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Mortgages & Security Documents – What You Need to Know

Property & Business Team

At one point in life you will be required to borrow money or be advanced credit in some shape or form. Whether it be for the purchase of residential property, commercial property, a business or a simple loan between relatives, most monetary advances will be secured in one way or another.

A security takes the form of a mortgage when concerning funds for residential or commercial property (known as real property). When non real property is involved a charge is usually recorded over the assets of a person, business or company on the Personal Property and Securities Register.

What follows is an overview of the types of securities and a simple guide on what to consider when signing any mortgage or General Security Agreement ("**GSA**").

Mortgages In Qld

Most land in Australia is registered under a system known as the Torrens system. Each state and territory operates its own Torrens system (including its own register) for land located in its jurisdiction. Registration in the Torrens system creates title to the relevant parcel of land. Consequently, it is registration of a transfer, not execution of the instrument of transfer that passes title to the purchaser on a sale of Torrens title land. The main types of tenure are freehold estates (that is, freehold ownership), leasehold estates and crown land. The relevant state or territory register records details of the land and any registered interests in that land (for example, mortgages, leases and easements).

An important and fundamental principle of the Torrens system is that the register is paramount, the purpose of which is to save persons from "going behind the register" to investigate the history and validity of the title to the interest in land. Accordingly, the registered proprietor of an estate of interest in land obtains what is known as an indefeasible title to its interest. This means title is not defeated by existing defects in title prior to registration or other unregistered interests.

There are some limited exceptions to indefeasibility, including prior registered interests, fraud, easements and surveying errors, among others.

Generally, the most common form of security granted over freehold land is a mortgage. Once registered, a Torrens title mortgage operates as a charge on the relevant lot for the amount of debt or liability secured.

General Security Agreements In Australia

A GSA is a common form of security often used to secure commercial loans or credit arrangements. It can be an effective way to obtain security over the assets owned by a person or company. GSA's replaced Fixed and Floating Charges when the Personal Property Securities Act 2009 ("**PPSA**") came into force.

The PPSA established the Personal Property and Security Register ("**PPSR**") on which the securities are recorded. A security interest will be an interest in personal property which secures payment of debts or other obligations. Personal property includes all property that is not real property (land).

When entering into a GSA with your bank or any lender, you or your company will often be asked to provide security over all of your present and after-acquired property, meaning the bank will have security over everything you own now and everything you will own in the future.

A bank could, for example, require a GSA from you or your company to secure loan monies advanced by the bank. A GSA will usually secure all moneys owed to the secured party now and in the future (called 'secured moneys'). This will include collateral liability and the costs of enforcement.

When entering into a security agreement with one of your suppliers or for equipment purchases, you will typically provide security over just some of your assets (Specific Security Agreement, often classified as a "PMSI"), usually the assets that they supply to you together with the sale proceeds of such assets.

Key Considerations for Mortgages & GSA

It is important that you thoroughly read your mortgage/GSA documents and if you have any concerns, seek legal advice. Some of the important feature of the mortgage/GSA agreements are outlined below.

Term	Consideration
Lender (mortgagee)/ Secured Party	Ensure the lenders details are recorded correctly as these are the details of the provider of funds.
Borrower (mortgagor)/ Grantor	Ensure the Borrowers details are recorded correctly as the Borrower is the receiver of funds.
Loan Amount	This is the total amount begin lent, this will include any fees or charges by the Lender. It is important to remember that the fees and charges will reduce the total amount, particularly when the funds are to be drawn upon.
Loan Term	This is the duration of the loan, usually set out in months and years in the repayment schedule.
Repayment Schedule	This will detail the amount and frequency of payments.
Loan Expiry Date	This is the day when the loan will be fully repaid. After this date you should request that the mortgage or charge be removed from title as banks often do not do this on their own.
Security/ Collateral	This will be the property or assets that the mortgage or charge will be registered over to secure the funds. Ensure the property details are correct.
Special Conditions	These can include a number of variations to the mortgage or security agreement, particularly in relation to interest rates, default fees and other obligations placed on the Lender or Borrower or both. It is best practice to take note and discuss these with your bank or solicitor before signing the documents.

Term	Consideration
Guarantors	Often banks require a personal guarantee to also sign the mortgage or security documents, guaranteeing the repayment obligations of the Borrower in the event of a default. It is highly recommended that legal advice be sought before signing a personal guarantee.

It is recommended that you seek legal advice when entering into any major asset acquisition, particularly if mortgage or security documents are involved. The above is a brief overview of the application of mortgages and GSA's, for more comprehensive review of your documents please contact us on 1800 999 529.

The Police Want to Speak to Me - What Should I Do?

Criminal & Traffic Law Team

Nothing causes your stomach to drop quite like hearing that the local police wish to speak to you. Whether that be coming home to a calling card left at your front door or a phone call from the police Officer themselves. "*Mr Smith, we would like to speak to you about an incident. When can you come down to the Police Station*?"

The reason for police wanting to speak to you can be narrowed down to only 2 reasons. They wish to obtain a statement or conduct an interview.

Statement or Interview?

There is a vast difference between police wanting to speak to you for a "statement" or an "interview".

A statement refers to a witness statement. The usual scenario is where police believe you may have witnessed an incident occur, such as an assault or a traffic accident and your observations of the incident will assist them in investigating the matter.

You are not obliged to provide police with any information that you may be aware of and you are also under no obligation to provide a formal signed statement. In saying this, there are no obvious negative consequences of doing so, other than perhaps having to attend court in the future to give your evidence in the witness box, should the offender choose to contest the charge alleged.

An interview on the other hand, is far more serious and a great cause for concern. In essence, this means the police have formed reasonable grounds to believe that you have committed a criminal offence.

The more formal "textbook" reason for police wishing to interview a person is to determine their involvement in the suspected offence. Whilst this sounds harmless, it is fraught with danger. In reality, police interview suspects in the hope of obtaining admissions or

confessions of the persons guilt in committing the alleged crime.

Fortunately, legislation is in place to ensure the person (who is now a suspect) is provided with a sufficient warning that anything they say during the interview may be given in evidence.

What does this mean?

Anything you say during that interview (and in the presence of police generally) will be used as evidence against you in the upcoming court proceeding. Alas, this is where we come in.

Legislation also requires police to inform you that you may contact a legal practitioner at this point. This is where you need competent legal advice!!!!!

The confident "suspect" may feel they can handle Police questioning by not making any admissions but even responding to a question asking where you were on a particular night, or do you know a certain person can and most often will, be used as evidence as against you in ways you would not anticipate.

Remember, police hold the cards here whereas the person being interviewed goes in blind.

What Should You Take from All This?

When police want to "speak" to you, seek clarification as to WHY they want to speak to you

Is it for a statement or an interview?

The experienced (and dare I say it slightly cagey) police officer on the other end of the phone may attempt to avoid answering this question but insist (politely) on being told.

As stated above, there is a huge difference and your handling of the situation may well determine your future.

If you find yourself in the situation where you are required to speak to the police and require expert representation for the interview contact us on 1800 999 529. Our criminal lawyers are experienced representing clients from interviews through to court proceedings.

Application for A Statutory Will (Court-ordered Will)

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The need for a Statutory Will or Codicil arises in circumstances where a person does not have capacity to make a Will or Codicil themselves. The *Succession Act 1981* (Qld) ("**the Act**") gives the Supreme Court the power to make or alter a Will for a person in circumstances where the person does not have testamentary capacity and is alive at the date of the order, and the terms of the proposed Will are approved by the court.

When May A Statutory Will Be Required?

There are many different circumstances in which an application for a Statutory Will may be appropriate and where courts have made orders in the past. For example:

- A person has dementia, and it is clear that their existing Will is out of date and needs to be updated, but they lack the necessary capacity to make their own Will.
- A person's existing Will includes a gift of their house to a particular beneficiary, but the person has since moved into a nursing home and the house has been sold. This gift may fail to take effect, and the named beneficiary may not receive any compensation for the loss of the gift.
- A person suffers an injury at birth, and receives a large compensation payment. If a Statutory Will is not made, their estate will pass according to the laws of intestacy, which might not be appropriate in their particular case. For example, the child's parents may have separated, and only one parent has acted as the child's care-giver for a number of years and the incapacitated child is estranged from their other parent.

Who May Make A Statutory Will Application To the Court?

Any person can make an application to the court for a Statutory Will on behalf of another person. However, the court must be satisfied that the person applying is an appropriate person to make the application.

The following are examples of the categories of persons who have been found to be appropriate applicants:

- a spouse,
- a parent of an incapacitated child who is the primary carer and who has a close and enduring relationship with that child,
- the incapacitated person's administrator who looks after that person's financial affairs,

- Relatives who have a relationship with the incapacitated person.

What Is the Process for Making An Application for A Statutory Will?

A Statutory Will application is a two-stage process:

Step 1: Apply to the court for permission (leave) to make the application

The first step is for the person to make an application to the court for permission to make a Statutory Will application. This step is intended to prevent an application from going ahead if it is frivolous or clearly unlikely to succeed.

The court may grant permission to make the Statutory Will application if it is satisfied of the following:

- the applicant is an appropriate person to make the application,
- there are reasonable grounds for believing that the person does not have testamentary capacity,
- adequate steps have been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the incapacitated person,
- the proposed Will, alteration or revocation is or may be a Will, alteration or revocation that the person would make if the person did have testamentary capacity, and
- it is or may be appropriate for an order to be made in relation to making a Will or altering a Will for the incapacitated person.

Step 2: Make the Statutory Will application

If the permission (leave) of the court is granted, the second step is to make the actual application to the court. It will be necessary for affidavits to be provided to the court setting out relevant information such as:

- evidence of the incapacitated person's lack of testamentary capacity,
- an estimate of the size and character of the person's assets,
- A draft of the proposed Will, revocation or alteration,
- evidence of the testator's wishes,
- details of who would be entitled to the testator's estate if the rules of intestacy applied, and
- whether it is likely that a family provision claim will be made upon the person's death, and by whom (if these details are available).

The court needs to be satisfied that the proposed Will is one that the person would likely have made if he/she were to have testamentary capacity.

As part of the process, the court will also expect the application to be served on those who may have an interest in the case. This includes people who would have an interest in the estate if there is no will.

Costs

If the Statutory Will application is successful, the legal costs of the application are generally paid out of the incapacitated person's assets, although this is not always the case. Any costs order is at the discretion of the judge.

Case Examples

Re APB [2017] QSC 201

APB was an elderly gentleman of 91 years who had very substantial assets. His assets included a shopping centre which was operated under a joint venture agreement. His assets were estimated to be worth approximately $70m, accompanied by a monthly income of over $200,000.

APB's litigation guardian made a Statutory Will application for an order authorising a Will to be made on his behalf. The parties to the case included the man's 3 adult children, his joint venture partner, various friends of 50+ years, his trusted solicitor of long standing, 2 charities, an estranged grandson, and various "new friends" including a Gold Coast real estate agent, her husband and a solicitor.

APB had made 4 Wills over a period of 14 years and then 3 Wills in one year. The last 3 Wills were made after APB's "new friends" befriended him in 2012.

At one stage, APB was in hospital when some of his "new friends" removed him from hospital without telling nursing staff or his attorney of their actions. They took him to a lawyer close to the hospital with the purpose of having a new Will made. A Will was not made so they took him to another lawyer where a Will was made in their favour for more than 50% of APB's estate.

Justice Applegarth ordered a Statutory Will which included pecuniary legacies to APB's adult children, an ex-nuptial grandchild, several old friends including a former brother-in-law, and the balance of the estate into two trusts. On winding up of the trusts, the capital is to be divided between the adult children, a spouse of one of the children, the ex-nuptial grandchild and 2 charities.

His Honour made no gift at all in favour of 3 out of the 4 "new friends" (who had each sought a legacy of $1.4m) on the basis that their conduct rendered them undeserving. In respect of two of them, his Honour described their conduct as "disgraceful". The fourth "new friend" received a pecuniary legacy of only $20,000.

MZY v RYI [2019] QSC 89

In this case, the Supreme Court of Queensland was asked to authorise the making of a Statutory Will for a severely injured child ("**SGA**").

SGA was aged 30 and had no capacity to make a will due to severe brain injuries arising from medical negligence occurring during birth. Compensation was awarded to SGA and a significant portion of the awarded sum had been contributed to a superannuation fund on behalf of SGA.

The total asset pool at the time of the hearing was approximately $2,860,000.

SGA's mother, MZY, applied to the court for a Statutory Will for SGA. MZY proposed that a Will be made gifting SGA's principal place of residence, household contents and 75% of the residuary estate to MZY, with the remaining 25% of the residuary estate to be gifted to SGA's father, RYI.

RYI objected to the application for a Statutory Will, preferring that SGA's estate be dealt with in accordance with the rules of intestacy. That is, that upon SGA's death, SGA's estate be divided equally between her parents, MZY and RYI.

MZY and RYI had been separated since 2009 and divorced in 2013.

SGA lived with and was cared for by MZY, and had been for the past 30 years.

The court ordered that a will be prepared for SGA gifting SGA's principal place of residence and household contents and 65% of the residuary estate to SGA's mother, MZY, with the remaining 35% of the residuary estate to be gifted to SGA's father, RYI.

MZY also sought an order that she be able to make a binding death benefit nomination with SGA's superannuation fund on behalf of SGA.

The court held that due to the significant value in the superannuation system for SGA, it was also necessary and appropriate to make an order conferring power on the mother to make a binding death benefit nomination for SGA. The mother was authorised to sign a binding death benefit nomination in favour of SGA's estate.

Care needs to be taken when considering bringing an application of this type. Before a Statutory Will application is commenced, contact us on 1800 999 529 and obtain expert legal advice tailored to your individual situation.

Australian Skilled Visas

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Skilled visas enable applicants with certain specified qualifications to live and work in Australia.

Am I Eligible for A Temporary Skilled Visa?

Certain provisional visas can lead to permanent residency. These include:

- Skilled – Regional (provisional) visa (sub-class 489): This is a 4-year provisional visa which allows holders to live only in certain areas of Australia. However, an applicant would need to be sponsored by an Australian relative, living in a "designated area," or by a State or Territory government.
- Graduate Temporary visa (sub-class 485): This is a work visa which can be applied for by international students who have completed a qualification taking 2 years of study in Australia.

Can I Obtain A Permanent Skilled Visa?

Permanent resident visas for points-tested skilled workers who want to work and live in Australia include the following:

- Skilled Independent visa (sub-class 189): This visa does not require sponsorship by a relative or by a State or Territory government.
- Skilled Nominated visa (sub-class 190): This is a permanent visa requiring nomination by an Australian State or Territory government.
- Skilled Regional visa (sub-class 887): This visa is the permanent stage of the Skilled Regional (provisional) visa. To qualify for a permanent Skilled Regional visa, you must live in the required

region of Australia for 2 years and work full-time there for 12 months.

If you think you may qualify for any of these visas, and wish to discuss your options, contact Quinn & Scattini Lawyers' Migration Team on 1800 999 529, email mail@qslaw.com.au or visit www.qslaw.com.au and submit an online enquiry.

Sacked, Fired, Let Go! Unfair Dismissal – What You Need to Know

Commercial Litigation Team

No matter which way you put it, being dismissed from a job can be an incredibly stressful situation to find yourself in. Statistics released by the Fair Work Commission in its Annual Report for 2017-2018 show that unfair dismissal claims account for over 40% of all complaints lodged with the Commission.

There are of course circumstances where a dismissal is justified. This would include where an employee has engaged in serious misconduct or is incapable of performing the requirements of a job.

However, even where a valid reason exists for the dismissal, employers must still ensure that they follow fair and transparent procedures when dismissing an employee.

When Is A Dismissal 'Unfair'?

An employer who dismisses an employee without a valid reason, or without following fair and transparent procedures, may expose themself to a claim for unfair dismissal. Section 387 of the *Fair Work Act 2009* (Cth) ("**the Act**") sets out the legal threshold that must be met in order for a dismissal to be considered an "unfair dismissal." Under the Act, a dismissal may be found to be unfair if it is harsh, unjust or unreasonable.

In determining what constitutes harsh, unjust or unreasonable conduct by an employer, the Fair Work Commission ("**FWC**") will take into consideration the individual circumstances of each case.

The Act sets out a number of matters that the FWC must take into account in determining whether a dismissal is harsh, unjust or unreasonable. These matters include:

a) *whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees), and*
b) *whether the person was notified of that reason, and*
c) *whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person, and*
d) *any unreasonable refusal by the employer to allow the person to have a support person present to*

assist at any discussions relating to dismissal, and

e) *if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal, and*

f) *the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal, and*

g) *the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal, and*

h) *any other matters that the FWC considers relevant.*

Key Cases

Dismissal for performance reasons

The case of *Welsby v Artis Group Pty Ltd* [2016] FWC 2251 involved an unfair dismissal claim by Mr Welsby, an employee who was terminated for performance-based reasons from his position as a Regional Manager of the Artis Group. Mr Welsby alleged that he had been unfairly dismissed as his employer had:

1. Failed to notify him that continued poor performance may result in termination, and
2. In doing so, denied him a reasonable opportunity to improve his performance.

The FWC found that while the employer had previously discussed performance issues with Mr Welsby on a number of occasions, the employer had failed to formally warn Mr Welsby that his performance issues may result in the termination of his employment.

Accordingly, the FWC found that the dismissal was harsh, unjust or unreasonable and ordered an award of compensation to Mr Welsby.

Dismissal for Serious Misconduct

Serious misconduct is defined in regulation 1.07 of the Fair Work Regulations as:

- *wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, or*
- *conduct that causes serious and imminent risk to:*
  - *the health or safety of a person, or*
  - *the reputation, viability or profitability of the employer's business.*

Generally, for an employer to validly terminate an employee without notice on the grounds of serious misconduct, the employer must have a "sound, defensible or well-founded" belief that the employee engaged in the conduct that forms the basis of the dismissal (*Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333).

As is the case with dismissal on the basis of performance issues, an employee who is dismissed for an allegation of serious misconduct must first be afforded an

opportunity to respond to the allegations against them. In *Walker v Salvation Army (NSW) Property Trust t/as The Salvation Army – Salvos Stores* [2017] FWC 32, an employer dismissed a store manager on the basis of theft allegations. The employer relied on CCTV footage of the store manager that purportedly showed the store manager taking notes from a cash register.

The store manager was not provided with an opportunity to view the footage nor was she given a chance to respond to the allegations of misconduct prior to her dismissal. The unfair dismissal claim was successful as the FWC found that the employee's dismissal was unjust in the circumstances.

Remedies for Unfair Dismissal

There are generally two remedies available to a successful unfair dismissal claimant. The first remedy is reinstatement. The Act provides that, where possible, reinstatement of the employee to their original or an equivalent position is the preferred approach.

If reinstatement is inappropriate in the circumstances, the FWC can order that the employer pay the employee a sum of money by way of compensation.

Compensation is capped at the lesser of either 6 months' pay or the equivalent of half the unfair dismissal high income threshold. The FWC does not have any jurisdiction to order additional compensation for shock or distress.

Quinn & Scattini Lawyers Can Help You

Unfair dismissal applications must be lodged with the FWC within 21 days after the dismissal taking effect. The FWC will only allow an application outside of the 21-day period where there are exceptional circumstances warranting the delay.

If you are an employee, it is therefore important that you seek expert legal advice as soon as possible after you become aware that you are being dismissed, in order to ensure that your interests are fully protected.

If you have been dismissed from your job in circumstances that could be considered harsh, unjust or unreasonable, call Quinn & Scattini Lawyers. Our expert employment litigation lawyers can assist you through the entire process, on a "no win, no fee" basis in approved cases.

Grandparents & A Grandchild – The Legal Position

Tim Ryan
Director
Family & De Facto Law

"Young people need something stable to hang on to – a culture connection, a sense of their own past, a hope for their own future. Most of all they need what Grandparents can give them." – Jay Kessler

It is thought of as a 'rite of passage' for parents to evolve into grandparents and get the chance to commune with children without the responsibilities of parenthood. It's an opportunity to play with a child and be their friend and support without consequences.

Sometimes this evolution from parent to grandparent is fractured by a breakdown in relationships with their adult children. The breakdown may be with your own adult child or with their partner.

There may be abuse in that relationship which is beyond your ability to repair. Sometimes parents use their children as leverage and to obtain financial gain from their grandparents.

What Happens to Your Grandchildren?

It is a sad reality that children are significant casualties of parental separation. It's hard enough when the separation is amicable. A child's feelings of stability are undermined and the concepts of love and nurture no longer provide protection from external forces. Everything changes.

If the separation of parents is not amicable, and possibly violent, the children suffer the most. Even if the separation is concluded the child's relationship with their grandparents can be disrupted. Parents can relocate or form a new relationship. The opportunity for grandparents to see grandchildren can be severely curtailed or be non-existent.

Changes In Law

The *Family Law Amendment (Shared Responsibility) Act 2006* introduced significant changes to the *Family Law Act 1975* ("**the Act**"). The amendment confirmed and emphasised the importance of the relationship of grandparents and grandchildren.

Grandparents are specifically recognised in the Act. The act sets out the objects and principles of Sect 60B to ensure that the best interest of the children are met by (I am paraphrasing relevant sections of the Act):

- protecting children from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence,
- ensuring that children receive adequate and proper parenting to help them achieve their full potential, and

- ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

- children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives), and
- children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

A court will determine what is in a child's best interests in a primary sense which deals with essential conditions of health, safety and wellbeing and, assuming separation has occurred, having a meaningful relationship with both of the child's parents.

A Grandparent's Legal Right

The additional considerations are most relevant to grandparents and formally recognise the significant role played by grandparents in children's lives.

That is:

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views,
- the nature and relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child),
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either his or her parents or any other child or other person (including any grandparent or other relative of the child), and
- the capacity of each of the child's parents and any other person (including any grandparent or other relative of the child) to provide for the needs of the child, including emotional and intellectual needs.

The above summary is selected from relevant parts of the Act namely, Sect.60B and Sect. 60CC.

Sect. 60CA provides the overriding (or paramount) principle. That is, in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Each Case Is Different

As in all aspects of family law the particular approach should be measured by the unique (almost always) set of circumstances relevant to the situation. The court will apply the principles as set out above with a view to achieving the summarised objectives. Whilst there is no automatic right as a grandparent to see

your grandchildren the children do have a right to see you if it is determined that it is in their best interests (and, of course, the grandparent is agreeable).

Utilising the principles set out above, a court has the jurisdiction to consider a grandparent's role if it must determine what future care and living arrangements would be best for the child.

The Best Approach

It is trite to say that utilising the court process is not a preferred option to seeking arrangements to maintain a relationship with a grandchild. Apart from the cost (significant if you do not have access to public assistance) the acrimony that can simmer between parents and grandparents may create barriers that are difficult to overcome.

Grandparents should always try to discuss options and seek agreement to arrangements. Mutually agreed arrangements usually work without any lingering resentment that sometimes arises from those that are court ordered.

Parenting Plans

Grandparents can instigate mediation and seek assistance from a Family Relationship Centre.

All parties are usually invited to mediate a sensible arrangement that can be documented by way of a Parenting Plan ("**Plan**"). These Plans are utilised by parents and deal with issues concerning the child's welfare.

A Plan can include a grandparent or other relative of the child. The Plan must be signed by both parents so if there is no agreement the grandparents cannot be included.

A Plan is not enforceable by a court but can be relied upon as a reflection of the intent of all parties when the plan was agreed.

The courts can consider the content and the intentions of the parties if the matter is litigated.

If All Else Fails

A grandparent is entitled to apply to the court if negotiation and/or mediation fail. The court will only grant an application if, upon consideration of the goals and principles set out above the application is considered to be in the child's best interests.

The circumstances of care for the child may be such that a grandparent may feel it necessary to apply for custody or access. The court must be satisfied that the parent is unable to care for the child or the child is in danger.

If the court is satisfied that access or custody (to the grandparent/s) is in the child's best interests a further order would be considered so as to confer upon the grandparent/s parental responsibility which allows the grandparent to make decisions for the child (schooling, health, living arrangements and religion) without the need to consult with the parents.

Alternatively the grandparent may simply be seeking quality time with his or her

grandchild. That is an easier decision for the court to make although it must still be satisfied that the decision is in the best interests of the child.

The Act promotes mediation and discussion as a means to resolve disputes regarding children. Litigation should be regarded as a last resort. Sometimes there is no choice and the Family Court is set up and available to make a decision where only a legally binding resolution can succeed. It is important to note that it is compulsory to attempt to reach agreement by mediation before commencing proceedings.

A certificate must issue from the mediator noting your attempts to mediate and be made available to the court before any application will be accommodated.

In Summary

It is important to understand the dynamics that the court applies. The court will have regard to and consider arrangements for children on the basis that they have a right to a meaningful relationship with their grandparents. Arrangements that the court may put in place will not be as extensive as that between a parent and his or her child.

In certain circumstances the orders for care of a child by a grandparent/s may be extensive and a subjective approach is always applied taking into account the welfare needs of the child.

Obviously, a grandparent must actively engage with the parents in negotiation, mediation and, if necessary, the court process in order to warrant consideration by the court when determining care arrangements.

Grandparents will invariably be successful in obtaining orders or arrangements for some form of communication and time with their grandchildren.

The child's needs and the availability of the grandparent will determine the extent of the arrangements. In normal circumstances it is expected that grandparents will work with the parents rather than replace them.

Sometimes it may be appropriate for a grandparent to step back and not add to the conflict.

All these variables are 'packaged' so that a determination can be made taking into account the child's interests, the grandparent's availability and the particular circumstances of the case.

Key Takeaway

It is important for grandparents to consider the impact that their involvement will have on all parties including the parents and to make sure that their goal is child focussed and conducive to a child's ongoing welfare.

An important takeaway from this is that a child's right to have a meaningful relationship with his or her grandparents is enshrined in the Act and is not dependant on the whims and fancies of the child's parents.

If you have questions seek the assistance of a family lawyer. Obtain advice as to your options and then attempt to

negotiate an appropriate outcome. If all else fails our team of family law specialists can provide appropriate and cost effective guidance to assist you in achieving your goal with regard to your relationship with your grandchild. Call 1800 999 529.

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