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Parenting Plans – Too simple?

New parenting Laws came into force under the Family Law Act on 1 July 2006. In particular, advisers are now required to inform clients that they "could consider" entering into a Parenting Plan to finalise children's issues. They are also required to tell clients where they can get further assistance in formulating a Parenting Plan.

The Parenting Plan is an agreement in writing which is dated and signed by the parents. It can include a third party like a grandparent, and it can include child support matters.

The government says that a Parenting Plan will enable parents to informally record their agreement in a way which would avoid the necessity for Court Orders. The idea is fine but there are some problems with it. The biggest problem is that the Parenting Plan is not legally binding. In other words, if someone breaches a Parenting Plan, they cannot be penalised by a Court for that breach.

Parenting Plans are most useful where the parties are relatively sensible and the chances of a breach or enforcement issue arising are low.

The obligated "adviser" includes legal practitioners, Court counsellors, "family dispute resolution practitioners" under the new law and anyone else involved in counselling or mediation with the couple outside the court system. Hence, many people are obliged to tell people about Parenting Plans and need to be aware of the pros and cons of a Parenting Plan. Clients should get legal advice about these matters, if in any doubt.

Collaborative Law is Taking Off!

As we mentioned in our previous Family Law Briefing, Collaborative Family Law is up and running. There are now 44 trained Collaborative Family Lawyers in Victoria.

Collaborative Family Law involves the two clients and their lawyers agreeing by a contract that they will not go to Court. This changes the negotiation dynamic. 95% of collaborations around the world settle during collaboration - a very high and satisfactory strike rate. Even cases of power imbalance can be appropriate for collaboration.

Stephen Winspear, Catherine Weir and Ellie Delafield of our office are trained in Collaborative Family Law and would be happy to act for any client through a collaborative process. They would also be happy to speak to you or your organisation about Collaborative Law, if you would like more information about it.

Family Law Training For You

We regularly present seminars to referrers – in your office or ours – on Family Law issues of interest and relevance to you. Whether you provide counselling, pastoral or welfare assistance or business or financial advice and services, we would be happy to run a seminar for you and your colleagues – at no cost.

Topics can be tailored to suit you, but may include:-

Immediate Separation Issues

- I'll just leave the kids with him for a couple of weeks...
- What if I leave the house?
- Surely he/she wouldn't draw on that line of credit?
- Kidnapping
- Injunctions – financial and children
- Violence – to Intervention Order or not to Intervention Order.

Financial

- Gambling, inheritances, Tattsлото (and other windfalls) in property cases
- It's my business/farm and my livelihood so I can't afford to give her/him half!
- When we marry I automatically get half of everything, don't I?
- Pre-Nuptial Agreements: insurance against an acrimonious separation
- Child Support Trusts and tax planning.

Children

- Overseas and the Hague Convention
- Can't he/she pop up to Broome to see the children? Relocation issues
- Parenting Plans
- 50/50 – or not? The new parenting laws
- Child support and maintenance.

Other

- Divorce
- If the marriage isn't consummated it can be annulled can't it?
- Collaborative Family Law: a guaranteed Court-free way to negotiate.

Please contact Stephen Winspear to discuss presentations on these or any other topics.

De Facto Couples Will All Be Married Soon!

I am sure the heading has got your attention - it is only a slight exaggeration.

The Commonwealth Government has just published legislation which is scheduled to go before Parliament early next year to govern the financial rights of de facto couples who separate. Previously the Commonwealth only had power over the financial rights of married and formerly married couples. The States have now given the Commonwealth the power to legislate over de facto couples - because many de facto couples live in long term relationships and produce children and there is often little to distinguish their relationships from traditional marriages.

The proposed legislation for de facto couples says that where a couple has lived in a de facto relationship for two years or they have a child together, all financial rights as between them shall be dealt with under the provisions of the Family Law Act in the same way as the Court determines the rights of married couples. The Court will be able to award a de facto wife or husband spousal maintenance in an appropriate case. The Court will be able to award amounts of money principally because one party is unable to work or has the responsibility to support children. These avenues were not available under the previous State laws governing de facto couples.

The effect of this is that for pretty much all legal purposes within Australia, de facto couples with a two year old relationship will have all the same rights as if they were married. The only legal distinction from marriage will be that they don't have a marriage certificate!

This is a dramatic social and legal shift. We wonder whether couples who currently enter into de facto relationships will regularly in future be separating after 23 months - a very de-stabilising thing to be happening.

Most significantly, there will be no legal incentive on a couple not to get married. Hence, this legislation may have the effect over time of increasing the marriage rate in Australia. Even now, people who are in de facto relationships or who are thinking of separating (or who have separated) should be getting advice about whether the new legislation will affect them: there is every chance it will.

An Informal Settlement is Dangerous – If you want to prevent a later Court application

W & T married in 1977 and separated in 1996. At that time they divided up their assets and the wife took about 90% of the assets of \$383,987.00. In 2002 the wife applied to Court for a property settlement because there had been no formalisation of their earlier settlement and no Consent Orders made by the Court to prevent further claims. The Trial came on for hearing in 2004 and at that time the three children were with the wife. Two of them were at university and one was in Year 7. She had been caring for them since separation with little child support having been paid.

At the time of Trial in 2004, the husband had \$1.6 million and the wife had \$800,000.00.

The Trial Judge decided that he had to work out whether the settlement was fair in 1997 because that was when they made a settlement between them. He decided that it was fair, especially since the wife had the small children and she got the lion's share of the assets. Accordingly, the Judge dismissed her application.

The wife appealed and went to a hearing before three Judges. They decided that the Trial Judge's approach was wrong. He should have assessed the fairness of the parties' circumstances as at the date of Trial, not at the date of informal settlement. The judge had not fully analysed the contributions the parties had each made since separation and had not fully analysed where their assets had come from and why or how their assets had grown since separation. Hence the Appeal Court sent the matter back to have another Trial to decide a fair settlement, based on the assets as at the date of the new Trial.

Comment: It is not uncommon for people to divide things up by agreement and not do anything formal to prevent any claim by the other side. This is perilous. If one party subsequently grows their assets then they can easily be open to another claim by the other party. On the other hand, the financially poorer party (perhaps desperately poor), can be advised to make a claim at a later date if they wish to.

A party wanting protection from further claims must get legal advice so that proper steps are taken to protect them.

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 on any Family Law matter, please contact a member of our Team

Stephen Winspear
Accredited Family Law Specialist (1989)
Head of our Family Law Team

Catherine Weir
Over 20 years experience and Partner
with our Family Law Team

Margaret Carney
Senior Lawyer & Accredited Family Law
Specialist

Sheryl Barker
Broad experience in Family Law and
General Litigation

Ellie Delafield
Broad experience in Family Law

Micheil Paton
Broad experience in Family Law

Katie Waldron
Broad experience in Family Law

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

If you would like to receive the Family Law Briefing electronically please forward your e-mail address to Lee Newnham, Marketing Manager, at lnewnham@mooreslegal.com.au

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