Family Law

Case Notes

September 2012 - March 2013

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The Family Law Book

CHILDREN

- ***Former flight risk allowed to travel to US***

In *Wessell* [2012] FamCA 772 (7 September 2012) Flohm J discharged an Airport Watch List order as to the parties' child (diagnosed with Asperger's syndrome), permitting the mother, a former flight risk, to take the child to Idaho once a year to visit her family. Conditions included an $8,000 bond, access to medical services in Idaho, the family consultant's recommendation that the mother initially travel without her new partner, the use of visual cues to prepare the child, an orientation visit to the airport, the trialing of medication and the use of electronic games and videos.

CHILDREN

- ***Father's hearsay account of mother's alcohol use admitted but given little weight***

In *Mabart & Haselden* [2012] FamCA 793 (18 September 2012) the father's affidavit containing statements allegedly made by the mother's housekeeper as to excessive alcohol consumption by the mother was admitted into evidence under s 69ZT(1) FLA but given little weight, Rees J saying (para 94) that "where the allegations are of a serious nature, and are material to the father's case, I must assume that [his] failure to call the witness, either by affidavit or by subpoena, must have been because her evidence would not have assisted [his] case". **Editor's note –** Also see *Baglio* [2013] FamCA 105 (27 February 2013) at paras 40-42.

PROPERTY

- ***Inheritances were 43.5 per cent of $2.7m pool***

In *Dinsmore* [2012] FamCA 798 (18 September 2012) a 28 year marriage, produced two children and net assets of $2.7 million. The husband made an initial contribution – a house bought for $45,500 (under mortgage, ultimately paid out by his father) – and contributed inheritances received one and two years before separation representing 43.5 per cent of the pool. Watts J (para 74) took into account "the extent of the property emanating from the husband's family and the myriad of other contributions both parties made over a 28 year period", assessing contributions as to 70 per cent to the husband and 30 per cent to the wife. An adjustment of 7.5 per cent was made in favour of the wife (paras 75-81) for her "limited employment opportunities".

PROPERTY

- ***Cohabitation agreement under Property Law Act 1974 (Qld) was not a recognised agreement or financial agreement***

In *Kevin & Trembath* [2012] FamCA 807 (11 September 2012) Murphy J made consent orders sought by the parties, declaring that their cohabitation agreement made during their de facto relationship under Part 19 of the *Property Law Act 1974* (Qld) was not a "recognised agreement" under that Act as it had been "witnessed by the parties' then cleaning lady" not by a solicitor or justice of the peace as required by s 266(1)(b).

PROCEDURE

- ***Subpoena to produce records of wife's psychiatrist***
- ***Legal professional privilege***

In *Hunt & Atkins* [2012] FamCA 911 (6 November 2012) the husband issued a subpoena for production of records held by a psychiatrist consulted by the wife. The wife objected on the ground of legal professional privilege. Ryan J upheld the objection as to "those parts that disclose[d] the wife's legal advice [conveyed by her to her psychiatrist]". Leave to inspect was granted as to material to which no objection was taken.

PROPERTY

- ***High earnings not allowed as "special contributions"***

In *Newman* [2013] FamCA 37 (30 January 2013) the husband argued that his high earnings throughout the parties' 28 year marriage were contributions "outside the normal range" and should be treated as a "special" contribution (para 114). Watts J disagreed, saying (para 118):

> "I infer the husband was able to develop these skills having been substantially freed by the wife from the primary role of homemaker and parent. … [that] role … 'should be recognised not in a token way but in a substantial way' (*Mallet* (1984) 156 CLR 605;

Ferraro (1993) FLC 92-335)."

CHILDREN

- **Evidence Act 1995 (Cth) to apply in the "exceptional circumstances" of alleged child sexual abuse under s 69ZT(3)**

In *Garman & Jackson* [2013] FamCA 54 (21 February 2013) the father submitted that the evidence at trial where he would be the subject of child sexual abuse allegations should be governed by the *Evidence Act's* rules against hearsay, arguing "exceptional circumstances" under s 69ZT(3) FLA to exclude the court's usual approach in child-related proceedings under subsection (1). Macmillan J agreed, citing (para 9) "the importance of that evidence and the significance of the possible outcome".

PROPERTY

- ***Equitable estoppel***
- ***Declaration that farm held upon trust***

In *Hampton & Farley and Ors* [2013] FamCA 213 (5 April 2013) the parties' son argued that his father should be estopped from denying that he (the son) had been encouraged to believe that his father's interest in a farm would "one day" be his and had relied upon that promise. Coleman J discussed equitable estoppel (paras 86-103) and *quantum meruit* (para 105), declaring that the father, son and a company held the fee simple upon trust for the father as life tenant and the son in remainder. **Editor's note –** In *Daymond and Ors* [2013] FamCA 215 (9 April 2013) a third party's application for a declaration that his father and uncle held their shares in a company on trust for him was dismissed. The alleged representations were found to have been ambiguous.

EVIDENCE

- ***Solicitor's letter as to settlement inadmissible***

In *Daymond and Ors* [2012] FamCA 1041 (3 December 2012) Murphy J held that a letter between solicitors was inadmissible under s 131 of the *Evidence Act*, being a communication made in an attempt to negotiate a settlement.

PROPERTY

- ***Relevant principles***
- ***Murphy J's application of Stanford***

In *Baglio* [2013] FamCA 105 (27 February 2013) Murphy J (paras 178-183) discussed the principles for property proceedings post-*Stanford* [2012] HCA 52. Murphy J identified each party's existing legal and equitable interests, making a finding as to the parties' net assets at para 208, then asked "should an order be made (s 79(2) FLA)?" Murphy J cited (para 212) the "'… express and implicit assumptions that underpinned the existing property arrangements [which] have been brought to an end by the voluntary severance of the mutuality of the marriage relationship' (*Stanford* at [42])", concluding (para 213) that "justice and equity require[d] an alteration to the parties' existing legal and equitable interests in property". Murphy J then examined contributions and s 75(2) factors, asking (paras 289-296) "result and orders – just and equitable?"

CHILDREN

- ***Dismissal of application to relocate set aside***

In *Richards & Parsons* [2013] FamCAFC 74 (7 May 2013) the mother was twice assaulted by the father during cohabitation in Canberra. The father was charged, convicted and sentenced respectively to a bond and three months' imprisonment. The mother separated. A child, born after the father's release, had "sporadic" contact with the father for two years (para 6). The mother moved with the child to Brisbane, for six months visiting Canberra to allow contact between father and child. The father applied for parenting orders. Six months later an interim order was made that the mother return to Canberra, the child to spend supervised time with the father. A year later a final order was made that the child live with the mother in Canberra and spend alternate weekends with the father. The mother appealed to the Full Court (Finn, Coleman and Strickland JJ) who remitted the case for re-hearing, saying at paras 46-48:

> " … given the mother had been in Brisbane for … some months before the father commenced proceedings; the extreme violence which had characterised their relationship … ; the relative certainty of her housing arrangements in Brisbane compared to the uncertainty of such arrangements in … Canberra … ; and the father's lack of commitment to his child support obligations, we can only conclude that his Honour's decision was … 'plainly wrong' and requires our intervention."

CHILDREN

- ***Estrangement***
- ***Order for therapeutic intervention and supervised contact***

In *St Claire and Ors* [2013] FamCA 108 (27 February 2013) two children (D aged 12 and K aged 7) were born during periods of separation and reconciliation. The wife alleged she had been "pressured, if not threatened,

to reconcile yet the relationship continued … for a number of years … " (para 4). The parties finally separated in September 2010. Cronin J said (para 6):

> "Since the separation, the husband has not had any contact with either of the children. The duration since separation has meant that K does not know her father but … has entrenched D's antipathy towards his father."

Cronin J concluded (paras 19-20):

> "In respect of the parenting proposals, I propose to order that there be no contact between the husband and D. D at least knows who his father is and has a very strong view about any relationship. I intend to respect that view. K is different and should have the opportunity to learn that she has a father who has an interest in her. The difficulty … is that this is not a reintroduction case but one involving introduction. I am satisfied that despite the husband's optimism … K has little, if any, memory of her father and the wife has done nothing to promote even his existence to K. It is in K's best interests for there to be face to face contact but only if a relationship can be created. The first step, an introduction, could only be undertaken by some therapeutic approach and the evidence is lacking to enable me to find how that could be commenced. For that reason, I must leave it to the parties to some degree. I am conscious however that forcing the reintroduction of a contact regime now will be distressing for the wife and D and may be detrimental to K's welfare."

It was ordered that the children live with the wife, that she have sole parental responsibility and that subject to therapy and the therapist's recommendation the father have supervised contact at a contact centre.

SPOUSAL MAINTENANCE

- ***Threshold not met***
- ***Children's expenses disregarded***

In *Nolan* [2012 FamCA 967 (5 November 2012) the wife applied for spousal maintenance. Rees J said at paras 1-4:

> " … Each of the parties is employed. The children of the marriage live with the wife [who] earns $3385 per week from her employment. She also receives money [for] child support, which for the purpose of this application, I propose to disregard … [T]he husband … is the beneficial owner of … shares in a company which has … a projected adjusted profit of $590,000 per annum … The first matter which I need to consider is whether or not the wife is able to meet the test prescribed in s 72 [FLA]. That is, whether she is able to support herself from the income … she has available … The wife's expenses which she claims on a fixed basis are $2034 per week … The wife's discretionary expenses are $1201 per week … I pause here to note that the wife also seeks to claim the expenses of the children of $833 per week. But having regard to … *Stein* (2000) FLC 93-004, I do not propose to take into account those expenses. Therefore, the wife has income of $3385 a week and total expenses of $3235 a week and she does not meet the threshold test in relation to spousal maintenance."

PROPERTY

- ***Imprecise application for equitable relief dismissed***

In *Friar and Anor* [2013] FamCA 121 (1 March 2013) the wife sought a declaration that she and the husband were sole beneficial owners of a property of which the husband and his sister were registered owners as tenants in common. The property had been sold and much of the proceeds held in trust. The wife sought a declaration of trust, arguing that there had been a joint endeavour between her, the husband and his sister the effect of which was that she and the husband were the owners of the property. The wife also submitted that she was induced by statements of the husband and his sister to believe that she would have a beneficial interest in the property and acted to her detriment in reliance on those statements. Murphy J held that the evidence did not disclose a joint endeavour or common intention, finding that the statements alleged by the wife to have induced her to act to her detriment were unclear and ambiguous. The wife's claim was dismissed.