



WELCOME MARIA KOURTIS

Maria joined Forte at the end of January 2008.

She has a Bachelor of Arts with Honours (in classical literature), and a Bachelor of Laws. She has been working as a family lawyer for over six years.

Maria has practised in family law since her admission. She is a member of the Education Committee of the Family Law Section of the Law Institute of Victoria.

She has frequently appeared as a solicitor advocate before the Family Court, Federal Magistrates Court, Magistrates' Court and the County Court and to a lesser extent before the Supreme Court Master.

Her considerable Court experience brings a new dimension to our team.

CHILD SUPPORT - MAKE SURE YOU ARE READY FOR 1 JULY 2008

In a few days the new Child Support Scheme will start. Before 1 July 2008 you should:

1. Let the Child Support Agency know of any changes to the care of your children
2. Let the Child Support Agency know of any changes to your income, address or circumstances eg. a new child
3. Go online at www.csa.gov.au/schemereforms for:
 - detailed information about the new Scheme and formula
 - child support and Family Assistance Estimator
 - child support and Family Assistance Tables
 - child support worksheets
 - case studies
 - frequently asked questions
4. Contact us if you have any queries or concerns which the CSA have not addressed

You may want advice on whether your child support arrangements should be documented using the "binding" type of child support agreement which can be made from 1 July 2008.

FINANCIAL AGREEMENTS

For the first time since they were introduced in December 2000, the Full Court of the Family Court has considered when financial agreements are binding.

Financial agreements are an alternative to consent orders after separation. They can also be entered into before marriage or before separation. An agreement is binding on the parties if the requirements of the *Family Law Act* are met:

- (a) the agreement is signed by both parties
- (b) the agreement includes a statement that each party was provided, before the agreement was signed by them, independent legal advice from a practitioner as to:
 - (i) the effect of the agreement on the rights of the party
 - (ii) the advantages and disadvantages of making the agreement
- (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided
- (d) the agreement has not been terminated or set aside by a court
- (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

Recent case

In *Black and Black* the parties entered into a pre-nuptial agreement. The husband and wife agreed that the husband would sell his property and place the sale proceeds into a joint account. The wife was in the early stages of a personal injury case. The parties agreed that she would put the proceeds of her claim into the joint account. The money was to be used to jointly purchase a home. If the parties separated, the home was to be sold and the sale proceeds divided equally between them.

The parties bought a home before the personal injury claim settled using the husband's money and a small mortgage. The wife's personal injury payment was significantly less than the husband expected. It was about one quarter of the value of his contribution to the home.

The parties separated. The husband applied to the Court to have the agreement set aside. The trial Judge considered the validity of the pre-nuptial agreement. The trial Judge found there was a clear intention by the parties to enter into the agreement, and that each party had received legal advice, as required by the legislation. However, the parties agreement did not contain a statement of independent legal advice as required by para (c) above. This statement was only in the certificate annexed to the agreement. He said that the intention of Parliament was for these types of agreements to be enforceable. If parties had to "cross all of the t's and dot all of the i's", it would discourage lawyers and parties from entering into agreements.

The Full Court disagreed with this approach, and found that the Court must interpret the legislative requirements strictly.

As a result of *Black and Black*, it is clear that a financial agreement requires careful drafting. Lawyers must ensure the requirements set out in the *Family Law Act*, as interpreted by the courts, are met.

CHILD ABDUCTION

Child abduction in family law occurs when one parent moves a child from their home, usually interstate or overseas, without either the consent of the other parent or a court order. Depending on the circumstances, the court can make an order for the return of the child.

International child abduction

These cases occur regularly in Australia. Children are removed to Australia and removed from Australia. A Government Department runs the court proceedings but the affidavits and other documents are usually prepared by the parents' lawyers.

A recent High Court case involved the removal of a 10 year old from New Zealand to Australia by the mother. The father applied in Australia for the return of the child to New Zealand. The mother submitted that the child's habitual residence was not New Zealand, the father was not exercising rights of custody and he consented or acquiesced to the removal of the child. The Court rejected these arguments and held that the child's removal from New Zealand was wrongful. The child had to be returned to New Zealand.

In a recent case we conducted, the mother was successful in resisting the New Zealand State Central Authority's request that the child be returned to New Zealand as the Court was not satisfied that the child habitually resided in New Zealand at the time of the alleged removal.

These cases are won and lost on technical grounds. The best interests of the child is not the paramount consideration.

The Hague Convention

If a child is removed from or to Australia, the Hague Convention on the Civil Aspects of International Child Abduction may apply. Australia is one of many countries which are members of the Hague Convention. Countries which are not signatories include Malaysia, Singapore, India and Lebanon. The Convention helps to secure the prompt return of a child wrongfully removed to a signatory country and to ensure that the rights of custody are respected by other countries which are signatories to the Convention.

A child will be protected under the Convention if:

- the child is under 16 years of age
- the child was a habitual resident in Australia or in another Convention country
- the child was wrongfully removed or retained. The rights of custody must actually have been exercised at the time the child was removed or would have been exercised but for the removal
- the application is brought within one year of the removal of the child

Grounds for refusal of return

If a child is wrongfully removed from Australia, from a Convention country, or to Australia from a Convention country, there are five grounds on which a court can refuse to order the return of a child to the Convention country:

- rights of custody were not being exercised when the child was removed or retained
- consent or acquiescence to a child being removed or retained
- grave risk the child will be exposed to physical or psychological harm
- the child's return would be a breach of its fundamental freedoms and human rights
- the child objects to being returned and is of an age and maturity to justify his or her views being taken into account

Abduction to a non-signatory country

If a child is wrongfully removed or retained in a country which is not a signatory to the Hague Convention, there may be other options outside of the Convention.

What should you do?

If there is a risk of a child being wrongfully removed from Australia you should obtain a court order preventing the removal of the child from Australia. If there are existing orders in place which provide for a child to live with/spend time with each parent it is possible to get an order to have the child's name put on the Airport Watch List at all points of international departure in Australia to prevent the child's removal from Australia.

If you are thinking of relocating with your child, it is important that you discuss this with the other parent and obtain their consent to the relocation. If consent cannot be obtained, you can apply to the court seeking an order which allows you to relocate with the child.

Forte Family Lawyers can provide you with advice on child abduction, how to try to obtain the consent of the other parent for a move and can assist you in obtaining any necessary court orders.

NEW RIGHTS FOR DE FACTO AND SAME SEX COUPLES

The Victorian *Relationship Act* has been passed. De facto and same sex couples have been given similar property and spousal maintenance rights although the claims will still be resolved in the Supreme and County Courts. These provisions are expected to start on 1 December 2008.

The entitlements of some people will be better under the new law. Other people will be worse off. You should contact us for advice on your specific position.

The Federal Government intends to pass its own legislation for de facto and same sex couples. This will override the Victorian legislation with respect to property division for de facto couples, and probably same sex couples too. It will be similar to the new Victorian *Relationship Act* except that it will also allow parties to split their superannuation and will enable disputes to be resolved in the Family Court and the Federal Magistrates Court. The Federal Bill has not yet been introduced to Parliament.

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If your name, address, email address or telephone number have changed, or if you think that the information we hold is inaccurate please contact us. We will remove your name from our mailing list if you ask us to do so. You can contact us on 9248 5800 or email to enquiries@fortefamilylawyers.com.au.

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