

FAMILY LAW REVIEW

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ARTICLES

Understanding discretionary trust structures in family law – Grant T Riethmuller

Discretionary trust structures are complex arrangements that present many difficulties when determining appropriate orders for division of spousal property under s 79 or s 90SM of the *Family Law Act 1975* (Cth). In order to understand how assets held on discretionary trusts are dealt with in family law property proceedings one must return to the fundamentals of trusts and property law, before turning to the more recent family law decisions. In this article, the law and principles are reviewed. Basic concepts of trusts and property law are recapped in order to provide a foundation to understand the more recent cases where assets held on trust are dealt with as “property” pursuant to the provisions of the *Family Law Act*. 165

Hague Convention on the Civil Aspects of International Child Abduction: The consideration of habitual residence in Australian courts – Patricia Easteal AM, Joshua Favaloro and Fanny Thornton

This article takes as its starting point the *Hague Convention on the Civil Aspects of International Child Abduction*, an international instrument providing a procedure for pursuing the return of abducted children in domestic courts. The Convention applies to children habitually resident in a Contracting State immediately before their alleged wrongful removal or retention, or to any breach of custody or access rights. Despite the importance that is clearly attached to the “habitual residence” construct, the drafters of the Convention did not clearly define the concept, leaving it to national courts to interpret based on their own understanding. The article presents the resulting conceptual and practical challenges with respect to the judicial application of the habitual residence test. More specifically, it presents analysis of the relevant Australian jurisprudence to clarify the reasoning applied in Australian courts. The article shows how weighting of shared parental intentions or broader, and especially more child-centred facts, may lead to different outcomes. It concludes that uncertainty underpins Hague Convention applications in the domestic legal context and suggests a couple of ways forward. 194

What happened in the Baby Gammy surrogacy case? – Michael Nicholls QC

This article summarises the legal problems that arose in the well-known Baby Gammy Thai surrogacy case in which the intended parents were falsely accused of abandoning one of the twins born as a result of the surrogacy arrangement. 209

CHILDREN AND PARENTING

State child welfare departments and federal family law matters – Felicity Bell

For many years there have been various attempts to overcome the problems of what Fehlberg and Kelly termed “jurisdictional overlap” between State child protection and federal family law. This article describes these issues before turning to examine some recent cases where judges hearing family law matters have expressed dissatisfaction with the conduct of State child welfare departments. 218

PROPERTY AND FINANCIAL ARRANGEMENTS

The treatment of uncertain liabilities in applications under s 79 of the Family Law Act – Anna Parker

In the 1995 decision of *In Marriage of Biloft*, the Full Court of the Family Court of Australia considered the treatment of uncertain liabilities in applications under s 79 of the *Family Law Act 1975* (Cth). The Full Court held that courts exercising jurisdiction under the Act may properly determine not to take into account or to discount the value of unsecured liabilities in certain circumstances, including where such liabilities are vague or uncertain, are unlikely to be enforced, or were unreasonably incurred. This article considers the approach taken by the Full Court in cases involving uncertain liabilities in recent years, in order to identify general observations that can be made about the likely treatment of such liabilities. 226

FAMILY DISPUTE RESOLUTION

Pro bono mediation and the Federal Circuit Court of Australia in Brisbane: Lessons learned – Donna Cooper

Delays in the Family Court of Australia was one of the reasons for the establishment of the Federal Circuit Court of Australia almost two decades ago. However, the original goal of resolving family law matters more efficiently has not been achieved in the long term as lengthy delays to final hearing in family cases are now a feature of the Federal Circuit Court. This article discusses a Brisbane pilot pro bono mediation program set up to provide a selected number of cases with an opportunity for earlier resolution. The program was developed by the Family Law Practitioners Association of Queensland and some judicial officers of the court, with the assistance of the Queensland University of Technology Law School. The objectives and organisation of the program are explained, as well as the lessons learned, including the need for parties to be psychologically ready for settlement and for their lawyers to have a positive attitude to mediation. 230

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