

## #37 -- August 2014 Edition

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The primary assets of the marriage were the family construction business and a substantial residential property which had been purchased and developed shortly prior to the end of the marriage.

Throughout the course of the marriage, the wife was the primary homemaker and parent and the husband was the primary breadwinner.

In relation to the issue of special contributions, the wife contended that the wealth accumulated during the marriage was as a result of their "economic, domestic and emotional partnership", so it would be unjust or inequitable to cast distinctions between their respective roles in the marriage.

Murphy J determined that it was appropriate for the parties' asset pool be divided 60/40 in favour of the husband.

Murphy J found that in respect of the parties' respective contributions, being the wife's homemaker contributions and the husband's financial earnings outside of the home, neither one was more important or more valuable than the other.

That being said, it was held that the husband had contributed to the ingenuity and stewardship of the business which was outside of the other contributions made to the business by the parties. Further, the husband has made significant post-separation contributions, whereas

the wife's homemaker and parent contributions were not as significant, as the children were over the age of 18 post separation.

### Bridgette Kildea Says Farewell

I started my legal career at Nicholes Family Lawyers in January 2009, having completed my law degree and practical legal training in Queensland. Sally and the team at NFL were kind enough to take me on for a 15 week work experience placement as part of my practical legal training.

Following the conclusion of my placement Sally offered me a position as a full time Associate with Nicholes.

During my time at Nicholes, I have been fortunate enough to gain experience in a broad range of family law issues including children's matters, family violence matters, international child abductions, special medical procedures, surrogacy, international relocation cases and complex property settlements and asset structures.

The experience I have gained in my five and a half years at NFL has been invaluable and I am very proud to have been part of the Nicholes Team.

It is with excitement and some sadness that I leave Nicholes Family Lawyers to pursue a career as a member of the Victorian Bar. I look forward to continuing to work with everyone at NFL moving forward.

### Thai Reforms Regarding Surrogacy Laws

Surrogacy in Thailand has recently been in the media spotlight for a few reasons. Many Australians are now familiar with the case of Gammy, a 7 month old boy suffering from Down's Syndrome and a congenital heart defect, who was born to a Thai Surrogate as a result of a surrogacy arrangement with an Australian couple.

In 2012, 5 Chinese nationals were sentenced to serve a jail sentence in Thailand after having been found guilty of trafficking 15 Vietnamese women aged between 19 and 30 years to Thailand to act as surrogates.

As from the end of July 2014, the current Thai military government has decreed new regulations regarding surrogacy arrangements in Thailand to try and prevent these situations occurring again.

These new regulations and guidelines require the following to be complied with for a surrogacy arrangement to be undertaken in Thailand:

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1. The intended parents must be heterosexual married couple;
2. The intended parents must be medically infertile;
3. The surrogate mother must be a blood relative of one of the intended parents;
4. The surrogacy arrangement cannot be commercial;
5. There can be no gender selection of the embryo implanted in the surrogate mother; and
6. The intended parents must have the permission of the Ministry of Foreign Affairs to leave Thailand with the child.

Clearly, the new regulations on surrogacy in Thailand will virtually rule out foreign intended parents, particularly if they are not related to the surrogate mother and in circumstances where they will not be able to pay a surrogate for her services.

It is currently unclear what impact the new regulations will have on those parents who have started the surrogacy process in Thailand. We recommend anyone who has commenced the process contact their clinics in Thailand to obtain urgent advice.

## Linda Rayment – 2014 Community Recognition Award

Nicholes Family Lawyers are very proud to announce that one of our Associates, Linda Rayment, has just been awarded the 2014 ReaILaw - Community Recognition Award from the Law Institute of Victoria (“LIV”). This award has been launched by the LIV to highlight the valuable contribution lawyers make within their communities through advocacy, charitable works and volunteering.

Linda has been working with ‘Operation Stitches’ for the past seven years, a charity dedicated to improving the lives of children in Melbourne’s inner-city public housing. These children, exposed to drugs, crime and violence on the estates, learn everything from computer skills to rap, graphics, street art and photography at Operation Stitches workshops aimed at boosting their self-confidence.

Linda, and four other Victorian Lawyers, were shortlisted by the LIV for their substantial contribution to their communities through advocacy, charitable works and volunteering. After receiving the most votes, Linda won the Award which meant that her charity of choice, Operation Stitches, was awarded \$5,000. This money will go towards Operation Stitches’ work, making a positive change in the lives of children of inner-city public housing.

Linda’s award was presented by LIV President, Geoff Bowyer at a ceremony at Nicholes Family Lawyers.

4. circumstances have arisen of an exceptional nature relating to the care, welfare and development of a child of the marriage, or if the applicant is the person who has the care and responsibility for the child, will suffer hardship if the Court does not vary the order;
5. the proceeds of crime order has been covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage.

The Court can also make orders varying, amending or substituting property orders if an application is made under Section 79A with the consent of both parties.

Should an order be varied, substituted or amended under Section 79A, after the death of a party to the marriage, it can be enforced against the deceased party’s estate.

Should a party to the marriage die during the proceeding seeking a change, the Court is able to continue with the application if it is satisfied that they would have made an order to vary, amend or substitute in the event the deceased party had not died and that it is still appropriate to exercise such power.

The Court is required to have consideration for any third parties. For example, in the event a property has been subsequently sold to a third party in an honest transaction, the Court will

have regard to their interests.

Should there be the involvement of a bankruptcy trustee or a trustee of an agreement, being an insolvency agreement, they may, in certain circumstances, be taken to be considered a person who is affected by the order.

## Smith & Fields [2012]

In 2012, His Honour Murphy J of the Family Court of Australia in Brisbane gave his Judgment in the matter of Smith & Fields [2012]. This was a case regarding the property settlement between parties who had been married for 33 years. The major issue in the case was that the husband asserted that his contributions to the marriage should be regarded as “special”, “unique” or “out of the ordinary”.

At the commencement of the relationship, neither party had any substantial assets; save that the husband had a modest amount of equity in a piece of real property and shortly into the marriage, the wife was injured and received a compensation payout.

There were 3 children of the marriage, all of whom were adults at the time of the final hearing.

At the date of trial, the matrimonial asset pool was estimated to be between \$30 million and \$40 million.

Mr Bowyer said the volunteer work of all finalists was outstanding.

“This award recognises the contribution lawyers make to their communities above and beyond their legal contributions”, he said. “Linda is passionate about helping disadvantaged kids develop life skills in practical areas such as computer training and workshops aimed at boosting their self-confidence.”

Linda’s story will be featured in the August edition of the Law Institute Journal.

Congratulations, Linda!

If you would like to learn more about Operation Stitches, please go to [www.stitches.org.au](http://www.stitches.org.au).

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### **Gardiner & Rivers 2014 FCCA74 (24 January 2014)**

In the recent case of Gardiner & Rivers, on 24 January 2014 in Melbourne the Court considered the question whether a parent’s new partner should be prohibited from seeing the children. This case involved a parenting dispute between a de facto couple regarding their two young sons aged 6 and 3 respectively.

The parties commenced a de facto relationship in July 2007 and separated on 12 October 2010 when the mother was 8 months pregnant with the second child. Following separation,

the mother had not re-partnered and the father had re-partnered with a woman referred to as “Ms S” throughout the Judgment.

The major issues of contention in the case were that the mother sought sole parental responsibility of the children and that the father be prohibited from allowing the children to come into contact with Ms S.

Parental responsibility, being the ability to make long term decisions for the care, welfare and development of children, is often jointly shared between parties. It is rare for a Court to order that just one parent have the sole ability to make such decisions regarding children.

As a result of the significant level of animosity and violence in this case, and in light of the father having never exercised parental responsibility regarding the younger child, the Court ordered sole parental responsibility be awarded to the mother. It was apparent from the judgment that the Court held reservations about the parties’ ability to consult one another regarding these long-term decisions for the children.

The second major issue in contention between the parties was whether the father should be able to bring his new partner into contact with the children.

The Court reiterated that the children’s best interests is the paramount consideration in considering arrangements for the children. In

particular, the Court had regard for two primary considerations:

1. The benefit of the children having a meaningful relationship with both parents; and
2. The need to protect the children from physical or psychological harm, and from being subjected to or exposed to abuse, neglect or family violence.

In the event the above two considerations conflict, the Court is required to place more emphasis on the need to protect the children from harm than the benefit of the children having a relationship with both parents.

The Court also has regard to various additional factors which are listed in Section 60CC(3) of the *Family Law Act*.

The Court was satisfied that although it was “an unlikely possibility”, it was not a “remote possibility” that Ms S may self-harm or cause harm to the children. Accordingly, the Court held that the father’s time with the children should proceed in the absence of Ms S.

If you or someone you know would like some assistance or information regarding the impact of a new partner or risk factors to the children, please do not hesitate to contact Nicholes Family Lawyers at your earliest convenience.

## Setting aside final property orders

Pursuant section 79 of the *Family Law Act* the Family Court has the jurisdiction to alter parties’ financial interests, namely to divide the asset pool of married couples.

In the event one or both parties are not happy with the orders made by the Court or by consent, there may be a remedy available to altering or setting aside those orders.

If a party seeks to have an order set aside, they will need to bring an application under Section 79A of the *Family Law Act*.

The Court may choose to set aside, vary or make further orders on the property settlement if the Court is satisfied of one of the following:

1. there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstances;
2. circumstances have arisen which make it impractical for the orders, or for part of the orders to be carried out;
3. a person has defaulted in carrying out their obligation under the order and in the circumstances that have arisen due to that default, it is just and equitable to vary the order;