Family Law
Case Notes
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PROPERTY

- ***"Add backs"***
- ***Pre-separation expenditure***

In *Mayne* [2011] FamCAFC 192 (23 September 2011) the Full Court set aside Neville FM's decision to add back a $173,000 inheritance the wife gave away or spent when she was "heavily in debt". Faulks DCJ said at paras 77-78 as to expenditure *before* separation:

> " ... while parties are together, each might, from time to time and with the consent of the other, either express or implied, apply or appropriate assets or funds to his or her own purposes. When the relationship is good, no-one is likely to care – let alone keep records. (...) It is not the Court's function to conduct an audit of the marriage or of the relationship finances."

Strickland J disagreed and May J (paras 106-107) said "the better course would have been for the [FM] to have considered the ... [expenditure for which 'there was no proper account'] ... in determining the proper percentage to be attributed to the parties by reason of their contributions during the marriage".

CHILDREN

- ***Order for immunisation set aside***

In *Mains & Redden* [2011] FamCAFC 184 (9 September 2011) Coleman J (para 136) set aside Dunkley FM's order that a child be immunised as medical evidence admitted by Coleman J, if accepted, suggested "that, whatever its magnitude, there was a measure of risk of the child suffering a significant reaction to immunisation, and certainly, a risk significantly greater than that found by [Dunkley FM]".

PROPERTY

- ***$1.3m loan from husband's father not deducted from pool***
- ***Resulting trust claim also failed***

In *Liakos & Zervos and Anor* [2011] FamCA 547 (15 July 2011), the parties were married for 13 years. Of their $663,000 asset pool, the husband's father sought a declaration of equitable ownership of two properties (total value $525,000) one of which he bought in his son's name. The other was bought by his son with finance paid out by the father. The father also sought a declaration that his son owed him $1.3m. Loughnan J dismissed both applications, referring at paras 139-150 to case law in support of the court's power to ignore debts for which it felt one party should bear sole responsibility. Loughnan J at paras 195-205 reviewed case law relevant to resulting trusts, finding that the evidence pointed to the presumption of advancement applying in favour of the husband.

PROPERTY

- ***Consent order and financial agreement not set aside despite wife's fraud***

In *Nyles* [2011] FamCA 565 (19 July 2011), the husband and wife entered into a property settlement by way of consent orders and a financial agreement. At that time the wife was a director of a private company engaged in the process of floating as a public company on the stock market. The float resulted in a vast increase in the value of the wife's shares in the company "which she realised to achieve a large windfall". Mushin J dismissed the husband's applications under s 79A and 90K of the FLA for orders setting aside the consent orders and financial agreement. Mushin J at paras 124-130 discussed the duty of "full and frank disclosure" as to both contested proceedings and consent orders, finding (para 174) that her failure to update her Financial Statement and valuation amounted to a fraudulent misrepresentation but that the husband had not relied on that misrepresentation resulting in a miscarriage of justice under s 79A as he knew a float of the company was "imminent", believed that the shares had "significant value" and had been advised not to settle until an up to date valuation had been conducted. Mushin J also found that the financial agreement had not been obtained by fraud within the meaning of s 90K.

FINANCIAL AGREEMENT

- ***Rectification denied***
- ***Unilateral mistake***

In *Sullivan* [2011] FamCA 752 (30 September 2011) the husband applied for the rectification of a financial agreement by changing references to s 90B to 90C (FLA) and a declaration that the agreement was a financial

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agreement under s 90C. The wife deposed that she signed the document under coercion from the husband two days before the parties' wedding. The husband signed it three days after the wedding. Both certificates of legal advice referred to "the agreement proposed to be entered into" by the parties. Young J found (para 138) that it was "not apparent that there was a common intention to enter into an agreement under s 90C of the Act". As to rectification, Young J said:

> " … the matter before the Court is distinct from both *Senior v Anderson* [[2011] FamCAFC 129], where there was a common mistake, and *Ryan v Joyce* [[2011] FMCAfam 225 where there was a unilateral mistake known to the husband before he signed the agreement. In the matter before the Court there is no common mistake and therefore no common intention to give rise to rectification as a remedy."

CHILD SUPPORT

- ***Applicant declared not the child's father***

In *Levine* [2011] FMCAfam 821 (22 August 2011) the applicant was granted a declaration under s 107 of the *Child Support (Assessment) Act* that he should not be assessed for child support as he was not the child's father and an order under s 143 of the Act that the respondent repay him $13,000 paid by him to the CSA, and costs in the sum of $6,000. Scarlett FM held that the court had no jurisdiction to order repayment of the $5,400 paid under a voluntary agreement made prior to the administrative assessment. (Editor's note – See also *Radcliffe & Hall* [2011] FMCAfam 781.)

CHILD SUPPORT

- ***SSAT appeal***
- ***"Care of child" not living with either parent***

In *Polec & Staker & Anor (SSAT Appeal)* [2011] FMCAfam 959 (9 September 2011) Hughes FM allowed the father's appeal against the SSAT's decision to affirm the Child Support Registrar's decision that the departure of the child (born in 1992) from his mother's home to take up an apprenticeship did not constitute a child terminating event or a significant reduction in the mother's care percentage.

PROPERTY

- ***Parties kept their finances separate***
- ***Asset by asset approach***

In *Stiller & Power* [2011] FMCAfam 996 (19 September 2011), the parties were married for 20 years but did not live together. Baumann FM found that the parties "kept their finances very separate". At marriage, the wife owned property which by the hearing had grown to $4m whereas the husband's wealth had "shrunk" to $315,000 due to losses caused by his mismanagement for which the wife (it was held) should bear no responsibility. Baumann FM took an asset by asset approach, finding that the husband's "minimal contributions [we]re almost irrelevant" and the wife's contributions "also [were] almost irrelevant." There was no adjustment for s 75(2) factors as the comparative positions of the parties were found to have stemmed from the wife's superior initial financial position and poor decision-making by the husband.

MAINTENANCE

- ***Bankrupt spouse may apply for variation of maintenance order***

In *Blake* [2011] FMCAfam 796 (17 August 2011) the husband, who was declared bankrupt on his own petition six months after an interim maintenance order was made against him, was allowed to apply for the discharge of the order. Connolly FM held "that, despite bankruptcy, a bankrupt party has standing to bring an application under the [FLA] … that [is] personal in nature … which do[es] not affect the quantum of the bankrupt estate". ●