Family Law
Case Notes
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CHILDREN

- ***Indefinite supervision of time set aside***

In *Slater & Light* [2013] FamCAFC 4 (5 February 2013) the Full Court (May, Strickland and Forrest JJ) allowed the father's appeal against Coates FM's order for indefinite supervision of his time with his children, an order made without hearing "expert evidence about the time and the circumstances in which [he] should spend [unsupervised] time with [them]" (para 71).

CHILDREN

- ***Overseas surrogacy***
- ***Step-parent adoption by same sex partner of sperm provider***

In *Blake & Anor* [2013] FCWA 1 (10 January 2013) Charles Blake applied for step-parent adoption of twins as de facto partner of James Marston, the father of the children. They were born by a surrogacy procedure in India in which an anonymous donor's eggs fertilised with Marston's sperm were implanted in a surrogate who gave birth to and then relinquished all rights in respect of the children. Before Crisford J was the question as to whether Marston could be considered a "parent" for the purpose of the *Adoption Act 1994* (WA) having regard to the circumstances of their conception and birth. After examining case law and legislation Crisford J held that Marston was a parent of the children.

COSTS

- ***Wife awarded costs due to her pre-action offer to settle***

In *Firmer & Britton* [2012] FamCA 576 (23 July 2012) Monteith J made an order for costs against the husband who had rejected the wife's pre-action offer to settle for less than she was ultimately awarded at the final hearing.

Editor's note – In *Bronson (No. 2)* [2012] FamCA 676 (13 August 2012) the husband was awarded 80 per cent of his costs as he had opposed the wife's maintenance application.

CHILDREN

- ***Interim order for wife to install an alcohol monitoring system***

In *Sebastian (No. 3)* [2012] FamCA 707 (13 August 2012) Young J made an order due to the wife's prior alcohol abuse and the need to secure the children's safety (para 10) requiring the wife to install an alcohol monitoring system in her home and undertake a breath test before driving the children.

PROPERTY

- ***"De facto relationship"***
- ***Separate homes***
- ***Prior inconsistent representation***

In *Kazama & Britton* [2013] FamCA 4 (15 January 2013) Watts J declared the existence of a de facto relationship where the parties maintained separate residences but spent significant time together at the respondent's home. Watts J also had regard to a prior inconsistent representation made by the respondent to the Department of Immigration in a document "Sponsorship for a partner to migrate to Australia" that the parties were in a de facto relationship.

PROPERTY

- ***Competing valuations***
- ***Party's "unusual" business model***

In *Gelledge* [2012] FamCA 641 (3 August 2012) Stevenson J resolved competing valuations of a 64 room health care facility catering to a niche market by choosing the one that did not require "the husband's business model [to] be altered so as to require clients to pay accommodation bonds" (para 38). Stevenson J agreed with his counsel that the business should be valued "as it is, where it is" (para 44).

CHILDREN

- ***No jurisdiction to allow access to deceased's frozen sperm***

In *Vallance & Marco* [2012] FamCA 653 (8 August 2012) Watts J held that the court had no jurisdiction to grant Ms Vallance ownership of the frozen semen of the late Mr J with whom she had had a relationship for two months, adding that a remedy may exist under State law by action taken by the executor of the deceased's estate.

PROPERTY

- ***Valuation of plant and equipment***
- ***"Highest and best use"***

In *Martin & Crawley* [2012] FamCA 1032 (10 December 2012) Coleman J determined a conflict between conflicting valuations of

plant and equipment used in a road freight business by preferring (to a valuation based on an *ad hoc* sale) a valuation based on "market value for continuing use" which applied (paras 64 and 78) the concept of "value to the party". The "highest and best use" of the assets was held to be as used in the current business (so that signwriting on vehicles would be an advantage not a disadvantage).

CONFLICT OF INTEREST

- ***No confidential information divulged when solicitor had acted for both parties***

In *House & Altimas* [2012] FamCA 625 (3 August 2012) Ryan J held that there was no conflict of interest in the husband's solicitor acting for the husband, in that when acting for both parties 14 years previously in matters arising from a road accident the applicant was found to have "communicated [no] confidential (*qua* the wife) material to the respondent's solicitor" (para 18).

EVIDENCE

- ***Transcript of taped phone conversation inadmissible***

In *Badger & Ors* [2013] FMCAfam 124 (14 February 2013) Myers FM held (para 59) that the transcript of a telephone conversation which had been taped without the caller's knowledge or consent was inadmissible under 138 of the *Evidence Act 1995* as "the desirability of admitting the evidence [did] not in the mind of the court outweigh the undesirability of admitting [it]".

PROPERTY

- ***Reconciliation***
- ***Implied consent to a fresh property order***

In *Saito* [2013] FMCAfam 112 (8 February 2013) Burchardt FM applied established authority upon holding that the court did have jurisdiction to make a fresh property order where parties had reconciled after the first order had been made.

PROPERTY

- ***Whether "still appropriate" to make property order after death of party***

In *Erdem & Ozsoy* [2012] FMCAfam 1323 (5 December 2012) Walters FM considered s 79(8) FLA, examining case law including *Stanford* [2012] HCA 52 which was said (para 131) to provide no "guidance as to the application of the 'just and equitable' test" where a party had died. Walters FM proceeded at paras 132-133 to set out "principles [that] apply or must be borne in mind when considering the provisions of s 79(8)".

CHILDREN

- ***"Very different parenting styles"***
- ***Sole parental responsibility***

In *Luu & Xia* [2013] FMCAfam 35 (25 January 2013) Sexton FM made an order for the mother to have sole parental responsibility where it was found (para 60) that the parties had "very different parenting styles" and that the father held "rigid views".

CHILDREN

- ***Indigenous issues***
- ***Appointment of family consultant***

In *Cerny & Fink (No. 2)* [2012] FMCAfam 1394 (20 December 2012), a case concerning a child of Indigenous and non-Indigenous background, Monahan FM sought a report from a family consultant "experienced in addressing Indigenous cultural issues".

PROPERTY

- ***Contributions assessment is not "an audit of earnings"***
- ***No loading for higher income***
- ***Costs awarded due to early settlement offer***

In *Petruski & Balewa* [2013] FamCAFC 15 (20 February 2013) the wife (a 54 year old Australian property developer) met on the internet and three years later entered into a five year marriage with the husband, a 36 year old African with a diploma, no assets and limited work prospects. The wife's initial contributions were mortgaged property, an income of $280,000 pa and her funding of the husband's re-training expenses. The husband ran the household for a year until finding paid work and at trial earned $70,000 pa. The wife added him as a beneficiary of her family trust, making distributions to him and to herself. They borrowed to buy land, build a house and buy other properties. The Full Court (Bryant CJ, Strickland and Moncrieff JJ) dismissed the wife's appeal against the order of Jordan AJ (FCWA) that she transfer to the husband her interest in the house and pay him $54,000 (his contributions being assessed at 22.5 per cent, adjusted upwards by 2.5 per cent for disparity and longer life expectancy). The wife argued that due to her superior financial contributions the husband should receive 7.5 per cent of the $2.39m asset pool – at trial "recalibrated down" to 3.36 per cent by reference to income from all sources (para 20). The Full Court said at paras 21-22:

> "His Honour was of the view that counsel for the wife['s] … 'returns on effort' … approach treated marriage as 'an event without consequence, to be wound up at its conclusion by a distribution based on an audit of earnings'. (…) The trial judge found the husband had made several significant indirect financial contributions … the parties had merged their finances in a joint account … were jointly responsible for [a] mortgage … the husband['s] distributions … were utilised for joint purposes … [their] finances and efforts had been combined and both … enjoyed tax advantages by splitting the distributions … also … whilst the husband was making his

> contributions the wife was making contributions to her superannuation fund. Further, the [husband ran] the household during his period of retraining."

The Full Court continued at para 25:

> "His Honour [upheld by the Full Court] rejected the proposition that the wife should be entitled to any extra loading simply because of her higher earnings during the marriage, and instead found there was 'a merging of effort, finance, risk and support … The trial judge also noted that the … increase in value of the parties' properties was through 'no particular ongoing effort of either of [them]', and that since separation the wife had … sole use and benefit of the bulk of the property."

The Court also upheld Jordan AJ's order that the wife pay the husband's costs having regard to s 117(2A)(f) and his offer to settle at "a very early stage in the proceedings" for less than was determined by the court.

PROPERTY

- ***No accrued jurisdiction to consolidate damages claim against lawyers with FLA proceedings***
- ***Need for factual basis of damages claim to arise out of same facts as in family law case***

In *Noll and Anor* [2013] FamCAFC 24 (28 February 2013) the Full Court (Bryant CJ, Finn and Strickland JJ) dismissed the husband's appeal against Le Poer Trench J's dismissal of his application for the court to exercise accrued jurisdiction to determine his cross-claim for damages against the wife's solicitors when determining the wife's application for an order setting aside a financial agreement. The Full Court described the background of the case at paras 4-5; the case for each party at paras 14-17 and case law as to the exercise of accrued jurisdiction (e.g. *Re Wakim; Ex parte McNally* (1999) 198 CLR 511) at paras 36-53. The Full Court distinguished *Ruane & Bachman-Ruane & Ors* [2012] FamCA 369 (where a negligence claim against solicitors was permitted to be joined with property proceedings), saying that a financial agreement "had already been declared to be non-binding" in that case and that "whether or not accrued jurisdiction is attracted in a particular case will very much depend on the facts of that case".

PROPERTY

- ***Informal agreement to keep finances separate***

In *Sabri & Abidin* [2013] FMCAfam 192 (12 March 2013) Altobelli FM found that as the parties had failed to adhere to their informal oral agreement to keep their finances separate during the marriage the agreement did not bind the court.

PROPERTY

- ***Wife's injury-related pension***
- ***Separate pools approach***

In *Crawford* [2012] FMCAfam 1315 (4 December 2012) the parties were together for 20 years. They had three children and net assets of $2.2m, including the wife's $987,000 pension in the payment phase received by her since retiring from the police service three years before separation due to an injury while on duty. Taking a separate pools approach and following other decisions in which the same assessment had been made as to an injury-related pension, Altobelli FM assessed the husband's contribution to the wife's pension at 15 per cent (awarding 18 per cent, being the percentage proposed by the wife).

CHILDREN

- ***Primary school preferred to home-schooling***

In *Bates & Churchill* [2012] FMCAfam 1495 (20 December 2012) Terry FM determined a conflict as to whether a five year old child should be home-schooled by the mother or attend a primary school by preferring the latter, saying at paras 50 and 52 that home-schooling "would become … very much a mother-and-daughter world – no peers, or very few peers" and that "the father's capacity to be involved in her education [would] be almost non-existent".

PROCEDURE

- ***Objection to subpoena for production (on ground documents were "private", irrelevant and speculative) dismissed***

In *Bennet & Carter* [2013] FMCAfam 149 (30 January 2013) an objection to production of immigration records on the ground that the documents were "private … not relevant … and … speculative" was dismissed by Harman FM who said (para 34) that the documents were "not private [but] public records accessible by a variety of government agencies [and that] once proceedings [were] on foot between parties … there is little, if anything, that, subject to the requirement of relevance as defined by section 55 of the *Evidence Act,* would be private as between the parents".

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