

The High Court determined that in this case, the mother had no concluded intentions to live in either Israel or Australia when she left Israel. Since the parents' intentions here were conditional on their prospects of reconciliation, and since settled intention is only one of many relevant considerations and the mother took steps before and after arrival in Australia to establish a new and permanent home here, the High Court concluded that the children were not habitually resident in Israel at the time of the alleged wrongful retention in July 2006. Accordingly, the High Court overturned the previous orders that the children be returned to Israel and the children and mother are allowed to remain in Australia.

New Zealand's relevant legislation also specifically excluded Hague Convention proceedings. Proceedings related to the status or property of a person who is not, or may not be able to, fully manage his or her affairs have been excluded because most States and Territories have guardianship boards or tribunals to deal with these matters, and there is no scheme facilitating interstate service of subpoenas issued by these bodies. Allowing these subpoenas to be served in New Zealand but not interstate within Australia would create an undesirable inconsistency. The Bill has been referred to the Senate Legal and Constitutional Affairs Committee, who will compile a report by 7 May 2009.

Proposed new trans-Tasman subpoena scheme for family law proceedings

On 19 March 2009, the *Law and Justice (Cross Border and Other Amendments) 2009 Bill* ('the Bill') was introduced to the House of Representatives. This Bill will amend the *Evidence and Procedure (New Zealand) Act 1994* (EPNZ Act) which provides for a cooperative scheme between Australia and New Zealand for the service of subpoenas. This scheme currently does not apply to subpoenas arising from family law proceedings. The Bill will remove this general exclusion, which the Explanatory Memorandum explains is 'consistent with Australia's longstanding view that the scheme should apply broadly to civil proceedings, including proceedings involving family law'.

Originally, New Zealand had requested that family proceedings be excluded from the scheme; however New Zealand has now changed this position and has passed legislation facilitating the expansion of the scheme to family proceedings. The Bill will allow consistency between the two jurisdictions in this regard.

Under the Bill, the majority of family law proceedings will be included in the trans-Tasman subpoena scheme. The only two exceptions will be family proceedings relating to applications made under the *Hague Convention on the Civil Aspects of International Child Abduction 1980* or to the status or property of a person who is not, or may not be able to, fully manage his or her affairs.

The exclusion of Hague Convention proceedings is considered necessary as the Convention's aim to hear cases quickly would be undermined if trans-Tasman subpoena arrangements applied to these proceedings.

For more information on Collaborative Law and Nicholes Family Lawyers, please visit our new-design, constantly updated website at :

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NEWSLETTER
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Avoid court -- Collaborate!

Nicholes Family Lawyers are proud to announce that each lawyer in the firm is an accredited collaborative lawyer.

Find out about our free information sessions on this new approach to resolving family law issues.

What is collaborative law?

Collaboration is a positive way for parties to resolve legal disputes about parenting arrangements and property



"I don't need time to think it over, Phillip—the answer is yes, I'll settle out of court with you."

In the news

Sally Nicholes featured on The Law Report and The Age

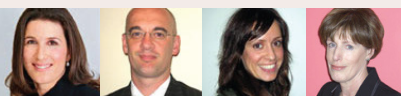
Sally Nicholes' expertise in international family law and specifically child abduction cases was evident when she featured as a special guest on ABC Radio's The Law Report program focusing on international family law disputes.

The program, airing on the 17 March 2009, came in response to the recent High Court decision *LK v Director-General, Department of Community Services*, summarised on page 5 of this newsletter. The program also discussed the recent case of *State Central Authority & Papastravou*, in which Nicholes Family Lawyers represented the successful respondent mother.

Sally's comments were also heavily featured in an article regarding the *Papastravou* case on the front page of *The Age* on 2 March 2009.

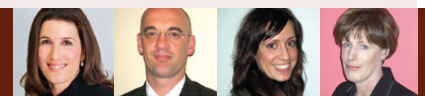
Full contents of both the radio program and newspaper article are available at our website.

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division that arise at the end of a marriage or a domestic relationship, and to decide about Financial Agreements before or during the relationship.

Collaboration law involves a series of meetings between both parties and their lawyers, often with the participation of a psychologist or "Divorce Coach", child specialist or financial Planner. A team approach is taken and instead of each person looking at what they are "entitled to" or what is "fair", The team works with the goal of creating the best solution for the couple and their children. A contract is signed establishing the rules for trust and openness and an agreement not to go to Court. Nadine Udorovic's article, 'The Collaboration Process', sets out in details the steps and elements of collaboration as Nadine recently learnt in a three-day collaborative training course.

Collaborative Law and costs

Some people think the collaborative process sounds expensive, but experience has shown us that discussions and dispute settlement is done surprisingly quickly in collaboration's series of meetings. The process is certainly faster and cheaper than going to a trial in the Family or Federal Magistrate's Court. To date, our experience has been that clients pay considerably less to achieve resolution in Collaboration than by litigation or any of the other methods of negotiation. The overseas experience supports this conclusion.

NFL and Collaborative Law

All of Nicholes Family Lawyers' solicitors are trained in Collaborative Law. Marguerite Picard has a particular interest in this type of appropriate dispute resolution, and has undertaken advanced training at the University of Technology Sydney, and was a delegate at the 2008 European Conference of Collaborative Professionals in Cork and the 2008 International Conference of Collaborative Professionals in New Orleans. She is a committee member of Collaborative Professionals Victoria and the Victorian delegate on the organising committee for the 2009 International Conference of Collaborative Professionals.

Free information session on Collaborative Law -- numbers limited!

In Collaboration it is essential that each person's lawyer is a trained Collaborative lawyer. We can provide a list of lawyers who are actively working in this area. Additionally, interested parties can call or email us to attend a 30 minute seminar at 5pm on each alternate Thursday at our office. We are happy to answer their family law questions and give more explanation about Collaboration and answer questions about it. Places will be limited to small groups.

Nicholes Family Lawyers sponsor Collaborating DownUnder, an international conference on collaborative law

The importance and the growth of collaboration law were evident in the recent 'Collaborating DownUnder' Conference, which took place in Sydney on 26 - 29 March 2009. Collaborating DownUnder was the first collaborative practice conference in the southern hemisphere..

NFL's Marguerite Picard was on the organizing committee of Collaborating DownUnder, and attended the conference in this capacity and on behalf of the firm. Marguerite chaired a session at the conference, featuring a former litigation lawyer from a large London firm who now practises exclusively in Alternate Dispute Resolution, including Collaborative Law. The conference was opened at a reception at the NSW Parliament House by the Honourable Mr. Peter McLelland, and featured a pipi dance by the children of the local Eora people. Each session of the conference recognised the Eora people, which drew admiration from an international audience unaccustomed to this convention which has grown up in Australia.

Her Honour Diana Bryant, Chief Justice of the Family Court, and the NSW Attorney General were amongst those who addressed the conference and gave their unqualified support and commitment to the growth and development of Collaborative Law in Australia. Delegates at the conference were from Canada, the United States, England, Ireland, Scotland, Switzerland, France, the Czech Republic and all the Australian states and territories. These delegates represented a range of professions, such as lawyers, psychologists, counsellors, financial advisors and planners at the Conference. The United Kingdom peak alternate dispute resolution body "Resolution", which brings all of these disciplines together, presented their history and future plans.

Stu Webb, the founder of Collaborative Law, was in attendance, and reflected on how far the movement has grown since it's origins in his office in Minneapolis in 1991. The conference, and Collaborative Law, was the subject of the "ABC Law Report" on radio National on 24 March, and was covered in "Moral Maze" in the Sydney Sun Herald on 19 April".

Nicholes Family Lawyers was a major sponsor of Collaborating DownUnder.

The Full Court rejected this submission, but in doing so offered no conclusive resolution to the difficult tension outlined above. The Full Court disagreed with the Commissioner's submission, firstly because it was formulated as a 'principle to be mandatorily applied' rather than as recognition of a factor that would be relevant to the exercise of discretion. The Full Court found that the Commissioner's argument may have more significance in regard to debt for prime tax, rather than debt arising from interest and penalties. This is because facts regarding the other spouse's innocence and knowledge might properly be relevant to determining whether the penalties and of the parameters of a reasonable judicial discretion. interests should be met solely by the guilty spouse. Notwithstanding this comment, the Full Court went on to conclude that their Honours could 'see no reason' why innocence and knowledge would not also be relevant to discretion in respect of unpaid prime tax, particularly where this exceeds the parties' assets.

Having considered these and the Commissioner's other grounds for appeal, the Full Court concluded that there were not merits in any of the arguments on appeal and found that this should be dismissed.

Cases between a party (most usually the wife) and their ex-spouse's creditors invariably involve a difficult tension between to valid arguments. Firstly, giving priority to the creditor would often cause grave harm to the wife, as in this case, as it would deprive her of property she was expecting to rely upon to support herself and her children. However, if the wife is given the property division she would have been entitled to if there were no creditors involved, this can be seen as allowing her to enjoy property that she would not have had access to if the husband had duly paid

Child abduction and habitual residence - new case law

The High Court recently made a decision redefining the way courts are to determine where a child's country of habitual residence is in Hague Convention child abduction case. The matter of *LK v Director-General, Department of Community Services* [2009] HCA 9 involved four Israeli-born children, who continued to live with the Australian-born mother in Israel after the mother and father separated in 2005. In May 2006, the mother and children travelled to Australia with the father's consent. The couple agreed before this departure that the mother and children would settle in Australia, but would return to Israel if the father decided he wanted to live with the family. The mother also registered the children as Australian citizens with Australian passports and enrolled the eldest children in an Australian private school before departing Israel. Upon arrival in Australia, the mother

settled into a family home, obtained Centrelink benefits and the older children took up sports and music lessons.

In July 2006, the father announced that he wanted a divorce and for the children to return to Israel. Upon the request of Israeli authorities acting on the father's behalf, the NSW Department of Community Services applied to the Family Court under the Hague Convention for orders that the mother must return the children to Israel.

At first instance, Justice Kay ordered that the children be returned so that the parents' custody dispute could be determined in Israel according to Israeli law. This decision was upheld by the Full Family Court upon appeal by the mother.

The key legal issue in this case was whether Israel was the children's country of 'habitual residence'. Under the Hague Convention, Courts must order that the children return to the country that was their place of habitual residence prior to the abduction, unless there are exceptional circumstances. The trial judge and the Full Court determined whether Israel was the children's country of habitual residence by examining whether the mother had a 'settled intention' of abandoning her Israeli place of residence. Their honours found that as the mother did not have such intention, Israel was the children's place of habitual residence and therefore the children must be returned to Israel.

The mother then appealed to the High Court of Australia. In a unanimous decision, the High Court found that the Full Court had erred by treating the mother's lack of a settled purpose to abandon habitual residence in Israel as the fact determining that Israel was the children's country of habitual residence. The High Court found that in determining the child's habitual residence, it will usually be very important to examine the habitual residence of the child's primary carers. However, their Honours concluded that the question of habitual residence is one of fact; therefore involves consideration of a 'very wide range of circumstances' beyond the intentions of the primary carer. In doing so, the High Court preferred New Zealand case law's 'broad factual inquiry' approach to determining habitual residence, rather than the Australian/United Kingdom approach which focused on the question of settled intention to determine this issue.

The High Court highlighted that the individual's intentions may often be ambiguous and un-formed, as with the mother in this case. Therefore when determining whether someone has abandoned residence in a country, it is necessary to recognise that it is possible for them to no longer be habitually resident in that place despite not having yet formed a clear intention not to return to that place. Their Honours also found that attention must be given to the intentions of both of the parents, regardless of who had day to day care of the child.



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Collaboration Training, Sydney March 2009

On 24 March 2009 Nadine attended a three (3) day intensive training session in Collaborative Law in Sydney, conducted by Sherrie Abney from Texas, United States. The training provided a very interactive and hands on approach to the way in which collaboration meetings are run. The training focused on the five step process of collaboration whereby lawyers, mental health professionals and financial advisors assist parties in resolving their dispute in a series of meetings. The parties and all of the experts in the room sign a contract, which states that they will not go to Court.

The steps are as follows:

Step One – Determine parties' interests and goals

The first step in the collaborative process is designed to allow parties' to determine their interests and goals. They are given an opportunity to determine common interests and goals in order to work towards a resolution which suits them and their partner. The collaborative process uses interest based negotiations designed to achieve equitable resolutions. The benefit of the parties stating their interests and goals is that the other party has an opportunity to hear the other parties' concerns, complaints and what they want to achieve first hand rather than through their lawyers or Court documents.

Step Two – Gather information

In step two of the collaborative process parties identify documents and/or information which they require to resolve their dispute. This step is designed to enable them to reach agreement as to the production of documents which are relevant to the dispute, and a timely exchange and production of documents. Expert opinions may also be required and the collaborative approach encourages the involvement of mental health professionals and financial advisors as part of the team.

Step Three – Generate options

The third step in the collaborative process is designed to allow the parties to brain storm options in order to formulate creative solutions. This step in the process allows them to explore possibilities which they would not be able to explore in a litigation sense. As the collaborative process is entirely confidential, and the parties have agreed not to go to Court, they can freely engage with each other to discuss options for an equitable resolution for them both.

Step Four – Evaluate options

The fourth step in the collaborative process is designed to allow parties to evaluate the options which they have generated and discussed.

Step Five – Negotiate a resolution

The last step in the collaborative process is where a resolution is negotiated and which takes into account each parties' interests and goals. The parties are encouraged to work through their dispute keeping in mind their common interests and their goals to reach a resolution. This stage culminates in the drawing of a Financial Agreement or Consent Orders by the lawyers.

A significant amount of time at the training was spent discussing the Participation Agreement which all parties must sign. This ensures that the parties are following the protocols which are agreed upon, including the production of an agenda for each meeting. The benefits of the Participation Agreement and/or Collaboration Agreement are that all participants the parties are clear on the approach and the discussion for each meeting. It facilitates a clear focused approach throughout the collaborative process

The collaborative process allows parties to resolve their dispute in a confidential and non-adversarial manner where transparency between the parties and their lawyers is paramount to the dispute being resolved. It allows parties to maintain complete control over the outcome of their dispute which is generally not the case in litigation. The collaborative process is convened in scheduled meetings to suit clients. There are no formal discovery or information requirements like in litigation which can be very costly and create delays. All the information relevant to the issues is exchanged by the parties in an agreed time frame with expert advice available from accountants, financial advisors, psychologists and/or counselors or any other expert required to assist the parties in reaching a resolution.

Another benefit of the collaborative process is that it allows parties to maintain a good, and often improved, relationship with each other as they work together as a team with their lawyers and other experts to reach a resolution. This is particularly beneficial to the children of separating couples. It is known that conflict between parents is one of the most damaging aspects of divorce for children, and Collaborative Law is a means of ensuring reduced conflict.

Sherrie Abney who has practiced as a Collaborative Lawyer since 2004 has also worked closely with the founder of collaboration, Stu Webb, who founded Collaborative Law in the 1991.

Nadine Udorovic



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Report highlights benefits of out-of-court family dispute resolution services

The benefits of settling family law matters out of court, such as through collaborative law, have been highlighted in a report by released on 2 April 2009 by the Attorney-General regarding 'Family Dispute Resolution Services in Legal Aid Commissions'. The report found that for every \$1 invested by the Australian Government in Family Dispute Resolution (FDR) Services, approximately \$1.48 is saved in court time and related costs. The report found that FDR services provided by Legal Aid Commissions:

- focus on the best outcomes for children;
- cost less than litigation;
- identify cases involving family violence or child protection issues;
- narrow the number of issues in dispute; and
- assist parties to reach agreement outside of court.

The report focused on the FDR services provided by Legal Aid Commissions; however we believe that principles regarding the efficiency and cost-effectiveness of out-of-court settlement can be applied to privately-arranged alternative dispute resolution services, such as mediation or collaborative law. The report was prepared by KPMG in conjunction with the Attorney-General's department.

Tax debts vs family law claims: new case law

The recent case of *Commissioner of Taxation & Worsnop* (2009) FLC 93-392 considered the issue of balancing the claims of a wife and the Commissioner of Taxation in circumstances where the husband's tax liabilities exceeded the couple's asset pool. In this case, the husband and his solely owned business owed nearly \$12.5 million dollars to the Australian Taxation Office (the ATO), and the parties' only significant asset was the former matrimonial home valued at \$4,750,000. The trial judge, Rose J, found that the wife did not know about the husband's non-disclosure of income and funds to the ATO, and that the taxation debt was solely the husband's.

When considering the parties' contributions to their asset pool, Rose J noted the husband's role of largely to establishing and running his business, and the wife's role as homemaker and primary carer to the parties' four young children. His Honour concluded that 'on a global basis', the parties' financial and non-financial contributions were equal. When Rose J

considered whether any further property adjustments should be made, his Honour noted that in ordinarily circumstances significant weight should be given to the wife's ongoing primary responsibility for the care of the four children, and her lack of income and earning capacity due to this responsibility. However his Honour went on to find that whilst the tax liability could not be attributed to the wife, it nevertheless had to be given weight in the circumstances. This led his Honour to conclude that a further property adjustment in favour of the wife should not be made despite her ongoing parental responsibilities. The trial judge accordingly found that the former matrimonial home should be sold, and proceeds of sale distributed equally between the wife and the Commissioner.

The Commissioner appealed this decision to the Full Court of the Family Court on several grounds. Firstly, the Commissioner argued that the trial judge should have found that the source of funds used for the acquisition of the former matrimonial home was income upon which tax had not been paid. The Full Court found that, on the evidence presented in both courts, no precise findings could be made regarding the degree to which the source of funds for purchasing the property was either unpaid tax or income on which tax should have been paid. Consequently, Rose J's consideration of the 'broad' facts regarding the source of funds used to purchase property was sufficient and there was no merit in the Commissioner's arguments otherwise.

The Commissioner also submitted that Rose J had erred in the exercise of his discretion in determining the case. The Full Court found that Rose J clearly appreciated the critical features of the discretion that he had to exercise, namely balancing the wife's claims against the Commissioner's. In relation to the wife's claims, Rose J made findings regarding her innocence relating to the tax evasion, her suggestions to live a less extravagant lifestyle, her equality of contributions and her ongoing parental responsibilities. In relation to the Commissioner's claim, Rose J recognised that the husband's tax liability is a debt to the Crown and 'implicitly there is a public interest issue.' The Full Court further noted on this issue that the Commissioner's position is distinguishable from that of a commercial creditor, as the Commissioner does not have discretion regarding whether to extend credit but rather relies on taxpayer's proper disclosure and conduct.

Overall, the Full Court concluded that Rose J's consideration of the claims of both the Commissioner and the wife was adequate, as he balanced these by providing the wife with half of the matrimonial home but depriving her of a large adjustment to which his Honour considered she would otherwise be entitled to. The Full Court noted that Rose J was somewhat restricted in his exercise of discretion in that neither party provided evidence or proposals regarding the availability or cost of alternative accommodation for the wife and children. Accordingly, the Full Court further found that Rose J's decision did not go outside



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