

# NICHOLE'S NEWSLETTER

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Family Lawyers

World Congress on Family Law & Children's Rights special - June 2009

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## Nicholes Family Law proud to participate in the 5th World Congress

Sally Nicholes is the Deputy Chair of the World Congress and is pleased that Marguerite Picard and Lucy Daniel will be accompanying her to participate in the event, this year being held in Halifax, Canada 23 - 26 August 2009.



Marguerite has been chosen to speak on collaborative law and Lucy on special medical procedure. Sally will be chairing sessions as well as speaking on cross culture and faith issues and family law in Australia.

There is not only opportunity to share skill sets on an international scale for family law practitioners but to examine "best practice" when protecting and promoting children's rights which is extremely fulfilling for those who have a human rights concern in their practice of family law.

## 5th World Congress on Family Law and Children's Rights

Early Bird Registrations are still open for the 5th World Congress on Family Law and Children's Rights, to be held on 23 - 26 August 2009 in beautiful Halifax, Canada.

The World Congress convenes every 4 years, providing unique opportunity for judges, lawyers, policy makers, medical practitioners, allied health professionals and all those associated to gather to share knowledge, develop

## At a glance

The 5th World Congress on Family Law and Children's Rights and Nicholes Family Law:

- NFL is proud to be a sponsor and to contribute man power to the World Congress on Family Law and Children's Rights which takes place in Halifax, Canada August 2009.
- The World Congress is a unique Australian initiative which convenes in a different country every four years. Sally Nicholes was approached to replace Her Honour Justice Jenny Boland as a Board member of the World Congress in 2004. She joins Justices Rod Burr (AM) and Fowler (AM) and Qld solicitor Michael Habermann.
- The United Nations recognises this unique organisation which focuses on best practices for family law on an international basis and moreover promotes the welfare of children in family law disputes.

See Also:

- New cases: interplay between Relationships Act 2008 & the Property Law Act 1958 - jurisdictional issues (*Hurley v Williamson*) & single & adversarial experts (*Gemmell v Gemmell*)
- Federal Magistrates Court dissolved to become part of the Family Court



policy, identify injustice and to seek solutions which are both achievable and lasting. The outstanding achievements of the World Congress have been awarded recognition by the United Nations.

The theme for the 5th World Congress is "Children Caught in Conflict". The outstanding program covers issues from cyber safety to adoption, children's participation in family law to shared parenting, and child abduction to the medical treatment of young people. This year's program is exceptional in both its breadth and calibre, and promises to be professionally and personally beneficial to all attendees.

Professionals working in family law or with children should not miss this rare opportunity to hear from the leading experts in your field, and to meet colleagues from all over the world.

Our 'Plotted History' of the World Congress gives a background of what this year's Congress will build upon, and a taste of what delegates can expect!

Early bird registration is available until 30 June 2009. For more information on registration or to view the full program, please visit [www.lawrights.asn.au](http://www.lawrights.asn.au)

## The World Congress - a plotted history

The 1st World Congress on Family Law and Children's Rights was launched in Sydney in July 1993, after three years of work initiated by the Honourable Justice Rodney K. Burr AM and the Honourable Justice Stuart Fowler AM. They had been prompted to do so after being invited to Hong Kong to address the Council of LAWASIA, an association which represents lawyers and lawyers' organisations in some 21 countries in the Asian and Pacific region.

At that meeting, the Council of LAWASIA asked them to accept a brief for the human rights of families and children in the Asian and Pacific region. The daunting challenge was accompanied by horror stories about the desperate plight of hundreds of thousands of children who were being forced into prostitution and child labour, forcibly adopted, mutilated for the purposes of begging, or decimated by AIDS.

From its inception, the World Congress was designed and promoted to achieve outcomes, not to be simply a 'talk fest'. Over 850 delegates from 54 countries of the world attended the 1st Congress in Sydney, drafting solutions and remedies to establish the momentum for change.

The 2nd World Congress was held in San Francisco in June 1997, in conjunction with the Association of Family and Conciliation Courts. It was attended by over 1600 registrants from more than 50 nations. The 2nd World Congress was honoured to have Hillary Rodham Clinton, the then First Lady of the United States and an ardent campaigner and advocate for the rights of children, as its Honorary Chair. The Second Congress was able to devote certain funds towards the building of two schools in Central America and a community farming plot for Central American women whose husbands were some thousands of kilometers away, working in mines.

The 3rd World Congress was held in September of 2001 in Bath, England, and attended by 850 delegates. Her Excellency Mary Robinson, then the United Nations High Commissioner for Human Rights and the former President of Ireland, was Patron and Honorary Chair of the Bath Congress. A major outcome of this Congress was the inauguration of an International Children's Rights Protection Network, now known as Children's Rights International.

The organizers were asked to form this body and direct it to the promotion of action to support the rights of children in the period between congresses. CRI's principle activities include education and legal advocacy, overseen by its Founding Patron the Hon. Alastair Nicholson AO RFD QC. More information on CRI can be found at [www.childjustice.org](http://www.childjustice.org).

The 4th and most recent World Congress took place in Cape Town, South Africa, in 2001. Madam Graca Machel, Patron of the 4th World Congress, opened the event with a stirring personal call which had the audience on their feet. The 4th World Congress continued its work on child sexual exploitation and provided a venue for an international meeting of law enforcement authorities who met to consider ways in which they might more effectively co-operate in the protection of children and the punishment of exploitation. Focus was directed to developing "best practices" in attacking child sex tourism in the various regions.

Since the Cape Town Congress, there has been a positive increase in communications between these law enforcement authorities to fight crimes against children and to develop ongoing projects. The 4th World Congress was significant in that its timing marked the 15th anniversary of the most widely ratified human rights convention of all time, the United Nations Convention of the Rights of the Child (UNCROC).

The Congress' program included a youth forum of university students around the world, who presented their critique on their countries' adherence to UNCROC along with their resolutions and quests for change. Many of these young people had either founded or participated in youth driven NGO's seeking to better the position of young people in their country. This



year's Congress will also include a Youth Forum, to be held as a memorial for the inspirational Danny Sandor.

This year's 5th World Congress promises to build upon this rich history and again serve to benefit the family law and children's sectors through the sharing of knowledge and ideas... which in turn promises to benefit children all over the world as Congress delegates take this knowledge home and implement it in their professional practices.

## World Congress Receptions

World Congress delegates benefit not only from the presentations by world-leading experts, but also from the chance to meet and share experiences with others working in their field from all over the globe. To enhance this rare opportunity, this year's Congress will host two special events for medical practitioners working with children and young people, and for law enforcement officers.

### Medical Practitioners Reception

This will take place on Sunday 23 August 2009, following from the Congress' Opening Reception. This cocktail event will be held from 8.00pm, in the gracious setting of the Halifax Harbourfront Marriott Hotel. This promises to be a wonderful prelude to the many medical-related presentations in the Congress program, including sessions discussing:

- Children recruited to war: studies from a medical perspective,
- Disorders of Sexual Development,
- Transgender issues and treatment,
- Surrogacy and
- Children's brain development

At only \$35 CAN per head, this event is sure to be popular - so spread the word and register early through the Congress website!

### Law Enforcement Officers Reception

This event will be organised by the Congress together with the Royal Canadian Mounted Police (the 'Mounties'), who will be hosting the reception free of charge. This will take place on Monday 24 August, in the Windsor Room of the Juno Tower, CFB Halifax. Again this promises to be a popular and exciting event, so RSVP to [lucy.daniel@lawrights.asn.au](mailto:lucy.daniel@lawrights.asn.au) early!

Both events are exclusive to registered delegates of the World Congress.

## New Case law: Hurley v Williamson [2009] VCC

As outlined in previous editions of the Nicholes Newsletter, the *Relationships Act 2008* (Vic) commenced on 1 December 2008, replacing Part IX of the *Property Law Act 1958* (Part IX) as the legislation governing de facto property disputes in Victoria. The Relationships Act repealed Part IX, and provided transitional provisions as follows:

- Any rights or entitlements that a person had under Part IX before 1 December 2008 become rights or entitlements under the Relationships Act, and
- An application made before 1 December 2008 by a domestic partner for adjustment of interests in property continue to be dealt with under Part IX.

In the case of *Hurley v Williamson*, the defendant filed an Originating Motion on 28 November 2008 for property orders under Part IX. The Plaintiff then filed a Writ on 11 March 2009 applying for property orders and spousal maintenance under the *Relationships Act*. Judge Misso of the County Court was required to determine whether the plaintiff was able to commence a separate proceeding under the *Relationships Act* where the defendant had commenced proceedings under Part IX. This decision would have a significant influence on the orders made in this case, because the Court did not have the power to make spousal maintenance orders under Part IX.

The defendant argued the *Relationship Act's* provision that proceedings made under Part IX should continue under Part IX confined the parties' applications to this legislation, preventing the plaintiff from making an application under the *Relationships Act*. Judge Misso found that if Parliament had intended the RA to impose this restriction, it would have explicitly provided this. Accordingly, the RA does not prevent the Plaintiff from bringing a cross-application under the RA merely because the commencing application was brought under Part IX.

Judge Misso found that this conclusion was supported by the RA's provision that that an application may be made under RA regardless of whether any other application for remedy or relief had been made under any other Act or law. His Honour considered that this confirms that Parliament intended that where an application was made under Part IX before 1 December 2008, cross-applications could be made under the RA after this date.



## Federal Magistrates Court to be dissolved into Family Court

The future of family law litigation was significantly altered in May 2009 with the announcement that the federal courts system would be restructured and the Federal Magistrates Court dismantled. The Federal Magistrates Court currently hears a significant proportion of family law cases involving less complex issues.

The Federal Magistrates Court was initially established with the intention of providing a cheaper avenue to justice for litigants in family and civil law cases. However, in November 2008, the Federal Government released the 'Future Governance Options for Federal Family Law Courts in Australia' report. This found that the current court structure including the Federal Magistrates court were financially inefficient, confusing for litigants, and created conflict over resources and inefficiencies in administration. The report recommended the creation of a single federal Family Law Court and a single Federal Law Court, by combining the existing Federal Magistrates Court into these as lower divisions.

Under the proposed restructure, the Family Court will be the single court that will hear all family law matters, and will have two tiers. The first tier will be constituted by existing Family Court judges, while current Federal Magistrates (renamed as judges) will hear cases in the second tier. The second tier will hear the majority of first instance family law matters, while appeals and more complex matters will be redirected to the first tier. It is estimated that overall, the restructure save \$7.8 million over four years through a reduction in duplicated administration costs. Over four years, \$1.5 million of these savings will be reinvested into family relationship and alternative dispute resolution services.

### ***Gemmell & Gemmell [2009] FamCA 29***

The husband brought an Application in a Case to adduce expert evidence from an independent expert witness (IEW) despite of a single expert witness (SEW) having been appointed under *rule 15.49*. The case was a *s79* proceeding to be heard in June.

Ryan J did not delve into the facts of the case except to say that the Application was brought in the context of a contested *s79* proceeding for property adjustment to be heard at a 4 day hearing commencing on 2 June 2009. The parties entered into Consent Orders

for parenting and living arrangements for their three children on 29 January 2009.

Under *rule 15.49(2)* there are 3 grounds under which the Court may order additional evidence:

- a) A substantial difference in opinion between experts which may be necessary for determining the issue;
- b) The IEW knows of matters that the SEW does not which may be necessary for determining the issue; or
- c) Another special reason for adducing evidence from an IEW.

The SEW was evaluated the parties assets in mid 2007. After the initial report was produced 2 subsequent reports were made to answer questions from the parties.

The husband's IEW assessed the assets and found a difference in the pool of \$500,000 to that assessed by the SEW. Compared to the size of the asset pool (\$2,500,000-\$3,000,000), and objectively, Ryan J was of the opinion that this was a significant sum. Ryan J took the view that sub-rule (2)(a) was satisfied.

Furthermore, Ryan J was also of the opinion that *rule 15.49(2)(b)* was satisfied as the IEW had specific market knowledge regarding direct market evidence and expertise which may be necessary for determining the valuation issue. Yet Ryan J reiterated that satisfaction of any of the three grounds does not automatically give rise to leave being granted.

Lord Woolf MR on *Daniels v Walker* commented that a joint report should be obtained wherever possible and accepting evidence from an IEW should be a last resort.

Under *rule 15.64(b)* the court has the power to order a conference between individuals. In this matter Ryan J believed that there was still time for a pre-trial conference between the two experts and as such the husband should have been seeking a conference rather than leave to adduce evidence.

Ryan J noted that, should no agreement be reached between the experts, the husband would retain the right to apply for leave under *rule 15.49(2)*.

The application was dismissed.



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