

FAMILY MATTERS

THE NEWSLETTER OF BERRY FAMILY LAW

SPRING 2012

Should the Family Court of Australia have the power to release children from immigration detention centres?

The High Court has found that the Full Court of the Family Court decision to release children held in immigration detention centres was ill founded. Two boys who were aged 12 and 14 had made an application directly to the Family Court to be released from a detention centre. Their case was based on their detention being harmful to their welfare. The trial judge in this case found that he had no jurisdiction to make such orders. The children and their father appealed to the Full Court of the Family Court. The appeal was upheld and the matter sent to a re-trial. The Full Court mainly heard arguments about the breadth of the welfare provision (contained in s 67ZC of the Family Law Act 1975).

A series of cases of this nature have been heard by the courts and all courts have found that the Family Court of Australia has no jurisdiction to apply the principle of the best interests of the child to direct immigration authorities to release children held by them.

S 67ZC of the Family Law Act 1975 has been read in a narrow way when read in light of the Australian Constitution.

Even if the Family Law act was redrafted to provide for the release of children from detention centres such an amendment would be considered unconstitutional and without power.

In addition the Convention of the Rights of the Child did not provide jurisdiction for the Family Court as the Family Law Act 1975 did not rely on it.

Further, six Justices of the High Court found that there was no jurisdiction for the Family Court to release children even if they were held unlawfully.

There remains a situation which has not been dealt with and that is if a parent who was not detained made an application in relation to a child who was detained against a parent who was detained, it could be argued that the Family Court may have jurisdiction. Any orders made would not be binding upon immigration authorities. Such orders might operate in the same way the Family Court power is limited by State and Territory welfare authorities. That is such orders might only operate and not interfere with the power of immigration authorities and the operation of the Migration Act.



New Lawyer Joe Buckley

We are extremely pleased to announce that Joe Buckley joined Berry Family Law on 9 July 2012. Joe previously lived and worked in the Northern Territory, and performed as a Judge's Associate in the Northern Territory Supreme Court before being admitted to practice in 2008. Joe has practised as a solicitor and advocate in Family Law almost exclusively since his admission. Joe has settled in well and is primarily based in our Williamstown office being mentored by our senior lawyers, including Peter Berry and Timothy Byrne.

Berry  Family Law

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Financial Agreements

The legislation concerning financial agreements, particularly those entered into prior to a marriage or de facto relationship, are the subject of much 'urban myth' and speculation in the wider community. This is often not helped by the sometimes lurid reporting of relevant issues in the tabloid press.

In essence, financial agreements can be made either before, during or after a marriage or de facto relationship. With certain limited exceptions, they are binding on both parties if drafted correctly and signed under the necessary conditions.

One of the prerequisites for an agreement to be binding is for both parties to the agreement to receive independent legal advice from different solicitors employed at different firms. This can be a major 'sticking point' for agreements made prior to the commencement of a relationship which are clearly drafted with the intention of excluding one party from certain 'pre-owned' assets. It will be necessary for the independent solicitor to firmly advise the party being excluded that the proposed agreement is not in their financial interests.

Due to the heavy burdens lying upon solicitors with regard to the preparation and execution of financial agreements, parties are often unprepared for the extensive thought and consideration which is required for a financial agreement, particularly one which is drafted in contemplation of a possible future separation. All manner of contingencies must be considered, many of which have not been given thought by the couple.

In future newsletters, we shall deal with some of the more specific issues which arise with regard to financial agreements. Do not hesitate to contact any of our experienced solicitors with any particular queries.

Bankruptcy and Family Law

Bankruptcy lawyers and family lawyers deal primarily with two different and distinct pieces of legislation. Bankruptcy lawyers deal with the *Bankruptcy Act 1966* ("BA"), whilst family lawyers refer to the *Family Law Act 1975* ("FLA").

The introduction of the *Bankruptcy and Family Law Legislation Amendment Act 2005* ("BFLAA") substantially changed the landscape in respect to bankruptcy and family law. The BFLAA gave the Family Court jurisdiction to deal with matters relating to a bankrupt's property and a bankrupt spouse in circumstances in which previously the Family Court's role was limited once a party became bankrupt.

The BFLAA permitted concurrent bankruptcy and family law proceedings to be brought together in the Family Courts to ensure that all the issues are dealt with at the same time. The BFLAA allows clarification of the competing rights and interests of the creditors and the non-bankrupt spouse where bankruptcy and family law issues co-exist.

The BFLAA gives the Family Court power if there were property proceedings on foot to make Orders about property which had vested in the trustee in bankruptcy.

Bankruptcy disputes between married and de facto couples are now dealt with under the FLA. A non bankrupt spouse or de facto can make a claim in the Family Court for property vested in the trustee in bankruptcy. However, before doing so, the bankrupt will need to join the trustee in bankruptcy to the proceedings or have the trustee's permission to apply to the Court.

Want to know more? – go to www.berryfamilylaw.com.au

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