Adding to the hullabaloo with the most withering attack on legal aid reforms by a serving member of the judiciary to date, Lord Justice Moses, a Lord Justice of Appeal has delivered a most damning verdict on the Government's plans to deliver '*justice on the cheap*' by letting giant companies bid for legal aid contracts.

In an after-dinner speech to the London Criminal Courts Solicitors' Association he described proposals by Chris Grayling as a *'joke'* and chided David Cameron for not knowing what Magna Carta meant.

This was a thinly veiled reference to the fact that Eton education aside, Downing Street should perhaps have known better than to put the Prime Minister on *The Late Show* with David Letterman. Yet on 27 September 2012 David Cameron did just that, walking on to the set to the strains of Rule Britannia, sorely mistaken if expecting some friendly chat about Old Blighty's glorious past.

And so the ambush of *"dumb American questions"* as Letterman put it, began…

1. *Who composed Rule Britannia? "Elgar?"* Nope, Thomas Arne.
2. Turning to the Magna Carta... "*Well that was "signed in 1215"* said the PM, "*on an island in the Thames."* Full marks for 1215, but Runnymede is mainland.
3. *Where is the Magna Carta now? "It does exist,"* the PM ventured; he had seen a copy in the Houses of Parliament.
4. The final humiliation: *What does Magna Carta mean?* He was in big unchartered waters with that one!

Lord Justice Moses had written a very tongue in cheek spoof application to become the next Lord Chief Justice (a post which now requires candidates to submit a 2000 word essay.

His essay, featured scathing criticism of the government's legal aid proposals, and concluded by questioning what is to become of the proud boast that London is a world leader in legal services; that the integrity of the rule of law must be maintained?

> If it is unthinkable, simply unthinkable to procure the services of the judiciary by permitting their services to be performed by the lowest bidder... by laying them waste, by offering their services only to the wealthy, and to the privileged... why is it thinkable to procure the services of the lawyers in such a manner?

He wasn't expecting to get the job.

What I want to do when I am Lord Chief Justice…written by Alan Moses, aged 67½, court 63, RCJ

- ***Moses jokingly argues that any reforms should apply to the judiciary as well as lawyers***
- ***If lawyers are not to provide services of a quality above a level specified by the state, why should judges?'***
- ***Judges urged to enter the modern legal world of Price Competitive Tendering; the more judgments each can produce in the shortest time at the lowest rates, the more they will be permitted the privilege of making them.***
- ***We have learnt ... that the litigant is a commodity, and you the government are the monopoly purchaser.***
- ***Financially wasteful to have lots of independent judges so they should 'amalgamate' and form larger entities.***
- ***Judges could cut costs further by taking sponsorship from companies such as L'Oréal, Silk Cut and Virgin.to help save the Treasury money.***
- ***Sponsors won't sponsor for nothing... a bit of branding will not surely come amiss.***
- ***L'Oréal Judges…because you're worth it, or at least worth seven years,***
- ***Costa Baristas or Costa Judges…***
- ***Silk Cut Judges…what about Virgin Judges?***
- ***You need not worry about Magna Carta, after all, the Prime Minister had forgotten what it means, and if excellence is to be replaced by the merely adequate... a judicial force composed of the merely adequate who have tendered the lowest bids is entirely consistent with the very principles you seek to apply to the lawyers on whom they depend to hand out justice.***
- ***He warned that plans to take legal aid cases away from hundreds of high street firms and hand them to companies such as haulier Eddie Stobart would create 'a desert' where choice would be meaningless.***

Family Law
Case Notes
March - June 2013

Robert Glade-Wright
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The Family Law Book

CHILDREN
- ***Mother v non-parent***
- ***Parenthood v parenting***

In *Withall, Richardson and Powles* [2013] FCWA 54 (21 May 2013) Walters J determined a parenting dispute between the mother of three children and the father's former de facto partner (Ms Powles) by finding that the children should live with Ms Powles. The judgment at paras 181-189 contains a review of case law relevant to the mother's submission that weight should be given to the fact that she was the children's mother.

SUBPOENAS FOR PRODUCTION
- ***Objections of third parties upheld***
- ***Discovery by wife had not been pursued first***

In *Cahill* [2013] FamCA 176 (26 March 2013) Cronin J at paras 14 and 17 upheld the objections of the wife's mother and brother to the husband's subpoena for production of documents as he had not pursued discovery by the wife first.

PROPERTY
- ***Unvested share units in employee share fund***
- ***Not "property" but a "financial resource"***

In *Beklar* [2013] FamCA 327 (10 May 2013) Ryan J held at para 119 that the husband's unvested share units were a "financial resource" not "property" as (1) "he [could not] sell, assign or deal with them until they vest[ed]"; (2) "until the shares vest[ed] he [was] entitled to receive dividends on the underlying shares and nothing more" and (3) "the probability [was] that he will [still be employed when the shares vest]".

PROPERTY
- ***Foreign divorce***
- ***Leave to proceed out of time not required***

In *McIntosh & Anderson* [2013] FamCA 164 (20 March 2013) the parties had married in Australia but divorced overseas. Upon the wife later applying for property orders under the *Family Law Act,* the parties agreed that the divorce should be recognised under s 104 but the husband argued that the wife required leave to proceed. Murphy J concluded at para 69 "that the words of s 44(3) construed in their proper context evidence an intention that the expression 'divorce order' … is confined to orders for divorce obtained in Australia pursuant to an application under the Act".

CHILDREN
- ***Overseas surrogacy***
- ***No federal power to declare parentage***

In *Mason and Anor* [2013] Fam CA 424 (7 June 2013) the applicant and his male partner sought parenting orders and a declaration of parentage in relation to twins conceived and born in India by surrogacy. Conception occurred by placing an anonymous donor's egg inseminated by the applicant's sperm into the uterus of the birth mother by IVF. Ryan J held that the applicant as the children's biological father was entitled to a parenting order but not a declaration of parentage, saying at paras 33-34:

> " (…) for the purposes of the Act [FLA], the 2008 amendments [introducing ss 60H and 60HB] evince an intention by Parliament that the parentage of children born as a result of artificial conception … [to which the *Status of Children Act 1996* (NSW) applies] or under surrogacy arrangements [under the *Surrogacy Act 2010* (NSW)] will be determined by reference to those provisions and not the general parentage provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parentage. The effect of this is that unless an order is made in favour of the applicant pursuant to the *Surrogacy Act,* the provisions of the Act do not permit this Court to make a declaration of parentage in his favour."

CHILDREN
- ***Artificial conception***
- ***Sperm donor with intention to father a child may be a "parent" under Family Law Act***

In *Groth & Banks* [2013] FamCA 430 (11 June 2013) a child was born to the mother, conceived by assisted reproductive technology using the applicant's genetic material. The mother submitted (para 4) that under s 15 of the *Status of Children Act 1974* (Vic) a man who produces that material for an IVF procedure is not the father of a resulting child and that she undertook the procedure "in expectation that she would be a single mother and that the applicant would only have an avuncular role in the child's life [being allowed to see the child but without any share of parental responsibility]". Cronin J disagreed, saying at para 6, 12 and 16:

> "The definition [of 'parent' in s 4(1)] is unhelpful where the child has not been adopted. The lack of a comprehensive definition means that the word 'parent' should be given its ordinary dictionary meaning.

> (…) [The applicant's] argument is that [the case] is … distinguishable from a donor who does not wish to have an involvement in the child's life. (…) The applicant fits [the two parent] presumption in the Act of who is a parent. He is the biological progenitor and one of two people who set about a course of conduct with the intention of fathering a child … a logical conclusion would be that the applicant is the parent of the child."

PROPERTY

- ***De facto relationship***
- ***Evidence inconsistent with prior statements not excluded***
- ***Elias principle not applied***

In *Benedict & Peake* [2013] FCCA 332 (23 May 2013) the existence of a de facto relationship was in issue, the Respondent's case being that any such relationship ended in 2006 and was out of time. The Respondent sought to exclude "substantial portions of the Applicant's evidence [under] the '*Elias* principle'" as being inconsistent with prior statements to Centrelink and the ATO (para 10). Judge Harman at para 43 declined to apply that principle as it was alleged "that each party … had knowledge of the statements and ha[d] each benefited from the statements (at least to the extent of income thus derived)".

CHILDREN

- ***Substituted service by email***
- ***Ex parte orders***
- ***Father's consent to application for children's passports dispensed with***

In *Kozar* [2013] FCCA 339 (20 May 2013) the mother was granted *ex parte* parenting orders, substituted service on the overseas, elusive father by email and an order dispensing with his consent to the mother's application for the issue of passports to the children. Judge Scarlett's considerations are set out at paras 22-28 of the judgment.

PROPERTY

- ***Valuations of foreign real estate 500 per cent apart***

In *Swarb* [2013] FamCA 404 (3 May 2013) valuations adduced by the parties of the husband's interest in a property situated near a popular ski resort in Lebanon (at US$460,000 and US$90,000 on behalf of the wife and husband respectively) were 500 per cent apart. The valuers were cross-examined by telephone through an interpreter. Coleman J said at para 68 that the wife's valuer's research was more extensive but that "in the absence of … comparable sales, that thoroughness does not necessarily translate as correctness, or a greater probability of correctness". It was nevertheless held (paras 76-77) that "the figure asserted by the wife's valuer [was] probably closer to the real value of the husband's interest … [that the] absence of any suggested [comparable] sales … is supportive of the assertion of counsel for the wife that properties [in the area were] 'tightly held' and likely to achieve a substantial price if … it [were] made available for sale."

CHILDREN

- ***Nature of appointment of family consultant***

In *Hardwick* [2013] FCWA 57 (20 May 2013) the parties disagreed over the terms of reference for a family report in relation to their two year old child. Walters J observed (para 3) that the expression "terms of reference" does not appear in the *Family Law Act,* s 69ZN of which contains the principle that child-related proceedings should be "conducted … with as little formality, and legal technicality and form, as possible". Walters J said at paras 36-38:

> " … the issues in dispute … are broader than those suggested by the wife [who] seeks orders that the husband's overnight contact with [D] be supervised … [she also] proposes that overnight contact occur less frequently than … proposed by the husband … The wife's insistence upon overnight contact being supervised raises issues relating to the potentiality of risk to [D] if such contact is unsupervised. It also raises issues about the wife's *bona fides* in requiring the supervision. I see no reason why the instructions to be given to the expert should [instead] not reflect the considerations set out in s 60CC of the [Act] or, at least, those of them that are relevant to the current dispute."

PROCEDURE

- ***Leave for witnesses to give evidence by video link from US***

In *Newberry* [2013] FamCA 421 (28 May 2013) Kent J granted the mother's application for leave for the evidence of three witnesses in US (who deposed to lacking the funds to fly to Australia and, for one who was a police officer, work and family commitments) to be given by video link despite non-compliance with FLR 16.05 (such applications to be made at least 28 days before trial). Noting the mother's undertaking to file "properly sworn affidavits" from those witnesses, Kent J said at paras 4-7:

> "The evidence each of those witnesses seeks to provide … concerns a central allegation … whether or not the father has perpetrated any act of sexual abuse in respect of the mother's adoptive sister, Y … [The] evidence they potentially provide … is crucial. (…) In the end, these are proceedings concerning the best interests of the children … It seems to me that … there is no choice … but to allow the evidence to be given by video … "

CHILDREN

- ***Unsubstantiated allegation of child sexual abuse***

In *Raki & Perez Varela* [2013] FamCA 122 (1 March 2013) the parties agreed that equal shared parental responsibility was appropriate. An allegation by the mother that the father had acted in a sexually inappropriate manner towards their child was unsubstantiated. It was held by Johnston J that unsupervised time with the father would not expose the child to an unacceptable risk of abuse. It was found that the child needed an adequate opportunity to develop a relationship with the father but that overnight time with him should be delayed to enable the mother to settle her concerns and become confident that the child was not being exposed to any risk of improper or damaging behaviour. It was ordered

that the child live with the mother and spend limited unsupervised time with the father in the short term graduating to overnight time and holiday periods.

CHILDREN

- ***Sole parental responsibility preferred to proposed division of responsibilities***

In *Penski & Kocher* [2013] FamCA 255 (17 April 2013) the father sought a division of responsibilities and the wife wanted sole parental responsibility. The parties could not communicate and argued frequently. Cronin J said at paras 71-73:

> "Children have the rights that are set out in s 60B … Those are the responsibilities that parents have for their children. Here, there is little prospect that those responsibilities could be fulfilled together in any joint sense … where one parent had the responsibility for one thing and the other for another … where they were parenting in their own way oblivious to the views of the other, the child must be at risk. If major long term health issues includes psychological assistance, a school welfare counselor might be conflicted if the wife had the health responsibility and the husband the education responsibility. Similarly, if the wife is responsible for the major daily activities of the child, having the husband make long-term decisions in relation to education, could be problematic if he chose a school that was difficult for the wife to attend … [other examples given]

[U]ntil such time as the parents can have a modicum of respect for each other and make decisions in a consultative way, the person who has the major responsibility for the daily activities including giving the child a home base, should be the person who has the responsibilities for making those long term decisions. In this case, that is clearly the wife. The husband also sought a variety of other orders and the underlying theme was flexibility. Mr B [the family report writer] baulked at such a concept of flexibility and so should this Court."

MUSTER ROOM

Thomas Austin, Melissa Bateman, Melanie Blackman, Hugh Bond, Daniel Collins, Anne-Marie Hardwick, Deborah Hewitt, Danielle Hutchison, Simon Lapinski, Thomas Richards, Melissa Schilling,