



**NICHOLLES**  
Family Lawyers

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

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## Welcome.

Welcome to the first edition of The Nicholes Newsletter, our monthly newsletter. We hope it will provide you with a snap shot of contemporary and relevant issues relating to family law and keep you up-to-date with changes to the law.

These are exciting times to be in family law with an overhaul of both the child support system and the parenting laws. The new Shared Parental Laws have a focus on mediated results. Our law firm has consistently promoted mediation as a preference for our clients; especially in respect of issues relating to children and parenting. We utilise our excellent referral base of family counselors and expert psychologists to achieve collaborative outcomes for families wherever possible.

The Nicholes Newsletter will be updated regularly. The Newsletter aims to be of interest to those working with families and children as well as financial advisors and accountants.

If you want further information about an issue featured in the newsletter, please contact either Sally Nicholes, our principal or our Associates Annie Fielder and Nadine Udorovic who will be happy to assist you.

## Our New Website.

Our website is finally up and running. Visit [www.nicholeslaw.com.au](http://www.nicholeslaw.com.au) to find additional news and information about Nicholes Family Lawyers, our team, and the not-for profit Foundations that our firm supports...



**Nadine Udorovic**  
EDITOR

## Our Family Law Team.

The Nicholes Family Lawyers team is an interesting and diverse group of lawyers. The firm's principal, Sally Nicholes, has been practicing family law for 12 years. Sally enjoyed 11 years at Middletons Lawyers where she advanced to being one of the youngest appointed partners in 2001. Sally was one of the few female partners and particularly enjoyed her role as a mentor to young solicitors and her professional relationship and friendship with her Middletons partners which happily continues today.

In 2006, Sally has been involved in a number of important family law events in Melbourne, including speaking at a seminar to family law practitioners in February on the Hague Convention on the Civil aspects of International child abduction. The crew from 'A Current Affair' also filmed an interview with Sally in our office for expert opinion on family law and child abduction. Sally will be speaking at a Legal Wise Seminar to family law practitioners in July on the new changes to parenting laws as well as child support.

Annie Fielder joined NFL in May 2006 from extensive experience at Kennedy Wisewoulds, Berry & Associates and Hayes and Associates.

Nadine Udorovic left Nedovic & Co with great memories and friendships having benefited from the tutelage of her principal Peter Nedovic, a highly respected and senior practitioner in family and property law.

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## The highly publicised "Shared Parenting Bill" becomes law as of 1 July 2006.

The main objective of the New Family Law Parenting System is to ensure the best interests of children are met by ensuring the children have the benefit of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child" new section 60B(1)(b) Family Law Amendment (Shared Parental Responsibility) Act 2006 ("The new Act")

The main stated intention of the new Shared Parenting laws is to "protect the rights of children of separating parents", particularly their right to the "love and support of both their parents".

### EQUAL SHARED PARENTAL RESPONSIBILITY AND EQUAL TIME SPENT WITH THE CHILD.

The Courts are required to apply a presumption that it is in the child's best interest for their parents to have equal shared parental responsibility for the child. This presumption will not operate if there are reasonable grounds to believe a parent is engaged in child abuse or family violence.

If an order for shared responsibility is made the Court must consider whether the child spending equal time with each of the parents would be in that child's best interest and is reasonably practicable. If the Court does not consider equal time as an appropriate order, it must consider whether the child spending substantial and significant time is in the child's best interest.

In determining whether the level of contact is considered “reasonably practical” , the Court must have regard to:

- How far apart the parents live from one another
- The parents’ current and future capacity to implement an arrangement for the child
- The parents’ current and future capacity to communicate with each other and resolve difficulties
- The impact that any arrangement will have on the child
- Such other matters as the Court considers relevant

“Significant Time” is time including weekends, holidays and other days. The time that a child spends with a parent should allow the parent to be involved in the child’s daily routine, as well as occasions and events that are of particular significance to the child or parent.

Parents are obligated to:

- Consult on major long term issues whenever there is an order for shared parental responsibility

The Court is obligated to:

- Consider equal time
- Presume equal shared parental responsibility
- Ignore interim orders
- Consider substantial and significant time

A two tiered structure of considerations support the main objective of the Shared Parenting laws. The best interest of a child remains a paramount consideration. The new Act lists matters that the Court must consider when determining what is in the child’s best interests. These matters are divided into primary and additional considerations. They include the relevance of parent’s attitudes to the child and to the responsibilities of parenting. It requires the Court to look at the extent to which each of the child’s parents has fulfilled, or failed to fulfill, their responsibilities as a parent. This includes the extent to which the child’s parents have participated in making decisions about long term issues, time spent with the child and communication with the child. It importantly considers whether or not each parent has facilitated the other parent in fulfilling their responsibilities.

Many of the considerations in the two tiered system were relevant to judges’ considerations in parenting cases according to practice and precedent. However, the historical parenting issues were not a point of emphasis before the new laws and this firm hopes that re-emergence of past parenting will focus on critical and relevant past issues.

Parties to Family Law actions will be required to try to resolve issues without the need for Family Court litigation. One of the requirements will be that parties will be required “to attend mediation before filing in the Family Court”, except where family violence has occurred.

Her Honour, the Chief Justice Diana Bryant of the Family Court of Australia has made it clear that litigating parties already in the Family Court of Australia and those whose proceedings are underway should not rush to the Family Court in the hope of having existing orders or pending hearings changed on the basis of the Shared Parenting laws. The new laws do not represent “changed circumstances” to vary a current parenting order.

## MEDIATING FAMILY LAW DISPUTES.

“From 1 July 2007 it will be mandatory to have a certificate from a family law dispute resolution practitioner before parenting proceedings can be commenced”

The Family Court of Australia and the Australian Government hope that the introduction of the Shared Parenting laws will steer families away from litigation and towards mediation, attempting to understand and build on the relationship of parents with their children.

The object of the compulsory family dispute resolution is to ensure that all parties who have dispute about matters make a genuine effort to resolve that dispute by family dispute resolution before an application to the Court is made.

Family relationship centres will be created to help people who are separating to resolve their disputes without the need for litigation.

## RELOCATION AND THE SHARED PARENTING LAWS.

“One of the most interesting issues arising out of the new Act is whether the law related to relocation will change. There is a degree of certainty that the introduction of the Shared Parenting laws will make applications to relocate more difficult.”

A move interstate or overseas (as opposed to an intra –metropolitan move) would conflict with the new focus on a child having a meaningful relationship with both parents, being one of the primary considerations to consider under the new two-tiered system.

The leading cases on relocation refer to the importance of guiding legislation. The question to be considered is whether the shared parenting laws give primary consideration to a child having a meaningful relationship with both parents over the relocating parent’s freedom of movement to live where they desire. The impact of the new laws on a parents’ right to move with a child will need to be tested in Court; however it may be that if it is found that the relocation impacts on the meaningful relation with the non-relocating parent and child, the relocation will fail.

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## CONCLUSION.

The new regime will be a challenge to the Courts, practitioner and parties alike. There are a number of significant and related issues that have not been covered in the Newsletter that you may wish to explore including the status of parenting plans. Please contact our office if you wish further information on the new laws.

## Financial Developments and Family Law.

### NEW CHILD SUPPORT REGIME.

“The Ministerial taskforce on Child Support introduced reforms to the present Child Support Scheme (“the Bill”) in response to the Parkinson Report “In the Best Interests of Children – Reforming the Child Support Scheme”. The report’s concern is that the current laws do not reflect community standards on shared parenting and the increased participation of women in the workforce. The Taskforce also reported that the scheme does not accurately reflect the relationship between income and spending on children in ordinary families, nor is it well integrated with the income support, family payments and family law systems.”

The new reforms commence 1 July 2006 and will include a new child support formula that reflects the true costs of raising children in Australia, recognizing the incomes of both parents and balancing the needs of first and second families.

The reform package will be introduced in three stages, with the more extensive and complex elements, including the new formula, being the third stage.

On 15 June 2006 assent was given to the initial reforms as described in brief below:

- 1 An increase in the minimum child support payment from the current amount, equal to \$5 per week, to the amount that would have been in place if the old minimum had been indexed since its introduction to 1999. This new minimum payment, currently equal to about \$6.15 per week, will retain its value through a regular indexed process.
- 2 Lowering of the cap on income that is in excess of 2.5 times the yearly value of average weekly total earnings from full-time adults is disregarded. The changed cap will have a comparable amount drawn from the average weekly total earnings for all employees, that is, a lower reference amount. This will mean that some high-income earners will pay child support at a lower rate than under the current cap, which required some payers to pay more than the actual costs of their children.
- 3 More detail will be provided by the Bill on the circumstances in which a parent’s capacity to earn may allow the Child Support Agency or a court to depart from the usual administrative assessment rules in setting the amount of child support paid. For example, it would have to be clear to the Child Support Agency or court that the parent is either unwilling to take up work opportunities, has reduced his or her employment to a level that is lower than the normal full-time level in the occupation or industry or has changed his or her occupation or working pattern. The decision would not be justified by that parent’s health or caring responsibilities. The parent would have to be found to have not demonstrated that the major reason of the employment decision was not to effect child support.
- 4 The Bill increases 25 per cent to 30 percent the proportion of which the payer’s child support payment can be met through prescribed non agency payments such as child care, school fees and essential medical and dental bills. This will give payers more flexibility in meeting their obligations.

5 Making provision to ensure that there is no hiatus in the scheme with respect to exnuptial children in Western Australia between amendments by the Commonwealth and adoption of those amendments in WA (WA not having remitted power to legislate over exnuptial children to the Commonwealth).

## RECENT PROPERTY JUDGMENTS.

“Assessing Liabilities in property cases including guarantees and capital gains”

In the recent case of IABH and HRBH [2006] Fam CA 379 the Full Court of the Family Court determined that a trial judge has erred in finding that the value of a guarantee relating to company debts should be deducted from the asset pool or treated as a liability.

The trial judge has reduced the party’s asset pool by taking into account a sum of \$210,313.00 (being the alleged liability of the husband under a guarantee given by him and two of his partners in respect of the debts of their company).

There was no evidence that any attempt had been made to place the company in liquidation, receivership or otherwise to seek to have orders made against it. Further there was no evidence of any demand being made upon the husband in reliance under the guarantee. There was no evidence that the company was no longer trading.

The failure to take into account the factors referred to above meant that it was not open to the trial judge to treat the liability as one to be met wholly by the husband and included in the list of assets and liabilities of the parties.

The trial judge was also found to have erred in treating capital gains tax and selling expenses as liabilities and deducting them also from the pool of assets. The trial judge finding that the sale of certain entities was an inevitable consequence of the husband continuing to conduct his business in the manner in which he had done for years was not open to the judge and thus he had erred in deducting the notional selling expenses and the capital gains tax. Such factors in respect of the possible selling expenses and incurring capital gains tax should be taken into account in the percentage division not off the value of the assets pool.

Settled by Sally Nicholes, Principal, Nicholes Family Lawyers.