

Family Law

Case Notes

September - October 2010

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PROPERTY

- **Long marriage**
- **Greater contributions by wife**

In *Franklin* [2010] FamCAFC 131 (14 July 2010) the Full Court allowed an appeal in a case involving net assets of \$9m where a professional couple had been married for 18 years and had two children. The trial judge assessed the contributions of the wife, whose income from her business exceeded that of the husband and whose contributions to the welfare of the family also exceeded his, at 67.5%. A majority of the Full Court reassessed the wife's contributions at 60%.

CHILDREN

- **Overseas relocation**

In *Cowley & Mendoza* [2010] FamCA 597 (16 July 2010) Murphy J heard a dispute between child-focused parents where the mother sought to return to Brazil with the children (three and five). The father sought an order that they live in Australia and spend week about time with each parent. Murphy J referred to *MRR v GR* at paras 41-43, concluding at para 82 that "the mother's choices had neither more, nor less, 'legitimacy' than the father's choices".

Murphy J accepted the report writer's view that the children, particularly at their age, would be "likely to suffer at least some emotional detriment" if their time with one parent were effectively reduced to a couple of times a year, which "can be destabilising, thus, undermining their capacity to form secure attachments to

either of their parents and form healthy relationships as adults. Such an arrangement can cause children to become anxious and stressed which can impact upon their developmental progress".

FINANCIAL AGREEMENT

- **Rectification of technical errors**

In *Senior & Anderson* [2010] FamCA 601 (13 July 2010) a financial agreement had been drawn under s 90C instead of s 90D, the lawyers' certificates referred to neither section and the parties' given names were also wrongly stated. Noting at para 85 the "concern of Government [via the post-*Black* amendment to the FLA on 4 January 2010]...to avoid the consequences of technical errors", Young J concluded that "each of the five errors in the agreement, whilst legally substantial are of a technical nature that can and should be rectified." The case was distinguished from *Balzia & Covich* [2009] FamCA 1357 where Collier J ruled an agreement void as the certificates were made under incorrect sections.

FINANCIAL AGREEMENT

- **Amendment initialled but certificate unaltered**

In *Parker* [2010] FamCA 664 (3 August 2010) the addition of a new clause received from the husband's lawyer after they had signed the financial agreement (and certificate) was initialled by the wife and her lawyer but no change was made to her lawyer's certificate. After hearing evidence Strickland J was not satisfied that

the wife's lawyer had fully explained to the wife the implications of the husband's amendment as required by s 90G(1)(b), nor that it would be unjust and inequitable if the financial agreement were not binding within the meaning of the new s 90G(1A), given that:

"...the new s 90G(1)(b) is intended to ensure that parties receive independent legal advice before signing the agreement so that they are able to make an 'informed decision'.

PROPERTY

- **Separate pool for judicial pension**

In *Hayton & Bendle* [2010] FamCA 592 (16 July 2010) a judge and his wife had been married 22 years. An adult son with special needs was in the wife's care. The asset pool comprised a judicial pension worth \$2m and other property totaling \$2.3m (including non-pension superannuation accrued during the marriage which the wife could access). Contributions to the non-pension pool were assessed as equal and to the pension (para 165) 85/15 favouring the husband (\$300,000 for the wife). A further adjustment of \$300,000 to the wife under s 75(2) gave her property worth \$1.77m, the husband to receive property worth \$570,000 and his pension. The wife was awarded maintenance of \$500 per week for 18 months.

CHILDREN

- **Interstate relocation**

In *Mallahan* [2010] FamCA 631 (26 July 2010) the primary carer

of children (seven and ten) sought to relocate from Queensland to Victoria where her mother and friends lived. The father sought continued alternate weekend time. Describing the parties' capacity to communicate about and with the children as "very poor", Murphy J found (para 171) that the overall "benefits [from] living with the mother in Victoria outweigh[ed] the detriments". His Honour considered the s 65DAA(5) matters and the factors highlighted by the High Court in *MRR* "in attempting to take account of 'the reality of the situation of the parents and child[ren]'", "such as the availability...of housing, employment...[and] significantly... the...availability of familial support and the impact on the emotional and mental health and well-being [of] the mother [as in this case]. The father was granted time during holidays and other block periods.

CHILD SUPPORT

- **SSAT appeal**
- **Payer's expenses**

In *Carlson & Acuff (SSAT Appeal)* [2010] FMCAfam 677 (30 June 2010) Riethmuller FM allowed an appeal from an SSAT ruling that the father's decision to forego half his salary to share the care of his children was unjustified as child care was available, allowing for full-time work. The court held that the SSAT "failed to have regard to the costs of child care...if the appellant [were] working full time" or the extra tax he would have to pay.

CHILD SUPPORT

- **Pre-1/7/08 child support agreements**

In *Ackers & Ducley* [2010] FMCAfam 809 (30 July 2010) as to a husband's application that a 2004 child support agreement be set aside, Monahan FM (paras 33-47) discussed the effect of the reform of the *Child Support (Assessment) Act* on 1 July 2008 on earlier agreements being "binding" or "limited". Monahan FM (para 96) held that the review letter to the wife from the CSA (determining that the agreement would "continue after 30 June 2008", to which neither

party objected) made it a "binding" agreement, then set it aside as the failure of the husband's business and his ensuing bankruptcy were "exceptional circumstances" which would cause him (financial) hardship from enforcement of substantial arrears if the agreement were not set aside.

PROPERTY

- **"De facto relationship"**

In *Pike & Howlett* [2010] FMCAfam 802 (9 July 2010) Turner FM reviewed the meaning of a "de facto relationship".

CHILD SUPPORT

- **SSAT appeal**
- **Retrospective departure**

In *Barone & Bianco (SSAT Appeal)* [2010] FMCAfam 836 (9 August 2010) Slack FM allowed an appeal from the SSAT's dismissal of the payer's application for departure from the child support assessment for the 18 months before the filing of his application, holding that the Tribunal had erred by ruling that "exceptional circumstances" were required for a retrospective order.

CHILDREN

- **Relocation**

In *Klein* [2010] FamCAFC 150 (18 August 2010) the Full Court allowed an appeal from Riley FM, remitting the case for re-hearing, due to the federal magistrate's failure to make a practical assessment of whether the equal and substantial and significant arrangement considered by the court to be desirable was feasible ("reasonably practicable") having regard to the interstate relocation sought by the mother. It was held that the court had not considered where the mother would live, what support she would have and other practical considerations. The Full Court at para 216 adopted what it said in *Collu & Rinaldo* [2010] FamCAFC 53 at paras 332 to 346, where it applied the High Court's ruling in *MRR v GR*.

CHILDREN

- **Parenting order to Department of Human**

Services (NSW)

In *Director-General of the Department of Human Services (NSW) & Tran and Anor* [2010] FamCAFC 151 (20 August 2010) the Full Court allowed an appeal from Rose J, remitting all parenting issues for re-hearing. Where Rose J had granted the Department parental responsibility for major long-term issues in relation to a child, it was held that Rose J's order that the child live with the mother was in error as such an arrangement was not on the evidence in the best interests of the child. It was also held that the absence of any assessment of the father where allegations of sexual abuse had been made was also appealable.

CHILDREN

- **Audio recording made available to court expert**

In *Tripp* [2010] FamCA 691 (5 August 2010), a case involving child sexual abuse allegations, the mother's audio recording of an earlier interview between the court-appointed independent expert and the children made without the expert's knowledge and which "appear[ed] contrary to... the *Surveillance Devices Act 2007 (NSW)*" was allowed to be made available by the ICL to that expert by Fowler J who at para 14 said:

"It seems to me that the provision of the recording and the transcript to the witness might considerably shorten the proceedings and serve the interests not only of justice and of the public, who expect the court system to act with efficiency, but also of these parties."

PROPERTY

- **Enforcement**
- **Order for sale of property**

In *Turner & Kemp* [2010] FamCA 697 (5 August 2010) Young J made an order for the sale of property, the wife's appointment as trustee for sale, a s 106A order (for a registrar to sign documents) and an order

for interest and costs, to enforce the husband's payment of money to the wife under an earlier consent order.

CHILDREN

- ***Homosexual parents v homosexual non-parents***

In *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734 (19 August 2010) a two-year-old child's biological mother and her female partner opposed the wish of the biological father and his male partner to spend substantial time with the child ("E"). Discussing the meaning of "parent" at paras 38-52 Dessau J concluded that under s 60H the mother and her partner having consented to the carrying out of an artificial conception were E's parents, the party who provided genetic material not being deemed to be a parent (his partner not being one either). Dessau J then discussed the court's approach to an application for parenting orders by a non-parent, considered the evidence, and at paras 325-336 concluded:

"The evidence satisfies me that the four of them did, contrary to the women's accounts, set out with a shared decision, as two couples, to create and contribute to the raising of a much-wanted and much-loved child. Although events did not unfold in that idealised way, I am not satisfied that the men's behaviour, the conflict, or the impact on E was as dire as the women have said. E is the product of a number of fine people. He is entitled

to know about them, to know them, and to know their love of him. Each can contribute something important to him. To choose the course proposed by the women, that they raise him within what they refer to as 'a nuclear family', that is without knowing the men (until, maybe, some nebulous time in the future) precludes him from knowing and enjoying what is rightfully his. The reality for E is that his mothers are his primary attachment figures. I am [also] satisfied that E should have the benefit of the men's loving involvement in his life."

Dessau J made an order so that by the time E started school he would be spending each third weekend with the men and time in the school holidays.

CHILDREN

- ***Parental neglect***
- ***Child to live with non-parent***

In *Goombe* [2010] FamCA 736 (20 August 2010) where both parents had neglected the children's education Bell J ordered that the children live with the second respondent, a family friend and spend three out of four weekends with their father. The mother, an African resident, took no part in the case.

PROPERTY

- ***"De facto relationship"***

In *Moby & Schuller* [2010] FamCA 748 (25 August 2010) Mushin J discussed the evidence in support of an application for a declaration

as to whether a de facto relationship existed between the parties and if so for what periods. The relevant legislation and case law was discussed at paras 126-142. See also *Dakin & Sansbury* [2010] FMCAfam 628 (13 August 2010) (Bender FM).

PROPERTY

- ***Foreign banks ordered to release information***

In *Porto* [2010] FamCA 750 (26 July 2010) Dessau J granted the wife's application for an order that three Spanish banks be required to release information as to the husband's bank accounts in an endeavour to track down the "millions of dollars" the husband alleged he had "lost" in Spain.

CHILD SUPPORT

- ***SSAT appeal***
- ***Respondent's "consent"***

In *Bonner & Neville (SSAT Appeal)* [2010] FMCAfam 848 (16 July 2010) Slack FM expressed doubt that an SSAT appeal could be allowed by consent, given s 110B of the *Child Support (Registration and Collection) Act* requiring the court to be satisfied that there had been an error of law. Noting that SSAT had come "to a number of conclusions as a result of the applicant's failure to appear [including] that he... was avoiding giving evidence" and that he had not been "given the opportunity to explain his failure", Scarlett FM held that "the question of whether he was afforded sufficient procedural fairness...is attended with sufficient doubt to warrant the orders...sought by the parties". ●

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