

## **FAMILY LAW UPDATE**

### **The more important 2005 cases**

#### **PALM COVE JULY 2006**

**MICHAEL PAUL**

1. *Hunt and Zuryn* (2005) FLC 93 – 226
2. *W and W (abuse allegations: unacceptable risk)* (2005) FLC 93 – 235
3. *Bolitho and Cohen* (2005) FLC 93 – 224
4. *Spiteri* (2005) FLC 93 – 214

### **Hunt and Zuryn (2005) FLC 93-226**

This case raised a number of interesting issues which frequently perplex practitioners in property settlement matters, these were:

1. The weight to be given to the initial contributions;
2. Lump sum child support; and
3. The quarantining of a particular asset in a property matter.

This was a 10 year relationship with 2 children aged 12 and 8 at the time of the hearing which was some years after separation.

There was agreement that the husband's initial contribution was almost 85% of the parties then assets and that during the course of the relationship the pool of assets had grown from \$300,000 to nearly \$1.2 million.

It was clear that the wife had during the relationship that "*spanned more than a decade and involved the raising of 2 children...made significant contributions to the welfare of the family both as a homemaker and parent and considerable non-financial contributions*".<sup>1</sup>

The Full Court considering these matters concluded that an appropriate assessment of the contributions should not have exceeded 67.5% on behalf of the husband (contrasted with his almost 85% initial contributions) and the Court took the view that:

*"such an assessment ought adequately recognise that much of the parties wealth can be attributed to the capital growth in the assets by the husband at the commencement of the marriage but at the same time bring into consideration the myriad of other contributions each made in the course of their relationship"*.<sup>2</sup>

In coming this conclusion the Court which one would regard as a fairly strong Court (Kay, May and Boland JJ) considered that the Trial Judges finding as to contributions being 75% in favour of the husband and 25% in favour of the wife was because His Honour concluded that the difference between the husband's and wife's initial contributions could not be seen as "insignificant or inconsequential".<sup>3</sup>

The Court reached its view after noting that ultimately the final contribution assessment is "very much a matter of the subjective opinion of the Trial Judge...the authorities on appellate interference speak of the generous ambit with which a reasonable disagreement is possible"<sup>4</sup>.

In coming to its conclusion the Full Court really only considered one of the leading cases on initial contributions. This was *Pierce*<sup>5</sup>. It will be remembered that in *Pierce* the husband's assets at marriage were \$226,000 and at the trial the pool was \$320,000 and that the Full Court on appeal had evaluated the husband's contribution in a 10 year marriage as to 75%

---

<sup>1</sup> Hunt and Zuryn (2005) FLC 93-226 at 79,730 (para 45)

<sup>2</sup> IBID

<sup>3</sup> IBID, 79,729 (para 41)

<sup>4</sup> Norbis(1986) FLC 91-712

<sup>5</sup> (1999) FLC 92-844

in favour of the husband. This did include some further post separation contribution to the children.

## WHAT ARE WE TO MAKE OF THIS?

It seems to me that the Court has in this matter made a very generous assessment of the weight to be given to the Husband's initial contribution.

It may be that the end result was obtained because of the nature of the assets which were largely real estate and that it was capital appreciation that brought about the result.

In an appropriate case it might be able to argued that a initial contribution which required ongoing and substantial "nourishing" by the party originally introducing the assets might produce a different result – depending on which party did the nourishing.

Nevertheless a discount from 85% to 66.5% over 10 years was probably about right.

Indeed the Court said:

*"a very significant part of the parties wealth as at the date of the hearing could be seen to be attributed to the capital growth of the properties **rather the physical effort that each of the parties had put into improving them**"<sup>6</sup>.*

## THE CHILD SUPPORT ISSUE

The Trial Judge in this matter was held to be error in that he failed to have regard to a number of matters set out in Section 117 of the Child Support Assessment Act.

What the Trial Judge did was to purport to exercise the child support power "albeit that he was doing under the guise of a property order"<sup>7</sup>.

The discussion of the relevant principles in the interplay of the Child Support legislation with Section 79(4)(g) of the Family Law Act ("the Act") was unfortunately all too brief.

Section 79(4)(g) requires the Family Court to take into account in determining what orders should be made for alteration of property interests, any child support that a party has provided or is to provide or might be liable to provide in the future.

It is by no means clear how such consideration will effect any property order.

The Child Support departure provisions contained in Section 117 can oblige the Court in exercising its jurisdiction under the Child Support legislation to have regard to any payments or transfer or settlement of property under the Act or otherwise.

There is power under Section 124 of the Act to enable the Court to make an Order for the provision of Child Support otherwise in the form of a periodic amount. The section is in these terms.

If the Court finds that such an order should be made then Section 125 of the Act allows the Court to make a lump sum order, but:

---

<sup>6</sup> 79,730 (para 43)

<sup>7</sup> 79,736

***“125(1) The Court must state in the order whether the Child Support ordered to be provided is to be credited against the liable parents liability under any...assessment...that relates to the period or part of the period to which the Order has an effect”***

and subsequent subsections give the Court a discretion in this regard.

The Full Court held that the trial judge was in error in that the trial judge dismissed the application for a departure order and purported to order a lump sum of \$40,000. However by doing that the process His Honour employed was flawed because in dismissing the application for departure order “the nil assessment remains valid”.<sup>8</sup>

The Full Court went on to say “off setting the \$40,000 against any future assessments will effectively mean that the husband’s liability to support the children for the remainder of their dependency will be pegged in sum of \$40,000”<sup>9</sup>. This is in my submission by no means clear given the ability of a party to make an application at any future time for departure or variation.

What was not spelled out by the Full Court but which seems me to be appropriate is that before the court can make an order for a lump sum payment it has to be satisfied in a number of respects. Section 124 of the Child Support (Assessment) Act give the Court power to make Orders other than in the form of periodic amounts. This includes but is obviously not limited to Lump Sum Orders. The Court is to have regard:

1. The Administrative Assessment;
2. Any Departure Order;
3. Whether there is a pension involved; and
4. Then it must determine whether it is “just and equitable” and otherwise proper to make the Order.

Ordinarily a Lump Sum Order is not made for fairly obvious reasons. It is a pity that the Court in that case did not go further and lay down some rules for Lump Sum Orders. Ordinarily one expects that they will only be made where there is a history of default. There was a history of default in this case which may have well have justified the making of the Lump Sum Order.

## **THE QUARANTINING OF AN ASSET**

The quarantining of an asset in the assessment of a property order is a process that is usually embarked upon at the stage of determining what the assets of the parties for the purpose of division might be i.e. stage one of the four stage process enumerated in *Pastrikos*<sup>10</sup> and confirmed in *Hickey*<sup>11</sup>.

What His Honour did was to examine the assets of the parties and in particular their original contributions by excluding from his consideration of the equation a property which the husband had held as tenants in common in equal shares with sister at the commencement of the marriage. The Trial Judge arrived at his determination of the parties initial contributions by excluding from the equation in assessing the parties respective initial contributions this particular property and looking at the assets at the conclusion of the marriage as what they were less this particular property.

---

<sup>8</sup> 79,735

<sup>9</sup> 79,735

<sup>10</sup> (1980) FLC 90 – 891

<sup>11</sup> (2003) FLC 93 – 143

Obviously appeals have to be considered by the Full Court having regard to the manner in which the proceedings were approached by Counsel at the Trial. There is accordingly no criticism of this approach by the Trial Judge which seems warranted by reason of the fact that the Husband's Property was something which one could regard as well outside the atmosphere and efforts of the marriage having been something more or less akin to having been inherited. Indeed not much is said about this property in the course of this judgment other than to recognise that its value and effect was excluded.

### ***W and W* (Abuse allegations: unacceptable risk) (2005) FLC 93-235**

An order had been made for supervised contact by a father to the only child of the marriage aged 4.

It was asserted on behalf of the mother that the child had made various statements to the maternal grandmother, the mother and to a social worker which led them to believe that there was a possibility that the father had been “sexually abusive or sexually inappropriate to the child when she was aged 3”. The allegations were continuously and vigorously denied by the father.

The Trial Judge held:

1. That on the balance of probabilities a finding that the father had sexually abused the child **could not be made**.
2. That **there was an unacceptable risk** of sexual abuse to the child if she were to have unsupervised conduct with her father.

The Full Court reviewed the authorities and noted that the Court was required to examine principles relevant to the child sexual abuse cases with particular emphasis on:

1. What is meant by an unacceptable risk;
2. The potential cessation of a significant or meaningful parent/child relationship;
3. The appropriateness or otherwise of supervised contact and the nature of supervised contact.

The Court recognised the development of the law in this regard and noted that the High Court had made an unambiguous statement in *M and M*<sup>12</sup> that a Trial Judge should not make a positive finding of sexual abuse “unless the high standard of certainty referred to *Briginshaw* is discharged”.<sup>13</sup>

It was then necessary for the Court to consider what was meant by “**unacceptable risk**”. The Court recognised the serious effect upon a child of sexual abuse whilst at the same time noting problems that can occur where false allegations are made.

The Court’s core finding appears to be as required by *M and M* that the “ultimate and paramount issue to be decided in proceedings ... for parenting issues” may be summarised as follows:

1. The ultimate and paramount issues to be decided in proceedings... in relation to a child is whether the making of the Order sought is in the interests of the welfare of the child;
2. The fact that the proceedings involve “an allegation that the child has been sexually abused does not alter the paramount or ultimate issue... although the Court’s findings on the disputed allegation... will have an ...impact on the resolution of that issue”.

---

<sup>12</sup> (2003) FLC 93-192

<sup>13</sup> (1938) 60 CLR 336 – see Section 140 of the Evidence Act (Commonwealth).

3. It is a mistake to think that the Family Court is under the same **duty to resolve in a definitive way** the disputed allegation of sexual abuse as a Court exercising criminal jurisdiction would be if it were trying the party for a criminal offence.

The Court went on to say that proceedings in relation to children are not disputes inter partes or definitive of or enforcing a parental right but “*the Court is concerned to make such an order...which will in the opinion of the Court best promote the interests of the child*” and that the Court should give very great weight to the importance of maintaining parental contact.

The resolution of the an allegation of sexual abuse against a parent is subservient and ancillary to the Court’s determination of what is in the best interests of the child...the Court’s consideration...can not be diverted by the supposed need to arrive a definitive conclusion of the allegation of sexual abuse.

The Court reviewed with approval the *Briginshaw* standard and stated that “the Court should not make a positive finding that the allegation is true unless so satisfied accordingly to the civil standards of proof (however with due regard to the *Briginshaw* factors).

Whilst this is now embodied in Section 140 of the Evidence Act it is as well to restate what Dixon J as he then was said in *Briginshaw*:<sup>14</sup>

*“The seriousness of an allegations made, the inherent unlikelihood of an occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect references.”*

The High Court noted in *M v M*:

- That it did not follow that if an allegation of sexual abuse is not made out that such conclusion determines the wider issue which confronts a Court called upon to decide what is in the best interests of a child.
- That there will be many obvious and different results where a Court will either accept or reject the proposition but “there will be very many cases... in which the Court **cannot confidently make a finding** that sexual abuse has taken place.
- There are strong practical family reasons why the Court should refrain from making a positive finding...unless it is impelled by the particular circumstances of the case to do so.

The High Court then went on to lay down the principles applicable to “risk” noting that in deciding what is in the “best interests of child” the Court is frequently called upon to assess and evaluate the likelihood of various events which affect a child’s well being.

As the Court said:

*“The existence and magnitude of the risk of sexual abuse **as with other risks of harm** to the welfare of the child is a fundamental matter to be taken into account and deciding “issues” relating to the child.”*

---

<sup>14</sup> (1938) 60 CLR 336 at 362

That is, that that particular risk is something which the Court must evaluate along with other matters concerning the raising of the child. The Court noted various prior efforts to define with greater precision the magnitude of the risk which will justify orders which interfere with contact as with:

1. “risk of serious harm;”<sup>15</sup>
2. “an element of risk” or “an appreciable risk;”<sup>16</sup>
3. “a real possibility;”<sup>17</sup>
4. “a real risk;”<sup>18</sup> and
5. “an unacceptable risk.”<sup>19</sup>

The High Court concluded *“to achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse”*

In its review of the authorities the Court in this case referred to the efforts that the Court should make to quantify the relevant risk (as expounded by Fogarty J in *B and B*):<sup>20</sup>

1. What is the nature of the event that is alleged to have taken place;
2. Who has made the allegations;
3. To whom have they been made;
4. What level of detail did they involve;
5. Over what period of time have these allegations been made;
6. What are the effects exhibited by the child;
7. What is the basis of the allegations;
8. Are the allegations reasonably based;
9. Are the allegations genuinely believed by the person making them;
10. What expert evidence has been provided;
11. Are there satisfactory explanations apart from sexual abuse;
12. What are the likely future effects on the child.

The Court concluded<sup>21</sup>

*“In summary, the law is well settled as to the standard of proof required to make a positive finding of sexual abuse, and that such a finding should not be made unless a Trial Judge is satisfied to the highest standard, on the balance of probabilities abuse has occurred.”*

As well as coming to a conclusion on the primary issue a Trial Judge will have to consider *“whether or not an unacceptable risk of abuse exists”*.

The Court then went onto consider in circumstances where there was a finding of abuse or an unacceptable risk what should be done in relation to contact.

---

<sup>15</sup> A v A (1976) VR 298 p 300

<sup>16</sup> M and M (1987) FLC 91 – 830

<sup>17</sup> B and B [Access] (1986) FLC 91-758

<sup>18</sup> Leveque v Leveque (1983) 54 BCLR 164

<sup>19</sup> Re G (a minor) (1987) 1 WLR 1461

<sup>20</sup> [Access] (1986) FLC 91-758

<sup>21</sup> 79,910 (para 111)

The Court took the view that it ought not to set guidelines as to when supervised contact could or should be ordered or whether such contact should be in a professionally run contact centre or supervision by private arrangement.

The Court noted however, that supervision under a private arrangements *“affords a potentially longer term solution which is likely to afford an opportunity for enjoying more realistic and relaxed parenting time between a parent and child”*.

The Court considered the nature of the evidence that ought to be available in matters of this nature. There were a number of experts including a social worker who was not a psychologist or psychiatrist whom the Court accepted in circumstances where she had obvious experience in the area.

Matters which appeared to be necessary for the experts to consider were:

1. The attitude of the child at the first session with the expert and the father together;
2. The attitude of the child at the session in the absence of the father.
3. the ability or otherwise of the child to volunteer or describe or refer to one incident in any session despite leading by the mother and vigorous questioning by the expert.
4. The fact that the child had made a statement that the mother had tricked her into saying something – was this a retraction.
5. The fact that immediately after this the child was cross-examined by the mother and supposedly said it was true.
6. The fact that no attempt was made forensically such as time and place

But it is as well to remember the evidence given by the expert in this case as to why she was having a “non-directive” play therapy with the child. The reason given was that the child was not yet four and *“children of that age don’t respond to a traditional interviewing verbally based process. They actually require a different medium.”*

The improbabilities of the story and the possibility of a fantasy emerging in the child’s disclosure will always need to be considered.

The Court analysed the evidence of one of the experts and noted that the Trial Judge<sup>22</sup> had accepted the expert psychiatrists evidence as to:

1. The high probability of inappropriate and sexual activity between the child and the father.
2. The overstepping by the father or normal sexual boundaries could not be discounted.
3. A hypothesis propounded by the father involving one of the animals was unlikely in all of the circumstances.

It was coming to findings of this nature that compelled the court to a finding of unacceptable risk.

In coming to those findings the Court had to and did in fact have regard to the fact that:

1. The allegations were made against the natural father;
2. The father had been living in the house with 2 young step daughters without the slightest suggestion of any improper conducted<sup>23</sup>.

---

<sup>22</sup> 79,915 (para 142)

At the same time no submission was made that the mother acted maliciously in respect of the allegations against the father.

It was noted that the Trial Judge accepted that one of the experts said that “it was extremely unlikely that the disclosures referred to an “unknown perpetrator” and that the child named the father “without evidence of any intimidation to do so”.

Although the Trial Judge found that the mother was poorly disposed towards the father but then made findings “that the mother’s action shortly after separation did not demonstrate a parent trying to stop conduct”<sup>24</sup>. There is some suggestion that the mother may have been “consciously or subconsciously seeking to obtain further disclosures from the child.

The Full Court then went on to consider the Trial Judges examination of the evidence of the experts about the mother’s behaviour and the Trial Judge’s finding as to whether the mother’s attitude to the father in contact was directed as to whether she was motivated to make allegations by reason of the breakdown in the relationship.

The Full Court held that the Trial Judge thoroughly examined that relevant evidence and that having done this properly concluded that there was no proper foundation for such a finding.

What is relevant in consideration of the impact of a decision like this is the various matters that ought to be considered one by one. There is no dispute in this matter about the fact that the Trial Judge had correctly recorded the child’s loving relationship with the father. In recognition of this the father ordered an ongoing regime of contact but “with a review mechanism”.<sup>25</sup>

Importantly the Trial Judge and the Full Court accepted “I am conscious that the (child) enjoys contact with her father. I am also conscious that it must sustainable taking into account all of the circumstances. The Trial Judge then drafted orders “which facilitated the maintenance of the father’s worthwhile and loving relationship with (the child) whilst providing adequate and appropriate protection given (the Trial Judge’s finding of an unacceptable risk).

The Full Concluded:

1. The Trial Judge did not make a finding that the evidence reach the standard required under Section 140 of the Evidence Act that the father had sexually abused the child.
2. That it is not necessary having regard to the principles enunciated in *M v M* neither is appropriate for such a finding to be made.
3. Notwithstanding that no such finding was made “it was necessary nonetheless for appropriate consideration to be given to the evidence relevant to the question of unacceptable risk”.

The Trial Judge’s Orders were as follows:

1. That the father’s defined contact until the child was 8 (in 3 years time) should be supervised.
2. That when the child was 8, a further report was to be prepared and were confirmed. Future contact was to be reviewed.

---

<sup>23</sup> IBID

<sup>24</sup> IBID (para 144)

<sup>25</sup> 79,197 (para 61)

## **Bolitho and Cohen (2005) FLC 93 – 224**

In this matter the mother appealed against interim orders to the effect that the children aged 13 and 12 reside with the father in Japan where he carried on his business. The appeal from a decision of Rowlands J when varying interim orders which had been entered into in 1999.

Some years prior to these orders being made, in 1999, Final Consent Orders had been put in place providing for the children to live with the mother with the father to have certain defined contact with the children when he was in Australia as well as on an occasional overseas trip.

The father endeavoured to carry on his business by coming to this country for periods of about 10 days every 4 weeks.

Before dealing with this case it is appropriate to revisit *Rice v Asplund*<sup>26</sup> where Evatt CJ with whom the other Judges agreed stated<sup>27</sup>

*“The principles which, in my view, should apply in such cases (i.e. cases where earlier orders are sought to be varied) are that the court should have regard to earlier order and to the reasons for and to the material on which that order was based. It should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigations **for change is an every present fact in human affairs**. Therefore the Court would need to be satisfied by the applicant...that there is some changed circumstances which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material”* (emphasis added).

A last minute amendment to the new Children’s Legislation was actually made to ensure that the amendments to the law “are taken not to constitute changed circumstances that would justify making an Order to discharge or varying an order (that was made before the commencement of the legislation).

This authority has been affirmed time and time again<sup>28</sup> and it is clear and well established that it is a matter for the discretion of the Trial Judge as to whether to require the *Rice and Asplund* issue to be taken as a preliminary or threshold matter or whether it should be considered at the conclusion of the hearing. The Court referred with approval to the decision by Collier J in *King v Finneran*<sup>29</sup> that the Trial Judge had this discretion in circumstances where the rule in *Rice and Asplund* is “a rule evolved to protect children from involvement in further unnecessary litigation”. The Full Court approved of and adopted the principles espoused by Collier when he said that a Judge should:

*“Extremely loathe to reopen the issue of custody except on **strong** grounds.” The words **strong** in that case is a departure from “substantial” and “significant” as used in previous cases. It indicates clearly what is required...the change or fresh circumstances must be such that upon becoming advised of it and being satisfied of its existence a court will be left in no doubt that it was necessary to re-litigate the parenting issues...but that is not to say that court must be satisfied that the fresh or changed circumstances **would result** in a change to the orders...it merely indicates*

---

<sup>26</sup> (1979) FLC 90-725

<sup>27</sup> IBID, 78,905

<sup>28</sup> Also see the 2006 Amending Legislation

<sup>29</sup> (2001) FLC 93-079 at 88,368

*that the change of fresh circumstances that if taken into account that was a real likelihood that a change may follow”.*<sup>30</sup>

One of the grounds of appeal was the Trial Judges consideration of the children’s wishes. Counsel for the appellate wife submitted that the Trial Judge refused to take the task referred to in *R and R (Children’s wishes)*<sup>31</sup> where the court said “ultimately it is a process of intuitive synthesis on the part of any Trial Judge weighing all the evidence relevant to the wishes of the children and applying it in a commonsense way as one of the factors in the overall assessment of the children’s best interests.”

Counsel for the mother further submitted that if the “change in children’s wishes were the only significant change in circumstances that to have regard to them “could potentially lead to a flood of litigation by non-residential parents claiming a change in their child’s wishes to justify a fresh residence application”.

The Court went on to examine what were the relevant principles in determining whether children’s wishes were “soundly based” and “founded upon proper consideration”. The Court noted *H v W*<sup>32</sup> where Fogarty and Kay JJ said:

*“the wishes of children are important and proper and realistic weight should be attached to any wishes expressed by children. **There can be little doubt that there has been a perceptible change in the approach to the wishes and feelings of children no merely in custody cases in this Court but against the wider spectrum of society generally.**”*<sup>33</sup>

It is interesting that some of the matters which the Full Court took into account was the evidence of the independent expert, the well qualified and experienced psychologist Doctor Qaudrio.

Doctor Quadrio noted that “both of the children had a better quality of relatedness with their father compared to the mother... and that the mother was not particularly tuned into the children... and the father was more tuned into them”.

The Court rejected submissions based upon the fact that:

1. Japan was a non-signatory to the Hage Convention;
2. The Children did not speak Japanese;
3. That they would live in largely expatriate community;
  - a. Will change schools;
  - b. Lose friends;
  - c. Have an entirely different lifestyle from the Sydney Northern Beaches to an apartment in Tokyo;
  - d. The father may have a new family with his new wife.

It was submitted that the Trial Judge had failed to follow the Full Court’s directions in *A and A Relocation Approach*<sup>34</sup> in which the Full Court said that in effect the Trial Judge had to

*“consider each relevant Section 68F(2) Factor...set out the relevant evidence and the submissions with particular attention as to how each proposal is said to have*

---

<sup>30</sup> IBID, 79,692

<sup>31</sup>(2000) FLC 93-000 at 87,072

<sup>32</sup>(1995) FLC 92-598

<sup>33</sup>IBID 79,696 (Para 54)

<sup>34</sup> (2000) FLC 93-035

*advantages and disadvantages on those factors and then to make findings on each factor”.*

In that case the Full Court went further and identified three practical steps which should be followed in determining a parenting case, namely:<sup>35</sup>

1. *“Identify the relevant competing proposals*  
*;*
2. *For each relevant s 68F(2) factors, set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to Section 60B;*
3. *On the basis of the prior steps of analysis, determine and explain why one of the proposals is to be preferred, having regard to the principle that the child’s best interests are the paramount but not sole consideration”*

The Court then referred to *U and U*<sup>36</sup> in which in the High Court Gummow and Callinan JJ said that whilst not doubting that the court was obliged to give careful consideration to the proposed arrangements said:

*“Whether the Court is obliged, or be able in every case to treat the three steps as discreet and in the suggested order may be another suggestion. But the Court is, not, on any view bound by the proposals of the parties...and has to look to the matters stated in 68F and elsewhere...and the objection is always to achieve the child’s best interest”.*

The Full Court noted<sup>37</sup>

*“We discern that the decision in U and U has ameliorated the somewhat rigid and/or formulaic suggested approach set out in A and A. In U and U the High Court said that the proper approach to be adopted in a relocation case is weighing of the competing proposals having regard to the relevant section 68F(2) factors and consideration of other relevant factors including the right of freedom of movement of the parent who wishes to relocate bearing in mind that ultimately the decision must be one which is in the best interests of the child”.*

In coming to the view that the Trial Judge’s order that the children should “*as an alternative and perhaps half way move...start school in Tokyo in that year in September and then return to visit their mother at Christmas. This would provide (the mother) with the opportunity to see that the boys are progressing well and that they are free to return to Australia*” should in accepting the Full Court noted what Gummow and Callinan JJ had said in *U and U*<sup>38</sup>

*“There will be cases...in which it will simply not be possible for Judge to adopt exclusively or perhaps even substantially a proposal of either party. In such a case the final order **will evolve out of the evidence** as it emerges and submissions as they are developed.”*

---

<sup>35</sup> 79,698 (Para 68)

<sup>36</sup> (2002) FLC 93-112 at 89,089

<sup>37</sup> 79,699 (Par 72)

<sup>38</sup> IBID (Para 70)

The Full Court also referred to Hayne's approach in *U v U* where His Honour had suggested that a Trial Judge should look beyond the proposals of the parties in the fundamental task of ensuring that the parenting orders are made in the best interests of the children.

They noted that His Honour felt that *"it would be quite wrong to treat the decision that is to be made as confined to a choice as to whatever may be the particular proposals that the parents may make"* and that *"so to confine the enquiry... would have required the Family Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than in India."*

Hayne J suggested that confining the enquiry in this way would be to disobey the fundamental requirements in the Act to regard the best interests of the child as paramount. His Honour was quick to point out that the Family Court is (not) to embark upon some roaming enquiry about the matter unfettered by any regard to the evidence led and the matters which the parties seek to contest.

The Full Court noted that:

*"The requirement to look beyond the proposals of the parties highlights the fundamental difference in litigation involving the welfare of the children and ordinary inter parte's litigation".*

The Trial Judge only made an interim orders pending a short hearing of approximately 2 hours following the release of any updated report by the child psychiatrist in relation to

1. The effect of the orders on the children; and
2. The children's wishes

But the fact that it was so did no play any part in the Full Court's determination of the matter other than in a limited respect of endorsing the remarks of the Full Court above. His Honour has now retired. No Application has yet been made to relist the matter

## **Spiteri (2005) FLC 93-214**

The relevant facts were:

1. A nine year cohabitation;
2. 3 children under 18 with the wife;
3. Husband's assets at cohabitation \$198,000 while the wife had virtually nothing;
4. At separation the parties assets were about \$445,000;
5. The asset pool increased thereafter to about \$1.6 million at trial;
6. The Court found that much of this was due to the husband's work and expenditure.
7. The Trial Judge found a contributions based entitlement of 75:25 in favour of the husband and allowed a 15% 75(2) adjustment.
8. It was asserted that the wife had misapplied substantial funds possibly up to \$300,000 – the Court appeared to accept that the figure may have been \$150,000.
9. That the husband inadequately maintained the wife and the children post-separation.
10. The hearing took place some 4 years after separation and it was in this period that the Husband's work and development of rural activities increased the value of the assets while the Wife cared for the children.
11. There had been an element of a negative contribution by the Wife.

The Full Court found that the Trial Judge “*effectively set off the Husband's contribution of the property post separation against the Wife's responsibility for the children in that period with limited financial support from the Husband*” and that this course was not only open to His Honour but also an appropriate course in the circumstances and “*the situation concerning the post separation contributions of the parties provides good reason why it would not be appropriate to calculate the parties entitlements on account of their contribution by reference only to the value of the property post-separation.*”<sup>39</sup>

In re-exercising the discretion, the Court found that:

1. On the evidence overall there would have been an assessment of equality were it not for the Husband's initial contributions and the Wife's wastage of \$150,000 thereby finding an assessment of 80:20 in favour of the Husband appropriate.
2. The Husband's post separation contributions to the increase and value of the property and the Wife's post separation contribution to the care of the children as offsetting each other i.e. absorbed in the finding of equality of contribution which is departed from the only account on the two matters mentioned. Having regard to the Section 75(2) factors however, the Court found that there should be an adjustment of at least 20% in the Wife's favour such that the Husband ended up with 60:40 in his favour.

The principal s 75(2) factors were:

1. The Wife's responsibility for 3 children aged 12, 10 and 8;
2. Her lack of qualifications;
3. The huge disparity between her future income earning capacity and the Husband's;
4. The capital disparity which would result from the 80:20 split of the property on a contributions based entitlement.

---

<sup>39</sup> 74,573 (Para 47)

## **Coghlan (2005) FLC 93-220**

This was the major superannuation decision of the year and was an appeal from Justice Rose who assessed the net property of the parties at \$590,000 **exclusive** of their respective superannuation entitlements.

The Husband's superannuation (being paid as a pension) was valued in accordance with the Regulations at \$231,000.

The Wife's superannuation which was under an accumulation scheme (but with a part deferred benefit) was valued at \$65,000.

The Trial Judge excluded superannuation from his assessment of the net property of the parties. His Honour then assessed the contributions in respect of the property of the parties of 60:40 in favour of the Wife without any adjustment for s 75(2) factors.

The complaint on appeal was that the Trial Judge had failed to take into account the value of the superannuation interests of the parties and that he had erred in principle having regard to the dictates of Part VIIIIB of the Act.<sup>40</sup>

The appeal was allowed by Bryant CJ, Finn and Coleman JJ. They found that:

1. There is no mandate in Part VIIIIB to include the value of superannuation in the pool of assets to be divided under Section 79 but, the Court may include the superannuation in the first step in the determination of Section 79 proceedings either where this is agreed between the parties or where the Court concludes that this would be the appropriate approach.
2. The preferred approach is to prepare a list of any superannuation interests, separate to any items of property.
3. The purpose of Section 90MC is to confer jurisdiction on the Court to make Orders to divide or otherwise affect the parties superannuation interests.
4. The only occasion on which superannuation is to be treated as property is for the purposes of (ca)<sup>41</sup> of the definition of matrimonial cause in Section 4. This is for the purpose of conferring jurisdiction upon the Court to deal with Superannuation.
5. Superannuation interests are another species of asset which is different from property as defined in Section 4(1). This is because of the word "also" in Section 90MS. The interpretation of the operation of Section 79C in the Full Court decision in *Hickey*<sup>42</sup> is wrong.
6. The Court does not have to determine whether superannuation may also come within the definition of property or whether it is a financial resource.
7. Consideration must be had to the overall "justice and equity" of any proposed orders, including the **real nature** of the Superannuation interests.
8. An obiter view was expressed to the effect that the legislation is defective in that it does not provide for the ability of the Judge to apply the provisions of Section 79 except in circumstances where an order is actually sought under Part VIIIIB. Nevertheless the requirement to make a "just and equitable" order<sup>43</sup> will enable the Court to make an Order in relation to a superannuation entitlement whether or not a splitting order is sought.

---

<sup>40</sup> As set out in the schedule attached

<sup>41</sup> (ca) is in these terms

<sup>42</sup> (2003) FLC 91-143

<sup>43</sup> Section 79(2)

## THE FACTS

1. The net value of the property of the parties excluding superannuation was \$590,000;
2. The superannuation entitlements had an added value of \$364,000 comprised of:
  - a. The Wife's entitlements in a defined benefit accumulation scheme valued at \$65,000;
  - b. The superannuation lump sum of nearly \$67,000 received by the husband nearly 3 years previously; and
  - c. A superannuation pension received by the Husband at \$420 per fortnight which in accordance with the regulations had a value of nearly \$243,000.
3. The relationship was for some 6 years prior to the marriage and then after the marriage 11 nearly 12 years. There were no children and each of the parties were 48 years of age.
4. The Husband was unemployed and in receipt only of his pension.
5. The Wife was still employed.

The Trial Judge whilst recognising the calculation of the value of the Husband's fortnightly pension correctly said, "*it has such an air artificiality about it...that it would be unjust to apply that valuation for the purpose of the calculation of the parties net property*" (following Coleman J in Cahill)<sup>44</sup> excluded the Wife's superannuation not quite on the same basis but as "it represents a valuation of the prospective entitlements which will only arise many years into the future".

Pausing here you find in this matter perhaps four distinct varieties of superannuation:

1. One which had vested;
2. One which was a pension and capable of valuation under the regulations; and
3. A defined benefit scheme capable of valuation under the regulations.
4. An accumulation interest which because it would only arise many years into the future His Honour did not take it into account.

The Trial Judge's reasons indicated that his assessment of the contributions of the parties was arrived at without regard to either parties contributions to their superannuation interest.

The Court referred to Hickey and the preferred four step approach to the determination of a Section 79 Application and suggested that "because the superannuation interest is to be treated as property.... It follows that it will be included in the list of property".

In *Hickey* it was suggested that at step 3 the superannuation interests may be taken into account are other items of property and financial resources pursuant to Section 75(2) but that the superannuation legislation introduced reforms which are directed to help a court will deal with steps 1 and 4 of the 4 step approach in a Section 79 application and that **the legislation did not amend Section 75 or Section 79.**

In *Coghlan*, The Full Court went on to say<sup>45</sup> there appears to be no explanation in Hickey as to why the Full Court held in that case that despite the concluding words of Section 90MC that section has an operation beyond conferring jurisdiction with respect to superannuation interests.

---

<sup>44</sup> (unreported) 7,303

<sup>45</sup> Coghlan (2005) FLC 93-220 at 79,641 (para 36)

The Court pointed out that Section 90MC is to be found in Part VIII B and not Part VIII<sup>46</sup> and it then concluded that Section 90MC does no more than operate to extend the definition of matrimonial cause so that it can exercise jurisdiction.<sup>47</sup>

Section 90MS(1) provides as follows.<sup>48</sup>

**Order under section 79 may include orders in relation to superannuation interests**

- (1) In [proceedings](#) under section 79 with respect to the [property](#) of [spouses](#), the [court](#) may, in accordance with this Division, also make orders in relation to [superannuation interests](#) of the [spouses](#).

Note 1: Although the orders are [made](#) in accordance with this Division, they will be [made](#) under section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.

Note 2: Sections 71A and 90MO limit the scope of section 79.

- (2) A [court](#) cannot make an order under section 79 in relation to a [superannuation interest](#) except in accordance with this Part.

The Court concluded that “*superannuation interests are **another species of asset** which is different from property as defined in s 4(1), and in relation to which orders also can be made in proceedings under Section 79,*”<sup>49</sup> otherwise the word “also” would not be required.

It is important to note that the Court found that it was unnecessary to decide whether a superannuation interest is property or merely a financial resource. This seems strange.

The Full Court said<sup>50</sup>

*“Against the background of the word property means property as defined in Section 4(1) **and therefore not or may not in many cases include superannuation interests.** It seems to us that Section 90MS compliments Section 90(1). In other words Section 90(1) provides that in proceedings with respect to property as defined in Section 4(1) the Court may make such orders as it considers appropriate dealing with the interests of the parties of the parties in that property, and Section 90MS(1) provides that in such proceedings the Court may **also** make orders in relation to superannuation...and if it intends to do so it must do so in accordance with Part VIII B. **The meaning is given to both Sections when read in this way.**”*

Their Honours then went on to note that the Court is “*required under Section 79(4) **in considering what orders should be made with respect to the property of the parties (and/or any superannuation interests) to take into account the following matters which included contributions of whatever kind and the Section 75(2) matters inter alia.**”*

Their Honours then had regard to the explanatory memorandum as they were able to do under Section 15AB of the Acts Interpretation Act 1901.

Their Honours concentrated on a number of paragraphs dealing with Sections 90MC and 90MS and reproduced from the Memorandum the entirety of the matters set out with respect

---

<sup>46</sup> IBID para 37

<sup>47</sup> IBID para 38

<sup>48</sup> IBID para 41, 79,642

<sup>49</sup> IBID para 43

<sup>50</sup> IBID para 46

to those clauses<sup>51</sup> (summarised), those provisions were Section 90MC (which provides) that a superannuation interest is to be treated as property for the purposes of this definition i.e. the extended meaning of matrimonial clause.

The Memorandum went on to say however:

*“However creating the jurisdiction in this way means that superannuation interests, where they are to be divided, will have to be divided in accordance with new Part VIII B. **They will not be able to be treated as property generally for the purposes of Part VIII (emphasis added).**”*

Their Honours then dealt with the provisions of the explanatory memorandum so far as same relate to Section 90MS.

This appeared to be quite conclusive:

1. An order dealing with a superannuation interest will be made in the context of a property settlement order, pursuant to Section 79 of ... the Act. However, a Court will only be able to make an Order about a Superannuation interest in accordance with the provisions of new Part VIII B, which deals specifically with superannuation interests.
2. Their Honours then concluded that noting in the explanatory memorandum would seem to suggest that superannuation interests are *“to be treated as property” in proceedings in relation to property under Section 79*<sup>52</sup>.

The majority were therefore able to conclude:<sup>53</sup>

*“The conclusion of Section 90MC and Section MS which we have suggested above would therefore appear to be consistent with the intended interpretation as expressed in the explanatory memorandum. That is, that Section 90MC does no more than confer jurisdiction on the relevant courts to make Orders in relation to superannuation interests in proceedings with respect to the property of parties to a marriage... and*

---

<sup>51</sup> IBID 79, 643

<sup>52</sup> IBID para 51

<sup>53</sup> IBID at para 52

### ***Sean and Hopkins (2004) FLC 93-204***

This was an appeal on a number of issues by the one relevant to the present paper is the manner in which or if at all legal costs paid by a party to property proceedings should be notionally added back.

It may be recalled that in Farnell<sup>54</sup> the Court held that it was appropriate to notionally add back to the assets of the parties for the purpose of a property division monies withdrawn from a Bank Account of one of the parties and applied towards legal costs.

After the decision in Farnell the practice arose in the Sydney Registry of the Court at least to require party's to provide at the commencement of property proceedings with a Memorandum as to Costs setting out:

1. The amount of costs paid;
2. The source of those costs;
3. The further costs anticipated.

Farnell is in my view properly decided on its own facts. That is where a party has by a unilateral action reduced the value of an asset ie money at Bank for a selfish purpose, then those monies used should be notionally added back to those assets.

However, the practice developed in the Sydney Registry over a period that almost without recognition or consideration of the source of the funds, that there had to be an add back of a notional asset such as costs.

In this case the Court had to consider the issues as to whether the Trial Judge erred in adding back to the pool legal costs which the husband has earned from post separation income and also from borrowings.

The following appears to be the view of the Full Court:

This issue is one which remains a matter for discretion of the trial judge but the Court in exercising such discretion must have regard to the source of the funds which we use for the payment of fees.

Where funds used to pay legal fees existed at the date of separation ie where the parties can be seen to have had an interest therein – then those amounts should be added back as a notional asset for whose benefit the asset was used.

Ordinary pre-trial living expenses will not normally be added back. The court should have evidence which will enable it to make a finding as to the source from which costs have been met. Where borrowings have been made for the purpose of paying costs then either you don't add the legal fees back and you disregard the borrowings. However if the fees are added back then the liability must also be brought back into account. Absent any other relevant matters where a liability exists for legal costs then that liability should be ignored.

This was the matter in which the Full Court accepted as principle previous decisions. However, what needs to be resolved is the controversy arising from part of the Full Court's discussion including if funds used to pay legal fees have been generated by a party post separation from his or her own endeavours or received in his or her own right (for example by way of gift or inheritance they will generally **not** be added back as a notional assets, nor

---

<sup>54</sup> (1996) 20 Fam LR 513

would any borrowing undertaken by a party post separation to pay legal fees be taken into account as a liability in the calculation of the net property of the parties. Funds generated from assets or businesses to which the other party has made a significant contribution or has an actual legal entitlement may need to be looked at differently from other post separation income and acquisitions.<sup>55</sup>

In a very succinct and well argued paper in Volume 19 of the Australian Journal of Family Law prominent Sydney Solicitor Paul Doolan argues:

*“The decision of the Full Court... raises, perhaps unintentionally, the fundamental question of what constitutes (property) in proceedings under Section 79 of the Family Law Act”.*

The court has in many cases accepted as a day to day reality that it will be necessary to do notional add backs in various circumstances. However, as referred to above since *Farnell* costs paid have tended to have been added back.

**K v K (unreported) Fam CA O’Ryan J 30 August 2005**

---

<sup>55</sup> *Sean and Hopkins* (2004) FLC 93-204 (para 58)