

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

CDJ

APPELLANT

AND

VAJ

RESPONDENT

CDJ v VAJ (No 2) (S32-1998) [1998] HCA 76
10 December 1998

ADDITIONAL ORDER

- 1. Set aside Order 1 of the orders of the Full Court of the Family Court of Australia.*
- 2. Remit the matter to the Full Court of the Family Court to make such further order as is necessary with respect to the alteration of property and, if appropriate, an order as to the costs of proceedings in the Full Court.*
- 3. The appellant and respondent each pay one-half of the costs of the children's representative of the proceedings in this Court.*
- 4. The respondent pay the appellant's costs of the proceedings in this Court.*
- 5. The respondent to have a costs certificate under s 6 of the Federal Proceedings (Costs) Act 1981 (Cth) in respect of the proceedings in this Court.*

On appeal from the Family Court of Australia

Representation:

D M J Bennett QC with T L P Hodgson for the appellant (instructed by Barwick Boitano Lawyers)

2.

D F Jackson QC with P Hanna for the respondent (instructed by Mark Phillip Symonds)

Intervener:

P I Rose QC with R Flohm for the children's representative (instructed by Legal Aid Commission of New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 GAUDRON, McHUGH, GUMMOW AND CALLINAN JJ. On 22 October 1998,
the Court allowed an appeal from the decision of the Full Court of the Family Court
of Australia in this matter. The parties were given liberty to file written
submissions with respect to certain additional orders to be made. The Court has
received and considered those written submissions.

2 We are of the view that further orders should be made as follows:

1. Set aside Order 1 of the orders of the Full Court of the Family Court of Australia.
2. Remit the matter to the Full Court of the Family Court to make such further order as is necessary with respect to the alteration of property and, if appropriate, an order as to the costs of proceedings in the Full Court.
3. The appellant and respondent each pay one-half of the costs of the children's representative of the proceedings in this Court.
4. The respondent pay the appellant's costs of the proceedings in this Court.
5. The respondent to have a costs certificate under s 6 of the *Federal Proceedings (Costs) Act* 1981 (Cth) in respect of the proceedings in this Court.

- 3 KIRBY J. Before the Court are questions reserved when judgment was given and orders pronounced in *CDJ v VAJ*¹.

The reservation of orders as to costs

- 4 I was of the opinion that the appeal should be dismissed. The majority, however, favoured allowing the appeal, setting aside the orders of the Full Court of the Family Court and substituting an order that, so far as the issues of residency and contact were concerned, the appeal to that Court should be dismissed. In disposing of the appeal to this Court I agreed to a proposal that the parties and the children's representative should be heard separately on the issue of costs. I have now read the submissions of the parties and of the children's representative.

- 5 Had my view prevailed, the proper order as to costs would have been to confirm the costs orders made by the Full Court and to order that the appellant, who would then have twice failed, pay the costs of the respondent and of the children's representative in this Court. No question would then have arisen under the *Federal Proceedings (Costs) Act* 1981 (Cth) ("the Act")².

- 6 However, I must now approach the submissions as to costs on the premise that the appeal has been allowed in accordance with the majority's opinion³.

The costs of proceedings in the Family Court

- 7 Despite the substantial submissions received from the parties urging this Court to do otherwise, I do not consider that this Court should dispose of the costs of the proceedings in the Family Court. Those proceedings were extended and complex, the entitlement to orders as to property being partly related to the outcome of the orders as to residency. The Family Court is in a much better position than this Court to determine, in accordance with the *Family Law Act* 1975 (Cth)⁴ and its practice, what consequences for costs flow, in that Court, from the

1 *CDJ v VAJ* (1998) 72 ALJR 1548; 157 ALR 686.

2 The Act was held valid in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [No 2]* (1982) 152 CLR 179.

3 cf *South-West Forest Defence v Conservation Department [No 2]* (1998) 72 ALJR 1008; 154 ALR 411.

4 s 117. That section provides, in sub-s (1), that, subject to sub-s (2) and s 118 (dealing with frivolous or vexatious proceedings) "each party to proceedings under this Act shall bear his or her own costs." Sub-section (2) provides that "[i]f ... the court is of opinion that there are circumstances that justify it in doing so, the court may ... make such order as to costs ... as the court considers just."

3.

order of this Court giving effect to the opinion of the majority that the Full Court erred in disturbing the order of the primary judge as to residency and contact.

- 8 Similarly, the Full Court would be in a much better position than this Court to decide whether to adjust the orders concerning the alteration of property interests in the light of the outcome of the appeal to this Court. I would therefore remit all such matters to the Full Court to reconsider the orders as to property and costs in that Court (and as to any consequential certificate under the Act), in the light of the outcome of the appeal to this Court. The present proceedings do not allow the application of the simple rule that costs follow the outcome. Accordingly, it should be for the Full Court of the Family Court to sort out the consequential orders, including as to costs.

The appellant's costs in the High Court

- 9 As to the costs in this Court, they are not governed by the *Family Law Act* 1975 (Cth). The respondent's submission that s 117 of that Act applies in this Court should be rejected. This Court enjoys, in relation to the ordering of costs of matters before it, broad powers, relevantly including those conferred by the *Judiciary Act* 1903 (Cth), s 26⁵.
- 10 On that footing, I see no reason for departing from the ordinary rule in this case. On the premise established by the opinion of the majority, the appellant, having succeeded, is entitled, in this Court, to an order for costs against the respondent. He should have that order.

The children's representative's costs in the High Court

- 11 By an order made on 20 May 1998, the children's representative was granted leave to intervene in the appeal to this Court. His intervention was not opposed either by the appellant or by the respondent. The children's representative seeks an order for his costs of the appeal against both the appellant and the respondent. The children's representative has a duty to "act in an independent and unfettered way in the best interests of the child"⁶. This duty carries over to an appeal. The interests of the children and their welfare is of concern to the public. Those interests extend beyond, and are separate from, the interests of the parents. The children are the children of both parties. They should share equally the costs of their children being separately represented in this Court.

5 See *De L v Director-General, NSW Department of Community Services* [No 2] (1997) 190 CLR 207 at 220-223; cf *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 93-94.

6 *Bennett and Bennett* [1991] FLC ¶92-191 at 78,259.

Certificates under the Act

- 12 That leaves the application for certificates under the Act. Whatever the position may have been on any of the issues in the Full Court of the Family Court, there can be no doubt that the appeal succeeded in this Court on a question of law⁷. The respondent has enlivened the discretion to grant a certificate by applying for "a costs certificate in respect of the appeal"⁸. I would grant such a certificate to the respondent.
- 13 The respondent went further. She asked for two certificates under the Act – one for her own costs and another for the costs of the children's representative, the intervener. There is no basis for a second certificate. Section 6 of the Act talks of "a certificate". That certificate is one which the court in question may "grant to the respondent". The Act does not provide for the grant of a certificate to an intervener, as such, and no certificate under the Act is sought by the children's representative. By the order which I favour, he gets his costs, in part, from the appellant and, in part, from the respondent. The one certificate is designed to apply to the costs of the respondent which include those costs which must be paid to the children's representative. The request for a second certificate should be rejected.
- 14 As for the appellant, he sought a certificate pursuant to s 9(1) of the Act but only in the event that his submissions as to costs were not accepted. Having concluded that the appellant is entitled to have the respondent pay his costs of the appeal to this Court, I need not consider this submission. Moreover, as this Court has not had a contradictor to contest the submission of the parties in relation to the meaning to be given to s 9(1) of the Act, in its application to appeals from the Family Court to this Court, I shall refrain from saying anything on this point.

Orders

- 15 Accordingly, whilst adhering to my opinion expressed in my earlier decision, upon the basis that the Court has held that the appeal should succeed, I agree in the orders proposed by the other members of the Court.

⁷ Act, s 6; cf *Cramer v Davies* (1997) 72 ALJR 146 at 149.

⁸ Act, s 6(1).