

Family Law

Case Notes

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Property proceedings – Time limit for Respondent

A wife has won her appeal from the FMC's dismissal of her property claim for being late, the Full Court holding that s 44(2) allowed her, *being a respondent*, to seek property orders out of time (even though the husband's application was for parenting orders): *Hedley* [2009] FamCAFC 179.

Property – Contributions – Retention of farm

In the case of a couple married for 16 years with two teenage children, the husband's contributions to net assets of \$6.4m, being mostly the value of a farm brought into the marriage by him, have been assessed at 70%: *Casper* [2009] FamCA 989 (Fowler J).

The wife's settlement, increased slightly under s 75(2), was payable in part within 30 days to enable her to complete the purchase of another property, the balance being payable in 12 months with interest enabling the husband to raise the settlement and retain the farm.

Spousal maintenance – Cessation of order

The Full Court in *Bucknell* [2009] FamCAFC 177 at para 55 held that a maintenance order that contained no cessation date was not in error, given "that s 83... provides for variation (of the order) if circumstances so change that variation is justified".

Financial agreement – Release of maintenance void

A husband who entered into a financial agreement after the wife

had received a \$980,000 inheritance (there being few other assets) failed in seeking to have the agreement set aside, despite its "extra wording" as to the receipt of independent legal advice which went beyond the scope of s 90G(1)(b)(i): *Adamidis* [2009] FMCAfam 1104 (Laphorn FM).

He did, however, succeed in getting the release of maintenance severed from the agreement which contained no provision for payment or allocation of maintenance as required by s 90E, and was granted leave to amend his \$250,000 property claim so as to be for maintenance instead.

Financial agreement – Duress – Unconscionability

A financial agreement which a husband was found to have bullied his new Russian wife into signing has been set aside for duress and unconscionability: *Moreno* [2009] FMCAfam 1109. Demack FM also held that the agreement was not binding because a copy had been shown to the wife, not "given to her" as required by s 90G(1)(e).

Children – Use of research into shared care – Parental conflict

For the use of research findings as to ongoing parental conflict predicting poor outcomes for a shared care arrangement, and an order for graduated time with the father: *Beadle* [2009] FMCAfam 1147 at paras 25-30 and 103-109 (Altobelli FM).

Maintenance – De facto relationship – Declaration

In a case where the authorities

as to the existence of a de facto relationship were discussed, it was declared that there was such a relationship between the parties and that it did not break down before 1 March 2009 (when Part VIIIAB of the FLA began): *Vine & Carey* [2009] FMCAfam 1017. Slack FM then made an order for interim maintenance of \$500 per week.

Children – Interim relocation – Acquiescence

A mother's interim relocation has been allowed by Neville FM where the father in a letter had agreed to the move: *Moreau & Trejo* [2009] FMCAfam 1184.

Children – Relocation

A mother wanting to move from Tasmania to Victoria with a child she had twice withheld from the father has been required to leave the child with him: *Samuel & Wright* [2009] FMCAfam 1170 (Roberts FM).

Note – The High Court has sent *Rosa's Case* back to the FMC for re-hearing (*MRR & GR* [2009] HCA Trans 316). In this case a mother, who failed in her bid to return to Sydney with a child from Mount Isa where the parties had gone for the father's employment just months before separating, has won her appeal to the High Court.

The Court held that the Full Court of the Family Court (which upheld Coker FM's refusal to allow her to relocate) should have held that it was not open to the federal magistrate to find that it was reasonably practicable for the child to spend equal or substantial and

significant time with each parent.

Reasons for judgment are at the time of writing yet to be published, but it had been argued for the mother that Coker FM had not properly assessed practicability in respect of the scenario proposed by the mother that she and the child live a great distance away from the father, having erroneously discounted that scenario (and not explored the prospect of the father moving so as to be closer to the child) after the mother reluctantly had indicated that she would remain in Mount Isa if she had to in order to be with her child.

Children – Parenting order

For the wording of an order for an angry husband to attend a men's behaviour change program; for a wife lacking a child-first focus to receive parenting guidance from a child psychologist; and for the parties to complete a "parent after separation" course, see *Flores* [2009] FMCAfam 1164 (Bender FM).

Property – Finality of orders – Impact of section 81

A wife has been allowed to take over from the husband the home mortgage repayments and have the property in her name, his proposal being that he continue the payments for another nine years: *Eades* [2009] FMCAfam 1165, Bender FM accepting evidence from the wife and her psychiatrist that continued financial entanglement would have "an ongoing negative impact on her mental health" which, under s 81, should be avoided.

Property – Payments to mistress – Loss under car leases

Payments totalling \$30,000 to a mistress have been brought to account as an add-back to the asset pool, and the pay-out shortfall under three car leases treated as a liability for the figure arrived at upon the husband being required to "maximise what he is able to secure for the vehicles...by private sale", not by the (easier) means of a trade-in: *Juarez (No. 2)* [2009] FMCAfam 1188 at paras 58-61 and 71-73.

Purdon-Sully FM at paras 84-86 made no adjustment favouring the wife for the impact upon her role of the husband's extra-marital relationship of some years, being unable to find that his conduct had made her contributions "significantly more arduous" (Full Court in *Kennon* [1997] FamCA 27).

The parties' many and varied contributions to property and family (including three children) over a 29-year marriage and five years post-separation were assessed as equal, which was adjusted (at paras 107-137) in the wife's favour by 10% of their \$3m asset pool due to significant disparity of income, her ill health and cessation of work on medical advice, the court citing the Full Court in *Clauson* (1995) FLC 92-595 at p 81,911:

"...in most cases the most valuable 'asset' which a party can take out of the marriage is a substantial reliable income-earning capacity."

Children – Drug and alcohol abuse – Sole parental responsibility

A father has been given sole parental responsibility where, owing to the mother's regular abuse of alcohol and nitrazepam, "it would simply be dangerous for the child for the mother to be left in charge of him": *Mashman & Lockwood* [2009] FMCAfam 1171 (Roberts FM) at paras 47, 69-72.

Subpoena – Implied waiver of legal privilege

A mother who deposed to her state of mind (anxiety) about her child's relationship with the father being formed by her discussions with her lawyers was held to have impliedly waived her right of legal privilege, requiring production of her lawyer's file as to all notes and letters relating to the advice given on that issue: *Mark & Messina* [2009] FamCA 1021 (Cronin J).

Binding child support agreement set aside

Such an agreement, made before the child support scheme changed on 1 July 2008, has been set aside due to the "exceptional circumstance" of hardship to the mother and children whose child support would be 30% higher under the administrative formula based on the father's current income: *Daley* [2009] FMCAfam 398 (Brown FM).

Children – Unilateral change of school

A mother who changed the children's school and crèche has been ordered to re-enrol them where they were: *Josey & Meibos* [2009] FMCAfam 470 (O'Sullivan FM).

Children – Alienation causing "damaging family dynamic"

A mother found to have persistently undermined the relationship of four children with their father through false allegations of violence to the point where the children were expressing anxiety about seeing him and two of them had spoken of suicide and self-harm has had her care of them reduced to four nights a fortnight; an order made for therapeutic intervention; and the father's time increased from alternate weekends to 10 nights per fortnight: *Hacker* [2009] FMCAfam 217.

For the wording of orders for therapeutic intervention and future dispute resolution see paras 24-31 of the order.

Property – Contributions – Short marriage – Gambling and other losses

In a case that lasted longer than the (18 month) marriage, the contributions of a wife who began with assets of \$600,000, finishing with \$200,000 (the husband turning his \$300,000 into a loss of the same amount) were assessed at 65% of a \$500,000 asset pool.

O'Sullivan FM held that an asset by asset approach was inappropriate as the parties had not kept their assets "entirely separate": *Kiefer* [2009] FMCAfam 279 at para 51. As to competing claims that losses were made by the wife through gambling and by the husband in his business dealings concluded at para 93 that the parties should share the losses.

The court at para 65 followed the Full Court's rulings in *De Angelis* [1999] FamCA 1609 (FC):

"We agree that gambling is for some people a form of entertainment and that a party can be no more criticised for spending money on it than the other party can be criticised for spending money on sporting or other forms of entertainment. However every case must depend on its own particular circumstances."

And (at para 70) in *Hamilton & Thomas* [2008] FamCAFC 8 (FC):

"In our view, there was nothing so disproportionate in relation to the losses incurred by the parties in the lifestyle that they chose, that would make it inappropriate for there to be an adjustment of the available capital upon the breakdown of the marriage. More is required than simply the existence of gambling losses. There needs, in our view, to be some element of waste that is disproportionate to the positive contributions being made by each of the parties."

O'Sullivan FM, at para 72, found the husband's explanations for his business losses to be unsatisfactory but that both parties had "gambled for enjoyment", there being no evidence that what was spent was not from money the wife had

brought in or disproportionate to it.

Children – Family violence – Sole parental responsibility

Sole parental responsibility has been awarded where a father's aggressive and threatening behaviour during the marriage had caused the mother to fear for her safety, and it was "impossible to contemplate the parties sharing in parental responsibility at this time": *Wood* [2009] FMCAfam 788 at paras 162-3 (Kelly FM).

Interim parenting order – Return of child

Where a child lived with the father under an order, a mother who withheld the child based on an unfounded allegation of harm has been ordered to return the child immediately: *Rose & Barwon* [2009] FamCA 958 (Barry J).

Children – Commonwealth information order – Injunction – Watch List

A recent example of these orders being made where a father disappeared with a child after separation is *Tesluk & Gordon* [2009] FamCA 952 (Austin J).

Children – Independent children's lawyer

In a review of the role of an ICL, Coates FM varied an interim order appointing an ICL and for a father's time with a child to be supervised by adding liberty to the ICL to inform the supervisors (a nanny agency) of the father's potential mental health issues: *Black & Cauldwell* [2009] FMCAfam 1079. ↓