

Family

Law Case Notes

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Children – Relocation

For a review of the authorities on relocation and the meaning of a “meaningful relationship with both parents” see *Fraser & Wilson* [2009] FMCAfam 674 at paras 23-46 where Coakes FM refused a mother’s relocation from Newcastle to Melbourne with an eight-year-old child, concluding that the court was “bound by ...the amending legislation(’s) new focus and emphasis on both parents being not only involved but substantially involved with the lives of their children except when it is or would be contrary to the child’s best interests”.

See, however, *Lynch & Gage* [2009] FMCAfam 885 where a mother was allowed to move with a child of five from Melbourne to a place a three-hour drive away. Henderson FM weighed the family report writer’s evidence (of the mother’s depressive condition which was likely to seriously worsen if required to remain in Melbourne where she had no support) and found that the child/father bond was too strong to be compromised by such an order.

Note – The mother in *Rosa’s Case* (MRR v GR [2009] HCA Trans 248) has been granted leave to appeal to the High Court.

Child support – Lump sum orders

A mother’s application for lump sum instead of periodic child support on the ground that the father’s payments had become “sporadic” was refused in *Godfrey* [2009] FMCAfam 626. Referring to the father’s explanation for stopping some payments and his insistence that he would continue

meeting his child support liability while in employment, Baker FM applied the Full Court’s ruling in *Prpic* (1995) FLC 92-574.

But see *Aitken & Porteus* [2009] FMCAfam 783 (Lindsay FM) where, in an asset rich/income poor case, a lump sum order was made.

Subpoena – Implied waiver of legal professional privilege

Where a wife applied for a financial agreement to be set aside, her lawyers were held to be required to disclose all written communications between them sought by a subpoena issued by the husband: *Bell* [2009] FMCAfam 595.

Burnett FM held that the wife’s lawyers had impliedly waived privilege by having written to the husband to discourage him from contesting the matter by saying that detailed instructions had been obtained by the wife as a result of which she had been advised that the agreement should be set aside on certain grounds (which were then set out in their letter).

Children – Time sharing

A father seeing himself as a “weekend dad” was granted an extra night with his children, being a sixth night per fortnight, a week on/week off arrangement not being favoured due to continuing conflict between the parties: *Costa* [2009] FMCAfam 568 (Bender FM).

Variation of a parenting order

A court has refused to dismiss an application to reopen a parenting case brought by a father, who alleged

that the mother had refused to allow him to participate in decision-making concerning their child’s serious ill health and also referred to the children’s expressed wish to spend more time with him: *Vanderhum & Doriemus* [2009] FMCAfam 708 (Altobelli FM).

But see *Cortes & Cabrera* [2007] FMCAfam 293 where a father sought to reopen a case when children of 13 and 15 had expressed a wish for change, *Wilson* FM (at para 25) holding that “parenting orders should not be varied or discharged according to the whim of a child”.

Interim spousal maintenance

A 40-year-old “homemaker” who sought interim maintenance of \$896 a week from her 50-year-old husband was granted \$866 per week. Her need for maintenance was conceded and most of her stated living expenses were accepted by the court: *Yanez & Kouros* [2009] FMCAfam 791.

As to the husband’s alleged incapacity to pay maintenance, Altobelli FM (at para 14) said that: “the evidence of the husband is inconsistent, fragmented, but nonetheless points to a business that produces for the most part a positive cash flow and is able to sustain a personal weekly payment by the husband for the benefit of the wife and children of at least the amount he was paying between July 2008 and March 2009; that is, \$960 per week”.

Stay of interim parenting order pending appeal

A limited stay of part of an interim parenting order has been granted due to a mother’s distress (which,

the court accepted, would become apparent to the child) over that aspect of the case, and the child's own upset during an overnight visit to her father: *Treloar & Nepean* [2009] FMCAfam 847.

Altobelli FM held at para 6 that "the real question...is whether to grant a stay is in the best interests of the child and, if so, on what grounds should a stay be granted". The order was modified pending the appeal.

Property settlement

In *Hornby* [2009] FMCAfam 397, a case of a 20-year marriage of which there were four teenaged children, the various contributions of the accountant husband and his wife (a full-time homemaker and part-time health care professional) were agreed by the parties as equal. Their investment in the children's private schooling had left them with net assets of \$261,000 and superannuation of \$335,000 (mostly the husband's).

Bender FM granted the wife a further 30 per cent of the non-super assets for section 75(2) factors including disparity of income, earning capacity and borrowing power, and a splitting order for an equal share of the super with the option of rolling her interest into a fund of her own choosing.

The husband, who was paying child support for the two children under 18, was also ordered to pay his agreed share of their private school expenses.

Parentage testing

For a review of the courts' approach to a parentage case, see *Letsos &*

Vakros [2009] FMCAfam 897 (Kemp FM).

Property settlement

In the case of a 32-year marriage of which there were five adult children, a husband has been awarded 52.5 per cent of a net asset pool of \$970,000 due to a gift of \$15,000 from the husband's father midway through the marriage; the wife's gambling problem; and her post-separation mismanagement causing the mortgage to be increased by \$5,000. No adjustment was made for section 75(2) factors: *Kutras* [2009] FMCAfam 898 (Terry FM).

Interim costs

The test for interim costs is not "compelling circumstances": *Strahan (Interim Property Orders)* [2009] FamCAFC 166 (FC) at paras 132, 144 and 145:

"It did not require a detailed inquiry into the conduct of the litigation on the part of the wife (...) As...the trial judge was satisfied that the wife needed funds to meet ongoing legal costs of the proceedings and that she did not have the funds to pay those costs...it was an appropriate case to exercise the jurisdiction to make an... order."

Parenting order graduating to equal time

See *Banning & Wylie* [2009] FMCAfam 1049 (Laphorn FM).

Maintenance order discharged

A successful applicant called a doctor and a recruitment consultant, and relied on the "Westpac-

AFSA Retirement Standard for 'a comfortable lifestyle' for a single female in Tasmania", of which the court found the wife's expenses were "well in excess": *Bastow* [2009] FMCAfam 21 (Roberts FM).

Violence and abuse – Unacceptable risk

O'Reilly J in *Foster* [2009] FamCA 499 at para 133 applied *A v A* (1998) FLC 92-800 (FC) which held:

"The first enquiry is whether there is objectively an unacceptable risk. If [so] the Court must take steps proportionate to the degree of risk. If...not, the Court may then need to consider whether the residence parent has a genuinely held belief that such a risk exists and whether that will have a significant impact on (their parenting) capacity and so impinge on the (children's) best interests. The Court then needs to take steps proportionate to that circumstance."

Supervision v no time

The court in *Foster* (above) imposed contact centre supervision, applying at para 162 the approach in *Moose* [2008] FamCAFC 108 (FC):

"...(W)here the choice is between supervised time...as opposed to...no time, there are occasions on which, particularly if there is an established relationship between a child and a parent to be preserved, supervised time should be favoured, even...long term supervision."

For an order allowing no time with children see *Maluka* [2009] FamCA 647, in which Benjamin J applied the Family Court's *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*.

Consent property order set aside

Such an order was set aside under s 79A as the wife's settlement had been based on a property's agreed value that upon its sale soon afterwards proved to be \$1m less than its true value, the husband concealing receipt of a pre-settlement offer near its sale price: *Barker* [2007] FamCA 13 (FC) at para 123 (recently published).

Children – Grandparent v parent

For a review of the "parent v grandparent" cases see the recently published *Kay & Jasper* [2007] FamCA 1646 at paras 67-74 (O'Reilly J).

Child protection v parenting order

In *Dunstan & Jarrod* [2009] FamCA 480 Murphy J held at paras 50-56, applying *Re Alex* [2004] FamCA 297, that the written consent of a child welfare authority gave jurisdiction to the court to make parenting orders for a child under that authority's care.

Property – Contributions – Kennon – Non-disclosure

Where a husband's pre-marital damages were used to buy a property the sale of which at separation 23 years later netted half the parties' \$1.3m assets (including a \$268,000 add-back for his gambling waste) his contributions were assessed at 65

per cent: *Kozovska* [2009] FMCAfam 1014 at paras 73-4.

Altobelli FM at paras 75-8 then adjusted 10 per cent to the wife whose contribution was made more arduous by the husband's "coercive controlling violence" as categorised in a 2008 paper by social scientists Kelly and Johnson. Her 45 per cent was increased by 10 per cent under s 75(2) (the husband's unemployability being assessed at 5 per cent minus 15 per cent for his non-disclosure).

In *Kucera* [2009] FMCAfam 1032 at para 110, Altobelli FM awarded a wife 15 per cent of a \$600,000 pool under *Kennon* for enduring prolonged abuse.

Parenting order – Overnight time v breastfeeding

For an order (shorter day visits more often; monthly overnight stays) letting mother wean 19-month-old child and father begin overnight time, see *Marsh & Hornby* [2009] FMCAfam 951 (Monahan FM).

Property – Contributions

A wife who sought 35 per cent of a \$1.4m pool after contributing little and living for half her six year marriage in the Philippines (so she could apply for a spouse visa) had her contributions assessed at 2.5 per cent: *Parke* [2009] FMCAfam 934. Phipps FM added 7.5 per cent under s 75(2).

Parenting order – Non-parent's standing

Where former partners each had a child from different sperm donors, Purdon-Sully FM held that one of those donors and his new (male)

partner could apply for an order opposing the relocation sought by one mother: *Halifax & Fabian* [2009] FMCAfam 972 at paras 34-5.

The court held the male couple (and the other mother) to be "persons concerned with the care, welfare or development of the child" under s 65C, finding at paras 46-55 that the mother had agreed they be involved in her child's life; and that they had been involved.

Child support – SSAT appeal

SSAT has been held to be in error by relying on a payer's capacity to borrow money: *Wright (SSAT Appeal)* [2009] FMCAfam 979 (Riethmuller FM) at paras 16 and 24.

Financial agreement – Validity

An agreement has been set aside for not referring to legal advice on the disadvantages of making the agreement as required by s 90G(1)(b): *Gardiner & Baker* [2009] FMCAfam 1029 (Coakes FM).

In *Fevia & Carmel-Fevia* [2009] FamCA 816, Murphy J ruled invalid a (pre-marital) s 90B agreement where the husband had disclosed a list of his assets, but no annexure was attached to the agreement when the wife signed it; and where the agreement had an annexure attached when signed by the husband, but no copy of what he had signed had been given to the wife. ↓

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