

# NICHOLE'S NEWSLETTER

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NICHOLE'S  
Family Lawyers

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## **Binding Financial Agreements - new legislation commencing soon!**

On 24 September 2009 the House of Representatives passed a bill designed to relax the technical requirements on both financial and termination agreements and restore confidence in the binding nature of such agreements. The amendments will take effect 28 days after receiving Royal Assent. At this time Royal Assent has not been passed.

The Amendments will apply to agreements made on or after 27 December 2000, unless a Court has already ruled that an agreement should be set aside.

Section 90G still requires each party to obtain independent legal advice from a legal practitioner about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement. However, now both parties must exchange a copy of the certificate of legal advice either before or after signing the agreement rather than each party receiving a copy.

Moreover, the changes now explicitly require that each party actually receives independent legal advice, rather than requiring that there be a statement and solicitors' certificate claiming that independent legal advice has been provided.

## **What's New:**

Sally Nicholes presented to TEN video on practical tips and traps for prosecuting or defending a Hague Convention matter in the Gold Coast Family law intensive and on educational video (29/30 October 2009 and 25 November 2009).

Monica Blizzard has presented at a legalwise seminar to schools on family law for principals and teachers (25 November 2009).

Marguerite Picard assisted at an inter-disciplinary collaborative law session with guest speakers from the US (27 November 2009).



Therefore it is no longer just a matter of including a statement and certificate 'ticking boxes' that advice has been given, as the new s 90G(1) requirements may not have been complied with if the parties do not actually receive all the required legal advice. It is to be seen whether the court will find that the required advice was not in reality provided if a case should arise where the requisite statement confirming its provision has been included.

A final significant change to the legislation is that the court now has the power to declare an agreement binding, even if some of the new statutory pre-requisites are not complied with, in circumstances where it would be inequitable or unjust for the agreement not to bind the spouse (disregarding any changes in circumstances from the time the agreement was made).

It will be most interesting and important to monitor the implementation and development of these changes - watch this space for more!

## ***Fevia & Camel-Fevia*** **(2009) FamCA 816**

The new Binding Financial Agreement law is of particular interest as it comes shortly after compliance with s 90G was examined in the case of *Fevia & Camel-Fevia* (2009) FamCA 816.

Mr Fevia was a man extreme wealth and Ms Camel was of modest means. In 2001 the parties decided to enter into a s 90B binding financial agreement. On 14 September 2001, one week prior to the marriage, the wife signed a financial agreement. On 20 September Mr Fevia also signed the same financial agreement.

Of controversy was the fact that Ms Camel's signed a copy which did not contain an annexure of assets owned by Mr Fevia. The

annexure was contained in the copy signed by Mr Fevia.

Further, the solicitor for the husband claimed that upon the document being signed, she hand delivered a completed copy of the agreement to the wife's solicitor with a 'with compliments slip'. However, the wife's solicitor was overseas at the time. The wife did not receive a completed copy of the agreement until 2008 when, during the course of Family Law proceedings, she received an Affidavit from Mr Fevia annexing the document.

Thus the court was left to consider whether the parties had entered a binding agreement? Was a copy provided? And could the husband rely on the principle of estoppel to have the contract upheld?

After much deliberation Murphy J determined that there was no agreement within the context of s 90G. The parties had signed two agreements which were materially different and thus no contract arose. The fact that the wife had previously viewed the annexure as part of negotiations and disclosure was not sufficient for the listed assets to be deemed part of the agreement or to be ousted from the jurisdiction of *Pt VIII B*.

The court further found that as there was no agreement, neither party had the original or a copy. Justice Murphy argued in the alternative and found that, although the wife did receive a completed copy eight years later, the copy needed to be provided within reasonable time.

Finally, Murphy J came to the view that estoppel cannot operate so as to preclude reliance by a party on s90G. A party cannot use estoppel as an excuse for failure to comply with the statutory pre-requisites.

### *Fevia and the new amendments*

Had the case of *Fevia* been determined after the legislative changes took place, the court would have had the power to uphold the



agreement if it was satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement.

However, as the court has already ruled regarding the 'agreement' in this matter the new amendments cannot be used to 'revive' the agreement.

Prior to *Fevia*, there was an indication that the Family Court was not going to indulge non-compliance with the strict statutory requirements of Binding Financial Agreements. In the case of *Black v Black*, discussed in previous Nicholes Newsletters, amendments and alterations were also made to the Agreement after one of the parties had signed, leading the court to find that the Agreement should be set aside.

## The effect of death on binding child support agreements

The *Child Support Assessment Act* is clear that death of a paying parent, or of a child, is a terminating event for a Child Support Assessment. The Act is silent on the effect of death on Limited and Binding Child Support Agreements.

A Binding Financial Agreement is binding on the Estate of the parties to the Agreement, and therefore any lump sum or periodic payments due to be made under a Binding Financial Agreement will continue to be enforceable. There is a misconception that a Binding Child Support Agreement parallels a Binding Financial Agreement in relation to the death of a party.

This is not the case. It is important that payers and payees are aware that the death of a payer will terminate a Limited or Binding Child Support Agreement, and that the child/ren and surviving parent will be required to rely upon the Estate of the payer, which may

include an application under the Testator's Family Maintenance Provisions of the *Administration and Probate Act*, if insufficient provision has been made under a Will.

Advisors should be aware when drafting wills for payer parents that sufficient provision is made for children after the death of the payer and the consequent termination of the Limited or Binding Child Support Agreement, in order to avoid an action which may potentially arise in circumstances where the payer parent believes that a Binding Child Support Agreement would prevail after death, and has not made proper provision.

## Setting aside pre-2008 child support agreements

The ability to set aside 'binding' child support agreements made before the significant changes to child support law came in to force over 2008 has been examined in the recent case of *Daley and Daley* (2009) FLC 98-039.

This involved a case in which a husband and wife entered a child support agreement regarding their two children in early 2005 and purported to be binding until 2013, when the youngest child would turn 18 years of age. Neither the husband nor the wife obtained legal advice before entering the agreement.

The agreement had been deemed in force and binding by the Registrar of the Child Support Agency. This means that it could only be set aside if one of the parties could establish that there were exceptional circumstances under s 136(2) of the *Child Support (Assessment) Act 1989*, such as a change of circumstances that would cause the child or the party to suffer hardship if the agreement was not set aside.

The husband's previous and current employment arrangements were such that, under the child support agreement, the wife was receiving approximately 30% of what



she would receive under the current child support formula. The wife sought to have the agreement set aside so that the Child Support Agency could calculate her entitlements using the new formula and the husband's new salary.

The husband argued that these changes were not 'exceptional circumstances' allowing the agreement to be set aside, and that the wife should not be able to do so as she was aware that the agreement would be binding until 2013 when she entered it.

The court found that the statement that the agreement was binding was an 'administrative fiction' as the parties has not received legal advice about it before entering it. The court found that the Registrar had deemed the agreement binding largely because it did not provide for any terminating event besides conclusion when the youngest child turned 18 years old.

Further, before the child support changes commenced on 1 July 2008, the wife could have applied for the agreement to be discharged under the former section 98 - in which case she would not have had to establish 'exceptional circumstances' as she did now.

The court also held that the new child support scheme had been introduced to take into account a broader range of factors and allow more flexibility, so that a fairer outcome can be achieved between the parties.

With regard to the specific agreement between the parties, the court found that this did not reflect the parties' individual capacity financially support their children or the legislative standards established by the new child support scheme. It was also found that, following the case of *Whitford and Whitford* (1979) FLC 90-612, the child support agreement caused detriment to the child. Accordingly, the case involved 'exceptional circumstances' and the child support agreement should be set aside.

## Message from Sally Nicholes, Principal

We wish all our friends and colleagues a very happy and safe festive season.

We have had great joy this year in supporting the World Congress on Family Law and Children's Rights in Halifax, Canada, Children's Rights International, the International Academy of Collaborative Lawyers Conference in Sydney, International Social Services, Women's Information Referral Exchange, and the Lasallian Foundation.

At this time for reflection and giving we would like to recommend a special Christmas project of providing mobile education units to the children of Papua New Guinea. We have been a supporter of the Lasallian projects, where 100% of your donation is attributed to the projects that support children in desperate need.

Please review the attached flyer for further details. It is so hard to believe that our nearest neighbours, only 160km away from the coast of Queensland, live in these appalling conditions. So close and yet like a century away.

Please consider the plight of these children and consider giving the best gift possible during this Christmas season.

For more information on Lasallian Foundation projects, further opportunities for donation, or to volunteer either overseas or local events, please contact the Lasallian Foundation on (03) 9832 3100 or via [info@lasallianfoundation.org](mailto:info@lasallianfoundation.org).



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