

EDITION 6. AUTUMN 2017

SAFEGUARDING THE RIGHTS OF CHILDREN

WELCOME TO 2017. FROM THE TEAM AT CALLEY RAJAH FAMILY LAWYERS, WE WISH YOU ALL THE BEST FOR A HEALTHY AND PROSPEROUS YEAR AHEAD.

Welcome to 2017. From the team at Calley Rajah Family Lawyers, we wish you all the best for a healthy and prosperous year ahead. In the blink of an eye, we are already approaching Easter! It is hard to believe given the beautiful warm and sunny autumnal weather we have been experiencing in Melbourne.

As many of you are aware, Calley Rajah Family Lawyers has fortified its presence as the leading provider of family law services in Melbourne's bayside region with the opening of new offices in Mt Eliza and Braeside. Our Collins Street practice remains in full operation meaning that we are able to continue to service our broad network of clients.

Our Firm Principal, Vic Rajah was recently appointed to the role of Deputy Chair of Bestchance, a leading not-for-profit Organisation which delivers a range of programs which include Family Day Care, Kindergarten, Child Care, Early Childhood Intervention, Parent and Child Support, Training, Community Support and Cheshire - an independent primary school for children with social, emotional and learning difficulties.

Bestchance which employs over 600 staff and has an annual turnover in excess of \$30m recognises that the early years of a child's life are the most formative and influential and the organisation strives to adhere to the principles of 'best practice'. This commitment ensures that families are, at all times, respected as the experts on their children and supported in an environment that is strength based and family centred.

Through his association with Bestchance, Vic has enhanced his practice as an expert family lawyer. He has had the opportunity to liaise with the National Children's Commissioner, Megan Mitchell and key figures in the area of

family violence, namely, Prue Cameron, the Senior Policy Advisor with Domestic Violence Victoria and Maya Avdibegovic, the CEO of InTouch Multicultural Centre Against Family Violence.

Megan Mitchell is a high profile advocate for the rights of children across Australia. She has been instrumental in promoting the voice of children in the decision making of judges and legislators. Ms Mitchell cites the United Nations Convention on the Rights of the Child ('the Convention') as her compass. Essentially, the Convention is a roadmap which seeks to ensure the safety and belonging of children worldwide. Australia ratified the Convention in 1990.

Ms Mitchell has a keen interest in family law and its impact on children. Whilst there is support for giving children a voice in family law, she has observed that there is a significant gap between the 'principle' of participation and 'how it is put in practice'.

In referring to the Convention, Ms Mitchell noted that Article 12 requires that: A child who is capable of forming his or her own views has the right to express those views freely on all matters affecting the child and that they be given due weight in accordance with the child's age and maturity. Article 9 which refers specifically to parental separation and a child's place of residence states that all interested parties shall be given an opportunity to participate in proceedings and make their views known.

In Australian family law proceedings it is rare to hear directly from children. This is usually accomplished through the use of Family Consultants (Court-engaged counsellors / psychologists) or Independent Children's Lawyers (a lawyer appointed to reflect the best interests of the child). Anecdotal studies conducted by the Australian Institute of Family Studies reveal that Independent Children's Lawyers rarely meet with the child/ren and child/ren who have had the opportunity to meet with them and or Family Consultants are often "disappointed" by the process.

There is a widespread perception that by involving children in adversarial family law proceedings this will be harmful to them. There is also the threat of 'parental coaching'.

Ms Mitchell has identified a number of studies in which the idea of 'having a say' has a great level of



ABOVE : VIC RAJAH WITH MEGAN MITCHELL

support amongst its youth participants. This does not necessarily equate to children being involved in the decision-making process but empowering them to be involved or not to be if that is their wish.

The paramount principle underpinning family law parenting proceedings is the best interests of the child/ren. According to Ms Mitchell, inherent in this is providing a forum for children to express their views about their living and spend time arrangements and providing a suitable environment for this to happen.

The 2014 Children's Rights Report identified intentional self-harm, and family and domestic violence as being areas requiring further research and focus.

The awful passing of Luke Batty at the hands of his estranged father drew national attention to the issue thanks largely to the tireless efforts of his mother, Rosie Batty, the 2015 Australian of the Year.

Data reveals that 1 in 12 men and women experienced physical abuse and one in 28 experienced sexual abuse by a family member before the age of 15. Moreover, studies have estimated that over 20% of children have witnessed violence against a mother or step mother. Quite inexplicably, 18% of women who experience family violence do so for the first time while pregnant.

According to Maya Avdibegovic, the most dangerous time for women and children is when they are preparing to leave or have recently left an abusive relationship.

Reporting family violence remains a great challenge for affected family members and in particular for those from migrant communities due to factors including: language difficulties, a cultural reluctance to talk about domestic

T : 03 9781 4222

F : 03 9781 3850

E : CALLEY@CALLEYFAMILYLAW.COM.AU

W : WWW.CALLEYFAMILYLAW.COM.AU

CITY OFFICE

LEVEL 17

459 COLLINS STREET

MELBOURNE, VICTORIA 3000

PENINSULA OFFICE

1-3 DAVIES AVENUE

MT ELIZA,

VICTORIA 3930

BRAESIDE OFFICE

GROUND FLOOR

232 BOUNDARY ROAD

BRAESIDE, VICTORIA 3195

issues and the fear of having an abuser spouse / father punished.

It is well-established that exposure to family violence can have significant negative impacts on the developmental trajectory of children (including in utero) and has been directly linked to mood and personality disorders, impaired cognitive functioning and learning, antisocial and aggressive behaviours, heightened anxiety and pervasive fear.

The largely female victims themselves are likely to experience emotional impacts (including fear, shock, anger, depression, mental exhaustion, low self-esteem and shame), cognitive impacts (inability to concentrate, confusion, impaired daily functioning, flashbacks), biological impacts (sleep disturbance, nightmares, psychosomatic symptoms) and behavioural impacts (social withdrawal, substance abuse, eating disorders, parenting difficulties).

Family violence has major adverse effects on its victims and legislators are now becoming more informed about the impact that this is having on society. Awareness campaigns and better programs for victims are being implemented however as family law specialists, we are equipped to assist clients who are in the throes of painful separations or are contemplating leaving abusive relationships.



ABOVE : VIC RAJAH AND THE HONOURABLE JENNY MIKAKOS MP



VALUING BUSINESS INTERESTS IN PROPERTY SETTLEMENT MATTERS

BUSINESS VALUATIONS IN FAMILY LAW MATTERS ARE BECOMING INCREASINGLY IMPORTANT IN DETERMINING THE DIVISION OF MATRIMONIAL AND DE FACTO RELATIONSHIP PROPERTY.

A business as defined in the International Glossary of business valuation terms is a "commercial, industrial, service or investment entity (or combination thereof) pursuing an economic activity."

Many family businesses are conducted via corporate entities and discretionary family trusts for a number of reasons including tax minimisation and limitation of personal liability. As individuals become acutely business savvy and place

greater reliance on the advice of their accountants and financial advisors, traditional approaches such as partnerships and sole trading set-ups have diminished in operation over the past few decades.

The issue of how to value a business (which will usually be retained by one of the parties) remains a critical factor in most property settlement negotiations.

In many cases, one party may have an active role in the day-to-day running of the business and it is not uncommon for the less-involved spouse to be an 'on-paper' director or shareholder of the business.

Parties may seek the assistance of their accountant or alternatively, rely on the advice of business brokers focussed on 'comparable sales' or obtain industry 'rule of thumb' information in attempting to find a cost-effective way of valuing the business. All of these approaches entail significant risk and may result in grossly-inaccurate outcomes to the disadvantage of one or both parties. The independence of the parties' accountant may also be called into question particularly if one spouse maintains a closer working relationship.

In most negotiations involving lawyers and in litigated proceedings, an independent valuer at arms length to both parties is appointed to determine the value of the business. The valuer is known as an 'expert' as he or she maintains "specialised knowledge based on the person's training, study or experience."

Tony Natoli, a director of PPB Advisory states that "forensic accountants are familiar with the litigation support process including providing expert testimony. You don't know what you don't know. Many people accept the valuation without questioning and as a result many poor reports slip through the net. 'Trusted advisors' that have looked after the parties for a long period of time have a conflict of interest and should not do the independent valuation."

In the Family Court it is a requirement that a 'single expert' provide expert evidence although a party may apply to the Court to adduce evidence from a 'shadow' expert if there is a substantial body of opinion contrary to any opinion given by the single expert, another witness knows of matters not known to the single expert or there is another special reason for adducing evidence from another expert.

In the Federal Circuit Court where most family law cases are heard, there is no requirement that a single expert needs to be appointed. Lawyers however have pragmatically adopted this approach to save clients the cost of appointing 'competing' experts and to achieve valuations from an impartial expert which will be more likely to be adopted by both parties.

Darryn Hockley, a Partner at Grant Thornton notes that a single expert appointment can be beneficial if the expert is "appropriately qualified with relevant industry insight and knowledge". This will generally lead to a "robust and reliable valuation report." He does note however that a limitation exists which is the expert brings only one view or opinion as to value. He acknowledges that, "the opinion provided is based upon their understanding of the business, the industry and the financial information provided

to them. Any misinterpretation of these areas may lead to an incorrect valuation conclusion."

The majority of businesses which require valuation in family law settings are small (turnover of less than \$2m per annum) to medium enterprises. The most common valuation methodologies adopted are the income based or asset based approaches.

The income based approach determines the value based on the expected returns from the business and the required rate of return thereon. The capitalisation of maintainable earnings is the most common approach and is generally adopted if the business is a going concern and has stable future earnings. It is not appropriate if the business is a start-up or is not sufficiently profitable or the entity is a holding company.

Valuations of small to medium enterprises are generally based on a multiple of maintainable earnings commonly referred to as earnings before interest and tax (EBIT) or earnings before interest, tax, depreciation and amortisation (EBITDA). The multiple is known as the capitalisation rate and is determined by the Expert who must factor in the risks associated with generating the maintainable earnings along with current industry trends and growth applicable to the relevant sector.

The asset based approach determines the value having regard to the market value of the tangible assets and liabilities of the business. It essentially considers what the business would be worth today if it was liquidated. There is no regard for goodwill under this approach which is the difference between the true value of the business and the net value of its assets. This may be a crucial factor in the valuation of retail and service-based businesses.

Business valuations for family law purposes are generally determined according to a market-based approach which is defined as "the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction, after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion."

Business valuations involve careful consideration and at Calley Rajah Family Lawyers we work with highly-credentialed forensic accountants to achieve the most accurate outcomes for our clients and their spouses.

Valuing a business is an essential step in many cases and thereafter determining how the business is to fit into the subsequent asset division requires specialist legal advice. Most businesses are retained by one spouse meaning that the other spouse needs to be removed from the business which may involve drafting indemnities, transferring shares, relinquishing entitlements and resigning directorships. Restraint of trade provisions and non-competing agreements may also need to be considered where the non-retaining spouse could be a potential competitor in the marketplace.

The team at Calley Rajah Family Lawyers are highly-experienced in dealing with complex business and commercial structures and are able to work with clients to guide them through their property settlement negotiations.