

FOLEY'S LIST – FAMILY LAW BREAKFAST

HYPOTHETICAL SCENARIO

15 SEPTEMBER 2022

The parties

1. The parties in this matter are:
 - (a) Ms Selma Benkendorf (**the Wife**) aged 37; and
 - (b) Mr Duncan McFerguson (**the Husband**) aged 40.
2. The Wife is employed on a part-time basis as a relief teacher and earns about \$40,000 per annum. The Wife currently has an ongoing WorkCover claim for common law damages against her former employer, but is unsure what, if anything, she will receive.
3. The Husband is a partner at an accounting firm and earns about \$270,000 per annum plus bonuses. He started working from home in 2020, during the first Covid lockdown, and has managed to keep doing this since. At the present time he visits his office in Melbourne as needed, which averages out to be a few days in each fortnight. He plans to keep working remotely for as long as possible for “lifestyle” reasons.

Background

4. The parties commenced cohabitation in January 2009, married on 16 June 2009 and separated on a final basis in July 2021.
5. There are two children of the marriage, namely:
 - (a) Shenae Benkendorf-McFerguson born 15 March 2011 (aged 11 years); and
 - (b) Eamon Benkendorf-McFerguson born 22 June 2015 (aged 7 years).
6. The Husband has made admissions to certain allegations of family violence, including that he threw a spatula at the Wife causing her injuries to the left eye socket, but he asserts that this was a result of his depression caused by the COVID-19 lockdowns. He denies the allegations that he is a violent person by nature.
7. Victoria Police took out a Family Violence Intervention Order against the Husband in July 2021 with an exclusion condition, and the Husband has since lived at the parties' holiday house in Sorrento (**the Sorrento property**).

8. The Wife continues to reside at the former matrimonial home in Malvern (**the Malvern Property**).

Parenting

9. In late-July 2021, the parties reached an informal arrangement whereby the children would spend time with their father from Thursday to Sunday each alternate week.
10. In late August 2021, the Wife unilaterally withheld the children from spending time with the Husband as the Husband refused to share his load with home schooling. The Wife told the Husband that if he was not willing to home school the children on the Thursdays and Fridays that they spend with him every second week, then she would not allow them to see him at all.
11. The Husband brought an urgent application in the COVID-19 list in early September 2021 and was successful in getting interim parenting orders that provided for the children to spend Thursday to Sunday with him each alternate week and half school holidays at the Sorrento property.
12. Once the children went back to school in person, the parties agreed that the Husband's time would be reduced to Friday to Sunday every alternate weekend.
13. The parties attended mediation in March 2022 but failed to reach any agreement on either property or parenting.
14. During term 3, 2022, the children have missed 4 weekends with the Husband as the Wife said that they have Saturday morning sport in Melbourne and that they don't want to miss out by going to Sorrento. The Wife also says that the travel to Sorrento is getting to the children and every second weekend with the father is too much for them. She claims that the 11-year-old is now yelling and screaming and refusing to get into the car.
15. The Husband instructed his solicitors to write to the Wife regarding her failure to comply with the interim orders, however she has told the Husband that the children will only be going to Sorrento every fourth Sunday to see the Husband notwithstanding the Court orders.

Property

16. In relation to property matters, the relevant background facts are as follow.

17. The parties commenced cohabitation and married in 2009. The Husband was aged 27 years and the Wife was aged 24 years.
18. At cohabitation, the Husband owned an apartment in Glen Iris with a small mortgage. The equity of the property in 2009 was approximately \$150,000. The Husband also owned shares in the amount of \$50,000, a Mitsubishi motor vehicle worth approximately \$5,000 and \$40,000 in superannuation.
19. The Wife had about \$15,000 in savings and approximately \$8,000 in superannuation. She otherwise had no significant assets or liabilities at cohabitation.
20. In 2012, the Husband sold the Glen Iris apartment and used the proceeds of sale of \$200,000, plus a gift of \$250,000 from his father, to purchase the Malvern property for \$1.8million. The balance of the purchase price was borrowed from the CBA and secured by a mortgage on the Malvern property. The balance owing on the mortgage is now \$1.25million.
21. The Sorrento property was a surprise Christmas gift from the Husband's parents.
22. In 2015, the parties received a Christmas card which said:

"To our son and his wonderful wife, thank you for making us grandparents and bringing such joy to our lives. We hope that you can enjoy this beach house at Sorrento together as a family."

23. There is now a dispute regarding the values of the real properties owned by the parties. Just prior to the mediation in March 2022 the parties obtained joint valuations of the Sorrento property (valued at \$2.7million) and the Malvern property (valued at \$3.3million).
24. Four months later, the Wife obtained a shadow valuation for the Malvern property at \$3.0million and the Husband subsequently obtained a shadow valuation for the Sorrento property at \$2.1million.
25. The shadow valuation for the Malvern property includes three comparable sales that are not referred to in the valuation of the joint expert as those properties sold between March 2022 and July 2022.
26. The shadow valuation for the Sorrento property includes two comparable sales that are not referred to in the valuation of the joint expert, one of these was in February 2022

and the other in April 2022. The joint expert gives the land size for the Sorrento property as 950 square metres. The shadow expert says that this is a mistake and the correct land size is 875 square metres.

27. There are also disputes about the assessment of the parties' respective contributions throughout the relationship and the post-separation contributions. In particular, the Husband contends that the Sorrento property ought to be attributed solely as a contribution brought in by him, but the Wife contends that this was a gift from the paternal grandparents intended for both parties and the children.
28. The Husband refuses to provide the Wife with documents relating to his interest (if any) in the accounting partnership and says that these documents are none of her business.
29. The Husband also believes the Wife will receive in the vicinity of \$350,000 from her personal injury claim, but she refuses to provide the Husband with disclosure documents relating to same, as she says this is not relevant to the property settlement.
30. Prior to separation the parties had always discussed having the children attend a private school for their secondary education. Both their names have been down for Wesley College since they were toddlers. Shenae has a place commencing in year 7 in 2023. The wife wants the children to attend a Wesley for their secondary education and says that the husband should pay the school fees. The husband says that he can only afford to pay half of the fees and the wife should also pay half. The fees and other ancillary expenses will be approximately \$40,000 per child per annum.
31. There is a compliance and readiness hearing listed for this matter in early October 2022.