

# Family Law

## Case Notes

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### CHILDREN

- **Father's appeal against termination of his time with child dismissed**
- **Emotional abuse by both parents likely**

In *Summerby & Cadogan* [2011] FamCAFC 205 (20 October 2011) the Full Court (Thackray, Strickland and Young JJ) dismissed the father's appeal against Wilson FM's order that he was to have no further contact with his five year old daughter. The father had been spending time with the child but his (ultimately discredited) allegations of child sexual abuse against the mother's new partner led to the mother's decision to begin withholding the child from the father; counter-allegations of abuse; a child protection order; the mother's disappearance and ten contraventions; the child's "unwillingness" to see her father; and a 14 day trial over two years. The Full Court said at para 87:

"Unpalatable as it clearly was, his Honour ... had to take account of the fact that the child's primary carer would 'actively try and destroy the relationship' with the other parent if contact was ordered. Given the 'emotional abuse' to which he found the child would be exposed in such circumstances, we consider his Honour was right not to take into account the conduct of the mother to any greater extent than he did."

### PROPERTY

- **Discovery**
- **Party granted certificate**

### against self-incrimination

In *Aitken & Murphy* [2011] FamCA 785 (12 October 2011) the applicant filed an affidavit deposing that he had made partial discovery but objected to produce certain documents relating to undisclosed income between 2004 and 2010 on the ground that their production may tend to prove that he had committed an offence or was liable to a civil penalty. The applicant applied to Young J who considered the relevant case law and granted a certificate under s 128 of the *Evidence Act 1995* (Cth) that such evidence could not be used against him in proceedings under the *Taxation Administration Act*, *Crimes Act* and *Criminal Code* (all Cth).

### PROPERTY

- **Small asset pool**
- **Wife to receive entire pool**

In *Shroeder & Drummond* [2011] FamCA 741 (22 September 2011) Ryan J gave the mother of two young children, after a relationship of 10 years, the entire pool valued at \$100,000 half of which was her own superannuation. The order was constituted by a contributions assessment of 70% in the wife's favour and a further 30% for s 75(2) factors. The husband's debts of \$50,000 were excluded from the pool and his undisclosed inheritance was said to be available for the repayment of those debts.

### PROCEDURE

- **Registrar's refusal to abridge time**
- **When an application should be listed urgently**

In *Myers* [2011] FMCAfam 1104 at paras 32-33 and 52 (24 October

2011) Halligan FM (disagreeing with *Lynch & Dunstan* [2011] FMCAfam 389 and *Zeller & Whitby* [2011] FMCAfam 431) held that a Registrar's refusal to list a child support stay application urgently is reviewable under s 104(2) of the *Federal Magistrates Act*. At paras 87-89 Halligan FM said that it was "not for me or a Registrar ... to pre-judge [a] substantive application" and then set out the circumstances in which a substantive application should be listed urgently.

### FINANCIAL AGREEMENT

- **Husband received less than he expected**
- **Impracticability**

In *Sanger* [2011] FamCAFC 210 (28 October 2011) Kemp FM granted the wife's application for enforcement of payment of \$350,000 by the husband to her under a financial agreement, dismissing the husband's application for an order setting the agreement aside on the ground that the subsequent sale of properties at prices below their value as recited in the agreement had not given him the 40 per cent share of the parties' assets as agreed. The husband appealed to the Full Court (Coleman, May and Thackray JJ). The Full Court at paras 63-67 reviewed contract law, including the function of courts to give effect to a bargain, and at para 71 observed that the "covenants of the BFA embodied the risks which the parties clearly accepted" and that the "recitals to the BFA made clear that they understood those risks". The Full Court disagreed that the agreement was "impracticable" and dismissed the appeal, saying at



paras 85-86:

"The husband's personal covenant to pay the wife any shortfall was always dependent upon the husband's personal capacity to pay such shortfall. The BFA created, and the wife accepted, an unsecured contingent entitlement in relation to any shortfall. ( ... ) the provisions of s 90K are not designed to, and do not facilitate a party escaping from what proves, or is perceived to be a 'bad bargain'."

#### ACCRUED JURISDICTION

- **Husband's application to join law firm as a party to wife's application to set aside financial agreement dismissed**

In *Noll and Anor* [2011] FamCA 872 (11 November 2011) Le Poer Trench J dismissed the husband's application for the court to invoke its accrued jurisdiction to determine, in proceedings in which the wife was applying for an order setting aside a s 90C financial agreement, his action in damages against a law firm for negligence, holding after a review of the law relevant to the joinder of a third party to family law proceedings that the two claims were not part of a "single justiciable controversy".

#### PROPERTY

- **Short de facto relationship**
- **Order reflected parties' unequal interest in property adjusted for improvements made**

In *Scofield & Shaw* [2011] FMCAfam 1296 (30 November 2011) a de facto couple held a property as tenants in common in shares 63% to the respondent and 37% to the applicant. They separated when the applicant assaulted the respondent and an apprehended violence order was made on the application of the police on her behalf. Upon reviewing relevant case law, Brewster FM dismissed the applicant's claim for payment of an occupation fee by the respondent during her sole occupancy of the property (when

she paid rates and other outgoings but had no mortgage payments to make), holding at para 19 that there had been no ouster, the applicant having been excluded from the property not by the respondent but by "operation of law" when the applicant was restrained from entering the property as a condition of his bail.

Brewster FM did, however, make an allowance for the applicant's payments towards renovations and furniture and one-half of a joint credit card debt, holding that such "an accounting exercise" was appropriate in the case of a short relationship (para 24). On that basis, it was ordered that the applicant be paid \$186,595 and transfer his interest in the property to the respondent.

#### PROPERTY

- **Post-separation inheritance excluded from pool**

In *Victor* [2011] FMCAfam 920 (16 September 2011) a 22 year marriage produced four children and assets of \$750,000. Two years after separation the wife inherited \$700,000 as sole beneficiary of the estate of her former next door neighbour who with his late wife had known the wife since she was three and regarded her as their own daughter. Applying the Full Court's decision in *Bonnici* (1992) FLC 92-272, Burchardt FM excluded the inheritance from the asset pool saying at paras 42-44:

The inheritance was an asset ... that came into the wife's possession after separation and to which the husband had made no effective contribution. In these circumstances, prima facie, these assets should be excluded from the pool [subject to the court first considering] whether there is a sufficiently significant asset pool excluding the inheritance to enable a just and equitable outcome ..."

#### PROPERTY

- **Overseas superannuation**

#### **excluded from pool**

- **Financial resource**

In *Perry & Nesbit* [2011] FMCAfam 1195 (11 November 2011) Whelan FM excluded the husband's overseas superannuation interest from the asset pool, treating it instead as the husband's financial resource, applying the Full Court's approach in *SHL & EHL* [2006] FamCA 1287.

#### PROPERTY

- **Change of venue**
- **Sydney preferred to Adelaide for Part VIIIAB case**
- **Disputed date of separation**

In *Benson & Owens* [2011] FamCAFC 236 (15 December 2011) former de facto partners were resident in SA when one filed a Part VIIIAB application in Sydney, alleging that four of their six years together were spent in NSW where most of their property dealings occurred. There was also a property in SA. Their relationship was alleged to have broken down in January 2010 by the applicant and in 2006 by the respondent. Walker FM transferred the proceedings to Adelaide and the applicant appealed. Coleman J referred to the factors relevant to change of venue under FLR 8.01, allowing the appeal on the ground that the appellant could be disadvantaged by the transfer to Adelaide due to the date of referral of State powers in SA (1 July 2010).

#### PROPERTY

- **Husband's bankruptcy**
- **Joinder of former lawyers for purpose of "getting paid" set aside**

In *Sresbodan and Ors (No 2)* [2011] FamCAFC 240 (16 December 2011) the husband became bankrupt during property proceedings. His trustee in bankruptcy intervened. His former solicitors (S) lodged a proof of debt for costs of \$273,000 of which the trustee rejected \$85,000. S appealed to the Federal Court, and was also granted leave by Watts J to intervene in the property proceedings, the husband appealing against that order to the Full Court (Coleman, Thackray and Young JJ). The basis for S seeking to remain



interveners was said to relate to “the mechanics of getting paid” (para 15). Allowing the appeal, the Full Court held at para 37 that S should pursue their remedy in the Federal Court.

### CHILDREN

- **Contravention of order**
- **“Reasonable excuse”**

In *Raider* [2011] FamCA 488 (23 June 2011) Forrest J reviewed “reasonable excuse for contravening” an order under s 70NAE (FLA) and applied *Stevenson v Hughes* (1993) FLC 92-363 in which the Full Court said:

“... it is not a sufficient discharge of a custodian’s obligations to point to words and actions and to say, in effect: *‘you see, I tried. But the child does not want to go’* and thereafter to ... fold their arms as if that were the end of the matter ... the custodial parent’s role is an active role with an obligation to positively encourage access.”

### PROPERTY

- **Money from parent a contribution, not a “compellably repayable” loan**

In *Maddock & Anor (No. 2)* [2011] FMCAfam 1340 (13 December 2011) the husband’s father had given the parties \$240,000 towards the cost of buying acreage and building a house. After separation the father intervened, seeking repayment of what he alleged was a loan. Burchardt FM described the evidence as lacking any dates or places for the alleged loan discussions, finding that the father had “agreed to help them out” and that there had been “no formality”; no term for repayment; no demand for repayment until separation; and no capacity to repay. Burchardt FM concluded at para 73:

“... if the parties had not been separated, the intervener would never have asked for his funds. They would have been repaid as and when they were able to be repaid ... That ... position

excludes the proposition that the \$240,000 was compellably repayable.”

### FINANCIAL AGREEMENT

- **Set aside as legal advice had been unintelligible to a party with no English**

In *Omar & Bilal* [2011] FMCAfam 1430 (21 December 2011) the wife sought an order setting aside a s 90C financial agreement as it failed to comply with s 90G (FLA). She alleged she had not understood her legal advice. The parties had migrated to Australia from Lebanon. Henderson FM found that the wife had “no English, the deed and certificate are all in English and no translation of the deed and its effect ... for her is evident in a language she can understand”. The wife was found to have lacked formal education and left school at age seven. An Arabic translator was employed to explain the deed and did so but not in the presence of the wife’s lawyer.

### PROPERTY

- **\$4.5m pool included wife’s pre-marital \$3.89m inheritance**

In *Hardy & Markson* [2011] FMCAfam 1061 (20 October 2011) a nine year marriage produced one child and net assets of \$4.5m, \$3.89m of which the wife inherited three months after the marriage. *Willis FM took a global approach due to the husband’s various contributions during the marriage. Those contributions were assessed at eight per cent of the total pool, s 75(2) factors being assessed at two per cent in his favour.*

### PROPERTY

- **Distinction made between parent’s “loans” and “gifts”**

In *Pelly & Nolan* [2011] FMCAfam 530 (25 July 2011) the husband’s father (Mr P) advanced \$250,000 to help his son buy a property and another \$70,000 when the property was sold and another one purchased. The father later advanced \$200,000 to “help him out”. He gave evidence that he did not expect repayment of the

\$200,000 but did require repayment of the first two sums in due course. Howard FM found that although “no interest [had] been paid ... [nor] any demand [made] for ... any interest” it was “only in respect of advancing money for the purchase of real estate ... that Mr P prepared a loan agreement” and that “when the obligation to repay the principal of \$320,000.00 arises it [was], on the balance of probabilities, likely to have to be repaid”. That sum was held to be a liability and the \$200,000 treated as a contribution on the husband’s behalf.

### Adult child maintenance

- **Contravened periodic order replaced by lump sum order**

In *Bridges* [2011] FMCAfam 1288 (13 December 2011) the father was in default under an order that he pay \$84.40 weekly in child maintenance to his daughter until completion of her first tertiary qualification. The mother sought variation of the order to a lump sum order for payment of \$5,486 to cover the remaining 65 weeks of her daughter’s degree (and that in default the father’s car be sold and the amount paid to her from the proceeds). Burchardt FM granted the application under s 66S(2)(d) FLA.

### PROPERTY

- **Contributions**
- **Wife awarded \$150,000 under Kennon**

In *Dixon* [2011] FMCAfam 1244 (2 December 2011) a 22 year marriage produced four children and net assets of about \$750,000. It was described as a “troubled” relationship due to the husband’s “very substantial and regular alcohol consumption and use of marijuana” which “made his moods during the relationship extremely volatile [such] that he subjected the wife and the children ... to considerable amounts of abuse”. Where contributions were found to have been otherwise equal, Burchardt FM held at para 64 as to the wife’s *Kennon* argument that it was “appropriate that there be a 20 per cent loading in the wife’s favour under this heading.” ●