

Family Law

Case Notes

May 2012 - January 2013

Robert Glade-Wright
Author and Editor
The Family Law Book



PROPERTY

- **Superannuation**
- **Separate pool**
- **Non-member reassessed on appeal**

In *Palmer* [2012] FamCAFC 159 (28 September 2012) the parties' 16 year marriage produced two children, non-super of \$358,000 (Pool A) and in Pool B super of \$27,000 (mother's) and \$864,386 (father's military super). Brewster FM assessed contributions to Pool A as 53:47 favouring the mother (who had made a financial contribution and post-separation welfare contributions) and to Pool B as favouring the father 70:30 as to his super or 68:32 as to total super. The Full Court (Bryant CJ, Finn and Strickland JJ) allowed the wife's appeal. The father's super had accrued for 10 years before cohabitation and 2 years post-separation. Upon a re-exercise of discretion, the Court left undisturbed Brewster FM's order as to the non-super and found the mother entitled to half the difference between the father's super at separation and its value at cohabitation (para 76).

PROPERTY

- **Big money case**
- **Long marriage**
- **"Special contribution"**
- **"Clever" husband awarded 60 per cent**

In *Smith & Fields* [2012] FamCA 510 (6 July 2012) a 29 year marriage produced three children and an asset pool of \$32-39m comprising the parties' "very successful construction business" and \$10m home. It was agreed

that "the wife's predominant contributions ha[d] been directed to the home, children and family and that the husband's ... ha[d] been to the business". The husband sought 70 per cent for his "special' or 'unique' or 'out of the ordinary' [contributions]". The wife argued that their wealth was "as a result of an economic, domestic and emotional 'partnership'". After reviewing case law, Murphy J said as to the contributions of the parties (para 63) "I do not consider the one to be more or less important (or 'valuable') than the other." Observing, however, at para 73 that "the parties' children ha[d] been adults for the whole of the [four year] post-separation period", Murphy J said at para 75:

"... an analysis of [the parties'] contributions points to a greater contribution having been made by the husband directly to the business, predominantly by reference to the design of the buildings which the business constructs and sells so successfully and to what I will call the stewardship of the company including the plainly clever strategies and planning that have given it such success and to the financial and other planning that have led to it doing, relatively speaking, remarkably well in very adverse macro-economic conditions. These are important contributions

[as to] which it is ... both appropriate and just to distinguish between the parties to this lengthy union. I consider that disparity to be particularly evident ... in the period post-separation."

Contributions were assessed as to 60 per cent in favour of the husband, there being no adjustment under s 75(2). (**Editor's note** – This decision is understood to be under appeal.)

PROPERTY

- **Injunction to restore wife's employment with company**

In *Lampros and Anor* [2012] FamCA 415 (18 May 2012) Forrest J granted the wife's application for an injunction restraining the husband as director of a publishing company, from preventing the wife from conducting the company's business, saying at paras 51-53:

"I am satisfied [as to] ... the wife's involvement in the day to day operations of the [company's] publication (...) the proper orders ... to make in this case are those that will put the parties ... back in the same positions relative to each other as they were prior to matters falling asunder in February."

PROCEDURE

- **Service of initiating application in a foreign jurisdiction**

In *Davenport & Rattray & Anor* [2012] FMCAfam 1097 (26 June

2012) Myers FM granted the mother's application for an order that in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Convention") the Registrar forward a request to the (omitted) Zurich to serve on the respondent the mother's initiating application and other filed material. The respondent's address (in Switzerland) was noted in the order. Myers FM referred at para 32 to Part IIAB of the *Family Law Regulations 1984* which sets out the procedure to be adopted by the Family Court and FMC both as to service in countries that are signatories to the Convention and countries that are not, and Schedule 1 which contains a draft form for use when requesting service abroad under the Convention.

CHILDREN

- **Parenting order made to accommodate father's shift work**

In *Lees* [2012] FMCAfam 1074 (10 October 2012) Whelan FM granted the father a parenting order that "would align the time the children spend with him with his work roster" whereas the mother sought an alternative weekend arrangement. Whelan FM said at paras 61-62:

"The type of orders framed by the mother are commonly seen in this court as some standard for children to spend substantial and significant time with their fathers. They are a model based on certain assumptions about working patterns which are not present in this case. I am satisfied that the mother in this case has exaggerated the inflexibility of her own situation. (...) At the same time she exaggerated the father's flexibility ..."

FINANCIAL AGREEMENT

- **Agreement set aside as unenforceable due to (1)**

frustration by failure of anticipated refinancing and (2) impracticability

In *Herold & Kay* [2012] FMCAfam 1071 (4 October 2012) Jarrett FM set aside a Part VIIIAB financial agreement as being unenforceable under s 90UM(1)(e) FLA and impracticable to be carried out under s 90UM(1)(f). Under the agreement Mr Herold was to transfer his interest in a property to Ms Kay who in turn was to "undertake a refinancing of some joint debt ... secured over the property". Ms Kay's application to the Commonwealth Bank for refinancing was declined. Jarrett FM held that the agreement was frustrated by the Bank's failure to approve refinancing and was also impracticable to be carried out.

PROCEDURE

- **Registrar's refusal of leave to serve at short notice set aside**

In *Bardon* [2012] FMCAfam 1116 (24 August 2012) the husband filed an application for review of a registrar's refusal to grant leave to serve an application in a case at short notice. The husband was seeking "an earlier return date ... because he claim[ed] that 15 October [was] too late to enable him to obtain necessary valuations and make other preparations for the final hearing". Scarlett FM granted the application, ordering that the matter be returnable on 5 September.

PROPERTY

- **Trust documents of corporate trustee not discoverable**

In *Schweitzer* [2012] FamCA 445 (10 May 2012) O'Reilly J dismissed the wife's application for disclosure by the husband of the financial statements, tax returns and bank statements for two discretionary trusts (of which he was a beneficiary) and the minutes as to trust distributions of the corporate trustee (not a "one man company") of which the husband was a director but not a shareholder on the ground that the documents were not under

his "control" within the meaning of FLR 13.07.

NULLITY

- **Marriage declared void**
- **Duress**

In *Nagri & Chapal* [2012] FamCA 464 (1 June 2012) Collier J declared void a marriage on the ground that the husband's consent had been obtained by duress.

PROPERTY

- **Subpoena for wife's parents to produce their wills set aside**

In *MacDowell & Williams and Ors* [2012] FamCA 479 (22 June 2012) Kent J set aside a subpoena issued by the husband for production by the wife's parents of their wills as there was no evidence that the parents had lost testamentary capacity, nor was there any "reason to suppose that the wife [was] likely to receive any inheritance in the near future" (para 22).

INTERIM COSTS

- **Partial property settlement**
- **"Level playing field"**

In *Peabody* [2012] FMCAfam 1224 (13 November 2012) Sexton FM granted the wife's application for an interim costs order against the husband, ordering him to pay to the wife's solicitors \$127,000 by three instalments. In doing so, Sexton FM applied *Strahan* [2009] FamCAFC 166 (FC) and *Osferatu* [2012] FamCA 408 in which Watts J said at para 35:

"The notion of a 'level playing field' is one which almost axiomatically is in the interests of justice and an important matter to consider when deciding whether it would be appropriate to make an interim property order."

PROPERTY

- **Leave granted to proceed 26 years after divorce**

In *Ordway* [2012] FMCAfam 624 (13 July 2012) Cole FM granted the wife leave under s 44(3) FLA to file property proceedings out of time where the wife had lived

in the matrimonial home of which the husband was registered owner since the parties' divorce in 1986 and the husband had continued to meet the outgoings on the property.

Property

- **Involuntary "separation"**
- **Power to make property order**
- **Death of party**

In *Stanford* [2012] HCA 52 (15 November 2012) the husband "separated" from his wife when she was admitted to a nursing home. The Full Court had allowed his appeal from an order of Duncanson M (Magistrates Court of WA) on the application of the wife's daughter of a prior marriage as case guardian that he pay the wife \$612,931 (an order that could only be satisfied by the sale of the home where he continued to live). The Full Court held that a property order could be made despite the marriage being intact. In a later hearing, after the wife had died, the Full Court upon a re-exercise of discretion ordered the sum to be paid to the wife's personal representatives upon the husband's death. The High Court on appeal rejected the husband's argument that the Court had no power to make the orders made but held that it should not have exercised that power. The majority of the High Court (French CJ, Hayne, Kiefel and Bell JJ) said (paras 22-23) that "of central importance" to the determination of the appeal were ss 79(2) and 79(8), paragraph (b) of which required a court to consider "whether, the party having died, it is *still* just and equitable to make an order" (para 24). The majority concluded (para 49) that "[i]t was not shown that the wife's needs during her life were not being or would not be met".

Property

- **Valuation of business for which proper records had not been kept**
- **Order for sale of business**

In *Baghti* [2012] FamCA 711 (22 August 2012) Fowler J accepted the recommendation of a valuer (paras 694-718) that the wife's

retail business, owned by the wife and her sister in partnership, be sold because the absence of proper records prevented the valuation of the business.

Property

- **Registrar's refusal to make consent orders set aside**
- **Severance of joint tenancy did offer a "clean break"**

In *Laice & Longki* [2012] FamCA 526 (26 June 2012) a registrar declined to make consent orders filed by the parties, referring the matter to Cronin J. Cronin J disagreed that the proposed order by which the parties would become owners of a property as tenants in common in unequal shares (to reflect their property settlement) did not afford a clean break as intended by s 81 FLA.

Children

- **Order made for traditional (in preference to homeopathic) immunisation of child**

In *Kingsford* [2012] FamCA 889 (19 October 2012) Bennett J heard a parental dispute and conflicting experts as to whether a child should be immunised by way of homeopathic or traditional vaccination. Bennett J found in favour of the latter, taking into account (para 110) that "the position articulated by the British Homeopathic Association and the Australian Register of Homeopaths ... is the support of traditional immunisation in all cases except those, impliedly exceptional cases, which are medically contraindicated".

Property

- **Case adjourned to allow wife's allegation of tax evasion by husband to be investigated by ATO**

In *Pisani* [2012] FamCA 532 (2 July 2012) the wife alleged fraudulent tax evasion by the husband who denied the allegation. Upon finding that the potential liability would have a considerable impact on the asset pool, Ryan J held that it was appropriate to adjourn the s

79 proceedings until that issue was resolved. It was ordered that the Principal Registrar provide certain affidavits, an expert report and the Court's reasons for judgment to the Deputy Commissioner for Taxation.

Children

- **Alleged mental illness and child abuse**
- **Single expert preferred to two experts as sought by mother**

In *Swefford & Tarbell (No. 4)* [2012] FamCA 888 (22 October 2012) the mother supported then opposed a psychiatrist Dr R as single expert, before seeking the participation of a second expert, a Ms V. Before stating Dr R's qualifications and experience as a single expert Watts J said at paras 12-13:

"Ms V has an honours degree in social work. She has no relevant experience in psychiatry and the mother, to be fair, does not suggest that she has the qualifications to give the Court any opinion in relation to the issues as to the mental status of either of the parents or the history of their mental status. I am of the view that I would be assisted if the one expert did the whole report."

Procedure

- **Registrar's refusal of leave to serve at short notice set aside on review**

In *Hathaway* [2012] FMCAfam 1447 (28 December 2012) the mother alleged that the father had unilaterally removed their child from school and since withheld the child from her care. Upon the review of a registrar's refusal to list her application for a recovery order urgently for an *ex parte* hearing, Scarlett FM brought the return date forward from 5 February to 10 January in open court. It was ordered that the respondent be served with the order and court papers.

Editor's note – For a successful review application in a property

case, see *Bardon* [2012] FMCAfam 1116.

Children

- **“Contact” may be used interchangeably with “spend time with” according to context**
- **Relocation case**

In *Abrahams & Rathbone* [2013] FMCAfam 1 (9 January 2013) Roberts FM allowed the mother to relocate from northern Tasmania to Melbourne where her new partner worked. Roberts FM referred at paras 32-34 of the judgment to the use of the term “contact” in a parenting case, citing the following statement of the Full Court in *Carpenter & Lunn* [2008] FamCAFC 128 at para 4, applied in *Chappell* [2008] FamCAFC 143 at para 5:

“The new legislation replaced the legal concept previously known as ‘contact’ with the concept of a child ‘spending time’ with someone. The legislation, however, does not prohibit the use of the noun ‘contact’ in its everyday sense. In these reasons, we propose to use ‘contact’ interchangeably with expressions such as ‘spend time with’. In doing so, we have not ignored the legislative intent, but rather have avoided the linguistic gymnastics that would otherwise have been necessary.”

Children

- **Interim hearing**
- **Mother not required to return to Sydney after her unilateral relocation to Adelaide**

In *Chapa* [2012] FMCAfam 1420 (18 December 2012) the mother unilaterally relocated from Sydney to Adelaide with two young children, alleging child abuse and family violence by the father. At the interim hearing Halligan FM did not require her to return to Sydney, concluding at paras 73-76:

“ ... I am concerned about

the potential adverse effect upon the mother and, through her upon the children, of ordering a relocation back to Sydney. The father’s case [e.g. he produced a suicide note written by the mother] ... is that the mother has ... significant issues with anxiety (...) ... [his] own evidence is that the mother has difficulty making friends in Sydney. There is no other maternal family in Sydney. (...) On the father’s own case [requiring her to return there] would seem to be highly likely ... to compromise significantly the mother’s ability to parent these children ... ”

Contravention

- **Document as to previous settlement negotiations held admissible under s 131(2)(f) Evidence Act 1995 (Cth)**

In *Garcia & Vibbard* [2012] FMCAfam 1413 (20 December 2012) the mother was alleged to have contravened a consent order that she return the child’s passport to the father upon her return from an overseas trip with the child. The mother argued “reasonable excuse” for her contravention as the father was seeking to resile from his agreement not to travel overseas with the child for the rest of 2012. She sought to tender parts of an affidavit sworn by the father’s former solicitor containing evidence of that agreement (which had led to the consent order). The applicant objected on the ground of client legal privilege. Scarlett FM said at paras 55-56:

“It was submitted ... that the evidence ought to be admitted under paragraph 131(2)(f) of the *Evidence Act*, because the evidence is sought to be adduced in a proceeding to enforce an agreement between the parties in dispute to settle the dispute. The evidence has been admitted on that

basis.”

Property

- **“Unusual relationship” that began as a business association declared a de facto relationship**

In *Gissing & Sheffield* [2012] FMCAfam 1111 (18 December 2012) O’Sullivan FM described (para 2) as “unusual” the relationship between the 48 year old applicant who alleged a 17 year relationship with the respondent, a 65 year old business proprietor, that began as a business association and became a personal one. After considering much evidence, in particular as relevant to the factors set out in s 4AA(2) of the *Family Law Act* and reviewing the authorities, O’Sullivan FM at paras 192-198 cited the factors to which weight was given and declared that the parties were in a de facto relationship.

Children

- **Same sex parenting**
- **Order under s 19(2) Births, Deaths and Marriages Registration Act 1995 (NSW) to register both mothers as parents**

In *Dent & Rees* [2012] FMCAfam 1303 (19 December 2012) Terry FM heard a parenting dispute as to three children after a same sex de facto relationship of 17 years. The biological mothers were Ms Dent (for child Y) and Ms Rees (children X and Z), the father of each child being an anonymous sperm donor. Only the birth mother could be registered as parent but the children were all given the surname Dent-Rees. Terry FM at para 238 said that in 2008 retrospective legislation was introduced in NSW which permits two parents of the same sex to both be named on a child’s birth certificate. Terry FM determined the matter by ordering pursuant to s 19(2) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) that both parents be registered as parents of both children. Terry FM’s reasons are set out at paras 250-257 of the judgment. ●