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Family Law Solutions

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CHANGING TIMES

FROM THE TEAM AT CALLEY FAMILY LAWYERS, WELCOME TO THE WINTER EDITION OF FAMILY LAW SOLUTIONS. AS THE AIR GETS COLDER, THE TREES SHED THEIR LEAVES AND THE NIGHTS SEEM LONGER, SEASONAL CHANGE IS CLEARLY AFOOT.

There is also significant change mooted in the family law realm. Many of our readers have no doubt heard about the issue of marriage equality. What is this about and how does it affect Australia?

As the law currently stands, it is not possible for a same sex couple to marry in Australia. Same sex partners can be legally-considered de facto partners and are able to enter civil unions however this does not automatically entitle participants to the rights conferred on married couples.

The Commonwealth legislation which prescribes the requirements of marriage in Australia, the Marriage Act 1961 is very clear in defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (section 5). The definition borrows largely from the words of Lord Penzance in the case of Hyde v Hyde and Woodmansee heard before the English Court of Probate and Divorce in 1866!

In recent years, legislators have also fortified the Marriage Act 1961 to prevent same sex marriages solemnised in foreign countries from being recognised in Australia.

Why is there now a push for marriage equality?

In recent years, opinion polls have suggested that a majority of Australians favour marriage amongst same sex couples. A Galaxy poll conducted in May 2011 indicted that 75 percent of Australians believe that marriage equality is inevitable.

A number of reasons have been proffered namely, the rising mainstream acceptance of same sex relationships, the declining participation rates of Christian-based faiths and an increase in the number of de facto relationships.

In 2013 the Australian Capital Territory attempted to subvert the Commonwealth Marriage Act by introducing its own Marriage Equality Act to allow for same sex marriages to take place in the ACT. The Federal Government challenged the validity of the legislation and it was torpedoed on constitutional grounds by the High Court of Australia.

Earlier this year, Ireland, a country known to be a bastion of Catholic conservatism embraced same sex marriage via a referendum put to its voters. For advocates of marriage equality this proved to be a watershed moment.

At the present time, the Australian media and legislators have placed marriage equality high on the national agenda. The Federal Opposition has recently introduced a Marriage Equality bill to spark parliamentary debate on the issue at the forthcoming Spring sittings.

Whatever your view, it seems that the issue will not die down. Discussion will focus on whether same sex marriage should be determined by elected representatives in the national parliament or whether the matter should be dealt with directly by voters via a plebiscite. Stay tuned!

Having highlighted the remarkable work of 2015 Australian of the Year, Rosie Batty in the previous edition of Family Law Solutions, it was with great excitement that our Firm Principal, Vic Rajah was afforded the opportunity to meet with Ms Batty.

Despite her personal pain, she continues to tirelessly highlight the scourge of family violence in Australia and is focussed on effecting positive change in this area.

"Meeting with Ms Batty and discussing her vision was an absolute privilege. All Australians should be inspired by this amazing individual" said Mr Rajah.

Calley Family Lawyers is committed to ensuring that our clients receive top shelf service and the support required to negotiate the often challenging nature of family law situations. Every case is different and tailored advice and strategies recognise each client's diverse needs and expectations.

Your support and ongoing confidence in Calley Family Lawyers is greatly appreciated. We are always keen to develop and strengthen our collaborative partnerships and Vic and his team look forward to assisting your friends, family and associates with your family law needs.

WHAT IS THE COURT'S ATTITUDE TO BIG MONEY CASES?

ARE CASES INVOLVING LARGE ASSET POOLS (E.G. > $10 MILLION) TREATED DIFFERENTLY FROM "GARDEN VARIETY" PROPERTY SETTLEMENT CASES?

This question has challenged courts for a number of years. The landmark case of Ferraro and Ferraro which was heard by the Full Court of the Family Court in 1993

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gave rise to the "special skills" doctrine.

Put simply, the "special skills" doctrine limits the notion of marriage as equal partnership in cases where one party, usually the husband has generated significant economic wealth. For many years, property settlements that involved significant economic assets – often referred to as "big money" cases – were typically dealt with as a distinct category of property settlement cases. In such cases, the significant wealth accumulated through entrepreneurial business activity was viewed as the sole product of the husband's skill. In recognition of his "special skills", the husband typically received a larger portion of the assets.

Mr and Mrs Ferraro had been married for 27 years and had accumulated a large asset pool of just over $10 million. Although the wealth of the parties had been obtained during the course of the marriage, the Court took the view that it was due to the husband's business acumen and entrepreneurial skills. His "ingenuity" and "enterprise" had produced substantial assets. This led to a lopsided division of the assets in Mr Ferraro's favour.

Whilst there has been much debate about the appropriateness of the outcome in Ferraro's case and the potential undervaluing of homemaker and parenting contributions the issue has gained greater significance in recent times with the increase in multi-millionaire couples.

The treatment of the "special skills" doctrine has recently been re-considered by the Full Court of the Family Court in the 2014 case of Hoffman and Hoffman.

For almost 40 years, the Hoffman's shared their lives, raising four children and accumulating significant assets. When they split, Mr Hoffman argued that he should receive 70% of their $10 million assets because it was his "special skills" and "entrepreneurial flair" that had created their collective wealth. Although Mrs Hoffman was primarily responsible for raising their four children and engaged in paid work at various stages throughout the marriage, Mr Hoffman asserted that she should receive a smaller portion of the assets as she was "indifferent" to his money-making ventures, preferring to "play mah-jong and read books". To support his case, Mr Hoffman relied on the "special skills" doctrine.

The Full Court in Hoffman v Hoffman did not agree. The approach adopted suggests a partial abandonment of the notion of "special skills". The court determined that the contributions of each party to the marriage must be assessed on a case-by-case basis, with no special rule applying to big money cases. It can thus no longer be said that the presence of "big money", in itself, supports a different approach to judicial decision-making. However, the "case-by-case" approach does not preclude the recognition of "special skills" where appropriate. It is therefore still possible that the party with the special skills may receive a larger portion of the property.

So what can we make of "big money" cases after Hoffman? Perhaps most importantly, we can no longer say that "big money" cases are dealt with differently than any other property dispute. Rather, every case turns on its own facts. Contributions must be assessed and compared, even if such a task is, as the Federal Magistrate in Hoffman noted, "a comparison of apples and oranges". However, post-Hoffman, it is still open to the Court, when it assesses the contributions of the parties, to take into account the "special skills" of one of the spouses and reward him or her accordingly.

MOVING WITH CHILDREN IN SEPARATION – HOW EASY IS IT TO RELOCATE?

AFTER PARENTS SEPARATE, IT IS NOT UNCOMMON FOR ONE OF THEM TO WANT TO MOVE. IT MAY BE THAT THEY WISH TO BE CLOSER TO FAMILY, WANT TO MOVE IN WITH A NEW PARTNER, OR WANT TO TAKE UP A NEW JOB OPPORTUNITY. BUT WHAT HAPPENS IF PARENTS SHARE THE CARE OF THEIR CHILDREN AND MOVING MIGHT MAKE IT DIFFICULT FOR THE CARE ARRANGEMENTS TO CONTINUE? WILL THE MOVE BE ALLOWED?

Relocation cases are amongst the most difficult in family law, particularly in circumstances where both parents are substantially involved in the child's life. A parent may have a very good reason for wanting to move, but courts over a number of years have determined that the interests of the child are paramount. Ultimately, decisions are made on a case-by-case basis, where the judge must decide what is in the best interests of the child, which may mean that a parent's interests take a back seat.

If a parent with the primary care of the child wishes to move whether that be to a new setting (which makes the existing care arrangement impracticable), interstate or overseas he or she must apply to the Family Court or Federal Circuit Court for permission. The child's non-relocating parent may respond by applying for orders restraining the move from taking place.

Because of the increased emphasis in the Family Law Act on both parents having an ongoing, significant involvement in their child's life, obtaining permission to move has become increasingly difficult. This is despite the increased prevalence of cheaper travel options and the ready availability of electronic communication such as Skype which has arguably reduced the difficulty and cost of maintaining relationships across distance.

How do judges make relocation decisions? There are no specific provisions in the Family Law Act dealing with relocation which means that relocation decision are made on the basis of the best interests of the child. However, the Full Court held in the 2009 case of McCall v Clark that while there is no presumption in favour of or against relocation, if equal shared parental responsibility has been awarded in a case involving an application for relocation, the court must still consider making orders for equal or substantial and significant time with both parents. The effect of this decision is that by permitting a relocation this could significantly reduce the time that a child spends with a parent. Accordingly, making the move may not be in the child's best interest.

Several key factors have emerged over the years in influencing Courts. These include the distance of the move, the reasons for the relocation, how contact might be continued despite the move, and the presence of family violence.

It is very difficult however, to predict the outcome of a potential relocation case. For example, despite travel being a real challenge to ongoing contact, in 2013 a mother was permitted to relocate to the United States (her country of origin) because she was lonely and isolated in Australia, had been diagnosed with depression, was unable to find employment, and wished to be closer to family and friends in the United States. Thus, despite the enormous distance, the court concluded that if the mother were forced to stay in Australia it would further damage her mental health, which would not be in her child's best interests (Hunt v Planey [2013] FamCAFC 160).

At Calley Family Lawyers, we have assisted many parents to relocate and to prevent relocations from taking place over a number of years. If you or your contacts are contemplating relocating, or are seeking to prevent a parent from relocating, you should seek advice from one of our experts.