Family Law
Case Notes
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PROPERTY

- ***Big money case***
- ***Royalty rights are "property"***
- ***Historical valuation of interest in entertainment group***

In *Pope* [2012] FamCA 204 (3 April 2012) property proceedings were issued after a nine year marriage (with pre-marital cohabitation) between the wife and a founding member of a successful entertainment group formed four years before cohabitation. They had one child and the wife had an adult son. The husband claimed 85 per cent and the wife an equal share of the parties' $12m asset pool. At cohabitation the wife had a car and $10,000 in savings and the husband contributed $1.9m (being mostly the value of his one-quarter share in the group) and had an annual income of $237,000. The husband's retirement from the group due to ill health two years after the parties separated resulted in his being paid for his share in the group and retaining a share of royalties.

Ryan J considered at paras 101-118 the treatment of the husband's future royalty streams, concluding at para 118:

> "There is no doubt that the husband is contractually entitled to receive both types of royalty streams which, for example, he can assign and sell. In my view the royalty income constitutes property within the meaning of s 79(4)."

Ryan J at paras 121-138 reviewed and ultimately accepted the company expert's valuation of the value of the husband's interest in the group when cohabitation began. Contributions were assessed 74:26 in favour of the husband (para 152). There was no adjustment under s 75(2).

CHILDREN

- ***Relocation from Melbourne to northern NSW allowed***

In *Danner & Kelso* [2012] FMCAfam 824 (10 August 2012) Bender FM allowed the mother to relocate from Melbourne to northern NSW, her place of origin, with the parties' two year old child (X). Bender FM took into account the family consultant's support for relocation if the court found "that the impact on the mother of being required to stay in Melbourne would so impact on her emotional and psychological functioning that it would adversely undermine or compromise her capacity to care for X" (para 173).

Bender FM did find that the mother as X's "primary attachment figure" (para 300) was "struggling in Melbourne"; that her "distress and unhappiness was palpable whilst giving her evidence" and that her "struggles to find a way forward [were] genuine" (para 312); that the mother had "not engaged in any mother's group, [had] been unable to find childcare and [had] been unable to find any employment opportunities that accommodate[d] her obligations to care for X" and had "rejected the genuine offers of assistance from the extended paternal family as she believe[d] they [did] not support her in her role as X's mother" (para 313). It was found that the mother had "realistic expectations for employment in northern New South Wales, a supporting family including ready made accommodation in her mother's home … and a support network" (para 314); that when she became pregnant with X the parties had discussed a move to NSW; and that what the mother believed to be the father's retraction of an agreement after separation that she would be able to relocate back to New South Wales by mid-2011 "further exacerbated her sense of isolation and despair" (para 315).

CHILDREN

- ***Mother's unilateral relocation from SA to Qld***
- ***Injunction made requiring her return to Adelaide***

In *Talia* [2012] FMCAfam 567 (15 June 2012) Brown FM heard an interim relocation case concerning the parties' seven year old son. The mother met a new partner on the internet in 2011, now wishing to start a new life with him and the son in Queensland. The son was living in Adelaide until April 2012 when taken by the mother to Queensland and enrolled in school there. The father deposed that he had agreed to their going to Queensland for a holiday. He strongly opposed the son's relocation. The mother alleged she was the child's "primary carer" and the husband a "poor parent", saying that the boy loved his father but had no wish to return to South Australia, being "very comfortable

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with her fiancé, referring to him as 'Dad'" (paras 12-17).

Brown FM at paras 1-9 discussed the implications of a unilateral relocation and at paras 91-126 reviewed the evidence deposed by each party, making an order that the mother return to the metropolitan area of Adelaide within 14 days. In doing so, Brown FM at para 122 applied the view of the Full Court of the Family Court in *C & S* [1998] FamCA 66 that "it is preferable that issues relating to relocation should not be determined against a background of recent development, which significantly alters the relationship of the child concerned in regard to one or other of his or her parents, particularly if that recent development has been created by the actions of one parent alone" (applied by Boland J in *Morgan & Miles* [2007] FamCA 1230).

PROCEDURE

- ***Change of venue from Melbourne to Albury granted***

In *Argyle & Jerrams* [2012] FMCAfam 149 (22 February 2012) Harman FM granted the father's application for a change of venue for the further hearing of parenting proceedings from the Melbourne registry to the Albury registry of the FMC where the proceedings had previously been conducted. Harman FM cited FMCR 8.01 as to the factors relevant to an application for change of venue between registries of the Court, being the convenience of the parties; the limiting of expense and the cost of the proceedings; whether the matter has been listed for final hearing and any other relevant matter. Harman FM's discussion of the case for each party in respect of each of those factors is set out at paras 15-48.

Editor's note – Also see *Maddox & Maille* [2012] FMCAfam 294 (29 March 2012) at paras 87-116 in which in respect of "any other relevant matter" O'Sullivan FM considered the factors set out in FLR 11.18, being the public interest; whether the case if transferred or removed is likely to be dealt with at less cost to the parties, at more convenience to the parties or earlier; the availability of a judicial officer specialising in the type of case to which the applicant relates; the availability of particular procedures appropriate to the case; the financial value of the claim; the complexity of the facts, legal issues, remedies and procedures involved; the adequacy of the available facilities, having regard to any disability of a party or witness; and the wishes of the parties.

CHILDREN

- ***Order for disclosure of notifier's identity set aside***

In *Department of Family and Community Services & Jordan and Ors* [2012] FamCAFC 147 (7 September 2012) the Full Court (Bryant CJ, Coleman and Ryan JJ) allowed an appeal by the Department of Family and Community Services ("the Director General") against an order made by Cleary J under s 69ZW FLA for production to the Court of a notification of suspected abuse and associated documents and disclosure of the identity of the notifier. The appellant had argued that the order was contrary to s 29(1)(e) and (f) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("State Act") and to s 69ZW(3) and (6) FLA. The Full Court concluded at para 61:

> "Section s 69ZW did not provide her Honour with power to order the Director General to disclose the identification of the notifier. In relation to this matter her Honour was required to apply the provisions of the State Act, in particular s 29(1)(f), (2) and (3). We are strongly of the view that the Director General was correct in her contention that disclosure of the identity of the notifier was not critical and, that failure to order disclosure would not prejudice the proper administration of justice."

PROPERTY

- ***Superannuation***
- ***Treatment of a DFRDB pension***

In *Semperton* [2012] FamCAFC 132 (24 August 2012) the Full Court (May, Thackray and Ryan JJ) allowed the husband's appeal against a property order made by Baumann FM in relation to his Honour's treatment of the husband's Defence Force Retirement and Death Benefits Scheme ("DFRDB") interest. Baumann FM had taken a separate pools approach to the parties' superannuation interests and non-super assets. The husband's case was that his Honour "erred by considering the husband's DFRDB pension as a relevant factor at the s 75(2) adjustment stage, and then treating the pension as if it were a capital sum which could be used when adjusting the parties' superannuation interests, in effect 'double dipping' of the asset" (para 40). Thackray and Ryan JJ concluded at paras 194-195:

> "There can be no doubt that the Federal Magistrate appreciated the special nature of the DFRDB. This is because he referred to it as having a 'different character' at an early stage in his reasons when commenting on the fact the parties had adopted a two

> pool approach, when his Honour considered three pools may have been more appropriate. However, we consider his Honour should also have paid regard to the 'different character' of the DFRDB when he came to the s 75(2) adjustment. The 'different character' of the DFRDB required attention not only when constructing the pools, but at each other point in the process, most especially at the s 75(2) stage and when assessing the justice and equity of the outcome."

DE FACTO RELATIONSHIP

- ***Meaning of "couple" and "living together on a domestic basis"***

In *Taisha & Peng and Anor* [2012] FamCA 385 (24 May 2012) Ms Taisha lived for 17 years with Ms Peng who remained married to Mr Pan. Ms Peng and Mr Pan had three children. During that time all either lived together or Mr Pan and one child lived elsewhere. Ms Taisha alleged that she and Ms Peng were in a "de facto relationship" (in that they slept together, shared holidays and she had made financial contributions), seeking a declaration under s 90RD as a precursor to property proceedings. Ms Peng's case was that her association with Ms Taisha was "that of like mother and daughter" (para 4). Upon reviewing the evidence, case law and legislation, including s 4AA(1) FLA (which requires that the parties were a couple who lived together in a domestic relationship), Cronin J dismissed the application, referring at para 17 to the Australian Bureau of Statistics' definition of a "couple relationship" as "two people usually residing in the same household who share a social, economic and emotional bond … and who consider their relationship to be a marriage or marriage-like union." Cronin J continued at paras 20-21:

> "But there must still be evidence of a domestic relationship … a domestic relationship must be one in which there are activities of running a household or shared households. That is, something must be seen to be related to domesticity which refers to home conditions and arrangements. For example, it could be indicated by people coming and going as if entitled to use and share the home's facilities which is quite distinct from a boarding house or backpacking hostel where individuality reigns. A couple therefore living in a domestic relationship is the opposite of a couple of individuals."

CHILDREN

- ***Contravention of parenting orders***
- ***Hearsay evidence***

In *Biddell & Ervin* [2012] FMCAfam 926 (5 September 2012) Sexton FM dismissed the father's contravention application against the mother, saying that his allegations were "imprecise" (para 41), "couched in vague, generalised terms" (para 42) and lacked any specific allegation relating to any of the orders (para 43). Sexton FM said at para 62 that the applicant needed to show "that it was the [Respondent] who was, either by her action or inaction, preventing those arrangements from commencing". As to hearsay evidence relied on by the applicant (statements made by Contact Centre staff to him), Sexton FM said at para 68 that the evidence was "so remote and therefore unreliable" and that it "[could] not be given any weight [under s 69ZT(2) FLA]".

CHILDREN

- ***Time sought by paternal grandmother opposed by mother as father's "backdoor attempt" at more time***
- ***Time granted***

In *Schroeder & Raleigh & Anor* [2012] FMCAfam 834 (3 August 2012) the paternal grandmother applied for an order that she spend time with her grandchildren. The mother opposed the application, alleging that it was a "backdoor attempt to increase the father's time with [the children]" (para 115). She also alleged that the applicant was attempting to undermine the mother's parenting and that the order sought would cause the mother to suffer such anxiety that her parenting capacity would be adversely affected. Bender FM disagreed, saying at para 119:

> "I am satisfied that it is in Y and X's best interests that they have a special relationship with their grandmother that is different to that which they have with their parents. That they currently spend relatively limited time with their father is not a reason, in my opinion, to place limits or constraints on their relationship with the grandmother or their time with her." ●