FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

Cases every family lawyer should have up their sleeve

The Honourable Justice Jarrett

Robson as former trustee of the estate of Samsakopoulos v Body Corporate for Sanderling at Kings Beach CTS 2942

[2021] FCAFC 143

Bench: Allsop CJ, Markovic, Derrington, Colvin and Anastassiou JJ

Important issue

What is the width of the power granted to the court by s.104(3) following a review of the registrar's decision?

s.104(3) of the *Federal Circuit Court of Australia Act 1999* (Cth):

> The Federal Circuit Court of Australia may, on application [for review of a Registrar's decision] or on its own initiative, review an exercise of power by a Registrar under subsection 102(2) or under a delegation under subsection 103(1), **and may make any order or orders it thinks fit in relation to the matter in respect of which the power was exercised**.

Similarity of sections

- The *Federal Circuit and Family Court of Australia Act 2021* (Cth)

s.100(2):

> The Federal Circuit and Family Court of Australia (**Division 1**) may, on application under subsection (1) or on its own initiative, review an exercise of power by a delegate under section 98, **and may make any order or orders it thinks fit in relation to the matter in respect of which the power was exercised**.

s.256(2):

> The Federal Circuit and Family Court of Australia (**Division 2**) may, on application under subsection (1) or on its own initiative, review an exercise of power by a delegate under section 254, **and may make any order or orders it thinks fit in relation to the matter in respect of which the power was exercised.**

Takeaways:

- A review is a hearing *de novo*. The correctness of the original decision is generally irrelevant and the applicant on the original application is still the applicant in the review. [63]
- The court should affirm the registrar's order if they come to the same conclusion. [65]
- The court may set aside the registrar’s order. [4]
- Once set aside, the court may make necessary consequential orders to unwind the effect of the registrar’s orders.
- If a party’s conduct contributes to the making of an order which is subsequently set aside, that may impact costs and what necessary consequential orders are made.

A hearing *de novo*

[…] The *de novo* review is not to be seen as directed to a consideration of the correctness of the delegate's decision or redressing error by the delegate. On review, the Court hears the case again unaffected by what has gone before. However, the Court does not act as if there is a new appellate proceeding. The review task it undertakes is a determination again of an application that has already been listed for hearing and proceeds in the same manner that would be the case if the power had not been delegated. In consequence, on review, the Court can entertain new arguments, receive new evidence or adjourn the proceeding but only to the extent, and in the circumstances where, it would do so in a matter that had already been set down for determination. Further, the applicant on review is the applicant on the application irrespective of whether the applicant was successful before the delegate. The same onus arises as if the application was being heard for the first time. […]

[63], per Colvin J

Affirmation of order

[…] As was observed in *Bechara v Bates* an order made by a registrar in the exercise of delegated judicial power takes effect without reservation when pronounced. […]Its past validity is not undone if a judge, on review, decides on the review that the order should not be made on the application. […]Even where, on review, the Court determines that the same order should be made as was made by the delegate it is usual for the Court on review to affirm the orders made by the delegate.

[65], per Colvin J

Setting aside order

[…] It is important to recognise the nature of [an order setting aside the registrar's order] in this context: It is *not* a setting aside for some vitiating flaw as substantive relief; rather, it is a consequential order recognising that the one petition can only have one outcome if it be dismissed by the judge as the Court on review. That is not to undermine the character of the power exercised by the registrar. The power exercised by the registrar was judicial power. Rather, it is to accommodate the reality that the one whole exercise of delegated judicial power (including the review) cannot have two contradictory orders by way of outcome on the court record. […]

[4], per Allsop CJ

Necessary consequential orders

[…] There is ample content to s 104(3) of the FCCA Act (and s 35A(6) of the FCA Act) to make all appropriate orders to deal with the remuneration, costs and expenses of the trustee and the other consequential matters to which Colvin J refers. For the reasons that I have given, this burden should not fall to be shared by the debtor merely because the sequestration order has been set aside. […]

[30], per Allsop CJ

Conduct and consequential orders

[…] There may in any given case be circumstances that make it just for the debtor to pay some money for what, or in respect of what, has occurred. Such an order would need to be conformable with the constitutional imperative. The debtor may have contributed to the making of the first sequestration order by his or her conduct, such as by failing, after being told clearly of the necessity, to bring forward evidence of solvency; the debtor may have asked the trustee to take steps that the trustee was not obliged to take and which have benefitted the debtor. There may be other circumstances. Thus, the circumstances surrounding the making of the order by the registrar may be relevant to consider in the making of the consequential orders. […]

[30], per Allsop CJ

Lawson & Glenning

FedCFamC2F [2021] 118

Bench: Riethmuller J (as his Honour is now)

Key passage:

The new Court system of having Registrars undertake interlocutory work should not be treated as an invitation to simply lodge review applications without careful consideration of the need for a review application, and the importance of properly using the Court's resources. **A Registrar's hearing should not be used as a 'dry run' or a 'practice run' at a case, but rather the main event**, with a review application there in the background, in a similar way to that of an appeal if it were a judge dealing with the matter. If the system is not approached in this manner, then litigants and practitioners can expect costs and other consequential orders, to ensure that the processes of the Court are not misused or wasted. [27]

What is expected of parties and practitioners?

- Compliance with your obligations to the overarching purpose of the Court. [9] (see also ss.190-191 regarding Division 2, and ss.67 – 68 regarding Division 1 of the FCFCOA Act 2021)
- Upholding the core principles in the Central Practice Direction. [10]-[15]
- Considering if an application is worth bringing. [17]
- Understanding the consequences of bringing an application which should never have been brought. [19]-[24]

The overarching purpose and your obligations

Section 67 of the FCFCOA Act

(1) The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.

Section 190, regarding Division 2, is in similar terms. Sections 68 and 191 require your clients to conduct themselves consistently, and for you to assist them to do so. The 10 Core Principles in the Central Practice Direction provide further guidance.

Is the application worth bringing?

Is there a prospect of success?

The review application, it seems to me, was pointless, not only from the perspective that the order made by the Registrar was obviously a reasonable order to make in the circumstances, but also because the interim hearing was to be finalised on Friday upon receipt of more detailed material to enable the Registrar to make a more nuanced decision. [17]

Does success, practically, achieve anything?

It is difficult to see what purpose the review would serve if heard prior to Friday when the matter was to return before the Registrar for a detailed hearing. If it was intended, or thought, that the review would not be listed until after Friday's decision, then, the review would be entirely pointless in that the decision on Friday will supersede any decision that has already been made and the review would need to be a fresh review of the decision on Friday, rather than the [original] decision […] [18]

The consequences of a futile application

Consider if these are submissions you wish to make:

> […] Counsel for the mother submits that it was not intended to misuse the Court's resources in such a way as to try to gain a listing advantage[…]. Nor does he say that there was ever any intention to simply file reviews to cause the costs of the other party to be run up unnecessarily[…]. It was further submitted that the application for review was not a way to intimidate the Registrar in the carrying out of her decision by making it clear that the applicant intended to review any decision that she made. […] [19]

The consequences of a futile application

Cost consequences:

> Before making a determination about costs, I afforded the counsel for the mother an opportunity to get specific instructions from the mother about what may or may not have been advised by her solicitor as to the potential benefits of a review application in the circumstances of this case, and in particular, whether or not it would be futile, and the consequences thereof. Of course, I did not require her to disclose confidential legal advice.
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> […]Had she alleged that she was not given appropriate advice, or was given inappropriate advice, it may be that the solicitor rather than the client should pay the costs.
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> [23] – [24]

Frost (deceased) v Whooten

[2018] FamCAFC 177

Bench: Alstergren DCJ, Aldridge & Kent JJ

Facts

Married but separated parties. In 2016, the husband was hospitalised. He died the next day at 11.00pm. At approximately 7.00pm the day he died, the wife filed an application in the Family Court. She did not seek full final orders, but to be excused from particularising her final orders until after full and frank disclosure.

Her application was filed after 4.00pm. Per the Family Law Rules 2004, it was taken to be filed after the husband's death. As proceedings cannot be initiated against a deceased party, this ultimately excluded the Court's jurisdiction.

Key take-aways

1. A matrimonial cause, and the jurisdiction of the Court, can be enlivened by no more than orders referencing property settlement or spouse maintenance and how boxes are ticked on the Initiating Application. The whole document is read and relevant to the issue. [20] – [31]
2. The Court's rules regarding practice and procedure can permissibly impact substantive rights. As the rules prescribe how proceedings are instituted, a failure to comply with them can exclude jurisdiction.[41] - [42], [48] – [61]
3. A Court cannot dispense with the rules to give itself jurisdiction or create substantive rights which, but for that dispensation, would not exist. [70] – [73]

The boxes on an initiating application matter

The respondent placed a cross in the box marked “Financial (property and/or maintenance)” and no other boxes. It was this that led the primary judge to find at [45] that she “was unashamedly seeking that there be a property settlement”. [23]

The answers to questions 12 and 22 describe the parties as “wife/mother” and “husband/father” respectively. The answers to questions 25 to 28 indicate that the parties were married, had separated but had not yet been divorced. It can be seen therefore that the basis of any “financial” orders is the marital relationship, and not a de facto relationship. That is indicated by the answers to Part H denying such a relationship. [25]

The answers to questions 51 and 53, under the heading “Part G: For property and/or spouse/de facto spouse maintenance applications” make it plain that no financial agreement was relied upon and that neither party was bankrupt, subject to a personal insolvency agreement or a debtor in bankruptcy proceedings. [26]

The appellants’ senior counsel, correctly in our opinion, accepted that the words “property settlement”[…] would have sufficed to identify the relevant matrimonial cause (definition (ca)) and thus invoke the jurisdiction of the Court. […]. That, in our view, is little different from drawing the same inference from looking at the document as a whole. [30]

The Rules can exclude jurisdiction

In the present case, by the operation of r 24.05(2), the Initiating Application was taken to be filed on the day after the deceased died […]Thus, on the face of the matters as they then stood, the Court had no jurisdiction to proceed as there were then no proceedings between the parties to the marriage as one had died the day before. [55]

Section 39(1) of the Act permits a matrimonial cause to be "instituted" in the Family Court. Rule 2.01 of the Rules provides that a person starting a case must file an application as set out in the table in that rule. [59]

It follows that a case is started – or "instituted", to use the language of s 39 – when the requisite application is filed. [60]

This, in turn, leads to the conclusion that as the application was filed on the day after the deceased died, there was no matrimonial cause that could be invoked and that the Court had no jurisdiction. The only order that the Court could make was one dismissing the application for want of jurisdiction. [61]

The Rules cannot be used to obtain jurisdiction

As *Harrington* [*v Lowe* (1996) 190 CLR 311] identified, rules cannot alter or vary or be used to alter or vary the parties' substantive rights. It follows, then, that the Rules cannot be used so as to provide to a person a substantive right contrary to the operation of the Act. For example, if the Initiating Application in this case had been unequivocally filed on the day after the deceased's death, the operation of the Act meant that there was no matrimonial cause before the Court. The Rules could not be used to vary the time for filing or deprive the Rules of operation so as to provide the respondent with a remedy that, otherwise, had ceased to exist. [72]

Shaw & Shaw

[2016] FamCAFC 159

Bench: Thackray, Strickland & Ainslie-Wallace JJ.

The following orders were made at first instance:

1. These orders are made by way of alteration of property interests pursuant to s.79 of the *Family Law Act 1975* (Cth).
2. In full and final settlement of property issues between the Husband and Wife, the assets of the [the husband and the wife] be divided between the [husband and the wife] as to 65% in favour of the First Respondent Wife and 35% in favour of the Applicant Husband.
3. There be liberty to the [husband and the wife] to apply in relation to consequential orders.

[…]

Without machinery orders, the orders were ineffective

In *Mullane v Mullane* (1983) 158 CLR 436 the High Court identified the characteristics of orders made pursuant to section 79 of the Act. Their Honours (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ) said at 445:

> In our opinion, therefore, s. 79 on its proper construction refers only to orders which work an alteration of the legal or equitable interests in the property of the parties or either of them. An interest in property is a right of a proprietary nature, not a mere personal right: *Stow v. Mineral Holdings (Aust.) Pty. Ltd.* [(1977) 51 ALJR 672 at 679]; *Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd.* [(1982) 158 CLR 327 at 343, 350 – 351]. It does not exclude every interest which is not assignable or transferable (cf. per Mason J. in *Meneling Station* [at 343]). Thus an order under s. 79 may give rise to an interest in property which is defeasible on assignment or transfer to a third party, or on the occurrence of some other event, or which the holder is enjoined from assigning or transferring.
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> [86]