



**NICHOLLES**  
Family Lawyers

The Nicholes Newsletter.  
[www.nicholeslaw.com.au](http://www.nicholeslaw.com.au)

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## NEWS & EVENTS:

### *Collaborative Law Accreditation*

Sally Nicholes has become one of the few Solicitors in Victoria to be accredited as a “Collaborative Lawyer” with the Law Institute of Victoria. Collaborative Law is designed to focus on resolution and minimise conflict. Separating couples and their lawyer agree to make a good faith attempt to reach a mutually acceptable settlement without going to Court.

If you are interested, or if your client’s are interested in pursuing this form of legal resolution, please do not hesitate to contact Sally Nicholes at [sally@nicholeslaw.com.au](mailto:sally@nicholeslaw.com.au).

### *Winter Clerk - Lucy Daniels*

We are looking forward to our Winter Clerk commencing work with us on 25 June 2007.

Lucy Daniels is a 4th year law student at the University of Melbourne.

### *Launch of Lasallian Foundation*

**18 April 2007 of RACV Club**

Our principal partner Sally Nicholes is a board member of the Lasallian Foundation along with former Chief Justice of the Family Court, The Honourable Alistair Nicholson AO RFD QC, Tony Smith, Peter Mitchell, Br Kevin Moloney fsc, John W. Mann, Tony Southall, Mark Smith and Dr Manjula Waniganayake.

The Lasallian Foundation is a non-for-profit organisation which does not deduct any administrative costs from donations. The charity is underwritten and supports projects for the very poorest of the poor children in Australasia.

Any persons interested in sponsoring a child or contributing to any of the corporate events of the foundation, please review the contact details at [www.lasallian.org](http://www.lasallian.org)

### *Independent Children’s Lawyers*

On 2 August 2007 Sally Nicholes will be chairing a conference on the role of the Independent Children’s Lawyers for Legal Wise.

## *Welcome to our New Solicitor!*

We are pleased to welcome our new Associate Solicitor Danielle Wooltorton. Danielle has had an extensive background in child protection as well as a corporate and property law experience.

With her dynamic background combining both children's issues and commercial and property interests and her great personality, we are looking forward to Danielle's contribution to the firm. Danielle commences employment on 2 July 2007.

## *WIRE - Pro-bono contribution to Womens' Information Referral Exchange*

Our firm has settled on a pro-bono basis handouts for Women's Information Referral Exchange on Family Law developments to support women in crisis.

## *Recent cases/ developements in the law*

### *Property Settlements : Contributions in Respect of "Non-tangible Assets" - that is Retirement Funds & Pensions*

From time to time clients will have to divide "tangible assets" including such assets as the former matrimonial home and other "non-tangible assets" including superannuation, retirement funds or pensions.

In a recent case of *Mowbray & Mowbray*

[2007] FAMCA 167 9/3/2007 the husband argued that there should be two asset pools and these pools should be divided differently accordingly to whether the assets were "tangible" or "non-tangible". Pool one contained "tangible assets" including the former matrimonial home and pool two contained the husband's defence force retirement and death benefit fund (DFRDB pension).

The husband sought that pool one be divided 45% in his favour and that pool two be divided 66.6% / 33.3% in his favour. The Trial Judge divided both pools 55% / 45% in the husband's favour. The husband appealed the decision and argued that the Trial Judge had erred in assessing that the contribution to pool two was the same as pool one.

The husband argued that the contribution formula that should be applied to the "nontangible" assets should be a "time served" contribution similar to that used the case of in *West v Green* where there should be a calculation that factored in the length of the marriage over the length of contributing to the asset. The Trial Judge found that as the husband earnings and DFRDB pension entitlements were not at the same level for the entire marriage, the application of the formula would not have been appropriate. The proposition argued by the husband was simply against the overwhelming weight of authority, including the decisions of *Pierce, Figgins & Farmer & Bramley*. It implied that no other contributions were relevant to the division of pool two. For the Trial Judge to have adopted the approached urged upon by the husband would have constituted error.

### *Conclusion*

Whilst it may suit many people to access the Family Court in relation to arrangements for children because the Court has the ability to tailor Orders to particular arrangements and can modify such court-orders to enable the fine tuning of arrangements over the course of a child's life, the permanent change of legal guardian by way of Adoption Order can suit some families as it only deals with one solitary, yet important, aspect of the parent-child relationship.

The permanency of an Adoption Order can provide peace of mind as well as a definite finality to such matters. The formal recognition by way of Adoption by a parent who has had a primary role in the upbringing of a child can be extremely meaningful and important to both the parent and child. This is evidence by the fact that many adults are the subjects of Adoption applications, and also helps to understand why the Court encourages parties to bring recording devices, cameras and the like to capture such special moments for posterity.

Applications before the Family Court do not have the permanence of an Adoption Order, but instead offer the opportunity to inclusively account for extended family members' involvement in children's lives.

However, it is mindful to remember that when a Court is determining an Adoption, and in so doing the potential removal of a biological parent from having any further legal standing in a child's life, the views of both biological parents are a vital and important part of such process, and the issue of consent can have a significant bearing on the likelihood of success of such applications.

There are no such impediments to applications for parenting orders through the Family Court, and whilst Orders made by consent are usually less time consuming, stressful and costly, it is nevertheless a common occurrence for parenting Orders to be made in the absence of consent by either, or sometimes both parties, to some extent due to (a history of) acrimony between parents and the consequent polarity of views regarding the appropriateness of arrangements for children.

## *1 July 2007 Compulsory Mediation*

### *- Parenting Orders 1 July 2007*

Parties wishing to make an application to the Federal Magistrates' Court and/or the Family Court for parenting Orders as of 1 July 2007, will be required to provide the Court with a certificate from a Registered Family Dispute Resolution Provider, confirming that the parties have attempted to resolve matters by way of Family Dispute Resolution (mediation).

The exceptions to obtaining a certificate from a Registered Family Dispute Resolution Provider are as follows:

1. If the parties are resolving children's matters by way of a Form 11 Application for Consent Orders and Minutes of Consent Orders;
2. If a party is Responding to an application;
3. If there is Family Violence or Child Abuse;
4. If there has been a Contravention or serious disregard for previous Orders made within the last twelve (12) months of filing the application;
5. If the matter is urgent which may include recovery orders or child abduction; and/or
6. If one or more of the parties are unable to participate effectively in the Family Dispute Resolution process due to any of the following reasons:
  - (a) one or either of the parties reside in a remote area;
  - (b) one or either of the parties has some form of intellectual or language impediment which would prevent them being able to participate in the Family Dispute Resolution; and/or

(c) any other factor considered as an incapacity to one or either of the parties attending the Family Dispute Resolution.

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*1 July 2008*

As of 1 July 2008 the Court will have a requirement that a certificate from a Registered Family Dispute Resolution Provider will apply to all Applications in respect to children, including applications seeking changes to any existing parenting Order previously made in the Court prior to 1 July 2007. Again, the exceptions to this requirement are the same as those set out above in respect to the 1 July 2007 requirements.

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*Registered Family Dispute Resolution Provider*

A Registered Family Dispute Resolution Provider is an individual or organization who meets the required standards of training, experience and suitability for inclusion on the Family Dispute Resolution Register. Solicitors working in private practice may also apply to be Registered Family Dispute Resolution Providers. It is a requirement of the *Shared Parental Responsibility Act 2006* that practitioners act confidentially in respect to the family dispute resolution process.

*Types of Certificates*

There are four (4) types of certificates that may be issued to parties from a registered family dispute resolution provider which may state either of the following:

1. That the person did not attend Family Dispute Resolution due to the refusal or failure of the other party or parties to attend;
2. That the person did not attend Family Dispute Resolution because they did not consider it would be appropriate to conduct Family Dispute Resolution;\*
3. That the parties attended Family Dispute Resolution and all parties made a genuine

effort to resolve the issue or issue in dispute; or

4. The parties attend Family Dispute Resolution but one or more of them did not make a genuine effort to resolve the issue or issues in dispute.

All Certificates issued by a registered family dispute resolution provider must comply with *Schedule 7A of the Family Law Regulations 1984* (“the Regulations”).

**\*When looking at whether it is appropriate to conduct family dispute resolution, practitioners must consider the following factors which if of concern to practitioners, would qualify the parties as not being appropriate to engage in the family dispute resolution process:**

1. history of family violence among the parties;
2. question of the safety of the parties;
3. disparity in the equality of bargaining power between the parties;
4. risk that a child may suffer abuse;
5. emotional, psychological and physical health of the parties; and
6. any other matter considered by the practitioner as relevant to the parties attending the family dispute resolution. If a party does not attend or does not make a genuine effort in respect to Family Dispute Resolution, the Court may take the parties’ lack of participation into account when determining costs (which means that a party may be ordered to pay some or all of the other parties’ legal costs) and in deciding whether to make an Order that the parties must attend Family Dispute Resolution.

The newly established Family Relationship Centre’s across Victoria, located in Frankston, Ringwood, Sunshine and Mildura aim to provide information about family relationships, new relationships, overcoming

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relationship difficulties and dealing with  
For further information in respect to the  
Family Dispute Resolution requirements as of  
1 July 2007 please feel free to contact any of  
our solicitors.

We will aim to keep you informed of the  
progress of the family dispute resolution  
process in our next edition of the Nicholes  
Newsletter.

## **STEP-PARENT ADOPTION**

Given the wide jurisdiction of the Family  
Court of Australia by way of the *Family Law  
Act (1975)* to make Orders in relation to the  
living arrangements and like Orders  
concerning children, in what circumstances  
might a non-biological parent seek to apply to  
the County Court of Victoria for an Adoption  
Order?

### **Take the following example:**

- *A mother ('A') of two children aged 9 and 11 ('B' and 'C') has re-partnered with ('Y')*
- *Y has no children of his own, and has not previously been married.*
- *A and Y have lived together as a family for three years,*
- *B and C's have not seen nor spent any time with their biological father ('X') for more than five years. The whereabouts of X are unknown. There are no Family Court Orders pertaining to the relationship between X and B and C.*
- *Y has formed a strong and loving bond with B and C, and A and Y would like to formalise his relationship with them.*

In this scenario, in an Adoption application  
Y is the applicant, as A is already the legal  
guardian (with X) of the children. Given that  
X's views of such application are unknown,  
the (State) Court would take reasonable steps  
to ascertain X's whereabouts, a role that is  
likely to be taken up by an Adoption Agency.  
If X is able to be located, his views regarding  
the proposed Adoption would be taken into

account by the Court - usually via the Agency's  
Report.

Note that an Adoption Agency Report is  
a mandatory component of all Adoption  
applications (save for if B and C happened to  
be over 18 years in which case a Report is not  
required).

The Report from an Adoption Agency covers  
aspects of the Adoption that are likely to  
be useful to the Court in determining the  
Application. The views of, and other relevant  
information regarding, the children are  
included in the Report as well as comments  
regarding A and Y's relationship, and also X's  
involvement in B and C's lives. The Report is  
obtained prior to the Hearing of the Adoption  
application.

In the Family Court, A is the Applicant and  
X is the Respondent. Accordingly, there is a  
significant obligation upon A to make contact  
with X to serve him with notice of such  
application before the matter reached Court.  
In fact, recent changes to the Family Law Act  
1975 may even impose upon A an obligation  
to attempt mediation with X before Court  
proceedings were issued. Y's involvement in  
such proceedings would be fairly secondary  
to A's application to (presumably) minimise  
or completely abrogate B and C's rights to  
communicate and or spend time with X.

Unless exceptional circumstances apply, the  
State (County) Court will attempt to ensure  
that X is aware of the Adoption Order  
application and that his consent to same is  
provided in order for the Adoption to occur.  
Such exceptional circumstances include: if X  
cannot be found; If X has a mental or physical  
illness that renders him incapable of giving  
consent; or if X has abandoned or mistreated  
the children.

In the Family Court, X's consent is not  
necessary for Orders to be made regarding  
children, however the Court will not consider  
that an application to remove X from  
involvement in the children's day-to-day lives  
should be made without close examination of  
the past present and future relationship and  
related issues between X and the children, and  
much evidence will need to be provided by

A and Y (assuming X is located and objects to same) to indicate that it would be in the children's best interests to not be able to spend such time or communicate with X.

In the Family Court, a Report per se is not mandatory in proceedings involving children, however it is fairly common for a Family Welfare Report to be considered necessary by the Court once proceedings have been commenced. Such Report is usually prepared by a Child Psychologist or Counsellor for the purpose of addressing and illuminating the views and relationship of and between each parent and the children.

To an even greater degree than seen in the Family Court, the views of A and X carry significant weight in relation to Y's application for Adoption of B and C. This is because an Adoption Order terminates permanently the legal rights and responsibilities of X in favour of Y in relation to the children.

Orders of the Family Court do not change the children's legal guardian per se, and instead the Court focuses on considering, describing and predicting how each parties' involvement and responsibilities for children can, in effect, continue (if at all possible) with the absolute focus on what is in the best interests of the respective children and in so doing trying to ensure that children have the opportunity of knowing and forming ongoing meaningful relationships with their parents and other important persons in the childrens' lives.

Note that Orders of the Family Court are also more fluid, in the sense that circumstances may arise in the future that create a need for previous Orders to be modified. This is not the case with an Order of Adoption which is permanent.

## OTHER ISSUES

*What if X had previously obtained Orders of the Family Court to see / spend time with the children?*

Leave of the Family Court is required before an Application for Adoption in a State Court can be considered if the biological parent has, and is exercising, a court-ordered right to spend time or have contact with the subject child.

*What if the children were over the age of 18?*

The Family Court does not have jurisdiction to make parenting Orders for persons over the age of 18 years, whereas adults can be the subject of an application for adoption.

*What if A and Y had only lived together for one (1) year?*

Then they would not be able to apply for Adoption at this stage. In order to apply for an Adoption, the parties (ie. A and Y) must be married, or have lived in a de facto relationship for at least two years. There is a similar restriction

*What is the timeframe for such matters in the Family Court compared to the State Courts?*

Unlike proceedings under the Family Law Act which may require several court dates leading up to a final hearing if the matter remained unresolved, and this process could take up to twelve months or so to occur, an application for Adoption, once filed and a summons for Hearing sent to the respective parties, only requires one hearing for the matter to be finalised.

*Is there a difference in the type of Hearing involved?*

The hearing of an Adoption application occurs in camera, a closed court, and parties are encouraged to bring with them a camera / movie camera for the purpose of capturing the moment for posterity.

Whereas, the majority of proceedings in the Family Court are held in open court. It is however an offence to publish identification details of matters heard in the Family Court. It is not possible to record or otherwise keep an electronic record of matters occurring in the Family Court unless with the special permission of the Court.

*Inheritance entitlements*

It is notable to remember that because an Adoption severs the legal relationship between X and the children, thereafter B and C's automatic rights in relation to inheritance of X's estate are forfeited, notwithstanding that X may have referred to either or both B and C in his will.

Parenting Orders under the Family Law Act do not automatically entitle a child to inherit from the step-parent (ie. Y) and the inheritance rights of the children B and C as to A and X are unaffected.

*If you have any family law queries or questions arising from this Newsletter, please do not hesitate to contact our office.*

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