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This Family Law Briefing looks at some practical issues confronting those going through the family law process such as:

- The financial upheaval of the breakdown of the marriage of the proprietors of a business; and
- Providing evidence as to what is best for the children in a family breakdown.

It also looks at recent developments in Family Law:

- The impending merger of the Family Court and the Federal Magistrates' Court to simplify the court processes; and
- The new law which causes all de facto couples to be married...

The Less Adversarial Trial process dealing with unresolved parenting arrangements is also explained.

How Accountants Can Preserve Their Clients...

A concern for accountants and financial advisers arises when a business for which they act goes through the upheaval caused by the breakdown of the marriage of its proprietors. The proprietors may be partners in the family business, shareholders of the family company or joint trustees of the family trust which operates the business – the family law problems are equally serious.

If the adviser favours one client after the separation, they can have serious legal and ethical problems with the other client who has an equal right to instruct them and to obtain information from them.

In these circumstances, we recommend that accountants and financial advisers send their clients to trained collaborative family lawyers. The emphasis is on interest based and constructive negotiation aiming at all times to come to a reasonable conclusion which can be accepted by both parties and which avoids Court.

In this way, the financial adviser should avoid being caught in the “cross fire” because of the sensible and conciliatory process of collaborative family law. Stephen Winspear, Peter Szabo and Helen Matthews of our office are trained in the process of collaborative law which commences with the parties signing an agreement not to go to court. A list of other trained collaborative lawyers is available on the website of the Law Institute of Victoria.

If you would like to discuss collaborative law with us please call.

Stephen Winspear

Principal, Head, Family Law Group

Merger of Family Courts

At present, people going through family law disputes have a choice between the Family Court and the Federal Magistrates' Court as to where their court case is to be heard. In theory the “complex” cases are heard in the Family Court but in practice there is uncertainty sometimes about which Court should hear particular cases.

The Government has now decided to remove the problem by merging the two courts. The Opposition interestingly has said that they oppose the change (for no obvious reason apart from the fact that that is what oppositions do).

We expect that this change will happen in the next three to six months. It may not have much impact on clients but it will simplify the court processes further in the difficult family law domain.

Stephen Winspear

Principal

The Family Report

Who knows what is best for children? In cases that go to Court, we trust it is the Judges and Federal Magistrates. But before deciding, they need **evidence**, and the best evidence is often a Family Report, prepared by an independent expert, either a psychologist or social worker, who is an expert on child development issues and family dynamics.

The Family Reporter is attached to the Court or in private practice and privately funded.

A Family Report prepared by a Reporter in private practice costs between \$2,000.00 and \$4,000.00 including GST. The fee is usually shared equally by the parties to the proceedings, usually the child's parents. Helpfully, the parties can jointly choose who will prepare the Report and it is often prepared within a few weeks of proceedings beginning. Frequently the recommendations in a Report are accepted by the parties and their dispute ends early. This obviously reduces litigation costs.

What does a Family Reporter look at? Basically, at the same issues that the Court looks at. The Reporter, interviewing the parents and the children, individually or in different combinations, takes into account any views expressed by the children about their living arrangements, bearing in mind the children's maturity and level of understanding. Critically, they are expert at seeing behind the words, reading the body language and getting to the depths of the issues. The observed relationship between the children and the parents: warmth, ease, age appropriate communication, etc are all very important.

Before interviews commence, all the Court documents relating to the children should have been read by the Reporter. He or she may also gain information by telephoning school teachers, doctors, psychologists, social workers and any other people who have special knowledge about the children.

The factors to consider include:

- The nature of the children's relationship with each of their parents and any other relevant persons such as step parents, grandparents or siblings.
- The willingness and ability of each of the children's parents to facilitate and encourage a continuing relationship between the children and the other parent.
- The likely effect of any change in the children's circumstances.
- The capacity of each of the children's parents or any other person (such as a step parent or grandparent) to provide for the needs of the children, including their emotional and intellectual needs.
- The attitude of parents to the responsibilities of parenthood. It is common for a Family Reporter to find that one parent is prioritising his or her needs above those of the children.
- Family violence is always carefully looked at.
- The cultural background of the family.

Sometimes a Reporter will identify a specific problem and recommend therapy for an individual child or parent or the family as a whole.

If an early Family Report does not resolve a parenting dispute, an updated Report may be organised just before trial. Similarly, if there has been a significant change in family circumstances (such as a long term change in the primary carer of one or more children) an updated Report should be organised.

A Family Report is powerful evidence in Court proceedings but is not, of course, infallible. The recommendations in a Report can be challenged. One way this occurs is through cross-examination of the Family Reporter at a trial – and it is not uncommon, though it is relatively unusual, for a judge to make a decision quite different to the Reporter's recommendations.

A Family Report is also not compulsory. However, it is a frequently used source of evidence in litigation over children. One should be considered early in proceedings.

Margaret Carney
Senior Lawyer

De Facto Couples Are Now Married...

On 1 March 2009, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* commenced. This Act allows opposite sex and same sex de facto couples (domestic partners) to access the Federal Family Law Courts about property and maintenance issues after the breakdown of their relationships and effectively gives them the same rights as married couples.

A de facto relationship is defined in the *Family Law Act* as a relationship where two people who are not married or related by family live together on a genuine domestic basis. All circumstances of a parties' relationship will determine whether a de facto relationship exists for the purposes of the new laws. These circumstances include:

- the duration of the relationship.
- the degree of financial dependence or interdependence.
- the ownership, use and acquisition of property.
- the care and support of children.
- the degree of mutual commitment to a shared life.

The new laws introduce big changes, namely:

- de facto couples may now enter into binding financial agreements either before, during or at the end of their relationship which define their property distribution and maintenance rights if the relationship breaks down.
- the superannuation of each partner can now be split so that part of the policy of one party goes to the other after separation.
- a de facto spouse can claim ongoing spousal maintenance from the other if unable to support themselves without a Centrelink benefit.

The new laws apply to those relationships that break down after 1 March 2009 and applications for property settlement must be made within two years of the relationship ending. Couples who separate before 1 March 2009 can choose to opt into the new legislation, provided they both agree.

De facto couples are now being treated like married couples on separation. This is good news for the financially weaker party who often got a bad deal under the old State laws. On the other hand, the wealthier partner will probably pay out more under the new law. These issues are complex and de facto spouses should obtain legal advice as soon as possible after the break down of their relationship.

Julia Frigo
Lawyer

Less Adversarial Trials

People disputing over parenting arrangements for children are required to "make a genuine effort" to resolve their dispute by attending a Family Dispute Resolution practitioner prior to commencing legal proceedings. If the matter remains unresolved an application may be made to the Family Court or the Federal Magistrates' Court for parenting orders. A children's matter which is heard in the Family Court of Australia proceeds as a Less Adversarial Trial ("LAT"). The LAT process is radically different to our traditional, adversarial Court processes.

On the first day the matter comes on before the Court a registrar of the Court will refer the parties and the children to a family consultant to be interviewed for the purpose of the consultant providing a report to the Court. The registrar will also allocate the matter to a judge for trial.

The parties to the proceedings complete a parenting questionnaire, expressing in their own words relevant matters about the present arrangements for the children and their proposals for any change.

The first day of the LAT before the Judge is the official commencement of the trial, but does not involve the formal giving or testing of evidence. Both parties are sworn in and are invited to speak directly to the Court from the bar table where their legal representatives are also seated. The parties are on oath, but are not being questioned by their lawyers or cross-examined. Rather, they are asked to express their concerns and indicate to the judge those matters which are important to them. (Lawyers find this challenging as there is little control over what a client may say. On the other hand, the Judge gets a better chance of understanding what is really

important to the parties – and what he or she thinks of them!) At this stage, the judge has not commenced hearing all the evidence or determining facts. The judge is trying to identify and narrow the areas of dispute. The judge usually also hears from the family consultant who has seen the family. As the real issues in dispute are identified, the possibility of reaching agreement or settlement increases. If the matter remains unresolved, directions will be made for the further required legal steps, such as obtaining reports, filing affidavits, identifying witnesses, and the matter is then listed for further hearing. As the trial has officially commenced and to ensure greater continuity, the same judge will continue to preside over the further hearing of the matter.

By the time the matter is next in Court the parties should have filed all affidavits and documents upon which they wish to rely. While the conduct of the proceedings is still at the discretion of the judge and there may be less formality, generally the case can be expected to proceed in the manner of most trials. Evidence is given and witnesses are cross-examined.

How each LAT will run will vary from judge to judge and matter to matter. The aim is to keep the trial child focussed through the involvement of the family consultant and by having the judge direct the proceedings, rather than the parties through their lawyers as is the traditional adversarial approach. Parties are more involved in the process than previously, and research indicates much more satisfaction with this process by clients going through it, as compared with the traditional process.

Helen Matthews
Senior Lawyer

Our Family Law Department

Our department continues to grow with the appointment of a further lawyer, Julia Frigo. Julia has spent several years working in a small firm before moving to us recently to continue her enthusiastic specialisation in family law. Our department now totals 15, including principals Stephen Winspear and Peter Szabo and senior lawyers, Margaret Carney and Helen Matthews.

We handle large or small matters with a range of fee scales depending on the nature of the client's matter.

Please note that the latest Family Law changes also appear in the updates to Peter Szabo and Stephen Winspear's *Family Law Practice Manual*, 6th Edition. This is accessible at www.smokeball.com.au/familylawmanual.

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.

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

Peter Szabo
Accredited Family Law Specialist (1989)
and Principal with our Family Law Team

Margaret Carney
Senior Lawyer and Accredited Family
Law Specialist

Helen Matthews
Senior Lawyer
Family Law

Greg Oliver
Lawyer
Family Law

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Family Law

Lara Guarino
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Lawyer
Family Law

Katie Waldron
Broad experience in Family Law

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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.

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