NICHOLES NEWSLETTER

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Eighth Edition - October 2008

What's New

Nicholes Family Lawyers continue to be active participants in a range of professional development forums, as part of our commitment to both high quality and progressive lawyering.

In September 2008 Sally Nicholes made a presentation to the Television Education Network (TEN) regarding issues surrounding Family Law, Religion and Indigenous Culture.

Nicholes Family Lawyers also organised and hosted a forum of mental health professionals to review of the Shared Parental Responsibility Laws. Full details of the speakers and discussion are outlined on page 2.

In October 2008 Marguerite Picard will travel to San Francisco to look at projects designed to support children after separation, and then on to the International Association of Collaborative Professionals Conference in New Orleans.

In November 2008 Sally Nicholes will address the Australasian Paediatric Endocrine Group's Annual Scientific Meeting on 'Ethics and Legal issues of Disorders of Sexual development.'

In November 2008 Marguerite Picard will address the Lexus Nexus Family Law Conference on recovery of children under the Hague Convention on Child Abduction.

Marguerite Picard

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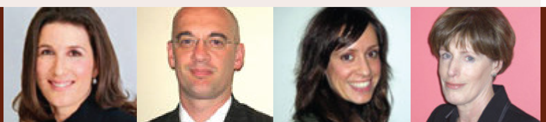


De Facto Property Bill Update for Financial Advisors and Accountants

The August edition of the Nicholes Newsletter looked at the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*. Present indications are that the Bill will pass into law in March 2009, which raises a number of issues for people residing in heterosexual and same sex domestic partnerships. Firstly, Family Law considerations will then apply to division of property of parties in de facto relationships. Secondly, aspects of relationship breakdown such as maintenance and superannuation splitting will require legal advice. The new legislation will also allow couples in domestic partnerships to enter into Financial Agreements (a 'Part VIIIAB Agreement'). These will permit parties to plan for the management of financial matters in the event of relationship break down, providing for matters such as maintenance, superannuation splitting and division of property.

Marguerite Picard

Forum with Psychologists

Nicholes Family Lawyers organized and hosted a forum of mental health professionals to review of the Shared Parental Responsibility Laws on 17 September 2008

The forum was addressed by Associate Professor Dr Jennifer McIntosh of Latrobe University, Melbourne University and "Family Transitions" in Carlton. Jenn McIntosh is the co-author of a recent paper entitled "Shared Care and Children's Best Interest in High Conflict Separation, a Cautionary Tale". At the forum she shared her analysis of data emerging about the affect of high levels of post-separation parental conflict on children. This indicated the potential for harm to children in shared care arrangements which often increase the opportunities for the manifestation of parental conflict.

The forum was also addressed by Associate Professor Dr Lawrence Moloney of La Trobe University and the Australian Institute of Family Studies, who has been involved in the development of the Family Relationship Centres. Lawrie described his dream of legal and non-legal family practitioners giving a consistent and understandable message to all separating families. In his dream, social scientists and lawyers could reinforce each others' messages about how debilitating parental conflict is for children, and how grateful children will be in later life if parents can manage to get their parenting act together.

Alan Baker addressed the forum on the establishment and intake procedures at Centacare where he is a Family Dispute Resolution Practitioner and described the positive affect of working with separated families in this context. Finally, forensic psychologist Vincent Papaleo spoke of the concept of therapeutic jurisprudence and a multi-disciplinary approach in family therapy.

Following a lively discussion, the forum resolved to establish the ground work to develop a model which promotes a better working relationship between lawyers and mental health professionals, and which will provide families with some sense of therapeutic benefit at the conclusion of their dispute.

Marguerite Picard

Child Support Changes, 1 July 2008

1 July 2008 saw a number of changes introduced in the stage 3 amendments to the child support scheme. The most fundamental change is that each parent's income is now assessed in the same way, whereas previously the carer parent had an excluded income amount of $45,000 per annum. Each parent is able to subtract a self support amount of approximately $18,000, before assessing income for child support purposes. Further information on the formula is available on the child support website: www.csa.gov.au

Changes have also been made to the linkage of care to child support payments. From 1 July 2008 a single recognition of cost will apply to all care between 14% and 34% of care, with a sliding scale increase in this recognition between 35% and 50%. The Family Tax Benefit only be shared between parents if they each have at least 35% of care.

Binding Child Support Agreements must include a certificate of independent legal advice and can only be ended by a subsequent Binding Agreement requiring fresh legal advice or a Court Order in very restricted circumstances. A Limited Agreement can be ended by agreement, a Court Order, by either party after the elapse of 3 years, or when the amount of child support payable under a notional assessment varies by more than 15% in circumstances not contemplated by the agreement. Limited Agreements are not required to include certification of legal advice, however given their impact and complexity, they should not be entered without consulting a lawyer. For all agreements the Family Tax Benefit will be assessed on the amount of child support that would be payable under the formula if the agreement had not been made.

The minimum amount of child support payable by low income earners is $339.00 per annum, but not payable where the parent has at least 14% of care. Importantly, parents reporting very low incomes but not claiming support will be required to pay an annual rate of around $1,100 per child unless they can show that their incomes are indeed genuinely low.

In limited circumstances, recognition will now be given to the financial responsibilities of a payer parent in relation to step children and children in de facto relationships.

Marguerite Picard

Section 106B Applications

Section 106B of the *Family Law Act 1975* allows the Family Court, in considering family law proceedings, to set aside transactions which may frustrate the operation of the Act. Section 106B only applies to transactions entered into or made on or after 3 August 2005.

Section 106B(4AA) provides that application for a s 106B Order may be brought by a party to the family court proceedings, a creditor of a party who may not be able to recover their debt if the instrument or disposition were made, or any other person whose interests would be affected by the making of the instrument or disposition.

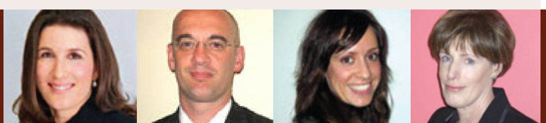
Third parties

The Family Law Act provides the Family Court jurisdiction to make Orders which may affect third parties in certain circumstances, including Section 106B orders which may involve third party entities (companies or trusts).

Section 106B gives the Family Court powers to "*set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party*" to the marriage; but also requires the Court to have regard to and provide proper protection for bona fide interests of third party purchasers.

The Family Court has previously made Orders against bona fide third parties in some cases under s 106B. In other cases, however, the Court has suggested that such Orders should not be made lightly, even where the elements of s 106B are established.

The Family Court can also exercise jurisdiction against third party entities on an interlocutory basis. In those instances, relief sought at the final hearing pursuant to s 106B entitles the Family Court to grant such interlocutory relief so as to preserve the asset pool pending determination of the Final Application.



ASIC v Rich & Rich and third party interests

This case looked at circumstances where a Binding Financial Agreement was thought to have been entered into as a way of defeating third party interests in a family law matter.

During the marriage in this case, the husband transferred assets to the wife during the marriage and the parties entered into a Financial Agreement. The third party creditors brought proceedings arguing this Financial Agreement was executed to defeat their interests.

The case was heard by Justice Ryan, who found that the Family Court did not have jurisdiction to set aside a Binding Financial Agreement in so far as it related to third party interests at the requests of third parties.

Justice Ryan stated "*a Binding Financial Agreement is a form of contract and should be interpreted in accordance with the law of contract. The law of contract generally recognizes that an agreement may be valid as between the parties, yet void in whole or part, as against a third party*."

Subsequent to this decision and as a direct result of this case, the Family Court's jurisdiction has now been widened to deal with third party (i.e. creditors) applications to set aside Binding Financial Agreements. The amendments to the Family Law Act and the *Family Law Amendment Bill 2004* are often referred to as the "*Jodie Rich Amendments*".

Bankruptcy

The amendments to the *Bankruptcy and Family Law Legislation Amendment Act 2005* relating to the interaction between family law and bankruptcy came into effect on 19 September 2005. These amendments now enable concurrent bankruptcy and family law financial proceedings to be heard in a Court with Family Law jurisdiction.

As a result of these amendments, the Family Court can now exercise s 106B powers where a party to a marriage is bankrupt and the trustee is also a party to the family law proceedings.

Specifically, s 106B(1) provides that the Family Court may set aside or restrain the making of an instrument or disposition:

- *"which is made or proposed to be made by or on behalf of, or by direction or in the interest of, the bankrupt", and*
- *"which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order".*

Nadine Udorovic

Case Note: Vandelay and Theodopolos [2008] FAM CAFC 119

In a recent appeal from the Federal Magistrates' Court, the Family Court found that unconscionable conduct by a party was insufficient to overcome other procedural and evidentiary deficiencies. This resulted in orders for property settlement being overturned and proceedings being remitted to the FMC for rehearing.

As was the case in Rutherford (1991) FLC 92-255) it was not necessary to determine whether the applicant must show an error of principle and that the decision appealed from caused her a substantial injustice or whether establishing either of these circumstances is a sufficient basis for the granting of leave to appeal.

Background

The husband commenced Hague proceedings against his wife after she and the child remained in the Netherlands in late February 2005.

The wife took considerable steps to avoid the child and herself being located by the central authorities. Ultimately, the child was returned to Australia prior to the end of December 2006 to live with the husband.

On 22 February 2007 the FMC made property Orders. The wife was ordered to transfer her interest in the matrimonial home to the husband. The wife later claimed that she did not know of the hearing date. The wife also claimed to have not been served with an affidavit filed by the husband and filed 12 February 2007. There was no evidence that the wife was served with such affidavit.

In March 2008 the wife sought leave to appeal out of time to the FMC property proceedings on the basis that she had "no knowledge" of such proceedings having been before the court on 22 February 2007.

The wife's appeal is summarised as follows:

Natural Justice

The wife claimed a denial of natural justice by the Federal Magistrate proceeding in her absence on 22 February 2007. Notably, Kirby J explained in *Allesch v Maunz (2000)* 203 CLR 172 that it is the *opportunity to be heard* which is fundamental to natural justice:

38.…Affording the opportunity is all that the law and principle require.

Decision-makers, including the courts, cannot generally force people to protect their own rights, to adduce evidence or other materials, to present submissions or to act rationally in their own best interests. This consideration may be especially relevant in relation to the Family Court…

The wife failed on this ground as it was considered that the *wife chose to put herself in the position where she could not know*. On the wife's own evidence for approximately 18 months prior to December 2006, the wife was "incommunicado", and remained so, for the clear and tacitly acknowledged purpose of defeating the husband's attempts to procure the return of the parties' child to Australia.

Lack of expert evidence and failure to prove service

The wife's second and third grounds related to matters contained in the husband's 12 February 2007 affidavit, namely the value to be attributed to the matrimonial home and the alleged indebtedness of the parties to the husband's parents.

The court found that His Honour erred in finding the value of the former matrimonial home to be $620,000 (a figure put forward by the husband without expert evidence). In the matter of *Stead v State Government Insurance Commission* (1986) 67 ALR 21 the High Court said:

16.…All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.

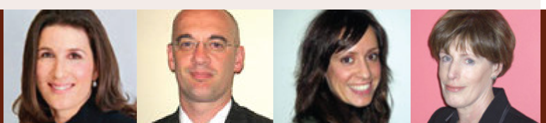
The Court also found that His Honour erred in accepting that the parties were indebted to the husband's parents in the sum of $537,666 in circumstances where, at most, the wife in her affidavit evidence conceded that the husband's parents had provided to the parties $363,000 and had disputed that such funds were provided by way of loan to the parties. The issue turned on the fact that evidence led by the husband failed to establish that the wife knew, or had the opportunity to know, of the husband's allegations as described in his 12 February 2007 affidavit.

Decision

It is apparent that once a denial of natural justice has been established, the respondent to such appeal bears a heavy onus having regard to the terms in which the High Court has expressed that onus in Stead (supra).

It was determined by the appeal court that the wife had demonstrated merit in her challenges to the learned Federal Magistrate's decision, and the husband failed to disincline the Court to exercise such discretion to extend time within which the wife may appeal his Honour's decision.

Thus the orders of the Federal Magistrates Court with respect to property settlement were set aside and the



proceedings remitted for rehearing before another Federal Magistrate.

Mike Wells

Family Law and Indigenous Issues

An ongoing issue for the Family Court is how and to what extent issues regarding Indigenous culture should be considered in family law cases. Under the 1 July 2006 reforms, the legislature gave specific consideration to Aboriginal and Torres Strait Islanders, and refers to cultural considerations in the statement and assessment of what is considered 'best interests' under the paramountcy principle.

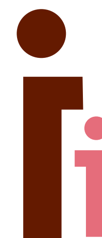
Section 60CC(3)(h) of the *Family Law Act* provides that when determining the child's best interests, Courts should consider Aboriginal or Torres Strait Islander children's right to enjoy that culture and the impact of any parenting order on that right. In *W v R* (2006) 35 Fam LR 608, Justice Carmody noted that provision for the right to enjoy culture involves strengthening links with extended family and receiving support and opportunity to explore the heritage with other people who share that culture (at 682).

Difficulty arises where when the customs of the child's indigenous culture means that their best interests differ from those applied to white mainstream society. For example, many Indigenous cultures have a much broader kinship system than Western society. Some indigenous communities also view movement (geographically or between kin groups) as beneficial to children, which conflicts with the high value placed on stability of residence in Western society.

In cases involving such issues, the Court must negotiate the difficult tension between the need to protect children's safety, and the importance of respecting that Indigenous cultures' value different principles than those the Court is instinctively inclined to favour as a white, Western institution. This was first acknowledged in the finding in *In the Marriage of McL* (1989) 15 Fam LR 7 that it was inappropriate to use a 'European yardstick' to judge the standard of accommodation provided to children in an Aboriginal community, as this offered 'a lifestyle markedly different from that available in a conventional Australian community' (at 24).

The recent case of *M v L* (Aboriginal Culture) (2006) 37 Fam LR 317 also provides a vital reminder of the diversity within Indigenous Australia which requires decisions to be made on the specific circumstances of each case, rather than over-generalised concepts of the experience and cultures of different Aboriginal and Torres Strait Islander communities.

Sally Nicholes



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