

Family

Law Case Notes



By Robert Glade-Wright of *The Family Law Book*

Property settlement – Section 75(2) factors

The s 75(2) factor “disparity of income” between parties refers to net not gross income: *Phipson* [2009] FamCAFC 28 (FC) at para 44.

Children – Relocation

A case to add to those cases where interstate relocation with children is refused is *Rosa* [2009] FamCAFC 81, in which the Full Court upheld Coker FM saying no to a move to Sydney from NW Qld where the children had been living week on/week off with each parent, and the mother wishing to move was found to be less in tune with the children’s needs than the father.

Children – Unilateral relocation

In *Pace & Wilson* [2009] FMCAfam 367, Demack FM allowed interim relocation from Qld to NSW by a mother and 5-year-old child who had not seen her father for three years. But in *Silas & Barry* [2009] FMCAfam 448, Altobelli FM required an absconding mother to return and enjoined her from changing a child’s name.

Financial agreements

In *Blackmore & Webber* [2009] FMCAfam 154 the parties entered into a s 90B financial agreement in contemplation of marriage, marrying three days later. A child soon followed but they separated two years later. The Thai wife had limited English (and visa status).

Bender FM set aside the agreement on the ground of fraud due to non-disclosure of the value of the

husband’s pension.

Although not required to determine the issue, the Court also found that it would have been satisfied of the ground of duress, where:

- the BFA was first produced to the wife five days before the wedding;
- the husband told the wife the wedding was off should she not sign the BFA;
- the wife was four to five months pregnant with the husband’s child; and
- the wife’s visa was due to expire had the wedding not proceeded.

The Court also found that it would have been satisfied that the husband had engaged in conduct that was, in all the circumstances, unconscionable, finding that the wife was at a “special disability” in lacking English skills at the date the Agreement was signed, in addition to the factors set out above.

Property – Creditors

A case where a wife was not as lucky as the wife in *Worsnop* earlier this year where the husband had been found to have been “on a frolic of his own” (*Commissioner of Taxation & Worsnop* [2009] FamCAFC 4) is *Trustee of the property of Lemnos* [2009] FamCAFC 20. In this case, where the husband’s debts of \$6m had placed the asset pool into deficit, the Full Court at paras 173-181 ruled in favour of the creditors (including the ATO) in preference to the claim of the wife having

regard to:

“the (amount) of the husband’s (debt), the identity of the creditor, the manner in which the (debt) arose and the reality that, on the evidence before (the trial judge), the wife must have benefited, directly or indirectly, from the husband’s non-payment of his (tax) obligations from 1991 to 2002.”

Child support – Change of assessment over 18 months old

In *Cantrell & Jennings* [2009] FMCAfam 229, the application by a father, who owed \$33,000 in arrears and \$11,000 in penalties, for a departure order (for a nil assessment) relating to child support dating back five years was dismissed by Baker FM as:

- the court was not satisfied that he had explained the delay in applying (his claim that he could not afford to take action was rejected); and
- the balance of hardship favoured the mother, the father being financially stronger (having been able to afford recent loan commitments, the cost of renovations and white goods). He had also failed to make full disclosure.

Property – Short marriage – Asset by asset approach

In *Edgar & Faines* [2009] FamCAFC 22, Warnick J upheld Spelleken FM’s approach to reinstate the parties to a three-year marriage with their respective pre-marital

properties, with an adjustment to allow for money paid by the husband towards the wife's house, holidays and other joint expenses.

Child support – Appeal from SSAT

In *Parrish & Torrey (SSAT Appeal)* [2009] FMCAfam 274, Riethmuller FM allowed an appeal from the SSAT, remitting the case for rehearing by the Tribunal, which had ruled that interest should be added back to the payer's income on a home loan that he had been given by his mother interest-free.

The court's approach to an appeal from the SSAT was reviewed by Slack FM in *Hadley (SSAT Appeal)* [2008] FMCAfam 1252 at paras 28-30.

Property – Effect of death of a party

Where a boy was left without his mother after her suicide, and the husband continued court proceedings against her estate, Coker FM in *Healy* [2009] FMCAfam 351 proceeded to order the husband to transfer 40% of his property to himself as trustee for the child in satisfaction of the wife's entitlement.

Children – Grandparents

For how a court dealt with a "toxic" mother/grandmother relationship, see *Simm & Forest and Anderson* [2009] FMCAfam 369 (Sexton FM).

Children – Parenting orders

An example of how to word an order dealing with high parental conflict,

see Altobelli FM's order in *Silas & Barry* [2009] FMCAfam 448.

For the wording of an order for graduated time in case of young children, see the order made in *Ledersole* [2009] FamCA 279 (Ryan J).

Children – Alleged child abuse

A mother's child abuse allegations against a father were found to be false and were described in the context of her surrounding conduct as amounting to psychological abuse in *Dalziel & Belladonna* [2009] FamCA 254 (Brown J). The finding led to a prior parenting order in the mother's favour being discharged and an order for sole responsibility and care of a five year old daughter being given to the father. See also *Mackillop & Jell* [2009] FamCA 191 (Bennett J).

But see *Wang & Dennison* [2009] FamCA 206 where Bennett J in such a case required the parties and children to attend counseling with a view to the father recommencing time with the children.

Children – Alienation

In *Irish & Michelle* [2009] FamCA 66, children of seven and nine who were found by Benjamin J to have been indoctrinated by the mother against their father were ordered to be transferred from her care in Hobart to his in Melbourne.

Property – Contributions

In a recent case where a \$200,000 asset pool came solely from the husband, the wife (who had two children to him and also worked

and was treated like a slave in their market garden business throughout their ten year marriage) was awarded 60% for her contributions under s 79(4) and another 15% under s 75(2) for the provision of support and a home for the family: *Columbia* [2009] FamCA 311 (Bell J). See paras 45-47.

Children – Unilateral relocation

Unilateral relocation was allowed in *Wadsworth & Gale* [2009] FMCAfam 537. After consent orders in June 2007, the mother unilaterally relocated in November 2007. The husband protested by letter in April 2008, filing a contravention application in February 2009. Neville FM dismissed his application and made an interim relocation order on the ground that the husband had acquiesced in the relocation.

Leave to apply out of time under s 44(3)

A wife has been allowed to apply for property and maintenance orders 13 years out of time after the husband had won a lottery, where the parties had had no assets at separation: *Richardson* [2008] FamCAFC 107.

The husband had continued after separation to support the wife, who was ill and being cared for in a nursing home. On being required to leave that home when her health worsened she moved in with an adult child to whom the husband paid money for her board.

He then won \$3m, whereupon his support continued by giving his wife (who had begun receiving a

disability pension) \$500 and the use of his credit card to pay for dental treatment, allowing her to live in a property he had vacated, and by paying the outgoings on the property.

Upon the failure of a business in which the husband had invested he gave the wife notice that he intended to sell the property where she lived.

The Full Court upheld the decision of Moore J to grant the wife leave to proceed, saying at para 25:

“...this was not a case where the wife sought to commence proceedings once the husband had acquired some property. Rather she only sought to institute proceedings once the support which he had been providing for her was withdrawn or substantially altered”.

Children – Relocation

Four cases disallowing a mother's relocation with children are *Kemyss & Flint* [2008] FMCfam 833 (Halligan FM said no to a move from Sydney to New Zealand with a three year old); *Monahan* FM declined a mother's move from Ballarat to NZ based on her new partner's employment, in *Ryder & Roby* [2009] FMCAfam 416; and *Beaufort* [2009] FMCAfam 191 (no from Walker FM to a move with six and eight year olds from Sydney to Melbourne).

The fourth case was *Baier & Wagner* [2009] FMCAfam 683 where the mother, primary carer of a 19-month-old infant, had unilaterally moved from Darwin to Melbourne with the child, refusing to return. Terry FM granted an injunction for the child's return, ordering that the

child live with the father.

Property – Treatment of add-backs

An example of how the court deals with a case where various sums spent by both parties for their own purposes were being claimed as being money that should be added back to the asset pool as notional property is *Lisle* [2008] FMCAfam 1466 at paras 14-20 (Altobelli FM).

In *Miller* [2009] FamCAFC 121, Strickland J upheld an appeal by a wife who argued for an add-back of the husband's post-separation insurance proceeds which at first instance had been reduced on the basis that the husband was likely to have spent some of it on living expenses. Strickland J held that such a ruling was in error without evidence from the husband as to how he had applied the funds, and that the full amount should have been added back.

Children – Parenting order

For the wording of an order where a teenage child is refusing to see or speak to a parent, see *Abernethy* [2009] FMCAfam 426 (Halligan FM)

Appeals – Stay pending appeal

In a property case, the Full Court in *Gull (Stay Application)* [2009] FamCAFC 104 at para 9, applying High Court authority, said that:

“The jurisdiction to grant a stay depends on whether a stay is necessary to preserve the subject-matter of the litigation. If an application for special leave to appeal would be futile unless a stay is granted, the jurisdiction arises.”

In a parenting case, *Aldridge & Keaton (Stay Appeal)* [2009] FamCAFC 106, the Full Court outlined the applicable principles at paras 17 and 18, dismissing a mother's appeal against Pascoe CFM's refusal pending the hearing to stay an order allowing the (same sex) respondent to continue spending time with their child.

The Full Court at para 21 said:

“Referring to whether the refusal of a stay would render a successful appeal nugatory or make it impossible or impracticable to restore the position, he (Pascoe CFM) concluded that it would be likely to be more difficult to re-establish the existing warm and significant attachment between the respondent and the child if it was ended or significantly limited rather than if it was allowed to continue as he had proposed.”

Children – Separation of siblings

Where children of 13, 12 and 10 began spending time with their father under an interim order after eight months without seeing him, the eldest decided that she wished to live with him. Demack FM balanced that wish with the disadvantages of separating siblings but ordered that the eldest child live with the father and the younger ones remain with the mother: *Patrick* [2009] FMCAfam 326.

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