

FAMILYLAW

LEGAL UPDATE

JUNE 2005

Third Parties and Family Law Proceedings: The Courts' New Powers

On 17 December 2004, courts exercising jurisdiction under the Family Law Act 1975 (Cth) (Act) acquired new powers to make injunctions and orders that are binding on third parties to a marriage. The courts' new powers are broad and can affect everyone from extended family members, to family trusts and financial institutions.

Key message

*Australian Courts have acquired new powers with regards to third parties to a marriage. **There is no doubt the Courts' new powers are a significant departure from the fundamental principles of corporations and contract law.***

In proceedings for property the court can now:

- » direct a creditor of one or both parties to substitute one or both parties to the marriage in relation to the debt owed;
- » direct a creditor of both parties to the marriage that the parties are liable for a debt in different proportions; or
- » direct a director of a company or the company itself to register a transfer of shares from one party to the marriage to the other party.

If the parties are jointly and severally liable under a loan and mortgage agreement with a bank, for example, a court can order that one party be solely liable. The Court can also direct the trustees of a discretionary trust distribute income to a beneficiary who is a party to the marriage every year, or require partners in a family business to buy a party's interest.

In proceedings for injunctive relief under s114 of the Act, the courts have new powers to grant injunctions. Under these powers, a court might, for example, restrain a financial institution from foreclosing on a mortgage

until property proceedings are resolved. Alternatively, it might prevent a creditor from commencing proceedings to recover money owing from a party to a marriage.

The new provisions override, to the extent of any inconsistency, any written or unwritten Commonwealth or state laws as well as any trust, deed or other document. There is accordingly no doubt that the Courts' new powers are a significant departure from not only from established case law in the family law area but also fundamental principles of corporations and contract law.

In addition to the above, in property proceedings, a court must be satisfied that it is just and equitable to make the orders. Orders or injunctions granted in proceedings for injunctive relief, on the other hand, only need to be 'proper' and 'just or convenient'.

Paul Fildes | Partner

World Congress in South Africa Inspires

Lara Ruddle and Sally Nicholes attended the 4th World Congress on Family Law and the Rights of the Child in Cape Town in March 2005. The Congress brought together Judges, Lawyers, Psychologists and non-governmental organisations to discuss issues in relation to Family Law and children.

Key message

Middletons lawyers were active participants at the 4th World Congress on Family Law and the Rights of the Child in Cape Town in March 2005. Middletons was awarded a humanitarian award to recognise the firm's contribution in developing a number of projects including the youth voice forum and the child sex tourism forum.

The conference commenced with inspirational talks from Gracia Michel (Human Rights Activist & Wife of Nelson Mandela), Mary Robinson (Former President of Ireland & President of the UN Human Rights Committee) and Carol Bilamy (Head of UNICEF). All three speakers focused on the significant work that still needs to be undertaken to implement the UN Convention on the Rights of the Child in providing children with access to education and health care.

Some of the other topics discussed included the following:

- » international relocation (with perspectives from Australia, UK and Canada);
- » giving children a voice in dispute resolution;
- » post separation parenting (researchers from the USA and the UK spoke about the risk factors and protective factors that influence children after divorce); and
- » new frontiers in the law (including gay parenting and adoption).

Lara participated in a session named the 'The Youth Voice Forum'. This session brought together young people from Australia, South

Africa, Somalia and the Netherlands to speak about how young people are working with and assisting children.

Lara developed a questionnaire that asked children about their various rights under the UN Convention on the Rights of the Child. Children in Australia and Ghana were surveyed and the results were compared. In terms of children's living arrangements, it was found that more children were happy living with both parents, as opposed to only one parent or a relative or foster parent and more than half the children from both countries indicated that if they did not live with both their parents they were not consulted in the decision making process as to where they should reside.

These results suggested that adults need to be educated about the impact of separation on children and how children need to be involved in the decision making process if their parents separate.

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Further Info

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