

A Review of the Case Law
2010 – February 2011
An update

By the Honourable Justice Garry Watts

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A. HIGH COURT (J Boland)

- *MRR v GR* (2010) 240 CLR 461
- *Ian Charles Fowell Spry in his Personal Capacity and in his Capacity as Trustee of the ICF Spry Trust v Moylan & Ors* [2010] HCATrans 195 (30 July 2010)
- *SJB v SRB* [2010] HCA Trans 196 (30 July 2010)
- *TH v ERH* [2011] HCA Trans 102 (8 April, 2011; *Harris & Harris* (2010) FLC 93-454
- *Pearce v Gomez and Anor* [2010] HCA Transcript 274 (21 October 2010); *Puddy v Grossvard and Anor* (2010) FLC 93-432

B. DIVORCE (J Boland)

- *Department of Human Services & Brouker* (2010) FLC 93-446
- *Navarro & Jurado* (2010) 44 Fam LR 310
- *Jamine & Jamine* (No 2) (2010) FLC 93-440

C. DISQUALIFICATION (J Boland)

- *Stephens & Stephens (Disqualification)* [2010] FamCAFC 206
- *Batey Elton & Elton* (2010) 43 Fam LR 62
- *Dunwell and Ors & Dunwell* [2011] FamCAFC 2

D. CHILDREN

(i) Child Welfare Cases (J Boland)

- *Director-General of the Department of Human Services & Tran and Anor* (2010) FLC 93-443
- *Secretary of Department of Health & Human Services & Ray and Ors* (2010) FLC 93-457

(ii) Parenting Proceedings – the Canadian Experience (J Boland)

- *Bruni & Bruni*, 2010 ONSC 6568

(iii) Interim Parenting (J Boland)

- *Marvel & Marvel* (2010) 43 Fam LR 348; 240 FLR 367
- *Tryon & Clutterbuck* (2010) FLC 93-453

(iv) Relocation (Watts J)

- *MRR & GR* (2010) 240 CLR 461
- *Collu & Rinaldo* [2010] FamCAFC 53

- *Hepburn & Noble* (2010) FLC 93-438
 - *Cowley & Mendoza* (2010) 43 FamLR 436
 - *Edelman & Ziu (No 2)* [2010] FamCAFC 236
 - *Hopkirk & Hopkirk* [2010] FamCAFC 187
 - *Hannigan & Sorraw* [2010] FamCAFC 257
 - *Deiter & Deiter* [2011] FamCAFC 82
- (v) Parentage Testing (Watts J)
- *Brianna* (2010) FLC 93-437
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- *Farmer & Rogers* [2010] FamCAFC 253
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- *Vance & Vance* (2010) 246 FLR 122
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- (ix) Meaningful relationship v the reality of the situation (Watts J)
- *Dennison & Wang* [2010] FamCAFC 182
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- (x) Rice & Asplund (Watts J)
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E. PROPERTY

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- (iii) Superannuation (Watts J)
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- G. PRACTICE & PROCEDURE (J Boland)
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- H. SPECIAL MEDICAL PROCEDURE (J Boland)
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- *Brennan and Shaw and Anor* [2011] FamCAFC11

K. CHILD SUPPORT (J Boland)

- *Jacks & Parker* (2011) FLC 93-462

RELOCATION

MRR & GR (2010) 240 CLR 461 (High Court)

Professor Boland has already mentioned this case. It is useful however at the commencement of this paper to set out two of the important passages from *MRR & GR*.

33. At paragraph 13, French CJ, Gummow, Hayne, Kiefel and Bell JJ said:

Section 65DAA(1) is expressed in imperative terms. It obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (para (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (para (b)). It is only where both questions are answered in the affirmative that consideration may be given, under para (c), to the making of an order. The words with which para (c) commences (if it is) refer back to the two preceding questions and make plain that the making of an order can only be considered if the findings mentioned are made. **A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist.** If such a finding cannot be made, sub-ss (2)(a) and (b) require that the prospect of the child spending substantial and significant time with each parent then be considered. That sub-section follows the same structure as sub-s (1) and requires the same questions concerning the child's best interests and reasonable practicability to be answered in the context of the child spending substantial and significant time with each parent.

34. Later, at paragraph 15, their Honours explained as follows:

Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. **The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1).** Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible. Since such parenting would only be possible in this case if both parents remained in Mount Isa, Coker FM was obliged to consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable.

Collu & Rinaldo [2010] FamCAFC 53

(May, O’Ryan & Strickland JJ)

This international relocation case was the first relocation case considered by the Full Court after the High Court decision in *MRR v GR*. It involved a child who was aged four years at the date of the hearing of the appeal. It is a lengthy judgment. The Full Court even gave it an index.

The trial Judge determined that the mother’s application to relocate to Dubai should be dismissed. Those orders were set aside by Full Court and the matter was reheard in the Sydney Registry. The result of that second rehearing is the subject of a further appeal.

Background

The brief relevant background facts were that the father was born in 1967 and the mother was born in 1973. The parties commenced a relationship in 2003. The only child of the relationship was born in 2005 and after his birth the mother was his primary carer.

In March 2007, with the agreement of the father, the mother and the child commenced to live in Dubai. The parties’ agreement was that the mother would live in Dubai for a period of 13 months. She had obtained employment there as an environmental engineer.

In March 2008 the mother sought orders she be permitted to remain in Dubai for a period of approximately two years. The trial commenced before the trial Judge in December 2008.

The trial Judge recorded the mother’s proposal was that she live in Dubai with the child until either April 2010 or December 2011 and thereafter that she live in North Queensland. The mother made specific proposals for the child to spend time with the father in Sydney. She also proposed that the child spend time with the father in the United Arab Emirates (UAE) up to six times each year, and each occasion be for periods of up to two weeks.

The trial Judge noted that the mother’s alternate proposal was for the child to live with her in North Queensland and spend three months each year with the father in Sydney.

For his part, the father proposed in the event the mother lived in Dubai or North Queensland then the child live with him in Sydney and spend three periods per year each of three weeks with the mother, either in Dubai or North Queensland until the child started school. Additionally, he proposed the mother could spend four periods each of a maximum of one week’s duration in Sydney with the child. The father proposed that once the child commenced school, the child spend all of each short school holidays and half of each Christmas holidays with the mother. The father also had proposals in the event the mother returned to Sydney.

The trial Judge had the benefit of a Family Report and the Full Court noted Her Honour appeared to have placed considerable weight on certain opinions of the Family Consultant.

In their reasons, the Full Court noted, at paragraph 12, “we observe that Her Honour did not mention that the Father’s proposals did not address the prospect that the child would live in the UAE or north Queensland”.

As I have already noted the trial Judge refused the mother’s application and made orders that the mother return the child to Sydney within 30 days of the date of her orders. Her Honour ordered that the child should live with the father in the event that the mother resided in Dubai or North Queensland and spend periods of time with the mother. Order 6 of the trial Judge’s orders provided that in the event that the mother lived in Sydney then the child should live with her and until he commenced his schooling spend each alternate weekend and additionally in the other week from 6.00 pm Sunday until 9.00 am Monday, as well as some block periods which coincided roughly with the school holidays. The trial Judge provided for an equal shared week about arrangement for the care of the child after the child commenced school.

After the mother filed her application, on 18 June 2008, another judge made interim orders which had the effect of the child living on a month about basis with each of the parties and travelling between Sydney and Dubai each month.

At paragraph 15 of their reasons, the Full Court noted the very unsatisfactory current arrangements for the child. The Full Court noted that after they had heard the appeal, but before delivering their reasons, the High Court had handed down its decision in *MRR v GR* and the parties had been given an opportunity to make further submissions as a result of that decision.

On 4 March 2010 the Full Court advised the parties that the appeal would be upheld and they would subsequently publish their reasons.

When the matter was reopened on the Court’s own motion in February 2010 the mother filed an updating affidavit in which she deposed she had become redundant from her position in Dubai and had been offered a position in Qatar. Notwithstanding this fact the mother said she if the Full Court allowed the child to remain in Dubai she would in fact remain there and abandon the position in Qatar.

In dealing with the background the Full Court noted that the mother’s move to Dubai was financially driven. The mother’s professional occupation was as an environmental engineer. There was evidence before the trial Judge of the mother having difficulty obtaining employment in her area of expertise in Sydney.

The Full Court also referred to the fact that in her evidence the mother had asserted the father had reneged on an agreement to assist her with mortgage payments for the first six months after the child’s birth. The father conceded in cross-examination that he had agreed he would help out with mortgage payments for six months.

The father held an Italian passport and was a permanent resident of Australia although not an Australian citizen. He was engaged in work for a large international family business which had a factory in China. He agreed he had undertaken extensive travel in Australian and internationally. In cross-

examination the father conceded he spent perhaps 4-5 months per annum in China.

The Full Court was critical of the trial Judge for making findings that an order should be made for equal shared parental responsibility *prior to* considering the relevant statutory considerations and, in particular, s 60CC of the Act.

At paragraph 140 of their reasons, the Full Court said:

In authorities we will later identify there is discussion about an appropriate approach to consideration of the relevant statutory provisions in relocation parenting cases. We do not intend to consider at any length those authorities, or an appropriate approach, as such matters were not the subject of any detailed submissions before us. However, we are of the view that, ordinarily, a consideration of the relevant matters in s 60CC of the Act would be undertaken before a concluded view could be formed that the presumption of equal shared parental responsibility applied. That does not mean that such a finding could not be made at an early stage of reasons for judgment provided it was clear that it was made having regard to findings made in relation to the s 60CC considerations.

At paragraph 156 of their reasons, whilst the Full Court noted that it could be argued that the trial Judge did consider s 65DAA of the Act, their Honours went on to say:

However, without any analysis of the proposals in the context of the provisions of s 65DAA the trial Judge said at [58]: “Both of [the Mother]’s proposals, being that [the child] live with her in either Dubai or north Queensland, mean that equal or substantial and significant time with each parent is a practical impossibility”. In other words, at this point in her reasons, her Honour, without having analysed the Mother’s proposals in light of the requirements of s 65DAA, and in particular s 65DAA(5), determined the second of the two important issues that “must” be considered pursuant to that section, namely, whether equal or substantial and significant time is reasonably practicable.

The Full Court also found, at paragraph 166, that the trial Judge had failed to carry out any analysis of the father’s proposals in the context of the provisions of s 65DAA.

In their consideration of the trial Judge’s treatment of the first primary consideration (s 60CC(2)(a)) their Honours noted there was no obligation under the Act to make a finding as to attachment but noted in the facts of this particular case that attachment was an important matter to have been considered by the trial Judge and she had failed to do so.

The principles to be applied in a parenting case are dealt with by the Full Court commencing at paragraph 332 of their reasons. At paragraphs 334 and 335 the Full Court dealt with the order in which the statutory provisions in Part VII are best considered. They said:

Section 60CA of the Act provides that in deciding whether to make a particular parenting order in relation to a child the court must regard the

best interests of the child as the paramount consideration. “Parenting order” is defined in s 64B. Section 60CC then sets out how to determine what is in a child’s best interests. Section 60CC(1) provides that in determining what is in the child’s best interests the court must consider the matters set out in s 60CC(2) being the primary considerations and the matters set out in s 60CC(3) being the additional considerations. In other words, the matters in s 60CC could be described as the “best interests” considerations and they must be considered.

There is a possible overlapping of a number of the considerations in s 60CC of the Act. For example, the first primary consideration in s 60CC(2)(a) of the Act, which deals with a child having a meaningful relationship with both of his parents may overlap with the additional consideration in s 60CC(3)(b) which requires consideration of the nature of the relationship of a child with each parent and other persons. So also any finding as to the nature of the relationship of a child with a parent would be relevant to consideration of s 60CC(3)(d) which requires consideration of the likely effect of any changes in the circumstances of a child including the likely effect of separation from a parent. It is for this reason that there is some attraction in the idea that perhaps the additional considerations in s 60CC(3) should be looked at before consideration of the primary considerations in s 60CC(2): *Mazorski v Albright* (2007) 37 Fam LR 518 per Brown J.

In summary, the Full Court suggested the additional considerations should be addressed prior to any findings in respect of the primary considerations. After setting out s 65DAA at paragraphs 339 and 340, the Full Court said:

In considering s 65DAA of the Act there are two important matters a court must deal with first, namely:

1. whether the child spending equal or substantial and significant time with each parent is in the child’s best interests; and
2. whether the child spending equal or substantial and significant time with each parent is reasonably practicable.

The best interests considerations in s 60CC of the Act are therefore of importance when considering the equal or substantial and significant time requirements of s 65DAA of the Act. Also s 65DAA(5) sets out matters that the court must have regard to in determining whether it is reasonably practicable for a child to spend either equal or substantial and significant time with each parent.

Having referred to the significant paragraphs of the High Court’s judgment in *MRR v GR* the Full Court then discussed statutory provisions in cases prior to the 2006 amendments. Having referred to cases such as *Smith & Smith* (1994) FLC 92-488, at paragraph 345, the Full Court said:

We also observe that one commentator said that “since the 2006 amendments it is of particular importance that judges carefully follow the now much more complex guidelines set out in Pt VII, particularly s 60CC”: See Butterworths, *Australian Family Law*, vol 1 (at s 60CC.20).

However, what is important is that it remains necessary that the court should “consider, weigh and assess the evidence” on each of the relevant matters, and then “indicate” the relative weight the court attaches to each of those matters, and “how all of those matters balance out”: see *Smith and Smith*.

At paragraph 374 of their reasons, the Full Court set out their conclusions as to how, following the 2006 amendments and the decision in *MRR v GR*, a trial Judge should proceed. Their Honours said:

As to the best interests requirement of s 65DAA of the Act, in our view, it is not necessary for a court to repeat all of the findings made in relation to the primary and additional considerations in s 60CC of the Act. However, at some point the best interests considerations must be considered in the context of or by reference to the requirements of 65DAA(1)(a) and 2(c) of the Act. In *McCall v Clark* the Full Court (Bryant CJ, Faulks DCJ and Boland J) said at 498:

In our view, it is inevitable, given the provisions of the legislation, that the exercise to be undertaken will, on its face, involve dual consideration of some matters. For example, consideration of matters under s 60CC(3)(d) (the likely effect of any change in the child’s circumstances) and matters in s 65DAA(5)(a) and (b) and s 60CC(3)(e) (practical difficulty and expense of a child spending time with a parent) and s 65DAA(5)(a), (b) and (c) involve examination of similar criteria.

In this case, in our view, the trial Judge did not consider the requirements of 65DAA(1)(a) and 2(c).

At paragraph 375, their Honours said:

Then the trial Judge was required to consider 65DAA(1)(b) and (2)(d) of the Act. Section 65DAA(5) sets out matters that the Court must have regard to in determining whether it is reasonably practicable for the child to spend either equal or substantial and significant time with the parents. As Bryant CJ and Warnick J said in *Sampson and Hartnett* at 82,013: “The court must meet these obligations irrespective of the proposals of the parties”. Kay J said at 82,031: “The legislative requirement under section 65DAA(5) is mandatory”. The requirement to consider the matters in s 65DAA(5) is put beyond doubt by the High Court in *MRR v GR*.

Their Honours went on to explain, at paragraph 376, just what the trial Judge was obliged to do.

In their further discussion of s 65DAA, the Full Court referred to the comments of Kay J in *Sampson & Harnett* about practical matters which arose on making an order in that case to move the children to Sydney, noting the large area occupied by the Sydney Metropolitan boundaries and lack of certainty as to where the father would be living.

Having determined they were unable to re-exercise the discretion the Full Court remitted the matter for redetermination by another trial Judge (which turned out to be me).

Hepburn & Noble (2010) FLC 93-438; [2010] FamCAFC 111

(Coleman, Strickland & Crisford JJ)

In this case the Full Court was dealing with an appeal from orders made by Federal Magistrate Brewster in a relocation case. The children involved were aged 10 and 7 years. The Federal Magistrate's orders permitted the mother to relocate from the Wollongong area to Victoria. After their relocation the children were to spend time with the father for half of each school holiday period and on one specified weekend in each school term. The orders contained provisions for the father to spend time with the children on giving notice to the mother.

Background

In the background facts the Full Court recorded that following separation the mother unilaterally relocated to Melbourne with the children and after orders were made in the Federal Magistrates Court the mother was required to return the children to the Wollongong area. The mother had formed a relationship with a gentleman who lived in Victoria. He had two children from a previous relationship with whom he spent time each alternate weekend. The father had also commenced a new relationship and his new partner had two children from a previous marriage who lived with her on alternate weeks.

The case raised two important issues. The first was the ground directed to the Federal Magistrate's finding that the wife would be "extremely unhappy, bitter and resentful" if the relocation were not permitted. The appellant father relied on the dissenting judgment of Faulks DCJ in *Taylor & Barker* and the decision of the Full Court in *McCall & Clark*. He submitted the finding was not open on the evidence.

At paragraph 63 of their reasons, the Full Court rejected the submissions made and said:

... It is perhaps a truism, but each case is different, and in relation to this issue, each case turns on its own facts. Here, we consider that the evidence that we have been referred to is sufficient to support the findings of the Federal Magistrate as to the impact of the mother's unhappiness on the children. There was clear unchallenged evidence on this topic. However, on a comparative basis, it is only just sufficient and should be viewed as being at the bottom end of the scale.

The Full Court found that the findings of the Federal Magistrate were consistent with the evidence of the mother, about which she was not cross-examined.

The second challenge related to the Federal Magistrate's reliance on *A v A: Relocation Approach* (2000) FLC 93-035. At paragraph 100 of its reasons, the Full Court said:

With respect to the guidelines in *A v A: Relocation Approach* (supra), the appropriateness of these guidelines in light of the amendments to the Act introduced in 2006 was not the subject of substantial argument before us, although at first blush this issue is raised by this ground of appeal. For our part we are concerned that this decision is still being referred to given that since then the Act has been substantially amended via the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), and there have been a number of significant decisions of the Full Court addressing the issue of relocation since those amendments commenced on 1 July 2006. We refer to decisions such as *Taylor and Barker* (supra), *Sealey & Archer* [2008] FamCAFC 142, *Starr & Duggan* [2009] FamCAFC 115, and *McCall & Clark* (supra). Of course, the Federal Magistrate here had regard to and followed the legislative path now contained in the *Family Law Act* as amended, but it seems to us that rather than refer to and rely on a decision of the Full Court from prior to the amendments it would have been more relevant for the Federal Magistrate to have had regard to the guidelines and principles emanating from the subsequent Full Court decisions.

***Cowley & Mendoza* (2010) 43 FamLR 436; [2010] FamCA 597**

(*Murphy J*)

His Honour was considering whether or not a mother could return with the children to live in Brazil, which was her country of origin.

I have included this case because of His Honour's discussion about the earlier Full Court authorities which comment upon the preferred legislative pathway and how those authorities might be affected by the High Court's decision in *MRR & GR*.

After referring to paragraphs 29 and 30 of *MRR & GR*, His Honour provides the following analysis at paragraphs 33 to 43:

33. Findings about best interests might be seen to have a predominant relationship with the child; findings about reasonable practicability might be seen to have a predominant relationship with the parents. Writing in the *Australian Law Journal* after the decision in *MRR*, Dr Dickey QC has said:

In the majority of cases concerning a child's future there must be a balancing of the interests of the child with the interests of each of the parents. The interests of the child do not override the interests of the parents; they have to co-exist with them. The function of the court is to balance these interests in a way that best promotes the welfare of the child whilst giving appropriate recognition to the claims and interests of the parents.

(Reflections on *MRR v GR* (2010) 84 ALJ 296)

34. The court is bound to consider carefully the proposals of the parties but, in ultimately making parenting orders, is not bound by the parties' proposals; an obligation exists to formulate (subject to procedural fairness considerations) orders considered to best meet the best interests of the subject children. (See *AMS v AIF* (1999) 199 CLR 160; *U v U* (2002) 211 238). Section 65DAA, as it seems to me, legislatively endorses that approach. The obligation created by the section is an obligation to consider the matters there enumerated - independent of the proposals of the parties – in circumstances where an order provides, or is to provide, for the parties to have equal shared parental responsibility.

The Nature of the Inquiry?

63. The Full Court said in *Starr and Duggan* [2009] FamCAFC 115:

36. The Full Court [in *McCall & Clark* [2009] FLC 93-405] ... pointed out that in seeking to address the relevant provisions of the legislation it is inevitable there will be “dual consideration” of some matters. This is so because consideration of the s60CC factors does not take place in a vacuum and those factors will need to be assessed in the context of the competing proposals. Some of the matters to be considered under s 60CC(3), for example the likely effect of any change in the child's circumstances and the practical difficulty and expense of a child spending time with a parent, must also be considered when applying s 65DAA, especially s 65DAA(5).

64. In the same case, the approach of earlier Full Courts to the manner in which the parenting enquiry should take place was endorsed:

38. ... it is important to emphasise (as was made clear in *Taylor & Barker* and *Sealey & Archer* [2008] FamCAFC 142) that the legislation does not mandate consideration of the relevant sections in any particular order, although a logical approach is to:

- First make findings concerning the relevant s 60CC(3) factors;
- Then consider (based on the s 60CC findings) whether equal time or substantial and significant time is in the child's best interests; and
- Then consider whether such arrangements are reasonably practicable by addressing the matters referred to in s 65DAA(5) – which may be done by referring back to the earlier s 60CC findings.

65. It seems to me that the subsequent decision of the High Court in *MRR* gives cause to respectfully review at least some of those statements.
66. While it is plain that the legislation does not, itself, mandate any particular order for the consideration of the prescribed matters, if, as the High Court has determined, s 65DAA contains the *power* to make parenting orders in the circumstances specified within it, and its provisions contain, as the High Court has said, "... a power which is conditioned much as it is where a jurisdictional fact must be proved to exist...", it seems to me necessary to first make findings necessary to decide whether the power is invoked: namely, findings about whether an order "is to provide that a child's parents are to have equal shared parental responsibility for the child".
67. That question, in turn, depends upon whether the statutory presumption (s 61DA) applies or, does not apply (s 61DA(2)) or, is rebutted (s 61DA(4)) or, whether one or more parties, independent of the application of the presumption, seek such an order.
68. Taken together, then, the decision in *MRR* and the provisions of the Act (as interpreted by the High Court) require the court, as a first step, to make findings so as to determine the question of whether the presumption applies or, independent of that, whether the court should make an order to that effect (either because one or other of the parties seek it, or because, subject to natural justice considerations, the court considers such an order is in the best interests of the children the subject of the proceedings). That decision involves findings about either "family violence" or "abuse", as each is defined, or "best interests". (See s 61DA.)

Summary of Principles

69. The decision in *MRR*, in combination with the legislative requirements (and bearing in mind the Full Court's decision in *Goode v Goode* (2006) FLC 93-286), would, then, appear to me to require a court contemplating the making of parenting orders to:
 - First apply a presumption that it is in the best interests of the subject children for their parents to have equal shared parental responsibility in respect of them;
 - Next, make findings as to whether any "family violence" or "abuse", as each is defined, exists;
 - Further or alternatively, then make findings, by reference to s 60CC(3) *{sic}* about such matters pertaining to best interests relevant to the issue of whether parental responsibility should be shared equally;
 - Determine, accordingly, whether the presumption of equal shared parental responsibility is, as a result of findings about

each (or, perhaps, both) of the above matters, respectively, inapplicable or rebutted or, presumption or not, whether such an order should be made;

- If the presumption is inapplicable or rebutted, and such an order should not otherwise be made, make findings about best interests relevant to a determination of what ultimate orders are in the best interests of these particular children in their particular circumstances (s 65D; s 60CA; s 65AA). (As the Full Court put it in *Goode*, the enquiry about best interests is “at large”);
 - If the presumption is not inapplicable or rebutted, or if it be determined that an order for equal shared parental responsibility should in any event be made, the court must (s 65DAA) then proceed to:
 - Make findings as to whether the subject children’s best interests are best met by an order for equal time; *and*
 - Make findings as to the matters prescribed in s 65DAA(5), *and*, as a result;
 - Make findings about whether an equal time order is reasonably practicable (that is, in the words of the High Court, make “a practical assessment of whether equal time parenting is feasible”); *and*
 - If it is not, conduct the same process, but this time with findings directed to a consideration of whether a “substantial and significant time” order (as defined – see s 65DAA(3)) should be made;
 - If neither an equal time order, nor a substantial and significant time order, should be made, proceed to determine the orders which the earlier findings point to being in the subject children’s best interests. (s 65D; s 60CA; s 65AA).
70. It might be thought that, as a matter of logic, if neither party seeks an order for either equal time or substantial and significant time, a consideration of the power to make such an order may become moot. But, that is clearly not so.
71. First, the court must (subject to procedural fairness) formulate proposals, independent of the parties, consistent with findings about the children’s best interests. (See, eg. *U v U*, above). Secondly, while, in accordance with the High Court’s judgment in *MRR*, s 65DAA contains the power to make those orders, the section also plainly casts an express obligation upon the court to consider the exercise of the power to make each such order in the prescribed manner when the precondition to its application is met (*viz.* an order is to provide for equal shared parental responsibility). That

statutory obligation exists despite the fact that, in any given case, neither party seeks an order of either type.

The Full Court has before it at the current time a number of appeals which assert that the trial Judge has not properly followed the preferred legislative pathway. It may be that a Full Court in the future will have something further to say about whether or not the Full Court's suggestion as exemplified in paragraph 38 of *Starr & Duggan* survives the decision in *MRR v GR*.

Edelman & Ziu (No. 2) [2010] FamCAFC 236

(Boland, O’Ryan & Le Poer Trench JJ)

In this matter, the father appealed against parenting orders made by Federal Magistrate Slack, for the parties' only child, aged 6, to spend two weekends out of three with the father and live with the mother at all other times. There were five grounds of appeal which the Full Court grouped into 3 overall groups – that the Federal Magistrate erred in failing to follow the legislative pathway and in doing so, failed to provide adequate reasons; in failing to make adverse credit findings against the mother; and in giving improper weight to his findings.

Background

The parties were married for approximately 5 years and had one child. Each party had another child from a previous relationship. The mother's child from a previous relationship had lived with the parties during their marriage but this had been the source of some conflict between the parties.

In her application before the Federal Magistrate, the mother sought for the child to live with her in B and spend time with the father where he lived in L, approximately 2 hours away.

In his response, the father sought that the child remain living in L, and if the mother also lived in L then the parties have equal shared care, and otherwise the child live with him in L and spend time with the mother in B.

The first grounds of appeal related to whether the Federal Magistrate had failed to follow the legislative pathway under s 65DAA. The pathway that the Federal Magistrate adopted was to set out his conclusions in relation to the primary considerations (s 60CC(2)). He found it important that the child had a meaningful relationship with both parents and that there was no need to protect the child from being exposed to the risk of family violence, abuse or neglect.

He next considered and weighed each of the relevant additional considerations (s 60CC(3)).

He then turned to consider s 61DA (the presumption of equal shared parental responsibility). He found that the presumption applied (there was no abuse or family violence) and that the presumption was not rebutted on best interests considerations. The Federal Magistrate indicated that he proposed to make an order for equal shared parental responsibility. The Federal Magistrate

noted that accordingly he was required by s 65DAA to consider whether to make orders that the child spend equal time, or substantial and significant time with each parent. He commenced by looking at equal time and whether or not that was in the best interests of the child and whether or not it was reasonably practicable. He noted that if he concluded that the child should not have equal time with his parents, he would consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child and whether it is reasonably practicable.

In relation to an equal time arrangement, the Federal Magistrate was not satisfied that the mother would be prepared to live in L and consequently concluded that it was not “practicably possible for a week about arrangement to continue”. The Federal Magistrate found that it was in the child’s best interests to live predominately with the mother. The Federal Magistrate therefore rejected an equal shared parenting time order. The Full Court found that the Federal Magistrate had adequately explained why he had reached the conclusion that it was in the child’s best interest to live predominately with the mother. The Full Court found that the Federal Magistrate had carefully weighed and balanced each of the relevant s 60CC(2) and (3) considerations.

The Full Court was satisfied that the Federal Magistrate (in the words of the High Court) had looked at the reality of the situation and concluded that it was in the child’s best interests to be with the mother and not reasonably practicable for the mother to live in L.

The travelling distance between the two households was approximately two hours duration. The Federal Magistrate concluded it was not reasonably practicable to make an order for midweek time (the child was 6 years of age at the date of the trial). Consequently, the Federal Magistrate found that it wasn’t reasonably practicable for the child to spend days that did not fall on weekends or holidays with his father (and consequently the definition of substantial and significant time (s 65DAA(3)) would not be satisfied). Instead, the Federal Magistrate ordered that the child spend two weekends out of three with the father.

The Full Court concluded:

40. The Federal Magistrate’s discussion on whether substantial and significant time was in the child’s best interests and was reasonably practicable can be found in paragraph 98 of His Honour’s reasons. It is clear that as the travelling distance between the two households was of approximately two hours duration, it was not reasonably practicable to make an order for midweek time and the Federal Magistrate found, given the child’s relatively young age, he should spend two weekends out of three with the father.
41. We take this opportunity to note that the Federal Magistrate’s reasons were delivered prior to the High Court decision in *MRR & GR*. Having had the benefit of the High Court’s explanation of the requirements of s 65DAA it may be noted that the structure of his Honour’s reasons in respect of this section could, in hindsight, have been set out with greater clarity if drafted with the benefit of the High Court’s reasons for judgment.

Ground 3 was that the Federal Magistrate had failed to make credit findings. The Independent Children's Lawyer submitted that not every issue asserted by a party as relevant is deserving of a mention or finding, and the Federal Magistrate was not in error in not taking into account what the father perceived as issues in relation to the mother's credit. The Full Court accepted this submission.

Grounds 4 & 5: The Full Court found that the Federal Magistrate gave such weight as was within his discretion to the factors of child's relationship with his half-sibling and need for the child's connection with his cultural heritage to be promoted.

Conclusion: The Full Court found that each ground of complaint was essentially directed towards weight, saying:

75. We note each of the complaints in this ground are essentially directed towards the weight given to various matters by the Federal Magistrate. It is relevant that we observe that this was a discretionary judgment. The limits on appellate interference with such a judgment are well known.
76. We are satisfied that the weight afforded by the Federal Magistrate to the sibling relationship, the child's Chinese heritage and the father's parenting capacity were all matters well open to the Federal Magistrate. No appealable error is established.

Appeal dismissed and the father ordered to pay the costs of the mother and the Independent Children's Lawyer.

Hopkirk & Hopkirk [2010] FamCAFC 187

(O'Ryan J)

This is a case about whether or not a child (born in 2006) should have the opportunity to accompany her mother to the United Kingdom in each alternate year for three consecutive weeks. A Federal Magistrate had refused the mother's application.

The Full Court analysed why it was the Federal Magistrate had not given any or any adequate reasons for refusing to allow the child to travel outside Australia in circumstances where an order allowing travel was supported by the evidence.

On the re-exercise of discretion, His Honour said:

155. I have no doubt that during the short period the child is in the United Kingdom with her mother that the child will be adequately cared for by the Mother. The Father did not put in issue the finding of the Federal Magistrate at [114] that the Mother is "well able to provide for [the child]'s needs". The Father also did not put in issue the finding of the Federal Magistrate at [117] that the Mother has "demonstrated an admirable attitude to the responsibilities of parenthood". There were other relevant findings made by her

Honour such as the finding at [132] that the parents agreed that the child “should live with her mother, at least for now”.

156. I am also of the view that a period of approximately three weeks during which the child will not see the Father will not have an effect on the relationship of the child and the Father.
157. The Mother will be required to provide the Father with 45 days written notice, setting out dates of travel, all flight arrangements, the general itinerary of where the child will be staying and the contact details for all accommodation. Thus all relevant arrangements will be known to the Father.
158. I am also not persuaded that there is a risk that the Mother will not return the child to Australia at the conclusion of the period the child was in the United Kingdom. I observe that the United Kingdom is a signatory to the Convention on the Civil Aspects of International Child Abduction.

Hannigan & Sorraw [2010] FamFC 257

(May, Ainslie-Wallace and Watts JJ)

The father has sought special leave to appeal to the High Court in this case.

The child born in 2005 was permitted by the trial Judge to relocate with her mother to New York State, United States.

There was a challenge to the credit and demeanour findings made by the trial Judge. The Full Court found that it was open to the trial Judge to make findings about the father’s credit as he did and that it was open consequentially to the trial Judge to view the father’s other evidence with some hesitation before accepting it. The Full Court found that the trial Judge’s findings about the mother’s credibility and his use of those findings was open to him on the evidence.

The father complained on appeal that the trial Judge had failed to take proper account of the fact that the parties’ daughter had “shared residence” with each of the parties in practically equal proportions, “which arrangements worked satisfactorily” prior to the trial Judge’s decision. The trial Judge had accepted evidence which pointed to the fact that the arrangements had not worked satisfactorily. The Full Court concluded that the trial Judge had assessed and weighed the relevant evidence before coming to the decision that he did and that the arrangements for shared care were but one part of the evidence. The Full Court found that no error was demonstrated on that ground.

Both family consultants had recommended against international relocation for the child. It was asserted that His Honour had given insufficient reasons for not accepting that evidence (and other evidence called in the father’s case). The Full Court accepted the effective conclusion that the utility of the report of the first family consultant was limited by the context in which it was provided. In relation to the second Family Report, the Full Court referred to the extensive evidence before His Honour and noted that the Family Report

formed part of the material upon which the judge came to his ultimate decision. The Full Court referred to *Makita* where Haydon JA (as he then was) said, referring to *Ramsay v Watson* (1961) 108 CLR 642 at 67, that a court should not simply transfer its task to an expert witness but rather must make a determination about a fact, on a balance of probabilities, on the whole of the evidence.

At paragraph 136 of the judgment, the Full Court referred to another 2010 Full Court case in the following terms:

136. In *Friscioni & Friscioni* [2010] FamCFC 108, the Full Court considered the nature of a Family Consultant's report. In the course of their discussion, the Court cited with approval that which was said in *Hall and Hall* (1979) FLC 90-713 at 78,819 noting that while decided in 1979, it is still to the point:

...In view of the comments in this case as to the weight to be given to a Family Report, we feel it may be helpful to make certain observations which we stress are of a general nature.

(a) There is no magic in a Family Report. A Judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court or that the Judge is abdicating his responsibilities. In *Wood* (1976) FLC 90-098 at p. 75,447; *Harris and Harris* (1977) FLC 90-276; (1977) 29 F.L.R. 285.

(b) Family Reports are meant to be, and almost invariably are, valuable and relevant material to assist a Judge in forming his ultimate conclusions. When those views coincide with the judgment of the court, it is not because they have been accepted automatically but because the Judge has found them consistent with the rest of the body of evidence before him.

(c) While the counsellor's views will normally have weight with the court because of his expertise and experience, the counsellor does not usually have the same opportunity as the trial Judge to weigh the evidence, observe the demeanour of the witnesses in court under examination and cross-examination, and make findings of fact based on evidence before the court which might not have been available to the counsellor.

(d) Hence, the counsellor's assessment of the parties may often be based upon facts which the counsellor has accepted but which turn out to be wrong; or favourable or unfavourable views formed by the counsellor from interviewing the parties without the opportunity to test in depth the credit of persons who may in court, and under cross-examination, or in the face of evidence of other witnesses, prove to be of a different character from that which the counsellor has accepted.

In this case the Full Court was of the view that the trial Judge had properly explained why it was he did not accept the ultimate opinion of the second

family consultant. The Full Court found that it was implicit in both the general nature of what the family consultant had been asked to do and explicit in her report that she had not been able to determine disputed issues of fact between the parties.

Deiter & Deiter [2011] FamCAFC 82

(Finn, Thackray and Strickland JJ)

Facts

This was a case in which an Acting Magistrate of the Magistrates Court of western Australia made an interim order that the mother return to Sydney with the children, until the final hearing could be heard.

Following a violent altercation and her immediate separation from the father, the mother moved to Perth with the children, to gain the support of the maternal extended family. The mother immediately attended upon the police, who issued a temporary AVO, and the father was charged with assault. Neither the AVO nor the assault charge had proceeded to hearing. The father then bombarded the mother with numerous text messages, which Kaeser AM described as “innocuous to strange, loving, pleading and threatening”.

Findings

Regard to likely duration of interim arrangement:

While it was not a specific ground of appeal, the Full Court dealt first with the fact that the Acting Magistrate made an interim order without regard to its likely duration between the time of the interim hearing and the time of the final hearing. The Full Court considered that having determined it was not in the children’s best interests to have such little time with the father, the next step should have been to consider how long the unideal arrangement could last. This is especially the case considering:

1. There were strong reasons why the mother and children should remain in Perth, including the mother’s state of mind and the children having settled.
2. Section 60K requires consideration of orders to ensure that allegations of family violence are dealt with as “expeditiously as possible”.
3. Rule 11.18 provides a list of factors the Court may take into account in dealing with an application for a transfer of proceedings, including whether an earlier hearing can be provided

The Judges noted “it is unsatisfactory for a judicial officer to recognise the difficulty in determining the accuracy of disputed allegations of violence, without also giving consideration to dealing with those allegations as a discrete issue or expediting the final hearing.”

Exposure of children to family violence:

The Acting Magistrate decided to make no findings in relation to violence, in circumstances where the father contested the mother's allegations, and a full investigation could not be carried out until a later stage. While acknowledging the Acting Magistrate could not make a determinative finding about family violence, it was held that he erred in giving insufficient weight to the mother's allegations. The Full Court noted "in our view, the assessment of risk in cases involving the welfare of children cannot be postponed until the last piece of evidence is given and tested, and the last submission is made." The Acting Magistrate should have made an interim assessment the likelihood of violence and the severity of its likely impact. In particular, the Acting Magistrate failed to:

1. consider any affidavits of the mother's witnesses, even though inconsistencies were untested, but who's allegations were consistent with the father's post separation conduct;
2. acknowledge that the mother was too afraid to return to the home and stayed in a 'secured apartment' before leaving for Perth;
3. acknowledge that the mother met with the father at a third party's house to tell him her intentions;
4. pay proper attention to the alleged threats to kill the mother; and
5. pay proper regard to the existence of the police report, criminal charge and the AVO.

The Full Court was particularly concerned with the doubt cast by the Acting Magistrate about the alleged harassing phone exchanges which he said were not reported to police though being in breach of the AVO, and discounted as being the result of the father's 'devastation'. This is in the context where the Acting Magistrate had previously noted the texts were 'threatening', they were consistent with untested evidence, and the police *had* been informed.

It was also held that the Acting Magistrate erred in considering the mother's altered orders to allow the children unsupervised time, as evidence that she had no fear of violence. Earlier the Acting Magistrate had considered that the alterations represented a preparedness "to encourage an ongoing relationship with the Father". The Acting Magistrate however went on to say, because the mother would allow unsupervised time, that she "clearly no longer considers the children need to be protected from exposure to family violence".

In conclusion, the Full Court noted that "given the uncontested evidence, unless and until the mother's evidence had been tested and discounted, it would not have been appropriate to consider any arrangement for the children which would involve the mother coming into contact with the father. On the contrary, it was most important that any interim orders be crafted to preserve the mother's safety"

The possibility of the father moving to Perth:

It was held that the Acting Magistrate erred in failing to consider whether the father could move to Perth, instead determining only that he was unlikely to, and that he could not be forced to.

It was considered by the Full Court within reason to consider the father able to relocate considering he had no job, no financial or contractual commitments, a source of income not reliant on location, and the father had expressed the possibility of relocating to Perth previously. It was noted the father's relocation was no more difficult than the mother's and the mother had the added complication of fearing for her safety upon relocation.

Priority given to the children having a meaningful relationship with the father:

Unlike his approach to violence, the Acting Magistrate felt free to make an interim determination on the children's relationship with the father despite the mother's evidence to the contrary of the father's claims. In particular, the following determinations by the Acting Magistrate flew directly in the face of the mother's evidence:

1. That the father could provide for the children's needs;
2. That the father had an appropriate approach to parenting; and
3. That the father would facilitate the relationship between the children and the mother.

The mother's ground of appeal that the children's relationship with the father was afforded inappropriate priority was found to have merit.

Failure to make a genuine attempt to resolve the dispute:

The Acting Magistrate referred to this aspect which arose in the list supplied by Boland J in *Morgan and Miles* (2007) FLC 93-343 for consideration in relocation cases. The Full Court noted that the list was intended as guidance for parties and practitioners involved in relocation disputes, not to be applied in preference to the legislation. They noted this point on the list was subject to clearly stated exceptions to that requirement which Boland J referred to by using the words "unless an exclusionary circumstance applies". The Acting Magistrate did not address the nuance contained in the statute in s 60I (9) FLA.

PARENTAGE TESTING

***Brianna & Brianna* (2010) FLC 93-437; [2010] FamCAFC 97**

(Bryant CJ, Finn & Thrackray JJ)

This significant decision of the Full Court deals with parentage testing. The facts in the case are interesting.

The father agreed that he could be recorded on the child's birth certificate in the United States as the child's biological father. The father also executed an affidavit in the United States in which he acknowledged that he was the father of the child and waived his right to parentage testing in a court.

At trial the father asserted he was not the biological father of the child. He said the parties had met over the internet in late 2000 when he was residing in

Western Australia and the mother was living with the child in the United States of America. At that time, the child was about 18 months of age.

It was noted by Bryant CJ that the father asserted he agreed to be recorded as the child's biological father on the birth certificate in order to meet certain United States immigration requirements and to enable a US passport to issue for the child. The mother, in opposing the application for parentage testing, contended the father was legally bound by the affidavit he had sworn and the application should be dismissed.

In June 2008 the trial Judge, Crooks J, made an order pursuant to s 69W of the Act for parentage testing to determine whether the child was in fact the biological child of the father.

His Honour had however made this decision without reference to whether or not the decision was in the child's best interests.

The mother in this case referred to the threat to the child of loss of identity if the parentage tests were carried out, to the child's unwillingness to participate in any tests and to the severe emotional and psychological damage that the child has suffered because of the proceedings.

Given that His Honour had failed to take the child's best interests into account in his reasons, the issue arose as to whether or not, in proceedings for parentage testing, a child's best interests is the paramount consideration.

In her separate reasons, Bryant CJ noted the difference in the jurisprudence relating to parentage testing orders associated with substantive parenting proceedings and those where the substantive proceedings were for other than parenting order, in particular, proceedings under *the Child Support (Assessment) Act*.

The Chief Justice referred to the 2006 amendments to the Act and concluded s 64B(2)(f) makes it clear that a parenting order is not an order in relation to the *Child Support (Assessment) Act*. Having referred to the decision of Coleman J in *Tryon & Clutterbuck* (2007) FLC 93-332 that an order for parentage testing was a parenting order, Her Honour went on to then consider the decision of the Full Court in *Tryon & Clutterbuck* where the Full Court did not determine whether Coleman J was correct in finding an order under s 69W was a parenting order.

At paragraph 92 of Her Honour's reasons, the Chief Justice said:

Prior to the amendments to the Act in 2006, the issue of whether the child's best interests were paramount or relevant would have been decided depending on whether the substantive proceedings related to parenting orders or child support. (*F and R* (supra); *Duroux v Martin* (supra) However since the amendments it may no longer be wise to rely upon previous authorities. As this particular issue was not identified, and thus not argued before us, I think it prudent not to express a concluded view without the benefit of full argument. I agree, however, with the comments of Finn J in *Tryon & Clutterbuck (No 2)* (supra) and repeated more fully in paragraphs 155 - 160 inclusive of Finn and Thackray's JJ reasons for judgment in this matter, that whether it was intended by the

2006 amendments that the making of a parentage testing order is itself a parenting order, with the consequences that follow, is unclear.

Her Honour went on to note that, even if not the paramount consideration, a child's best interests were an essential factor to be considered. Having found the trial Judge had failed to do so, Her Honour found appealable error established.

In their separate reasons, Finn and Thackray JJ, after citing the authorities referred to by the Chief Justice, at paragraph 154 of their reasons, noted:

The argument for a parentage testing order being a "parenting order" is that s 64B(1) defines a "parenting order" as being an order under Part VII which deals with a matter mentioned in s 64B(2). There are then eight specific matters in s 64B(2), none of which could be said to include the matter of parentage testing. However, it can be argued that the ninth and "catch-all" matter mentioned in the subsection (in subparagraph 64B(2)(i)), being "any other aspect of the care, welfare and development of the child or any other aspect of parental responsibility for a child" does include an order for parentage testing, on the basis that such an order relates to an "aspect" of the "welfare" of the child.

Their Honours went on to note that the drafters of the legislation had included a specific provision in s 67ZC (the welfare provision). That section required a determination with the best interests of the child as a paramount consideration (similarly for s 67S and s 67V). Thus their Honours said, at paragraph 156, "Again this suggests that the drafter must have considered that the reference in s 64B(2)(i) to 'welfare' was of limited operation". Like the Chief Justice their Honours concluded, in paragraph 158:

Interesting though this question of whether or not a parentage testing order is a parenting order may be, this case is not, in our opinion, the case in which this question can, or should be, determined (if indeed it can be satisfactorily determined without legislative intervention), for the reason that the Court has not had the benefit of any legal argument on the question given the self represented status of both parties.

In the end, each member of the Full Court concluded that His Honour should have taken into account the child's best interests and that in the circumstances of this case, the child's best interests were "determinative". That is, the members of the Full Court said that whatever the eventual outcome of the debate about whether or not a parentage testing order is a parenting order, in this case the child's best interests were a determinative factor and in that sense were the paramount consideration in this case.

In that context it is useful to quote some of the authorities referred to by Finn and Thackray JJ with approval:

177. As long ago as 1970 Lord Hodson said in *S v S; W v W* [1970] 3 All ER 107 (albeit with regard to blood rather than to DNA testing):

The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the

suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong? Failure to submit the child to a blood test may eventually lead the child to unnecessary doubt as to his paternity the chance of removing that doubt may be lost in the passing of time. There may be genetic consequences in some cases which could have been avoided if a blood test had been taken.

178. In this country in the High Court decision of *G v H* (1994) 181 CLR 387 Brennan and McHugh JJ said, at 391:

We do not suggest that paternity is not a serious issue. It is serious because paternity carries with it both significant privileges and grave responsibilities, only some of which relate to monetary obligations. The attribution of paternity may be seen by a child's mother to be no more than the means of procuring a maintenance order during the child infancy, but a finding that a particular man is the child's father might well be of the greatest significance to the child in establishing his or her lifetime identity ...

179. In the same case it was said by Fogarty J as a member of the Full Court (*G v H* (1993) FLC 92-380, at 79,942):

Paternity is now a medical and not a legal issue. Society is entitled, through the legislature and the Courts, to an inexpensive, prompt and virtually certain procedure to decide this question. Paternity is no mere *inter partes* issue. The child and society has a vested interest in the correct outcome. The reasons for that are many, including heredity, the sense of identity and the private and public obligations of financial support directly relevant in this case and so emphasized [sic] by the legislature over the past decade.

(See also the judgment of Strauss J as a member of the Full Court in *G v H* (1993) FLC 92-380 and in particular the English authorities cited; see also the decision of the New South Wales Supreme Court in *Taylor v Burgess* (2002) FLC 93-120.)

180. This recognition by the law of the child's long term interest in knowing the truth about his parentage, coupled with the likelihood earlier discussed of the child already being aware, or of his becoming aware in the future, of the controversy surrounding his paternity, must outweigh not only the wife's expressed concerns regarding the threat to his loss of identity, but also the emotional and psychological harm which she reports he has suffered.

181. It must also be borne in mind in connection with the matter of harm or distress to the child, that the proposed tests can be carried out in a non-invasive way. Thus, any practical objection he may have to the test can be avoided. Any other objection which he may voice to the test must be subsidiary to the long term interest which the law recognises that he has in knowing about his parentage (or at least, so much as can be known at the present time).

In this case, although a ground of appeal was satisfactorily established, when re-determining the matter, the Full Court reached the same conclusion as the trial Judge (that the parentage testing procedure should take place). Consequently the Full Court affirmed the orders made by the trial Judge and dismissed the appeal.

DIVISION 12A

Farmer & Rogers [2010] FamCAFC 253

(Bryant CJ, O’Ryan & Ainslie-Wallace JJ)

This appeal was against a Federal Magistrate from the north who has a reputation for getting on with it. In this case, the Full Court upheld an appeal and remitted the matter for rehearing in circumstances where they had found that the Federal Magistrate had failed to explain to a self represented litigant the orders that the Independent Children’s Lawyer had sought at the conclusion of the trial.

The mother was a qualified fitness and swimming instructor and the father had a PhD in geological studies. The Full Court noted that, given the mother was self represented, the Federal Magistrate had certain responsibilities in relation to how the hearing was conducted and referred to the guidelines prescribed in *Johnson v Johnson* (1997) FLC 92-763; *S v R* (1999) FLC 92-834 and *Re F: Litigants in person Guidelines* (2001) FLC 93-072. In passing, the Full Court mentioned that it may be that the guidelines described in *Re F* should be reviewed (but they did not go on and do that job). The Full Court also referred to the High Court authority of *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 where the High Court discussed and emphasised the importance of case management of proceedings and said, “In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone”.

The Full Court emphasised that Division 12A implements a range of amendments to provide legislative support for a less adversarial approach. It quoted the revised Explanatory Memorandum which said that this approach relies on active management by judicial officers of matters.....the intention is to ensure that the case management practices adopted by the courts will promote the best interests of the child by encouraging the parents to focus on their parenting responsibilities.

Section 69ZN(4) provides that the court is to actively direct, control and manage the conduct of the proceedings. Section 69ZN(7) provides that the

court has a responsibility of ensuring matters are conducted without undue delay and with as little formality, and legal technicality and form as possible. However, the Full Court endorsed the Parliament's statement that that doesn't mean that parenting cases are to be conducted in a casual way that detracts from the seriousness of the orders being made. It is clear the Parliament intended that as early as possible in the proceedings, the court identify the issues in dispute and make directions to ensure that the case focuses on those issues.

In this case the Full Court commented that after many lengthy appearances, the Federal Magistrate did not inform the mother of critical matters. It commented, "In this case, which involved a relocation proposal, the appointment of a court expert and an Independent Children's Lawyer, evidence from another expert and a significant volume of written material, the Federal Magistrate should have identified the issues and attempted to confine the evidence to the issues". They were critical of the fact that His Honour had before him in excess of 23 affidavits and critical of the trial management that had led to that happening.

There was no discussion after expert reports became available as to what further evidence might be required flowing from issues raised in those reports. There was also criticism that the family consultant had not been guided under any order under s 62G as to the issues which should be her focus. The Full Court was critical that no orders or directions were made about the proposed evidence and that at no time was there any adequate discussion about defining the issues and limiting the evidence to what was required to adjudicate the issues.

The main reason that the appeal was successful was a finding that the mother had not been given procedural fairness.

At the conclusion of the hearing, the Independent Children's Lawyer, without prior notice, put forward a proposal which was contrary to the expectation of each parent as to what would happen at the trial and the manner in which the case was prepared and the trial was conducted. The Independent Children's Lawyer suggested that final orders not be made but an interim trial arrangement be put in place.

The mother sought assistance from the Federal Magistrate as to what was required but no guidance was given. The Full Court was critical that the Federal Magistrate did not do at least the following things:

- Explained what was sought by the Independent Children's Lawyer;
- Explained that it was contrary to the expectations of the parties' and what His Honour had earlier made clear would happen at the trial;
- Required the Independent Children's Lawyer to give notice of the reasons why such a proposal was being put forward;
- Explained that the parties should have the opportunity to put on further evidence to deal with the proposal for an adjournment of the hearing; and

- Explained that the parties should have the opportunity to further cross examine each other and the lay and expert witnesses.

The Full Court acknowledged that there was no doubt that the Federal Magistrates Court is a very busy court. They noted that in this case the Federal Magistrate said that he dealt with over 1000 cases a year. The Full Court however were not prepared to allow a situation where the pressure of work becomes an excuse for a failure to afford what in the Full Court's view would have been a fair trial.

The Full Court referred to *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 where the High Court in a famous passage said (in the context of a maintenance and property case) that the judge ".....is not entitled to do what has been described as 'palm tree justice'".

The Full Court pointed out that s 97(3) has been in the Family Law Act since 1976. Section 97(3) provides "In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted".

Quoting *Watson's* case, the Full Court referred to the passage where the High Court said:

"The provisions of s 97(3) of the Act, which require him to proceed without undue formality, do not authorise him to convert proceedings between parties into an inquiry which he conducts as he chooses."

It had been thought that the comments of the High Court in *Armstrong's* case might be limited to cases relating to financial matters and might be of very little relevance after the introduction of Division 12A. The High Court however in this case says:

"In our view, what said in *The Queen v Watson; Ex parte Armstrong* remains apposite to proceedings in the Federal Magistrates Court."

The matter was remitted for rehearing before a different Federal Magistrate.

***Akston & Boyle* [2010] FamCAFC 56**

(Warnick, Boland & O'Ryan JJ)

In this matter, the mother appealed against the decision of a Federal Magistrate, and in particular the findings in relation to the issue as to whether there was unacceptable risk of harm to the child, aged 10 at the time of first instance hearing, in relation to the father's drug use.

Prior to the commencement of the first instance hearing, the parties agreed to orders for equal shared parental responsibility, and to some orders in relation to time the child should spend with the father during school holiday periods. The question for judicial determination was how much time the child should spend with the father outside of school holiday periods. The Federal Magistrate ultimately made orders in the following terms:

- (11) When the child is not otherwise living with each of the parents in accordance with Order (2) above, he will live in alternating weeks with each parent with the change-over occurring after school on Friday or 5.00 pm on a non-school day.
- (12) The child attend at the [Y] Primary School.
- (13) In the week the child is living with the mother, the mother is to transport the child to school and the father is to transport the child to the mother's residence at the conclusion of school.
- (14) The father be restrained and an injunction issue from the use of any illegal drugs including marijuana.
- (15) By consent the father is to request a copy of the results of any drug tests taken by the Alcohol Tobacco and Other Drugs Services Unit of the Queensland Health Department (ATODS) and provide same to the mother until the child turns 12 years of age.

By way of 2nd Amended Appeal filed at the commencement of the appeal hearing, the mother appealed against orders 11, 12 and 15 (although in relation to Order 15, it was observed that this order was actually made by consent and none of the grounds of appeal were directed to this order). The mother sought alternative orders that the child live with her and spend time with the father each alternate weekend in the event her appeal was successful.

A Family Report was prepared for the first instance hearing. The Family Consultant was not cross-examined in relation to the report and the orders made did not reflect the recommendations of the Family Consultant.

Background

Both the parties were young when the child was born and both admitted at hearing to using large amounts of alcohol and illicit substances. The Family Report sets out the parties' drug history, and the very troubling early years of the child's life. The parties separated in 2000, when the child was about two. From that time until 2004, the child had an unstable base, as he spent some time living with the father and sometime in the care of DoCS. In 2004, the child was returned to the full time care of the mother where he had remained since that time.

The mother ceased using illicit substances in 2002. In 2003, the father went on the methadone programme, and submitted at hearing that he had not used illegal drugs since that time, however, over the course of the hearing it emerged that this was not in fact the case as he had continued to use marijuana since that time.

The Family Report prepared for the matter recommended that the child remain living with the mother, that there be equal shared parental responsibility, and that the child spend substantial and significant time with the father. The orders sought by the mother were consistent with these recommendations.

A significant aspect of the father's evidence was that the father had progressed and developed significantly in his attitudes and responsibilities towards parenthood since the report had been prepared and released to the parties (a period of approximately 6-8 months). This was accepted by the Federal Magistrate.

In his reasons, the Federal Magistrate dealt firstly with the additional considerations as required under s.60CC(3). He then turned to the primary considerations.

When considering s 60CC(2)(b), the Federal Magistrate focused upon the risk of harm to the child as a result of the father's drug use. The Federal Magistrate was of the view that if the mother truly believed the child was at a real risk of harm as a result of the father's drug use, she would not have consented to an order for the child to spend half the school holidays with him. The Federal Magistrate concluded that "I could not term the risk or the fear of the father's return to drug usage as an unacceptable risk. He is on the methadone program to assist him to keep off hard drugs".

The mother submitted on appeal that given the father's long drug history, this was not a finding that was open to the Federal Magistrate.

Having considered the issue of risk, the Federal Magistrate went on to consider the presumption of equal shared parental responsibility, which was consented to by both parties. On finding, independently of the parties, that this was a matter in which the presumption applies, His Honour went on to consider substantial and considerable time. However, the Full Court found that whilst the Federal Magistrate ultimately concluded that a shared care arrangement was appropriate, "at no point did the Federal Magistrate expressly state that he was satisfied, as required by s 65DAA(1)(a), that having regard to the findings he had made in relation to the matters in s 60CC(3) an equal time arrangement would be in the best interests of the child and why".

In her appeal, the mother listed some 17 grounds on which she contended that the Federal Magistrate had erred in relation to week about time, 4 in relation to schooling, and that the Federal Magistrate had erred in his finding that she did not truly believe the child was at risk by her consent to school holiday time. These grounds were consolidated at the appeal hearing.

In considering the Federal Magistrate's reasons, the Full Court found that the Federal Magistrate had identified the various statutory provisions as was required by him.

In relation to the Federal Magistrate's findings regarding drug use and risk, the Full Court said:

242. In passing, I observe, that in concluding that the Father was not using "hard drugs" and that there was no risk of harm to the child, the Federal Magistrate appeared to place weight on the fact that the Family Consultant had recommended that during the school holiday periods there be a week about arrangement, whereas, the

Mother agreed to a continuous period or one half of each school holidays.

...

244. I accept that, in so far as it was relevant to consider the Mother's fear or belief of the Father's drug usage and of any risk of harm, the Federal Magistrate was entitled to take into account the Mother's consent to the holiday arrangement. However, in my view the issue was not whether the Mother had a genuine fear or belief of the Father's drug usage and of risk of harm to the child but whether there was a risk of harm to the child irrespective of the Mother's fears or beliefs.
245. I also observe that the risk that the Federal Magistrate identified was a risk of the Father's "return" to drug usage and he said nothing in relation to whether or not in the circumstances the Father's admitted current use of drugs was a risk of harm to the child.
246. In my view, consideration of the reasons of the Federal Magistrate reveals that it is very difficult to know what matters he took into account in reaching the two conclusions I have identified, namely, that the Father was not using hard drugs and that there was no unacceptable risk that he may "return" to drug usage.
247. In conclusion, I am persuaded that there is considerable merit in the complaints about the findings of the Federal Magistrate in relation to the Father's use of drugs and the risk of harm to the child.

In relation to the mother's consent for school holiday time, the Full Court found:

282. For reasons I have already given I accept that in so far as it was relevant to consider the fears and beliefs of the Mother it would be relevant to take into account her agreement about school holidays. However, I am also of the view that it was not a matter of significance and, in any event, is not something that would be determinative of any issue about whether fears and beliefs were genuine. For example, in this matter the parties agreed on an order for equal shared parental responsibility in circumstances where there is a great deal of evidence that would suggest that such an outcome was not in the best interests of this child.

The Full Court found that the Federal Magistrate had failed to properly consider the father's drug history, and had placed undue weight on the father's submissions in relation to what had occurred since the preparation of the Family Report.

In relation to the Family Report, in finding that this was a matter which was in need of expert evidence, the Federal Magistrate failed to give adequate reasons as to why he ignored the opinions and evidence of the Family

Consultant, and gave significant weight to the evidence of the father on what had taken place since the Family Report interviews.

In relation to the question of school, the Full Court found that many of the findings were within the Federal Magistrate's exercise of discretion, but that "many of the schooling issues were intertwined with the parenting issues and given the redetermination of the school term living arrangements the schooling of the child will also have to be dealt with".

Justice Boland made some important comments about the way that this case had been prepared prior to trial and said the following:

31. It is of concern to me that the issue of the father's continuation on the methadone program was not investigated prior to the hearing. At paragraph 70 of her report, the Family Consultant highlighted the need for expert evidence on this topic. The Family Consultant said:

Of concern is the fact that [the father] remains on the Methadone Program. He insists his reliance on methadone is to treat back pain. However, it may assist the Court to seek an opinion from a specialist in substance abuse or a medical professional regarding the appropriateness of this treatment option for this particular problem.

32. The evidence in this case disclosed the competing parenting applications were about a very vulnerable and needy child who had been exposed to mistreatment, lack of proper hygiene and care, and who had for much of his life not received appropriate emotional nurturing. The Court was being asked to make an order having regard to his best interests as its paramount consideration. The matters revealed in the Family Consultant's report indicated:

- that it was an appropriate case for the appointment of an independent children's lawyer;
- the need for expert evidence on drug use and dependence; and
- consideration of transfer to the Family Court.

33. While I appreciate the rationale behind the objects of s 3 of the *Federal Magistrates Act 1999* (Cth) and acknowledge the many innovative practices adopted by the Court to achieve those objects, to me, this case required more than a streamlined procedure. Although the predominant issue in this case revolved around the question of impaired, or potentially impaired parental capacity because of drug abuse, the discussion of the Full Court in *Oakley & Cooper* [2009] FamCAFC 133, although directed to the issue of family violence, has relevance. In *Oakley*, at paragraph 68, the Full Court said:

We also think it important to record that while s 3 of the *Federal Magistrates Act 1999* (Cth) includes in the objects of that Act

that the Court operate as informally as possible in the exercise of judicial power and use streamlined procedures, those objects must be carefully balanced against the need to ensure that children's proceedings conducted under the Act where serious allegations of violence are raised are not unduly truncated, and opportunity is afforded, particularly to an [independent children's lawyer], to adduce evidence of appropriate protective or therapeutic programs or measures likely to avoid or minimise, as far as possible, the risk of harm to the children the subject of the proceedings where family violence affecting a child is identified. The allegations may be so serious that the proceedings should be transferred to the Magellan list in the Family Court of Australia. Also relevant in the context of this discussion are the provisions of Division 12A of Part VII of the Act. We draw attention to the principles to be applied in interpreting this Division including in particular s 69ZN(5), and certain provisions of the division which enable proceedings to be conducted in a manner appropriate to the matters in issue (see in particular s 69ZQ(1), and s 69ZX(1)). ...

SUBSTANTIAL AND SIGNIFICANT TIME

***Vance & Vance* [2010] FamCAFC 250**

(Boland J)

In this matter, the father was appealing against some of the orders made by a Federal Magistrate about time spent with two children, aged 11 and 7. The interim orders in place prior to final hearing were that the children live with the mother and spend time with the father each alternate weekend.

Grounds of Appeal

Ground: Failure to properly apply s. 65DAA

The Federal Magistrate found that equal shared parental responsibility was in the children's best interests, but that equal time was not. In ultimately making an order that the children spend time with the father after school each Wednesday, the Federal Magistrate said the following:

77. ...I am satisfied that this is substantial and significant time, as defined in the Act, and it will provide the father with ample opportunity to be involved in his children's daily routine, as well as occasions and events that are of particular significance to the children, and to the parent.

Counsel for the father submitted that in not making an order that the children spend an overnight with the father on anything other than a weekend night, the Federal Magistrate failed in his requirement to provide substantial and significant time.

The father's Counsel submitted that the reference in the Act to "days" should be found to be a period of 24 hours. The appeal judge was not persuaded by this argument, saying:

46. I am satisfied that this argument is without foundation. Adopting a purposive interpretation of s 65DAA(3) (see s 15AA of the *Acts Interpretation Act 1901* (Cth)) I discern what is required is **the time** the child spends with a parent **includes** days that fall do not fall on weekends or holidays and the **time** spent with the child allows the parent to be involved in the child's daily routine, and occasions and events that are of particular significance to the child, and occasions and events which are of special significance to a parent.
47. The section does not require that a child spend 24 or more hours mid week with a parent, although of course such an order may be, and is not infrequently, made. If the legislature intended substantial and significant time must include, as minimum, a 24 hour mid week period it would have said so clearly and unequivocally. Further, s 65DAA(4) provides, that the matters in s 65DAA(3) which define substantial and significant time "does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant". ...

In considering other authorities on the issue, His Honour said:

52. It is also instructive to refer to the decision of the Full Court (Finn, Coleman and Collier JJ) in *Eddington & Eddington (No 2)* (2007) FLC 93-349.
53. At paragraph 54 of their reasons, the Full Court accepted the orders made by the trial Judge fulfilled the requirements under s 65DAA(3). In the course of that determination their Honours' said:

It is evident that, although orders for time to be spent with a parent fall literally within the provisions of section 65DAA(3)(a)(b) and (c), that does not mean that the orders thereby provide for substantial and significant time within the terms of the legislation. It is equally evident that orders made for time spent cannot satisfy the requirements of substantial and significant time unless they literally meet all of the requirements of those provisions. What constitutes substantial and significant time will vary from case to case. What is substantial and significant time in one factual context may well not be in another. Whatever their terms, orders for substantial and significant time will have in common that they literally comply with each of the requirements created by s 65DAA(3). There is no issue that the orders under consideration did so comply.

54. Later, at paragraph 66, the Full Court explained that there was a nexus between the substance and the significance of the time the children would spend with their father. Importantly, their Honours concluded that paragraph saying:

... Clearly, the amount of time which children spend with a parent potentially impacts upon the quality or significance of that time. In our view, the time which the children would spend with the appellant pursuant to the trial Judge's orders, the duration of such periods and the frequency at which they would occur are likely to impact adversely upon the significance of the time which the children would spend with the appellant. There is thus a nexus between the substance and the significance of the time which the children would spend with the appellant. Beyond noting that the legislative requirements are conjunctive, we need say no more, other than to stress that the case turns on its own particular facts and circumstances, and the reality that the roster of the appellant in this case has particular impacts upon what may constitute substantial and significant time spent with the appellant.

Bearing in mind the circumstances of this case, the appeal judge was satisfied that the orders made by the Federal Magistrate were within the boundaries of his discretion.

USE OF SOCIAL RESEARCH AND COMMON KNOWLEDGE

***Vance & Vance* [2010] FamCAFC 250**

(Boland J)

Ground: Procedural Fairness:

The father asserted that he was not afforded procedural fairness by way of being put on notice of academic materials referred to in the judgement.

The Federal Magistrate set out in his reasons that this material was referred to by way of background material and not evidence before him.

On this issue, the appeal judge said:

70. The line between what is truly background material, and material which is relied on in determining proceedings may be a fine one. It is understandable that parties to proceedings may be at a loss to understand why material, about which they have had no prior knowledge, finds its way into a judgment, particularly when its inclusion is clearly directed to them. While I am satisfied in this case that his Honour did not use the material as evidence before him, and no appealable error is established, it may have been prudent to direct the parties' lawyers to the material and/or to provide copies to the parties at the commencement of the hearing so that they could discuss it with their lawyers.

Appeal dismissed except those orders to be amended by consent.

Salvati & Donato [2010] FamCA 263

(Boland, Strickland & Benjamin JJ)

In this case the Federal Magistrate made reference to a used social science research in circumstances where such material was not tendered by the parties and in respect of which the parties did not have an opportunity to make submissions. Although there was no ground of appeal arising from those circumstances, the Full Court took the opportunity to make some comments about the use of social science research in parenting cases.

The Full Court said:

103. As previously mentioned, the Federal Magistrate referred to and cited in detail a number of journal articles, and his Honour said this at paragraph 19:

This research is background material to my judgment. It is not evidence. It is not material in respect of which I take judicial notice, and I make no findings of fact as a result of this material. It is background material, and it assists in understanding the expert evidence provided by the Family Consultant. One also lives in hope that parents might learn from it.

104. However, despite this disclaimer regarding the use which would be made of the material, in the context of discussing the orders he proposed, his Honour said:

92. ... I appreciate that I am ordering what is, in effect, shared care in a case where the lack of communication and trust has led to an order for sole parental responsibility. I appreciate that this is contrary to the research and recommendations of MacIntosh [sic] and Chisholm (see paragraph 16). However the facts of this case are unique ...

105. In a number of previous decisions, this Court has addressed the appropriateness of trial Judges and Federal Magistrates referring to and citing social science research and academic writings which have not been tendered by the parties and in respect of which the parties have not had an opportunity to make submissions.

106. In *McCall & Clark* (2009) FLC 93-405, the Full Court (Bryant CJ, Faulks DCJ and Boland J), in the context of discussing that the Federal Magistrate in that case did not have before him any expert evidence, said at 83,477:

126. ... Neither party tendered to the Federal Magistrate any of the well recognised peer reviewed research on the establishment of primary and significant attachments of infants and young children, nor did the Federal Magistrate raise with the parties that he could have recourse to such material. **Absent such evidence the Federal Magistrate**

could not have informed himself of such matters since the type of research required would not, in our view, fall within the term 'common knowledge' in s 144(1)(a) of the *Evidence Act 1995* (Cth). It may have been admissible under s 144(1)(b) after giving the necessary notice prescribed in s 144(4) of that Act. (Emphasis added)

107. In *Barclay & Orton* [2009] FamCAFC 159 May J commented on the reliance by the Federal Magistrate in that case on academic writings. After reference to the above passage from *McCall & Clark*, her Honour observed:

While of course it is entirely desirable that judges have the assistance of expert evidence it is not appropriate, in my view, that a Federal Magistrate inform himself about some academic writings and not provide those writings to the parties nor allow other expert evidence to be called. As it is quite clear that his Honour relied upon his own appreciation of this expert evidence in making what was an important decision to the parties in this case, that is, what arrangements should be made during Christmas holidays, the appeal must be allowed.

108. Further, in *Allen v Green* (2010) 42 Fam LR 538, Boland J also addressed this issue, finding there had been lack of procedural fairness amounting to appealable error in that case. Her Honour said at 549:

The father's central complaint is directed to an asserted lack of procedural fairness. It is not controversial that neither party had referred to the two specific articles the subject of the complaint, or that the father was denied the opportunity to make submissions on those articles. No attempt was made by the mother's counsel to provide the article by Professor Chisholm and Dr McIntosh to which she alluded in her cross-examination to Dr T for him to comment on its relevance to specific circumstances in this case, or to tender that article. The paper by Ms Tucker was sourced by the Federal Magistrate without reference to either party. In these circumstances a careful scrutiny of the Federal Magistrate's reasons is necessary to discern whether she treated the material to which she referred as a "background" to the proceedings before her, or whether her decision rested on this material, as well as the evidence adduced before her, and was integral to her exercise of discretion.

...

If the material merely gave background to the Federal Magistrate's decision or was extraneous to her decision, then notwithstanding she did not draw the parties' attention to the material such a process would not constitute

appealable error. Similarly, the appeal will fail if notwithstanding the failure to afford procedural fairness, a new trial would not produce a different result...

...

I do not consider that the Federal Magistrate's treatment of the material can be regarded as background to the issue she was required to determine. The reasons disclose she took into account Ms Tucker's opinion that a cautious approach should be adopted in making overnight arrangements for young children in situations where there was an absence of cooperative parenting. This determination was made notwithstanding the firm opinions expressed by Dr T. I will refer to Dr T's opinion and recommendations in more detail later in these reasons. The Federal Magistrate's further reference under the heading "Conclusion", in paragraph 57, to the report of the research conducted by Professor Chisholm and Dr McIntosh in their article published in the *Australian Family Lawyer* was again expressed as material "to which she had regard" in reaching her decision.

The father did not have the opportunity to address the material on which the Federal Magistrate relied. That absence of procedural fairness discloses appealable error.

See also *Vance & Vance* [2010] FamCAFC 250 at paragraphs 67 to 71.

109. In *Lamereaux & Noirot* (2008) FLC 93-364 the Full Court (Coleman, May and Boland JJ) discussed the limits on a judge or federal magistrate relying on evidence not adduced by the parties, to ensure procedural fairness, and that natural justice requires that parties be given an opportunity to controvert or comment on any contentious matter (at paragraphs 48 to 56).

110. Section 144 of the *Evidence Act 1995* (Cth) provides:

Matters of common knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is:
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
 - (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.
111. We do not consider that the research and articles to which the Federal Magistrate referred could be considered to be “common knowledge” such as to fall within s 144(1). In any event, the parties were not given the opportunity to make submissions in relation to this information.
112. While his Honour said that he referred to the research only as background material and that he would make no findings as a result of it, the Federal Magistrate’s comments at paragraph 92 when discussing the proposed orders are at odds with this and indicate that his Honour did have regard to the research in considering the orders he would ultimately make.
113. We consider that it was inappropriate for the Federal Magistrate to refer to the journal articles and for them to inform his decision in circumstances where they had not been tendered by either party or the Independent Children’s Lawyer and where the parties had not been given the opportunity to make submissions in relation to them. However, given the nature of the appeal and in the absence of any ground directly challenging the Federal Magistrate’s reference to and use of such material, our criticism of the Federal Magistrate in this regard does not affect the outcome of this appeal.

Maluka & Maluka [2011] FamCAFC 72

(Bryant CJ, Finn and Ryan JJ)

Facts

The orders made by the trial Judge in this case essentially ensures the father have no contact with the children whatsoever during their childhood. He ordered that:

1. The children live with the mother
2. The mother have sole parental responsibility
3. The mother may change the children’s names
4. The mother may relocate anywhere within Australia
5. The father is enjoined from having any contact with the children or the mother, including coming within 500 metres of the mother and children’s home, the children’s school or any other place where they may be present.

6. The father may be arrested without warrant if he breaches an injunction.

Despite the severity of the orders, the father appealed only that which prevented him from spending time and communicating with the children at a contact centre for two hours each fortnight.

The orders were appealed on a number of grounds, however I deal here with the grounds relating to the Judge's use of social science material.

About a month after the conclusion of the hearing, the Judge's associate emailed the parties about published material on domestic violence, comprising of three articles published in the Family Court Review Vol 46 No 3 July 2008. The lawyers were advised to prepare submissions on whether the Judge should refer to such material. No party to the proceeding wished for the Judge to consider the social science material, submitting that the evidence before the court was sufficient to decide the issues, and that if the Judge needed further information he should instead recall the independent expert. The trial Judge nonetheless referred to the material in his judgment, saying that it provided the court with "further evidence of the likelihood of the continuation of that violence".

The father claims:

1. he was denied procedural fairness by the Judge failing to disclose how the material would be taken into account;
2. the Judge erred by using the social science material as further evidence of the likelihood of the continuation of the violence; and
3. the trial Judge failed to provide adequate reasons as to how the material provided further evidence of the likely continuation of the violence.

Findings

All grounds of appeal were found to have merit. The Full Court noted that s144 of the Evidence Act was the provision under which extrinsic material can be introduced but noted the trial judge did not apply the legislation adequately, providing inadequate notice, and not having proper reference to the requirement that the knowledge be "not reasonably open to question".

In relation to the issue of procedural fairness, the Full Court referred to *Lamereaux & Noirot* (2008) FLC 93-364 and said "we agree where reliance is placed by a judge on evidence other than evidence regularly adduced by the parties to the litigation, procedural fairness issues are particularly significant." Section 144(4) outlines the notice required. The Full Court considered that the Judge did not give adequate knowledge about how the material would actually be used, in providing "further evidence of the likelihood of the continuation of that violence".

Even with adequate notice, it was argued by all three counsel in the submissions that the social science material could not constitute "common knowledge" about the impact of family violence, under s144 of the Evidence Act as it was not knowledge that is "not reasonably open to question". The

Full Court noted that the three articles covered a breadth of issues and the Judge did not disclose which of these issues constituted 'common knowledge'.

With insufficient notice, and insufficient clarity as to what aspect of common knowledge was being applied, the Full Court concluded that it was erroneous to use the social science material to constitute "further evidence" of the likelihood of future violence, which his Honour found the father had previously perpetrated towards the mother and children.

MEANINGFUL RELATIONSHIP v THE REALITY OF THE SITUATION

***Dennison & Wang* [2010] FamCAFC 182**

(May, O'Ryan & Strickland JJ

In this matter, the Full Court heard an appeal by the father against orders made by the trial Judge that he spend no time with his two daughters, aged 10 & 12. The father lists 7 grounds of appeal, including failure by the trial Judge to have sufficient regard to the benefit of the children having a meaningful relationship with both parents.

The orders made by the trial Judge were for equal parental responsibility, the children to live with the mother and the father to communicate with the children through letters. No orders were made for time spent between the children and the father.

Background: the father was born in India, and has two children from a previous partner with whom he has a good relationship. The mother was in China, and has one child from a previous relationship, and this child grew up in the care of her paternal grandparents.

The parties met in China in 1995 and moved to Australia in 1997.

The two children of the relationship were born in 1998 and 2000.

The mother alleges a history of domestic violence, which is not substantiated by independent evidence.

Consent orders were made in 2004 which provided for the children to live with the mother and spend time with the father each alternate weekend.

There have been numerous notifications to the Department in relation to both the mother and the father. These included, *inter alia*, allegations that the father had physically and sexually abused the eldest child. The father was charged with a number of serious criminal offences in relation to these notifications but was found not guilty in relation to each. The consent orders of 2004 were suspended at the end of 2005 pending the father's criminal proceedings.

The parenting proceedings were heard over a number of periods. After a lengthy hearing in 2008, interim orders were made in March 2009. The matter

was heard further later that year and final orders, accompanied by reasons for judgement, were made in December 2009.

The mother's case was that there was an unacceptable risk of serious harm (sexual abuse) if the children were to spend time with the father unsupervised. However, she conceded at the hearing which led to the making of interim orders, that there was insufficient evidence to allow the Court to make that finding.

The father's case in the 2008 proceedings was that the children should live with him and spend limited time with the mother although this was expanded to each alternate weekend during the course of the hearing.

Noting the bond between the children and the mother, the Independent Children's Lawyer did not support the father's case. Their position was that the children should live with the mother and be re-introduced to the father with the assistance of a counsellor, and that the children should eventually spend time with the father each alternate weekend.

In her reasons for judgment that accompanied the interim orders of March 2009, the trial Judge was critical of the mother and found her to be an unsatisfactory and unreliable witness on matters of truth. The trial Judge was also not impressed by the credibility of the mother's main witness. In contrast, the father was found to be a truthful, intelligent, sensitive and principled witness.

The interim orders provided for the children to live with the mother and in conjunction with counselling, spend time with the father supervised by Centacare. The children saw the father only twice under these orders, and on the second occasion was told by the counsellor and the children that they did not want to see him again. Centacare were of the view that the mother and children were very fixed in their position in relation to the father, and that the bond between the mother and children was so strong that the children possibly did not have the capacity to understand that they could have a relationship with the father.

For the final hearing in 2009, a report was prepared by a Family Consultant, who recommended that the children live with the mother and spend no time with the father for now, but that it be explained to the children that they could spend time with the father in the future if they so wished. He also recommended that the children have ongoing counselling in relation to their unresolved issues about their father.

In her reasons for judgment of 18 December 2009, the trial Judge found that the father had little insight into the emotional needs of the children, but that the abuse allegations against him were unsubstantiated and the mother had conditioned the children to believe they had been abused by the father in order to sever their relationship with him.

The Family Consultant was of the view that the father was perpetuating the parental conflict and in doing so, 'further polarising the children's views of him'. He also had concerns that if the conflict were to continue, as it surely would if the children were ordered to spend time with him, the children were

at risk of long term harm emotionally, and possibly physical self-harm. This evidence was accepted by the trial Judge.

With regards to the primary consideration of risk of harm, the trial Judge said:

63. ... There is no evidence that substantiates that the children are currently at risk of physical violence by the mother. I have found previously that the mother's false allegations against the father, and her involvement of the children in those allegations, constituted emotional and psychological abuse of the girls. As undesirable as it may be from the father's perspective, the potential for the children to continue to suffer emotional abuse by the mother in this manner diminishes if the children do not spend any time with the father.

The children's strongly expressed wish to not spend time with the father was one of the additional considerations that formed a key part of the trial Judge's determination.

In relation to parental responsibility and the order for shared parental responsibility, the trial Judge said:

98. ...the best interests of the children require that the father be able to access information about their education and medical care. With the exception of the religious and cultural upbringing of the children, the father's responsibilities should be equivalent to those of the mother and his status in this regard should be communicated to all concerned.

In conclusion, the trial Judge found that the only outcome that in her view would preserve the physical and emotional safety of the children was to make the orders she made, understanding that the children might never establish a relationship with the father, or were likely only to do so in the very long term.

The basis of the father's appeal was that in light of the criticisms of the mother's credibility as a witness, the trial Judge placed too much weight on her evidence. He made a number of submissions, including that the children's best interests were not served by the orders made by the trial Judge.

In upholding the trial Judge's decision, the Full Court said:

142. The "reality of the situation of the parents and the child" (MRR v GR (2010) 263 ALR 368 at 372) was clearly a significant part of the trial Judge's reasons for making no orders, as opposed to the desirability for a parent having a "meaningful relationship" with his children.

Sigley & Evor [2011] FamCAFC 22

(O'Ryan, Strickland & Benjamin JJ)

Facts

The mother wished to relocate from south west Queensland to North Queensland. There is one child of the relationship who was eight months old

when the parents separated. Both parents were heavily involved in the child's life.

The father submitted that the child should remain living in south west Queensland in order to have a meaningful relationship with him. In considering whether the father and child can have a meaningful relationship under the primary objectives of Pt VII of the Act, the Federal Magistrate referred to the single expert's evidence that the child should see the father regularly, fortnightly at least, to develop such a relationship, noting their current relationship was 'fledgling'. The Federal Magistrate concluded that the child's relationship with the father would be 'less than optimal' if allowed to relocate.

This case deals with a number of issues, but in this paper I concentrate on the interpretation of "meaningful relationship" in s 60CC(2)(a) of the *Family Law Act 1975*.

Meaningful Relationship

The Full Court discussed the authorities' treatment of the word 'meaningful' in the Act noting that *McCall & Clark* (2009) FLC 93-405 recently approved the interpretation in *Mazorski v Albright* (2007) 37 Fam LR 518. In that case it was explained 'meaningful' was synonymous with 'significant', 'important' and 'of consequence' and concluded that a meaningful relationship is one that is "one which is important, significant and valuable to the child". This categorisation is *qualitative* rather than purely *quantitative*. The Full Court in *McCall & Clark* also noted that the enquiry about a meaningful relationship was to be prospective, in the sense that the determination should be made whether a meaningful relationship with both parents will be beneficial for the child.

The Full Court then noted there could be three interpretations of what is required by the Act when it considers a meaningful relationship, being:

1. That a court should consider the benefit to the child of a meaningful relationship with both parents based on the child's current relationships at the time of the trial;
2. Assume there is a benefit to all children of a meaningful relationship with both parents; or
3. The court should weigh the benefit of a meaningful relationship with both parents, then shape the orders to ensure such a relationship may develop, based on that determination

The third option is the prospective option which the full court prefers, though it notes considering the present relationship, as in the first option, may be appropriate and relevant. The Full Court cautions the first option, as it risks overlooking the future development of a relationship where the current was had not yet been allowed to develop. The Full Court rejected the second option.

Finally, the Court referred to *McCall & Clark* again, quoting the proposition that the determination of 'meaningful relationship' is a legal determination, not

a psychological one, and so it is for the court, not the single expert to make a finding about it.

The matter was remitted for a rehearing by the Federal Magistrates Court.

RICE v ASPLUND

***Reid & Lynch* [2010] FamCAFC 184**

(Finn, O’Ryan & Strickland JJ)

Here the Court was dealing with two appeals by the mother - one against the orders of a Federal Magistrate allowing the father’s application for parenting orders to proceed to final hearing despite consent orders having been made only 9 months earlier, and the other against the Federal Magistrate’s refusal to stay the orders made by him for the preparation of the matter for final hearing. Both appeals were heard prior to the proposed final hearing taking place.

Background

Prior to the consent orders being signed in July 2009, both parents had made applications to the Court. The father’s application was commenced in 2008, and orders had been made for the progression of the matter, including the preparation of a Family Report. Fairly shortly after the release of the Family Report, the father withdrew his application. Approximately 2 months later, the mother filed an application for orders allowing her to relocate with the child. Consent orders to this effect were made by the Federal Magistrate in chambers two weeks later.

Finn J considered the explanation that the father provided to the Court as to why the matter should be re-opened, namely that he was depressed at the time of signing the consent orders, had not obtained independent legal advice, and did not fully understand the consequences of the document that he was signing. The father also claimed he had not seen the Family Report that had been released to the parties prior to him withdrawing his application.

Finn J went on to briefly consider the reasons of the Federal Magistrate in allowing the father’s application to proceed, being that the time between the child and the father had not been happening since relocation; that the father had alleged he was not afforded procedural fairness in not reading the Family Report prior to signing the consent orders; the father’s misunderstanding of the document he signed; and that the principles of *Rice & Asplund* had been satisfied.

There were two bases for the mother’s appeal:

1. *Rice & Asplund* and *res judicata* issues; and
2. Procedural fairness.

The Federal Magistrate recognised that there had been no significant change of circumstances and appeared instead to be relying on Mr Lynch’s claim that

he had not read the Family Report, and that he did not understand the document that he signed.

The appeal was allowed.

O’Ryan J commences his reasons with a consideration of the legislative requirements in relation to making consent orders, and that it is not enough to simply “rubber stamp” orders without considering whether the orders are in the best interests of the children. Despite the terms of s 60CC(5); s 60CA still applies.

On the question of *res judicata* and *Rice & Asplund*, His Honour considered at length the relevant authorities on the matter, and concluded that the Court ‘should not lightly entertain an application to discharge, vary, suspend or revive a final parenting judgment’ and must be satisfied of significant change in circumstance.

He went on to find that:

258. Importantly, in my view, the Federal Magistrate failed to consider in any way what was said in *Rice and Asplund* and carried out what, in effect, was a review of his final judgment of 30 July 2009. His Honour approached the matter on the basis of considering whether or not his orders of 30 July 2009 should have been made given a number of matters which included whether the orders reflected what is set out in the legislation including the first primary consideration in s 60CC(2) of the Act; whether, in all the circumstances, the orders of 30 July 2009 were in the best interests of the child X. His Honour dealt with the matter on the basis of considering if his judgment was in accordance with the requirements of the legislation and decided that it was not.

259. In my view, it is clear from the various authorities, that this is not the nature of the enquiry if a *Rice and Asplund* argument is being considered. As the Full Court observed in *Langham and Langham* at 76,179: “Such a testing of the previous order upon the unchanged evidence would be in the nature of an appeal and could only be instituted as such”.

As His Honour found that the appeal must succeed because there was no significant change in circumstance, he did not consider in full the grounds of appeal in relation to procedural fairness. However, His Honour commented that the ground had significant merit as the Federal Magistrate relied heavily on the assertions of the father and gave no notice to the mother that he intended to do so.

His Honour found that the success of the first appeal meant that it was not necessary to consider the second appeal in relation to the stay.

Strickland J agreed with the reasons of Finn J and O’Ryan J.

SECTION 118 AND SECTION 114(3)

Coleman & Hindle & Ors [2011] FamCAFC 8

(Bryant CJ, O’Ryan & Strickland JJ)

This is a case in which a grandmother had looked after children for a period of their lives. After a ten day hearing the trial Judge ordered no face to face time, no communication (not even the delivery of presents). The trial Judge had also made an order under s 118 against both grandparents.

The case has an interesting factual matrix. At one point the grandmother, annoyed at the behaviour of her former solicitor, went with the grandfather after hours to the front door of the solicitor’s office, having procured 24 coloured mice. The mice were fed through the letterbox in the front door, but I digress.

One aspect of this judgment related to the trial Judge’s orders made under s 118 and s 114(3). The trial Judge, relying upon s 114(3), made an order restraining the grandmother from serving any application for leave under s 118 until the matter came before the court on an *ex parte* basis for her to obtain authority to actually serve the application for leave under s 118.

Vexatious litigants sometimes achieve the same result (harassing the other side) by serving papers seeking leave to apply under s 118 on the other side and having a hearing about that in circumstances where on the face of the papers filed, the application for leave under s 118 would be summarily dismissed. The orders as framed, take away from the vexatious litigant one possible further avenue of harassing pursuit. The Full Court did not interfere with the order under s 114(3) FLA.

DISQUALIFICATION

Murray & Tomas and Anor [2011] FamCAFC 81

(Coleman, Ainslie-Wallace & Johnston JJ)

Facts

The trial Judge, after making interim findings against the mother's credit on 2 June 2010, refused an application to disqualify himself from further hearing the matter based on actual or perceived bias.

The case concerned a child, who had lived with the mother for the first year and nine months of its life, and with the respondent adoptive parents since March 2009. The mother was seeking the child return to her care in Samoa.

In relation to the mother's evidence at the interim hearing, the Judge made such findings that her evidence in relation to a specific matter was "exaggerated or prevaricated", that her evidence was "unreliable" and the Judge had "some concerns about its veracity." He made a comment that the mother's allegations were "calculated". Notably, the Judge rejected the mother's submissions regarding the character of the respondents and their standard of care as not "well founded".

The Judge noted on 2 June 2010 that he expected further evidence to be presented before him in the final proceedings, on which a final adjudication would be made.

It was held that the Judge's decision not to recuse himself in the circumstances was an error of principle and should the appeal court not intervene, this would be likely to cause a substantial injustice to the mother.

Relevant Law

Both parties submitted, and the appeal court confirmed, that the test as to whether a Judge should disqualify themselves on the basis of bias is a two part test, as follows:

1. That a reasonable observer would form the view that there was a lack of impartiality on the part of the trial Judge with respect to any later proceedings which he might be called upon to hear and determine between these parties; and
2. That there was an appropriate nexus between the findings and/or conclusions made in the interim, and the issues which would require determination or adjudication at a final hearing.

In confirming the appropriateness of this test, the Full Court referred to the recent High Court case of *British American Tobacco Australia Services Ltd v Laurie* (2011) 273 ALR 429; (2011) 85 ALJR 348. They considered this case significant on the facts because the Judge in the interlocutory ruling made it clear that he was basing his conclusions on the limited evidence put before him and that a different picture might emerge at trial with further evidence. This was the point on which the Justices of the High Court disagreed, and the

majority held that the apprehension of bias was not overcome by such a statement, stating

“express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue...” (original emphasis)

Also particularly pertinent to the present case, the majority noted that the findings were expressed “without qualification or doubt” as if “based on actual persuasion of the correctness”.

The High Court justices also made reference to the earlier case in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 176 ALR 644 to confirm the two part test, and explained (as is the usual nature in disqualification cases) that “it is the public’s perception of neutrality with which the rule is concerned” not the actuality.

Findings

The Full Court found that the first step of the test for disqualification was clearly made out, stating:

“there is nothing expressly stated or implied by the trial Judge’s Reasons which suggests that he retains, or could be expected to retain, the kind of open mind which the test clearly requires.”

In relation to the second test, the Full Court held that the findings made in the interlocutory hearing were sufficiently connected to the findings that would be made in further proceedings. They noted that two significant issues emerged from the interlocutory hearing that would require adjudication at a final hearing, and the Judge identified them as major issues for final determination.

Unfortunately the Full Court indicated that they did not have available the Reasons of the trial Judge, and so it was unclear as to whether this was a matter to which the provisions of Division 12A Part VII applied. Section 69ZR FLA does not seem to have been argued before the Full Court and it remains to be seen if it would have made any difference.

Aligante & Waugh (No. 2) [2010] FamCA 554

(Watts J)

The proceedings involved a boy born in 2002. In this case the mother made allegations of serious violence. There was an extensive hearing. At the end of the hearing the Independent Children’s Lawyer suggested that final orders not be made but that interim orders be made. The trial Judge, in his reasons for judgment, ultimately accepted the Independent Children’s Lawyer’s position and made interim orders, setting in place a trial arrangement. The Chapter 15 Expert was asked, within a nine month period, to do a further assessment. In the reasons for judgment, the trial Judge had made adverse findings in relation to the mother’s credit and had found against the mother in respect of factual controversies, particularly relating to the history of alleged family violence.

The interim arrangements broke down after a short period of time when the mother complained that the child had been exposed to inappropriate sexual material in the father's household. The order for the updated report from the Chapter 15 Expert was brought forward. The Chapter 15 Expert recommended an immediate change in the residential arrangements for the child. The trial Judge, on an interim basis, moved the boy to his father. The mother thereafter made an application the trial Judge disqualify himself from hearing the matter to finality.

The trial Judge dismissed the application that he disqualify himself. In his reasons, the trial Judge acknowledged that the authorities would normally require him to disqualify himself.

The trial Judge however relied upon the provisions of s 69ZR FLA.

The trial Judge said:

62. I accept that a judge who has made findings of fact or credit against a party or an essential witness called by a party would, normally be expected to disqualify him or herself, as a result of that pre-judgment.
63. By the introduction of s 69ZR(1) and (3) FLA, Parliament provided that in child-related proceedings, facts or matters can be adversely decided against one party or more general findings of credit can be made against a party on the facts or matters known to that point without a judge automatically being required to disqualify himself or herself.
64. Section 69ZR(3) FLA evidences a clear statutory intention that merely because I have made findings, determined matters and made interim orders in the context of a hearing under Division 12A Part VII FLA, I am not for that reason alone required to disqualify myself from further hearing the proceedings. In this case, I find that I should rely upon the provisions of s 69ZR FLA to dismiss the disqualification application.

This decision has not been considered yet at appellate level, there being no appeal lodged in this decision in this case.

INTERIM PROPERTY

***Lippman & Lippman* (2010) FLC 93-439; [2010] FamCAFC 127**

(Bryan CJ, Coleman & Thrackray JJ)

This case is of interest in considering whether the power under s 79 has been "exhausted" in proceedings.

In this case the trial Judge made orders which included orders for the parties to appoint a valuer of a business, another valuer to value real estate and yet another valuer to value furniture and chattels. Thereafter solicitors for the parties were to prepare a common schedule of assets to be filed in the Family

Court of Western Australia. The trial Judge further recorded, at paragraph 27, “[t]he parties’ assets and resources are to be divided to achieve an overall division of 55% to the wife and 45% to the husband”.

At paragraph 23 of their reasons, the Full Court noted that the husband appealed the trial Judge’s orders on the basis the trial Judge’s conclusions as to the entitlements of the parties were wrong. In this respect, the husband sought to adduce further evidence to show the assets were worth substantially more than those as found by the trial Judge.

The wife’s counsel submitted that the trial Judge had not exhausted the powers conferred upon her by s 79 of the Act. The Full Court rejected the husband’s claim that the orders were final orders. At paragraph 45, their Honours noted:

It is clear that further orders need to be made to conclude the proceedings. Whether such orders can include substantive orders pursuant to s 79, or are limited to “machinery” orders, or orders implementing the orders of 30 March 2010, inferentially pursuant to s 80 of the Act, remains controversial.

Their Honours concluded, at paragraph 46 as follows:

In the light of the decision in *Gabel & Yardley* (supra), any distinction between “partial” and “interim” orders for settlement of property is probably more apparent than real. However, the distinction between orders which finally determine proceedings, and orders which do not remains potentially significant, as this case clearly illustrates. To the extent that orders do not finally determine proceedings, they are, at least to some extent, “interim”. We also note, without commenting further on its significance in this case, that the provisions of s 79(2) require the Court to make final orders that are just and equitable.

PROPERTY

***Teal & Teal* [2010] FamCAFC 120**

(Finn, Boland & Dawe JJ)

This case involved an appeal against property orders made by Federal Magistrate Dunkley. The Federal Magistrate found the parties’ property to have a value of \$1,324,725.00 which he determined should be divided as to 51% to the husband and 49% to the wife.

At paragraph 3 of the introduction the Full Court noted:

The Federal Magistrate determined the parties’ overall contribution based entitlements were in the ratio of 66 per cent (in favour of the husband) and 34 per cent (in favour of the wife). His Honour adjusted his contribution assessment by 12 per cent in the wife’s favour for relevant s 75(2) factors. Having found this would result in an overall division in favour of the husband of “54/46” his Honour said, presumably

with reference to the provisions of s 79(2) of the Act “I therefore make a further adjustment in respect of justice and equity of 3%”.

The issue became whether or not the so called fourth step was a discrete step which enabled the Court to make a further adjustment between the parties’ entitlements. At paragraph 68 of its reasons, the Full Court set out the ratio of the decision in *Norman & Norman*. The Full Court rejected the Federal Magistrate’s approach and at paragraphs 70 to 72 said:

70. By implication however s 79(2) requires if the Court is to make an *order* under s 79(1) altering the interests of the parties to the marriage in property, such an *order* must be just and equitable. This legislative imperative is often described as the requirement that a judicial officer “stand back” and look at the reality of the percentage division at which she or he has arrived. That requirement requires consideration of the actual assets to be retained by each party, and may include consideration of the effect when one party is to retain the greater proportion of his or her entitlement in superannuation of the nature, form and characteristics of the superannuation. It is also relevant when assets included for division are “notional” assets or “add backs”, including paid legal fees, or when a business which requires retention of business premises or re-financing is to be retained as part of one party’s entitlement (see *Loude & Loude* [2009] FamCAFC 52).

71 It will often require consideration of whether the percentage adjustment arrived at after assessment of contributions under s 79(4)(a)–(c), and adjustment for relevant factors under s 79(4)(d)–(g) when applied to the actual assets and liabilities requires the making of an order slightly outside the precise percentage arrived at as a result of the statutory imperatives. This exercise has particular relevance when a judicial officer is dealing with modest assets, and/or where the parties’ respective earning capacities are minimal or non-existent. Considerations such as we have just described applied in *Phillips & Phillips* (2002) FLC 93-104, where justice and equity required an order which enabled the wife to retain the matrimonial home rather than the home being sold in accordance with a strict percentage adjustment.

72 In this particular case the Federal Magistrate, at paragraph 55 of his reasons, had not considered the mix of assets to be retained by each party. He did not conduct that exercise until after he had determined to make a further adjustment of an additional 3 per cent in the wife’s favour. His expressed reason for the further adjustment was the husband’s greater earning capacity. That factor had already been taken into account in respect of the consideration of s 75(2)(b), and the resultant adjustment made under s 75(2) in favour of the wife of an additional 12 per cent. On its face, the further adjustment represented a double adjustment for the same factor – the husband’s greater earning capacity.

The Full Court concluded that the Federal Magistrate had fallen into appealable error in making the further adjustment.

They further noted error by the Federal Magistrate in failing to add-back when calculating the parties' entitlements the liabilities to be retained by the husband.

Agius & Agius (2010) FLC 93-442; [2010] FamCAFC 143

(Bryant CJ, Coleman & O'Ryan JJ)

This decision of the Full Court was delivered on 12 August 2010.

The appeal was an appeal against orders made by Federal Magistrate Burchardt under s 79 of the Act. The Federal Magistrate found that the parties had net assets of \$1,073,950.00 and those assets should be divided as to 75% in favour of the wife and 25% in favour of the husband for their respective contributions. The Federal Magistrate found no adjustment should be made under s 75(2).

At paragraph 5, the Full Court noted:

Consistent with the finding that the Wife receive 75 per cent of the net assets and the Husband receive the remaining 25 per cent, the Wife was entitled to \$805,462.50 and the Husband was entitled to \$268,487.50 being a disparity of \$536,975.00. However, the Federal Magistrate made an order that had the consequence that the Wife received an entitlement of \$823,387.50 and the Husband received \$244,588.00. It will be seen shortly that the Husband complains that consistent with the finding that he receive an entitlement to 25 per cent of \$1,073,950.00 the order should have had the effect that he received \$268,487.50

The Full Court found in dealing with the question of initial contribution the Federal Magistrate had misquoted what was said by the Full Court at paragraph 28 in *Pierce & Pierce* (1999) FLC 92-844.

At paragraphs 145 to 148, the Full Court said:

145. We accept that it is not necessary for a trial Judge to justify his or her decision in a property settlement case by reference to precise mathematical calculations. If a trial Judge takes a very broad approach to the figures which were before him or her then an appellant must show that there has been a fundamental and significant error before it can be said that the trial Judge's discretion has been wrongly exercised.

146. As we have observed, the effect of the order of the Federal Magistrate was that the Husband would receive \$244,588.00 whereas the Federal Magistrate found that the Husband should receive an entitlement of \$268,487.50 being a difference of \$23,899.50.

147. We are satisfied that an error was made by the Federal Magistrate and that, in the circumstances of this case, the amount of \$23,899.50 is not an insignificant sum. We accept that the mistake made by the Federal Magistrate could not be described as a minor mathematical error.
148. The mathematical error in this case highlights the importance of the suggested practice of setting out in reasons for judgment the effect of the proposed order in terms of what each party will receive pursuant to the order. This enables a reconciliation to be made with the findings as to the net assets of the parties. It enables confirmation that effect is given to the findings as to the entitlement of each party. Further, it makes it easier to understand what has been done.

The Full Court went on to consider, the other grounds of appeal having been rejected, how it could overcome the error in the Federal Magistrate's calculations. At paragraph 168 of their reasons, the Full Court noted the three ways the error could be corrected, namely, by appeal, by rectification under the slip rule or application under s 79A. The Full Court concluded that they could amend the Federal Magistrate's order by application of the slip rule in the Federal Magistrates Rules (r 16.05(2)(f)).

Sindel & Milton (Aka Sindel) [2010] FamCAFC 232

(Bryant CJ, Strickland & Murphy JJ)

The trial Judge in this case was dealing with the assets of a couple that had been together 26 years. At the time of trial he was 52, she was 50 and their only child was 12. They had shared care of the child. The net property was \$5.5 million. The husband at trial spent a lot of time analysing his superior earning capacity and investment and other business acumen during the marriage, putting strongly to the court his superior financial contributions. The trial Judge found that the husband had historically out-earned the wife by an amount of up to 3 to 1. The wife had a university degree; the husband had two degrees - engineering and masters of business administration. The trial Judge found that, when looked at overall, there was no doubt that the financial contributions in a direct sense of the husband to the acquisition, conservation and improvement of the property were superior to those of the wife. In fact, he was prepared to conclude that the contributions of the parties should be assessed in the proportion of 53% to the husband and 47% to the wife. As the Full Court reflected, that was a disparity in contributions between the parties of 6% or an amount of approximately \$330,000.

Some of the grounds upon which the husband appealed went to the weight which the trial Judge gave to his contributions. In a nice summary of the approach that a court should take in a longer relationship and a reference to the notion of a mutual partnership, the Full Court drew together and restated themes from previous authorities:

72. The High Court in *Norbis v Norbis* (1986) 161 CLR 513 said (per Mason and Deane JJ at 524):-

The Family Court has rightly criticised the practice of giving over-zealous attention to the ascertainment of the parties' contributions, and we take this opportunity of expressing our unqualified agreement with that criticism, noting at the same time that the ascertainment of the parties' financial contributions necessarily entails reference to particular assets in the manner already indicated.

73. In *Aleksovski & Aleksovski* (1996) FLC 92-705 Kay J held:-

90. ...What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.

74. Calculations that might be seen to have a "mathematical" or "accounting" emphasis can, particularly in the context of a lengthy marriage, be prone to mislead

75. An assessment of contributions is not a mathematical or accounting exercise because the assessment required by the Act is "a matter of judgment and not a computation". (*In the Marriage of Garrett* (1984) FLC 91-539 at 79,372; see also *Norbis*.) It is important not to "overvalue" direct financial contributions merely because they can be measured in money just as it is important not to "undervalue" indirect contributions or contributions to the family because they cannot be (commensurately) measured in money.

76. So, too, it is important to give recognition to the fact that the wife's homemaker and parent contributions have themselves contributed to the direct financial contributions made by the husband resulting from his remunerative employment. The income produced from that employment is itself referable to a number of factors, some related to the individual talents and abilities of the husband, some to plain good luck and others societal.

77. A marriage partner can arrive at a particular point (or points) in time at which they earn remuneration (or, not as the case may be) by reason of the contributions made by *each* of the parties across the length of a marriage partnership. So it is here, in respect of the husband's remuneration, significant though it was.

78. In this particular marriage partnership the roles of each of the parties led them to a point where the husband received and made a substantial financial contribution from his employment effort, and the wife made significant contributions by way of income from her

employment, albeit less than the husband, but greater contributions as homemaker and parent.

79. We also refer to what was said by this Court in *Kennon v Kennon* at 84,299:

Marriage involves a myriad of matters, large and small, which go to make up that union and differentiate it from more casual, transitory relationships. It involves sharing the minutiae of daily life, support during good and bad times, care and intimacy. These and other matters are intended to be encompassed by the matters in s.79, the actual balance of those components varying from marriage to marriage. Essentially it is an intimate sharing of mutual but diverse talents for their joint benefit...
[citations omitted]

80. The Full Court there also cited with approval what was said by an earlier Full Court in *Waters and Jurek* at 83,379, namely:

In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests - as individuals and as a partnership. The parties make different contributions to the marriage, which the law recognizes cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Homemaker contributions are to be given as much weight as those of the primary breadwinner.

On separation, the partnership, and the division of roles and responsibilities which it produced, comes to an end. Individually, the parties are left largely in the personal situations that the marriage has assigned to them. However, the world outside the marriage does not recognize some of the activities that within the marriage used to be regarded as valuable contributions. Homemaker contributions, for example, are no longer financially equal to those of the breadwinner. Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon.

81. The Full Court continued - in a passage which resonates with the husband's submissions in the appeal with respect to s 75(2)(b) of the Act:

When the marriage ends, especially where that marriage has been a long one, one cannot separate the parties as individuals from the people they became in the context of the marriage relationship, and the allocation of roles, duties and responsibilities which it entailed. In some cases, an adjustment is called for because it would be unjust for the roles and

activities of a party, which were recognized until separation, and which largely determined or influenced the personal development of that party and the arrangements between the parties, to suddenly count for little, while those of the other party, which were of equal significance during the marriage, to now have a far greater financial impact outside the home - in circumstances where it was the joint decision of the parties that that be the way in which they would conduct their affairs, and where that decision was made in the expectation of the relationship continuing.

The trial Judge's work however was not yet done. Although the husband was unemployed at the time of the trial, the trial Judge made findings based on admissions made by the husband of his future earning capacity, if he "was lucky" he would out earn the wife by a factor of 3 to 1 and if "unlucky" by a factor of 2 to 1.

The trial Judge gave the wife a 3% adjustment for s 75(2) factors, meaning that the overall result was an equal division of the assets of the parties (each of them entitled to in excess of \$2.7 million).

The husband complained about the judge's findings in relation to his earning capacity.

He argued that he was unemployed at the date of trial and "while hopeful", had "no future permanent employment prospects"; that he was at an age that "indicated an early re-employment at a level commensurate with his past earnings was much less likely than the husband's optimistic outlook indicated in his oral evidence" and that the trial Judge had "wrongly determined that the husband's scope of re-employment was greater than that available to the wife who was in secure permanent government employment". The Full Court supported the trial Judge's findings as to the husband's future earning capacity. The husband had done far too good a job in spruiking his superior earning capacity and other business acumen during his push throughout the trial for an adjustment in his favour based on contributions.

***Polonius & York* [2010] FamCAFC 228**

(Boland, Thrackray, O'Ryan JJ)

This property case revisited a factual situation which had some similarities to the well known case of *Farmer & Bramley* (2000) and interestingly focuses on a number of old chestnuts:

1. If waste is alleged, what is the most appropriate place in a four stepped approach to an adjustment under s 79 for it to be taken into account?
2. Is a global or an asset by asset approach more appropriate in circumstances where there has been a long period since separation where there has been a significant change in the asset holdings of one of the parties in that time?

3. In order for it to be appropriate to make an adjustment in favour of a party by reason of s 75(2) factors, does there need to be a connection between the post separation contributions and the marital relationship (at trial the Federal Magistrate relied upon the dissenting decision of Guest J in *Farmer & Bramley*) to assert that such a connection was necessary for there to be a 75(2) adjustment?

The parties lived together for approximately 22 years commencing in 1975. The parties married in 1980. There were two children of the marriage. They separated in 1997 but didn't divorce until 2007.

At the commencement of cohabitation neither party had any assets of significance. The parties purchased the former matrimonial home in joint names. Both parties were in paid employment during the period of cohabitation, save for periods in which the wife was on maternity leave and caring for the children of the marriage full time. At the hearing the Federal Magistrate found that it was a marriage where "both parties contributed in the traditional sense by their employment, their homemaking, and their parenting of the children". Also the Federal Magistrate found that, with respect to the pre-separation period up to 1997, with the exception of \$58,000.00 which the parties received from the wife's mother, neither party made any greater contribution than the other.

In July 1997 the wife became aware that a caveat had been lodged over the title to the former matrimonial home. That turned out to be in relation to a mortgage from 1985 of \$74,000 taken out to cover debts of the husband's which were the subject to a deed of compromise in that amount. The wife had never signed the mortgage and was not aware of its existence. It was at this point that the wife first realised that the husband's management of the family finances led to him being in debt.

At the date of separation, the only significant asset of the parties was the former matrimonial home with equity of approximately \$262,000.00.

In November 1998, after the separation, the Husband became bankrupt pursuant to a sequestration order. The Federal Magistrate found the husband to have liabilities to secured and unsecured creditors totalling close to \$300,000.00.

The Federal Magistrate found that the parties 'conducted their finances separately' after separation in 1997. Both of the wife's parents died in 2000, resulting in the wife inheriting \$281,000.00. In November 1999 proceedings were commenced by the Husband's trustee in bankruptcy against the Wife seeking a sale of the former matrimonial home in order to satisfy the Husband's creditors from his half share in the property. The wife ended up reaching an agreement to pay \$96,000 in settlement of these proceedings, effectively purchasing the husband's interest in the home. The wife purchased two properties, one in 1998 and another in 2001-2 following her inheritance, financed in part by mortgages and in part by loans from her mother.

The Federal Magistrate's Orders

The Federal Magistrate found the contribution based entitlements of the parties to be \$871,697.00 on the part of the wife and \$1,500.00 on the part of the husband. The Federal Magistrate declined to make an adjustment pursuant to s 75(2). The Federal Magistrate's orders had the effect of allowing the wife to keep the entirety of the property pool, save for the husband receiving his \$1,500.00 superannuation. Basically, as the Full Court articulated, the husband received 'virtually nothing, which is what His Honour intended'.

On appeal

Assessment of contributions

The Full Court found that:

In these circumstances, the findings made by the Federal Magistrate would support a conclusion that at the date of separation each party had a contribution based entitlement by reason of their respective contributions during cohabitation. The Wife may have a greater entitlement by reason of the contribution by her late mother of \$58,000.00.... The Wife may also have a greater entitlement because of the payment by her of \$96,000.00 to the Husband's trustee in bankruptcy in respect of debts the Husband had at the date of separation and \$16,279.00 to discharge the mortgage on the title of the former matrimonial home. However, it could not be said that the Husband had no contribution based entitlement.

'Waste'

At trial, the wife submitted that the Husband's debt situation could be found to have been 'wastage' of assets" by the Husband in reliance upon the decision of Baker J in *Kowaliw and Kowaliw* (1981) FLC 91-092.

The Full Court noted the authorities on both conduct and wastage, including *Kowaliw and Kowaliw* (1981) (supra); *Kennon v Kennon* (1997) FLC 92-757; *Sheedy and Sheedy* (1979) FLC 90-719; and *Fisher and Fisher* (1990) FLC 92-127 at 77,846.

The Full Court concluded that:

89. It follows that in certain circumstances financial misconduct or financial misbehaviour may be taken into account in a number of ways. It may be taken into account by the notional inclusion of an amount at step one of the preferred approach to the determination of an application pursuant to s 79 of the Act which was explained in *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC 93-143 or when assessing the contributions at step two of the preferred approach or perhaps when considering the other factors at step three of the preferred approach: see *M and M* [1998] FamCA 42 (1 May 1998).

The Full Court then noted that:

90. In this case, it was not established that there was financial misconduct or financial misbehaviour as we have described above.

The Federal Magistrate made clear at [73] that the evidence did not enable him to “make a positive finding that the [Husband had] acted recklessly, negligently or wantonly”. Thus, it follows that the parties had the benefit of amounts that comprised the secured and unsecured debts of the Husband of perhaps \$241,626.00 (\$139,626.00 plus \$102,000.00): see *Boege and Boege*.

The preceding comments were in relation to the pre-separation period. The Full Court then looked at contributions in the post-separation period.

Asset by asset approach

The Full Court referred to Finn J’s comments in *Zalewski and Zalewski* (2005) FLC 93-241 in relation to the suitability of an asset by asset approach to the assessment of contributions when the period between the parties’ separation and the hearing of their property settlement proceedings is substantial.

The Full Court agreed with Finn J’s comments in that case and concluded:

93. ... In a case such as this, where there was a marriage of long duration and a lengthy period of separation before the hearing of applications for property settlement, during which time significant assets were accumulated by one or both parties, it should indicate that in such circumstances it may be more useful to undertake an assessment of contributions on an asset by asset, or, category of asset by category of asset basis: see *Norbis v Norbis* (1986) 161 CLR 513. However, in this case, that was not the approach the Federal Magistrate adopted when assessing the contributions made subsequent to mid-1997.

The Full Court noted that the Federal Magistrate found that the Husband made no contributions subsequent to the separation of the parties in mid-1997. Their Honours concluded that:

104. ... This finding is incorrect because there was evidence of contributions by the Husband. However, it was open to the Federal Magistrate to find that subsequent to the separation, the Wife made significantly greater contributions than the Husband which included the inheritances she received of approximately \$291,366.00. If his Honour had adopted the approach suggested by Finn J in *Zalewski* then in respect of the category of assets acquired after separation it would have been within his discretion to find that the Wife had a significantly greater contribution based entitlement in respect of these assets.

The Full Court was particularly critical with regard to the Federal Magistrate’s reference to the wife’s “overwhelming and total post-separation financial contributions” serving to “negate any contributions made by the [Husband] during the course of the marriage” and His Honour’s conclusion that the Husband “should not receive any consideration on account of contributions”. The FC discussed the correct approach under s 79 and noted that “it is not an exercise of considering whether the contributions of one party nullify the contributions of the other party”.

The Full Court concluded that:

108. “If the Federal Magistrate had dealt with the matters of contributions in the manner that we have suggested above then this would have resulted in a finding that the Wife made significantly greater contributions than the Husband but not to an outcome that the Husband’s contributions were nullified by those of the Wife.
109. As we have observed, having regard to the evidence, it was within his Honour’s discretion to find that the Wife had a greater contribution based entitlement to the former matrimonial home being the significant asset the parties had at the date of separation. So also it was within his Honour’s discretion to find that the Wife had a greater contribution based entitlement to the assets she had acquired since the date of separation. However, such contributions would not entitle the Wife to the totality of the assets including those that were acquired before mid-1997.
110. In our view, the Federal Magistrate was in error in relation to the manner in which he balanced and assessed the respective contributions of the parties and also in relation to the weight which he attached to the contributions by the Husband.”

No s 75(2) adjustment

The Federal Magistrate made no adjustment in favour of either party by reason of the matters in s 75(2) of the Act and in particular s 75(2)(b). The Full Court noted the ‘enormous disparity in the financial circumstances of each party’ and that, ‘The Federal Magistrate did not clearly articulate why, in the circumstances of this case, given a marriage of 27 years, a cohabitation of 22 years and the significant wealth of the Wife, no adjustment was made in favour of the Husband to reflect the enormous disparity in the financial circumstances of each party.’

The Full Court tried to discern His Honour’s reasons for so doing and conceded some difficulty in the task.

Their Honours noted that:

114. On one view, it appears that the Federal Magistrate made no adjustment because he found that the Husband had no contribution based entitlement. On the other hand, it may be that his Honour was of the view that in considering the matters in s 75(2) of the Act unless a party made a contribution to the property of the parties to the marriage that existed at the date of the hearing, then no adjustment should be made in favour of that party...

Their Honours noted that the Federal Magistrate had relied upon the dissenting judgment of Guest J in *Farmer and Bramley* and said:

82. The dissenting judgment of Guest J has been the subject of considerable discussion and comment. Dr Anthony Dickey QC in ‘Financial relief and nexus with marriage’ (2002) 76 *Australian Law Journal* 287 observed that in *Farmer and Bramley*, Guest J

indicated that in order for a disparity of income and capital to be relevant for an alteration of property interests the disparity must concern circumstances pertaining to the spouses' cohabitation. Kay J, however, was of the view that there need be no causal nexus between the disparity and the marriage itself. Dr Dickey observed that this raised the question of whether the grounds for financial relief under the Act generally should involve a nexus with the parties' marriage, or put another way, the question is whether the provisions of Part VIII of the Act should be read literally, or whether there is always an underlying requirement that the grounds of relief have a clear connection with the parties' marriage: see also Professor Patrick Parkinson, 'Judicial discretion, the homemaker contribution and assets acquired after separation' (2001) 15 *Australian Journal of Family Law* 155; Dr Anthony Dickey QC, 'Property division and disparity of income and capital' (2002) 76 *Australian Law Journal* 223; John Fogarty AM '*Farmer/Bramley, Lynch/Fitzgerald and White* – Is this the Result of 25 Years of Section 79? Let's Start Again' (Paper presented at the 10th National Family Law Conference, Melbourne, March 2002); and Professor John Dewar, 'Contributions outside marriage' (Paper presented at the 10th National Family Law Conference, Melbourne, March 2002).

83. The issue raised by the reasons for judgment of Guest J in *Farmer and Bramley* was not extensively argued before us. However, the circumstances of this case are distinguishable from the facts of *Farmer and Bramley*. In that case the assets that existed at the date of the hearing were all acquired after the separation being a result of the significant lottery win by the husband. In this case, the former matrimonial home existed at the date of the separation and it represents approximately 47 per cent of the assets the parties had at the date of the hearing being \$873,197.00. Even making allowance for the significantly greater financial contributions by the Wife, the Husband made a significant contribution over at least 22 years.
84. The matters in s 79(4)(a), (b) and (c) of the Act deal with the past contributions of the parties to a marriage and the matters in s 79(4)(d), (e), (f) and (g) are concerned with the economic position of the parties. In *Sieling and Sieling* (1979) FLC 90-627, Evatt CJ and Marshall SJ at 78,264 observed that s 79(4) has "both a retrospective and a prospective element". The matters in s 75(2) of the Act are part of the 'prospective element' and are concerned with the economic consequences of the breakdown of a marriage and also any ongoing commitments subsequent to an order pursuant to s 79. For example, it often occurs that an adjustment is made to the contribution based entitlement of a party to reflect an ongoing responsibility to care for children and a disparity in earning capacity and financial resources of the parties: see *DJM v JLM* (1998) FLC 92-816; *Georgeson and Georgeson* (1995) FLC 92-618 and *Doherty and Doherty* (1996) FLC 92-652.

85. A consequence of the adoption of the view of Guest J may be, in the circumstances of this case, that when considering the matters in s 75(2) of the Act, and in particular s 75(2)(b), the only assets which could be considered are those in respect of which it was contended some contributions were made, being the assets which the parties had at the date of separation. Thus, there would be an asset by asset or category of asset by category of asset approach when considering the matters in s 75(2)(b). We do not agree with this approach. In any event, in this case the Federal Magistrate did not even adopt that approach because he appears to have taken the view that the matters in s 75(2)(b) are only relevant if there is a finding that the party who is seeking a further adjustment by reason of the economic consequences of the breakdown of the marriage had a contribution based entitlement. In our view, this was an error.

Franklin & Franklin [2010] FamCAFC 131

(Finn, Boland & Thackray JJ)

The focus of this appeal was whether the trial Judge's division of the parties' assets in the proportions of 67.5 percent to the wife and 32.5 to the husband was outside a reasonable range of discretion. The majority of the Full Court (Boland and Thackray JJ), in finding that the exercise was outside the trial Judge's ambit of discretion, focussed to some degree on the weight given by the trial Judge to the fact of the wife's business being more profitable/of greater value than the husband's business.

Facts of the case

The parties were married for 18 years, cohabited for approximately 20 years and accumulated assets of a value of about \$9 million. Both parties had successful businesses. The wife's business was particularly profitable and more profitable than the husband's. It increased significantly in value from its acquisition cost of \$596,323.00 to its value at the date of trial of \$2,455,000.00. The trial Judge found that both parties made significant direct and indirect financial and non-financial contributions to the welfare of the family up to the date of separation, although the wife's contributions to the welfare of the family exceeded those of the husband by reason of her having the primary care of the children whilst the husband worked abroad and post-separation and also during cohabitation by way of her taking on the large part of domestic duties. The trial Judge found that both parties had worked hard in his or her endeavours and that these contributions were made against a background of mutual decisions, joint endeavour and furthering a joint enterprise. Each assisted the other in ways towards the success of the other's business.

Trial Judge's orders

The trial Judge divided the assets 67.5 percent to the wife and 32.5 to the husband. This was based on His Honour's assessment of the parties' contributions under s 79(4)(a), (b) and (c). No s 75(2) adjustment was made.

The husband had asserted that the contributions should be assessed at 55 per cent in the wife's favour because the parties' contributions were equal other than some contributions made by the wife's parents to the wife's business, for which he conceded a 5 percent adjustment.

Whilst the trial Judge paid careful attention to the parties' respective contributions to assets, he did not purport to deal with the assets on an "asset by asset" basis, but rather adopted a global approach.

The trial Judge looked at the contributions made during the parties' relationship in five distinct periods of their lives.

The trial Judge made a separate assessment of each of the parties' contributions to their respective business endeavours and that he then separately evaluated the parties' respective contributions to the welfare of the family.

The issues on appeal

The main contention of the husband as to the appealable error was that:

- The contribution assessment was flawed because his Honour:
 - ignored or undervalued the partnership aspect of the marriage;
 - placed undue emphasis on the financial product of each party's effort and placed insufficient emphasis on the degree of each party's effort;
 - attributed the financial product of the wife's businesses as the contribution of the wife and the financial product of the consulting business as the contribution of the husband without going to the partnership nature of these endeavours;
 - erred in failing to take into account the husband's post-separation contribution to a particular property.

Having confirmed there is no presumption of "equality" of contributions, and referred to *Mallet v Mallet* (1984) 156 CLR 605, the plurality noted what they perceived to be the "nub of the primary contribution challenge" as:

"...directed to the asserted "separating out" by the trial Judge in his contribution assessment of the parties' respective businesses in circumstances where neither party's case was found to be one which fell into the category of the so called "special contribution" cases. Rather, what is asserted on behalf of the husband is error in treating the wife's significant financial income contributions (which were from a business which it was asserted happened to be more profitable than the husband's business) as inherently worth more than the husband's income contributions from his business. This treatment of the evaluation of contribution is said to ignore, or at least place little weight on, the trial Judge's findings:

- that the parties were looking to build a future together through their joint endeavours;

- that the husband’s business was a successful one due to his hard work in building it up over a number of years;
- that each made their respective contributions in different ways; and
- that the parties generally discussed what was happening in their business and involved each other in important decisions.”

Their plurality noted that “the case presented to the trial Judge was not one where one party by reason of “ability and energy” had established “an extensive business enterprise” and where the other party’s role did not extend beyond the home-maker and parent role.” Their Honours also noted their acceptance that, whilst both parties conducted their separate businesses, they were found by the trial Judge to have done so “to build a future together through their separate endeavours”.

The plurality noted that the trial Judge’s “finding of greater financial contribution by the wife post-separation appears to have been based on both her earnings from the wife’s business and the increase in its value to the date of trial”.

Their Honours noted that they were “unable to discern from the trial Judge’s reasons, when it was accepted before His Honour that contributions until about 1992 were equal, how that situation changed from that time up to separation, other than the contribution made by the wife’s parents, and the wife’s greater contribution to the welfare of the family” and noted the trial Judge’s finding that the parties had not separated and that “every move was a joint decision reached between the parties”. Their Honours further noted that “Nothing about the parties’ endeavours or the conduct of their respective businesses changed substantially until separation. Both continued to conduct their respective businesses, and clearly supported each other in such endeavours.”

Their Honours therefore acknowledged that “although the trial Judge’s reasons recording and analysing the parties’ various individual contributions are detailed, we think there is merit in the submissions of senior counsel for the husband that there was an internal inconsistency in His Honour’s reasoning process. It is apparent to us that the basis His Honour determined the wife’s contributions, apart from her contributions to the care of the children and her parents’ contribution on her behalf, outstripped those of the husband so substantially was his reliance on the higher income, and the use to which that income was applied, by the wife from her business. This is demonstrated by His Honour’s finding in paragraph 186 that “the wife’s financial contributions were greater given primarily the higher income that she was able to achieve through her [...] businesses”.

The plurality also noted that to reach the percentage split they did, the trial Judge “must have also recognised and given weight to the wife’s contributions to the husband’s business endeavours” and that “the overall result of the trial Judge’s evaluation of contribution had the effect of a very significant disparity in the parties’ entitlements at the end of their long-term marriage where there

was acceptance each had worked equally hard in their respective roles throughout the marriage.”

Thus the plurality concluded that whilst “having regard to all of the findings of the trial Judge, that evaluation of contribution, properly conducted, did not lead to a finding of equality of contribution, we are satisfied that the apportionment of assets in favour of the wife, and which led to the wife receiving \$3,158,418.42 more than the husband, was such a significant disparity that it was outside the reasonable range of the trial Judge’s discretion.”

Boland and Thackray JJ concluded that the appeal should succeed on the basis that His Honour’s assessment of the wife’s contributions at 67.5 percent were outside a reasonable range of discretion. On a re-exercise of discretion, the result was altered to 60/40 in the wife’s favour (an additional payment to the husband of \$677,000).

Finn J’s dissent

Justice Finn dissented. Her Honour’s reasoning for rejecting the appeal was that it was not established that the trial Judge’s ultimate assessment of all contributions in the proportions which he assessed, exceeded the “generous ambit within which reasonable disagreement is possible” (a reference, for example, to the judgment of Brennan J in *Norbis* (1986)). Her Honour added that the trial Judge (at least in the circumstances of this case) had to make his assessment and evaluation of contributions without any necessity to have regard to any theory or assumption relating to “the economic or partnership of the marriage relationship”.

SUPERANNUATION

***Kapoor & Kapoor* [2010] FamCAFC 113**

(Finn J)

This matter involved an appeal from orders made by Federal Magistrate Brewster determined by Finn J exercising the appellate jurisdiction of the Court.

The appeal concerned an error in the valuation of the wife’s superannuation which formed the basis of the Federal Magistrate’s property settlement division. Although the appellant wife, who appeared on her own behalf, raised many issues before Finn J, this case is of practical interest in relation to the manner in which Finn J determined the wife’s superannuation interest should be valued.

The wife’s interest in the Commonwealth Superannuation Scheme was contained in a valuation report prepared by a superannuation consultant. At paragraph 85, Finn J noted that by the time the matter was before her it was clear there had been errors in the “inputs” used to preparing the valuation. The difference in the valuation used by the Federal Magistrate and the correct valuation was approximately \$26,000.00.

In re-determining the matter Finn J referred to the difference between the wife's Member Statement and the information in the Family Law Information statement. Paragraph 94 of Her Honour's reasons are important. There Her Honour said:

The Contributing Member Statement, on which the wife relied, is a document which essentially shows what a member's entitlements in the scheme are, particularly on leaving the scheme. The Family Law Information statements serve an entirely different purpose, that purpose being, the valuation of superannuation interest for the purposes of Part VIII B of the Act, that is, for the purpose of property settlement proceedings under the Act. Moreover, such statements are accorded an evidentiary status under Regulation 68B(2) of the Superannuation Regulations. It may be that a Contributing Member Statement might be used for the purpose of preparing a valuation of a superannuation interest for family law proceedings, but in circumstances where a valuation is available which is based on a Family Law Information statement, that latter valuation must be preferred.

In re-determining the matter Finn J indicated she proposed "to accept the valuation prepared by Mr S as at 27 April 2007 on the basis of the Family Law Information statement to that date provided by the CSS".

BINDING FINANCIAL AGREEMENTS

Wallace & Stelzer

(Benjamin J)

Watch out for this decision on the internet. This case involved a challenge to a binding financial agreement. Questions of equitable rectification and allegations of fraud and/or unconscionable conduct were considered. His Honour was also asked to rule on the constitutional validity of the *Federal Justice Systems Amendment (Efficiency Measures) Act (No.1) 2009* (the *Black & Black* amendments). His Honour was of course the trial Judge in *Black & Black*. He found that the Parliamentary amendments, which changed the Full Court's position back to the position taken by His Honour at trial, were constitutionally valid.

SUMMARY DISMISSAL

***Friar & Friar* [2011] FamCAFC 71**

(Finn, Thackray & Watts JJ)

In this case the Full Court discussed the principles applying to applications for summary dismissal.

Facts

The wife sought a declaration under s 78 of the Act the wife and the husband be declared the sole owners of the matrimonial home, which they had shared for 30 years. The joint proprietors of the matrimonial home were the husband and his sister. The wife sought a declaration that the husband's sister held her share on trust for the wife. The sister was successful in her application before the trial Judge to have the wife's case in relation to the declaration summarily dismissed.

The Judge ordered the wife prepare a 'Statement of Claim' in relation to this matter and based his decision for summary dismissal on her position "as pleaded and particularised in her points of claim which was taken to be the foundation of her case". The wife's affidavit material was not therefore considered.

Findings

Finn J gave separate reasons to that of Thackray and Watts JJ. Essentially, Finn J found merit in the Grounds that claimed the trial Judge misunderstood paragraphs 23 and 24 of the wife's statement of claim.

Paragraphs 23 and 24 intended to set out how:

1. There was a common intention
2. The wife acted upon the representations made, to her detriment

Finn J found that the trial Judge improperly stated that monies were spent *before* representations were made, thus improperly concluding that the wife did not act upon the basis of the representations. A proper reading of the paragraphs would show the opposite is true.

Finn J also found that contrary to the trial Judge's conclusions, the wife *did* assert in her statement of claim that the sister made representations to her about her ownership of the property, and that was available on the reading of the material.

Given that the elements of trust were demonstrated in the wife's statement of claim, her application should not have been summarily dismissed.

Thackray and Watts JJ dealt with the grounds of appeal more systematically. They concluded that a number of grounds of appeal which complained about conclusions the trial Judge reached from a construction of the "Statement of Claim" were substantiated. Overall they found that the trial Judge had prematurely dismissed the wife's claim.

Australian Family Law Conference
Singapore
10 - 14 June 2011

A Review of the

Case Law

2010 – 2011

AN UPDATE

The Hon. Jennifer Boland

INTRODUCTION

On a number of previous occasions Justice Watts and I have been privileged to share with you our view of the “highlights” of cases determined, generally by the Full Court of the Family Court of Australia (“the Full Court”), under the *Family Law Act 1975* (Cth) (“the Act”) during the preceding year. As in the previous years, the focus of the paper is to present a relevant and practical update to practitioners. In presenting this paper we commence with our usual caveat that the summary is not an exhaustive one of all important cases determined in 2010/2011, but represents cases which present issues we thought to be of particular practical relevance and interest.

CASES CONSIDERED

For convenience we have grouped the cases to be reviewed under the following headings. We have indicated after each topic who will present their overview of the case or cases.

A. HIGH COURT (J Boland)

- *MRR v GR* (2010) 240 CLR 461
- *Ian Charles Fowell Spry in his Personal Capacity and in his Capacity as Trustee of the ICF Spry Trust v Moylan & Ors* [2010] HCATrans 195 (30 July 2010)
- *SJB v SRB* [2010] HCA Trans 196 (30 July 2010)
- *TH v ERH* [2011] HCA Trans 102 (8 April, 2011; *Harris & Harris* (2010) FLC 93-454
- *Pearce v Gomez and Anor* [2010] HCA Transcript 274 (21 October 2010); *Puddy v Grossvard and Anor* (2010) FLC 93-432

B. DIVORCE (J Boland)

- *Department of Human Services & Brouker* (2010) FLC 93-446
- *Navarro & Jurado* (2010) 44 Fam LR 310
- *Jamine & Jamine* (No 2) (2010) FLC 93-440

C. DISQUALIFICATION (J Boland)

- *Stephens & Stephens (Disqualification)* [2010] FamCAFC 206
- *Batey Elton & Elton* (2010) 43 Fam LR 62
- *Dunwell and Ors & Dunwell* [2011] FamCAFC 2

D. CHILDREN

- (i) **Child Welfare Cases (J Boland)**
 - *Director-General of the Department of Human Services & Tran and Anor* (2010) FLC 93-443
 - *Secretary of Department of Health & Human Services & Ray and Ors* (2010) FLC 93-457
- (ii) **Parenting Proceedings – the Canadian Experience (J Boland)**
 - *Bruni & Bruni*, 2010 ONSC 6568
- (iii) **Interim Parenting (J Boland)**
 - *Marvel & Marvel* (2010) 43 Fam LR 348; 240 FLR 367
 - *Tryon & Clutterbuck* (2010) FLC 93-453
- (iv) **Relocation (Watts J)**
 - *MRR & GR* (2010) 240 CLR 461
 - *Collu & Rinaldo* [2010] FamCAFC 53
 - *Hepburn & Noble* (2010) FLC 93-438
 - *Cowley & Mendoza* (2010) 43 FamLR 436
 - *Edelman & Ziu (No 2)* [2010] FamCAFC 236
 - *Hopkirk & Hopkirk* [2010] FamCAFC 187
 - *Hannigan & Sorraw* [2010] FamCAFC 257
 - *Deiter & Deiter* [2011] FamCAFC 82
- (v) **Parentage Testing (Watts J)**
 - *Brianna* (2010) FLC 93-437
- (vi) **Division 12A (Watts J)**
 - *Farmer & Rogers* [2010] FamCAFC 253
 - *Akston & Boyle* [2010] (2010) FLC93-436
- (vii) **Substantial and significant time (Watts J)**
 - *Vance & Vance* (2010) 246 FLR 122
- (viii) **Use of social research and common knowledge (Watts J)**
 - *Vance & Vance* (2010) 246 FLR 122
 - *Salvati & Donato* [2010] FamCAFC 263
 - *Maluka & Maluka* [2011] FamCAFC 72
- (ix) **Meaningful relationship v the reality of the situation (Watts J)**
 - *Dennison & Wang* [2010] FamCAFC 182

- *Sigley & Evor* [2011] FamCAFC 22
- (x) **Rice & Asplund (Watts J)**
 - *Reid & Lynch* (2010) FLC93-448
- (xi) **Section 118 and Section 114(3) (Watts J)**
 - *Coleman & Hindle & Ors* [2011] FamCAFC 8
- (xii) **Disqualification in Children's cases (Watts J)**
 - *Murray & Tomas and Anor* [2011] FamCAFC81
 - *Aligante & Waugh (No. 2)* (2010) 43 FamLR 423

E. PROPERTY

- (i) **Interim Property (Watts J)**
 - *Lippman & Lippman* (2010) FLC 93-439
- (ii) **Property (Watts J)**
 - *Teal* [2010] FamCAFC 120
 - *Agius* (2010) FLC 93-442
 - *Sindel & Milton* [2010] FamCAFC 232
 - *Polonius & York* [2010] FamCAFC 228
 - *Franklin & Franklin* [2010] FamCAFC 131
- (iii) **Superannuation (Watts J)**
 - *Kapoor* [2010] FamCAFC 113
- (iv) **Binding Financial Agreements (Watts J)**
 - *Wallace & Stelzer* {[2011) FMCA 54
- (v) **Third Parties (J Boland)**
 - *Puddy & Grossvard* (2010) FLC 93-432
- (vi) **Property and a personal injuries verdict (J Boland)**
 - *Dansford & Dansford* [2011] FamCAFC 5

F. LITIGATION LENDING (J Boland)

- *I Limited & Chester and Ors* (2010) FLC 93-456

G. PRACTICE & PROCEDURE (J Boland)

- (i) *Tanner & McShane* [2010] FamCAFC 110
- (ii) **Access to Court file by non party**
 - *Oates & Q and Anor* (2010) FLC 93-451

H. SPECIAL MEDICAL PROCEDURE

- *Re Bernadette* [2011] FamCAFC 50

I. CONTRAVENTION/CONTEMPT (J Boland)

- *Gravis & Major* [2010] FamCAFC 239
- *Rand & Rand* (2010) FLC 93-444

J. COSTS (J Boland)

(i) Section 117AB

- *Child Support Registrar & Kanavos and Ors* [2010] FamCAFC 244

(ii) Personal Costs order against solicitor

- *Re Z (a solicitor) & Limousin* (2010) FLC 93-433
- *Brennan and Shaw and Anor* [2011] FamCAFC11

K. CHILD SUPPORT (J Boland)

- *Jacks & Parker* (2011) FLC93-462

A. HIGH COURT

MRR v GR (2010) 240 CLR 461

This case has been discussed extensively in a number of papers since the High Court published its reasons in March, 2010, consequently we have not included a discussion of the High Court's decision in this paper.

Shortly after the High Court published its reasons Professor Patrick Parkinson and Professor Richard Chisholm co-authored a paper published in the Australian Journal of Family Law ((2010) 24 AJFL 255) in which they submitted that, as a result of the decision in *MRR v GR*, the validity of consent orders made in the Family Court (a superior court of record) may require action to validate them, and consent orders made in the Federal Magistrates Court may be invalid.

The doubt about the validity of consent orders post *MRR* resulted in legislation introduced to the Parliament before the Christmas recess. The *Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Act 2010* commenced on 17 December 2010.

Rather than discuss again the High Court's decision in *MRR v GR* in this paper we have focused on decisions in which the practical application of s65DAA of the Act as explained in *MRR v GR* have been applied (or there has been an asserted failure to comply with the statute)

Spry v Moylan

Ian Charles Fowell Spry in his Personal Capacity and in his Capacity as Trustee of the ICF Spry Trust v Moylan & Ors [2010] HCATrans 195 (30 July 2010)

On 30 July 2010 Heydon & Kiefel JJ dismissed the husband's application for special leave to appeal against the decision of the Full Court (May, Boland and O'Ryan JJ). The Full Court dismissed an appeal by Dr Spry against orders made by Coleman J which permitted the balance of funds due to the wife as a result of property orders made by Strickland J to be paid to her from funds held by her solicitors as stakeholders for the parties.

In the special leave application Heydon and Kiefel JJ noted they were required to consider six questions.

The first question was whether “a trustee of a discretionary trust the objects of which may be treated as including the trustee’s former wife can be compelled by order the Family Court of Australia to pay over to the former wife sufficient assets of the trust in order to satisfy orders for payment of money made against the trustee personally by that Court as to property settlement, interest thereon and costs of proceedings”. Their Honours concluded “[w]hether or not these grounds would be made out on an appeal there is no reason to suppose that the actual orders of the court below were incorrect”.

The second question posed was whether “in circumstances where the evidence demonstrated that a sum held by stakeholders was partly the property of a husband personally and partly his property as trustee of a discretionary trust, the burden of demonstrating what part of the property was the husband’s property lay on a former wife seeking to obtain the husband’s property to satisfy orders in her favour for a property settlement, interest and costs”. Their Honours held that the Full Court did not err in concluding in circumstances where Dr Spry had withdrawn trust property, invested and intermingled it with non-trust property so that the whole of the property was cash, that the burden lay on him to explain who owned which part of the intermingled fund.

The third question posed was whether “the approach taken by the Full Court in rejecting the applicant’s applications for 30 March 2009 and 9 November 2009 to adduce further evidence involved too narrow an application of s.96A(2) [semble 93A(2)] of the *Family Law Act 1975*”. Their Honours rejected this argument finding the decision of the Full Court was a discretionary one on practice and procedure.

Their Honours then considered the fourth question, namely, whether “the power under s.117B(2) of the *Family Law Act* may only be exercised by the Judge making the order for payment of money referred to in s.117B(1)”. Aligned to that question was whether “the approach to the selection of a rate

of interest payable under s.117B(2) taken by the primary Judge was inappropriate". Their Honours said "[w]hatever the answer to these questions, no injustice in the outcome in relation to the rate of interest selected in the Full Court has been demonstrated".

The final question posed for their Honours was whether "and in what circumstances Part VIII AA of the *Family Law Act* 1975 is applicable as against trusts". Their Honours refused to deal with this question saying "[w]hatever the answer to this question, the orders below are correct for reasons other than Part VIII AA".

Accordingly the husband's application for special leave to appeal was dismissed with costs.

The husband has now filed a further application for special leave which remains to be determined by the High Court (SA 23/10 - filed 6/10/10)

***SJB v SRB* [2010] HCATrans 196 (30 July 2010)**

This application for special leave was also heard on 30 July 2010. The application was dismissed by Gummow, Heydon & Kiefel JJ. The issues raised in the special leave application have relevance in both parenting and property proceedings.

The first challenge sought to be agitated before the Full Court was in relation to the single expert rules. Ultimately their Honours declined the special leave application on the basis it lacked utility as the Full Court had allowed an appeal and remitted the matter for rehearing before another trial judge.

In the special leave application a challenge was also made to Division 12A of the Act. Counsel for the father (the applicant for special leave) raised the issue of how the Court deals with a child's views in a less adversarial trial.

The flavour of the discussion between Gummow J and the applicant's counsel suggests that the High Court was interested in the issues raised in the special leave application with their Honours, however, ultimately concluded there was

insufficient utility in a grant of special leave as the matter had been remitted for rehearing by the Full Court.

***TH v ERH* [2011] HCATrans 102 (8 April, 2011 (*Harris & Harris (No 2)*) (2010) FLC 93-454; [2010]**

This application for special leave involved an unusual case under the *Convention on the Civil Aspects of International Child Abduction* (“the Hague Convention”).

The mother, an Australian citizen, asserted she was subject to repeated episodes of domestic violence by the father in Norway. The mother was found by the trial Judge to have wrongfully removed the child (aged approximately 3 at the date of trial – April 2010) from Norway or wrongfully retained him in Australia after January 09.

The appeal against the trial Judge’s orders refusing a return order under the convention was dismissed. The appeal grounds were summarised by the Full Court as follows:

- The first challenge asserted the manner in which the proceedings were conducted was procedurally unfair to the father because:
 - they were conducted on the papers without the father’s knowledge of or consent to that procedure,
 - no challenge was raised by the State Central Authority to the admissibility of evidence relied on by the mother, and
 - findings of fact adverse to the father were made without him having an opportunity to ensure the mother was cross-examined on her evidence

(“the procedural fairness challenge”).

- Secondly, the father asserted error of approach by the trial Judge in considering the application on the basis that if the orders sought in the application were granted, the mother and child would be returned to Norway rather than, as the application and regulations required, considering separately the return of the child to Norway (“the challenge to the trial Judge’s approach”).
- Thirdly, that her Honour erred in making factual findings not supported by the evidence, or based on inadequate or inconclusive corroborative evidence, or erred in accepting the mother’s untested evidence on the topic of domestic violence whilst rejecting other parts of her untested

evidence. Encompassed in this challenge is an assertion that, although her Honour identified the correct standard of proof, she erred in failing to have appropriate regard to that standard (“the asserted factual finding errors”).

- Fourthly, that the findings underpinning her Honour’s conclusions that the child would be exposed to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation if a return was ordered were not made out (“the asserted error in determining ‘grave risk’”).
- Fifthly, a failure by the trial Judge to properly consider appropriate conditions which could be attached to any orders for return of the child (“the conditions challenge”).

In the special leave application it was asserted the Full Court was in error in finding the father had not been denied procedural fairness, erred in finding it was not incumbent upon the trial Judge to have required cross-examination, erred in not considering the return of the child to Norway as a separate issue from the return of the mother, erred in failing to identify and apply the proper principles to be considered in determining there would be an intolerable situation on the child’s return to Norway, and erred in failing to identify and apply proper principles to be considered whether the child could be returned on conditions.

The High Court dismissed the special leave application. Gummow J said “Having regard to the terms of 13B [of the regulations], and the conclusions expressed by the Full Court in paragraphs 149, and in the first sentence of paragraph 150 and 151 to 155 of its reasons, there are insufficient prospects of success to warrant a grant of leave.”

In the paragraphs referred to by Gummow J the Full Court had found that the trial Judge’s finding of an intolerable situation was open on the evidence, that the mother would be without social security benefits, and by reference to the High Court’s decision in *DP v The Director-General* there was no error in the exercise of discretion by the trial Judge in have some regard to the future prospects for the child.

Gummow J then referred to concessions made before trial Judge by the father of violence, and concluded that the natural justice challenge did not require a grant of special leave.

***Pearce v Gomez & Anor* [2010] HCA Trans 274 (21 October 2010)
Puddy & Grossvard (2010) FLC 93-432**

The appeal decision is discussed in detail later in this paper. On the special leave application counsel for the husband submitted that Full Court had failed to deal with the issue of accrued jurisdiction. Gummow J, in rejecting the application for special leave, said “Having regard to the uncertain foundation presented to the Full Court of the Family Court for its consideration of jurisdictional questions, this is not an appropriate case for the consideration of such questions by this Court. Special leave is refused with costs.”

B DIVORCE

***Department of Human Services & Brouker* (2010) FLC 93-446**

In June 2010 the Child Protection Section of the Department of Human Services, Victoria received a report which suggested a girl, then aged almost 14 years, was not attending school. The report also suggested that the respondents to the application intended that she should shortly thereafter be married overseas.

The Department interviewed the child and applied to the Court’s after hours service for orders preventing her from being taken out of Australia. An order to that effect was made by Fowler J on an ex parte basis and the application was then listed before Mushin J. The Department relied on an affidavit from the child’s mother. Also before the Judge was an affidavit from an employee of the Department who asserted it would not be in the child’s best interests to travel overseas to be married as the child did not appear to understand the consequences of the marriage, that she would be deprived of a school education and may be at risk of sexual exploitation and emotional harm.

Mushin J examined the status of the Department to bring the application. His Honour found the child, or her proposed husband, did not satisfy the criteria of marriageable age under the *Marriage Act 1961* and a marriage could not be validly celebrated in Australia. His Honour found that the interim injunction granted by Fowler J should be extended until the child’s 18th birthday but granted leave to the child, or any other person who had standing, to apply to

the Court to set aside or vary the injunction preventing her from being removed from Australia after she attained the age of 16 years.

Navarro & Judado (2010) 44 Fam LR 310

The background facts in this matter are simple. The husband, who lived in Australia, applied for a divorce in the Federal Magistrates Court a few months after the wife had filed for divorce in Costa Rica where she was living with the parties' only child of the marriage. FM Jarrett dismissed the husband's application finding it had been commenced in a "clearly inappropriate forum".

The husband appealed and his appeal was heard by the Full Court of the Family Court (Thackray, O'Ryan & Ryan JJ). The majority, Thackray & Ryan JJ found no merit in the appeal. O'Ryan J, dissenting, determined no appealable error by the Federal Magistrate concluding the Federal Magistrate wrongly applied the test of "clearly inappropriate forum" and "also failed to consider the evidence of injustice that would be caused to the wife by a continuation of the proceedings in the Federal Magistrates Court".

The majority found the wife's application to adduce further evidence should be rejected. O'Ryan J concluded, if it was not for that application, he would have re-exercised the discretion, granted the divorce and made a declaration pursuant to s 55A(1)(b)(ii) of the Act that there were circumstances by reason of which the divorce order should take effect even though the Court could not be satisfied proper arrangements had been made for the child.

In his separate reasons, Thackray J referred to the principles established in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 "as explained in the context of family law litigation in *Henry v Henry* (1996) 185 CLR 571 and also referred to the consideration of *Voth* by the High Court in *Puttick v Tenon Ltd* (2008) 238 CLR 265. At paragraph 29 of his separate reasons, Thackray J said:

I am not persuaded it would have been appropriate for the Federal Magistrate to have become caught up in the argument about delay in the foreign proceedings. The plurality in *Voth*, at 559, and the majority in *Puttick*, at [27], emphasised that the focus must be "upon the inappropriateness of the local court and not the appropriateness

or comparative appropriateness of the suggested foreign forum”. Thus the plurality in *Voth* (at 558) and the majority in *Henry* (at footnote 68) stressed that Australian courts should not concern themselves with “an assessment of the comparative procedural or other claims of the foreign forum”.

One of the appeal grounds was that the Federal Magistrate erred in finding the commencement of the proceedings was oppressive or vexatious. Thackray J rejected that argument and distinguished the facts in the case from those in *Henry*. In the instant case the husband had lived in Australia for many years before filing his application for divorce and the wife also spent some time living in Australia. Notwithstanding these matters he found the Federal Magistrate was right to proceed on the basis that the husband’s application was vexatious and oppressive in the “*Voth*” sense.

Ryan J, as had Thackray J, found there was no error by the Federal Magistrate failing to take into account the husband’s evidence he wished to remarry. In dealing with the ground that the Federal Magistrate erred in finding the proceedings commenced in Australia were vexatious and oppressive, Ryan J explained that, notwithstanding there were already proceedings on foot in Costa Rica, the filing of the Australian proceedings did not necessarily result in an automatic stay of those proceedings. While noting subsequent proceedings are, *prima facie*, vexatious and oppressive her Honour found that the Federal Magistrate had had a regard to a number of factors of which the fact the wife had filed first in Costa Rica was but one.

In dealing with prejudice to the wife, Ryan J rejected the argument that the Federal Magistrate should have found there would be no prejudice to the wife and concluded such a finding would not have been open on the evidence.

O’Ryan J’s judgment contains a comprehensive review of the authorities on the issue of forum. His Honour distinguishes between the English test (the clearly more appropriate forum test) and the position adopted in Australia of the clearly inappropriate test. At paragraph 127 O’Ryan J explained:

The two tests are not identical and the difference lies in the emphasis placed on the appropriateness of the local forum rather than the appropriateness of any available foreign forum. The clearly inappropriate test avoids a mere comparison between the competing

forums and focuses on the extent to which the continuation of the proceedings in the Australian court should be regarded as inappropriate. The question of whether an Australian court is a clearly inappropriate forum requires attention to be directed to the inappropriateness of that court and not to the appropriateness or comparative appropriateness of the foreign forum. As the majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) observed in *Regie Nationale des Usines Renault SA and Another v Zhang* (2002) 210 CLR 491 at 503: “Thus, it should at once be noted that a court is not an inappropriate forum merely because another is more appropriate”.

Later, at paragraph 133, his Honour discussed the decision of the High Court in *Henry*. At paragraph 137 of his Honour’s reasons, his Honour summarised the criteria identified in the non exhaustive list of factors which should be considered to determine whether the Australian court is a clearly inappropriate one. Those included:

- the jurisdiction of the foreign court;
- whether its judgment can be enforced in Australia;
- the stage the separate proceedings have reached;
- the costs incurred;
- the relative connections each party has with the foreign and forum courts;
- the ability of each of the parties to participate in the proceedings in the foreign and forum courts on an equal footing.

O’Ryan J concluded his discussion of the law at paragraph 166 by citing from the current edition of Nygh’s *Conflict of Laws in Australia* as follows:

[I]t seems fairly clear from the court’s emphatic statement in *Zhang* that the primary judge should not weigh the relevant factors against one another. In *Voth* itself, the majority said that the primary judge’s focus should be ‘upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum, a phrase recently repeated with approval by the majority in *Puttick v Tenon Ltd*. Although primary judges occasionally express their conclusions using metaphors of balancing and weighing, the process is not one of weighing those factors that point towards a stay against those that point away from a stay, but rather of assessing whether there are enough factors indicating that the forum is clearly

inappropriate, in which case a stay should be granted. If there are significant factors pointing to the conclusion that the chosen forum is appropriate, *it is immaterial that there may be many factors suggesting that another forum might also be appropriate or even more appropriate.* The factors are not to be weighed to see where the balance lies because that would, in effect, be a *Spiliada*-like ‘more appropriate forum’ test. (footnotes omitted)

O’Ryan J’s dissenting judgment was based on his view the wife failed to establish that the continuation of the Australian divorce proceedings would cause an injustice to her. In summary, his Honour was not satisfied the evidence permitted a finding that the local proceedings were vexatious and oppressive.

Jamine & Jamine (No. 2) (2010) FLC 93-440

The wife filed an application for divorce in the Federal Magistrates Court. On 10 December 2008 Harnett FM granted the application for a divorce order. On 23 December 2008, i.e. prior to the expiration from one month of the granting of the order, the husband filed a Notice of Appeal. On 15 June 2010 O’Ryan J exercising the appellate jurisdiction of the Court dismissed the husband’s appeal with the effect the divorce order would then take effect on 15 July 2010.

On 13 July 2010 the husband filed an application in the High Court seeking special leave to appeal O’Ryan J’s orders. He also filed an application in the Full Court in which he sought orders, including an order “that time be extended when the divorce order will take effect pursuant to s 55(2)(a) of the Act pending the final outcome of the application for special leave to the High Court”. Finn J noted, at paragraph 12 of her reasons, it was doubtful whether the making of such an order was necessary as the word “appeal” in s 55(5) includes an application for leave to appeal. It is important to note that s 55(3) of the Act provides as follows:

- 3) If an appeal is instituted (whether or not it is the first appeal) before a divorce order has taken effect, then, notwithstanding any order in force under subsection (2) at the time of the

institution of the appeal but subject to any such order made after the institution of the appeal, the divorce order, unless reversed or rescinded, takes effect by force of this section:

- (a) at the expiration of a period of 1 month from the day on which the appeal is determined or discontinued; or
- (b) on the day on which the divorce order would have taken effect under subsection (1) if no appeal had been instituted;

whichever is the later.

As her Honour was unable to find any authority which supported the finding that the decree would not become final until one month after the determination of the special leave application, her Honour turned to consider the authorities on the granting of a stay pending special leave and determined, in the circumstances of the case, to make an order staying the operation of the effect of the divorce order until the matter had been determined by the High Court.

C. DISQUALIFICATION

***Stephens and Stephens* [2010] FamCAFC 206**

This was an appeal by the husband against orders made by Strickland J dismissing an application by him that his Honour disqualify himself from hearing any further proceedings between himself and his former wife. At the time of the application there were outstanding applications for costs of the proceedings under s 79 to be determined. The Full Court (Finn, Coleman and Thackray JJ) noted that the background to this matter is extensively set out in the judgment of the High Court (*Kennon v Spry*).

The trial Judge noted in his reasons for judgment that the husband had brought a previous application that he disqualify himself on the basis of reasonable apprehension of bias or actual bias. At the hearing of the appeal the husband qualified his grounds of appeal to limit the grounds to reasonable apprehension of bias rather than actual bias.

The Full Court rejected the basis on which the husband asserted a reasonable apprehension of bias and referred to the two steps relevant to an application for disqualification, namely, the necessity to establish that the judge had said something which might lead to a reasonable apprehension that the judge might not decide the case on other than its legal and factual merits and the establishment of the “logical connection” between the matters identified and “the feared deviation from the course of deciding the case on its merits” (see *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337).

The Full Court found nothing to which they had been referred identified or articulated the relevant connection and thus dismissed the appeal.

***Batey Elton & Elton* (2010) 43 Fam LR 62**

The appeal was an appeal by the wife against orders made by Cronin J (the substantive proceedings before the Court was the wife’s application under s 79A to set aside property orders).

During the proceedings before the trial Judge the wife sought leave to have the assistance of a McKenzie friend. At the commencement of their reasons the Full Court (May, Boland and Strickland JJ) deal with the law relating to the use of a McKenzie friend. The wife’s de facto partner, who had legal qualifications but was not admitted to practise, sought to appear on the wife’s behalf. The Full Court rejected that application although they permitted him to appear as her McKenzie friend. The wife sought that the trial Judge who had listed her substantial application for hearing in the week commencing 8 February 2010 be disqualified for actual bias or on her assertion his conduct led to a reasonable apprehension of bias.

At paragraphs 61 to 66, the Full Court summarised the principles relevant to disqualification for actual or apprehended bias as explained by the High Court in *Johnston v Johnston* (2000) 201 CLR 488; *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Minister for Immigration & Multicultural Affairs: Ex Parte Jia* (2001) 205 CLR 507. Having set out the facts on which the wife relied, including allegations that the trial Judge had shamelessly

badgered her, the Full Court found that allegation was not supported by the transcript and dismissed the application.

Dunwell and Ors & Dunwell [2011] FamCAFC 2

The Full Court dealt with a third disqualification application in 2010 and published its reasons for judgment on 18 January 2011. The trial Judge, Le Poer Trench J, refused an application that he disqualify himself on the grounds of apprehended bias. At the time of the application the final hearing had not been heard but the proceedings were being case managed by his Honour. Earlier applications by the husband had sought an order restraining the wife from continuing to instruct her solicitors to act for her in the property proceedings.

The basis of the application was that the wife's solicitors had corresponded with lawyers in the United States who were acting in matrimonial proceedings for the wife of a business associate of the husband.

In her separate reasons, Finn J noted "In the course of that correspondence the wife's solicitors had in a letter dated 11 May 2009 canvassed the possibility of an exchange of information between themselves and the American Lawyers for the benefit of both wives".

Prior to his Honour determining that application, an application was filed by the wife on her own behalf and also on behalf of her solicitors seeking that the trial Judge further disqualify himself from the proceedings on the basis that statements had been made by his Honour which caused her to be concerned that the husband's application would not be determined fairly by his Honour and that his Honour had formed a view about the matter without hearing all of the evidence.

Senior Counsel for both parties filed written submissions. The trial Judge heard the disqualification application and reserved his decision. Shortly thereafter Le Poer Trench J dismissed the disqualification application and published his reasons for dismissing the application by the wife and her solicitors.

At paragraphs 17 and 18 of her separate reasons, Finn J commented on the assertion that the trial Judge had not dealt with each of the complaints raised by the wife and concluded that the trial Judge's "consideration" of the matters was inadequate (his Honour had referred to and adopted the submissions filed on behalf of the husband and annexed those to his judgment). Her Honour explained at paragraph 18:

However, as I have earlier said, this adverse conclusion regarding his Honour's reasons does not necessarily mean that the appeal would have to be allowed. This is because this Court can consider the material relied on by the appellants and determine for itself whether or not his Honour should be disqualified from further hearing the proceedings for the restraining order in relation to the wife's solicitors. The issue of disqualification of a trial Judge is a matter which appellate courts commonly have to determine.

Similarly to the earlier disqualification cases Finn J in her separate reasons, as did May J, referred to the decision of the High Court in *Ebner*.

While May & Thackray JJ determined that the appeal be dismissed, Finn J determined there was appealable error and then, at paragraphs 49 to 63, set out how she would re-determine the application. At paragraph 51, her Honour when discussing the dialogue which took place between the trial Judge and counsel said:

When regard is had to the observations concerning modern judicial practice made by members of the High Court in *Johnson* (in the paragraph ([13]) which I earlier cited), I consider that his Honour's questions and observations, when read in context, concerning the strength that the letter of 11 May 2009 appeared to give to the case for the restraining order against the wife's solicitors, and the apparent reliance, at least at that stage, by the wife's side only on her affidavit, did not exceed the bounds of legitimate questions and observations by a judge (as referred to in paragraph 13 of *Johnson*). In these circumstances, the fictional lay observer, whose position is to be understood in light of what is said in paragraph 13 of the High Court decision in *Johnson*, could not reasonably apprehend that his Honour might not bring an impartial mind to the resolution of the case for the restraining order in relation to the wife's solicitors. (See also the observations in *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577 of Gummow ACJ at [4] and Callinan J at [173] to [180].)

Her Honour also found that the grounds which asserted undue familiarity between his Honour and senior counsel for the husband were without merit.

D. CHILDREN

(i) Child Welfare Cases

Director-General of the Department of Human Services (NSW) & Tran and Anor [2010] FamCAFC 151

This case which was determined by the Full Court on 20 August 2010, involved proceedings where the Department of Human Services intervened in parenting proceedings between the mother and the father.

The appeal by the Director-General, Department of Human Services challenged the orders of the trial Judge, who made orders under the Act in favour of the Director-General for parental responsibility for major long term decisions for the child (being those decisions set out in s 4 of the Act), that the child should live with the mother and spend unsupervised time with the father. The child was living with foster parents by reason of an interim parenting order made under the Act (not an order made under the *Children & Young Persons (Care and Protection) Act 1998* (NSW) (“the CYP Act”).

I do not propose in this paper to deal with all of the grounds of appeal. Suffice it to say that the appeal was allowed on the basis that the trial Judge had not given appropriate weight to the recommendations of the Chapter 15 expert and had placed undue weight on some matters canvassed in the expert’s oral evidence.

What I propose to discuss is the assertion made on behalf of the Director-General that, by reason of the parental responsibility order made by the trial Judge, his Honour was bound, by reason of s 79 of the *Judiciary Act 1903* (Cth), to apply the relevant State law (CYP Act).

In my separate reasons for judgment I set out, at paragraph 167, the issues which I dealt with raised in the appeal as follows:

In essence the Director-General of the New South Wales Department of Human Services (“the Director-General”), who is the appellant in this appeal, argued that:

- a) Section 79 of the *Judiciary Act 1903* (Cth) (“the Judiciary Act”) required the trial Judge, in making an order for the Director-General to have parental responsibility for the child the subject of the proceedings, to apply the substantive State law (the CYP Act). Applying the CYP Act the responsibility for determining where the child should *reside* vested in the Director-General. Thus it was submitted the trial Judge was in error in making an order the child *live* with the mother;
- b) the parental responsibility order in favour of the Director-General is in conflict with the order that the child live with the mother;
- c) Order 3 [semble Order 5] of the trial Judge’s order is impractical. It was further submitted there was no foundation on which the trial Judge could rely to determine the Director-General had the capacity to implement Order 3 [semble Order 5] of his Honour’s orders; and
- d) the trial Judge erred in determining he could not apply and make appropriate findings under Part VII of the Act, and in particular the provisions of s 60CA and s 60CC, because the identity of the foster carers, with whom the Director-General would place the child if his Honour made an order that the Director-General have responsibility for where the child would live, was unknown.

After considering the terminology used in the Act at various times, I concluded, at paragraph 194, that although aspects of parental responsibility are identified in s 4(1) that parental responsibility was not, in s 61B, defined precisely. At paragraph 199 I concluded as follows:

It appears the legislature has not attempted to constrain the concept of parental responsibility by strictly defining the limits of its ambit. This has relevance when consideration is given to the order made by the trial Judge. It follows that the order made by the trial Judge did not purport to vest unqualified sole parental responsibility in the Director-General, although I note there is some confusion caused by the trial Judge’s reference in paragraph 232 to “[t]he Intervenor’s sole parental responsibility for the child especially in relation to major long-term issues”.

I then summarised the effect of the CYP Act and concluded at paragraph 216 that at the time of the trial Judge’s orders:

- the child was not in statutory “out of home” care;
- although the child fell within the definition of protected person in s 135A(3)(c) of the CYP Act that provision only operated if the Minister had parental responsibility for the child as a result of an

order of the Children's Court or the child was in the care of the Director-General;

- section 164 of the CYP Act had no application because the trial Judge's orders did give the Director-General sole or exclusive parental responsibility for the child.

At paragraph 219 I concluded:

While persons are required, when there is an order for shared parental responsibility which involves major long-term issues, to make a genuine effort to agree about the future parenting of the child, the legislation has not specified choice of a child's housing to be "a major long-term issue". Thus it appears separated parents or a person with whom a child is to live must logically be able to select suitable accommodation for their individual needs and that of the child or children having regard to their financial circumstances, life-style and employment requirements without the requirement of express agreement of the other parent or person. It is only when a geographical move or, using the colloquial expression, a "relocation" is envisaged which would make the child's living arrangements significantly more difficult for the child to spend time with the other parent does a proposed new location of the child's residence fall within a defined area of parental responsibility.

I then went on to consider if I was wrong in my conclusions about the ambit of parental responsibility held by the Minister whether s 79(1) of the Judiciary Act required his Honour to apply any provisions of the CYP Act and, in particular, s 164.

After a review of the authorities (both family law and general law), I concluded, on the facts of this case, it was distinguishable from the factual situation in *Northern Territory v GPAO* (1999) 196 CLR 553 because all of the orders made by the trial Judge were orders under Part VII of the Act. Thus, the terms of s 79 of the Judiciary Act had no operation.

At the conclusion of my reasons I considered whether it is appropriate and possible for a trial Judge to make orders under the Act in favour of the Director-General when the person who will have the day to day care of the child is unknown.

At paragraphs 274 and 275 I said:

The trial Judge's comments in paragraph 247 highlight the difficulties for both the Court and the Director-General in parenting proceedings

under the Act. It is understandable that the Director-General's policies and procedures have been established against the background of the requirements of the CYP Act, not the Act. In respect of proceedings in the Children's Court I note that the Director-General is obliged to submit a care plan when seeking a care order in respect of a child. The CYP Act sets out the criteria for foster carers, the accreditation of foster care providers and the necessary supervision by the Director-General. Thus whilst the qualities of a particular long-term foster carer could not be assessed by the trial Judge, his Honour was able under s 60CC(3)(m) to take into account in a general way that a foster carer selected by the Director-General would have to satisfy the requirements of the CYP Act.

While there is unfortunately a need in respect of some very vulnerable children to consider whether a parenting order should be made in favour of a foster carer engaged by the State, rather than a parent or relative of a particular child, that has not in an appropriate case impeded the Family Court making orders, or the consideration of making orders, in favour of the Director-General in an appropriate case (see *Schmidt & Schott and Ors* [2008] FamCA 447; and *Hennessy & Rhys* [2007] FamCA 160).

***Secretary of Dept of Health and Human Services & Ray and Moles & Ors*
(2010) FLC 93-457**

This interesting Full Court decision arose as a result of orders made by Benjamin J on 31 March 2009. His Honour ordered that the Secretary of the Tasmanian Department of Health and Human Services should be joined as a party to certain parenting proceedings under the Act.

The Secretary appealed. The nature of the proceedings was summarised in paragraph 2 of the Full Court's judgment as follows:

The proceedings in which the orders now appealed were made related to the future living arrangements for a boy, J, then aged 15 and his sister, A, then aged 9, and were between the children's father and his current partner as applicants, the children's mother as respondent, and their paternal aunt as intervenor. It is relevant, having regard to certain of the submissions made to us, to mention that the children's father and mother are, or were, married.

The trial Judge had made the orders because he was concerned at the final determination of the parenting proceedings that none of the parties may be suitable to care for one or both of the children. Prior to making his order the trial Judge had requested, pursuant to s 91B of the Act, that the Secretary

intervene in the proceedings. Counsel for the Secretary subsequently appeared before the trial Judge and informed him that the Secretary did not wish to intervene in the proceedings, that the Secretary was not willing to accept any obligations under any order for parental responsibility made in his favour, and that the Secretary considered any parenting order made would be *ultra vires* the powers of the Family Court.

On the same day, Benjamin J received submissions from the Independent Children's Lawyer and from counsel for the parties, all of whom submitted his Honour had jurisdiction to join the Secretary as a party and to make orders against the Secretary, notwithstanding his lack of consent to intervene in the proceedings.

The Attorney-General for the Commonwealth intervened in the appeal. At the commencement of the hearing of the appeal the Solicitor-General for the Commonwealth informed the Court the Commonwealth had taken the view a constitutional issue was raised by the material prepared on behalf of the Secretary and therefore issued notices under s 78B of the *Judiciary Act 1903* (Cth) to the States and Territories. The Full Court noted "no State or Territory had chosen to intervene".

The first question considered by the Full Court was, whether as a result of orders made in the Hobart Children's Court under the relevant child protection legislation, the appeal was moot (see s 69ZK of the Act).

It was argued on behalf of the Secretary that the appeal was competent because, notwithstanding the child welfare order, as the Secretary remained a party to parenting proceedings, orders could still be made against the Secretary, including orders which could come into effect on the discharge of the State orders.

The Solicitor-General referred the Full Court to r 6.02(2)(d) of the Family Law Rules 2004. The Full Court said:

... Put simply, the Solicitor-General's point was that because the Rules require that a person in whose custody a child has been placed under State law, should be a party to any parenting proceedings

under the Act involving the child, Benjamin J's order, even if erroneous when made, was now no longer erroneous because of the making of the State orders...

The Full Court rejected the argument that the appeal was moot on the following basis:

- Benjamin J's orders for joinder remained in force;
- the orders could or would have operation subject to or after the discharge of the State orders.

In turning to the appeal, the Full Court noted that there would be no purpose in making an order for joinder of the Secretary unless orders could be made about the children absent his consent. The Full Court recited the basis on which Benjamin J had relied for jurisdiction to make the order for joinder (s 91B, r 6.02(1), s 31 in combination with Div 12A of Part VII of the Act and the welfare power (s 67ZC)). The Full Court noted that Benjamin J had concluded if the Court had no power to bind the Secretary under the Act it "probably" had power "to exercise accrued jurisdiction to exercise the *parens patriae* powers of the State Supreme Court".

The Full Court, at paragraph 48, set out the gravamen of the appeal as follows:

The fundamental question which arises out of the grounds when considered overall, and which is formulated in light of the submissions of the Solicitor-General for Tasmania, is whether a court exercising jurisdiction under the Act has the power to make an order concerning a child, in favour of (and thus order the joinder in the relevant proceedings of) a person, who is not "a necessary party" to the proceedings, who does not seek to intervene in the proceedings, and who does not consent to an order being made in his or her favour.

Counsel for the appellant argued that none of the three bases identified by Benjamin J to make the order would provide the necessary power. The arguments advanced on behalf of the Secretary-General of the Commonwealth (who supported the trial Judge's orders) were set out in paragraph 58 of the Full Court's reasons as follows:

Support for the proposition that there is power to make an order binding the Secretary even without his consent, was submitted by the Solicitor General for the Commonwealth to be found: first, in s 65D(1) as applied by s 69ZH; secondly, in s 67ZC, again as applied by s 69ZH; and thirdly, and alternatively, in the *parens patriae* jurisdiction of the Tasmanian Supreme Court, which falls within the accrued jurisdiction conferred on the Family Court by s 31(1)(d) of the Act read with s 69H(1).

It was argued that once one of the parents made an application for parenting orders the Court had power under s 65D(1) to make such parenting order as it thought proper, including an order against a person who is not the applicant and who did not consent. The Full Court noted that the Solicitor-General conceded it would be an extremely rare case where it would be appropriate to exercise the power to make an order in favour of the person who did not consent.

At paragraph 69 of their reasons, the Full Court explained there was no issue before them in a case in which the Secretary has chosen to intervene there would be power to make an order in his favour (see s 91B(2)(b)). Further, the Full Court noted in a case where a child is already subject of a State child welfare order an order can only be made under the Act where the Secretary has consented to the institution or continuation of the proceedings in which the order is to be made unless the order is to take effect when the child is no longer subject of the State orders. The Full Court went on to note that the language employed in s 91B and s 69ZK “were indicative of an intention not to bind the Secretary”.

The Full Court then considered whether the provisions of Div 12A of Part VII in combination with s 31 of the Act provided the necessary source of power for the order made and rejected that proposition. At paragraphs 81 and 82 of their reasons, the Full Court said:

It is, of course, true that the Court can, and does, make orders under the Act against persons who have parental responsibility, but who not only do not consent to the orders, but may have actively opposed the making of the orders. But even then common sense dictates that it would not usually be in a child’s interests for the child to be placed in the care or under the responsibility of a person who did not wish to

assume that care or responsibility. If the legislature had intended that obligations in relation to, and responsibility, for a child could be imposed on persons who do not already have parental responsibility for that child, it is only to be expected that it would have expressed such an intention in clear terms. It has not done so.

We consider that the conclusion we have just reached concerning the absence of power under s 65D(1) (in combination with the other sections relied on by the Commonwealth) to make a parental responsibility order “in favour of” a person who does not otherwise have parental responsibility and who does not consent to that order, applies not only to private persons, but also to a person in the position of the Secretary who has duties and responsibilities in relation to the care of children under State law. Support for the conclusion that an order conferring parental responsibility for a child on a person in the position of the Secretary can only be made where that person is willing to accept such responsibility, is to be found in the decision of the Full Court in *Faulkner and McPherson, CJ v Rugendyke; Department of Community Services* (1995) FLC 92-630.

The Full Court went on, at paragraph 84, to explain that s 65D(1) did not express an intention to bind a State official.

The Full Court then turned to the alternate provision relied on by the Commonwealth Solicitor-General as the source of power for the order, namely, the welfare provision in s 67ZC. Having recorded the Commonwealth Solicitor-General sought to distinguish the instant case from the facts in the *Minister for Immigration and Multicultural and Indigenous Affairs & B and Anor* (2004) 219 CLR 365 the Full Court said, even if the facts could be distinguished from that case, the judgments in the High Court posed “formidable difficulties for any attempt to rely on s 67ZC to support the orders appealed in the present case”.

Having concluded no provision of the Act provided the necessary source of power, the Full Court then discussed reliance on the accrued jurisdiction. The Full Court accepted that there was no claim or proceedings which involved the Secretary under State law and which might form part of the controversy between the child’s parents and other relatives which was pending in the Family Court. Thus, the Full Court rejected reliance on the accrued jurisdiction and dismissed the appeal.

(ii) Parenting Proceedings - the Canadian Experience

***Bruni & Bruni* 2010 ONSC 6568**

This judgment poignantly demonstrates issues in parenting cases heard in superior courts in Canada raise similar issues to those dealt with in Australia.

The trial Judge, Quinn J, noted the parties (Larry and Catherine) married and had two children. A fellow employee of the husband was the best man at the husband and wife's wedding. The best man ("Sam") separated from his wife and obtained custody of their two children. The husband and wife also separated with their children remaining with the wife. Sam and his children moved in with the wife and her children. The husband commenced living in a de facto relationship. His de facto partner had three children.

The trial Judge explained the husband and wife's households were located 1 km apart. The trial Judge commenced his reasons as follows:

Paging Dr. Freud. Paging Dr. Freud.

This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment. (para 1-2)

The trial Judge went on to note that he heard evidence from the parties, their new spouses and an expert who held a Master of Applied Psychology. There was an independent lawyer appointed to represent the children.

At paragraph 10, his Honour noted:

In the midst of this social stew perhaps it is not surprising that Larry and Catherine are having problems, serious problems, regarding the custody of, and access to, their children. The source of the difficulties is hatred: a hardened, harmful, high-octane hatred. Larry and Catherine hate each other, as do Larry and Sam. This hatred has raged unabated since the date of separation. Consequently, the likelihood of an amicable resolution is laughable (hatred devours reason); and, a satisfactory legal solution is impossible (hatred has no legal remedy). (footnotes omitted)

His Honour then commented:

Catherine and Larry were married on October 7, 1995. If only the wedding guests, who tinkled their wine glasses as encouragement for the traditional bussing of the bride and groom, could see the couple now. (para 11) (footnote omitted)

After recording threats made by the wife to the husband that she or her brother were going to get the Hells Angels after him and other threats his Honour said “As can be seen, [the wife] and her relatives are one-dimensional problem solvers”. Later in his reasons, his Honour recorded that there had been difficulties in the husband obtaining access to the children. His Honour explained, at paragraph 48:

Catherine denied access entirely to Larry from some point in January of 2010 up to the commencement of the four-month hiatus in the trial (May-October of 2010). This was a remarkably bold step on her part, taken without reasonable excuse or explanation. Most litigants are on their best behaviour as their trial approaches. Her conduct reflects the lack of respect she has for the legal system and the utter disregard with which she treats Larry’s parental rights. She is a law unto herself. She is also oblivious to her lack of objectivity in matters of access.

He recorded that the husband regularly drove by the residence of the wife and Sam and “often shoots the finger at Sam”, that he had created false Facebook accounts in the name of the wife and similar unfortunate evidence about the wife and Sam. Having recorded the type of matters normally seen in the judgment of the Family Court of Australia concerning the expert evidence and the needs and wishes of the children, at paragraph 131, his Honour said:

Absent counselling, matters will worsen, not improve. No practical purpose would be served if the court were to decree a schedule of counselling for the parties and the children. The hate and psychological damage that now prevail would require years of comprehensive counselling to undo. The legal system does not have the resources to monitor a schedule of counselling (nor should it do so). The function of Family Court is not to change people, but to dispose of their disputes at a given point in time. I preside over a court, not a church.

Having dealt with all of the issues agitated before him his Honour explained, at paragraph 213, as follows:

Despite the involvement of Niagara Family and Children's Services, Ms. Katz, Mr. Leduc and the court, the parties repeatedly have shown that they are immune to reason. Consequently, in my decision, I have tried ridicule as a last resort.

I commend to you the reading of the footnotes which include the following gems:

- [2] At one point in the trial, I asked Catherine: "If you could push a button and make Larry disappear from the face of the earth, would you push it?" Her I-just-won-a-lottery smile implied the answer that I expected.
- [3] I am prepared to certify a class action for the return of all wedding gifts.
- [4] It is likely that, in the period 2004-2006, Larry was having one or more extramarital affairs. Interestingly, Larry's father was married five times, in addition to going through several relationships. Perhaps there is an infidelity gene.
- [7] The courtroom energy level in a custody/access dispute spikes quickly when there is evidence that one of the parents has a Hells Angels branch in her family tree. Certainly, my posture improved. Catherine's niece is engaged to a member of the Hells Angels. I take judicial notice of the fact that the Hells Angels Motorcycle Club is a criminal organization (and of the fact that the niece has made a poor choice).
- [21] A finger is worth a thousand words and, therefore, is particularly useful should one have a vocabulary of less than a thousand words.
- [22] When the operator of a motor vehicle yells "jackass" at a pedestrian, the jackassness of the former has been proved, but, at that point, it is only an allegation as against the latter.
- [23] In recent years, the evidence in family trials typically includes reams of text messages between the parties, helpfully laying bare their true characters. Assessing credibility is not nearly as difficult as it was before the use of e-mails and text messages became prolific. Parties are not shy about splattering their spleens throughout cyberspace.
- [25] I confess that I sometimes permit a lengthier hiatus than the schedule of the court might otherwise dictate, in order to afford the parties an opportunity to reflect on the trial experience, come to their senses and resolve their difficulties like mature adults. It is touching how a trial judge can retain his naivety even after 15 years on the bench.

[26] *The New Shorter Oxford English Dictionary* defines “dickhead” as “a stupid person”. That would not have been my first guess.

His Honour’s footnote at paragraph 47 in dealing with the words “parental alienation” is incisive. It is as follows:

[47] I point out that I am not concerned with “parental alienation” as a psychological or a psychiatric term. My reference to parental alienation is merely factual and reflects the ordinary dictionary meaning of the words: “parental” – “of, pertaining to, or in the nature of a parent”; “alienation” – “the act of estranging or state of estrangement in feeling or affection”: see *The New Shorter Oxford English Dictionary*.

(iii) Interim Parenting

***Marvel & Marvel* (2010) 43 FamLR 348; (2010) 240 FLR 367**

In this case the trial Judge was dealing with a review of orders made by a Judicial Registrar. The mother, who was the applicant for review, had sought orders before the Judicial Registrar in respect of four of the five children of the marriage. The youngest child was disabled. The mother had sought orders that the father’s time with the child be limited and supervised by one of the older children. The Judicial Registrar refused to make orders about the teenage children but made an order that the father spend defined unsupervised time with the youngest child on a Sunday each week pending final hearing.

In his Response to Final Orders the father sought an order for equal shared parental responsibility. The mother did not seek, on an interim or final basis, orders for equal shared parental responsibility in respect of the child. The mother at the review application changed the orders sought by her and ultimately sought that there be no time spent between the child and the father pending release of an expert report some months hence. The trial Judge ordered the father spend time with the child each alternate weekend, including overnight time.

On appeal it was ultimately argued, among other matters, that the trial Judge had failed to consider the presumption in s 61DA. In its decision the Full

Court discusses the fact that s 65DAA is only triggered if an order is made, or proposed to be made, for equal shared parental responsibility. The Full Court went on to discuss the legislative requirements at interim hearings when only narrow issues are to be resolved and said at paragraphs 106 and 107:

106. We have already alluded to the fact that the legislation, after the amending Act, imposes on a judicial officer determining a parenting application, be it interim or final, consideration of a number of provisions of Part VII. We are conscious, particularly for judicial officers determining interim parenting matters in a busy court, such as the Federal Magistrates Court, and where issues may be narrowly confined, or there is only a single issue to be determined, that the requirements of Part VII are onerous, particularly if an order for equal shared parental responsibility has been or is to be made. However the legislation mandates the path which must be followed.
- 107 Although s 61DA(3) should not be applied in a broad exclusionary manner in interim proceedings, it appears to us that it is likely to have greater relevance in matters where a narrow issue is in dispute in interim proceedings, particularly if equal time or substantial and significant time orders are not in issue. The exclusion may also be relevant where there are numerous and complex factual issues which are incapable of determination at an interim hearing. The practical effect of the application of s 61DA(3) is that the task and complexity of decision making on a narrow issue or issues is reduced. However the task still requires some reference to s 61DA(1) and (2) and the giving of reasons, which may be very brief, why it is considered appropriate for the exception in s 61DA(3) to be applied. We accept the task involved in a final hearing when only narrow issues are to be determined, nevertheless requires the legislative path in all its complexity to be followed if an order for equal shared parental responsibility has been or is to be made.

A similar discussion may be found in the Full Court decision of *Treloar & Nepean* [2009] FamCAFC 206.

***Tryon & Clutterbuck* (2010) FLC 93-453**

This interesting appeal was heard before the Full Court of the Family Court at Sydney and adjourned to permit intervention by the Commonwealth Attorney-General. The appeal was an appeal against orders made by Stevenson J. The trial Judge ordered (the case involved issues of paternity) that the mother and her new partner attend on a Family Consultant for the purposes of the preparation of a Family Report. On appeal the mother and her new partner

sought to set aside that order on the basis that the effect of the trial Judge's order was that they were precluded from having legal representation at the interviews conducted with them for the purposes of the s 62G report the trial Judge having refused to so order.

After the Full Court had invited the Attorney-General to intervene in this matter, written submissions were received and the Full Court delivered further reasons for judgment on 12 November 2010.

At paragraphs 8 and 9 of their reasons, the Full Court noted:

The Tryons seek that the trial judge's orders be set aside. The practical effect of the Tryons' appeal is that in the absence of the trial judge's order, they would be able to have legal representation at the interviews conducted with them for the purpose of the preparation of a s 62G report.

Mr Clutterbuck, supported by the Independent Children's Lawyer ("the ICL"), has resisted the Tryons' appeal and sought to maintain the trial judge's order. So has the Attorney-General.

The appellant contended that the order made by Stevenson J requiring them to attend all appointments required by the Family Consultant in the absence of their legal representatives was a denial of natural justice. In his written submissions senior counsel for the Tryons submitted that although a Family Consultant did not sit judicially, or possess the qualifications of a judicial officer, nevertheless he or she performed discretionary functions "sometimes analogous to judicial work". That submission was rejected by the Full Court who expressed the view that a Family Consultant's role pursuant to s 62G is that of an expert preparing a written report in reliance upon his or her expertise and the Family Consultant was not exercising discretion or carrying out a judicial function.

While the Full Court did not disagree with the statement of principle of natural justice contained in the appellant's submissions, namely, the right to be heard and for the hearing to be determined by an independent adjudicator, the Full Court said there was a "a significant distinction between a person or body exercising "decision-making" powers, such as a court or tribunal, and a

person, such as a family consultant, who provides expert opinion evidence to such body for the purpose of its decision-making function” (para 30).

At paragraph 32, their Honours said:

... We do not accept however that the family consultant exercises any “power” in preparing a family report. Nor does the family consultant make “findings” in the sense that the term is applied to judicial determinations. Nor does it follow that the report of a family consultant “will lead” to findings by the court in which the evidence of the family consultant is adduced with respect to the “rights, interests or legitimate expectations” of parties to the proceedings in that court. They may have that result, or they may not. What impact, if any, the report of the family consultant has upon the exercise of a judge’s discretion will only be determined after its author has been cross-examined if the report is controversial, and all other relevant evidence considered. Clearly, the extent to which it emerges in the course of cross-examination of a family consultant that he or she has expressed opinions or recommendations in the absence of affording a party a fair opportunity to be heard is likely to reduce, or even destroy the weight which would otherwise be given such conclusions or recommendations.

In the submissions made on behalf of the Attorney-General, his senior counsel submitted that s 62G contain no express right to legal representation in relation to the preparation of a report.

The Full Court distinguished between the right of a party to legal advice to someone who is to be interviewed by a Family Consultant and having a legal representative present during the course of such interviews. The Full Court re-emphasised the fact that the trial Judge is the arbiter of fact and the Family Consultant is an expert witness, and referred to the decision of Heydon JA (as his Honour then was) in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

In response to a submission by senior counsel for the Tryons that Family Consultants were not trained in law, not trained in the manner of eliciting information and asking questions in a fair and appropriate way, the Full Court said:

With all due respect to senior counsel for the Tryons, we do not accept that family consultants are limited in the various ways asserted in this submission. Family consultants are “officers” of the court

(s 38N(1)(d)) whose functions and obligations are prescribed by s 11A of the Act. Family reports “may” be received in evidence in proceedings under the Act (s 62G(8)), they are not automatically entitled to be received in evidence. The tender of the report may be challenged on the bases identified by senior counsel for the Tryons, or on other bases (e.g. s 135 of *Evidence Act 1995*). The weight appropriate to be given to a family report is that determined by the court hearing the proceedings in which the report is tendered, if it is received in evidence by the court. Quite apart from the overarching requirement of the court to afford parties to proceedings before it natural justice, an ample legislative framework precludes family reports suffering from the defects referred to in this submission adversely impacting upon a party’s rights, without the necessity of the parties being legally represented at interviews for the purpose of preparing such reports.

The Full Court then discussed whether s 11C of the Act (which section deals with admissibility of communications with Family Consultant) supported the appellants’ asserted right to representation, and rejected that submission. Accordingly the appeal was dismissed.

E. PROPERTY

(i) Third Parties

Puddy & Grossvard and Anor (2010) FLC 93-432

This appeal was an appeal by the husband against an order for property settlement made in proceedings between the husband, the wife and the liquidator of a company of which the husband had been a director and shareholder.

The parties married and commenced cohabitation in 1990. They separated in 2004 and were divorced in 2007. In 1999 the husband registered a company through which he conducted a security business. The husband was the sole director and shareholder of the company.

In 1997 the husband sold his security business to a large national security business for \$746,000. The proceeds of the sale of the security business, together with the proceeds of sale of the parties’ former matrimonial home, were used by them to acquire land in a beachside suburb and to construct a home on that land.

The company continued to operate until 2002 when it was put into a members' voluntary liquidation and in December 2003 the company was put into a creditors' voluntary liquidation.

The liquidator intervened in the proceedings for property settlement between the husband and wife. The liquidator asserted that the husband owed the company \$508,947 as a result of "loans and advances made to him either by the company directly or through another corporation controlled by the husband ("R Pty Ltd").

Crisford J calculated the likely quantum of the company's debts to its creditors to be \$250,000. The husband appealed challenging the payment to be made to the liquidator.

The trial Judge had recorded that in June \$332,000 was transferred from a bank account in the name of the company to an account in the name of R Pty Ltd.

After the company had been put into voluntary members' liquidation and then creditors' voluntary liquidation the husband withdrew \$377,241 from R's bank account and deposited those funds into a cash management account in his name. The husband subsequently withdrew that sum.

The trial Judge recorded during his cross-examination the husband indicated he had been told a contingent creditor had one year to make a claim and that he was "not wanting to lose money to the city slickers", the term he used to describe the liquidator. The husband deposed in an affidavit he had withdrawn the money at the rate of \$1,000 a week for his support and that of his dog. The trial Judge found that the husband had removed the money to avoid the liquidators and to minimise matrimonial assets in the property proceedings. Crisford J had noted the liquidator's claim was based on a declaration of solvency in respect of the company which the husband had signed in 2002 in which he claimed \$508,947 was outstanding to the company by way of loans and advances.

The trial Judge discounted the sum to \$250,000 because the liquidator had not completed the liquidation or advertised for creditors.

Counsel for the husband agitated his appeal on the basis that Crisford J had not identified “the relevant indicia, criteria, factors and considerations which the Court was required to consider to determine if the accrued jurisdiction was invoked”.

At paragraph 51 of his reasons, Coleman J noted the trial Judge did not provide specific reasons for concluding she had jurisdiction to entertain the liquidator’s claim (her Honour had referred to the decision of the Full Court in *Biltoft*). His Honour also noted at trial jurisdiction to entertain the liquidator’s claim was potentially sought to be enlivened by s 90AE of the Act. Coleman J found there was nothing to which he had been referred which persuaded him there was necessarily any prohibition upon the Court ordering parties to a marriage to make payments to a third party creditor out of their property, whether in reliance upon the provisions of the Act and/or the Court’s accrued jurisdiction at the time *Biltoft* was decided or subsequent to the enactment of s 90AE in 2003 or the amendments to s 79 which were enacted in 2005.

His Honour went on to note:

... The issue remains whether the jurisdiction to make orders with respect to “debts” in reliance upon s 90AE and/or s 79 extends to determining the existence and quantum of debts asserted by a creditor which are disputed by the alleged debtor or debtors in circumstances where the issue has not been resolved by the judgment of a court of competent jurisdiction. (para 55)

His Honour concluded that s 90AE appeared sufficiently broad to encompass the determination of existing disputed debts but noted the focus of the section was on the rearrangement of existing liabilities.

His Honour then examined s 79(10) and concluded that section would not, of itself, enliven the Court’s jurisdiction to entertain disputed third party claims.

His Honour then referred to s 75(2)(ha), but noted that s 79(10)(a) and s 75(2)(ha) both appeared to refer to a debt which was non-controversial. His

Honour rejected, however, those sections as a jurisdictional basis to entertain the disputed debt claims.

At paragraph 63, his Honour said to the extent it could be inferred the trial Judge had relied on the Court's jurisdiction she was not in error. His Honour went on to note given there was no challenge to the jurisdiction to determine the claim before her it was not surprising that her reasons did not traverse in any detail whether such jurisdiction should be exercised.

His Honour concluded, at paragraph 74, that Crisford J was entitled, in the exercise of her discretion, to entertain the liquidator's claim. Coleman J found that the husband had failed to establish it was not open to the trial Judge to find the husband was indebted to the company to \$250,000 or in excess of that sum.

In their separate reasons, Warnick & Boland JJ agreed with Coleman J:

- there is power in terms of the Act to make an order that a party to a marriage is to pay an amount to a creditor whether the creditor is a party or not; However,
- they doubted that, leaving aside the accrued jurisdiction, there is power to bind a creditor even if a party to the property settlement proceedings to accept in satisfaction of a debt less than the full amount or to determine the merits and quantum of the creditor's claim;
- the principles in *Biltoft* are directed to the question of the right to and prospect of recovery by creditors of the debts not proof of those debts;
- if the husband's case was one which called into question the liability of the husband or wife to the liquidator and determined by the orders made by the trial Judge, those orders could only be supported as an exercise of the accrued jurisdiction (leaving aside any powers contained in Part VIII A of the Act).

Their Honours went on, in paragraph 105, to note their view that on the construction of the case asserted by the husband the order made by Crisford J did not extinguish the company's claims because the debts of the company had not been identified and established at the time of the s 79 proceedings. However, because of the way the case was run before the trial

Judge, Warnick & Boland JJ were satisfied that it was open to the trial Judge to find she should exercise jurisdiction to determine the liquidator's claim.

(ii) Personal injuries verdict

Dansford & Danford [2011] FamCAFC 54.

This case involved an appeal by the husband against property orders made by Rose J. His Honour found the parties' net assets to be \$3,010,257 (including \$554,516 superannuation). His Honour found contributions to the non superannuation assets to be 55 per cent by the husband and 45 per cent by the wife, and contribution to the superannuation assets were equal.

The trial Judge determined there should be a 3 per cent adjustment in the husband's favour in respect of the non superannuation assets under s75(2) and each party retain their own superannuation interests. The husband's superannuation interest was valued at \$38,000 more than the wife's interest. Although both parties sought to retain the matrimonial home, the trial Judge determined this issue in the wife's favour.

In 1999 the husband, who was aged 57 years at the date of the trial, was injured. His injuries resulted in one of his legs being amputated. In September, 2006 he received a damages award of \$1,441,941. The parties separated under the one roof ten days later.

The wife who was also aged 57 at the date of the trial was working in the family business.

The parties had married in 1983. There were three children of the marriage aged 22, 21 and 20 at the date of the trial. The wife also had two children of a previous marriage (aged 31 and 29 at the date of the trial). All of the children lived with the husband and wife during the marriage.

At the commencement of the marriage the wife had savings of approximately \$50,000 and for the two years after the marriage she worked on a part time basis. At the commencement of cohabitation the husband had assets worth approximately \$55,000. He had established a family business. The trial

Judge found the wife's contribution's after the marriage included not only her contributions as homemaker and parent, but that she took over the primary conduct of the family business after the husband's accident working for several years seven day's a week. The wife assisted the husband by attending some medical and legal appointments after his accident and provided substantial care of the husband.

After separation in 2006 and 2007 the wife received bequests of \$59,123. She continued to work in the business in addition to her role as parent and homemaker.

The trial Judge found the husband had received gifts from his mother between 1997 and 2006 of approximately \$45,000. \$40,000 of the sum received had been applied for the benefit of the family.

Post separation the husband met outgoings for the home from workers' compensation payments, and some living expenses of the children. He essentially maintained the capital of the personal injuries claim although he purchased a car for one of the children, and used some funds for his personal needs.

In his reasons the trial Judge explained that it was necessary for him to determine whether the damages received should be treated as a contribution by the husband, or whether it was a joint contribution. His Honour reminded himself of what the High Court had said in *Williams v Williams* (1985) FLC 91-628 to the effect that it may be relevant in some cases to have regard to circumstances relating to the award, but there was no presumption an award should be left out of a determination under s79. His Honour then referred to what was said by the Court in *Aleksovsky & Aleksovsky* (1996) FCL 92-705, namely that in most cases a personal injury claim is a contribution by the party who suffered the injury, but also noted the verdict should not be considered in isolation, but that all contributions made by the parties must be considered.

The Full Court set out the trial Judge's pivotal findings on contribution which in summary were that his Honour found, unsurprisingly, up to the date of the accident that the parties contributions were equal. His Honour found the

contribution of the personal injuries award by the husband constituted the major asset of the parties. His Honour observed there was no “breakdown” of the award as the claim was settled. The trial Judge went on to find that the husband’s post separation contribution (essentially the damages award) had to be balanced against the wife’s financial contributions, and her contribution in her role as homemaker and parent. The trial Judge described the wife’s effort as “Herculean”

In assessing s75(2) factors the trial Judge found the wife to be in good health, but that the husband continued to suffer some residual effects of his accident. His Honour referred to expert evidence which expressed the view the husband would require further surgery to his knee and that he would require some home assistance. His Honour considered the parties’ respective incomes (husband \$1,000 derived by way of interest) (wife \$712 from her income from the business).

In determining that the wife should retain the matrimonial home rather than the husband, the trial Judge was noted to have taken into account the modifications which would be necessary for the husband as a result of his injuries, and the preference for him to have single level accommodation with wheelchair accessibility.

On appeal the husband challenged the exercise of discretion by the trial Judge asserting that his contribution assessment was “manifestly in error” and that the 3 per cent adjustment under s75(2) was inadequate having regard to the husband’s future needs.

The Full Court found that the assessment of contribution up to date of the accident represented a period of 16 years, and the post accident period to date of trial covered a period of 10 years.

The Full Court in dismissing the appeal noted:

- the fact that the contribution assessment which involves comparison on quantifiable contributions and non financial contributions can never be made with mathematical precision;

- the trial Judge’s description of the wife’s efforts as “Herculean” as apt;
- that while some of the members of the Full Court may not have determined the wife’s contributions were as valuable as the trial Judge, the assessment was “within the range”;
- commented on the trial Judge’s assessment of the husband’s contributions to the wife’s children at the contribution stage rather than when assessing matters under s75(2) was not in accord with authority (albeit ultimately concluding there was some ambiguity about the trial Judge’s approach);
- found no error in the s75(2) adjustment; and
- found no error by the trial Judge in failing to give adequate reasons why the wife, not the husband, should retain the matrimonial home.

Having found the appeal was brought bona fide, notwithstanding the husband was entirely unsuccessful, the Full Court decline to make an order for costs of the appeal in the wife’s favour on the basis that she had received an award “at the upper end of the range”.

G. LITIGATION LENDING

I Limited & Chester & Ors [2010] FLC 93-456

The facts in this case are somewhat complex. They are comprehensively set out in the judgment of the Full Court in the first 29 paragraphs of the Full Court’s reasons for judgment.

Put shortly:

- (a) Both the husband and wife borrowed funds for legal costs of their property proceedings from I Ltd. (a litigation lender). The borrowings

were secured by a charge (which under the relevant Queensland legislation was deemed to be an equitable mortgage) over a property ("the H property") owned by the husband and wife as tenants in common in equal shares.

- (b) The proceedings under s 79 were heard by Baumann FM and his Honour published his reasons for judgment on 15 February 2008 but did not make orders on that day. Final orders in the property proceedings were made on 30 April 2008. The orders in broad terms provided that the parties' net assets should be divided between them as to 65% to the husband and 35% to the wife. To effect the distribution the Federal Magistrate's orders provided for the sale of the H property.
- (c) The day prior to the making of the final property orders, consent orders were made between the husband and wife and the litigation lender which provided that from the wife's share of the proceeds of sale of the H property an amount of \$238,641 plus interest be paid into a trust account pending resolution of a dispute between the wife and the litigation lender. The orders further provided from the husband's share of the proceeds of sale of H property an amount of \$116,636.21 plus interest until settlement be paid to the litigation lender. The litigation lender agreed to remove caveats lodged over the title of the property to permit completion of the sale.
- (d) A dispute arose between the wife and her solicitor and in January 2008 she made a complaint to the Legal Services Commission. The wife asserted that she had not received a bill or a trust account statement from her solicitor.
- (e) The H property was sold and realised net sale proceeds of \$877,234.07.
- (f) In December 2009 orders were made in the Supreme Court of Queensland in proceedings between the litigation lender as plaintiff and the wife as defendant. The wife was ordered to pay the litigation lender \$332,337.22 plus costs. The payment of that sum was said to be secured pursuant to the loan agreement between the litigation lender

and the wife over her one half interest in the proceeds of sale in the sum of \$438,617.03.

- (g) A dispute arose between the parties and on 29 January 2010 Federal Magistrate Baumann, by way of machinery orders, made orders as follows:

THE COURT ORDERS ON A FINAL BASIS

1. That the funds held by Woods Hatcher Solicitors be distributed as follows:-
 - a. The sum of \$165,690.37 to the husband.
 - b. The sum of \$332,337.22 to [I Limited].
 2. A declaration that the balance of \$12,155.26 is the entitlement of the wife, subject to the determination of the competing claims of unsecured creditors.
- (h) By the time of the hearing before the Full Court the husband had discharged in full his liability to the litigation lender.

The Full Court explained, at paragraph 19, that the effect of the Federal Magistrate's order of January 2010 was that the litigation lender "was not entitled to recover from the funds held on trust account (the proceeds of sale of the H property) the balance of the share of the Wife's share of the proceeds of sale of property H or any further interest that may accrue subsequent to 22 December 2009 on the amount of the Wife's debt nor their costs as ordered".

There were two appeals, one by the litigation lender and one by the husband. The gravamen of the husband's appeal was explained in paragraph 20 to 23 of the Full Court's judgment as follows:

20. The proceedings, the subject of this appeal, were a dispute between I Limited and the Husband as to who had priority over the net proceeds of sale of property H.
21. I Limited asserted priority pursuant to an equitable mortgage over the Wife's interest in property H and which after completion of the sale comprised one half of the net proceeds of sale in the sum of \$438,617.03. It was not controversial that an equitable

mortgagee's charge over real property also extends to the proceeds of sale.

22. The Husband, however, asserted a priority on the basis that the property settlement order made on 30 April 2008 finally determined the property issues between the Husband and the Wife and asserted, in relation to I Limited, that the claims by I Limited were *res judicata* because of the orders of 29 April 2008.
23. In his reasons for judgment of 29 January 2010 the Federal Magistrate at [27] described it as a "complex dispute" and at [46] as "somewhat complex and convoluted litigation". His Honour found at [53] of those reasons that the orders of 29 April 2008 finally determined the interest of I Limited in the Wife's "35% interest of the nett pool".

It was clear from the Federal Magistrate's reasons of January 2010 that he concluded that the consent orders represented a commercial compromise between the litigation lender and the wife. His Honour further found that the order of the Supreme Court had been made without reference to the prior agreement between the wife and I Limited in the consent order made on 29 April 2008. The Full Court noted the appeal was argued on the basis that what was in issue was whether the consent order constituted a binding contract of variation between the wife and the litigation lender or did the parties merely express consent to the order.

At the hearing of the appeal the husband contended that the wife had an entitlement from the net proceeds of sale of \$344,492.48. The litigation lender claimed to be entitled to \$438,617.03. Clearly the difference between the amount claimed by the litigation lender and the wife's entitlement could only come from the husband's share of the net proceeds of sale if taken from the funds held in the trust account.

The Full Court identified as an issue in the appeal the effect of a consent order. The Full Court noted, at paragraph 163, as follows:

As a general principle, if terms of settlement or compromise of pending proceedings are expressed in a consent order then there is an agreement between the parties for good consideration and it constitutes a new cause of action. The parties are then precluded from proceeding further with the action except for the purpose of enforcing the agreement embodied in the consent order.

The Full Court noted that a consent order could be challenged by way of an appeal, or in the case of an order pursuant to s 79 of the Act by application made under s 79A, including an application by a third party.

Paragraphs 166 to 174 of the judgment set out a detailed examination of the effect of consent orders. It is a thorough review of the authorities on the topic.

The Full Court noted that the litigation lender did not participate in the hearing of the applications for property settlement before the Federal Magistrate and was not given any notice of the final orders. The Full Court noted the position of a third party creditor whose interests may be affected by an order made pursuant to s 79 has now been “put beyond doubt by s 79(10)(a)”.

The Full Court went on to note, however, that the litigation lender was not an unsecured creditor and the equitable charge over real property extended to the proceeds of sale. The Full Court observed that in his reasons for judgment in the s 79 proceedings the Federal Magistrate, although recording that the parties each had a liability for legal expenses exceeding \$100,000, had not discussed how the wife would satisfy her obligations to the litigation lender, nor did he discuss how the sale of the H property could be completed in circumstances where the litigation lender had a charge over the one half interest of each of the husband and the wife in the H property.

At paragraph 191 of its reasons, the Full Court explained there were matters which may support the conclusion reached by the Federal Magistrate that there had been a compromise between the wife and the litigation lender. The matters identified were that the consent orders were made after negotiations between the wife and the litigation lender, that the orders only referred to an amount of \$238,614.41, together with accumulated interest, and did not include enforcement expenses and any other monies which became due and payable.

At paragraph 196 of its reasons, the Full Court set out in a summary way the submissions made by the litigation lender. The Full Court concluded that all the facts and circumstances did not support a conclusion that the consent orders of 29 April 2008 embodied a binding agreement or a conclusion that

they constituted a commercial compromise of the quantum and entitlement of the litigation lender and a variation of its security.

The Full Court further found that the Federal Magistrate was in error in inferring in his reasons that the litigation lender did not wish to be further heard on the final orders because of a commercial compromise of the value and extent of its interest.

At paragraph 231 of its reasons, the Full Court explained its conclusions as follows:

We are persuaded that, in the circumstances of this case, the orders of 29 April 2008 merely expressed the consent of the parties and did not embody and give effect to an underlying contract between I Limited and the Wife and thus the Federal Magistrate did not have the power to, in effect, vary the orders made by the Supreme Court of Queensland. We are satisfied that his Honour was in error.

The Full Court then re-determined the matter on the basis the orders of 29 January 2010 should not have been made and varied the amount to be held in trust. Accordingly, the Full Court ordered that the amount to be paid from the funds held in trust to the husband of \$165,690.37 be reduced to \$71,565.82. This had the result of leaving \$106,279.81 in the trust account pending quantification of the litigation lender's costs.

In his separate appeal, the husband submitted that the Federal Magistrate erred in declining to make an adjustment for a debt due by the husband in respect of a business so that the debt would be paid from the monies held in the solicitor's trust account in accordance with the final orders. The husband submitted this should occur because the wife was nominated under the orders to assume the liabilities of the business, and assume responsibility for and indemnify the husband against any claims, actions or demands against the business. The Federal Magistrate had declined to make any adjustments in the proceeds of sale for what was a contingent debt and had said that if there was such a debt it could be recovered by the husband from the wife by enforcement of the relevant order.

The Full Court found no error by the Federal Magistrate in so determining and dismissed his appeal.

H. SPECIAL MEDICAL PROCEDURE CASE

- ***Re Bernadette* [2011] FamCAFC 50.**

This appeal had some unusual features. The parents of a young person in her teens filed an application before the trial Judge seeking orders under s67ZC (“the welfare power”) that the child be entitled to and receive hormonal treatment to block the onset of puberty. The treatment was for transexualism (or Gender Identity Disorder). The trial Judge made final orders and published his reasons for those orders in January, 2010. In that month the child turned 18. There had been earlier proceedings about the child in 2005 and the trial Judge considered that any further findings were declaratory only.

The following month the parents filed a Notice of Appeal. Subsequently the child “Bernadette” was, by consent, granted leave to intervene in the appeal. The gravamen of the parents’ appeal was that the procedure was therapeutic, and provided the child had sufficient understanding and intelligence to enable him to know what was proposed, that the parents could lawfully consent to the treatment, and the consent of the Court was unnecessary. The parents also argued that the treatment was not a special medical treatment as defined in s175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

The trial Judge determined that the treatment proposed was treatment which fell outside the area of parental responsibility, and should be determined under s67ZC.

On the appeal the parents argued that the decision in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) FLC 93-175 was wrongly decided. In support of their argument they relied on *SMB & JWB; Secretary, Department of Health and Community Services* (1992) 175 CLR 218 (“*Marion’s Case*”)

An application was filed in the appeal by the Director-General, Department of Human Services (“the Director-General”) seeking summary dismissal of the appeal on the basis the appeal was moot because Bernadette was now 18. The Director-General argued that the Court was being asked to engage in an academic or hypothetical exercise in effect being asked to give an advisory opinion. The Full Court accepted that argument but in the course of so doing made a number of interesting and relevant observations about Part VII, particular, s67ZC, and the nature of gender identity disorder.

The Director-General’s argument was based on the assertion that the Court lacked the relevant jurisdiction to hear the case because Bernadette was 18. The nub of the argument advanced was that under the *Constitution* (placitum (xxii) of s51 (the matrimonial causes power which includes the guardianship of infants) the word “infant” should be given its contemporary meaning of under the age of 18, not the meaning at the time of the *Constitution* which was under the age of 21 years.

In dismissing the appeal as incompetent the Full Court (Bryant CJ and Strickland J with whom O’Ryan J agreed) took into account the following matters:

- An appeal to the Full Court is not an appeal *stricto sensu* but an appeal by way of rehearing;
- The Act does not define “a child” relevant to a particular age, but certain provisions of Part VII limit the Court’s jurisdiction to children under the age of 18 (s64B(2), s65(H)(1) (a))
- The High Court’s finding that s67ZC is not itself a source of power, and is dependent upon some other provision in Part VII creating a matter within s75 or 76 of the Constitution to which the claim under s67ZC can attach.

- The Court's role is one which is essentially "supervisory of parental responsibility"
- Found it unnecessary to decide whether an order under s67ZC is a parenting order.
- Concluded that the Court's powers to make an order under s67ZC is limited to children under the age of 18 years.
- Confirmed "It is the function of the courts to decide real disputes; not, as the authorities make clear, to "determine abstract questions of law"

I PRACTICE AND PROCEDURE

(i) *Tanner & McShane* [2010] FamCAFC 110

This case involved an appeal against an order made by Cole FM whereby the Federal Magistrate dismissed an application by the mother to revisit the question of her being allowed to participate by video link in the final hearing of the parenting proceedings.

The father had filed proceedings in the Adelaide Registry of the Court.

The parties had commenced their relationship in Tasmania where the child, the subject of the proceedings, was born in May 2009. They moved to South Australia in September 2009 but at the end of November 2009 the mother returned with the child to Tasmania where she and the child remained at the time of the filing of the father's application and at the time the appeal was heard. The matter was listed for final hearing in Adelaide on 25 May 2010.

On 1 April 2010 the mother filed an application seeking she, her witnesses and counsel be permitted to appear by way of video link at the hearing on 25 May 2010. In support of her application the mother, in her affidavit, deposed that she had made enquiries of the Legal Aid Commission of Tasmania and the Legal Services Commission of South Australia and neither would pay her travelling costs or those of her legal representatives to

Adelaide. She further deposed if her case was not conducted by video link counsel would need to be briefed in South Australia by way of a grant of aid from the Legal Services Commission of South Australia.

The father opposed the mother's application which was dismissed by the Federal Magistrate.

In his reasons for judgment, the Federal Magistrate referred to the need to observe a witness, but he did not make any reference to the issue of the mother's legal representation.

In May 2010 the mother filed a further application because she had, subsequent to the Federal Magistrate's first decision, been informed that the Legal Services Commission of South Australia had determined she was not eligible for legal aid. The mother also deposed she had been refused funding for a trial in Adelaide by the Legal Aid Commission of Tasmania. The Federal Magistrate rejected the mother's further application to appear by video link.

The Full Court (Finn, Thackray & Strickland JJ) found merit in the mother's third ground of appeal which was directed essentially to his Honour's failure to consider the mother's position in relation to legal representation and consequently inadequate reasons for his decision to dismiss her application. However, the Full Court considered that the Federal Magistrate was entirely correct in his conclusion on both occasions in finding that if the mother gave evidence by video link she could well be prejudiced because of the limitations in the technology and it would be in her own best interests to attend a trial in Adelaide in person where she could be clearly observed.

The Full Court found, given the importance of legal representation to the mother (and indirectly to the child), that the appeal should be allowed and that the Full Court would re-determine the matter.

After discussions with the parties the Full Court noted it was agreed that the trial could proceed with the mother in Adelaide but with her counsel conducting her case by video link from Tasmania to Adelaide. Accordingly, the Federal Magistrate's order dismissing the mother's application was varied

(ii) Access to Court File by Non Party

Oates & Q and Anor (2010) FLC 93-451

The wife appealed an order made by Cohen J granting access to the Court file in respect of property proceedings between the husband and wife to the husband's new de facto partner (a solicitor). The de facto partner sought the file for the purposes of defending herself in a complaint made by the wife to the Office of the Legal Services Commissioner.

The Full Court (Finn, Thackray & Strickland JJ) dismissed the appeal.

The decision to permit access to the file was originally made by a Registrar who gave notice of her decision to the husband and wife.

The wife filed an application to review the Registrar's decision and Cohen J permitted access to the file subject to an undertaking to the Court that the de facto spouse not use any information or a copy of any document obtained from such search for any purpose other than to defend herself from the complaint to the Legal Services Commissioner.

The Full Court referred to r 24.13 of the rules which deals with the right to inspect or copy a Court file. That rule limits the right to search a file to the Attorney-General, a party, a lawyer for a party or an independent children's lawyer or with the permission of the Court, a person with a proper interest in the case or in information obtainable from the Court record in the case.

The Full Court then referred to s 121 of the Act (the section restricting publication or dissemination to the public, or a section of the public of any account of proceedings or part of proceedings under the Act).

The trial Judge found that s 121(9), which section overrides the privacy provisions for a body responsible for disciplining members of the legal profession or persons concerned in disciplinary proceedings against a member of the legal profession, was wide enough to permit access.

The wife's complaint that the trial Judge had commented that r 24.13(3) was *ultra vires* was found by the Full Court to be a misstatement and that although the trial Judge had expressed doubt about the rule his Honour had considered relevant matters under it.

The Full Court, however, found the rule in its entirety was a valid rule of Court being a matter of practice and procedure made under s 123 of the Act by a majority of judges of the Court. The Full Court rejected the wife's claim that the primary judge had acted without jurisdiction or that his conduct gave rise to an apprehension of bias.

At paragraph 100 of its reasons, the Full Court referred to the decision of the High Court in *Hearne v Street* (2008) 205 CLR 125 and said:

In *Hearne v Street* at 155 the High Court recognised that the common law rule of non-disclosure, without the leave of the Court, of court documents (which have not come into the public domain through production in open court or otherwise) can be the subject of Rules of Court. In the Family Court, Rules of Court have been made and of course leave was given here pursuant to those Rules.

The Full Court concluded it was clearly open on the material available to conclude that the husband's de facto spouse was a person with a proper interest to have access to and copy the file.

Having referred to previous appeals where orders which had been made for copies of judgments to be provided to third parties as valid orders of the Court the Full Court, at paragraph 108, said:

In this case, we are not satisfied that there is any merit in the wife's submissions with respect to the restrictions or prohibition pursuant to s 121 on the dissemination of accounts of proceedings under the Act. The wife has not established that the trial judge erred in concluding that the use to which the wife sought to put the documents on the court file was not prohibited by s 121(1). In any event, we agree with his Honour that the OLSC falls within the exception created by s 121(9), particularly subs (9)(b) and dissemination of material to the OLSC would not be prevented by the operation of s 121.

I. CONTRAVENTION/CONTEMPT

Gravis & Major [2010] FamCAFC 239

This was an appeal by the mother against orders made Dunkley FM in contravention proceedings brought by the father. His Honour found the mother had contravened parenting orders on seven occasions and that the contraventions should be treated as “more serious”. The Federal Magistrate required the mother to enter into a \$5,000 bond to comply with the orders for 18 months and made orders for makeup time. He also ordered the mother to pay the father’s entire costs of the proceedings of \$22,162.50.

The appeal was upheld by the Full Court (Boland, Thackray & O’Ryan JJ). The judgment is important as it re-emphasises the necessity to deal with asserted contraventions individually and not on a global basis.

In their reasons, the Full Court referred to the scheme of Div 13A of Part VII of the Act and, in particular, to the explanation of that division by Finn J in *McClintock & Levier* (2009) FLC 93-401 and to the earlier Full Court decision in *Dobbs & Brayson* (2007) FLC 93-364.

The Full Court in upholding the challenge that his Honour was in error in finding the breaches were more serious observed at paragraphs 160 to 162:

160. Dunkley FM’s reasons expose no consideration of the individual breaches, nor does he consider the overall circumstances in which the breaches occurred, including confusion by both parties in respect of some weekends at the commencement of school terms. His Honour’s reasons for treating the breaches as “more serious” appear to overlook the extent to which the father did have time with the children, albeit not always on the dates to which he was entitled under the Court order. We have earlier acknowledged that orders must usually be obeyed when parents are unable to agree on a change in arrangements, but we have also noted that a flexible approach by parents is likely to be in the best interests of children.
161. His Honour’s lack of adequate reasons on this topic, which we note were not oral, but reserved written reasons, was no doubt compounded by the global manner in which he dealt with the contraventions (see *McClintock & Levier* per Finn J at [66]).
162. Our review of the evidence in this case does not satisfy us that his Honour’s conclusion that the breaches were “more serious” was open to him. In our view, the individual breaches each could well have been found to fall within the characterisation of

“less serious”. In saying this we note that the father was seeing the children on a regular basis including block school holiday periods. In our view, this was a case where orders for a post separation parenting program, and/or with compensatory contact could have assisted the parties to understand and comply with their obligations under the orders. Further the misunderstanding or the problem between the parties as to the weekend the father was to resume seeing the children after school holidays had been effectively dealt with by the variation to the consent orders made by Donald FM on 2 October 2008, and there had been compliance with the varied orders.

***Rand & Rand* [2010] FamCAFC 167**

This appeal occurred as part of longstanding litigation between the parties arising initially from applications for property settlement heard and determined by Rowlands J.

The husband filed appeals against the orders of Collier J. His Honour found that the husband was in contempt of orders of the Court and sentenced him to two terms of imprisonment to be served concurrently.

Senior counsel for the husband argued that the order which founded the contempt application was an order by way of mandatory injunction. It was asserted the order was ambiguous and therefore could not be relied on to found the contempt charge.

The relevant order was Order 3 of the orders of Rowlands J and provided as follows:

3. [a]nd Declared that the Wife (subject to Order 11 hereof) is entitled to one half of any profits arising out of the patents or other intellectual I property relating to the conversation [sic] of waste material to building products and further order that the Husband account and (subject to Order 11 hereof) pay to the Wife on behalf of any profits received in respect of the intellectual property of the various companies known as [NR] Technology Pty Limited, [NR] Corporation, [B] Pty Limited and related entities.

Senior counsel for the husband relied on a number of authorities and, in particular, to the UK decision in *Redland Bricks Limited & Morris* [1970] AC 652. In their reasons their Honours referred to the decision in *Owston*

Nominees (No 2) Pty Ltd v Branir (2003) 129 FCR 558 where Allsop J (as his Honour then was) was concerned with an order which was ambiguous.

The Full Court concluded that the orders of the trial Judge who heard the property proceedings (Rowlands J) were ambiguous. The Full Court, at paragraph 124 of its reasons, discussed the other remedies which had been available to the wife to enforce Rowlands J's orders but went on to note, in paragraph 125, having elected to proceed pursuant to s 112AP of the Act the wife "accepted the obligation to prove each and every element of her application beyond reasonable doubt".

The Full Court found that in order to find the conviction proved the trial Judge had imported a number of words into the order itself and thus determined the husband's guilt by reference to obligations which the order did not create.

At paragraph 128 of its reasons, the Full Court said:

Implicit in our conclusion as to the proper approach to construction of the trial Judge's order, is our acceptance of the submission of senior counsel for the husband that, had the husband raised the uncertainty challenge which has been raised before this Court before the trial Judge, other evidence could not have been adduced to meet that challenge.

Thus, the Full Court found that the conviction must be set aside.

The Full Court then went on to deal with the second charge of contempt which arose from orders made by Judicial Registrar Loughnan (as he then was) at the conclusion of contravention proceedings.

The Full Court found, for the reasons given in respect of Order 3 of the orders made by Rowlands J, that the contempt charge based on Loughnan JR's orders was also subject of appealable error as Loughnan JR had required the husband to comply with Order 3 of Rowlands J.

J. COSTS

(i) Section 117AB

Child Support Registrar & Kanavos & Ors [2010] FamCAFC 244

This was an appeal by the Child Support Registrar against orders made by Altobelli FM refusing to make an order for costs in support of the Child Support Registrar at the conclusion of enforcement proceedings.

The matter was dealt with by me as a single judge exercising the appellate jurisdiction of the Court.

The Federal Magistrate had been invited, in written submissions filed on behalf of the Child Support Registrar, to make an indemnity costs order under s 117AB, or in the alternative, costs under s 117 at the scale applicable under the Federal Magistrates Court Rules.

I have referred to this case because it involves a discussion of the effect of s 117AB of the Act. That controversial section of the Act was introduced by the *Family Law Amendment (Shared Responsibility) Act 2006*. The section is mandatory in its terms where the criteria in the section are established.

Section 117AB provides:

- (1) This section applies if:
 - (a) proceedings under this Act are brought before a court; and
 - (b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.
- (2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.

In my reasons, I referred to the decision of Cronin J in *Charles & Charles [2007] FamCA 276*, namely, that s 117(1) must be read as subject to s 117AB. I also agreed with the reasoning of Ryan J in *Sharma & Sharma (No 2) [2007] FamCA 425* where her Honour explained the application of s 117AB is mandatory provided the criteria in that section is satisfied.

I thereafter dealt with what is required to establish that a party to the proceedings has knowingly made a false allegation or statement in the proceedings and concluded there was a necessity for a conscious mental element involved in the making of the statement.

At paragraph 87, I determined as follows:

I am comfortably satisfied that his Honour's detailed and careful findings meant that he found the father had both lied to the Court by knowingly giving false evidence about the operations of W Pty Ltd, and his income. Having made these findings it was mandatory for his Honour to apply s 117AB. Thus his Honour was in error in his explanation that s 117AB "provides some further guidance about when a costs order should be made" without considering the requirements of that section in light of his findings. Accordingly I am satisfied that the Registrar has established appealable error and that his Honour's order dismissing the application for costs must be set aside.

(ii) Personal costs order against solicitor

- ***Z (a solicitor) & Limousin (2010) FLC 93-433***

This appeal was an appeal against orders made by Guest J. The trial Judge ordered that the wife's solicitor personally pay 60% of the husband's costs on an indemnity basis for certain days of the parties' property proceedings under s 79 of the Act, together with costs on a party/party basis in respect of a number of other applications. The trial Judge additionally ordered the solicitor pay indemnity costs of the wife's unsuccessful application that the trial Judge be disqualified from further hearing the matter and all party and party costs incurred by the husband in preparing written submissions in support of his application for costs.

Background

The substantive proceedings between the husband and wife commenced in 1988. Between February to December 2002 numerous orders were made for discovery. In December 2002 the parties' legal representatives submitted the matter should be fixed for trial in the long causes list.

Shortly prior to the commencement of the trial applications were made by senior counsel before the trial Judge seeking to adjourn the proceedings and for further discovery.

On 28 March 2003 Mr Maxwell QC (as his Honour then was), appeared for the wife and initially sought an adjournment of the trial to commence on the following Monday. However, he subsequently conceded the matter should proceed on the date set for trial.

On the eighth day of the trial another application was made for the trial to be adjourned. Subsequent applications were made during the course of the trial that the trial Judge disqualify himself from further hearing the matter.

At the commencement of his reasons, the trial Judge noted the husband's financial statement disclosed he had assets of about \$3,750.00 and debts of \$2.5 million. The wife's claim as articulated before the trial Judge was that she should receive a payment by way of property settlement, spousal maintenance and a child support departure application. The trial Judge dismissed the wife's application for property settlement and also her departure application. His Honour ordered that the husband pay the wife the sum of \$1,907.00 per calendar month for a period not to exceed two years by way of spousal maintenance.

The judgment of the Full Court is important because it discusses the circumstances in which a personal costs order may be made against a legal practitioner, with particular relevance to proceedings under s 79 of the Act.

Before the Full Court it was argued on behalf of the solicitor that findings of the trial Judge based on his in-court observations of the wife without the solicitor being given the opportunity to respond to the trial Judge's observations, constituted a denial of natural justice. It was further asserted that the trial Judge's findings that the litigation was conducted by the solicitor for an improper purpose was not established on the evidence. The Full Court found merit in each of these challenges but concluded the trial Judge's exercise of discretion in making the ultimate orders under s 117(1) was based

on the continuation of the proceedings by the solicitor with disregard of any proper consideration of the prospects of success.

At paragraphs 48 to 62 of their reasons for judgment, the Full Court reviewed recent authorities and set out the principles to be applied when a costs order is made against a solicitor. In particular, their Honours referred to the decision of French J (as his Honour then was) in *Ex Christmas Islanders Association Inc and Others v Attorney-General (Cth) (No 2)* (2006) 233 ALR 97. Their Honours summarised the circumstances in which a personal costs order could have been made against a legal practitioner in paragraph 62 of their reasons as follows:

Thus we conclude in this case a costs order could have been made against the legal practitioner if the proceedings:

- (a) were commenced with little or no chance of success, but for an ulterior purpose; OR
- (b) were commenced or continued with disregard of any proper consideration of the prospects of success.

Their Honours also highlighted and adopted the observations of French CJ in *Ex Christmas Islanders Inc and Others v Attorney-General* saying at paragraph 61:

We also with respect adopt the observations of French CJ at paragraph 30 of his reasons. There his Honour said:

A solicitor or counsel may conceive of himself or herself as advancing the public interest or some moral cause in pursuing particular proceedings. Whether acting in the public interest or to advance a moral purpose, whether charging the highest fees or acting pro bono and whether counsel or solicitor, legal practitioners have a duty to the client and to the court to be competent in their conduct of legal business.

In dismissing the appeal the Full Court found no error in his Honour's conclusions that the solicitor's undue protraction of the proceedings alone was sufficient to justify the costs order made, and that the solicitor's overall conduct of the proceedings demonstrated failure to adhere to r 19.10(a), (c) and (d). Their Honours concluded their reasons at paragraph 203 as follows:

The third identified basis which supported the making of an order was, in our view, clearly established in the findings of the trial Judge. We have already explained that we found merit in the submission of senior counsel for the husband that Order 1, being limited to 60 per cent of the husband's assessed costs for specified days on an indemnity basis reflects his Honour's conclusions that the solicitor's conduct in maintaining the proceedings with disregard of their prospects of success was the core finding on which that order was based. It is implicit in that order, and having regard to paragraphs 23, 24, but particularly paragraph 95, of his Honour's reasons, the recognition that, at least up to the commencement of the hearing, or perhaps some little time after the proceedings actually commenced, they may have appeared not to be utterly hopeless. But it was the failure of, or disregard by the solicitor, a very experienced practitioner in the jurisdiction, to conclude that the proceedings had no prospect of success, and his failure to advise discontinuance, or for him to withdraw from them, within a reasonable time, which justified the order. No error having been established in respect of that serious finding, notwithstanding the errors we have identified, the appeal should be dismissed.

(iii) *Brennan & Shaw & Anor* [2011] FamCAFC 11.

Before the Full Court was an application by the wife for leave to appeal, and if leave was granted, to appeal against two interlocutory orders made by Fowler J. His Honour, was hearing a claim by the husband against the wife and her former solicitor for costs of parenting proceedings. The orders the subject of the proposed appeal were first an order permitting inspection of the wife's file, and secondly against the admission of documents from that file in the costs hearing.

His Honour determined that the wife had waived her privilege in respect of her family law file. His Honour did this on the basis of an affidavit filed by the solicitor in which he said that "I have obtained the [wife's] consent to waive her privilege in respect of my evidence in this affidavit" and "At all times in the proceedings I acted on the instructions of the [wife]. At no time did I take any significant step in the proceedings without her instructions. She was copied in to all correspondence and given written court reports by my staff".

The wife raised two substantial issues before the Full Court. First she asserted she had been denied procedural fairness. Secondly she argued the

solicitor's assertion he was acting on instructions could not give rise to a claim for waiver of privilege.

The procedural fairness point arose in circumstances where the wife, who appeared on her own behalf, asserted she had not been afforded the opportunity to be heard on the question of whether or not she had waived her privilege (see s132 of the *Evidence Act 1995 (Cth)*).

The Full Court found that the wife's claim of denial of procedural fairness was established. Their Honours (Coleman, Thackray and Ainslie-Wallace JJ) found even if the wife had knowledge of what was to occur in the Court on 22/23 April (the husband's application for costs was listed for directions on the question of production and inspection of the solicitor's file on 22 April, and the costs hearing against the solicitor was heard on 23 April) the trial Judge had a duty to give her the opportunity to be heard on the question of the waiver of her privilege. The wife did not appear on those dates which had been arranged by the husband in correspondence with the trial Judge's associate. The wife had informed the associate she could not attend because of the short notice given to her, and the husband, having initially told the wife it was necessary for her to attend, then sent an email advising "your attendance is not required tomorrow".

Of the practice of communicating with the trial Judge's associate by email the Full Court said:

It is appropriate at this point in our reasons to comment on the practice of communication with a judge by email to his or her associate. It places the associate in an unenviable position of having to pass on messages from counsel or, in this instance, a party to the trial Judge and, at least in this case, it resulted in the relisting of the matter. In our view, the practice obscures rather than promotes justice which should be conducted in open court, on the record where one can have confidence that all parties understand what is happening. Clearly, when the email correspondence in this matter is considered, the wife was left in the dark, not knowing whether the hearing of 23 April 2009 was to proceed and not knowing whether she was required to attend on the 22 April 2009.

In dealing with the waiver point the Full Court said at paragraph 66 "The solicitor's assertion that he was acting on instructions could in no way give rise to such a claim in the context to which we have just referred. In our view,

the call for the file in these circumstances amounted to no more than a fishing expedition”

At paragraphs 72 to 73 of their reasons the Full Court explained the basis that the wife’s ground of appeal in respect of waiver succeeded. Their Honours said:

It is relevant to bear in mind that the privilege is that of the wife and it must be she who waives it. There could be no question of the solicitor having the authority to waive it on the wife’s behalf because he was no longer acting for her.

That the wife made no claim that the solicitor acted outside his instructions, is in our view, an important feature when considering the context of the asserted waiver. The wife had not purported to deflect a claim for costs against her by alleging that the solicitor acted without instructions. She was not using her privilege as a shield, nor as a sword against the husband’s claim for costs. Her conduct was consistent with the maintenance of her privilege.

We are of the view that on the evidence before the trial Judge, the bare assertion by the solicitor in paragraphs 3 and 11 of his affidavitcould not amount to a waiver by the wife of her privilege in relation to the solicitor’s file and his Honour was in error in finding that it did

The Full Court made orders preventing the use or dissemination of the material obtained as a result of the trial Judge’s orders pending further order.

CHILD SUPPORT

- ***Jacks & Parker (2011) FLC 93-462***

This was an appeal against orders made by Federal Magistrate O’Sullivan. The Federal Magistrate granted the application of the husband, and dismissed the response of the wife.

The Full Court (Thackray and Strickland JJ) allowed the appeal and remitted the matter for rehearing before another Federal Magistrate. Bennett J in her separate reasons agreed the appeal should be allowed and with the orders proposed by their Honours. However her Honour took the opportunity to point out that as the Federal Magistrates Court is a “high volume” court that the reopening of the matter by the husband to adduce further evidence, had the effect of increasing the burden on the judicial officer, and found in the

circumstances the Federal Magistrate's appeared to have become "distracted" by what "he and husband's lawyer perceived to be the boldness of the wife's failure to disclose [a lump sum received from a claim against her former lawyers]"

The applications before his Honour were an application by the husband seeking to vary a child support agreement so as to require the wife to pay the whole of the school fees for the parties' youngest child until he completed his secondary education backdated to the start of the 2007 academic year.

In her response the wife sought that the child support agreement be discharged, that there be a nil assessment against her in respect of the parties' youngest child, and an order that the husband pay the whole of the child's school fees. Additionally, the wife sought that the husband pay adult child maintenance in respect of one of the parties' children, who was a tertiary student, until she completed her tertiary education. It was not in dispute that the parties had agreed to enrol the children in a private school. However the wife had given notice to the school that she intended to withdraw the youngest child as she could no longer afford to pay the school fees.

The underlying conflict between the parties arose because they had, at the time they finalised property matters with consent orders under the Act, also entered into a child support agreement which was registered with the Child Support Agency ("the CSA") in respect of their three children.

At the time the child support agreement was registered with the CSA the three children were living in an equal time "week about" arrangement with each of the parents. The wife had been assessed to pay child support of approximately \$7,700 per year. The agreement provided it was to replace any administrative assessment against the wife, and the wife was to pay one half of the children's school fees. The agreement did not provide who was to pay the remaining half of the school fees! Although the wife assumed that the husband would pay the other half of the school fees, shortly after the

agreement was entered into the husband told the wife he would not pay the other half of the school fees.

The wife originally commenced proceedings in the Family Court seeking to seek aside the property orders under s79A and to vary the child support agreement. Although Brown J dismissed the wife's applications she found they were brought in good faith. The wife then commenced proceedings asserting negligence against her former solicitors who drafted the child support agreement. The proceedings were settled and the wife received a net sum of approximately \$35,000.

The wife paid all of the school fees for all three children from 2003 to 2006. The eldest child finished school in 2005, had a gap year, and then commenced her tertiary education. She lived with the husband with until she commenced university when she commenced to live independently.

The Federal Magistrate in his reasons noted that he intended to apply the provisions of the assessment Act in force in 2006. There was no objection to that course raised in the appeal. In the course of so doing his Honour referred to the then s98(1) of the assessment Act. The section empowered a court to discharge, suspend, revive or vary a registered child support agreement in the same manner and same circumstances as it could discharge, suspend revive or vary an order of that kind made by it. The Full Court noted however that the Federal Magistrate had not referred to sub-section (2) of s98 – this sub-section provided if “any difficulty arises in the application of subsection (1) in or in relation to a particular proceeding, the court exercising jurisdiction in the proceeding may, on the application of party to the proceedings, or of its own motion, give such directions and make such orders, as it considers appropriate to resolve the difficulty”.

Later in his reasons the Federal Magistrate was noted by Thackray and Strickland JJ to have referred to the provisions of s117 of the Act, and to the three stage process his Honour believed he had to follow. Their Honours

observed the Federal Magistrate was critical of the wife for failing to disclose the negligence claim (although she did discover her bank statements which disclosed the deposit of the settlement funds into her account).

The Federal Magistrate was noted to have found a change of circumstance which justified the order the husband sought was because the youngest child was moving to live with the husband.

Thackray and Strickland JJ explained that, as they had found error of principle, which they discussed later in their reasons, that leave should be granted to appeal the Federal Magistrate's orders in respect of the child support agreement. (It will be remembered that there is no automatic right of appeal to the Full Court in a child support matter, and such an appeal can only be brought if leave is granted).

Their Honours' reasons set out with particularity the relevant provisions of the assessment Act then in force, and they note that the wife's application was brought under s129 of the assessment Act, but the Federal Magistrate had not mentioned that section. (s129 enables the court to discharge suspend or vary an order made under s124). Section 124 of the assessment Act enables a court to make an order that child support is to be paid by the liable parent in a form other than periodic amounts paid to the carer of the child (in the instant case the payment of the private school fees). Thackray and Strickland JJ found his Honour's approach to the application was in error.

Their Honours pointed out if the Federal Magistrate determined to vary the agreement, then he was bound to have regard to the criteria in s129(3) which criteria are not identical to those in s117. Their Honours' went on to note that the wife's damages claim was a material matter which should have been disclosed, and did not find error in the Federal Magistrate's findings in respect of the wife's credibility. However, their Honours explained that the Federal Magistrate was obliged to assess the credibility of each party, and found he had failed to assess the veracity of the husband's evidence.

In examining the effect of s98(2) the Full Court agreed with Brown J that this section was not an independent source of power to make a child support order. However, their Honours departed from Brown J's reasoning in respect of the definition of "liable parent" for the purposes of the assessment Act. After tracing through the complex statutory provisions, their Honours at paragraph 206 said:

It will be noted that the categorisation of a parent as a "liable parent" arises out of the acceptance by the Registrar of an application for child support. The description is unrelated to the outcome of the application. Thus, a parent against whom an application for child support is made becomes a "liable parent" immediately upon the acceptance of the application by the Registrar. That parent remains a "liable parent" even if the assessment that ultimately issues is a "nil" assessment.

Thackray and Strickland JJ found the errors which infected the child support application were equally applicable to the adult child maintenance application (that is, that the Federal Magistrate had failed to assess the veracity of the husband's financial information) and that appeal should be allowed.