Robert Glade-Wright's Family Law case notes

PROPERTY

- ***De facto thresholds***
- ***"De facto relationship" in dispute***
- ***Injunctions set aside for want of jurisdiction***

In *Norton & Locke* [2013] FamCAFC 202 (18 December 2013) the Full Court (Bryant CJ, Murphy and Benjamin JJ) set aside interim injunctions to restrain an alleged de facto husband (the appellant) from evicting the respondent from a property or disposing of the property and requiring him to meet outgoings. The existence of a de facto relationship was disputed. The Full Court said (para 13):

> "The terms of s 114(2A) are clear; the court's power to grant injunctions pursuant to the section can only be granted 'in a de facto financial cause'. There is no 'de facto financial cause' until a de facto relationship is established and the additional ss 90SK and 90SB conditions met … [thus no] jurisdiction to make an order of the type contemplated by s 114(2A) … "

PROPERTY

- ***Full Court upholds decision that leave to proceed out of time is not required in respect of a foreign divorce***

In *Anderson & McIntosh* [2013] FamCAFC 200 (13 December 2013) the Full Court (Bryant CJ, May & Thackray JJ) dismissed an appeal against Murphy J's decision (in *McIntosh & Anderson* [2013] FamCA 164) where his Honour held that the 12 month time limit to institute property proceedings under s 44(3) of the *Family Law Act* refers to a divorce order made under the Act so does not apply to a divorce issued in a foreign jurisdiction.

PROPERTY

- ***Property order set aside where the notion of "special skill" had been applied***

In *Kane* [2013] FamCAFC 205 (18 December 2013) the Full Court (Faulks DCJ, May and Johnston JJ) remitted a property case for rehearing where the trial judge said (para 60) that "the law … recognise[s] a principle in which weight is attributed to the special skill of a spouse". The husband had argued that his investment of $1,060,400 in shares in a company which grew to $3,420,294 at trial in less than two years was a "special contribution" (paras 52-53). May and Johnston JJ said (paras 102-103) that "[t]he result in percentage terms … [i]n our view … demonstrates in very clear terms that excessive weight was given to the husband's contribution … [and] has brought about orders that are not just and equitable … ". Faulks DCJ agreed, saying (para 7) that "[t]he Act [FLA] does not require and in my opinion the authorities do not mandate any such doctrine [of 'special contribution']".

DISCOVERY

- ***Legal professional privilege***
- ***Evidence should identify the basis of such a claim***

In *Strahan* [2013] FamCAFC 203 (18 December 2013) the Full Court (May, Thackray & Murphy JJ) dismissed the wife's appeal against Dawe J's refusal of legal professional privilege which the wife claimed attached to some of her documents. Dawe J had found that the descriptions given in the wife's List of Documents were "not a sufficient description to establish the necessary basis for the privilege" (para 20). Murphy J (with whom Thackray & May JJ agreed) at para 30 cited from the judgment of the Full Court of the Federal Court in *Barnes v Commissioner of Taxation* [2007] FCAFC 88 about the claim for privilege made in an affidavit:

> "This affidavit falls far short of providing any adequate basis for claiming privilege in respect of any individual document. It consists of assertions, conclusions and generalised comments. The documents referred to are from a number of sources. (…) However, no evidence has been adduced from any of those persons. (…) In this context, the fact that Mr Barnes' affidavit does not clarify the reason why any specific document came into existence means that the court is left to consider the documents on their face and determine as best it can whether the documents are privileged. This is unsatisfactory. (…)
>
> The authorities emphasise the need for focused and specific evidence in order to ground a claim for legal

professional privilege. In *Kennedy v Wallace* (2004) 142 FCR 185 (*Kennedy*), Black CJ and Emmett J reiterated the principles that verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege: see also *National Crime Authority v S* (1991) 29 FCR 203 at 11 … [and] *Grant v Downes* [1976] HCA 63. Where possible the court should be assisted by evidence of the thought process behind, or the nature and purpose of advice being sought in respect of, each particular document. The fact that generalised evidence is not challenged in cross-examination does not mean that such evidence must be accepted, particularly when it is manifestly inadequate as it is in this case. As in *Kennedy*, mere general assertions of the purpose of creation of the documents are insufficient to discharge this onus. Even though in that case some evidence as to the purpose of particular records was adduced, Allsop J at [168] considered that the onus had not been discharged because the evidence did not permit a conclusion to be drawn as to the *dominant* purpose of the creation of any particular document or entry in a document. Simply to show that *one* purpose for creation of the document was to obtain legal advice or assistance is not good enough."

ADULT CHILD MAINTENANCE

- ***Court varied maintenance order where twins had declined job offers***

In *Wadsworth* [2013] FCCA 2043 (11 December 2013) Judge Monahan varied an adult child maintenance order made to enable twins to complete their tertiary education by reducing the maintenance payable from $1,250 per month to $1,000 per month. The father's case was that he had "made tentative arrangements" for the twins to be offered "casual full-time employment". The Court said at paras 67-68:

> " … the Court is of the view that the twins' decision not to actively seek any casual or part-time employment prior to the conclusion of their university studies amounts to a changed circumstance that may justify a variation to the current orders. (…) [While they] … appeared genuine in their desire to concentrate on their university studies, their evidence that they proposed to study full time during most of their university vacation … was not believable."

PROPERTY

- ***Valuation***
- ***Business was worth more to party retaining it than to hypothetical purchaser***
- ***Who should retain the business***
- ***Anti-competition injunction not granted***

In *Ledarn* [2013] FamCA 858 (1 November 2013) Cronin J considered a dispute after a 29 year marriage where each party sought to retain a business which was a large manufacturer of automotive accessories. The wife was its manager while the husband had designed its "unique product" (para 4). After the husband went bankrupt in 2003 the business structure was changed to give "most of the control of this enterprise and its associated trusts to the wife" (para 19). The Court said that while the experts had agreed a value of $8 million for the business the wife said it was "worth $10 million to her" (para 167). Cronin J said (at paras 83-84):

> "Normally, the primary test is the hypothetical prudent purchaser but it is conceivable and often seen in family law cases that the commercial or capital value of the shares in a company do not reflect the value for the particular spouse who controls or retains them after separation particularly where that party stands to benefit from those entitlements after the conclusion of the relationship (see *Reynolds and Reynolds* (1985) FLC 91-632). (…) Here, there is no question that the wife intends to retain the business and to continue to make money from it."

Cronin J held at para 87 that the wife should retain the business as she "ha[d] a much better understanding of the needs of the business and how it operates" but dismissed the wife's application for a "five year non-compete" injunction, saying at paras 164-165:

> "(…) it was the wife's evidence that the major customer is happy to negotiate the contract with whomever takes over the business. If that is so … the wife will have a significant contract to supply products with the major customer of the business into the foreseeable future and the husband faces a formidable task in breaking into that field. I find therefore that with the wife in control of not only the business name but its property, plant and equipment and also staff, the prospect of the husband breaking into that market seems remote."

PROPERTY

- ***Share market losses not added back***
- ***Adjustment made for post-separation investment***

losses of SMSF

In *Idoni* [2013] FamCA 874 (30 October 2013) Benjamin J considered a 20 year marriage where the wife sought notional addbacks for what she called "risky investments" by the husband, a "qualified financial professional", and a resultant loss of about $520,000. She also alleged that his management of their self-managed superannuation fund had caused its investments to drop in value by about $200,000 after separation. In rejecting the addback claim the Court found (para 23) that the husband's "share acquisitions took place shortly before … the 'Global Financial Crisis' … were highly geared and as such were vulnerable to the very high share market fluctuations at that time" and was satisfied (para 29) that "the husband engaged in a commercial risk but it was neither reckless or wanton on his part, having regard to his qualifications and his expertise". The Court, however, did make an adjustment (para 35) in favour of the wife for the husband's "poor management" of the superannuation fund.

FINANCIAL AGREEMENTS

- ***Agreement was voidable by wife as husband had misrepresented his assets***
- ***Duress***
- ***Signatory of s 90G certificate***

In *Adame* [2014] FCCA 42 (16 January 2014) Judge Jarrett granted a wife's application to set aside a financial agreement where she claimed that she had entered into the agreement "under duress"; that the husband "did not properly disclose all of his assets" (para 5); that while a statement of legal advice had been signed her lawyer had not given her "the advice as required by s 90G" and that "she received no copy of the certificate" (para 151). The parties' "relationship was tumultuous and they separated … on a number of occasions" (para 19). The wife took the agreement to two lawyers (the second of whom was referred to her and paid by the husband) both of whom advised her against signing it (paras 52-67). In evidence were emails between the husband and his lawyer who included in the draft agreement a house in California the husband said he had bought. The husband told his lawyer that the wife did "not know about the US property. It's under a trust fund for the kids so better take that one out" (para 79). The husband later said that he had not actually bought the property but had been "big noting [him]self" to his lawyer (para 68).

After the wife emailed the husband to say "I'm not signing it" (para 85) he made an appointment for her to see another lawyer (Mr F) with the husband present. Mr F said he "didn't discuss anything in relation to the *Family Law Act*" (para 91) but that the meeting "concerned clarification of the commercial terms … and … that the agreement reflected what the parties intended" (para 92). The certificate was signed by Mr F and the agreement was signed by the wife at a later meeting. The Court (para 113) was "not satisfied … that Mr F provided the advice set out in the certificate to Mrs Adame when she executed the agreement". The Court was satisfied (para 131) "that when Mr Adame signed the agreement he knew that [his] representation … of his assets …was false … [and] that he intended that [the wife] rely on that representation"; that she did rely on it (para 132) and that "[i]n those circumstances the financial agreement was voidable at Mrs Adame's election" (para 133).

As to duress, the Court (paras 141-146) accepted the wife's evidence that she "did not want to sign" (para 110); that the husband "harassed her until she signed [the agreement]" (para 138) and she "just 'gave in' and signed [it]" (para 115). The Court also held (paras 153-156) that the advice given to the wife by the previous lawyers and Mr F's signature did not comply with s 90G as to the provision of advice and the signing of a certificate.

PROPERTY

- ***Unwritten arrangement between parties after separation***
- ***Stanford applied***
- ***Not just and equitable to make any order***

In *Bevan* [2014] FamCAFC 19 (19 February 2014), the Full Court (Bryant CJ, Finn & Thackray JJ) determined the hearing of the wife's appeal against property orders (*Bevan* [2013] FamCAFC 116) after inviting further submissions as to the proper re-exercise of discretion. "The primary issue [was] whether [the trial judge] erred in concluding it was just and equitable to alter existing property interests when the parties had largely lived apart for 18 years and the husband had told the wife she could retain the assets" (para 2 of the Court's earlier reasons). In re-exercising discretion, the Full Court allowed the appeal and dismissed the husband's application for property orders.

Bryant CJ & Thackray J said (para 30) that "[a]cting on the representations, and believing the assets were hers, the wife dealt with the property as if [they] were her own", saying (para 40) that in *Stanford* [2012] HCA 52 "the plurality [of the High Court] touched on the issue of unwritten arrangements between parties to a marriage when discussing the three 'fundamental propositions' … governing applications under s 79 [said at para 73 of the earlier reasons in *Bevan* above to be (1) identify existing property interests, (2) discretion should not assume those interests are different from those determined by the common law and equity and (3) s 79(2) should be considered separately from s 79(4)]" and said (*Stanford* at [41]) that "[t]hese principles … require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties". Bryant CJ and Thackray J said at para 82:

"The basis upon which

it can be concluded in many cases that it is just and equitable to make orders interfering with existing interests in property following the breakdown of marriage is because it is no longer appropriate to proceed on the basis of the stated and unstated assumptions between the parties to the marriage in circumstances where they have not expressly considered whether, or to what extent, there should be some different arrangement of their property interests (*Stanford* at [41]). In the present matter, however, the parties **did** give express consideration to what should become of their property. In such circumstances we consider the husband must do more than point to the end of the relationship … to persuade us that there is some principled basis upon which we should interfere with an existing state of affairs created by consent, or at the very least, acquiescence of the parties."

CHILDREN

- ***Parental responsibility to be sole for some issues but equal for others***
- ***Right of access to family report writer's notes***

In *Doherty* [2014] FamCAFC 20 (19 February 2014) the Full Court (Ainslie-Wallace, Murphy & Tree JJ) dismissed the father's appeal against an order made by Demack FM as to parental responsibility which was made "sole" as to some issues but otherwise to be equally shared. After examining the husband's submissions (paras 34-43) the Full Court said (para 43) that "there [wa]s no error *per se* [in such an order] … [in that the trial judge's] finding … as to the parents' inability to co-operate and their incapacity to make decisions jointly … must be seen in light of the finding … that the mother did not seek a 'blanket order' the effect of which would be to exclude the father from decision making for *every* decision relating to *every* major long-term issue". As to the father's complaint that Demack FM refused him access to the family report writer's notes the Full Court (paras 78-84) cited *Weston & Laurent* [2013] FamCAFC 34, saying that "her Honour was … incorrect", that "[t]he father had (subject to any claims not evident or suggested in these proceedings) an indisputable right to have access to the notes on which the report was based, and indeed he was entitled to have that access at a time before the witness came to be cross examined". No injustice, however, was found to have resulted from the refusal of access.

CHILDREN

- ***Consent order for equal time (in place for three years where parents lived 93 km apart) discharged when child began primary school***

In *Meyer & Shipton (No. 2)* [2013] FCCA 2198 (19 December 2013) a son ("X") had been parented under a consent order "in an equal time regime" (para 18) for "well over three years" (para 29) despite the parties living an hour's drive from each other (para 9). When the child was due to begin primary school both parents sought the order's variation so that the child live with them instead. Giving weight (*inter alia*) to the family report writer's view that the mother "was genuine in her belief that X was a '*boy's boy*' who was very close to his dad" (para 346), Judge Brown discharged the order and ordered that the child live with the father and spend substantial and significant time with the mother (alternate weekends, alternate Wednesday nights and half the holidays).

CONFLICT OF INTEREST

- ***Solicitor had prepared wills for both parties***
- ***Solicitor was respondent's brother***

In *Edgley* [2013] FCCA 2024 (29 November 2013) Judge Halligan granted the wife's application for an injunction restraining the husband's solicitor from continuing to act for the husband as he had previously acted for both parties in preparing their wills. He agreed that when acting for the wife he received confidential information from her (para 59). The solicitor was also the husband's brother although it was held that confidences conveyed socially were "irrelevant" (para 58). The Court applied *McMillan* [2000] FamCA 1046, saying at para 45:

> " … the former client need only prove 'a *prima facie* case as to confidential material, the disclosure or use of which by the solicitors in the course of the conduct of the current proceedings for the present client would be prejudicial to the applicant' (quoting the words of Mullane J in *Griffis & Griffis* (1991) FLC 92-233). All that is required is that there be at least a theoretical possibility that confidential information could be used against the former client if the solicitor continued to act (*McMillan*, at [42])." ●