FAMILY Flyer

THIS ISSUE -

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CAN RELOCATION BE "URGENT"?

What Court Application is "urgent"? It's a question that the Family Court struggles with every day.

The Court has the discretion to determine matters on an "urgent" basis if the circumstances require it. This generally means that the Court will need to make a decision without having had the opportunity of considering all the evidence. For that reason, it is only those cases that are clearly urgent that will be given such treatment.

Recently, the Court heard an application brought by the Mother of two young children, seeking an urgent order allowing her to move from Bundaberg to remote central Queensland in order to secure a higher position with her employer and significantly increase her salary.

For the previous 2 years the children had been spending 4 nights per fortnight and half of all school holidays with the Father. If the Mother was allowed to relocate, the Father's fortnightly time would have been impossible.

The Court declined to make an "urgent" order, stating that "*There was so much evidence lacking that it would be quite wrong to make an interim relocation decision….without proper and full evidence before the Court".*

The Court went on to say that a mere employment opportunity alone does not meet the need for an urgent hearing, noting that the Mother could still begin her new job and the children could live with the Father until the matter could be properly decided.

IMPORTANCE OF MAKING PROPERTY AGREEMENTS FORMAL

When parties separate on what appears to be amicable terms, there is often a reluctance to involve lawyers or the Court, and as a result informal agreements are reached detailing how matrimonial property is to be divided.

But what are the consequences of failing to formalise your agreement?

Agreements which relate to the division of matrimonial property, or the payment of spouse maintenance can only be enforced if they comply with the strict requirements of the Family Law Act and are documented in the correct way. While the cost involved in preparing such documentation may appear onerous at the time, a recent case demonstrates how important it is to take that extra step.

Facts:

- Parties were married for 22 years;
- 4 adult children;
- Modest asset pool.

At the time of separation, the parties came to an informal agreement, which they intended to be binding on them, even though they did not seek legal advice or otherwise attempt to formalise the agreement in any way.

As there was no documented agreement (i.e. either a Consent Order of a Financial Agreement), the husband

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having lost most of the property he had, made a Court Application claiming that there had been no previous settlement or Agreement.

It was the wife's case that the initial agreement provided for the husband to receive about 45% and the wife about 55%.

Although the Court found that the wife was an excellent witness and did not doubt that the agreement existed, it did not change the fact that the agreement was not formalised and therefore not binding as a matter of law.

The Court found that the parties positions had changed radically in the 6 years since the informal agreement however the final order resulted in the wife losing more of the property she had initially received.

DOES "FINAL" MEAN "FINAL?

In a recent Final Hearing, the Court declined to make 'Final Orders'. This is unusual because it was not sought by either parent.

The case related to the parenting arrangements for a 4 year old child. The Mother sought Orders limiting the Father's time with the child to one day each week from 10am to 5pm. The Father proposed overnight time for one night each week.

Facts:

- Father was unrepresented at trial and used an interpreter.
- The Father had only had limited contact with the child and for the 18 months prior to the Application, had had no contact with the child.
- The Father had depression, for which he received counselling but he was not on any medication.
- The Mother said the Father had been violent when they were married and that the Father had a limited capacity to care for the child for an extended period of time.

Court Found:

- After considering the family report and the Father's evidence, the Mother had valid concerns.
- The Court did not want to deliver Final Orders which would mean the Father would never have overnight time.

Court Order:

- Interim Orders in accordance with the Family Report recommendations and the Orders sought by the Mother.
- The matter be adjourned for 12 months.

What happened in this case is the exception rather than the rule. It is clear that the Court believed that the Father deserved an opportunity to prove himself.

Parents should not expect this outcome if proceeding to a Final Hearing, the norm is that Final Orders will be made following a Final Hearing and, unless there are grounds for appeal, the parents will have to live with those Orders for the long term.

Q & A

Q: My spouse and I have recently separated, and have come to an agreement about our financial matters. We have agreed that I will not pay her spouse maintenance. Does this mean that she cannot pursue spouse maintenance in the future?

A: The only way for parties to contract out of spouse maintenance is with a Financial Agreement. It is important, however, that this Agreement complies with all the legal requirements. If it does not, it may be found to be invalid. You should work with a Family lawyer to help you draft and execute the Financial Agreement, to ensure it is compliant with the legislation and therefore enforceable.

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