Family Law
Case Notes
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CHILDREN
- ***Unilateral relocation***
- ***Need to protect children***

In *Deiter* [2011] FamCAFC 82 (12 April 2011) a 24 year old mother of children aged five, three, and one unilaterally relocated after the father's violence (witnessed by the children) leading to an interim domestic violence order and an assault charge being made against him. The mother appealed to the Full Court (Finn, Thackray and Strickland JJ) against the interim order of Kaeser AM of the Magistrates Court of WA that the mother return the children to Sydney from Perth and live there until the final hearing. The Full Court at para 55 said:

> "No consideration appears to have been given to conducting a discrete hearing to deal with the allegations of violence before determining the application for the return of the children or the secondary issue concerning the venue of the final hearing."

CHILDREN
- ***Order against time with children set aside***

In *Maluka* [2011] FamCAFC 72 (31 March 2011) the father appealed Benjamin J's dismissal of his application for time with his children at a contact centre. The Full Court (Bryant CJ, Finn and Ryan JJ) said at para 49 that Benjamin J had "misunderstood the orders sought by the father and overlooked that [he] sought supervised, not unsupervised, time with the children".

CHILDREN
- ***Unilateral relocation before child's birth***

In *Iris & Cohen* [2011] FamCAFC 77 (5 April 2011) a mother unilaterally relocated from Townsville to Wagga Wagga before the birth of the child. At the interim hearing, Coker FM ordered her to return to Townsville with the (since born) child. The mother appealed. May J held that in refusing a stay pending appeal Coker FM had "failed to consider that this was not a case where the child was having a relationship with the father and was unilaterally moved away from a settled environment"; had "no evidence indicating that the mother was not properly caring for the child"; having called for an ICL, should have "waited for the expert report and made no order until the [ICL's] first appearance"; and "[g]ave no real consideration to the mother's application that the matter be heard in Wagga Wagga".

CHILDREN
- ***Special medical procedure***
- ***Gender identity disorder***

In *Re: Jamie (Special medical procedure)* [2011] FamCA 248 (6 April 2011) a boy aged 10 years 10 months who acted and was treated as a girl was diagnosed by medical experts with gender identity disorder. Dessau J said at para 5:

> "The medical practitioners were unequivocal as to the absolute urgency for Jamie to start ... "stage one" treatment, to suppress male puberty. She currently has the pubescent development of a 14-year-old male, and it is rapidly progressing. The concern was that physiological developments, such as a deepening voice, would be irreversible unless treatment was started. For that reason, the hearing in this case was brought forward."

PROPERTY
- ***Request to answer specific questions disallowed***

In *Darbar & Batey and Anor* [2011] FamCA 97 (21 February 2011) Rose J set aside a registrar's order compelling a party to answer specific questions as the request was premature, the case not having been allocated to a first day before a judge as required by FLR 13.26.

COSTS
- **Where a party was wholly unsuccessful**

In *Kearney & Dreyfus (Costs)* [2011] FamCA 117 (2 March 2011) the father whose application for an order that a child attend a particular school was dismissed was ordered to pay the mother's costs of $14,000. Ryan J at para 13 said:

> "Senior counsel for the mother correctly pointed out this was a discrete issue in relation to which the Court was invited to decide between one of two options. In other words the limited nature of the dispute inevitably meant one party would be entirely successful and the other wholly unsuccessful [within the meaning of s 117(2A)(e)]. I agree."

FINANCIAL AGREEMENT

- ***Made under wrong section***
- ***Rectification***

In *Ryan & Joyce* [2011] FMCAfam 225 (18 March 2011) the applicant claimed he signed a financial agreement "to keep [his partner] happy", knowing that it was not legally enforceable because, by the time he got around to signing it, the section under which the agreement was made (s 90B) was the wrong one (the parties having since married whereupon s 90C would apply). Neville FM said that the misdescription was "simply the result of 'timing'" and that "such a 'slip' ... should be rectified."

See *Otero* [2010] FMCAfam 1022 where Hartnett FM severed a maintenance waiver for not complying with s 90E, but otherwise dismissed a wife's application for an order setting aside a financial agreement that recited as nil the value of the parties' company shareholding (which she transferred to the husband under the agreement) when its true value, according to evidence adduced by the wife in support of her application, was $1 million.

PROPERTY

- ***Business valuation***
- ***Conflicting expert evidence***

In *Pitt* [2011] FamCA 172 (15 March 2011) expert valuations of the parties' shareholding in a company by a chartered accountant (the court appointed single expert) and an accountant differed by $6 million. Rose J at para 157 cited the cases on the court's approach to conflicting expert evidence, saying:

> "I am not required to provide detailed reasons for preferring one expert witness to the other based upon a detailed analysis of the evidence so far as it conflicts. Rather ... the preference of one expert witness to the other means the adoption of the reasoning of the former compared to [that of] the latter."

Rose J preferred the evidence of the court appointed expert having regard to her appointment by consent, her admitted qualifications and experience as an expert witness, her "detailed and considered reports which applied accepted methodology" and her reasoning, in particular as to why a "non-binding indicative offer" was of no relevance to the calculation of value.

FAMILY LAW

- ***Married man's affair not a "de facto relationship"***

In *Jonah & White* [2011] FamCA 221 (4 April 2011) the applicant who had had a secret intimate relationship with a married family man for 17 years applied under s 90RD for a declaration that theirs was a "de facto relationship" within the meaning of s 4AA of the FLA. The respondent travelled overseas with the applicant, paying her $24,000 to help her buy a home and $2,000 monthly, increasing to $2,500 then $3,000 a month. Murphy J at paras 34-66 examined the legislation and Mushin J's review of the case law in *Moby & Schulter* [2010] FamCA 748 and at paras 58-60 said this:

> "In my opinion, the key to [the s 4AA] definition is the manifestation of a relationship where 'the parties have so merged their lives that they were, for all practical purposes, 'living together' as a couple on a genuine domestic basis' ... the manifestation of 'coupledom' ..."

Murphy J dismissed the application, also rejecting (paras 65-66) the respondent's argument that "exclusivity" was necessary for a de facto relationship to exist. See also *Barry & Dalrymple* [2010] FamCA 1271 where a "convenient commercial [live-in] arrangement" for three and a half years between an employed carer/personal assistant and a disabled respondent was held not to be a "de facto relationship".

PROPERTY

- ***$3 million lottery win***

In *Kneen & Crockford* [2011] FMCAfam 372 (21 April 2011) a childless couple began a de facto relationship in Sierra Leone and continued it, with some interruptions, in Australia. Some weeks after a resumption of cohabitation the applicant bought a lottery ticket and won $3 million. They collected and banked the money in an account managed by the respondent. Lindsay FM, applying *Zyk* (1995) FLC 92-644 (FC) held that the winnings "should be regarded as the joint contribution of the parties".

PROPERTY

- ***Post-separation family provision award***

In *Lombard* [2011] FMCAfam 339 (15 April 2011) the husband argued that his award of $150,000 (net after costs) in family provision proceedings brought by him in respect of the estate of his late mother who died two years before separation, which he did not receive until after separation, should not be included in the pool. Phipps FM agreed, citing *Bonnici* (1992) FLC 92-272 in which the Full Court held that an inheritance received by a party late in the marriage was "property" but that whether it should be treated differently from other property of the parties "must depend upon the circumstances" of the case. Phipps FM applied this statement by the Full Court:

> "The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances. Such circumstances might include the care of the testator prior to death ... or other particular services to protect a property. (...) But there was no evidence of this in the present case ... Accordingly; we think that ... the [money in question] should not be brought into account."

SPOUSAL MAINTENANCE

- ***Order until child began school***

In *Halley* [2011] FMCAfam 296 (8 April 2011) the mother gave evidence of struggling to make ends meet and being unable to obtain permanent work because the child (born in 2006) was still below school age. Scarlett FM granted her spousal maintenance of $120.00 per week until the child began school or attained the age of six years, whichever occurred first.

FINANCIAL AGREEMENT

- ***Rectification of "technical" errors available under ss 90B, C or D but not s 90G***

In *Senior & Anderson* [2011] FamCAFC 129 (14 June 2011) the majority of the Full Court allowed an appeal against Young J's order which rectified "technical" errors in a financial agreement (made under s 90C instead of s 90D, and the lawyers' certificates referring to neither section and misstating the parties' names). Strickland J at paras 106 and 121 held that "the [equitable] doctrine of rectification can apply ... to [an] agreement and to the requirements of s 90B, s 90C and s 90D" but that "a financial agreement can only be binding [under s 90G] if, and only if, each ... of the requirements of the Act to achieve that status are met". The case was remitted for determination as to whether the court should exercise its discretion under s 90G(1A) and (1B) to declare the agreement binding notwithstanding non-compliance with s 90G(1).

PROPERTY

- ***Consent order created a lease to husband***
- ***Trial judge's later order amending lease set aside***

In *Lenova* [2011] FamCAFC 114 (24 May 2011) consent property orders provided for the creation of a lease of land by the husband. Without an appeal or s 79A application, Young J granted the wife's application for variation of the lease. The husband appealed, arguing that the trial judge had no power to vary a final order. The Full Court agreed, ruling that the variation was "proprietary" and not a "consequential" change of an order that "failed to cover ... eventualities".

PROPERTY

- ***Adjustment for initial contribution despite long marriage***

In *Manolis (No. 2) [2011]* FamCAFC 105 (13 May 2011) a 26 year marriage produced assets of $4 million. The husband's pre-marital contribution of $40,000 from the sale of his business was used to establish another business which, four years into the marriage, was sold at a profit of $800,000. The Full Court allowed an appeal from but made the same contributions assessment as Demack FM, saying at para 71:

> "In our view the husband's contributions were greater than that of the wife by reason of the business at the time of the marriage which provided a 'springboard' for the later businesses. We would assess ... contributions ... as 55 per cent in favour of the husband."

PROPERTY

- ***Trust controlled by husband's father not a sham***
- ***Trust assets excluded from pool***

In *Keach & Keach and Ors* [2011] FamCA 192 (9 March 2011) at paras 172.21-172.22 the wife failed to demonstrate to Strickland J that a discretionary trust established and controlled by the husband's father to "keep the assets in the 'family' and to ensure that his four children benefited through the trusts", was a sham to conceal the husband's true ownership of trust assets.

PROPERTY

- ***Post-separation high earnings (and donations) not added back***
- ***Contingent tax debt excluded***

In *Shimizu & Tanner* [2011] FamCA 271 (20 April 2011) the parties separated in 2005 after an eight year marriage. The wife argued that $600,000 (being the husband's post-separation income less assets bought and his reasonable living expenses) and his charitable donations ($148,000) should be added back to the pool. Bryant CJ disagreed, saying at para 76:

> "First, the husband did not dissipate an existing asset. Far from it. He created assets which added to the pool from his income. Secondly, [he] was under no legal obligation to provide other funds from his income to the wife and B ... beyond what he was already contributing voluntarily. Thirdly, I am not satisfied that the figures put forward by the wife are in any event reliable as to what shortfall might have been provable between expenditure and income."

Bryant CJ noted the donations as representing just 0.04 per cent of the husband's gross income and excluded an overseas tax liability as "the tax expert said that he was not able to conclusively determine [the husband's status as] ... a permanent or non-permanent resident".

PROCEDURE

- ***Order for production of family counseling documents***

In *Harkiss & Beamish* [2011] FMCAfam 527 (26 May 2011) at paras 2-9 Altobelli FM ordered UnitingCare Unifam to produce under subpoena documents relating to family counseling where neither party objected and both consented to disclosure.

PROPERTY

- ***Rent-free housing***
- ***Wife's inheritance***

In *Ross & Audley* [2011] FMCAfam 280 (6 May 2011) the parties had been married for 22 years, had four children and another child. Most of the $3.15m pool came from the wife's inheritance from her mother's estate four years before separation. The family also lived rent-free courtesy of the mother. Bender FM made an adjustment of 25 per cent in the wife's favour for contributions.