

# Family Law

## Case Notes

### July - August 2010

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#### PROPERTY

- **Spousal loans**
- **Gifts from pre-marital assets**

In *Markham* [2010] FamCA 460 (9 June 2010) Austin J found that the husband owed the wife \$22,400 being the unpaid balance of loans made in aid of the husband's publishing business, saying at para 49:

"That asset/liability will be factored into the property adjustment orders but, because it is a commercial liability between the spouses, it will not figure in the balance sheet [asset pool] so as to avoid distortion of the matrimonial property. It is an asset solely of the wife and a liability solely of the husband."

Gifts of \$60,000 to each of the three adult children of the wife's former marriage (joined as respondents) from the proceeds of sale of a property of hers from that marriage was not added back as sought by the (second) husband, Austin J at para 72 saying:

"The property was not a matrimonial asset, and so consequently there was no waste or premature distribution of a matrimonial asset."

#### PROPERTY

- **Injunction against winding up of company**

In *Priddle* [2010] FamCA 464 (27 May 2010) Dawe J granted the wife an interim injunction restraining the winding up of a company (used by

the parties as trustee of their family trust) which the husband alleged owed \$15,000 to his parents, the second respondents, for rent due dating back to 2000.

#### PROPERTY

- **Alleged debt to relative**

In *Sulo & Colpetti* [2010] FamCA 493 (18 June 2010) Watts J allowed as a substantial contribution on behalf of the husband but not as a liability an advance of \$150,000 from his father in 1995 as the debt was statute-barred (six years having elapsed) and there was "no evidence that the husband's father [who was not a party nor called as a witness] is intending to actively pursue a claim against the husband for the monies (see *Biltoft* (1995) FLC 92-614)".

#### PROPERTY

- **Interim order for sale**
- **Bankruptcy**

In *Sresbodan* [2010] FamCA 494 (7 June 2010) Watts J granted the wife and the husband's trustee in bankruptcy an interim order for the sale of a property and application of the proceeds in repayment of the mortgage and the husband's creditors, the balance to be held in trust by the wife's lawyers pending the outcome of s 79 proceedings once the husband was free from his bankruptcy.

The husband was enjoined to vacate the property and the wife was appointed trustee for sale. That appointment was made so as to "allow the parties as much flexibility as [the court] could to enable them to bid at the proposed auction of the property", s 66 of the *Property,*

*Stock & Business Agents Act 2002* (NSW) otherwise restricting the parties to making a single bid.

#### PROPERTY

- **Civil claim by husband's sister for transfer of property**

In *Grefeld* [2010] FamCA 504 (22 June 2010), the husband and wife having resolved their s 79 proceedings, Barry J heard a civil claim by the second respondent (the sister of the husband) as plaintiff for the transfer of the property in which the wife (the defendant) lived, the claim being that the plaintiff's funds had been used in the acquisition of the property in 1996.

The settlement between the wife and husband included the wife's retention of the subject property and was said to have been arrived at independently of the outcome of the sister's claim. Barry J referred at para 21 to the pleadings (begun by Statement of Claim) as being "delivered in accordance with the usual practice [for hearing civil claims] in this jurisdiction".

On the "primary issue" as to whether the property was matrimonial property, the court at paras 128-130 followed *Warby* [2001] FamCA 1469 (FC), by exercising the court's discretion to adopt (accrued) jurisdiction. Barry J's ultimately held:

"The real issue is that [the property] is property acquired with her [the husband's sister's] money and was acquired in circumstances involving breaches of a

fiduciary relationship [by the husband] being the failure to inform her and the failure to account.”

Barry J granted the declaration sought that the wife held the property on a constructive trust for the husband’s sister.

#### PROPERTY

- **Litigation funding (interim costs)**
- **Enforcement**

In *Singer* [2010] FamCA 506 (23 June 2010) Cronin J made an order for the enforcement of an earlier litigation funding order (for the husband to pay \$320,000 to the wife) that in default of payment with interest within five weeks two specified motor vehicles be sold, the wife to be appointed trustee for that sale.

#### FINANCIAL AGREEMENT

- **Agreement in anticipation of Part VIIIAB held to be binding**

In *Cording & Oster* [2010] FamCA 511 (26 May 2010) Cronin J declared an agreement made between a de facto couple before but in anticipation of the commencement of Part VIIIAB to be a valid financial agreement under the Act.

It was an agreement between parties with no children to forego any claim to the other’s defined assets and superannuation benefits, but to equally share their joint property defined as all subsequently acquired property, subject to specified exceptions.

Cronin J held at para 44 that the agreement was not void for uncertainty and complied with *Kostres* [2009] FamCAFC 222 at para 129 where the Full Court said:

“While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give

meaning to an agreement whose terms are so imprecise or ambiguous the parties’ intent cannot be discerned.”

On the question whether there is an obligation upon a party to make comprehensive disclosure, it was conceded by counsel that no such obligation is contained in Part VIIIAB. Cronin J at para 58 referred to the Full Court in *Kostres* as “focussing on the importance of parties getting legal advice prior to the execution of the agreement because the advice would be expected to cover a myriad of issues”.

Cronin J went on to refer to the court’s power under s 90UM to set aside a financial agreement upon the “non-disclosure of a material matter in the sense of a fraud upon the party”, adding this at para 60:

“To reach the standard of a fraud, the non-disclosure must amount to a misrepresentation whether it is intended or otherwise. That is because the recipient of the information is entering into the agreement on the basis of the representations. To prove a misrepresentation of a material fact, one of the parties to the agreement must be able to show that he or she was contracting about something other than that referred to in the contract and in the circumstances, it would be unconscionable for the agreement to stand.”

The court found that there had been no such fraud and that the parties had received the benefit of legal advice.

As to whether the agreement was a financial agreement under the Act, Cronin J at paras 62-74 was satisfied that the agreement was one made under a preserved law of an earlier participating jurisdiction (Victoria) and, as such, the agreement was one to which

Item 88 of the transitional provisions of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* applied.

On the question whether a particular item of property (a hyperbaric chamber owned by a company of which a party was the shareholder) was covered by the agreement, Cronin J found that it was, referring at para 77 to his earlier finding that the parties’ property including their “interests in various corporate entities [had been] sufficiently clearly defined in the agreement”.

#### PROPERTY

- **Interim distribution**

In *Ruane & Bachmann-Ruane* [2010] FamCA 514 (4 June 2010), where the parties were seeking different interim distributions towards their legal costs and living expenses, Cronin J allowed an interim distribution from trust funds, as an interim distribution of property, \$200,000 to each party (plus a further \$50,000 to the husband enabling him to repay a loan of his in that amount); and for past and anticipated legal costs \$250,000 to the husband and \$160,000 to the wife.

#### CHILD SUPPORT

- **Recovery of payments by non-liable payer**

In *Forsythe & Latimer* [2010] FMCAfam 478 (8 June 2010) Scarlett FM ordered the recipient of \$39,000 in child support, paid by the applicant before he was declared not to be the child’s father, to repay the sum of \$6,900, being the amount paid to her after the results of the DNA test had become known. The court at paras 54-89 reviewed the evidence and the factors required to be considered under s 143(3B) of the *Child Support (Assessment) Act 1989*.

#### SPOUSAL MAINTENANCE

- **Enforcement**
- **Receiver appointed**

In *Henley & Garrett* [2010] FMCAfam 314 (31 March 2010) Coates FM at paras 160-188 reviewed and ultimately granted an application by a wife under FLR 20.46 (in

conjunction with FMCR 1.05 and s 80 of the FLA) for the appointment of a receiver of the income and property of the husband who owed \$117,000 under previous orders for payment of spousal maintenance, school fees, child support departure and interest, saying at para 161:

“The application is not common but is anticipated for cases including where a party is entitled to receive money under orders and the other party not only does everything possible to avoid paying, but also fails to disclose financial matters.”

#### CHILD SUPPORT

- **SSAT appeal**
- **Extension of time**
- **Company income**

In *Bagley (SSAT Appeal)* [2010] FMCAfam 215 (23 March 2010) Terry FM heard an application by a self-litigant father for an extension of time to file an appeal 12 months out of time against a decision of the SSAT on the ground that it had wrongly set his child support income higher than his taxable income.

The preliminary application was granted under FMCR 3.05(1) extending the 28 day time limit under FMCR 25A.06(2) for such an appeal. Despite the father *prima facie* not having made out a compelling case (para 25), Terry FM granted the extension as the payer had “always been genuinely aggrieved about the decision” (although perhaps mistakenly believing that he could raise his objection during the enforcement proceedings); was not legally represented; and may lose his home if enforcement were not stayed.

The appeal, however, was dismissed as the Tribunal was found not to have improperly reviewed the evidence or wrongly assessed

income the payer had received from a company of which he was the sole director and shareholder.

#### CHILDREN

- **Overseas holidays**

In *Lee & Zhu* [2010] FMCAfam 622 (17 June 2010) Scarlett FM would not allow a mother to take a child of eight to China for a five week holiday as missing 17 school days (allowing for the three week school holidays) was not in the child’s best interests. But see *Mancini & Kendling* [2010] FMCAfam 623 (22 June 2010) where a mother was allowed to take a child to Europe over the Christmas break.

#### CHILD SUPPORT

- **SSAT appeal**
- **Payer’s costs of self support**

In *Farrens (SSAT Appeal)* [2010] FMCAfam 325 (18 June 2010) Slack FM upheld an appeal against the SSAT’s treatment of a payer’s cost of self support, finding at para 33 that its failure to “provide any reasons as to why it rejected the claimed expenses” and why some expenses had been allowed but others of a similar nature were not gave rise to “sufficient doubt as to how the SSAT came to its conclusions and whether it correctly considered the statutory imperatives” (para 36), those “imperatives” being set out at para 31.

#### CHILDREN

- **Parental religious differences**

In *Macri* [2010] FMCAfam 662 (1 July 2010) McGuire FM preferred the position of the father, granting him an injunction against the mother’s proposal for the formal introduction of children of eight and ten into the Jewish faith, the mother “see[ing] the Bar or Bat Mitzvah to be a fundamental step in that process”, saying at paras 45-47:

“Essentially, the mother

wants to commit the children now. The father’s view is that such a decision should be deferred. I have no evidence before me that the deferring of a decision even at the age of 13 or 12 would prohibit a later choice to enter the Jewish religion.”

The mother was allowed (para 30) to take the children to a Jewish youth group and to the Jewish Synagogue for observances and the father to take them to Catholic Mass and events.

#### SPOUSAL MAINTENANCE

- **Respondant’s inability to maintain**
- **His new wife’s trust not relevant**

In *Potter & Watson* [2010] FMCAfam 556 (4 June 2010) Kemp FM dismissed a spousal maintenance application that relied solely on the existence of a trust held by the husband’s new wife, saying at paras 83-85:

“The Court accepts that this is not the case of a husband hiding behind a trust or where matrimonial assets have been removed into a trust. This is a situation where the husband’s new wife has created a trust to protect her own asset position from that of the husband and anyone claiming on him or through him.”

#### CHILDREN

- **Non-parent’s application for parenting orders**

In *King & Smith* [2010] FMCAfam 690 (7 July 2010) Baker FM at paras 17-25 discussed the legislation and case law in respect of an application for parenting orders by a non-parent concerned with the care, welfare and development of a child. ●

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