

Family Law

Case Notes

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CHILDREN

- **Equal time set aside**
- **"Unacceptable risk"**
- **Father's drug use**

In *Akston & Boyle* [2010] FamCAFC 56 (26 March 2010) the Full Court set aside an order made by the FMC for a child to spend equal time with both parents despite what O'Ryan J of the Full Court at para 41 called "a very harrowing history of abuse of the child".

PROPERTY

- **Interim property settlement for payment of costs**

In *Gaulit & Bunker* [2010] FamCA 232 (18 March 2010) Bennett J applied *Strahan (Interim Property Orders)* [2009] FamCAFC 166 (FC), ordering the husband out of the parties' net asset pool of between \$900,000 and \$2.4 million to pay the wife \$135,000 towards her past and future legal costs, the wife having had the benefit of a further \$45,000 under a previous litigation funding order.

PROPERTY

- **Non-disclosure of interest in company**

In *Baldachino & Hanas* [2010] FamCA 234 (24 March 2010) Faulks ACJ at para 74, applying the Full Court's ruling in *Weir* (1993) FLC 92-338 at pp 79,593-4 in respect of the husband's non-disclosure of his interest in his brother's taxi business, held:

"... it is a factor which I will take into account under s 75(2) of the *Family Law Act 1975* (Cth) and in the circumstances of

the husband's initial non-disclosure, his vagueness about the matter, the improbability of his evidence and my finding of his lack of credit in relation to this matter, I am prepared to ascribe to it a significant value as a resource in the overall balancing of other matters between the parties."

PROPERTY

- **Contributions**
- **Three pools approach**

In *Muir & Royston* [2010] FamCA 374 (19 March 2010) involving parties married 27 years with two adult children, O'Reilly J accepted the husband's submission that "the differing contributions of the parties" to their \$7.5 million asset pool would "be most readily recognised and assessed by adoption of a modified 'asset by asset' approach."

The resulting pools comprised inheritances totalling \$2.5 million from the husband's parents and other family (Pool 1), the wife's inheritances of \$44,000 from her family (Pool 2) and the remaining net assets valued at \$5 million (Pool 3). The husband argued contributions as to 100% in his favour for Pool 1, 100% of Pool 2 for the wife, and 55/45 of Pool 3 in his favour.

O'Reilly J assessed 25% of Pool 1 as having come "into the husband's hands for his own unqualified use very late in the parties' marriage" without any contribution in respect of it by the wife, but assessed at 40%

the wife's contribution in respect of the remaining 75% of Pool 1 by way of funds made available to the husband over many years by means of income splitting through the trust (being 30% of Pool 1).

The wife's contributions to Pool 2 were agreed at 100%, and her contributions to Pool 3 were assessed at 47.5%. There was an adjustment for s 75(2) factors of 3% of the total pool, which brought the overall settlement to 55/45 of the aggregate pool, being \$4+ million for the husband and \$3+ million for the wife.

FINANCIAL AGREEMENT

- **Declared invalid**

In *Balzia & Covich* [2009] FamCA 1357 (27 August 2009) Collier J, applying the Full Court's ruling in *Black* (2008) FLC 93-357, declared that an agreement under s 90B "in contemplation of marriage" but made a day after the parties married (when a s 90C agreement should have been used) was not a valid financial agreement.

PROPERTY

- **Contributions**
- **Four pools approach rejected**

In *Lambert & Jackson* [2010] FamCA 357 (6 May 2010) the parties lived together for a year and were then married for two years before separating. The marriage produced twins and, at trial, a net asset pool worth \$4.1 million, the husband arguing for a four pools approach to contributions (which were over seven years to the date of trial).

Initial financial contributions were in the order of \$570,000 by the wife and \$134,000 by the husband, the wife during the marriage contributing a further \$600,000. Watts J said this at para 263:

“ Whilst this is a short marriage and in some cases that may be indicative of an asset by asset approach being appropriate...I am being asked to assess contributions over a seven year period in circumstances where there has been substantial increase in the value of the wealth of the parties over that period... Balancing the arguments...I am not attracted to an asset by asset approach. It becomes cumbersome and artificial. I find that I can properly take into account the differing contributions made by both of the parties within the short period of time that I am analysing without specifically looking at contributions to individual assets.”

Watts J assessed contributions globally at 55% in favour of the wife and s 79(4)(d)-(g) factors at 20% in her favour, a settlement of \$3.1 million for the wife and \$1 million for the husband.

CHILDREN

- **Unilateral relocation a short distance away**

In *Meacham* [2010] FMCAfam 374 (16 April 2010) Dunkley FM held that the best interests of the children did not require a mother, who had unilaterally relocated to a country town a short distance (64 km, or a 45 minute drive) from the former matrimonial home, to return to her former residence but did require her to re-enrol the children at their former schools.

CHILD SUPPORT

- **Appeal from SSAT**
- **“Earning capacity”**

In *Kindree & CSR (SSAT Appeal)* [2010] FMCAfam 357 (22 April

2010) Riethmuller FM set aside a decision of the SSAT as to a payer's earning capacity. The appellant argued that the SSAT's finding as to the availability of work was not supported by any evidence, the SSAT restricting its consideration to jobs available in Sydney when he did not live there. And further, that there was no evidence of government positions being available to be filled (nor the income to be earned) as found. Riethmuller FM agreed.

DIVORCE

- **Applications dismissed**

Divorce applications alleging separation under the one roof were dismissed by Lapthorn FM in *Wilson* [2010] FMCAfam 435 (6 May 2010) and by Scarlett FM in *Shible & Mead* [2010] FMCAfam 354 (20 April 2010).

PROPERTY

- **Injunction against interference with company operations**

In *Krueger* [2010] FMCAfam 466 (30 April 2010) Scarlett FM imposed an interim injunction restraining a party from interfering with the parties' business operations. The court at para 31 found it a matter of concern that “warfare” between the parties “will bring the company down around them, and [that] the situation cannot be allowed to continue”.

PROPERTY

- **Rectification of loan agreement in favour of creditor**

In *Chow & Harris* [2010] FamCA 366 (14 May 2010), O'Reilly J allowed an application by the second respondent, a creditor of the husband (his sister) under s 90AE of the *Family Law Act* for rectification of a loan agreement so as to reflect their true agreement by including a default interest rate and requiring payment of the due amount from the spousal parties' property settlement.

CHILDREN

- **Appointment of psychiatrist**

In lieu of family report

In *Warner* [2010] FamCA 410 (14 May 2010) a husband successfully applied to Austin J for the appointment of a child and family psychiatrist as a single expert witness to prepare a report as to the usual terms of reference for a family report in a parenting case but which included as an issue, in his submission, the mother's psychiatric stability.

PROPERTY

- **CGT and GST**
- **Liabilities disallowed in the absence of proof**

In *Manichaeus* [2010] FamCA 397 (21 May 2010) Faulks DCJ disallowed a husband's claim for future CGT and GST as liabilities, holding that he had failed adequately to prove what those liabilities were likely to be.

CHILDREN

- **Contravention**
- **Security for costs**

In *Botsman & Amundson (No. 2)* [2010] FamCA 412 (17 May 2010) Dawe J allowed a mother's application under FLR 19.05 for an order that the father, an impecunious litigant who had filed an application alleging the mother's contravention of a parenting order, pay security for costs in the sum of \$10,000, his application to be stayed until payment.

PROPERTY

- **Asset pool**
- **Add-backs**

In *Owens (No. 3)* [2010] FMCAfam 3 (14 April 2010) Walters FM (at paras 220-221) applied *Gollings & Scott* (2007) FLC 93-319 in a property case by declining to add back \$10,000 paid by the husband to his new partner, saying:

“Given that the payment to the husband's partner was made nearly a year after separation, I am prepared to treat it as a manifestation of the husband simply getting on with his life. Although the husband's evidence surrounding the alleged

need for the payment was less than satisfactory, I am not comfortably able to reach any conclusion as to whether it was reasonably or unreasonably made."

However, Walters FM did add back \$40,000 used by the husband to buy a car for his late father soon after separation and \$19,800 used to buy a car for his mother several months later, saying:

"The payments had nothing to do with the husband 'getting on with his life'. On the contrary, the husband asserted...that the payments were ... repayments of...loans... Given that I have found that there were no such loans, I am of the view that it would be clearly unjust and inequitable if the payments were not added back."

PROPERTY

- *De facto relationship*
- *Length of relationship*
- *Aggregation of time*

In *Hamblin & Dahl* [2010] FMCAfam 514 (24 May 2010) Demack FM came to interpret s 90SB(a) which allows a court to make a maintenance or property order in relation to a de facto relationship if the court is satisfied "that the period, or the total of the periods, of the... relationship is at least two years". The parties were in a de facto relationship for four years and, after a separation of ten years (in the last two years of which the applicant was in a de facto relationship with another person), reunited for another 18 months.

Demack FM applied the reasoning of Thackray J in the WA case of *L and C* [2005] FCWA 23 in which Thackray J, upon analysing another interrupted but resumed

relationship, said:

"I suspect it would only be a lawyer (or judge) who would be tempted to think [the mother] and [the father] had two different de facto relationships. Anyone else who knew them would simply have seen them getting back together and resuming their original relationship."

CHILDREN

- *Application by child for injunction against her own abduction*

In *Kandal & Khyatt* [2010] FMCAfam 508 (6 May 2010) Dunkley FM granted a child aged 17 years an ex parte injunction restraining her mother and stepfather (with both of whom she was living) and her father (who supported the mother) from removing her from Australia (to Lebanon to be married).

CHILDREN

- *Relocation*
- *High Court ruling in Rosa's Case applied*

In *Sabens & Tadkin* [2010] FMCAfam 481 at paras 17-19 (19 May 2010) Riethmuller FM applied the High Court's ruling in *MRR v GR* [2010] HCA 4 in allowing the mother of a three-year-old child to relocate from Sydney to South Australia (SA). The father had had irregular contact with the child who (he agreed) would have "to fit around his work schedule".

His Honour was not satisfied that the father was capable of providing day to day care for the child, and accepted the mother's evidence as to the availability of pre-schooling, child care and extended family in SA, saying in regard to her proposed new business venture that it lacked detail but was "a real venture and provides possibilities for the mother

that may well lead to more". It was ordered that the child spend time with the father for up to five days in each school holiday.

PROCEDURE

- *Substituted service via Facebook*

In *Byrne & Howard* [2010] FMCAfam 509 at paras 16-29 (21 April 2010) Brown FM ordered that in lieu of personal service an application was taken to have been served on the respondent by the relevant documents being sent to him via the social networking site Facebook, which he used regularly.

PROPERTY

- *Kennon adjustment*

In *Fairchild* [2010] FMCAfam 527 (26 May 2010), regarding an asset pool of \$309,000, where the parties' nine year relationship was interrupted by a total of about four and a half years of imprisonment served by the husband for subjecting the wife to "horrendous ongoing violence" (para 67) Bender FM applied *Kennon* [1997] FamCA 27 (FC), saying at para 68:

"I am satisfied that the husband's initial greater contribution is outweighed by the wife's subsequent contributions that were made more arduous because of the husband's ongoing violence and that there should be an adjustment in the wife's favour of seven and a half per cent."

The wife was granted a further 10% for s 75(2) factors, in particular, her limited capacity to engage in employment due to post-traumatic stress disorder suffered as the result of the husband's violence. (For another recent *Kennon* adjustment see *Ferdinand* [2010] FMCAfam 465.) ●

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