is able to work from home, it is likely that the Court would seriously consider a father's application for child custody.

### **Pre-teens and teenagers**

As children enter their teenage years, and assuming that they can display a reasonable level of maturity, the Court increasingly allows them some control over how they will negotiate access to their parents.

If children have good relationships with both parents, and if the parents live within a reasonable geographical proximity, it is likely that the Court will allow the children to move between the parental homes. This allows children to have quality time and access to both their mother and father.

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**The role of psychological reporting**

The Family Court of Australia places emphasis upon the professional opinion of clinical psychologists who prepare Family Reports. These reports help the Family Court to determine what is in the best interests of children. The rights of parents often have to be put to one side, ensuring that the interests of children are paramount.

With changing work practices and more people now working from home, it is easier for men to be granted custody of children than it has been in the past.

**Useful websites**

**Relationships Australia**

A community-based, not for profit organisation providing relationship support services.

[www.relationships.org.au](http://www.relationships.org.au)

**Family Court of Australia**

The Family Court of Australia has jurisdiction over all matrimonial cases and their associated responsibilities. The Family Court of Australia assists Australians to resolve family law disputes.

[www.familycourt.gov.au](http://www.familycourt.gov.au)

**Family Relationships Online**

An initiative of the Australian government, Family Relationships Online provides families with access to information and services that may assist them manage family relationship issues.

[www.familyrelationships.gov.au](http://www.familyrelationships.gov.au)



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**Have you been left out of a Will?**

**The death of a family member is an emotionally challenging time. Discovering that you have also been left out of the Will is upsetting and may have long term financial ramifications for you and your loved ones. So, what should you do?**

**The changing legal landscape**

Recent legal changes have altered the ability for deceased estates to be challenged. On 1 January, 2015 significant changes to the Administration and Probate Act 1958 came into force. This has limited who may bring a claim for provision out of a deceased estate. The changes aim to reduce the number of frivolous claims in the future.

**Who can apply for provision?**

From now on, only people who are defined by the Act as being an “eligible person” may apply for a family provision order. Broadly, eligible persons can be summarised as:

- 1** Members of the nuclear family who do not have to show financial dependence upon the deceased including:
  - a spouse or domestic partner of the deceased
  - a child or stepchild of the deceased
  - a person who, for a substantial period during the life of the deceased, believed the deceased to be their parent or was treated by the deceased as a natural child
  - a former spouse or domestic partner of the deceased, if at the time of death, they had not yet taken or finalised Family Law proceedings

**2** The following persons, if they can show that they were financially dependent upon the deceased:

- a registered caring partner of the deceased
- a grandchild of the deceased
- a spouse or domestic partner of a child of the deceased (including stepchildren or a person who believed for a substantial period of time that the deceased was a parent or was treated as a natural child by the deceased) if the child died within one year of the deceased’s death
- a person who, at the time of the deceased’s death; is, was or would have become again, a member of the deceased’s household - had the deceased not died

Nieces/nephews, cousins, siblings, parents, neighbours and carers, will no longer be able to bring a claim unless they fall into one of these categories.

In determining the amount of provision the Court must take into account the degree to which an eligible person is not capable, by reasonable means, of providing adequately for their own proper maintenance and support.

**How long do you have to make a claim?**

Acting promptly is imperative. Applications for family provision must be made within 6 months of the Grant of Probate.

**What we advise**

Eligible persons with bona fide claims, who wish to make application to the Court for family provision, should do so. Determining whether your loved one had testamentary capacity or was unduly influenced by others upon making their Will is also important. Therefore, it is wise to seek our advice promptly.



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## Moving into a retirement village

**When the time comes to move out of the family home many people look at retirement villages. This type of property purchase has many unique characteristics requiring careful consideration.**

### The retirement village option

Moving into a retirement village can be a wonderful lifestyle choice. Many appreciate being free from the worries of property maintenance and security issues. Others find renewed energy in the company of others and the social activities offered by the village.

However, buying into a retirement village is different to a traditional property purchase. Buying into a retirement village is a lifestyle choice, not an investment decision. Therefore, it is important you and your family understand the legal and financial ramifications - before you sign any contracts.

### Understand the contract

Contracts vary markedly between retirement village operators and must be checked carefully to fully understand the legal and financial impacts. There are three main contractual types.

#### 1 Strata titled unit

You purchase a unit and receive title to it, as you would with any freehold

purchase of a property. In addition, you must enter into a management contract with the Village Manager.

#### 2 Leasehold

You enter into a lease which gives you the right to occupy a unit generally for life and pay a lump sum for such right.

#### 3 License-based with a loan

You pay a lump sum which is treated as an interest free loan to the Village Owner in return for a licence to occupy a unit, generally for life.

With each of the above options, it is important to understand:

- the ongoing fees that you will be charged, generally called service fees and payable monthly, and what services you will receive in return;
- the exit fees payable upon your right to occupy ceasing, generally called a deferred management fee, which can be up to 30% (sometimes even more) of the resale price of your unit;
- other costs such as refurbishment/renovation expenses and selling costs;
- how you or the Village operator can terminate your right of occupation.

### Before you decide

Investigate a range of retirement villages and ask questions. Will you use and enjoy the facilities and programs offered? Can visitors stay overnight and can you take your pet? If you have decided to move into a retirement village, our advice is to do so whilst you are able to enjoy the lifestyle offered and can make the transition with a minimum of stress.

Due to the high cost of entering and exiting retirement villages, carefully consider your current state of health and your future needs. If you have significant health issues, it may be better to investigate assisted aged care options rather than retirement village accommodation.

### Staying at home

Consider whether staying in your own home may be a real option. Federal and State governments and local councils are recognising the benefits, (both economic and personal) of supporting older people in their homes. As such, an industry is developing around supported living. This includes in-home care and home help, which may be provided to you with financial support. This would be cheaper in the long run than the cost of a unit in a retirement village and more importantly, may better suit your lifestyle needs and expectations.

### We can help you

We can assist with the sale of your family home and the review and negotiation of residential facility documentation. We take a holistic and caring approach to your circumstances and your legal requirements, undertaking the preparation of Wills and Powers of Attorney.



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**The story of Izzy** *The importance of procedural fairness for Incorporated Associations*

**Your neighbourhood sporting, leisure and community clubs are commonly incorporated associations. Each has rules governing the behaviour of members, including provision for disciplinary actions. Victorian law stipulates that any disciplinary procedure undertaken by an incorporated association must be by an unbiased decision maker who must, effectively, have no other function in the matter. Izzy's story makes this very clear.**

**The story of Izzy – [Isbester v Knox City Council [2015]**

Izzy is a small terrier dog residing in the City of Knox who was involved in a doggy altercation resulting in a 1.5cm bite to a human hand.

A Council officer, (Relevant Officer) investigated the matter, and subsequently determined, arranged and signed the charges, orchestrated summonses and instructed Council's solicitors to prosecute Izzy's owner. The action was brought to the Magistrates' Court under the Domestic Animals Act 1994. Izzy's owner pleaded guilty and was duly convicted. What followed related entirely to Izzy.

The Council had provisions for dogs like Izzy. It could, amongst other things order her destruction or declare her to be a dangerous dog, requiring permanent confinement inside her

owner's property. The Relevant Officer, complying with Council's Rules, convened a Panel of 3 Council officers – including the Relevant Officer. However, only the Panel Chairperson, who was not the Relevant Officer, was permitted to decide Izzy's fate.

The Relevant Officer supplied other Panel members her notes of the Magistrates' Court hearing, including comments which were adverse to Izzy's owner. Izzy's owner was informed that the Relevant Officer may be present, but not involved in decision making. However, the Relevant Officer participated fully in the Panel, playing a major role in the decision making process. The Chairperson duly decided that Izzy must be put down.

Izzy's owner unsuccessfully sought review of the decision in the Supreme Court. The matter then failed on appeal to the Court of Appeal of the Supreme Court of Victoria. Undaunted, Izzy's owner took the matter to the High Court of Australia. This Court unanimously decided that:

"A fair-minded observer might reasonably apprehend that the Relevant Officer might not have brought an impartial mind to the decision... This conclusion implies nothing about how the Relevant Officer in fact approached the matter. It does not imply that the Relevant Officer acted otherwise than diligently and in accordance with

the Relevant Officer's duties, as the primary judge found, or that the Relevant Officer was not in fact impartial. **Natural justice required, however, that the Relevant Officer not participate in the decision and because that occurred, the decision must be quashed".**

Costs were ordered against the Council. It's reported all up costs were in the vicinity of \$600,000.

Izzy's story should make sobering reading for all incorporated associations, government agencies and instrumentalities. Before commencing any disciplinary action obtain appropriate advice as to your compliance with the law - particularly as to procedural fairness. Failure to comply can be very, very expensive!



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## Flammable cladding on apartment buildings

In 2014 there was a dangerous fire at the Lacrosse high-rise apartment building in the Docklands. The Metropolitan Fire Brigade found that the rapid spread of the fire was exacerbated by the non-compliant use of aluminium composite panels (ACPs) on the exterior walls. It was fortunate that no one was badly injured.

*Pictured: The fire at The Address Downtown Dubai Hotel on New Year's Eve 2015.*

This event prompted a major inquiry by the Victorian Building Authority (VBA), a Senate committee investigation, consideration by the national forum of State building ministers, a review of the Building Code by the Australian Building Codes Board and changes to Victorian planning regulations.

Obviously, this is a serious problem. As the fire in a high rise building in Dubai on New Year's Eve shows, it is also probably a worldwide issue.

### 1 How widespread is the problem?

The VBA audit revealed that more than 50% of the 170 apartment and government buildings reviewed in and around Melbourne had non-compliant cladding. This statistic is probably representative of buildings across Victoria and in other Australian states. Although not part of the VBA audit, commercial and industrial structures may be similarly affected.

### 2 How dangerous are non-compliant ACPs?

The Lacrosse apartment fire and the Dubai blaze illustrate the dangerous nature of fires in apartment buildings. These events also demonstrate how other safety systems – especially emergency services, can save lives and prevent disaster.

The problem is widespread. However, the VBA noted that even if a building

has non-compliant cladding, it may still be safe. This is because of other safety features, in particular automatic sprinkler systems and internal fire doors. Only one of the non-compliant buildings was deemed unsafe (the Harvest apartments in South Melbourne). In the absence of other fire safety systems, the cladding will be dangerous.

### 3 What action is being taken?

In many ways it is fortunate that the problem is so widespread, as the authorities have been forced to respond relatively quickly. We can expect a nationally co-ordinated response, including amendments to the Building Codes and an education campaign for builders, building surveyors and architects.

However, the authorities are unlikely to do much more about existing non-compliant cladding in place in buildings around Australia. This will leave building owners to address the situation themselves.

### 4 What should Owners Corporations do?

In a typical strata high-rise, external cladding forms part of the common property. An Owners Corporation (OC) has an obligation to ensure common property is safe and does not present a danger to residents or the community.

There are details of more than 80 non-compliant buildings on the VBA website. This will be updated as further buildings are identified. Therefore, the first step for an OC manager is to check whether any buildings they manage are listed on the VBA website.

If not, the OC manager should take steps to investigate the situation themselves. The most straightforward way to do this is to request an inspection by an appropriately qualified and registered building practitioner.

If the building has non-compliant ACPs, any remedial steps will depend on whether there are other safety systems in place. If not, removal of the ACPs or installation of alternative systems may be required.

### 5 Can the costs be recovered?

If a builder constructs a home which is unsafe for occupation, the current owner may have a claim against the builder for the cost of making it safe. In this context, an owner includes the OC as the owner of the common property in a strata development.

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Where a building requires costly remediation for fire safety, the OC manager should seek legal advice about the possibility of recovering the costs from the builder or others.

Importantly, there is a 10 year limitation period for building claims in Victoria. This period starts from the date of the occupancy permit.

In other words, if the problem is identified after 10 years, it may be impossible for the OC to recover any compensation. For buildings more than 5 years old, we advise that investigations should start as soon as possible.



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## Property law alert

Lawyers must now take reasonable steps to verify your identity (whether you are an individual or a corporate entity) before any documents such as a transfer of land can be lodged at Land Victoria for registration. A standard procedure must be followed and will involve a face to face interview at our offices or through a third party agent, where you must produce original identification documents.



## David Brett receives mediation accreditation

David Brett is a Consultant Lawyer in our Litigation and Insolvency Team. He is an Accredited Specialist in Commercial Litigation and has over 35 years of legal experience. We are proud to announce that David has recently been approved as a Nationally Accredited Mediator with the Mediator Standards Board.

To differentiate professionals with high levels of mediation expertise, the Mediator Standards Board runs the National Mediator Accreditation System (NMAS). Established to promote high standards, it creates benchmarks for quality mediation services across Australia.

Expert mediation skills are increasingly valued in the legal profession. With the support of a mediator, parties in dispute identify issues, develop options and consider alternatives before reaching a mutually acceptable outcome. Mediation provides a way to find solutions to issues, thereby avoiding the cost and stress of litigation.

We are proud of David's success and congratulate him on this achievement.

## Website winners!

Thank you to all of our clients who participated in our recent website competition. Five lucky winners received Gold Class movie vouchers after correctly answering the name of our allied Sydney law firm - Pigott Stinson.

The next phase of our website will include the development of a social media platform. Stay tuned!

[www.mckeanpark.com.au](http://www.mckeanpark.com.au)

## Our expertise

- Aged Care & Retirement Living
- Building & Construction
- Commercial & Taxation
- Commercial Litigation
- Family Law
- Insolvency
- Leasing
- Property & Owners Corporations
- Rotary
- Wills, Estates, Succession Planning & Estate Litigation
- Workplace Relations

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