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“CLOSE-UP” EDITION

“But what about a child’s wishes?” It’s the perennial question in parenting disputes. So what happens if siblings are expressing different wishes. Read this edition’s close-up article: [“Different Ages, Different Wishes”](#).

Q & A

Q: When do I need to see a lawyer?

A: Ideally, before you separate to ensure that you are fully informed of your rights, responsibilities, obligations and likely entitlements in the event of a relationship breakdown.

EXCLUDING AN INHERITANCE

Generally if an inheritance is received during a relationship it is included in the pool of assets available for property division, with the spouse who received the inheritance to receive a percentage adjustment in their favour for the contribution. In some circumstances however the court may decide not to include the inheritance and treat it, only as a percentage adjustment on a “future needs” basis. Treatment of an inheritance in this fashion occurred in a recent case concerning a long de facto partnership of 21 years.

In this case the wife was 60 and the husband 65. There was one adult child. The husband had been the primary breadwinner and had a good salary which continued post-separation and was much higher than the wife’s salary.

About a decade before separation the husband received an inheritance, being a one third interest in a property following the death of his father. He had agreed that his mother and sister could have a life interest in the property. The wife was aware of this agreement.


Just prior to separation the wife received an inheritance of \$52,000 and after separation she received \$122,000.

The net value of the property available for distribution after excluding the inheritance was almost \$1.3 million. The Judge assessed the contributions to be equal at the time of separation. In terms of a “future needs” percentage adjustment he considered the inheritances. The Judge noted that the husband would have difficulty in realising his inheritance given the life interest however the wife could access a significant portion of her inheritance. The Judge awarded the wife a 2.5% adjustment for ‘future needs’ largely due to the difference in earnings making a total of 52.5%.

It is reasonable to assume that if not for the inheritance the wife would have potentially received a greater percentage for the “future needs” factors.

CONFUSION REIGNS – PARENTING ORDERS NOT CLEAR

When agreements for children’s arrangements are written down it is important that they are clear and cover all relevant issues. They should ideally be written by a lawyer.



A recent case highlights the problems that can arise when consent orders are not properly drafted.

The mother alleged that the father had contravened the Orders on numerous occasions eg. by not returning their 8 year-old daughter to her at the end of the school holidays, collecting the child on her weekend, failing to collect the child on his weekend, and not allowing her to spend time with the child on special occasions.

The Judge found that none of the alleged contraventions were made out because the Orders were not clear about these matters:

- The order stated that the Christmas school holidays concluded at the “*commencement of school*”. The parents argued as to whether this meant the ‘pupil free day’ at the start of the term or the first day that students were expected to attend, and also whether it meant that the child was to be delivered to school by the father or whether she should be returned to the mother the evening before. The Judge found that by the father delivering the child to school on the first day that students were expected to attend was not a breach of the orders, however a more precise definition would have been helpful.
- The order did not specify when the father’s alternate weekend time with the child would re-commence after the school holidays.
- The order provided for the parent to be able to attend “*any public or school social, sporting or educational event involving the children including... other special occasions.*”. The Judge held that this order related to events which the child was to attend, and did not provide for either party to spend specified time with the child on significant events such as birthdays.

The Judge concluded that the orders were ambiguous. The Judge invited the parties to apply for a variation of the orders saying that clear orders would take a lot of the uncertainty out of the arrangements and avoid arguments.

WHAT IS AN EX-PARTE APPLICATION?

A court application is heard on an ex-parte basis when the responding spouse is not given notice of (i.e. not served) the application and does not appear in court when the application is first heard. In an ex-parte application the court is deciding a matter without evidence from both spouses.

Accordingly, ex-parte applications do not occur very often. Here’s a recent example of an ex-parte decision in a case regarding children’s arrangements:

Facts:

- 2 children of the relationship aged 4 and 3;
- The father had been arrested for striking the mother and retaining the children, while intoxicated;
- After the father’s release from jail on bail he had again taken the children and the mother did not know where they were.
- The mother made an urgent application to the court without notice to the father, for a recovery order.

Court decision:

- A recovery order for the return of the children was granted to the mother. The Federal Police were ordered to make the recovery and arrest the father without warrant if the father again removed or took possession of the children.
- The mother to have sole parental responsibility for the children and that they live with her; and
- That Centrelink provide to the court any details they may have about where the father was residing.

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