

WELCOME DANIEL MYERS & MARG WILLIS

We are pleased to welcome two new lawyers, Daniel Myers and Marg Willis, to the Forte team.

Daniel has worked in law firms in England and in Australia. He volunteers at Fitzroy Legal Service.

Marg has previously worked in a high pressure emergency services role and is enjoying the ability to help our clients sort out their lives.

FAMILY TRUSTS

Family trusts are relevant in family law property settlements if the trust is controlled by a spouse either as trustee or appointor. The ability of a spouse to control a trust by appointing the trustee is particularly important. The assets of the trust are considered to be "property of the parties" and available for distribution between the parties.

In *Kennon v Spry* the High Court took a more "robust" approach to discretionary trusts than had previously been taken under the *Family Law Act*.

Dr Spry, when the marriage was in difficulty, varied the trust to exclude himself and his wife as capital beneficiaries. He later divided the income and capital of the trust between four trusts he set up for their four daughters.

The High Court held that without these two transactions, Mrs Spry would have had a right to have the trust administered properly and to be considered as a beneficiary. Dr Spry would have had the power to distribute all of the assets of the trust to his wife. Mrs Spry's rights were "property" of the parties to the marriage.

The Full Court agreed with the trial judge that the property of the parties should be divided on the basis that all the trust property was included even though Dr Spry had purported to distribute it to the children.

- Important points include: The Family Court can "undo" transactions if they were done to reduce a party's proper entitlements
- All of the assets of a discretionary trust may be dealt with as "property of the parties" if the trust is controlled by one of the parties to the marriage
- A discretionary beneficiary has a "right" to be considered as a potential beneficiary and this "right" may mean that all of the assets of the trust are deemed to be the "property of the parties".

FAMILY DISPUTE RESOLUTION

Relationships between separated couples are not improved by litigation. Statements are made in letters between solicitors and in affidavits which are hurtful and can't be unsaid. People are frequently left feeling angry, attacked and defensive. Couples with children are likely to find it more difficult to learn to parent together after separation.

Parents must attend mediation (known as family dispute resolution) before they can go to court over disagreements about their children. This process assists parents to learn to resolve their disputes outside court or in a more amicable way. There are some exceptions, such as if there is an urgent issue, there is abuse or risk of abuse to a child, family violence or a risk of family violence.

Family dispute resolution is conducted by Family Dispute Resolution Practitioners (known as "FDRPs") who are qualified mediators with additional training to mediate family disputes. FDRPs work in a variety of settings including Government funded Family Relationship Centres (FRCs), and counselling agencies like Relationships Australia, Lifeworks and Family Life. There are also private lawyers and psychologists.

The family dispute resolution process normally involves a 1 hour interview with each parent about their concerns and an assessment as to whether mediation is appropriate. If appropriate, the parents will attend a mediation session of about 1½ to 3 hours.

The aim of mediation is to help parents focus on the future rather than on the past. Parents are encouraged to work together for the best interests of their children in an attempt to take the focus away from the hurt and hostility of the separation.

The goal is to help the parties move from a relationship of conflict to a co-operative relationship as parents. The mediator helps the parents reach an agreement which is acceptable to both of them and realistic for their children.

We are pleased to offer family dispute resolution at Forte Family Lawyers through Belle Lane who is a trained mediator and registered Family Dispute Resolution Practitioner. She can be contacted on 9248 5800 or blane@fortefamilylawyers.com.au

CONGRATULATIONS CORALEE

We congratulate Coralee Elsum on obtaining her Master of Laws in Family Law. She has worked hard to complete this higher degree whilst working full time at Forte Family Lawyers.



RELOCATION

The most emotive and contentious matters in family law generally involve children. Cases involving relocation to another town, state or country are often the most challenging.

As with all decisions relating to children, the *Family Law Act* says that the best interests of the child are paramount.

What is relocation?

Moving from one suburb to another may impact on the non resident parent's time with the child. Moving longer distances may be a problem because of the cost of travel.

Best interests of child

Whether a parent can relocate with a child involves a fact-finding exercise by the court regarding the child's best interests. If a parent has unilaterally moved, the focus is also on the best interests of the child, but in the first instance, a move back to the original location is often required.

Meaningful relationship

In determining a child's best interests, the primary considerations of the court are the right of a child to have a meaningful relationship with both their parents and to be protected from harm.

Can a child have a meaningful relationship with a parent who lives in another town, state or country? Whether the relationship is already established will be significant. The ability of the child to communicate with the non resident parent via telephone or email may be important for the child to maintain the relationship.

In one case an 8 year old child lived in Melbourne with her mother. Her father lived in Canberra. The court allowed the mother to move to the United Kingdom with the child for 3 years. The relationship of the child with the father was meaningful despite the distance between Canberra and Melbourne. The child could continue to communicate with the father via telephone from the United Kingdom.

A court will take into account any improvements to the resident parent's circumstances by the move, such as better employment, extended family support or closeness to medical facilities.

In a recent case, a mother was effectively prevented from relocating. She wished to live in Sydney where she had family support, better accommodation and job prospects. The Federal Magistrate made orders that the child spend equal time with both parents on a week about basis. Therefore, the mother had to remain living in a mining town in North West Queensland. The mother appealed to the Full Court on a number of grounds including that the

orders restricted her freedom of movement. The appeal was dismissed by the Full Court, but the mother has obtained leave to appeal to the High Court.

In another recent case a mother was not allowed to move the children from Sydney to the Hunter Valley where she had family support, cheaper accommodation and would be able to work from home. The court took into account the mother's negative attitude to the father and to the paternal grandparents who saw the children regularly. The court believed that the move could damage the close relationship the children had with the father's family. The mother was required to maintain the children's residence within 30 kilometres of the Sydney GPO.

If you want to move with your children the arguments in favour of the move need to be carefully considered and presented to the court along with the ways in which a meaningful relationship can be maintained with the other parent.

It appears that the 2006 shared parenting amendments to the *Family Law Act* have made relocation more difficult because of the emphasis on each parent having a meaningful relationship with their children and to be involved in their children's lives.

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