Family Law
Case Notes
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PROPERTY

- ***Joinder of parent as alleged creditor***
- ***Consolidation of State proceedings***
- ***Accrued jurisdiction***

In *Stuart* [2011] FMCAfam 1228 (17 November 2011) the proceeds of sale of a property owned by the parties and the husband's parents ($90,000) were given to the wife and husband to be paid off their mortgage. The husband claimed the money had been a loan and his mother issued proceedings against them in the District Court of SA for repayment. Mead FM granted the wife's application for an order that the FMC exercise its accrued jurisdiction by joining the two proceedings, saying that it would not be possible to calculate the parties' assets and liabilities "without making a finding as to the parties' liability to Mrs I Stuart Snr" and that to "do so she must be afforded procedural fairness [which would be] best accorded to her by way of joining her to these proceedings" under FMCR 11.01 so as to enable the court "to completely and finally determine all matters in dispute between the parties".

PROPERTY

- ***Finding that party had indirect control of discretionary trust assets was in error***

In *Harris* [2011] FamCAFC 245 (22 December 2011) the husband appealed to the Full Court (Finn, Thackray and Strickland JJ) against Bell J's finding that the $1.5m assets of a discretionary trust were indirectly controlled by the husband (H) so should be treated as his property. H's mother became appointor upon the death of H's father. The trustee was HA Pty Ltd, the directors and shareholders of which were H's mother (2 shares), H's son from a previous marriage (1 share) and a "long standing friend" of H (1 share). The beneficiaries were H's parents; the children of H's father (H and his sister, B); and "the lineal issue" of H's father. The businesses were managed by H on behalf of the trust. Both W and B had worked in the business. Trust distributions had been made to W (although she was not a beneficiary) and H. Allowing the appeal, the Full Court found that H had no direct or indirect control of the trustee. The Court said at paras 64-67 and 70-73:

> " … the husband appears to be no more than … a beneficiary of [the] trust. He is not the appointor of the trust nor does he hold any position in the current trustee company. (…) Nor could it be said that he … control[s] the … trustee (…) [or that] the husband's mother is his puppet … One of the difficulties in this case is that the husband's mother was not called to give evidence. (…) On the evidence … the best that we could do would be to determine that the trust is a very significant financial resource for the husband."

Editor's note – See also *Morton* [2012] FamCA 30 at paras 35-38 (3 February 2012).

CHILDREN

- ***Failure to make interim order for supervision***
- ***History of non-contact***

In *Green & Graham* [2011] FamCAFC 248 (22 December 2011) Coleman J allowed the mother's appeal against Harman FM's interim order that a two year old child spend Saturdays with the father without supervision, saying at para 31:

> "The crux of the challenges … was that his Honour failed to give adequate weight to the need to provide reassurance to the mother for the safety of the child, and/or … failed to give adequate weight to the history of non-contact between the child and her father relative to her young age, the duration of separation and the absence of any evidence of an existing relationship."

Coleman J found at paras 40-45 that inadequate weight had been given to Harman FM's own findings that during the separation of 12 or 16 months the child had seen her father once (a supervised visit that "ended unhappily") and that "keeping the parents as far as practicable away from each other [would be] advantageous", concluding:

> "If his Honour had given proper weight to the child's circumstances he would have provided supervision at least on an interlocutory basis … the Court would have had both evidence of how the supervised contact had proceeded, the mother would have had the opportunity to see whether, despite the past, the father was capable of doing what he clearly expressed a desire to do, and for his part the father would have had an opportunity

to demonstrate the capacity which he asserted."

The proceedings were remitted for rehearing and an interim order made varying the order so as to provide for the father's time with the child to be supervised by the Centacare Campbelltown Contact Centre.

PROPERTY

- ***Subpoena***
- ***Accountant's claimed $4,000 for compliance reduced to $1,000***

In *Lavell* [2012] FamCA 34 (3 February 2012) the husband's accountant (Mr Y) sought under FLR 15.23(3) reimbursement of $4,000 for "substantial loss and expense" incurred (at an hourly rate of $158) by his firm's compliance with a subpoena to produce documents. Murphy J examined the principles relevant to conduct money at paras 236-247, saying at paras 250-261:

> "Plainly the expenses claimed by Mr Y are 'substantial'; they are significantly greater than the $43.00 conduct money provided by the wife and are, to use the words employed by Cronin J in *Moriarty* [[2009] FamCA 369] at [59], 'large, causing loss' and 'unusual in the sense of requiring normal activity to be stopped'."

Murphy J said that the question was whether the expenses are "reasonable" – not for an accountant to charge but "for an issuing party to pay" – and that "[in] essence, what is reasonable is partial compensation for loss associated with being drawn into a process essential to the administration of justice". Murphy J added that "it was open to Mr Y to object to production on the basis that the subpoena was oppressive or sought irrelevant documents (see r 15.31)". His Honour found charges for "discussing" and "reviewing" documents unreasonable, that "the subpoena was … clear in its description of the documents sought" so that "the task of searching the firm's records … was [not] especially complex". Murphy J held that "$1000 represents adequate recompense for the loss or 'expense' incurred by Mr Y's firm as a result of its compliance with the wife's subpoena".

CHILDREN

- ***Interim relocation from Sydney to Newcastle allowed***

In *West* [2012] FamCA 35 (6 February 2012) Ryan J made an interim order allowing the mother to relocate children of 8 and 11 from Sydney to Newcastle where her new partner (to whom she was pregnant) lived and worked. The mother was the children's primary carer, she was not in paid work and her partner was unable to move to Sydney. The children had maintained regular contact with the father and it was found that interim relocation would not adversely affect their good relationship with the father. It was ordered that they spend three out of four weekends with him and half school holidays.

FINANCIAL AGREEMENT

- ***Agreement set aside for not being a contract***

In *Pascot* [2011] FamCA 945 (21 December 2011) the wife *inter alia* sought a declaration that a pre-nuptial agreement (the commencement of which had been backdated to the day before settlement of a property purchase in the husband's name) was not a contract. The agreement was entered into when the wife was pregnant with their second child. A third child was born four years later. The agreement provided that the husband would provide a home in return for the wife being responsible for the care of the children. Le Poer Trench J examined the evidence at paras 166-190, saying that the "primary question … is whether the parties are *ad idem* as to the agreement they are entering". A contract required a "clear" offer (para 169) and "an unqualified assent to [its] terms" (para 174). It was found that the husband's offer to buy the house if the wife entered into a financial agreement was subject to negotiation (in that he could not have withdrawn from the contract without penalty). It "was not within [his] power to *offer* the purchase of the house" (para 170) yet the wife remained reliant on the husband's representations "that he was still capable of backing out of the purchase" (para 179). The wife's "interest in signing the agreement was to ensure "a roof over the children's heads". The husband's representations to that effect continued after completion of the purchase, making his representations impossible. Le Poer Trench J concluded at para 185:

> "Given that the offer was no longer *capable* of being offered, and was therefore *not* offered, it is not possible for there to be acceptance by the wife. The parties were not *ad idem* over the contract being entered and consequently could not be said to have reached agreement."

CHILDREN

- ***Interim order for sole parental responsibility not in error***

In *Gainforth* [2012] FamCAFC 24 (16 February 2012) the father appealed to the Full Court (Coleman, May and Ainslie-Wallace JJ) against an interim order granting the mother sole parental responsibility. Their Honours referred to *Goode* (2006) FLC 93-286 (FC) and the court's discretion under s 61DA(3) not to apply the presumption of equal shared parental responsibility at an interim hearing if considered not appropriate to do so. The Court said at para 22:

> "Although it may not have been necessarily in the children's best interests to make an order for sole parental responsibility on an interim basis, it was apparent that there were significant tensions between the parents [findings as to which went unchallenged]. Applying well known principles … it cannot be seen that the order was in error."

FINANCIAL AGREEMENT

- ***Appeal allowed***
- ***Strickland J's "narrow" interpretation of s 90G(1A)(c)***

In *Parker* [2012] FamCAFC 33 (7 March 2012) Coleman and May JJ (Murphy J dissenting) allowed the

husband's appeal against Strickland J's decision not to invoke s 90G(1A) in declaring that it would be "unjust and inequitable if the agreement were not binding on the parties" (where the agreement was amended after it was signed by the wife and her solicitor). Subsections (1A), (1B) and (1C) were described by Coleman J as "remedial legislation", to be "construed 'generously' to ensure that the 'mischief' which [it] seeks to address is remedied" and that the trial judge's interpretation of s 60G(1A)(c) was "erroneously narrow". The case was remitted for rehearing.

PROPERTY

- ***Farm***
- ***Alleged lease of cattle rejected***
- ***Initial contribution***

In *Preston* [2012) FCWA 6 (27 January 2012) the husband was a farmer and the wife worked in the home and part-time in a bottle shop. Their eight year marriage produced three children and net assets of $659,000. Thackray CJ found the husband to be the owner of 40 cows the husband alleged were under lease from his father (paras 40-42). The value at trial of the husband's initial contribution (the farm) exceeded the net pool. Finding that contributions were otherwise equal, Thackray CJ at paras 82-83 assessed contributions at 82.5:17.5 favouring the husband. The wife received a 25 per cent adjustment for s 75(2) factors, being the impairment of her earning capacity by her care of children, limited work opportunities and the husband's rent-free accommodation.

PROPERTY

- **Ex parte flagging order**
- **Prospect of withdrawal of superannuation**

In *Zoller* [2012] FamCA 47 (27 January 2012) Murphy J granted the wife's urgent *ex parte* application under FLR 5.12 for a flagging order under s 90MU due to the prospect of the husband, a resident of Germany although currently living in the Caribbean, withdrawing superannuation from his pension plan, being "a substantial part of the property of the parties".

FINANCIAL AGREEMENT

- ***Agreement not binding***
- ***Unreliable evidence as to legal advice given***

In *Hoult* [2011] FamCA 1023 (22 December 2011) Murphy J granted the wife's application for a declaration that a s 90B financial agreement made in 2004 was not binding because her solicitor Ms K never provided her with the advice required by s 90G. The wife (paras 76-78) complained that she was "not able to fully comprehend what was being read to [her]" and that Ms K did not explain "the law relating to the agreement … ask [her] any questions about the history of [her] marriage … or speak to [her] about [her] rights … nor the advantages or disadvantages arising from the agreement". Murphy J referred to Ms K's evidence at paras 47-50 and to "the prudence of comprehensive diary notes or other memoranda or, for example, a contemporaneous letter of advice" to assist recall or as evidence, saying at paras 78 and 94:

> "Ms K said it was 'not correct' for the wife to make that assertion. But, her evidence to that effect is not supported by any positive evidence by her as to what advice was actually given … I find her evidence to be generally unreliable. (…) The evidence as a whole, including the certificate, provides an insufficient evidentiary foundation for a finding that advice was given about the advantages and disadvantages of the agreement for the wife at the time that the agreement was made."

PROPERTY

- ***Contributions***
- ***Most of $13.7m pool inherited by husband***

In *Mackintosh & Greer* [2012] FamCA 55 (15 February 2012) the parties cohabited for a year, were then married for seven years and had no children. The $13.7m net assets comprised the farm inherited by the husband and other assets acquired by him ($12.3m) and property contributed by the wife ($1.4m). Dawe J assessed contributions at paras 110-115 as 75:25 in the husband's favour. No adjustment was made under s 75(2).

CHILDREN AND PROPERTY

- ***Drug testing***
- ***$3.5m of $5m pool inherited by the wife***

In *Vokic & Vlass* [2012] FamCA 56 (15 February 2012) the wife had a history of drug abuse and an interim order required her to undertake urinalysis and hair follicle tests for the presence of illicit drugs and continue with family therapy (para 69). Fowler J considered evidence from a medical specialist in addiction medicine and a family consultant, making an order (para 427) enabling the children to spend "regular … time with the wife with an opportunity for [her] to put her life back in order … on the basis that as the risk to the children demonstrably diminishes there will be increasing time with the wife [as to which] she will need to be able to demonstrate compliance with the orders and provide continued negative drug tests". The parties' ten years together produced net assets of $5m, $3.5m of which the wife inherited during their relationship. Contributions were assessed at 80:20 in her favour. The husband received an adjustment of seven per cent for s 75(2) factors, being the imminent termination of his employment, his need to retrain and the wife's superior earning capacity.

CHILDREN

- ***Risk of abuse acceptable if time limited to supervised day time***

In *Giordano & Sica* [2012] FamCA 64 (24 February 2012) Rees J found that the mother's concerns at the risk of sexual abuse of a child K by the father were valid, saying at para 101 that because the court could not "be sure that K [would] be safe overnight in the father's household" the time K spent with her father would be limited to day time. Rees J concluded that "[i]f the time is limited to day time, supervised visits, then the risk is acceptable".