

**Family Court CaseWatch - Trial Cases - May 2010, by Belle Lane, Forte Family Lawyers, released May/2010**

**Next, it's time for Family Law Case Watch, Trial Decisions, and with me is Belle Lane from Forte Family Lawyers in Melbourne. Thank you for agreeing to review our trial decisions this month Belle.**

**Let's start with the Federal Magistrates Court. Grant & Grant-Lovett is a decision of Federal Magistrate Altobelli. What's the background to this case Belle?**

The Husband applied to set aside a Binding Financial Agreement which he entered into with Wife in 2002. The parties had married in 1990 and separated in 2007 or 2008 (dispute about the date but nothing turned on it).

Wife's solicitors prepared a Binding Financial Agreement. The wife signed it and it was sent to the Husband and he signed it - s.90G certificates of advice were signed.

**The husband first argued that the agreement did not comply with the technical requirements in Section 90G. He claimed he did not receive a copy of the agreement under paragraph 90G(1)(e). How did the Federal Magistrate deal with this claim?**

The Binding Financial Agreement was found not to comply with s.90G

s.90G(1)(e) requires:

*"after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other"*

FM Altobelli found without too much difficulty that the Husband had not been provided with a copy of the BFA. Hu's evidence was that he didn't receive a copy of the BFA until after separation. There was no real dispute about it.

FM Altobelli followed the Full Court decision in Black and Black (2008) FLC 93-357 – which held that s.90G required "strict compliance" with the legislative requirements was necessary to oust the Court's jurisdiction under s.79.

The failure to provide the original or copy of the BFA to the Husband was sufficient grounds for setting the BFA aside under s.90K(1)(b) as it was "void, voidable or unenforceable."

His Honour also referred to the Full Court decision in Kostres & Kostres (2009) FLC 93-420 which confirmed the earlier approach of strict compliance.

**Amendments to Part VIIA made by the Federal Justice System Amendment (Efficiency Measures) Act 2009 were supposed to overcome the problems created by the decision in Black & Black. Where the amendments of any assistance in this case?**

- The amendments actually retrospectively revoked s.90G(1)(e).
- His Honour considered whether he should re-list the matter to hear argument about whether the retrospective re-write of s.90G would save the agreement, particularly since s.90G(1)(e) is retrospectively revoked.
- His Honour decided not to because of findings he made under s.90K about the wife's non disclosure and HH said he wouldn't have exercised his discretion under the new provisions to save the agreement b/c the defect was "so fundamental."
- The fact that there was one original of the BFA, the Wife retained it and the Hu didn't get a copy until after separation is not the type of defect that should be remedied.

**The husband also argued that agreement was unenforceable because of non-disclosure by the wife. Was he also successful in this claim?**

- The Hu alleged that the Wife failed to disclose to him her directorship and shareholding in a company Y and the fact that she was a discretionary beneficiary in the Lovett Family Trust under a Trust Deed settled in 1980.
- The significance was that remembering the BFA was signed in June 2002
  - a. Y Pty Ltd transferred her the property which was referred to in the first paragraph of the operative provisions of the BFA;
  - b. The wife received a distribution of \$430+K from the capital profits reserve of the trust in accordance with a resolution made in June 2002
- There was plainly no disclosure evident from the BFA or the evidence generally
- HH found that her failure to make any disclosure of her financial circumstances, let alone her shareholding in the company and interest as a discretionary beneficiary in the Family Trust pointed to non disclosure on her part
- She didn't even assert in evidence that the Hu was aware of these matters.

**The wife argued that the husband was estopped from claiming that the agreement was invalid. Why did the Federal Magistrate reject this claim?**

- The wife argued that an equitable estoppel operated in her favour
- She had been led by the Hu to believe that she had a proper and enforceable BFA:
  - a. Hu's evidence was that he had been to a Chamber Magistrate who provided the s.90G Certificate and advised that the BFA was worthless,
  - b. Hu signed it purportedly relying on this advice
  - c. Hu returned the BFA to the Wife "was then content to create a situation where she might reasonably apprehend that he had no concerns about the enforceability of the agreement."
  - d. This created an equitable estoppel.

Matters dealt with pretty readily:

- a. Firstly, given that the property had been transferred to the wife before the BFA was executed, HH asked how could the wife's position changed as a result of relying on the Agreement. The onus would be on the wife to establish that she would not have had the property transferred to her if she had known that the Hu believed the BFA to not be binding.
  - b. But there was a more serious problem - there was no statutory compliance with s.90G
  - c. Therefore there was no statutory agreement that attracts the benefit of s.90KA
  - d. Followed decision of Murphy J in *Fevia v Carmel-Fevia* (2009) FLC 93-411
  - e. Section 90KA allows the Court to determine whether a financial agreement is "valid, enforceable or effective" in accordance with the principles of law and equity
  - f. S.90KA deals with whether an agreement is "valid, enforceable or effective" after it has been validly created, but not the preliminary .
  - g. Here there was no validly created agreement and by implication, any equitable estoppel argument cannot be used to overcome a s.90G defect.
- Result was that Hu's s.79 claim would be listed and dealt with.

**The case of *Jessup & Jessup* is also about a binding agreement, this time a binding child support agreement. This was an agreement that was "transitioned" under the new child support regime Belle.**

- The parties entered into a Child Support Agreement on 12 May 2006.
- The Father sought that it be set aside.

- Significant amendments to Child Support Legislation Child Support Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006 – commenced operation on 1 July 2008
- Amendments created 2 types of Child Support Agreements:
  - a. Limited
  - b. Binding
- Child Support Registrar had to review all existing Child Support Agreements in force prior to 1 July 2008 to determine which would remain in force after 1 July 2008 and be deemed to be “binding child support agreements”
- This Agreement was found to be a “Binding Child Support Agreement”
- As the Father applied to set it aside after 1 July 2008, the new provisions (specifically s.136 which sets out the circumstances in which an agreement can be set aside) applied.
- s.136 greatly limited the Court’s ability to set aside a Binding Child Support Agreement.

**The father applied to have the agreement set aside under subsection 136(2) of the Child Support Assessment Act, arguing “exceptional circumstances”. What were the claimed “exceptional circumstances”?**

- s.136(2)(d) provides that if exceptional circumstances which relate to a party to the Agreement or to the child the subject of the Agreement, have arisen since the agreement is made and the applicant or the child will suffer hardship if the Agreement is not set aside
- Onus was on Hu to satisfy the Court that there were exceptional circumstances relating to him, the mother or the child since May 2006 and that because of these exceptional circumstances he or the child would suffer hardship if the Agreement wasn’t set aside
- Common ground that at the time the Agreement was made the Hu was working in the finance industry and earned about \$125K per annum. Under the parties BFA had retained assets of \$1.4M
- HH found Mother earned about \$95K per annum when agreement was made. She retained \$1.2M assets under BFA
- Father submitted his financial circumstances had worsened:
  - a. he was retrenched in April 2009 and unemployed until November 2009;
  - b. His current income was \$47K
  - c. Global Financial Crisis has limited his future employment prospects in finance industry
  - d. Had a child from a subsequent relationship that he was supporting
  - e. Taxation debt in Hong Kong he had to repay
  - f. Debts relating to property held by him
  - g. Made loss on investments
- Father submitted Mo’s circumstances had improved:
  - a. Her income had increased
  - b. She was living in Sydney rent free

**What, in the view of Federal Magistrate Sexton, is the meaning of “exceptional circumstances” in relation to the subsection?**

- Her H referred to decision of Warnick J in Balzano & Balzano (No2) [2010] FamCAFC 11
  - c. Referred to the Explanatory Memorandum – Binding Agreements shouldn’t be set aside lightly
- Warnick J in turn referred to the Full Court in Simpson and Hamlin (1984) FLC 91-576

- d. it was not sufficient that circumstances had arisen of an exceptional nature resulting in hardship to the applicant...court in exercising its discretion has to consider whether the hardship is of such a serious nature and results in such inequity that it can only be rectified by the extreme step of setting aside or varying an existing order
  - e. is the change out of and beyond the ordinary circumstances which would be expected to occur
  - f. a question of fact and degree
- and FM Brown in Daley & Daley [2009] FMCAfam398
    - g. “unusual, out of the ordinary or special”

**So did the effects of the GFC constitute “exceptional circumstances” in this case?**

- No. FM found that each party’s financial position had worsened since May 2006
- Accepted F’s employment position changed but unable to make findings about his current position b/c of inadequate evidence he provided.
- He had employment now.
- Despite alleged difficulties he had saved \$30,000
- he is trying to find more lucrative employment
- not satisfied that his difficulties are long term.
- He had the onus to provide to the Court a “careful analysis of what has happened to him financially since signing the Agreement:
- he needs to satisfy the Court that when viewed as a whole the changes should be regarded as exceptional
- not discharged the onus.

**Our next case, Mirtz & Mirtz, is another decision of Federal Magistrate Altobelli. This is a sad case whether the father had psychological problems Belle.**

- The parties had 3 children 17, 15 and 3 years.
- All children lived with the Mother and there was no dispute that this should continue
- Father had history of threats of suicide and displayed narcissistic tendencies – he had been unrestrained in his expression his emotional distress to the children.
- Issue about parental responsibility: father wanted equal shared and Mo and ICL wanted her to have sole parental responsibility
- An issue was the nature and extent of the Hu’s psychological problems he has experienced in the past, whether the problems are continuing and the impact of this on his parenting capacity. Hu conceded this was an issue.
- Father asked for no orders for the 15 and 17 year olds, they could decide what contact to have with him.
- Mo and ICL submitted orders should be made for all 3 children regardless of age.
- Mo was concerned that Fa presented a risk to the children and she wanted a to be able to veto the children’s contact with him should she become concerned about his condition

**Dealing with the parenting issues first. Why did the Federal Magistrate refused to make any orders in relation to the older children?**

- His Hon found that the boys enjoy a good relationship with their father
- He was reasonably satisfied that the Mo wouldn’t do anything to obstruct contact with their father
- The father didn’t want any orders made
- The Court recognised the children’s autonomy to do as they please
- Concern that if orders were made and the boys didn’t comply that this may precipitate a emotional crisis for the father, more so than if there were no orders and they wanted to spend less time with him than he hoped

**Given the possibility of the father's condition deteriorating it was proposed, by the ICL and the mother, that the mother be able to veto the younger child having contact with the father. Why was this proposal rejected by the Federal Magistrate?**

- His Hon didn't want to place the mother in the position of being a gate keeper
- There were many examples of the mother's own sub-optimal parenting
- she would have reasonable excuse as a defence in contravention proceedings if necessary
- if the father's mental health deteriorated then it was appropriate to bring the matter back to court

**Turning to the main property issue. The mother requested an order that the sale of the matrimonial home be deferred. Does the Court have the power to make such an order?**

- Mo wanted the sale of the FMH deferred until at least the end of the year as the eldest child was studying for 12 year
- There is no power to order a deferred sale under s Part VII, the only possible source of power is s.68B which relates to personal protection of children
- His Hon not satisfied that s.68B was intended to cover this situation
- There is power under s.79 and 80, provided all other requirements of the section 79 are met. Concern being able to set the order aside if the deferral was long. Here only talking about 7 months so not an issue.
- Maintenance power – s.72, 74 and 75
  - Advantage is that s.81 obligation to finalise financial relations does not apply
- Injunctive power under s.114. was considered. Normally dealing with exclusive occupation order which is pending outcome of s.79 proceedings. Here the relief is sought as a final order under s.79. Different
- His Hon considered best to use s.79 and 80

**Why did Federal Magistrate grant the order?**

- Hu would be deprived of his cash entitlement for a period of months in circumstances where:
  - a. His own evidence shows substantial surplus of income over expenses
  - b. He has stable and affordable rental accommodation
  - c. He has had stable employment for 4 years
- Wife's short term needs are greater and they extend to the children.
- Hu would miss out on interest he would earn, so His Hon made an order for interest to accrue at the rate the Hu received on his building society account.

**Our final case this month is a decision of Justice Cronin in the Family Court. This case, Ferraro & Ferraro, also concerns an application for a relatively unusual property order. It's not uncommon for parties to apply for an injunction to exclude each other from the matrimonial home. But in this case the parties wanted to exclude each other from business premises. What was the story here?**

- The parties conducted a business in wholesaling personal care products via a company in which they were directors and shareholders.
- The company owned 2 units from which the business was conducted. Both parties had contributed financially to the purchase.
- They had both been engaged in the business throughout the marriage.
- The parties had interim applications for occupation and control of the parties' business premises.
- Court satisfied that both Hu and Wife have a "significant entitlement not only to the business but to the real property from which it is conducted."

- There was a factual dispute about the level of the wife's involvement in the business after separation. Hu alleged that there were problems with the Wife and staff.
- His H couldn't decide that because it was an interim hearing.

### What did Justice Cronin decide?

- His Hon relied upon the injunctive power under s.114
- His Honour considered a number of Full Court authorities:
  - d. Davis v Davis (1976) FLC 90-062:
    - i. Court should consider:
      1. the means and the needs of the parties
      2. The needs of the children
      3. hardship to either party or the children
      4. where relevant, conduct of a party that may justify the other party leaving the home or asking for expulsion of the first party from the home
  - e. Sieling v Sieling (1979) FLC 90-627
    - i. Power to grant an injunction is a discretionary power, not to be exercised lightly
    - ii. Court must balance the hardship to each party of granting or refusing the injunction
    - iii. Court must frame the order to impose no further restriction than is necessary to achieve protection of the applicant's interests
    - iv. Court will not lightly interfere with the rights of an owner of property on the basis of a vague or uncertain claim
  - f. S & S (2002) FamCA 69
    - i. A grant of an injunction requires an appropriate factual base supporting it be "proper";
    - ii. Prohibition of a person from living in their own home is of such gravity that it ought only be exercised in restricted and exceptional circumstances.
- Following the line of authority, His Honour found:
  - g. There is evidence each party has an entitlement to the property and business;
  - h. No evidence of hardship caused to either party if orders made or not made;
  - i. Evidence by each party that their respective interests would be prejudiced by the other remaining in the business, but evidence doesn't establish that something untoward has occurred that if not stopped would so damage a party's interest that it couldn't be rectified at a final hearing.
  - j. The parties have their legal obligations under the corporations law as a director of the company. Neither party has made an application or taken any action under that legislation and nor was there any allegation that the accounts are not in proper order.

**Belle, many thanks for reviewing these family law trial cases. Belle Lane is Consultant Lawyer at Forte Family Lawyers in Melbourne.**

© 2010 Television Education Network Pty Ltd and Belle Lane, Forte Family Lawyers