SUPREME COURT OF QUEENSLAND

CITATION:	*K M R v S H F* [2011] QSC 153
PARTIES:	**K M R** Applicant v **S H F** Respondent
FILE NO/S:	SC 77 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	03 June 2011
DELIVERED AT:	Mackay
HEARING DATE:	30 May 2011.
JUDGE:	McMeekin J
ORDER:	**1. The Respondent's application is dismissed.** **2. The matter is listed for trial notwithstanding the absence of a Request for Trial Date;** **3. Direct that the respondent file and serve any further affidavit of himself or any witness on whom he intends to rely on or before 4pm on 16 June 2011.** **4. Direct that the trial be listed for hearing in the sittings of the circuit court in Mackay commencing 18 July 2011.** **5. The respondent pay the applicant's costs of each application on the standard basis.**
CATCHWORDS:	PROCEDURE - Where de-facto relationship broke down before statutory amendments - Whether it is more appropriate that the matter be heard in the Family Court JURISDICTION - ACCRUED JURISDICTION - Whether the Family Court has accrued jurisdiction *Family Law Act* 1976 (Cth) *Family Law Amendment (De Facto Financial Matters and Other Measures Act)* 2008 (Cth)

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Qld)

Property Law Act 1974 (Qld)

Benlair Pty Ltd v Terrigal Grosvenor Lodge Pty Ltd [2006] NSWSC 339

In the Marriage of Ireland; Collier (1986) 11 Fam LR 104

Paris King Investments Pty Ltd v Rayhill [2006] NSWSC 403

Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 45

Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261

Stott v Lyons & Stott [2007] QSC 87

Valceski v Valceski [2007] 70 NSWLR 36

Re Wakim; Ex parte McNally (1999) 198 CLR 511

COUNSEL:	Mr Burridge for the Applicant
	Mr MA Fellows for the Respondent
SOLICITORS:	Beckey Knight & Elliott Solicitors for the Applicant
	SR Wallace & Wallace Solicitors for the Respondent

[1] **McMEEKIN J:** Ms R (the applicant) and Mr F (the respondent) previously enjoyed a de facto relationship which lasted some 15 years. It ended in 2007. Mr F then married a Ms D in June 2009. That marriage ended in a separation in October 2010. Ms R has brought an application in this Court for property adjustment under Part 19 of the *Property Law Act* 1974 (Qld) ("*PLA*"). Ms D has brought an application in the Family Court for a property settlement. Mr F is the respondent in each application.

[2] There are two interlocutory applications before me. In one Ms R seeks that her property adjustment application be listed for trial notwithstanding that Mr F has not signed the Request for Trial nor filed his material. In the other Mr F seeks that the property adjustment application be transferred to the Family Court so both the applications he faces can be heard by the same tribunal. He concedes Ms R's entitlement to the orders she seeks if I am against his application for transfer.

Which Court is the "More Appropriate"

[3] The jurisdiction to hear and determine the application under Part 19 of the PLA resides in this Court, not the Family Court. That is so because the parties' relationship broke down before the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures Act)* 2008 (Cth).[1] Since the commencement of that Act all de facto property disputes arising after commencement are heard and determined in the Family Court. Where the relationship broke down prior to the commencement the parties have the right to "opt in" and have their dispute determined by the Family Court.[2] That has not happened here. Ms R opposes the transfer of the proceedings.

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1 See s86 of Sch 1 to the Act

2 Section 86A of Sch 1 to the Act

[4] Subject to the resolution of the question of "accrued jurisdiction", to which I will turn shortly, I have the power to order that proceedings before this Court be transferred to the Family Court under s 5(1)(b) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Qld) which provides:

> "5 Transfer of proceedings
> (1) If—
> (a) a proceeding (the ***relevant proceeding***) is pending in the Supreme Court; and
> (b) it appears to the Supreme Court that, having regard to—
> (i) whether, in the opinion of the Supreme Court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction and apart from any accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Federal Court or the Family Court; and
> (ii) the extent to which, in the opinion of the Supreme Court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and
> (iii) the interests of justice;
> it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court, as the case may be;
>
> the Supreme Court must transfer the relevant proceeding to the Federal Court or the Family Court, as the case may be.
>
> ….
>
> (9) Nothing in this section confers on a court jurisdiction that the court would not otherwise have."

[5] Neither of the first two matters mentioned in s 5(1)(b) have any application here – Ms R's proceeding is one which was capable of being instituted in this Court and the resolution of it does not involve "questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court". Thus the power, and indeed the obligation, to transfer only arises if the interests of justice make it more appropriate that the proceedings be determined by the Family Court.

"Accrued Jurisdiction"

[6] A preliminary matter to determining that issue is the resolution of the question of whether the Family Court has "accrued jurisdiction" in relation to Ms R's application. Absent that jurisdiction I cannot transfer the matter as s 5(9) makes clear the

Jurisdiction of Courts (Cross-Vesting) Act does not confer on that Court jurisdiction it does not otherwise have.[3]

[7] "Accrued jurisdiction" was explained by Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 as follows:

> "It is settled doctrine in Australia that when a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted federal jurisdiction. It extends, in my opinion, to the resolution of the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution. For this purpose, the court exercising federal jurisdiction may enforce rights which derive from a non-federal source. This exercise of this jurisdiction, which for want of a better term I shall call "accrued" jurisdiction, is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter."[4]

[8] Despite some initial doubts it is now well established that the Family Court has such "accrued" jurisdiction: see *In the Marriage of Ireland; Collier* (1986) 11 Fam LR 104 at 120-122 per Lindenmayer J; *In the Marriage of Warby* (2001) 166 FLR 319 (Full Family Court); *In the Marriage of Bishop* (2003) 175 FLR 10 at 17 (Full Family Court) and the review of the authorities by Brereton J in *Valceski v Valceski* [2007] 70 NSWLR 36 at 50 [42]-[59].

[9] Thus when a matter is before a federal court such as the Family Court its jurisdiction extends to determining the whole "matter" before it. It is not restricted to the federal aspect of the controversy but is "clothed with full authority essential for the complete adjudication of the matter".[5] So if a matter arises in a dispute before a federal court that properly falls under State law for determination the federal court has jurisdiction to determine that part of the dispute. To attract that jurisdiction it is necessary that the non federal aspect of the controversy form an integral part of the same controversy: *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

[10] This Court plainly has jurisdiction in relation to Ms R's proceeding. If it is seriously arguable that the Family Court does not have jurisdiction then it would not be the more appropriate court to hear the proceeding pending in this Court. I put the point in that way as it is clear that no determination of mine binds the Family Court - it might find it has no jurisdiction or it might find that even though it had jurisdiction it would not accept the matter. This approach is consistent with that adopted by Nicholas J in *Benlair Pty Ltd v Terrigal Grosvenor Lodge Pty Ltd* [2006] NSWSC 339 at [56]-[58]. *Paris King Investments Pty Ltd v Rayhill* [2006] NSWSC 403 is an illustration of the problems that can arise - there the proceedings were transferred by the NSW Supreme Court to the Family Court but a judge of that Court determined that the Family Court had no jurisdiction, or in any case should not hear the matter, and sent the matter back.

When is Jurisdiction Accrued?

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3 Reflecting the decision of he High Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

4 At 475

5 *Valceski v Valceski* [2007] 70 NSWLR 36 at 48 [38] per Brereton J

[11] The question here then is whether, in this case, the dispute between Ms R and Mr F forms an integral part of the controversy between Ms D and Mr F, whether there is a "single justiciable controversy". The High Court said in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261:

> "What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them, and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. In the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."[6]

[12] The reference to it being "a matter of impression and of practical judgment" was qualified by the majority in the High Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 where it was said:

> "The references to 'impression' and 'practical judgment' cannot be understood, however, as stating a test that is to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided on limited information. But the question is not at large. What is a single controversy 'depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships'. There is but a single matter if different claims arise out of 'common transactions and facts' or 'a common substratum of facts', notwithstanding that the facts upon which the claims depend 'do not wholly coincide'. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are 'completely disparate', 'completely separate and distinct' or 'distinct and unrelated' are not part of the same matter."[7]

[13] To determine the essential question it is necessary to identify the issues that arise in the two disputes.

The Submissions of the Parties

[14] Mr Fellows, who appeared for Mr F, put at the forefront of his submissions the risk of conflicting findings of fact. He pointed out that the majority judgment in *Re Wakim* posited that what is a single controversy is sometimes determined by asking whether or not, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings. If so, that would indicate there is but a single matter.[8]

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6 At 290; and repeated in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

7 At [140] references omitted

8 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [141]

[15] He further submitted that the two courts could potentially take differing views as to the value of the two claims being made. He submitted that Mr F "is a 'defendant' who, from the same pool of assets, must 'pay' money." While that last submission is true, that tends to obscure the more fundamental point that there are two quite separate questions to be determined – the just and equitable adjustment of property rights at a certain point in time for one applicant with certain needs and resources and the just and equitable division of property at a separate and later point in time for a different applicant with different needs and resources.

[16] That argument was the focus of Ms R's response to the application. She argued that there was no single identifiable controversy. Mr Burridge, who appeared for Ms R, stressed that the relationships were sequential and that resolution of one application did not determine the other. The relevant contributions made by each of the applicants must of necessity involve quite separate facts. That is so because there is no overlap here. One relationship ended and then the other began. He pointed out that in the Family Court there is no practise of consolidating matters, relevant as demonstrating that the Family Court does not tend to see sequential relationships as requiring the determination of overlapping questions.

[17] Mr Burridge stressed that whatever my decision the matter still would, of necessity, have to be accepted by the Family Court and on his present instructions would be re-litigated there. Given that the accrued nature of the jurisdiction was uncertain I should not find that the Family Court was the more appropriate court to hear the matter.

[18] Finally Mr Burridge submitted that the interests of justice required that I consider broader issues such as delay and the prospective venue of the hearing.

The Overlapping Issues

[19] One complicating feature in determining whether there is a single identifiable controversy is that in neither the proceeding in this Court nor in the proceeding in the Family Court are there pleadings as such. Both proceedings are commenced by a form of application in which the relief sought is set out in the broadest of terms. I was told from the bar table that Ms D sought a property order that was "just and equitable". In her most recent affidavit Ms R seeks a "just and equitable adjustment of the property".[9]

[20] In a proceeding of the type brought by Ms D the question for the Family Court is what, if any, alteration ought to be made to the interests of Mr F and her in their property. The resolution of that question involves a three stage process. First the Court must identify and appropriately value the property of each of the parties. Next the Court evaluates the contributions relevant under s 79(4) of the *Family Law Act* 1976 (Cwth). Finally the Court determines what adjustment is required having regard to the matters set out in s 75(2) of that Act to arrive at a just and equitable result.

[21] Part 19 of the *PLA* requires much the same process save it applies to de facto relationships. Section 283 of that Act provides that "a de facto partner may apply to a court for an order adjusting interests in the property of either or both of the de facto partners". The purpose is "to ensure a just and equitable property distribution at the end of a de facto relationship" (s 282). To that end the Court is required to bring into account the "financial and non-financial contributions made directly or indirectly by or

[9] Para 121 affidavit Ms Robinson filed 11 February 2011 – she initially sought a 65/35 division in her application

for the de facto partners … to the acquisition, conservation or improvement of any of the property of either or both of the de facto partners … and the financial resources of either or both of the de facto partners" (s291) and the "contributions, including any homemaking or parenting contributions, made by either of the de facto partners …to the welfare of … the de facto partners or … the family constituted by the de facto partners" and certain others (s 292). There are other provisions not necessary to mention here but finally s296 provides that the court "must consider the matters mentioned in subsubdivision 4 to the extent they are relevant in deciding what order adjusting interests in property is just and equitable". Various matters are then set out, some of which are relevant here and which I will later mention.

[22] In the Family Court the first stage of the process requires findings as to what property Mr F brought to his marriage to Ms D. To a degree that will be determined by the findings in the pending proceedings in this Court. That is so because whilst Mr F may have had the legal title to property at the time of his marriage to Ms D his rights might be adjusted under Part 19 of the *PLA* so that the property would no longer be his but would become Ms R's property. Indeed it seemed to be conceded by Mr F's counsel that such an adjustment was inevitable. A court has extensive powers under Part 19. Those powers are set out in s 333. The court can, amongst other things, order the transfer of property, order the sale of property, and the distribution of the proceeds of sale in any proportions the court considers appropriate, order payment of a lump sum, whether in a single amount or by instalments, or make an order or grant an injunction about the use or occupancy of the de facto partners' home. As well it can make declarations as to interests (s 280).

[23] Thus one important question that will arise in the Family Court proceedings is to what extent the property pool in which Mr F presently has an interest is reduced by the legitimate claims of Ms R.

[24] I have not been taken to any detail of the property interests. They are extensive and involved. Ms R's affidavit refers to various companies, trusts and inter family loans. In July and August 2007, that is prior to separation, over $12M was deposited into a bank account operated by a family trust.[10] Ms R complains of lack of disclosure and transparency in what happened to those monies. It may be contended that that the Court should ignore distributions of monies to putative third parties. I do not know the scope of the debate as yet. Mr F is yet to file his trial affidavit. Mr F has asserted that the assets available at separation totalled some $3M in value.[11] Those assets include real estate, including a unit in Mongolia, an "EWRAP share portfolio", bank accounts, superannuation funds, shares in a private company, units in a property trust, loans to related entities, farm machinery, a motor boat and a marina berth. Obviously the valuation of some of these assets might not be straight forward.

[25] Given the lack of detail it is not at all clear that any particular asset will be the subject of any special claim. It seems probable that the Court in each proceeding will come to a view as to an amount that ought to be paid to the applicant in each case to satisfy their entitlements. In the absence of any submission to the contrary I will assume that there is no prospect that Ms D might lay claim to an asset that this Court might order be transferred to Ms R, or order to be sold and the proceeds disbursed.

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10 Para 45 affidavit of Ms Robinson filed 22 February 2011

11 Para 190 affidavit of Mr Finch filed 10 December 2009

[26] Further in determining Ms D's claims it will be necessary for the Family Court to have regard to any continuing obligations that Mr F might have arising out of the de facto relationship with Ms R. There are two children of that relationship who will require support. The extent of that support is relevant in the proceeding before this Court (s 308).

[27] The cases also intersect in another way. In determining what is a just and equitable property adjustment the *PLA* requires that the Court consider Mr F's obligations to Ms D and their child. That is so because amongst other matters the Court is obliged to bring into account "the income, property and financial resources of each of the de facto partners" (s298), the obligation to support others (s300 and s301) and "any fact or circumstance the court considers the justice of the case requires to be taken into account" (s309). The fact that Mr F's financial position might be significantly altered by a subsequent failed marriage and pending property dispute is surely such a circumstance.[12] As well he has his ongoing maintenance obligations, at least to the child of the marriage.

Discussion

[28] Here it cannot be said that the different claims arise out of 'common transactions and facts' or 'a common substratum of facts' as postulated in *Wakim.* In one sense at least they are completely separate and distinct. As Mr Burridge submitted that is so because each claimant has made separate and different contributions to the acquisition, conservation or improvement of assets and each has differing needs and resources that will inform the tribunal hearing the application as to what might be a just and equitable resolution of the application.

[29] Nor is this case akin to any case previously decided, at least so far as counsel's researches could show. The facts in *Wakim* and *Valceski*, by way of example, are relatively straight forward by comparison. In *Wakim* the proceedings arose out of one set of events. In *Valceski* ownership of only the one asset was in issue. Here there are differing sets of events over different time periods involving multiple assets.

[30] However there are questions common to both claims:

(a) What property did Mr F have at the conclusion of his relationship with Ms R? Ms R obviously requires a finding about that. Mr F, and perhaps Ms D, would argue that a finding about that property would sensibly inform a decision as to the property brought to the marriage;

(b) What amounts ought to be paid to Ms D and by way of child maintenance? This Court is required to form a view as to the obligations that Mr F has to Ms D and their child in formulating a response to Ms R's claim;

(c) Mr F's position. Presumably the evidence as to his contributions to the acquisition, conservation or improvement of assets and his needs and resources will be the same in each case albeit that some assets may have been acquired after the end of the de facto relationship. As well his asset and financial position at the time of the hearing(s) will be of considerable significance to the resolution of the applications.

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[12] In that regard see s 307 of the *PLA* which provides that "[i]f either de facto partner is cohabiting with another person, the court must consider the financial circumstances of the cohabitation".

[31] Given the complexity of the financial arrangements and the nature of the assets it seems obvious that there is the potential for conflicting findings of fact. The evidence led in the two cases could well be different. Thus the Supreme Court might accept that certain monies have been expended or legitimately distributed, or assets transferred away and the Family Court take a contrary view. Conversely, one Court might value an asset or interest at a significantly higher amount than the other. There might be consequently very different views as to the asset pool available with the possibility of consequent inconsistency and perhaps unfairness.

[32] As well, conflict might arise in the potential findings in another way. The Family Court will be the ultimate arbiter of the obligations that Mr F has towards his wife and the child of the marriage and hence of the amount by which Mr F's asset base should be reduced by Ms D's claim. The view of the Family Court might not coincide with the view of this Court as to the impact of those claims on Mr F's financial position. Mr Fellow anticipated a need to inform this Court by way of expert evidence of the likely attitude in the Family Court – an unnecessary expense if the matter was heard in the Family Court.

[33] Thus there is the prospect of differing findings of fact with potentially inconsistent consequences.

[34] Importantly Ms D's position cannot be known until Ms R's claims are determined. A determination of Ms R's claim will not determine Ms D's entitlement but will necessarily inform it.

[35] While not straight forward, on balance, I am satisfied that the Family Court has accrued jurisdiction to determine Ms R's claim.

Discretion

[36] That decision enlivens my discretion but does not determine it. There are several relevant issues:

(a) The Family Court is the specialist court with great expertise in the resolution of matrimonial property matters. It is the natural forum for both disputes.

(b) A strong argument can be made out that it is desirable in the interests of "costs savings, convenience, and coherence of decision making"[13] that the one court hear both matters. The overlapping issues that I have mentioned make that clear. Mr F's capacity to resolve both matters would undoubtedly be enhanced if any mediation or alternative dispute mechanism encompassed both matters.

(c) While I am satisfied that the Family Court has accrued jurisdiction there remains the concern that my views may not be shared by a Family Court judge or, if he or she agreed, by the Full Court of the Family Court. As White J (as her Honour then was) observed in *Stott v Lyons & Stott* [2007] QSC 87 that is a matter of serious concern.[14] As I have said the resolution of the accrual question is not straight forward and it is ultimately for the Family Court to determine the extent of its jurisdiction.

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13 Per White J in *Stott* at [18]

14 At [17]

(d) In the absence of certainty of jurisdiction – a matter that could be resolved by application to the Family Court – it is far from clear that there would in fact be any saving of costs or increase of convenience by a transfer.

(e) Ms R's matter is, in a sense, ready for trial – in a sense because Mr F has not complied with his responsibilities and has failed to file his trial affidavit. Nonetheless he proposes to belatedly comply with his obligations within 14 days. While circuit court sittings are subject to the criminal list the Registrar advises that there is a reasonable prospect of a trial being had in the next sittings of the Court commencing 18 July. The proceedings in the Family Court are at an early stage. There is no evidence as to the state of preparedness of that matter. I was informed that a compulsory conference was yet to be held, indicating that a trial was a long way off.

(f) Ms R has the advantage in this Court of a venue convenient to her and indeed convenient to both parties as I understand Mr F's position. Whilst there has apparently been some indication in the Family Court proceedings of a readiness to transfer the matter from the Sydney registry to a more convenient registry, as one might expect, the fact is that Ms D's wishes and convenience are not known.

[37] With resolution of the doubt about the jurisdictional issue the case would be very much the stronger. With an expedited approach to a hearing of the Family Court matter and clearer evidence of Ms D's position on venue the advantages of "costs savings, convenience, and coherence of decision making" could be availed of. The remedy however lies in Mr F's hands. He can bring the necessary application in the Family Court to determine the jurisdiction issue or apply to that Court to transfer the Family Court matter to this Court.[15]

[38] As matters presently stand the first and second factors mentioned above support a transfer, the balance do not. I am not persuaded that it is in the interests of justice that I should order the matter to be transferred.

Orders

[39] The orders will be:

(a) The respondent's application is dismissed;

(b) The matter is listed for trial notwithstanding the absence of a Request for Trial Date;

(c) Direct that the respondent file and serve any further affidavit of himself or any witness on whom he intends to rely on or before 4 pm on 16 June 2011.

(d) Direct that the trial be listed for hearing in the sittings of the circuit court in Mackay commencing 18 July 2011;

(e) The respondent pay the applicant's costs of each application on the standard basis.

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[15] Under s 5(4) *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth); see *Friis v Friis & Ors* [2000] QCA 62 at [13] per McPherson JA