Family Law
Case Notes
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PROPERTY
- ***"Highest and best use"***
- ***Valuation***
- ***To exclude land bought post-separation was in error***

In *Bania & Jacopo (No. 2)* [2011] FamCAFC 139 (29 June 2011) the asset- pool included a block of land (Lot 10). Six years after separation the husband bought the adjoining Lot 11. The lots were valued individually at $20,000 and $35,000 but, together, at $150,000 for their development potential. Donald FM excluded Lot 11 from the pool as it had been bought after separation, with funds borrowed by the husband without contribution by the wife. In allowing the wife's appeal, Ainslie-Wallace J reviewed case law as to the valuation principle of "highest and best use" and said at para 45:

> " ... although it was the husband who purchased the second lot, it was not in accordance with [the valuer's] evidence to find that the value of the two lots resulted from the husband's efforts alone because it ignores the evidence of the obvious impact of Lot 10 in increasing the size of the parcel to make it suitable for residential purposes."

NULLITY
- ***Consent to marriage obtained by duress***

In *Robert & Golden* [2011] FamCA 443 (10 June 2011) Rose J granted a decree of nullity as the applicant's consent to marriage was not freely given but obtained by duress within the meaning of s 23B(1)(d)(i) of the *Marriage Act 1961* (Cth), the applicant giving in to the respondent's ultimatum that she "would not terminate her pregnancy unless [he] married her". Rose J held on the authorities that:

> "... duress does not ... need to involve a direct threat of physical violence so long as there is sufficient oppression from whatever source, acting upon a party to vitiate the reality of their consent."

CHILDREN
- ***Child in care under child welfare law***
- ***Parenting application dismissed for want of jurisdiction***

In *Tanner & Wagner* [2011] FMCAfam 663 (4 July 2011) Scarlett FM dismissed an application for parenting orders by the maternal grandmother of a three year old child who was in the care of a person under s 78 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) for want of jurisdiction, having regard to s 69ZK of the *Family Law Act.*

CHILDREN
- ***Removal of child welfare authority as party***

In *Messmer & Cable & Anor* [2011] FMCAfam 167 (15 February 2011), a self-litigant joined the Victorian Department of Human Services as a second respondent, which successfully applied to be removed as a party under FMCR 11.04. O'Sullivan FM relied on *Secretary of the Department of Health and Human Services & Ray and Others* [2010] FamCAFC 258 where the Full Court held that the court has no power to join the Department as a party without the Secretary's consent.

DE FACTO PROPERTY
- ***"Substantial contributions"***
- ***"Serious injustice"***

In *Miller & Trent* [2011] FMCAfam 324 (25 May 2011) a self-litigant sought a property order after an alleged 14-16 month de facto relationship, his case being that he had made "substantial contributions" and that a "serious injustice" within the meaning of s 90SB of the *FLA* would result if an order were not made. His contributions included building work, livestock care, training horses, cooking, driving the respondent's children to school and negotiating disputes. Coates FM dismissed the application. Coates FM concluded at paras 86-88:

> "The concept can probably be more easily understood if for example there were significant financial contributions by the applicant. I could also envisage circumstances which would be regarded as significant non-financial contributions as well but such must be so *substantial*, that is, *more than usual or ordinary* that they would stand out as against mere contributions. (...) Nor does the

applicant address what or how *serious injustice* would result if I did not make orders in his favour."

CHILD SUPPORT

- ***SSAT appeal***
- ***Procedural fairness***

In *Crowell & Bodrey (SSAT Appeal)* [2011] FMCAfam 275 (1 July 2011) Bender FM allowed an appeal from the SSAT for not affording the appellant procedural fairness.

CHILD SUPPORT

- ***Appeal against departure prohibition order dismissed***

In *Onder & Child Support Registrar and Sari (No. 2)* [2011] FMCAfam 430 (24 June 2011) Monahan FM dismissed an appeal against a departure prohibition order (DPO) made under s 72Q(1) of the *Child Support (Registration and Collection) Act 1989.* The judgment contains a review of the relevant law.

CONTEMPT OF COURT

- ***Law and procedure***

In *A bank & Coleiro & Anor* [2011] FamCAFC 157 (2 August 2011) Harman FM charged the husband with and convicted him of contempt of court (s 112AP) over the disappearance of $200,000. The ensuing sentence of imprisonment was not executed. The joinder of the bank was set aside by the Full Court (Bryant CJ, Finn and Strickland JJ). Bryant CJ also held "that his Honour failed to comply in almost all respects with the [FMCR] and ... the ... authorities" as to how contempt in the face of the court is to be dealt with.

CHILDREN

- ***Judge's reliance on news editorial***

In *Herridge & Handerson and Ors* [2011] FamCAFC 156 (28 July 2011) the Full Court (Coleman, May and Crisford JJ) allowed an appeal against a parenting order made by Cohen J who cited a newspaper editor's opinion as to the overuse of Ritalin, saying:

> " ... where there was unchallenged admissible expert opinion evidence that the child B exhibited a 'degree of ADHD', it was not open to the trial Judge, without reference to admissible evidence which was before him, to speculate as to whether or not ADHD existed or was exhibited by the child B. His Honour's personal opinions, whatever their basis, were no substitute for evidence."

ORDER TO PRODUCE COUNSELLING DOCUMENTS SET ASIDE

In *UnitingCare – Unifam Counselling & Mediation & Harkiss and Anor* [2011] FamCAFC 159 (5 August 2011) Coleman J allowed Unifam's appeal against Altobelli FM's order that Unifam produce counselling documents under subpoena by the father, saying:

> " ... the learned Federal Magistrate effectively concluded that 'may' [disclose upon consent] in s 10D(3) [FLA] meant 'must', and that, the parties' consent to disclosure having been given, Unifam had no discretion to disclose or not disclose ... "

COMMERCIAL SURROGACY

- ***Referral to DPP***

In *Dudley and Anor & Chedi* [2011] Fam CA 502 (30 June 2011) Watts J granted parenting orders to a Qld couple, who brought three babies back from Thailand under a commercial surrogacy arrangement, being "persons concerned with the care, welfare and development of the children" under s 65C(c). Watts J cited State laws authorising altruistic surrogacy, but making commercial surrogacy illegal, and directed that a copy of his reasons be sent to the DPP Qld for possible prosecution. See *Lowe & Barry* [2011] FamCA 625 (altruistic surrogacy).

SUPERANNUATION PENSION

- ***Life expectancy***

In *Winn* [2011] FamCA 501 (30 June 2011) the husband's interest in his super pension was valued under the FL (Super) Regs at $774,265, applying the Australian Life Tables assumption that the husband (57) would live to 80. Johnston J found that that assumption was not supported by the evidence of a consultant physician, reassessing the pension's value at $382,534.

SECRETLY TAPED INTERVIEW WITH FAMILY CONSULTANT

In *Hazan & Elias* [2011] FamCA 376 (24 May 2011) Watts J excluded the husband's recording of his interview with the family consultant, disagreeing that s 11C (FLA) (communications with family consultants admissible) ousted s 138 of the *Evidence Act* (EA) (evidence illegally or improperly obtained). Referring to the "golden rule" of statutory construction that "the grammatical and ordinary sense of the words is to be adhered to unless that would lead to ... absurdity ... or inconsistency with the rest of the [statute]", Watts J "read s 11C FLA down so that it is subject to ... the normal evidentiary provisions [of] s 69ZT(1) FLA ... [and s] 56(2), s 138 and s 135 EA".

REGISTRAR'S REFUSAL TO ABRIDGE TIME NOT REVIEWABLE

In *Zeller & Whitby* [2011] FMCAfam 431 (24 May 2011) Altobelli FM held that he had no power to review a Registrar's refusal to abridge time under s 104 of the FM Act as the refusal was not an exercise of power under s 102(2) or s 103(1).

PROCEDURE

- ***"Haystack" of an affidavit struck out***

In *Symes & Glover* [2011] FMCAfam 735 (13 July 2011) Halligan FM struck out an affidavit counsel said could be reduced from 130 pages to 20, saying:

> " ... it is an abuse of process ... oppressive ... vexatious ... It casts a ridiculous burden upon the Court to try and deal with a document of that

> magnitude where so much of its content should never have been included. (...) To ... find any specific piece of evidence in that particular haystack, even with an index to the annexures ... is almost impossible."

APPEARANCE BY TELEPHONE

- ***Procedural fairness***

In *Patison & Farington-Manning and Anor* [2011] FamCAFC 167 (15 August 2011) May J set aside an FM's refusal to grant further leave to a lawyer to appear by telephone, saying at paras 34-38:

> "As can be seen [an FM] has a wide discretion to allow hearing by audio link ... The [FM] was entitled to form the view that there were difficulties ... and direct that in future solicitors attend in person. However ... the [FM] took the view that in some way the solicitor was behaving inappropriately ... Having listened to the audio transcription ... and read each transcript it is apparent that ... the [FM] became exasperated and did not afford the solicitor procedural fairness. It is not immediately apparent what the solicitor did to cause this result."

PARENTING ORDER INCONSISTENT WITH FAMILY VIOLENCE ORDER

In *Brainard & Wahlen & Anor* [2011] FamCA 610 (5 August 2011) Austin J made a parenting order that would be inconsistent with family violence orders each party had obtained against the other. Upon making the parenting order, Austin J specified the inconsistency and how the contact was to take place and explained the status of both orders as required by s 68P(2) FLA.

HUSBAND'S INTEREST IN FARM HELD ON TRUST FOR HIS MOTHER

In *Markoska* [2011] FamCA 572 (19 July 2011) Murphy J declared that the husband (H) held his one-third interest in a farm on trust for his mother (M). The land was bought by M and her husband (E) before the wife (W) and H began living together (H was 17). The land was farmed by M and E until E's death after which M farmed it alone. His name was put on title in anticipation that he would pursue a career in farming, but he would not own his interest until he paid his parents his share of the purchase price. A year after his marriage H decided not to farm, finding work as a public servant instead.

CHILDREN

- ***Relocation to New Zealand allowed***

In *Harding & Crawley* [2011] FamCA 581 (26 July 2011) the mother of a five year old child was allowed by Kent J to relocate to NZ from Qld where the father had been spending alternate weekends with the child. The father had also had to issue Hague Convention proceedings to bring the mother back when she moved to NZ unilaterally.

CONFLICT OF INTEREST

- ***Lawyer restrained from acting***

In *Nettle* [2011] FMCAfam 414 (20 April 2011) the wife was granted an injunction restraining the husband's lawyer from acting where he had had pre-marital discussions with both parties separately, the wife deposing that she would not have given "information confidential to [her]self [had she been] forewarned about the current sorry state of affairs". She spoke of feeling "quite violated". Baumann FM summarised the relevant law, saying at para 15:

> "There are particular sensitivities that exist in family law litigation [where] the integrity of the justice system ... benefits from litigants ... starting from an equal position. Theoretically, the husband ... is in a superior position potentially, because of information disclosed by the wife to the solicitor and his firm." ●

Law Society Secretary and 2011 Indigenous Lawyer of the year, Nigel Browne (centre far right), is introduced to President Barack Obama in Darwin on 16 November 2011