

INDEX

The vagaries of Family Law and property settlements 1

Family Law parenting matters - current issues in family violence cases..... 2

The vagaries of Family Law and property settlements

Family Law clients are often surprised to hear that there is no specific formula to determine each party's entitlement in a property division, unlike child support for example. There is good reason for this – every party to a relationship is different, every relationship is different and everyone's financial situation is different. The *Family Law Act* provides a four step process in determining a property settlement in marriage (and now in de facto relationships also):

Identify and value all the assets owned jointly or individually or on behalf of a client (ie trust or company)

Full financial disclosure is required by the Family Law Act. It does not matter in whose name an asset is held – it is all part of the asset pool to be considered and possibly divided.

Determine each party's contribution to those assets and the whole relationship

In a long relationship contributions are usually seen as equal. Usually one person has contributed more by way of financial contribution, and the other has contributed more by way of non-financial contribution in caring for children and maintaining the home. The Court most often treats each party's contributions as being equal.

Assess each party's future needs

The Family Law Act provides a list of factors to be taken into consideration such as relative responsibility for children, health, earning capacity, age and so on. Often there is a 10%, 15% or 20% adjustment to one party, for example, where they are the primary carer of the children and have a lower earning capacity.

Finally, consider whether this is "just and equitable"

In the fairly typical case of a long marriage, dependent children, wife a stay-at-home Mum (or part-time employee Mum), the husband with a good earning capacity and an asset pool of \$1,000,000.00, the wife may get 70%. With an asset pool of \$2,000,000.00 the wife may get 60% and with an asset pool of \$10,000,000.00 the division to the wife is more likely to be 50%. As you can appreciate, as the asset pool gets higher, there is less need to give the "poorer" party an adjustment above 50% to help them provide for their future.

<continued over>

Editorial

Welcome to the Family Law Briefing, a regular update from the Family Law team at Moores Legal.

In this issue we clarify current vagaries in property settlements. The subjectivity involved highlights the preference to resolve a property matter through collaboration, mediation or negotiation.

We also look at proposed amendments to the law as it deals with family violence issues.

If any of the matters raised in this briefing resonate with you or your clients, or if you would like to discuss a matter with us, we are ready to take your call.

Stephen Winspear
Principal, Family Law Group



Sheryl Barker
Senior Lawyer
Family Law

Sheryl practises extensively in all areas of family law and receives referrals from a wide variety of accountants, other legal firms, barristers, and counselling and welfare agencies.

Sheryl advises clients on divorce, parenting disputes, property settlements, related taxation and estate planning issues, child support matters, spousal maintenance; and de facto marriage disputes.



Laura Dobson
Lawyer
Family Law

Laura practises in both parenting and financial matters, including children's arrangements, property settlements, de facto relationship disputes, child support matters and financial agreements.

<from page 1>

Ironically, above \$10,000,000.00, if one person is responsible for the wealth, contributions may not be considered to be equal and the party with the entrepreneurial flair may be given credit for a greater contribution – essentially because their contribution is argued to be far above the norm.

At the end of the day when taking your matter to Court, you put the outcome of your property settlement in the hands of the Judge or Federal Magistrate on the day. The Family Law Act does not provide a formula, but gives the Judge or Federal Magistrate a process which he or she must apply. In theory they are objective. In practice, there is a good deal of subjectivity, and different judges will give different results. After all, what is just and equitable to one, may not be to another. That is good incentive to resolve a property matter through collaboration, mediation or negotiation. Or enter into a prenuptial binding financial agreement and avoid Court altogether.

Do ask us about the alternative, and least stressful, ways of resolving these matters.

Sheryl Barker
Senior Lawyer

Family Law parenting matters - current issues in family violence cases

The *Family Law Legislation Amendment (Family Violence and Other Measures) Bill of 2011* ("2011 Bill") has recently entered the parliamentary process and is expected to impact the way family violence issues are dealt with in Family Law proceedings.

A key issue in family violence cases involving children has been the tension between protecting a child from a violent or abusive parent and the provisions in section 60CC(3)(c) of the *Family Law Act 1975* (Cth). This section, termed the "family friendly provision", states that the law must consider "the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent." This provision has meant that lawyers have had to be careful about recommending that a client refuse the other parent all contact with the child, even if the reason for doing so is the protection of that child.

The new 2011 Bill repeals the "family friendly provision" and replaces it with sub-paragraph (ca), which states that the Court is merely to take into account "the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to the child". The 2011 Bill also inserts a new sub-section 60CC(2A) which states that, in the event of inconsistency between the principle of a child having a meaningful relationship with both parents and the need to protect a child at risk of violence and abuse, greater weight must be given by the Court to the need to protect a child from the abuse or family violence.

<continued over>

<from page 2>

Another change included in the Bill relates to the requirement for compulsory mediation before going to court. It is compulsory for clients to attend mediation before being permitted to commence parenting proceedings, except in cases of family violence. This obligation will be easier to avoid now because of the expanded definition of family violence in the 2011 Bill.

The definition of family violence will now include, among other things: stalking, repeated derogatory taunts, intentionally damaging property, unreasonably withholding financial support or preventing a family member from keeping connections with family, friends or culture.

It remains to be seen what practical impact the 2011 Bill will have on parenting matters involving allegations of Family Violence. It does appear, however, that the intent is to set out the considerations for the Court in a more thorough way so as to ensure that no aspect of violence, abusive or coercive behaviour is overlooked.

Laura Dobson
Lawyer

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.

Stephen Winspear

Principal
Accredited Family Law Specialist (1989)
Tel: 9843 2129
Email: swinspear@mooreslegal.com.au

Peter Szabo

Principal
Accredited Family Law Specialist (1989)
Tel: 9843 2145
Email: pszabo@mooreslegal.com.au

Margaret Carney

Senior Lawyer
Accredited Family Law Specialist
Tel: 9843 2129
Email: mcarney@mooreslegal.com.au

Helen Matthews

Senior Lawyer
Accredited Family Law Specialist
Tel: 9843 2114
Email: hmatthews@mooreslegal.com.au

Greg Oliver

Senior Lawyer
Tel: 9843 2106
Email: goliver@mooreslegal.com.au

Sheryl Barker

Senior Lawyer
Tel: 9843 0415
Email: sbarker@mooreslegal.com.au

Lara Guarino

Lawyer
Tel: 9843 2145
Email: lguarino@mooreslegal.com.au

Julia Dickson

Lawyer
Tel: 9843 2114
Email: jdickson@mooreslegal.com.au

Stragen Foo

Lawyer
Tel: 9843 0405
Email: sfoo@mooreslegal.com.au

Paul Pallot

Lawyer
Tel: 9843 2106
Email: ppallot@mooreslegal.com.au

Laura Dobson

Lawyer
Tel: 9843 0405
Email: ldobson@mooreslegal.com.au

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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

9 Prospect St. Box Hill Vic. 3128
12/1140 Nepean Hwy. Mornington Vic. 3931
Tel: [03] 9898 0000 Fax: [03] 9898 0333
info@mooreslegal.com.au
www.mooreslegal.com.au

MOORESLEGAL