SOME LATEST AND GREATEST FAMILY LAW CASES

Legal Aid NSW Family Law Conference August 2011

RASTALL V BALL [2010] FMCAfam 1290

Facts

- 2 children (aged 10 and 3) - two different biological fathers (one is the respondent, one is the intervenor).
- Interim parenting consent orders were made.
- Orders were made for all parties to attend family dispute resolution pursuant to Section 13C of the Family Law Act.
- An initial intake occurred by a Family Dispute Resolution organisation (Centacare), but counselling did not occur as the mother alleged Centacare claimed it would not be useful and issued her a S60I Certificate.
- Centacare were invited to appear and did. They repeated the claim that they had made a determination that counselling would not be useful but would not provide any further reasons for the decision.
- Centacare claimed this information was protected as confidential under s 10H and inadmissible under 10J of the Family Law Act. They claimed that this included the initial intake assessment stage.

Held Federal Magistrate Reithmuller

- S 10H relates to a communication made to the practitioner while the practitioner is conducting family dispute resolution.
- Here the practitioner who made the assessment from Centacare was not conducting family dispute resolution.

"***The cone of silence only descends after an assessment by an approved person, and only covers the specific process then conducted by an approved person.***"

- The matter was adjourned so that the parties could review the evidence of the initial determination to see why Centacare made the decision and to allow objections to be made on admissibility on other possible grounds (if there are any).

HARKISS AND BEAMISH [2011] FMCAfam 527 (26 May 2011)

Facts

- A subpoena was issued to UnitingCare Unifam where the mother and father had previously attended for family counselling.
- The mother and father consented to the production of the material.
- UnitingCare Unifam objected to the production of material on the basis of Sections 10D and 10E of the Family Law Act.

Held *at first instance*

Federal Magistrate Altobelli

- rejected the submissions on behalf of UnitingCare Unifam, and
- ordered the material be produced.

On Appeal –Coleman J – (appeal heard 2 August 2011 and Judgment delivered5 August 2011)

- Leave to appeal granted
- Subpoena to produce to UnitingCare Unifam was set aside

UNITINGCARE-UNIFAM COUNSELLING & MEDIATION & HARKISS AND ANOR [2011] FamCAFC 159

- Confidentiality provisions of S10D (3) allows the family counsellor to disclose the communication with consent of parties BUT if the counsellor declines to voluntarily disclose they can not be required to do so by the Court.

- S69ZX did not empower the Court to order production.

- While S10E (*which deals with admissibility of communications in family counselling*) may have given the Court the power to make the order for the production of the documents the documents would not be admissible. The failure of the subpoena to seek production of documents falling with those provisions (of 10D and 10E) deprived the court of that source of power."

Vance and Vance (2010) FamCAFC 250

- Appeal from FM Altobelli decision re use of research material
- Articles referred to at beginning of the case
- Bruce Smyth, "Time to rethink time? The experience of time with children after divorce" *Family Matters* Johnston J *"Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making"* McIntosh J and Chisholm R in *'Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale From Current Research'*

Background

FM Altobelli extracted some paragraphs from various articles and stated that the research formed background to his judgment and was not evidence. The background material assisted understanding of the expert evidence. He also stated that he hoped the parents might learn from it.

Boland J said line between material which is truly background and material relied on may be a fine one.

It is understandable that parties may be a loss to understand how the material that they had no prior knowledge of wound up in the judgment

Maluka & Maluka (2011) Fam CAFC 72

- 9 hearing days in March 2009
- Decision reserved on 8 May 2009
- On 10 June 2009 Associate emailed parties material on domestic violence which judge proposed taking into account and invited submissions. Parties given opportunity make oral and written submissions. Hearing resumed 22 June 2009 for that purpose. Benjamin J stated it was a common knowledge S144 Evidence Act

s144 Evidence Act

- **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.

- The Full Court said Benjamin j fell into error in using social science material as further evidence of the of the likelihood of future violence

Secretary of Dept of Health and Human Services v Ray [2010] FamCAFC 258

- At first instance Benjamin J joined the Tasmanian Secretary of Dept of Health and Community Services without his consent. Benjamin J was concerned that there was no appropriate adult to have parental responsibility for the children
- He joined the Secretary as a party relying on Division 12A, s67C (welfare jurisdiction, accrued jurisdiction (parens patriae)

Unfortunately the Full Court disagreed:

- Division 12A is only about procedure and evidence. Div 12A does not talk about who the parties should be.
- s67ZC does not give the Court power to bind a third party who does not have parental responsibility without that third party's consent
- Although the court can and does make orders against persons who have parental responsibility who do not consent to those orders and actively opposed orders, as a matter of common sense it will not usually be in the child's best interest to place a child in the care of a person who does not want to assume that care or responsibility
- Accrued jurisdiction was not available as there was no claim or dispute in a state court involving the Secretary which could considered a controversy in dispute