NICHOLES NEWSLETTER

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NICHOLES
Family Lawyers

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NEWSLETTER
NICHOLES
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Christmas 2012

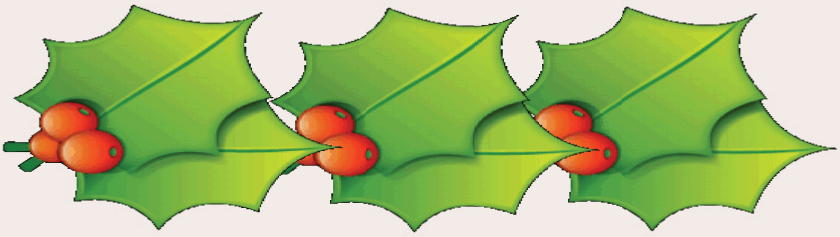
On behalf of everyone at Nicholes Family Lawyers, we would like to take this opportunity to wish you and your families safe and enjoyable Christmas and New Year.

Christmas is a very difficult time for many of our clients, and we hope that the new year brings calm and resolution to all involved in family law matters. This time of the year we also think of the families we support through various foundations, including Children's Rights International, the Lasallian Foundation and STITCHES.

If any of our readers would like to support these foundations please do not hesitate to contact Sally Nicholes (sally@nicholeslaw.com.au) or go to their websites (www.childjustice.org, www.lasallianfoundation.org and www.stitches.org.au)

If you experience any difficulties over that period with which you require our assistance, Kristina Antoniades of our office will be available to assist you during the holiday break. Our staff will otherwise be on leave from close of business on Monday, 24 December 2012 and returning to work on Monday, 7 January 2013.

We look forward to working with you in 2013.



What's new

Kristina Antoniades & Rebecca Dahl appeared as guests on the Victoria Police Community Hour on Joy 94.9FM on 21 November 2012 as part of the "Lesbians Matter" program. Kristina and Rebecca discussed recent amendments to the Family Law Act in relation to family violence, and also issues surrounding surrogacy.

Nicholes Family Lawyers are proud to be supporters of Joy FM.

We welcome our new Senior Associate, Keturah Sageman from Barkus Doolan Kelly in Sydney. Keturah is an Accredited Family Law Specialist with over 18 years experience advising clients in all areas of family law, with a particular interest in property matters. Keturah has worked in highly regarded specialist law firms in both Western Australia and New South Wales.

In this issue of the newsletter we consider how to ensure that a Binding Financial Agreement is binding, discuss issues of marriage equality and changes to the Court, and also how the Court deals with inheritances.

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STITCHES

Our Associate Solicitor, Linda Rayment, is an active supporter of Operation STITCHES – a not-for-profit charity that assists children from disadvantaged and low socio-economics backgrounds living in the inner-city housing estates of Melbourne.

Linda has helped develop the 'One Eighty' program, which is designed to give children and youth from all racial backgrounds an opportunity to turn their lives around, inspire and encourage creativity, grow their self-confidence and learn good life choices with an anti-drug, anti-violence and anti-crime emphasis.

One Eighty runs various workshops which are held by volunteers who are specialists in their field such as photography, film, drama, fashion, healthy cooking, automatix, graphics, hip-hop dancing, street art and computer skills.

Each elective is run with the purpose of giving youth an opportunity to learn new skills. The results of these workshops have proven outstanding amongst the youth. Many have an ignited passion for what has been taught and wish to develop their newly acquired skills further.

STITCHES runs other programs during the school term including, homework club and private tutoring, Kids Club, Super Saturdays, Streetwize dance group, Self Defence Academy to name a few.

Linda is currently involved in organising Operation STITCHES Christmas parties. Each year, STITCHES reaches out and hosts unforgettable Christmas parties for six of the major inner-city Public Housing estate communities, where many times Christmas imposes great financial pressure on the residents.

During the evening, the children select their own gift from the Stitches Toy Shop. Parents also receive a gift, and for many it is the only gift they will receive for Christmas! Christmas grocery hampers are also distributed.

Lively entertainment, food, the STITCHES train, jumping castle, super slide, crafts, games and prizes are enjoyed by all throughout the evening as well as watching Stitches' very own Inner City Kids Choir and dance group perform.

Operation STITCHES truly makes a difference every festive season.

For more information or if you would like to donate to Operation STITCHES this Christmas please visit www.stitches.org.au.

Ensuring a Financial Agreement is Binding

Under the Part VIIIA of the Family Law Act couples can choose to sign a financial agreement before marrying, during their marriage or after their divorce. These agreements oust the jurisdiction of the Court to adjust property, finances and other matters if the marriage breaks down. The purpose of these provisions is to permit parties to arrange their financial affairs in the way they choose, to give certainty and to avoid delay and costly disputes if the marriage breaks down.

However because these agreements remove the Court's ability to scrutinize agreements

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and ensure that they are just and equitable Courts have required that for an agreement to be binding the provisions of s90G must be strictly complied with. The agreement can also be set aside on one of the five grounds outlined in s90K(1).

This means that while binding financial agreements (BFAs) can be a powerful and effective tool they can also be overturned.

Here are 5 common pitfalls that can lead to an agreement being overturned:

1. Complying with s 90G

The requirements of s90G must be strictly complied with to effectively oust the jurisdiction of the Court. For example in *Ruane v Bachmann-Ruane* [2009] an agreement was found not to be binding because the legal advice certificate was signed by a legal practitioner who was not an Australian legal practitioner. In *Balzia v Covich* [2009] FamCA 1357 the Court held that it could not rectify the Deed and solicitors' certificates which mistakenly referred to s90B rather than s90C. Similarly in *Sullivan v Sullivan* (2011) 46 Fam LR 164, where the wife had signed the agreement before the wedding and the husband after, Justice Young held that the agreement was not valid and he could not rectify s90B to read s90C in the agreement.

However the Court will look to the substance of the defect rather than mere technicalities. For example in *Wallace v Stelzer* (2011) 44 Fam LR 648 the Court was prepared to declare an agreement binding even though the legal advisers had signed the wrong certificate (due to legislative amendments) as it was merely a technical fault. Similarly the Federal Magistrate in *Blackmore v Webber* stated that a BFA does not need to reproduce the wording of s90G verbatim.

Certain clauses that do not comply with the legislative requirements may in some cases be severed and while the rest of the agreement remain in full force (*Otero v Otero* [2010] FMCAfam 1022).

2. Uncertainty or Imprecision

The Court may choose to not enforce the terms of a BFA if the language of its terms is uncertain. In *Kostres v Kostres* [2009] FamCAFC 222 the Court decided that it was not prepared to enforce a BFA because the language of the agreement was ambiguous and they were not able to supply or correct the terminology with sufficient certainty. To avoid this pitfall the Court said the terms of the agreement "must accurately reflect the intention of the parties at the time of the making of the agreement, and be unambiguous." [127] The Court was not prepared to read in the subjective intentions of the parties to clarify the uncertainty.

3. Providing Correct Copies of the Same Agreement

The Court held that there was no binding agreement in *Fevia v Carmel-Fevia* 42 Fam LR 50 because the husband and wife had signed materially different agreements. The agreement which the wife signed was missing an annexure (which the husband alleged he had been given to her) which outlined all of the property and entities that were part of his business. To avoid this pitfall it is crucial to keep records of all documents delivered to the other side and record when they were delivered. A similar result occurred in *Sawyer v Sawyer* [2011] FMCAFAM 610 where there was no agreement as the wife did not receive the original agreement or a copy of the agreement.

It is also crucial that both parties see and sign copies of the same document in its entirety- it will not be a binding agreement if different parts of the agreement are passed back and forth (*Millington v Millington* [2007] FamCA 687).

4. Language Barriers and Informed Consent

Parties to BFAs must fully understand both the agreement and their legal advice for an agreement to be binding. In *Omar v Bilal* [2011] FMCAFAM 1430 the court set aside

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a BFA because it was not satisfied that the wife, who had very limited English and was illiterate in her native Arabic, had given informed consent when signing the Deed. Although the solicitor who provided her with advice on the Deed did so in Arabic, he had a strong accent and consequently referred the wife to a translator for an explanation of the legal effect of the Deed. The Court said that the legal advice was insufficient as it was never the role of the translator to explain the Deed's legal effect.

5. Sufficiency of Legal Advice

Parties must be careful to obtain comprehensive and independent legal advice as the certificate of legal advice is insufficient, on its own, to satisfy the onus of establishing that the relevant s90G requirements have been met. In *Hoult v Hoult* [2011] FamCA 1023 the Court found that the agreement was not binding because the wife alleged that the legal adviser had not outlined her rights under the agreement and the solicitor could not adduce any evidence to the contrary (she had no file notes or records) and could not readily remember the advice many years later.

It is unclear if it is necessary for further independent legal advice to be provided after any amendments to the original agreement. Initially in *Parker v Parker* (2010) 43 Fam LR 548 Justice Strickland held that such advice must be provided (and the certificate modified or reissued) after any amendment which imposed new obligations on the parties. However on appeal to the Full Family Court it was held that such advice was not necessary as the provisions of 90G should be construed generously because they are remedial. Consequently the agreement was held to be binding.

Historic Day for Marriage Equality – Marriage Equality Bill passed by Tasmanian Lower House on 30 August 2012

The 30th of August this year was a historic day for Australian same-sex couples. The Tasmanian Lower House passed the Marriage Equality Bill and became the first Australian parliament to legalise same-sex marriage. This is an historic turnaround considering that Tasmania was the last Australian state to decriminalize homosexuality.

There have been previous attempts to legalise same-sex marriage such as the Same-Sex Marriage Bill in 2008 and the recent failed legislation at the Federal level. There has been an increasing focus on whether same-sex couples have a right to marriage in the global human rights sphere. More and more countries outside of Australia, such as Holland and a number of states in America, have legalized same-sex marriage. However several countries have still have not accepted it. An example is Japan where homosexuality is not accepted culturally or legally and under Article 24-1 of the Japanese Constitution marriage is proscribed to be between a man and a woman.

Thus, it is to be expected that the issues surrounding same-sex marriage will receive increasing attention and focus at both the domestic and international level.

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Matrimonial Causes: Bringing proceedings out of time

Section 44(3) of the Family Law Act requires that a person bring proceedings for any matrimonial cause within 12 months after a divorce order or a decree of nullity of marriage has been made. Proceedings can also be brought post separation but before divorce. Section 44(5) provides that for de facto couples financial applications can only be made within two years after the end of the de facto relationship.

However the Court can grant leave under s44 for parties to bring proceedings beyond these limitation periods if they are satisfied that "hardship would be caused to a party [to the relationship] or a child if leave were not granted".

In such cases the court is required to make two separate decisions:

1. Will the applicant or a child of the marriage suffer hardship if leave is not granted?

2. If it is satisfied that it will cause hardship, should the Court exercise its discretion to allow the proceeding?

The onus is on the applicant to establish hardship and to persuade the court to exercise their discretion. However it is not the role of the judge in these proceedings to determine whether the proposed applications would ultimately be successful (*Hall v Hall*). The Full Court has also said that it will take into account the cost of proceedings when deciding on prospective claims (*Sharp v Sharp*).

Such an application was recently considered by Federal Magistrate Terry in *Card v Mathis* [2012] FMCAfam 1007. Here a wife brought a property claim nine years after the divorce. The Magistrate determined that the wife would suffer hardship from not being able to pursue her property claim. However he then chose not to exercise his discretion to allow the claim to proceed due to the wife's very long delay in bringing a claim, the husband's ill health (and consequently the hardship proceedings would cause him), the fact that the wife was unlikely to succeed (even taking her evidence at its highest) and the small amount of money in dispute.

Changes to Federal Court Funding and the Federal Magistrates Court

Attorney General Nicola Roxon has announced that the Federal Magistrates Court will soon become the Federal Circuit Court of Australia and Federal Magistrates will be renamed Judge. The new name for the Court is intended to highlight the important service it provides to rural and regional communities through its program of regular court circuits.

Ms Roxon also announced that the Federal Court will receive increased funding, as was foreshadowed in the 2012 budget. Ms Roxon stated that "these measures will ensure our courts can deliver key services, including regional circuit work, which are vital for disadvantaged litigants and small businesses...Funding of $38 million over four years from court fee revenue will be injected into the courts to ensure they are able to provide the services the community needs."

The government currently only recovers about 15% of the cost of running the courts and believes there should be a greater contribution from those with a greater capacity to pay who use courts regularly.

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Inheritance in Property Matters

There is a lack of clarity as to when assets or liabilities received by way of inheritance will be considered as part of the asset pool.

The Court in *Davut v Raif* (1994) confirmed that the following process needs to be applied by the Family Court when adjudicating property matters:

1. Identify the property that is able to be adjusted between the parties;

2. Assess the contribution that each party has made towards the acquisition, conservation and improvement of the assets and towards the welfare of the family

3. Consider the future needs of each party as outlined in s75(2) of Family Law Act

A fourth step was added by the subsequent decision of *Lynch v Fitzpatrick* (2001) that having completed the three steps the Court must step back and consider whether or not in "real and overall sense" the decision is just and equitable.

Anticipated future inheritances: The current case law suggests that anticipated future inheritances (as the time of settlement) will be considered under step 3 as a s75(2) factor rather than as a relevant factor in defining the asset pool available for division between the parties. Where possible the Court will provide parties with a far more significant share of the asset pool available for division between the parties rather than awarding a party a share of the inherited estate. (*De Angelis v De Angelis* (2000))

Post separation and pre settlement inheritances: In circumstances where an inheritance is received by a party after separation, but before settlement, there are difficulties in assessing whether it should be dealt with as part of the asset pool or under future needs. The treatment of such inheritances is assessed on a case by case approach. The Court will particularly consider contributions made by either party to the inheritance, the size of the inheritance relative to the size of the asset pool and the length of time that has passed since separation.

Registering Interstate Family Violence Orders

A family violence order is usually put in place to try and protect you, your property and children from domestic family violence. A family violence order will set out the rules and conditions that the defendant must abide by. Family violence orders are generally made under a prescribed law of a state of territory and as such are named differently depending on the state in which the orders were made.

The state-by-state variations in naming are as follows:

- Protection Orders (QLD & ACT)
- Apprehended Domestic Violence Order (NSW)
- Intervention Orders (VIC)
- Violence Restraining Orders (NT, SA & WA)
- Restraint Orders (TAS)

Despite differences in naming, ultimately all state and territory family violence orders are treated the same as they all aim to protect against domestic family violence. Under the Commonwealth Family Law Act, all state and territory orders are collectively grouped as family violence orders. Because of this, interstate orders can be registered in any state or territory at the respective Family Violence Register of the Magistrates' Court.

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