

Family Law

Case Notes

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CHILDREN

- **Overseas relocation allowed**

In *Hannigan & Sorraw* [2010] FamCA 807 (13 September 2010) Cowen J allowed the mother to relocate with a child to the US, her country of origin. The pros and cons of each parent's case were weighed at paras 168-183 and the determining factors set out at paras 228-229.

PROPERTY

- **Inconsistent pool approach**
- **Wrong s 75(2) adjustment**

In *Baxter* [2010] FamCAFC 183 (17 September 2010), a case involving both super and non-super (house), the Full Court said at para 31 "that his Honour [had] moved from a one pool approach ... to a two pool approach" in assessing contributions. The Court also found the s 75(2) adjustment (made only in relation to the non-super) to be erroneous, saying at paras 45-46:

"... where both were working for much of the time it is artificial ... to regard either party as having made any indirect contribution of any real worth to the other's superannuation. (...) That does not, of course, mean that those interests should then be overlooked ... [when] considering ... a s 75(2) adjustment ... or assessing the justice and equity of the ultimate orders."

CHILDREN

- **Variation of consent parenting order**

In *Reid & Lynch* [2010] FamCAFC 184 (17 September 2010) the Full

Court allowed an appeal against Neville FM's refusal to dismiss the father's application to re-litigate consent parenting orders. Finn J at paras 23-26 said that there was "no changed circumstance" since the orders were made; the applicant's claim that he had not seen a family report was unsupported by sworn evidence; his claim not to have understood the nature of the orders did not overcome *Rice & Asplund* (he not having sought to appeal the orders or seek their discharge); and the non-implementation of the orders did not affect their enforceability.

CHILDREN

- **Overseas travel allowed**

In *Hopkirk* [2010] FamCAFC 187 (17 September 2010) O'Ryan J allowed an appeal against Riley FM's refusal to allow the mother to take a child to the UK to see her family for three weeks in alternate years, saying at para 136 that the father's issues as to the child's young age and her comfort while overseas had been addressed by the mother.

CHILDREN

- **Expert given document without consent**

In *Nepean & Treloar* [2010] FamCA 781 at para 18 (23 August 2010) Fowler J discharged the appointment of a single expert psychiatrist who took into account a document supplied by one party without the consent of the other in breach of FLR 15.54(3).

PROPERTY

- **Financial contributions exceeded value of pool**

In *Sindal* [2010] FamCA 784 (6 September 2010) the wife's inheritances and pre-marital assets were greater in value than that of the \$1m asset pool after a childless nine-year relationship. Fowler J assessed contributions at 80/20 to the wife and said this of s 75(2) at para 70:

"... [I] take the view that there should be no adjustment ... The husband is earning more than the wife. True the wife will have the benefit of more capital for the future but I find that ... that is just. Although the wife will have a continued earning capacity that capacity will, after the sale of the hotel, cease until she is re-employed."

CHILDREN

- **Equal time v home base**

In *Holman-Lloyd & Lloyd* [2010] FamCA 840 (22 September 2010) a 13-year-old daughter (V) (whose relationship with the mother was "conflicted") lived with the father, and since separation their sons of seven and nine had been living "week about" with each parent. Ryan J at paras 1-2, however, said that although "theirs [was] ... a poisonous relationship with little prospect of improvement" the parties did agree that "the younger children require[d] a main base and ... should live primarily with one of them". Upon ordering that they spend ten nights a fortnight with the mother, Ryan J at para 169 said:

"I am strongly satisfied [that] if the boys live primarily with the father during school

term, their relationship with the mother is likely to suffer the same fate V's has. The family consultant said the boys' relationship with the mother should be prioritised over being able to live most of the time with V. I agree."

CHILDREN

- **Parenting order to grandparents**

For such orders see *Paton & Williams* [2010] FamCA 855 (27 September 2010) (Austin J) and *Miels & Moulden* [2010] FamCA 875 (22 September 2010) (Burr J).

PROPERTY

- **Non-disclosure**

In *Gerber* [2010] FamCA 861 at para 380 (24 September 2010) Coleman J found that the husband had failed to fully disclose his financial circumstances post-separation or at trial. Applying *Weir* (1993) FLC 92-338, Coleman J notionally increased the \$1.6m asset pool by \$500,000 under s 75(2)(o) because of benefits derived by the husband after separation from a business in which he was found to hold an interest.

PROPERTY

- **Subpoena**
- **Discretionary trust**

In *Read & Chang* [2010] FamCA 876 at paras 15-16 (9 June 2010) Cohen J granted the husband leave to inspect a memorandum of settlor's wishes in respect of a trust of which the wife was a discretionary beneficiary.

CHILD SUPPORT

- **SSAT appeal**
- **"Income"**
- **"Financial resource"**

In *Manchester (SSAT Appeal)* [2010] FMCAfam 947 (7 September 2010) Dunkley FM held that the SSAT was in error to rule that a payer's overdraft borrowings, monthly financial help from his brothers and the proceeds of sale of a property (without evidence as to the sale's assessability for CGT) were income or a financial resource. Dunkley FM

held that the Tribunal's failure to quantify the needs of the children or consider hardship was also in error as a court "must have regard to" such matters under s 117(4) of the *Child Support (Assessment) Act* in determining whether an outcome is "just and equitable".

PROPERTY

- **Interim costs denied**

In *Abrams* [2010] FMCAfam 560 (3 August 2010) Willis FM dismissed an application for interim costs where the wife (who had received earlier property distributions) could not point to an available source for the proposed funding, the remaining asset pool being insufficient to enable the proposed payment of \$80,000. There was also no evidence of the cost of valuations.

CHILDREN

- **Five nights with father, nine with mother**

In *Bahl & Brandon* [2010] FMCAfam 630 (20 August 2010) Bender FM dismissed the father's application for a ten-year-old child to spend "week about" time with each parent, ordering that the parties' existing arrangement of spending five nights a fortnight with the father continue.

PROPERTY

- **Short marriages**

In *Brandow* [2010] FMCAfam 1026 (24 September 2010) Brewster FM discusses the case law as to property division after a short marriage.

PROCEDURE

- **Change of venue**

In *Scott & Walker* [2010] FMCAfam 1081 (28 September 2010), where the mother lived in Victoria and the father in NT, Turner FM discussed the principles relevant to change of venue.

CHILDREN

- **Rejection of family consultant's findings not in error**

In *Horan & Beckett* [2010] FamCAFC 200 at para 189 (14 October 2010) the Full Court dismissed the father's

appeal from Wilson FM whose order reversed a long-standing arrangement by which a child had been living with the father – the continuation of which was supported by the family consultant and ICL both of whom submitted that the child had a primary attachment to the father. Holding that Wilson FM did not err in rejecting the findings of the family consultant, the Court found that the federal magistrate was entitled to draw an adverse inference from the father's failure to have his partner, a significant carer in the child's life, give any evidence; that the child would reside in a more stable environment with the mother; and that the father (who had been found to be using drugs) could not properly care for the child on his own.

DIVORCE

- **Jurisdiction**
- **Australia "a clearly inappropriate forum"**

In *Navarro & Jurado* [2010] FamCAFC 210 (28 October 2010) the Full Court dismissed an appeal against Jarrett FM's dismissal of the husband's divorce application filed in the FMC a few months after the wife had filed for divorce in Costa Rica.

CHILDREN

- **Special medical procedure**

Re: Sean and Russell (Special Medical Procedures) [2010] FamCA 948 (26 October 2010) contains a review of the *Family Law Act* by Murphy J as to the circumstances in which proposed special medical procedures come within the scope of parental responsibility or require the sanction of the Family Court.

CHILD SUPPORT

- **Child support agreement set aside**

In *Venson (No. 2)* [2010] FamCA 963 at paras 99 and 108-111 (2 November 2010) Austin J ordered that a child support agreement be set aside (for a particular three-year period) as the applicant, within the meaning of s 136(2)(d) of the *Child Support (Assessment) Act*, would

suffer hardship due to exceptional circumstances since the agreement was made if the agreement were not set aside.

CHILDREN

- **Discharge of family consultant**
- **Bias alleged against ICL**

In *Kingley & Arndale (No. 2)* [2010] FamCA 968 (8 October 2010) O'Reilly J discharged the family consultant (Mr P) after counsel for the ICL informed the court that Mr P during a discussion with a judge in another case in which the ICL's counsel appeared had also discussed the present case, and that that discussion had predated his report and not been disclosed in it. A new report was ordered. O'Reilly J dismissed an application for the ICL's discharge for apprehended bias, saying at para 31:

"It is fundamental ... that even in cases of alleged apprehended bias, some *actual conduct* of the person sought to be impugned be identified, and that there be a finding that such conduct, in the view of the objective bystander, realistically could give rise to the opinion that the person is not impartial."

PROPERTY

- **Procedure**
- **Choice of case guardian**

In *Stellard & Dresdon-Stellard* [2010] FamCA 971 at para 26 (22 October 2010) O'Reilly J appointed a case guardian for the wife, choosing a close friend of the wife in preference to the husband's nominee, a solicitor who fulfilled all of the criteria of FLR 6.09.

PROPERTY

- **Improvements to parents' farm**

- **Equity of exoneration in favour of co-owners**
- **Occupation rent**

In *Hearst and Ors* [2010] FamCA 977 (18 October 2010), a farming couple's property settlement was accompanied by third party claims by family members. The husband's two sisters were joined as respondents as each held interests in two farms in the marital asset pool. Both originally owned by the husband's late parents, one farm had been substantially improved in value (by an agreed \$315,000) due to renovations by the husband and wife, the other farm having been bought by the husband and his parents. Coleman J held that the sisters were liable to the husband and wife for two-thirds of those agreed improvements (para 62) but held that an equity of exoneration arose in favour of the sisters in respect of loans secured over the farms by mortgages taken out by the husband and his parents (para 89) and that the claim of the husband and wife be offset by a figure for an occupation rent (occupation fee) at \$31,000 for each year they occupied the main farm (paras 93-104).

PROPERTY

- **Inconvenience not a ground for setting aside property order**

In *Carrington (No. 2)* [2010] FamCA 982 (5 November 2010) the husband's application for a property settlement to be set aside on the ground that his receipt of a tax demand for \$76,000 more than anticipated and his bank's withdrawal of finance putting his company into voluntary administration had made it impracticable for the order to be carried out within the meaning of s 79A(1)(b) was dismissed by Benjamin J who at para 75 said:

"... it is not impracticable for the husband to comply with the order, it is inconvenient. In that regard the husband has sold two assets being part of the farm real estate and his business but there is no evidence he has endeavoured to sell other assets [enabling him to raise the funds from which to pay the wife the \$1.98m due to her under the order]."

PROPERTY

- **Alleged conflict of interest of solicitor**

In *Rawlings & Morris & S Law Firm* [2010] FMCAfam 938 (1 September 2010) Riley FM refused to restrain a solicitor from acting due to an alleged conflict of interest, principally having regard to the applicant's delay in bringing the application. Also see *Edgcombe* [2010] FMCAfam 894 (19 August 2010) at paras 13-15.

SPOUSAL MAINTENANCE

- **"Reasonable standard of living"**

In *Dawson (No. 2)* [2010] FMCAfam 1106 (13 October 2010) Turner FM found at paras 7-8 that "a standard of living that in all the circumstances is reasonable" within the meaning of s 75(2)(g) meant in the present case, where both parties were wanting to buy a property of their own after distribution of their property settlement, that they should rent instead. Turner FM accepted the wife's incapacity for gainful employment or self-support but dismissed her maintenance application as the husband was found not to be "reasonably able to maintain" the wife, having a surplus of just \$65 weekly with which to provide for any unexpected expenses for himself and his son. ●

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