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(Articles and Legislative Reform Update included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

There have been few appraisals of the jurisprudential foundations of the administrative joining of two jurisdictionally and hierarchically different Commonwealth Courts since the enactment of the Federal Circuit and Family Court of Australia Act 2021. The review of that Act has now been announced and will report by March 2025. A cornerstone of this 'merger' is for one person to be the head of jurisdiction of two Courts at the same time, a feature of curial governance that appears not to have occurred since the time of Cardinal Wolsey during the reign of Henry VIII. Despite warnings to the Senate Legal and Constitutional Affairs Legislation Committee, such a construct places that person in potential breach of long-standing principle regarding breach of concurrent duties. It also potentially risks the 'institutional integrity' of the Courts as discussed by the High Court in Wainohu v New South Wales (2011). Other flaws in relation to the legislation are canvassed including the misleading names of both Courts. An historical overview of curial reform beginning with Attorney-General Murphy's original plan for a Superior Court of Australia that included a family law division provides context for the consideration of options for review of the current structures.

The rule in Rice & Asplund provides that a court should not reopen final parenting orders unless there has been a significant change of circumstances that justifies reconsideration. This has now been given statutory expression in s 65DAAA of the Family Law Act 1975 (Cth). This followed from a recommendation of the Australian Law Reform Commission that codifying the rule would make it more visible, particularly to self-represented litigants. However, codifying a nuanced rule that has developed through case law over four decades has its disadvantages, as its nuances may not be well-captured in a few statutory words.

This article first explains what the rule is, and why it is justified. It goes on to consider whether s 65DAAA, as drafted, has brought about material alterations to the rule. The Full Court in Radecki & Radecki has expressed the view (obiter) that the section should be read in a non-literal manner so as to be consistent with the intentions of Parliament. To do so, it went beyond the legitimate application of relevant principles of statutory interpretation. However, even if the interpretation offered in Radecki & Radecki is accepted, s 65DAAA still materially alters the operation of the rule.

The common law has long been plagued by the question of whether there can be property in human tissue and, if so, what kinds of human tissue. In no area is such a decision more challenging than when it comes to reproductive material, particularly given the increasing use of artificial reproductive technology. This article considers the implications of Riethmuller J's recent decision, Leena & Leena, where his Honour found that stored embryos were property for the purpose of s 79 of the Family Law Act 1975 (Cth) (FLA). While similar matters have come before family courts in Australia and overseas historically, never have embryos been considered property, despite many cases finding that gametes can be the subject of property rights at common law. This article questions whether s 79(2) of the FLA, and family law property jurisprudence more generally, is an appropriate and adapted tool for deciding what happens to embryos upon the breakdown of a relationship.

Legislative Reform Update