

# NICHOLLES NEWSLETTER

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**NICHOLLES**  
Family Lawyers

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## Nicholes Family Lawyers proud to participate in the 5th World Congress

Sally Nicholes, Marguerite Picard and Lucy Daniel have all returned from a whirlwind trip to Halifax, Nova Scotia, for the 5th World Congress on Family Law and Children's Rights.

In his address during the Opening Ceremonies, Nova Scotia Chief Justice MacDonald praised the Congress' pro-active approach to child welfare, telling delegates, 'The Congress is not just an instrument of mutual education; it is indeed a powerful instrument of change. We've all gone to conferences where we talk about change and are passionate for the need for change and then leave and wonder what's for dinner. This body, in fact, walks the walk and is a catalyst for much-needed change to protect our children.'

The Congress was a great success, with delegates hearing from an outstanding array of world experts in children's rights and family law, including judges, professors, doctors and leading legal practitioners.

To start off with, however, Hurricane Bill's arrival in Halifax on the opening day presented a few challenges to speakers and delegates flying in that day! The Hon. Michael Kirby was nevertheless able to arrive in time to present the Peter Nygh Memorial Oration in the Opening Ceremony through determination and a reschedule of his flight routes. Hurricane Bill did prevent Canadian Chief Justice Beverley McLachlin from arriving in time for her opening address, which was instead delivered by Chief Justice Michael MacDonald.

NFL were proud sponsors of and contributors to the World Congress. Sally Nicholes is Deputy Chair of the Congress and worked tirelessly leading up to and during

## Welcome Monica!

We are very pleased to welcome Monica Blizzard (pictured third from left in our newsletter footer) to the NFL team as a Senior Associate.

Monica brings a wealth of experience to the firm. Since her admission to practice in 1998, Monica has obtained accreditation as an LIV Family Law Specialist and also trained as a Mediator and Collaborative Lawyer.

Monica has expertise in all aspects of matrimonial and domestic and same sex property matters. She has handled a broad range of complex children's matters, including residence, contact, international and interstate relocation applications and child support issues. Monica's experience with property matters is similarly extensive, covering property and maintenance negotiations, general advice and preparation of binding financial agreements. Monica has also handled out-of-court settlements of both financial and children's family law matters, and contested hearing and appeal cases.

Monica also shares in NFL's keen interest in alternate dispute resolution, having recently undertaken training in mediation and in collaborative law. Monica is also a member of Collaborative Professionals Victoria and the International Academy of Collaborative Professionals.



the Congress. Sally initiated a session in which the leading expert paediatricians in the area of gender dysphoria collaborated together, as well as arranging for a Youth Forum in honour of Danny Sandor. Marguerite Picard was chosen by the Programme Committee to speak on collaborative law, and Lucy Daniel also gave two presentations, on special medical procedures and the child protection issues faced by intellectually disabled parents. Lucy was also the Congress' Program Coordinator, and was very pleased to finally meet all the Congress speakers whom she had been in constant correspondence with throughout this year!

Congress co-founder, Justice Stuart Fowler, announced that the next World Congress will be held in Sydney in 2013. While the NFL team will enjoy a well-deserved break before then, we are looking forward to working to make this next Congress as successful as the 2009 Halifax Congress was.

For more information and news on the Congress, visit [www.lawrights.asn.au](http://www.lawrights.asn.au)

## Congratulations Bridgette!

NFL are also proud to congratulate Bridgette Kildea on her recent admission to practice, and we now welcome her in the new role of Associate! Bridgette joined NFL to complete her legal traineeship in January 2009, following her studies at Bond University and Victorian College of Law. Bridgette has already gained significant experience in complex high asset property and children's matters, and is looking forward to the new challenges that come with being a solicitor!

## Marguerite visits USA's leading Collaboration Centres

Marguerite has recently spent several days conferring with other collaborative practitioners at two international collaborative law centres. She visited the Centre in New Jersey which opened in February 2009, and the Minnesota Centre in Minneapolis. The Minnesota centre is home to Stu Web, who founded collaborative law in 1991. Each of these centres provided a most generous welcome to Marguerite, who gained enormously from the opportunity to learn and exchange information and experiences of collaborative practice with the lawyers, financial planners, psychologists and child specialists in these centres.

## Surrogacy parentage case law

The legal complexities of surrogacy have again been demonstrated in the recent Family Court Sydney decision of *Re Michael: Surrogacy Arrangements* [2009] FamCA 691. This matter was heard under the *Family Law Act 1975 (FLA)*, because unlike Victoria, ACT and WA, there is no clear state legislation in NSW dealing with surrogacy. Family Court proceedings would not be relevant if the parties lived in Victoria, as they would come under the *Victorian Assisted Reproductive Treatment Act 2008*.

The case involved the child Michael, who was born in October 2008 as a result of a family surrogacy arrangement. The essential question determined by the Family Court was, 'Who are Michael's parents?' The relevant parties were Sharon and Paul (who are married to each other), Sharon's mother Lauren, and Lauren's de facto partner Clive. Sharon is unable to conceive due to treatment for cervical cancer; however she had her eggs harvested and fertilised by Paul's sperm. The embryo was implanted into Lauren with the consent of all parties, and Lauren subsequently gave birth to Michael. Immediately after Michael's birth, Lauren handed him to Paul and Sharon, who have provided all care since. Michael's birth certificate lists Paul as the father and Lauren as the mother. Lauren and Clive consider themselves to be Michael's grandmother and step-grandfather.

On 24 February 2009, Federal Magistrate Sexton ordered by consent that Michael should live with Paul and Sharon and that they should have equal shared parental responsibility for him. Paul and Sharon further wished to adopt Michael, and applied to do so under s 60G of the *FLA*. Section 60G allows the parent, or partner of the parent, or a child to apply for adoption proceedings to be commenced. Accordingly, the Court had to determine whether or not Sharon and Paul were Michael's parents in order to determine whether or not they could bring the adoption proceedings.

With regard to surrogacy parentage, the *FLA* provides that orders made under State or Territory law regarding parentage should be taken to determine parentage for the purposes of proceedings under the *FLA*. If there are no orders made under State law regarding parentage, then the child should be taken to be the child of the birth mother and the birth mother's partner. The *FLA* specifically provides that other parties who may have provided genetic material for the child are *not* parents for the purpose of the *FLA*.

New South Wales does not have clear law regarding surrogacy parentage, so Sharon and Paul could not apply for State orders declaring them to be parents. Accordingly, in *Re Michael* Justice Watts had to apply the *FLA* to find that Michael was the child of Lauren, as she gave birth to him, and Clive, as he is Lauren's partner. Justice Watts found that as the *FLA* sections



clearly provided this outcome, it is irrelevant that Lauren and Clive did not intend to become Michael's parents.

The *Family Law Act* also provides a rebuttable presumption that the parties named on the birth certificate are the child's parents. However, Justice Watts found that this would be rebutted by the *FLA*'s provision that the birth mother and her partner are the child's parents. Accordingly, under the *FLA*, Michael is the child of Lauren and Clive even though his birth certificate names Lauren and Paul as his parents.

Justice Watts noted that this finding mirrors the outcome that would be reached under the New South Wales *Status of Children Act 1996* which provides an irrebuttable presumption that a woman is the mother of any child born as a result of her pregnancy, even if she did not provide the ovum used in the procedure causing the pregnancy. As with the *FLA*, this overrides any presumption regarding parentage raised by the names on the child's birth certificate.

Given this finding that Sharon and Paul are not Michael's parents, Justice Watts found that he could not make an order in favour of their adoption of Michael under s 60G *FLA*. However, his Honour found that Sharon and Paul could jointly make an application to the New South Wales Supreme Court to adopt Michael under the New South Wales *Adoption Act 2000*. While this would lead to outcome originally intended by the parties involved, the considerable delay and expense incurred to arrive at this outcome demonstrates a need for national review of laws regarding surrogacy.

## Jail orders for contravention parenting orders

The Full Court of the Family Court recently considered the use of imprisonment of parents who contravene parenting orders in the case of *McClintock & Levier (2009) FLC 93-401*. In the initial hearing, Federal Magistrate Brewster sentenced the mother to six months imprisonment for each of her six contraventions of parenting orders, to be served concurrently.

The parenting orders provided that the eleven year-old child spend time with the father overnight during weekends and on school holidays. Rather than facilitating these visits, the mother had relocated with the child from New South Wales to Queensland, and then Western Australia. The mother enrolled the child in school under the name of her new partner and their

whereabouts remained unknown until the child was eventually recovered by the police 13 months after the mother left New South Wales. The mother admitted in the initial hearing that she did not have a reasonable excuse for this contravention of the parenting orders.

The *Family Law Act* gives the Family Court power to make orders to enforce compliance with family law orders affecting children. In circumstances involving a serious contravention without reasonable excuse, the *FLA* provides that the Court can make orders including community service, fines or a sentence of imprisonment for a maximum of 12 months. Such orders can only be made if the Court is satisfied beyond all reasonable doubt that the grounds for making the orders exist. The Court can only order a sentence of imprisonment if it is not appropriate to deal with the contravention through any other alternate order, and must state its reasons for coming to this decision.

In considering what orders to make, FM Brewster referred to the principles of sentencing outlined by the ACT's *Crimes (Sentencing) Act 2005*. His Honour acknowledged that a sentence of imprisonment would cause great hardship to the mother and would not be in the child's best interests. Nevertheless, his Honour concluded the unilateral contravention of Court Orders must be deterred and that general deterrence must prevail in this case. Accordingly, his Honour was satisfied 'beyond reasonable doubt' that none of the other sanctions short of imprisonment were appropriate.

The mother then appealed this decision to the Full Court. In separate judgements, Finn, Coleman and Cronin JJ all found that FM Brewster erred in sentencing the mother to prison in the circumstances. The Full Court found that the sentence imposed by FM Brewster was 'manifestly excessive.' Justice Cronin considered that it would be an error of law to punish a party to make an example of them. Justice Finn noted that this was particularly so considering that while the mother's six contraventions were substantial when approached globally, at least the first three were relatively minor as they each involved only one weekend and occurred prior to the mother's disappearance. The traumatic effect that the imprisonment would have on the child was also considered to support the finding that the sentence was manifestly excessive.

At the time of the hearing, the mother had already served 16 days of her sentence. The Full Court ordered that her remaining sentence be suspended and ordered a good behaviour bond of two years without surety or security.



## LIV Collaborative Practice Section

The Collaborative Practice Section has been introduced as a new section of the Law Institute of Victoria. The LIV supported the formation of this section in keeping with its commitment to promote collaborative practice in the community and the legal profession.

Collaborative practices involve not only to lawyers but counsellors, child specialists, psychologists and financial planners.

NFL has a long-standing commitment to using collaboration as an alternative to court proceedings. All of our solicitors have undertaken collaborative law training. Our Senior Associate Marguerite Picard is a member of the executive of Collaborative Professionals Victoria, and is co-facilitator of the Marketing sub-committee.

## Statutory Declaration for Informal Relative Carers

The Victorian Government has developed a Statutory Declaration for Informal Relative Carers (SDIRC). This scheme recognises that children and young people in Victoria are increasingly unable to live with their parents and are being cared for by relatives through informal arrangements.

The lack of official documentation recording informal care arrangements can often mean that informal carers face difficulties in accessing government and community family support services. The SDIRC seeks to address this problem by providing a pro forma declaration verifying the adult's care of the child in order to assist access to such services. For example, informal carers may use the SDIRC to obtain information relating to the child from schools, child care facilities or the Registry of Births Death and Marriages; to enrol children in kindergarten or recreational clubs; or to approve certain medical procedures on the child.

The SDIRC may not be sufficient to gain information or services in all circumstances. In some cases additional information, documentation or parental consent may be required.

Although the statutory declaration is titled for 'relative carers', it can also be used by a significant friend or person who cares for the child even if they are not biologically related. The nature of the relationship to the child needs to be recorded in Section 1 of the SDIRC.

The SDIRC scheme is being managed through the Office of the Child Safety Commissioner. For more information, visit [www.oscs.vic.gov.au](http://www.oscs.vic.gov.au)

## Study into the financial impact of divorce

The Australian Institute of Family Studies recently released a new report, '*The effect of relationship breakdown on income and social exclusion*', examining the financial impact of divorce on men and women. This found that 5 years after divorce took place, divorced women are significantly worse off than divorced men and women who have not divorced.

This study goes beyond previous studies into financial disadvantages of divorce on women, by comparing divorced women not only to men but also to non-divorced women. The study found that four years after divorce, divorced women experienced on average a 2.9% increase in income from pre-divorce levels. This is dramatically less than the 12.3% increase experienced by non-divorced women and 12.5% experienced by divorced men.

The study also looked beyond income levels to also compare degree of hardship experienced by parties, such as being unable to pay rent or mortgage, going without meals or seeking assistance from a charity. The study found that divorced women, particularly those with children, were much more likely to experience hardship than non-divorced women or divorced men. The hardship experienced by all groups decreased over time; however divorced women experienced the least improvement.

Interestingly, the actual experience of hardship and prosperity of these groups differed significantly from the groups' self-perception of these. Despite having higher income and lower experience of hardship than divorced women, divorced men are more likely than divorced women to say that they were poor or very poor two years after the divorce.

For more information and the full report, visit <http://www.aifs.gov.au/>



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