

effectuated”.

Thus in the event there is a dispute regarding property the Court will consider whether arrangements can be made to effect Section 79 of the Family Law Act, being the section of the Act which gives the Family Court power to adjust the parties property entitlements, without having to sell the farm. If such a way is able to be found the Family Court will do that over selling the property.

Some of the ways in which the Family Court may attempt to effect a settlement without selling the property could be:

1. Release alternative property to the non-farming spouse such as investment properties, cash held in bank accounts or other assets held by the parties.
2. Sell a portion of the land if it is able to be subdivided.
3. Order the farmer to pay the non-farming spouse such sum equivalent to their entitlement under the Family Law Act to a share of the parties joint property in instalments over an extended period of time.

In the event the Family Court is unable to effect a fair and equitable settlement by keeping the farming property, then the property will need to be sold.

It is important to note that pursuant to Section 75(2) of the Family Law Act the farming party who is required to sell the property may then get an adjustment in their favour as they would be losing their income earning ability.

If you or someone you know has a farming interest and wishes to protect that land there may be options available to that person be that by way of a Binding Financial Agreement or otherwise.



2013 Highlights

2013 has once again been a very busy year at Nicholes Family Lawyers.

We have been pleased to help the many clients who have come to us throughout the year with a very broad range of family based issues and problems and we appreciate greatly the trust they place in us. We have enjoyed working with them on both traditional and emerging legal issues.

Our staff have continued to develop their professional skills and this year:

Rebecca became a fully qualified Collaborative Practitioner

Claire and Linda were elected as the Co-chairs of the Community Issues Committee of the Young Lawyers section of the Law Institute of Victoria

Jason completed his Bachelor of Laws at Monash University

Nadine and Bridgette attended the National Surrogacy Conference in Melbourne

Andrew presented a paper on the Hague

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Convention at the German Australian Pacific Lawyers Associates ("GAPLA") Conference in Sydney

Rebecca presented to teachers and school principals about Family Law issues effecting schools; and

Linda was appointed to the Board of Abolishion, an anti-human trafficking organisation dedicated to ending sexual slavery

In addition, many of our lawyers are actively involved in the Family Law Section of the Law Institute of Victoria ("LIV") with the following lawyers contributing to various committees:

The Children's Law Accredited Specialisation Advisory Committee

- Anna Parker

Victorian Women's Lawyers Networking Committee

- Bonnie Phillips
- Claire Walczak

The LIV Young Lawyers Professional Development Committee

- Kate Ettershank
- Linda Rayment
- Jason Schroen

Victorian Women's Lawyers Communications Committee

- Kate Ettershank

Women's Legal Service Victoria

- Bonnie Phillips

The Children and Youth Issues Committee

- Anna Parker
- Rebecca Dahl

The Family Law Section Executive

- Anna Parker

The LIV Social Media Taskforce

- Anna Parker
- Andrew Sauer

The LIV Community Issues Committee

- Linda Rayment
- Claire Walczak

The team also found time to keep fit and have fun, competing in both the LIV Fun Run and Hertz Corporate Relay. A special mention must go to Claire, Nadine and Kate who were one of the only all female teams competing in the Hertz Relay.

As a firm, Nicholes Family Lawyers has sponsored a number of organizations and activities which are congruent with the values of the firm. The jurisdiction we work in provides us with opportunities and responsibilities to "give back".

We sponsored the World Congress on Family Law and Children's Rights, which brought together a range of highly regarded individuals ranging from judges, governmental officials and legislators from all around the world to raise awareness in relation to various children's issues and sought outcomes that promote and protect the rights of children.

decision of the NSW Court of Appeal and the High Court will now make a final decision on whether or not a person can be listed on a birth certificate as anything other than 'male' or 'female'.

Norrie appears to be the first person in Australia to litigate for the right to be identified as being of 'non-specific' sex.



Same-Sex Marriage in the ACT

As most of us are aware, the Australian Capital Territory became the first state to legalise same sex marriages. The Marriage Equality (Same Sex) Act 2013 came into effect as of 7 November 2013. The purpose of the act was to provide for marriage equality by allowing for marriage between two people of the same sex.

Pursuant to section 9 (2) of the legislation, couples wanting to marry under the legislation were required to issue a notice of intention to marry no later than one month before the proposed date of marriage. This meant that same-sex couples were able to marry from 7 December 2013.

It was well known that the Commonwealth Government intended to challenge the legislation's constitutionality as soon as it was passed. This challenge came before the High Court of Australia on 4 December 2013. If struck down then, this would mean that no couple would be able to marry under the legislation, due to the one month notice requirement. To the federal

government's dismay, the High Court of Australia decided to reserve its decision until 12 December 2013. This meant that same sex couples were able to marry from 7 December 2013.

On 12 December 2013 however, the High Court unanimously held that the Australian Capital Territory law was constitutionally invalid. That only the federal parliament has the right to legislate in this area. Unfortunately this means that all same-sex couples that have been married since 7 December will have their marriages annulled.

Many believe however that this exercise from the Australian Capital Territory has not been for nothing. Resulting from this legislation, there has been increased pressure placed on the federal government to call for another conscience vote on this issue and many believe that we as a country are one step close towards marriage equality.



Farming cases

Farming cases are traditionally very difficult cases as they have often been passed down through generations and people are very connected to the land.

In the 1980 the case of Magas and in the 1985 case of Lee Steere it was determined that farming land does not fall in to a protected category of property simply because it is a farm. That being said, the Family Court does have a wide discretion in regards to "ways and means by which the property division should be

grievous bodily harm as an element however it is important to note that intention is not required. The bill has fired debate between pro-life and pro-choice advocates. One criticism of the amendment relates to the arbitrary grounds upon which the law is activated, that is, the foetus must be 20 weeks old or if the age cannot be determined then the foetus must weigh 400 grams.

Of great concern to the NSW bar association, who oppose the introduction of the new law, is the potential spread of foetal rights into other areas of law. The association President, Phillip Boulten SC said 'What's the difference really between a special law saying that if you cause grievous bodily harm to a foetus that's one thing, why would it not be the logical next step is to criminalise the deliberate killing of a foetus or the deliberate and wilful killing of a foetus? That could be manslaughter or murder'. Many opponents to the proposed law believe it to be impossible to quarantine the introduction of foetal rights to grievous bodily harm offences under the Crimes Act.

One of the most controversial aspects of the proposed law is how this new recognition of foetal rights will affect current medical practices, particularly in relation to abortion. The bill seeks to address this by way of s 8A(4) which states the amendment will not apply to any medical procedure. Another concern is that by conferring rights on the foetus a mother could be potentially liable for a criminal offence s 8A(6) seeks to address this by specifically stating that the amendment should not affect the criminal law in relation to actions of the mother. Although this provision potentially protects the mother, other people connected to the pregnancy could potentially be exposed to criminal liability. To take an extreme example, could a father be charged under the law for smoking in the presence of the mother, given the known link between

passive smoking and miscarriage. The narrow formulation of the proposed law has not satisfied opponents, including many women's groups, who say this type of legislation pits the rights of the foetus against the reproductive rights of women. This they say can only result in a winding back of the hard fought rights of women to control their own bodies.



“Male”, “Female” and everything in between

In November this year, the High Court granted leave to hear *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 (Norrie's case) a matter which tests the ability of intersex Australians to be legally recognised as being neither male or female.

In 2010, a NSW resident, Norrie (who does not use a last name) applied to the NSW Registry of Births, Deaths and Marriages for a certificate to register a change of sex from male to 'non-specific'. At birth Norrie's sex had been recorded as male, however, as an adult, Norrie underwent medical procedures, and now identifies as intersex. The NSW Court of Appeal held that Norrie did not identify as either male or female and should therefore not be trapped within the female-male binary of sex (that is that only men and women exist). The court held that it was possible in particular circumstances that some people do not have a sex as it is conventionally understood.

The NSW Registry have appealed the

We also sponsored the “Eliminating Violence Against Women” media awards, a great cause highlighting the need to report violence against women in a safe, appropriate and honest manner.

Bonnie was the guest presenter at the Australian Same Sex Dance Sport Championships held at the St Kilda Town Hall and we were proud to be a major sponsor of this event.

We also ran a family fun day fundraiser at Dominique Portent Winery for Children's Rights International (CRI) which raised over \$20,000; and

Claire and Bonnie ran a clothing drive and fundraiser to assist the organisation “Fitted for Work” which assists women returning to work.

Other organisations we are proud to be aligned with and support include:

- Alannah and Madeline Foundation
- Children's Rights International International Social Services
- Justice Connect
- Lasallian Foundation
- Project Respect
- Victorian Women's Legal Service
- Women's Information Referral Exchange
- Word Congress on Family Law and Children's Rights

As a firm we have devoted many hours to Children's Rights International and the World Congress and were active in the operations and administration

of these not for profit organisations who have little to no administration or financial support.

We thank all of friends, clients, referrers and supporters for their interest in and enthusiasm for the organisations and cause with which we have aligned.

We take this opportunity to thank you all for your greatly-valued support of Nicholes Family Lawyers in 2013 and we look forward to our continued association in 2014.



Anna Parker

Nicholes Family Lawyers is pleased to announce the appointment of Anna Parker as a partner of the firm. Anna has practiced exclusively in family law for a number of years and is an accredited specialist in both family law and children's law. She is also undertaking a professional doctorate in family law and is active in a number of family law committees. Anna joined Nicholes Family Lawyers in March 2013. Anna has been delighted to become a member of the Nicholes Family Lawyers team and is looking forward to embracing the future as a partner of the firm.

Nicholes Team to Attend the Kid Zone at the Midsumma Carnival!

The team at Nicholes Family Lawyers are extremely excited to have a stall in the Kid's Zone at the 2014 Midsumma Queer Festival's Carnival! The Nicholes team are extremely passionate about helping same-sex couples with children's issues and more importantly providing tools and advice to prevent these issues from occurring in the first place.

Happening on Sunday 12 January 2014, the Kid's Zone has been organised by the Rainbow Families Council. The Kid's Zone will provide a quiet and safe place for families to bring their children to play and enjoy the day. The Nicholes team will have a stall manned by at least two lawyers between 11:00am-5:00pm to provide guidance to any family that have any issues or possibly foresee any issues occurring in the future.

Come on down, say hello! It is going to be a great family day and we look forward to seeing some of you there!



Australian Same Sex Dance Sport Championships 2014

Nicholes Family Lawyers is once again proud to support the annual same-sex dance sport championships. As a part of the annual Midsumma Queer

Festival the Australian Same Sex Dance sport Championships promises to be a night filled with Elegance, Grace and Electrifying Energy!

The event is on Saturday the 18th of January at the St. Kilda Town Hall. Tickets are available at www.midsumma.org.au. This is an event that must not be missed! Hopefully we will see you there!



The Family Law Courts' Jurisdiction to deal with unborn children

Separations can be a difficult time for all of those involved, however separations involving a pregnant mother can be all the more difficult.

Recently there has been some judicial discussion regarding the Court's ability to make Orders injuncting expectant mothers from terminating a foetus and to make parenting Orders in relation to an unborn child.

In 1989, the Family Court presided over a case called *In the Marriage of F*. In that case, a married couple decided to have a second child. Shortly after conception the wife communicated her unhappiness in the marriage to the husband and ended the marriage. The husband then brought

an Application to the Family Court seeking to injunct the wife from terminating the pregnancy.

The Court determined that, in accordance with the principle set down in an United Kingdom Case *Paton v. British Pregnancy Advisory Service (1979)*, 'that a foetus has no right of its own until it has been born and has a separate existence from his mother'.

In light of this, the Court ultimately held that a child for the purposes of the Family Law Act is a child once born. The Court determined that they had no jurisdiction to make Orders in relation to an unborn child.

That being said, the Court went on to say that pursuant to section 114 of the Family Law Act this pregnancy has come about as a result of a matrimonial cause and thus the Court had jurisdiction to make Orders and Injunctions regarding the matrimonial cause. However the Court ultimately held that it would not be 'proper' to make an Order regarding the foetus.

In 2012, the Court was again asked to determine the question of making Orders in relation to a foetus in the matter of *Talbot v Norman*. That case involved a very young couple, with the mother being 16 years at the date of trial. The parties had a very short relationship and were not married.

As with *In The Marriage of F* the Court held that the foetus had no rights and that the 'jurisdiction of this Court in respect of ex-nuptial children extends

only to ex-nuptial children once born'.

As the parties were not married, and based on the limited facts provided in the reported judgment the parties were not in a de facto relationship, there was no ability to rely upon 'matrimonial cause' as was the case in *The Marriage of F*.

Accordingly, the Court has affirmed its view that a child for the purpose of the Family Law Act is a child only once it has been born. Although a party may be able to claim a matrimonial cause to seek that an Order be made in relation to the child, to date the Court has not seen it 'proper' to make an Order requiring an expectant mother to take the foetus to full term.



Foetal Rights – Zoe's Law

On the 21st of November the controversial amendment to the NSW Crimes Act 1900 known as Zoe's Law passed the lower house. The initial push for the amendment came about in tragic circumstances after pregnant Brodie Donegan lost her baby as a result of collision with a drugged driver. The bill was put to a conscience vote and passed with a vast majority of support with 63 votes to 26. In essence the bill seeks to create a separate recognised offence against the foetus in circumstances which involve grievous bodily harm. As such the amendments are targeted at a number of offences all of which include