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This Family Law Briefing discusses perennial family law questions:

1. **The numerous different ways of going about settling a family law case** – there are many ways to approach a negotiation and Court is very much a last resort.
2. **Parenting arrangements** - the parenting provisions of the *Family Law Act* were changed dramatically over two years ago and the governing principles have now been developed and considered by the Courts. We give you an up-to-date description of what happens in many parenting cases.
3. **Child support** – a completely new child support formula commenced operation on 1 July 2008 and we discuss that in this briefing.
4. **De facto or domestic partner relationships** – the law relating to maintenance and property settlements is changing dramatically and we discuss this in the briefing

DIFFERENT WAYS TO RESOLVE A CASE

Most cases do not go to Court and indeed some cases which go to Court should not. We always discuss with our clients which method of dispute resolution is best for them. The types of dispute resolution include:

Around the kitchen table

We have no objection in principle to the client discussing and negotiating matters directly with the other side. However it should be remembered:

- (a) it is important to have legal advice first so that they have a reasonable idea of what should be agreed to and what shouldn't;
- (b) if at the kitchen table they sign an informal agreement relating to children, that is a "Parenting Plan" and it is possible that it will be enforced by the Courts - so they need to be careful about signing anything;
- (c) if they have a de facto property dispute and they come to a clear agreement with the other party about settling their matter they may find that it is legally binding - so they need to be careful about committing themselves without their lawyer's precise advice; and
- (d) in all other areas including property settlements arising from marriage separations, they cannot have a legally binding settlement without relevant paperwork being prepared by their lawyer. Hence they should take such an agreement to their lawyer to implement.

Negotiations through a solicitor

Many cases are settled through a solicitor doing the negotiation on their client's behalf by telephone, mail and in roundtable conferences involving them and the other side as well. A solicitor gives a client advice about what is a fair settlement but, often more importantly, helps to take the pressure and strain of negotiations off a client. Where there is a significant power imbalance between the parties a solicitor is often vital to redress the power balance. A solicitor often negotiates on a client's behalf even if the other party does not have a solicitor representing them.

Collaboration

This is a negotiation process where the two lawyers and clients sign a contract promising not to take the matter to Court and to focus on interest based negotiations, not positional bargaining.

Stephen Winspear, Peter Szabo, Sheryl Barker and Helen Matthews of our Family Law Department are specially trained in this process.

Family Dispute Resolution Practitioners

Government funding provides for 3 hours of free “mediation” with a family dispute resolution practitioner in relation to children’s matters. This does not cover financial matters.

Mediation

Mediation involves your client and the other party and sometimes the two lawyers attending a mediator who tries to resolve matters by agreement. This can take place before or after Court proceedings are commenced and avoid any need to go to Final Hearing in Court.

Arbitration

Arbitration is a private process. Both parties must have lawyers and by agreement an Arbitrator is appointed and paid to be the Judge of the case in a financial case. It does not apply to children’s matters. This can be a very helpful process because it avoids the often long waiting lists in the Court queue for matters awaiting Final Hearing.

Court

Generally Court is necessary where something very urgent has arisen and the other party is uncooperative or, alternatively, negotiation (through any of the above methods) has failed or is simply taking so long that a client can’t wait any longer. The Court system itself encourages people to negotiate and even when contested Court proceedings are commenced, 95% of those cases settle by agreement before Final Hearing.

CHILDREN

Basic principles

The basic principles relating to children in the *Family Law Act* are:

- (a) children have the right to know and be cared for by both their parents;
- (b) children have a right to spend regular time with each parent and other significant people in their lives;
- (c) parents jointly share duties and responsibilities concerning the welfare of the children;
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture.

The law must do what is in the child’s best interests, must foster a meaningful relationship with both parents if at all practicable and must protect the child from the risk of abuse, neglect or harm.

Each parent automatically has parental responsibility for a child which includes the issue of decision making for the child – see section 61C of the *Family Law Act* (FLA).

When a Court makes a Parenting Order in relation to a child there is a presumption that it is in the child’s best interests for the parents to have equal shared parental responsibility (meaning: they must agree about significant decisions relating to the child’s future). This presumption does not apply if there is a risk of abuse or family violence and in certain other circumstances.

If the presumption of joint parental responsibility is applied then a Court must consider whether it is in the child’s best interests to spend equal time with both parents. If that is not applicable, the Court must then consider whether it is appropriate for the child to spend “substantial and significant time” with each parent – see section 65DAA of the FLA.

Substantial and significant time must include both weekends and holiday time and weekdays. It also must include both parents being able to be involved in a child’s daily routine and in the child’s special occasions –

see section 65DAA(3) of the FLA. In deciding any issues in relation to children, what is in the best interests of the child is the paramount consideration of the Court. The Court must take into account:

- (a) the nature of the relationship of the child with each of his or her parents;
- (b) the effect on the child of the separation from either parent or other person;
- (c) the desirability of an effect of any change in the existing arrangements for the care of the child;
- (d) the attitudes to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent;
- (e) the capacity of each parent to provide adequately for the needs of the child, including emotional and intellectual needs of that child;
- (f) the need to protect the child from abuse, ill treatment or exposure or subjection to behavior which psychologically harms the child; and
- (g) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account.

Typical Arrangements

Children equally sharing time with both parents is more common than it was a number of years ago. In many families however this is not practical due to work responsibilities or geographic distance between the parties. Common arrangements which parents negotiate for the care of their children today are often along the following lines:

- (a) one parent having less time such as 5 or 6 nights out of 14 (across a fortnight), often in one block across one weekend per fortnight;
- (b) half school holidays;
- (c) half Christmas Day each;
- (d) Father's Day with the father and Mother's Day with the mother each year;
- (e) each parent to have their children on the parent's birthday for some time (or perhaps on the nearest weekend);
- (f) each parent to have some time with the children on the children's birthday or birthdays – but this is difficult with school aged children. Nearby weekends are a more convenient time to have a party with school aged children if both parents cannot have them for a period on the one day during the week;
- (g) arrangements can be changed substantially from this pattern. They can be more precise with starting hours and finishing hours. They can be left to the discretion of the parents if communication is reasonable and in that situation the arrangements could be left fairly open.

CHILD SUPPORT

Child support is calculated by a formula which relies upon the taxable income of both parents. To check what the assessed child support is likely to be, Google "csa" to find the Child Support Agency website. Then click on "ESTIMATOR" and answer the questions about income, ages of children and number of nights the children spend with each parent to get their child support estimate.

There can be a delay of some months before child support is received. A client should not delay in making the required application to the Child Support Agency to calculate what child support is payable. The application is free.

If for some reason the Child Support Assessment is not appropriate, it is possible to apply for a "Departure Order" or variation of that assessment. This is undertaken without lawyers, and initially through the Child Support Agency. If the assessment review is unsuccessful a further review application may be made to the Social Security Appeals Tribunal. Private school fees are not covered by the normal assessment procedure. It is common for parties to come to a private arrangement regarding child support, including school fees, and to have that agreement documented. There are severe limits to what can be agreed to if the recipient of child support receives a pension. Broadly, if a client receives less than what would otherwise be assessed by the Agency, their Centrelink benefit may be reduced.

DE FACTO RELATIONSHIPS

From 1 December 2008, the Victorian *Relationships Act* replaces the *Property Law Act* and gives more substantial rights to the financially weaker party, including the person who has made a smaller financial contribution to the relationship. For example, that person's future needs can be taken into account which is a similar concept to what happens for separated married couples under the *Family Law Act*.

It is also anticipated that in 2009 the Federal Parliament will finalise legislation to bring de facto couples under the jurisdiction of the Family Court so that for all financial purposes they will be treated the same as married couples who separate. Again, this gives greater rights to the financially weaker person.

If the *Property Law Act* does not apply to a specific de facto relationship, it is still possible to apply for a property settlement under (unwritten) common law principles but the grounds for the application will tend to be more limited than under the *Property Law Act*.

Applications are made in the Supreme, County or Magistrates' Courts depending on the value of the property to be considered. This will change when these relationships come under the *Family Law Act*.

There are some complex legal issues for de facto partners, especially over the next few months as the new legislation applying to them comes into force. If a person separates from a de facto or domestic partner relationship they should urgently get legal advice in view of the changing legal environment.

CONCLUSION

Family law changes constantly. The government is considering a review at the moment and it is expected to recommend that the Family Court and the Federal Magistrates' Court merge into one Court. This will change procedures from the lawyers' point of view but probably not affect clients a great deal.

It remains the case however that family law clients need expert family law advice because the legal environment does not stand still. Even more importantly, these matters need to be handled with experience and sensitivity to take all the interests of the client into account and our team of experienced family lawyers do just this. If you as a potential referrer of a family law client would like to call for a "no obligation" chat about any family law matter we would be happy to hear from you.

Please note that the latest Family Law changes also appear in the updates to Peter Szabo and Stephen Winspear's *Family Law Practice Manual*. This is accessible at www.flpracman.com.au.

The Moores Legal Family Law Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team on (03) 9898 0000.

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DISCLAIMER: This Family Law Briefing is of a general nature only.
Specific legal advice should be sought rather than relying on this Briefing.