



**NICHOLLES**  
Family Lawyers

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

Second Edition • September 2006

## Welcome.

Welcome to our September edition of *The Nicholes Newsletter*! Our articles this month target some up-to-date financial issues including new laws about the enforcement of child support, interesting developments regarding a shareholders agreement between a husband and a group of third party companies and the position of gambling losses when adjusting property.

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

### NFL Updates:

We have the pleasure of 2 new additions to our staff. **Deanne Turnbull**, Senior Executive Assistant and Paralegal, formerly at Middletons Lawyers and **Eve Stella**, Receptionist, also a former colleague from Middletons Lawyers.

**Australia's Biggest Morning Tea** held at our office on Friday 26 May 2006. The breakfast was attended by all staff, barristers and practitioners from various legal firms across Melbourne.

On 20 July 2006 Sally Nicholes presented a comprehensive paper for family law practitioners on "**Shared Parental Responsibility & Child Support**". The paper is available on our website: [www.nicholeslaw.com.au/publications.html](http://www.nicholeslaw.com.au/publications.html)

**Our staff have been dedicated to ongoing charities and raising money for various causes including:**

- Red Nose Day held on Friday 30 June 2006.
- Olivia Newton John Cancer Centre Appeal on Friday 9 June 2006
- Daffodil Day held on Friday 25 August 2006.

# Changes In Enforcement Of Child Support.

CHANGES 1 JANUARY 2007 REGARDING COLLECTION OF CHILD SUPPORT

Previously if a Payee had elected for the collection of child support through the Child Support Agency any unpaid child support was considered to be a debt to the Commonwealth and be enforced by the Child Support Agency. The debt could not be enforced by the Payee.

If the Payee elected for the private collection of ongoing child support, then the Payee was personally responsible for enforcing the obligation to pay such monies.

Commencing 1 January 2007 a Payee will be able to pursue the collection of child support arrears even while the debt remains registered for collection by the Child Support Agency, and therefore a debt to the Commonwealth.

## ENFORCING CHILD SUPPORT ARREARS

In a recent decision of Mathieson and Hamilton (2006) FMCA fam 238 Federal Magistrate Walters outlined various considerations which the Court thus considers when determining whether to enforce child support arrears as follows:

- whether the Payer knew or ought to have known of the obligation to pay maintenance or child support;
- whether the Payee pursued the Payer for payment of maintenance and child support and did so in timely fashion;
- whether the Payee allowed the Payer to form a reasonable view that the Payer's obligation to pay the maintenance or child support could not be enforced;
- whether the Payer led or permitted the Payee to form a reasonable view that the Payer's obligation to pay maintenance or child support would be met;
- whether the Payer had appropriate or adequate reasons for failing or refusing to

- pay the maintenance or children support;
- the financial circumstances of the Payer, the Payee and the children;
- whether the Payer has made a full and frank disclosure of his/her financial position; and
- whether the Payee has made full and frank disclosure of his/her financial position.

## METHODS OF ENFORCEMENT

Where the Court is satisfied that a person appearing before it has failed to satisfy an obligation, a Court may order the payment of an amount found to be owing under the obligation by any of the following:

- a garnishment order;
- an order for the seizure and sale of personal property belonging to the person;
- an order that the estate of the person be sequestered;
- an order for the sale of an interest in real property belonging to the person; and
- any order it considers necessary to enable enforcement of the obligation or to prevent the dissipation of property or the wasting of assets.

## PARENTAGE TESTING

The Court must be satisfied as to the evidence suggesting that the person subject to the enforcement proceedings is not the parent of the child prior to the Court agreeing to undergo the parentage testing. In T & L and CY2 the Court ruled that "the Courts power to make an order for parentage testing is clearly subject to the parentage of the child being a question in issues". To satisfy this threshold: (1) parentage must be relevant to the nature of the proceedings and (2) there must be evidence which places the parentage of a child in doubt". The Full Court further stated that "an Applicant must have an honest, bona

fide and reasonable belief as to the doubt. An objective test is not to be applied, for the evidence in such applications is seldom (if ever) sufficient to enable the Court to come to any objective conclusion, and if it were, parentage testing orders would not be necessary, but the Court will objectively assess circumstances giving rise to the Applicant's belief".

## LUMP SUM ORDERS BY WAY OF CHILD SUPPORT

The new laws make provision for child support to be paid other than in the form of periodic payments. Parties are able to agree to pay child support by way of a lump sum, although if only one party is seeking a lump sum payment an application must be made to the Court. A Court must be satisfied that it would be just and equitable and otherwise proper to make such an order for lump sum child support. The Court must have regard to the following:

- whether the career entitled to child support is in receipt of an income tested pension, allowance or benefit;
- whether the career entitled to child support is not in receipt of such a pension, allowance or benefit; and
- whether the circumstances of the career are such that, taking into account the affect of the order proposed to be made by the Court, the career will be unable to support himself or herself without an income tested pension, allowance or benefit.

It is though highly unlikely that a Court will make an order for the payment of child support by way of a lump sum rather than in a form of a periodic payment unless there is good reason to do so. In *Lucky and Lucky* 1989 FLC 92 to 036 explains the rationale behind such attitude. The Full Court here ruled that "save in exceptional circumstances, the most appropriate order for child maintenance was a periodic order rather than a lump sum order anticipating the long term future". Even though the Courts are reluctant to order a

lump sum payment of child maintenance there are always cases which justify the making of a lump sum order. The case of *Pripic and Pripic* 1995 determined that lump sum payments may well be appropriate where there are difficulties in enforcement. This may be cases where the liable parent may be asset rich but income poor, the Court may be likely to make an order for lump sum payment of child support.

## WIFE APPLIES TO SET ASIDE CLAUSE AND SHAREHOLDER AGREEMENT.

The Full Court considered whether third party Appellant companies ("the companies") had suffered a substantial injustice by a Trial Judge ordering to set aside a clause and shareholder agreement entered into by the husband and the companies. The effect of that agreement was to restrict the husband's ability to freely dispose of his shares to anyone other than an "affiliate" of the husband. The husband and some of the companies sought to have the wife's application summarily dismissed. The application failed and the companies' leave to appeal also failed.

The Court awarded the wife costs on the basis that the companies had not suffered a substantial injustice.

In determining the outcome, the Court considered that the companies now had to face a Trial and should the wife fail against the investors at Trial there would be re-dress in the form of costs against the wife. (*Bain Specific Associations & Ors and Kelly & Ors* (2006) FLC 93270)

## GAMBLING LOSSES ON PROPERTY SETTLEMENT

The recent case of *Crampton & Crampton* (2006) FLC 93269 considered, inter alia, the impact of gambling losses as a negative contribution in a case as well as impacting on Section 75(2) factors.

The essential question was whether overall the



evidence about gambling losses demonstrated conduct which should result in her bearing the entire or some other proportion of the losses. The Trial Judge accepted evidence which established:

- (a) the pathological nature of the wife's gambling;
- (b) her irrational belief that she would recover losses;
- (c) the estrangement in her relationship with the husband, from as early as 1985; and
- (d) the wife's subsequent illness, symptoms of

which included "an inability to understand what one was doing", preoccupation "with worry" and inability to "concentrate".

Under those circumstances the Full Court determined that it was open to the Trial Judge to make the findings that the wife's conduct was not such that should see her bear the gambling losses.

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*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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### NFL Upcoming Events:

**22 to 26 October 2006** Sally Nicholes and Nadine Udorovic will be attending National Family Law Conference in Perth, Western Australia.

**28 October 2006** Sally Nicholes to join Registrar Fitzgibbon of the Melbourne Registry of the Family Court of Australia and Joanne Stewart of Counsel in giving a joint presentation on recent family law issues at a family law conference in Margaret River, Western Australia.