NICHOLES NEWSLETTER

www.nicholeslaw.com.au

NICHOLES
Family Lawyers

#32 -- November 2013 Edition

NEWSLETTER
NICHOLES
www.nicholeslaw.com.au

Enrolling children at a new school following separation

Unless a Court decides otherwise, both parents of a child have parental responsibility for the child. This means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

When parenting orders are made under the *Family Law Act*, there is also a presumption that it is in the best interests of a child for the child's parents to have equal shared parental responsibility. Equal shared parental responsibility means that both parents are jointly responsible for major long term decisions regarding the children. Major long term decisions are defined to include decisions regarding the child's education, health, religion, name and changes to living arrangements. This requires each parent to consult with the other parent make a genuine effort to reach a joint decision.

Therefore, in circumstances where the parties have equal shared parental responsibility, if a parent wishes to move a child to a different school, both parents must agree to the change.

If parents cannot agree on which school their

Contents

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

child will attend, the first step should be for the parents to participate in Family Dispute Resolution. If the child is of an age where his or her views are relevant, child inclusive mediation might be an appropriate forum for the matter to be decided. Mediation could take place at a Family Relationship Centre or other community or private provider, including Nicholes Family Lawyers. Alternatively, family counselling or therapy may resolve any issues

If dispute resolution is unsuccessful, a parent may make an Application to the Court for an order regarding where the child should go to school. The Court will determine the issue of the child's enrolment having regard to the best interests of the child.

If a parent attempts to enrol a child in a school, principals should ask for copies of any relevant court orders. Parents are able to enrol their child in a school without the agreement of the other parent, but if there is a dispute regarding whether a child can be enrolled, principals of schools are likely to maintain the status quo in regards to where the child is enrolled until the dispute can be resolved.

Property Settlements following separation: don't delay getting family law advice

If clients are considering separation, or have recently separated, they are strongly advised to seek legal advice from a specialist family lawyer regarding division of the matrimonial assets as soon as possible.

When family law clients divide their assets (reach a property settlement), the first step in the process is to ascertain the existing legal and equitable interests of the parties in property. This includes all assets and liabilities held by, or on behalf of, of the parties or either of them, including but not limited to real property, cash, shares, superannuation, trust assets, business assets, credit card debts and loans.

Property settlements are based on the existence and value of the various assets as at the date the agreement is reached, or if the matter proceeds to trial, as at the date of the trial. Therefore, if one party depletes the parties' assets, whether through reckless or negligent behaviour prior to the property settlement, the assets available for division could be significantly less than when the parties initially separated.

Previously, such wastage could be "added back" to the asset pool for division. However, recent decisions of the trial division of the Family Court suggest that the "add back" is no longer applicable following the High Court of Australia decision in *Stanford & Stanford* [2012] HCA 52. The law in this area is presently unsettled.

Furthermore, increases in the value of various assets will also be taken into account, and parties cannot depend on the fact that assets have been in their possession or control and assume any post-separation increase in value will be theirs to retain.

It is therefore advisable that clients seek legal advice as soon as possible after a separation.

Clients also need to be aware that once a Divorce Order has been made, they have twelve months in which to make an Application to the Family Court seeking a property settlement. De Facto couples have a period of two years following separation in which to make an Application. In the event that clients are "out of time" they will need to

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

seek the Court's permission to make an Application, and will need to demonstrate that they will face hardship if permission is not granted.

Clients are advised to seek legal advice as early as possible regarding their entitlements. Speaking to a family lawyer does not usually mean going to Court. It can, however, result in actions which preserve assets, prevent the need to go to Court later, or prevent clients from running out of time to pursue their entitlements.

Section 121 and Social Media

With social media being at the forefront of our society, and at our fingertips (literally!) it should come as no surprise that it can have a significant impact on family law proceedings.

People vent their feelings, opinions, attitudes about others, their life and circumstances on Facebook and Twitter. If this occurs in the context of family law proceedings and those "feelings and attitudes" are about your former partner, your children, or your case, they can have far greater implications.

Section 121 of the Family Law Act make it an offence to publish any account of family law proceedings that identifies any of the persons involved in a newspaper or periodical publication, radio broadcast or television, or by other electronic means. "other electronic means" can obviously include Facebook and Twitter.

The prohibition in s121 is directed as much against the parties themselves as against anyone else, including the media.

A breach of s121 is punishable by imprisonment.

In the recent of *Lackey & Mae* [2013] FMCAfam 284, the Father was warned by the Judge presiding over his case that he risked receiving a penalty for breaching s121 by publishing details of the current proceedings, after he and members of his family posted comments on Facebook about his family law proceedings. Despite the warning, the father continued to post comments on Facebook, including comments that criticised the Judge.

His Honour ordered that the father and members of his family be restrained from publishing or otherwise distributing any material relating to the proceedings, the children, the mother or members of her family, including publication on Facebook or other social media site. The father was ordered to remove all reference to the proceedings from Facebook.

The matter was also referred to the Court Marshal and the Australian Federal Police. Orders were made providing for the Marshal to monitor social media for postings made by the father and his family for the next 2 years and the Court Marshal was directed to investigate breaches of s121 and make arrangements for prosecution if deemed appropriate.

His Honour made the following comments in the course of his judgment:

> *"An unfortunate and increasing feature of modern litigation, particularly but not exclusively in family law, is the use of 'social media'. While it can be used for good, often it is used as a weapon, either by one or both of the parties, and or by their respective supporters. … As a weapon, it has particularly insidious features. Unfortunately, in the context of this matter, 'netiquette' was not on display, and in fact, it could only be a nothing more than a euphemism for outlandish electronically-fomented conduct."*
>
> *For example, it seems often to be the case that people will put on such*

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

media (particularly but not only Facebook) comments that I suspect they would not say directly to the person against or about whom such remarks are directed. In this regard, such remarks are, in my view, a form of cyber-bullying. Often, they are very cowardly, because those who 'post' such derogatory, cruel and nasty comments (regularly peppered with disgusting language and equally vile photographs) appear to feel a degree of immunity; they think they are beyond the purview or accountability of the law, and that they need not take any responsibility for their remarks. They inhabit the cyber-sphere and operate as 'Facebook rangers' who 'hit and run' with their petty and malicious commentary, and seem to gloat (or be encouraged) by the online audience that waits to join the ghoulish, jeering crowd in the nether-world of cyber-space. To a significant degree, such conduct has been on display here."

"Indeed, in the light of the Father's (and that of his family) unremitting, unreformed and unenlightened conduct, it is essential that the Mother and the children be protected as much as possible from further insidious and corrosive attacks."

A breach of s121 of the Family Law Act does not require that the persons involved be named, but simply that enough information is disseminated to enable them to be identified. Those involved in family law proceedings must be very careful about what they post online.

Parenting Orders: International Travel

The recent case of *Lorreck & Watts* (No.2) [2013] FamCAFC 128 brought to light the issues of international travel arrangements for children with separated parents. Section 65Y(2) (a) and (b) of the Family Law Act makes it clear that in cases where the parents of a child are separated, that the child cannot be taken out of the Commonwealth of Australia, unless there is written consent from the other parent or there is an order approving the travel plans. It should be noted that section 65 X of the Act states that the child is no longer considered a child in this respect when they turn 18.

In *Lorreck & Watts* (No.2) the mother appealed the decision of a Federal Magistrate, as they were then known, authorising the father to apply for passports without the mother's consent and to travel with the children overseas. The mother submitted, inter alia, that the trail judge had erred in not considering that the father intended to take the children to Vietnam, a country that is not a signatory to the Hague Child Abduction Convention.

The mother's Appeal was dismissed. Her Honour Finn J examined the issue of Vietnam being a non-signatory nation to the Hague Child Abduction Convention and held that that given the Father's position in the Australian Armed Forces, he is extremely unlikely to keep the children overseas for an extended period of time. Her honour also held that the Father should be able to travel to Vietnam to introduce the children to their step-mothers family.

The above case reminds us that if there is no provision in any current children orders for international travel, it is important to seek the written consent of the other parent. If this is not possible, you should seek legal advice in order to

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

lodge an application to the Court, prior to booking any international holidays this Christmas or in the future.

Adamson & Adamson [2013] FamCAFC 157: The Courts Restrain a Mother from Removing There Children from Metropolitan Sydney

In *Adamson & Adamson* [2013] FamCAFC 157, the mother appealed against injunctions made by a Federal Circuit Court Judge whereby she was restrained from removing two children outside the Sydney metropolitan area and requiring her to return them to an address within Metropolitan Sydney the area within 14 days.

In August 2013 the father submitted an application before the FCC seeking a recovery order, and injunction restraining the mother from removing the children from Sydney, and an order requiring her to return them to Sydney. The mother submitted that the nominated point in which the father could collect the children was merely a 90 minute drive from their respective houses.

The Father submitted that taking into account the time for him to drive to collect the children and return to the house, it was likely that they would not arrive until 10pm Friday night and result in the father's time over the weekend being curtailed and that this would not be in the best interest of the children.

The Judge declined to make a recovery order, observing that to have the police remove them would have a negative effect on their relationship with the father. However, the Judge made two injunctions sought by the father, citing that it was indeed in the best interest of the children, that; the mother is restrained from removing the children from outside the Sydney Metropolitan area; and (2) the mother must return the children at an address within the Sydney Metropolitan area within 14 days

On Appeal the mother submitted, inter alia, that the trial judge failed to consider her right to choose her place of residence and that his honour erred in providing insufficient reasons for the orders. The crux of the Appeal's judgement was that the trail judge delivered his decision ex tempore, in front of the parties and their respective Counsel. Therefore the trial material was fresh in his mind and there was no need to make specific reference to it in his honours subsequent written judgement.

In response to the submission that the trail judge erred in not considering the Appellant mother's right to choose where she lives, her Honour Ainslie-Wallace J notes that no submissions were made to the mother's "right to choose her place of residence" and, had it, no doubt his Honour would have referred to the decision of the High Court in *AIF v AMS* (1999) 199 CLR 160 and that the outcome would be the same.

The Appeal was dismissed and the mother was ordered to pay the husband's costs. Although this is a rare decision, it highlights that it is in the best interest of the children will be the most important factor when considering these applications.

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

Implicated by association? The far-reaching powers of family violence intervention orders

In Victoria, there are two Acts which provide protection for victims of stalking and family violence. These are, the *Stalking Intervention Orders Act* 2008 ("the Stalking Act") and the *Family Violence Protection Act* 2008 ("the Family Violence Act), but what is the difference?

1. The Stalking Act allows a victim (or a police officer or another authorised person on behalf of the victim) to make an application for an intervention order where they have been exposed to stalking behaviour.

   In summary, pursuant to the Stalking Act, a person is stalked if another person engages in a course of conduct with the intention of causing physical or mental harm to the victim, and/or arouses fear in the victim for their own safety or the safety of another person. The stalking behaviour must also include conduct such as following or contacting the victim, publishing material relating to the victim via electronic means, and the stalker must know or ought to have known that the stalking behaviour would be likely to cause such harm or arouse such fear in the victim.

   Under the Stalking Act, the victim does not need to be a family member, domestic partner, or relative of the stalker. There is a high threshold associated with meeting the definition of "stalking" and as a result, it is often very difficult for victims to obtain intervention orders under the Stalking Act, particularly on a final basis.

2. On the other hand, the Family Violence Act allows family members, domestic partners and relatives to obtain intervention orders in circumstances where they have been exposed to family violence. The definition of family violence under the Family Violence Act is extremely broad and is much more expansive than the definition of stalking used in the Stalking Act. Family violence includes physical and sexual abuse, emotional and psychological abuse, economic abuse, coercive behaviour, behaviour that controls or dominates a family member and causes that family member to feel fear for their safety or wellbeing or that of another person, or behaviour that causes a child to hear or witness, or otherwise be exposed to the effects of family violence (such as overhearing threats, comforting a family member who has been physically abused, cleaning up after an incident of family violence, or being present during the attendance of police or ambulance services for example).

   Due to the expansive definition of family violence used in the Family Violence Act, it can be less difficult for family members, domestic partners or relatives to obtain intervention orders under the Family Violence Act as opposed to the Stalking Act, as they are not required to meet the stringent definition of stalking. Therefore, victims of family violence are encourage to apply under the Family Violence Act if there safety and wellbeing is under threat or at risk.

So what happens if a victim's safety and wellbeing is under threat, but the perpetrator is not a family member, domestic partner or relative, and the behaviour falls short of stalking, such as in circumstances of emotional abuse?

There may be a way for the victim to make use of the provisions of the Family Violence Act in certain circumstances, even if they are not a family member or domestic partner of the perpetrator of violence.

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

Section 76 of the Family Violence Act allows a court to make a final Intervention Order against an associated person (in addition to the respondent who is a family member, domestic partner or relative of the victim) in circumstances where:

1. An Intervention Order has already been made against the respondent; and

2. The court is satisfied on the balance of probabilities that the associated person is an associate of the respondent; and

3. The associate has subjected the victim to behaviour that would be family violence if the associate and the victim were family members, domestic partners or relatives; and

4. The associate is likely to do so again.

Further, an Intervention Order may be made for the protection of an associated person where:

1. A final order has been made to protect a protected person; and

2. The court is satisfied on the balance of probabilities that-

(i) the additional applicant is an associate of the protected person; and

(ii) the respondent has subjected the additional applicant to behaviour that would be family violence if the respondent and the additional applicant were family members, and is likely to do so again.

Pursuant to the Family Violence Act, an associate means a person who is so closely connected with the respondent that the respondent can influence the actions of the person, whether directly or indirectly. For example:

Person A and person B are in a genuine domestic relationship as a de facto couple. As a result of A subjecting B to physical and economic abuse, B successfully obtains an Intervention Order against A pursuant to the Family Violence Act.

Shortly thereafter, A's brother C begins emotionally abusing B due to B's action of obtaining an Intervention Order against A.

B can then make an application to the court for an Intervention Order against C on the basis that C is an associate to A due to their close relationship as brothers.

We, therefore, encourage clients to consider taking action under the added protection of Section 76 of the Family Violence Act in circumstances where they are being subjected to family violence by a person outside of the usual definition of a family member, domestic partner or relative.

The holiday period

The team here at Nicholes Family Lawyers would like to wish you, your friends and family a very happy and safe holiday period.

The holidays can be a wonderful time for catching up with friends and family, relaxing and enjoying the break. Unfortunately this period often also brings with it stresses which can lead to various family law issues arising.

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

Time with children during the holiday period

As the holiday period is an important family time for many people, this can often lead to conflict between parents and other parties regarding the time children will spend with each of them over that period.

Although there is no set rule about which party should spend time with the children and when over the Christmas period (being Christmas Eve to Boxing Day), it is generally accepted that the children should have the opportunity to see both of their parents on Christmas Day if possible.

If you are having any problems in arranging time for the children to spend time with both you and your former partner over the Christmas period and summer holidays it is important that you action this sooner rather than rather.

In the event you are unable to reach an agreement with your former partner regarding your respective time with the children over that period, it may be that you require assistance from a Court. Both the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC) are equipped to deal with these issues.

The FCA has "filing deadline" in relation to Applications seeking arrangements for the children over the Christmas period. Should you need to issue such an Application in the FCA you will need to do so prior to 8 November 2013.

The Federal Circuit Court has not yet announced their filing deadline and will allocate dates based on the urgency contained in the Application.

Separations

Emotional or difficult holiday experiences or new years' resolutions can often lead to family separations over the holiday period. There is a range of legal and non-legal factors which arise upon a separation. We recommend that anyone experiencing a separation obtain both legal advice and counselling assistance as early as possible to deal with this difficult time.

Family Violence Intervention Orders

Unfortunately we often see an increase of Intervention Orders being applied for and/or granted during the holiday period, often following stressful or emotional holiday experiences.

Intervention Orders are, in essence, Protection Orders issued by the Magistrates Court of Victoria to protect one party from another in relation to family violence.

Family violence has a very broad definition and can be physical violence, emotional violence, economic violence or sexual violence. If you or a loved one is the victim of domestic violence or if you know someone who is involved in a domestic violence situation, we would suggest you contact the Police or feel free to contact us to discuss this further.

NICHOLES
Family Lawyers

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au