Robert Glade-Wright's
Family Law Case Notes

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PROPERTY

- ***Husband's 20 per cent loading for financial contributions during long separation set aside***
- ***"Huge disparity" between parties' incomes***

In *Marsh* [2014] FamCAFC 24 (25 February 2014) the Full Court (Ainslie-Wallace, Murphy & Le Poer Trench JJ) allowed the wife's appeal against a property order, remitting the case for re-hearing. It was a 21 year marriage with three children where the parties had been separated for 10 years, in which time the pool grew from $3.5 to $4.8m. W's appeal was against the 20 per cent loading given to the husband on contributions and the 10 per cent adjustment for the wife under s 75(2). Ainslie-Wallace J at [55] said that "the husband built his career due to the wife by mutual agreement not working outside the home but assuming the role of homemaker and parent". The husband admitted that the wife both pre- and post-separation was "absolutely marvellous". Murphy J said at [120] that "the foundation for the property transactions … subsequent to separation was the property acquired during the marriage and the husband's income acquired through advancement in his employment" and that "[t]he wife contributed significantly to each". As to s 75(2), Ainslie-Wallace J said at [75] that the huge disparity in the incomes [wife's benefits and board cf. husband's $13,000 per week income] … should have led to a significant adjustment in the wife's favour".

PROPERTY

- ***Error found where trial judge attached percentages to components of contribution***

In *Bolger & Headon* [2014] FamCAFC 27 (27 February 2014) the Full Court (Thackray, Murphy & Kent JJ) allowed H's appeal against a 51/49 property order in his favour, remitting the case for re-hearing. A seven year cohabitation produced no children but a net pool of $1.5 million where the husband's initial contribution had a current value of half the pool and the wife had inherited at separation a property worth $250,000 at trial. The court below [7]-[8] "attribute[d] seven per cent to the husband's initial contributions", "a further four percent [to him] by way of contribution [during cohabitation and post-separation]" and 7.5 per cent to the wife as "an appropriate figure" for her inheritance. The wife received a further adjustment of 2.5 per cent under s 75(2). The Full Court said at [15]-[16] that "the attribution of specific percentages to components of contribution and the adjustment in respect of the s 75(2) factors can only be seen to result in the overall conclusion if the premise is a 50/50 starting point", a presumption that was rejected by the High Court in *Mallet* [1984] HCA 21.

CHILDREN

- ***Sexual abuse allegation not made out***
- ***Mother genuinely believed children not safe with father***
- ***No time allowed***

In *Starkey (No. 2)* [2013] FamCA 977 (13 December 2013) Dawe J considered a Magellan list case involving two children of ten and eight where the father suffered from "29 per cent incapacity" as a result of a head injury sustained in a car accident [17]. Allegations were made by the children "suggesting sexual abuse by the father" [38] which the Child Protection Service (CPS) found was "the most likely hypothesis to explain" experiences described by the eldest child [66]. The father denied the allegations. A report of a clinical psychologist said that the father had "poor insight into the sexual role boundary violations between parent and child" [98]. Dawe J said [94]:

> "Notwithstanding the inconsistencies in some parts of the father's evidence and the detail in the CPS interviews concerning [the eldest child's] statements and the initial findings by the CPS, the evidence of the father raised considerable doubt about the allegation of sexual abuse … "

Dawe J said [146] that it was "still … necessary to consider the background to the allegations and the impact it has had, and will continue to have, upon the children". Dawe J [147] was "satisfied … that the mother was reasonable in forming her belief that the children had been abused by the father, or that there was a serious unacceptable risk that the children might be abused by the father" such as [148] to require the court to "consider the

impact that any order requiring her to hand the children over into the [unsupervised] care of the father might have upon her future parenting capacity". Dawe J was satisfied that such an order would be "likely to have a significant effect upon her psychological health and her capacity to provide ongoing, emotional and psychological care for the children". Dawe J [177] found that there was "no reasonable prospect of … ongoing supervision [being] available" nor would ongoing supervision be in the best interests of the children. There was no order for the children to spend time with the father.

CHILDREN

- ***Father's self-harming de facto partner restrained from being present during children's time with father***
- ***Risk was unlikely but possible***

In *Gardiner & Rivers* [2014] FCCA 76 (24 January 2014) Lindsay J granted the mother's application for an injunction restraining the father's de facto partner (Ms S) from being present during the children's time with the father. Ms S had drunkenly stabbed herself and accused the wife of being responsible, lodging a complaint with the police which was some time later found to be false [26]. A psychiatrist (Dr T) appointed by the ICL said that the incident was isolated, expressing the opinion that Ms S was not a risk to the children [57]-[58]. Lindsay J, however, said [71] that it was "difficult to predict the level of risk involved in her being [present] at the time of the interaction of the father and the children". Lindsay J said that the family report writer "identified no reason not to fall in with [Dr T's report] that she was not a risk to the children" and it "recommended the introduction of Ms S to the husband's time spent with the children on a gradual basis" [79]. Lindsay J concluded [133]:

> "The children are at some degree of risk from interacting with her. I do not want to overstate the risk but she may well again, if drinking and unsupported emotionally by the husband, self-harm or essay self-harm while the children are in her household. It is an unlikely but not a remote possibility. On the other hand, her harming the children directly is a remote possibility. Her behaviour in March/April 2011 was very singular behaviour. The wife is entitled to be apprehensive."

PROPERTY

- ***Leave to proceed out of time***
- ***'Hardship'***
- ***Stanford argued***

In *McCoy & Chancellor* [2014] FamCAFC 62 (11 April 2014) the Full Court (May, Strickland & Kent JJ) dismissed Ms McCoy's appeal from Judge Turner's granting of leave to Ms Chancellor under s 44(6) FLA to apply for property orders three months out of time. The parties had been in a de facto relationship for 27 years. The appellant argued (para 33) that before considering hardship under s 44(6)(a) the judge was required to make findings that altering the property interests under s 90SM was necessary to do justice and equity between the parties and that a mere intermingling of property and financial resources was insufficient to demonstrate hardship. The Full Court said (para 37):

> "… the voluntary severance of the de facto relationship rendered the just and equitable requirement 'readily satisfied' in the language of the High Court. As is made clear by *Stanford* [[2012] HCA 52] it is not necessary to find that an order adjusting property interests will be made, for the just and equitable requirement to be satisfied. Indeed [*Stanford*] allows for cases where the just and equitable requirement is fulfilled, but application of s 79(4) may result in no order being made adjusting the parties' existing property interests."

PROPERTY

- ***Superannuation disability pension commutable to a lump sum – One pool approach***
- ***DFRDB cases distinguishable (such pensions in payment phase being not commutable)***

In *Balzano* [2014] FCCA 615 (3 April 2014) Judge Bender considered a 39 year marriage where each party had retired and the husband sought to "retain the total benefit of his [E] Superannuation indexed disability pension from which he currently receive[d] $42,384 per annum" (para 2). He argued that the pension should be "dealt with differently to the parties' realisable assets", the wife to receive "a greater portion of the parties' realisable assets" (para 3). The rules of the pension (para 14) made *"no provision to create a separate interest for the non member spouse and/or for the non member spouse to receive on-going pension payments"* (Court's emphasis) and a splitting order would mean "the non member spouse will be entitled to be paid as a lump sum". The superannuation benefit had been valued in accordance with the *Family Law (Superannuation) Regulations 2001* at $455,761 (para 15). Judge Bender said at paras 28-29:

> "Counsel for the husband referred the Court to a number of 'superannuation pension' cases in which it was submitted the principle expounded by the Full Court in *C v C* [*C & C* [2005] FamCA 429 also known as *Coghlan*] that the preferred approach by the Court when determining a property matter where there was an entitlement to a superannuation pension was to deal with that entitlement separately

to the parties other assets was upheld (*T & T* [2006] FamCA 207).

The cases to which the husband's counsel referred the Court were all dealing with a Defence Force Retirement and Death Benefits Scheme (DFRDB) pension in its payment phase. A DFRDB pension in its payment phase cannot be commuted to a capital sum."

Judge Bender concluded (at paras 34-39) that "[b]y contrast to the DFRDB entitlement at the centre of the cases to which reference ha[d] been made, the husband's [E] pension can, and must, be commuted to a lump sum in the event a splitting order is made" and that therefore the preferable approach was to include the lump sum of $455,761 payable upon commutation in a single pool of assets.

FINANCIAL AGREEMENTS

- ***Pre-nuptial agreement made two days before wedding set aside for unconscionable conduct***

In *Parkes* [2014] FCCA 102 (24 January 2014) Judge Phipps set aside a s 90B financial agreement made two days before the parties' wedding. The parties had been de facto partners for six years and engaged to be married for 11 months. The husband had raised the question of a prenuptial agreement three days before their wedding, handing her a copy of a proposed agreement signed by him and saying that "if she did not sign it … the wedding was off". The wife signed it the next day, her evidence being that she "had no choice". Wedding arrangements were in place, guests had been invited and her parents had paid $40,000 for the reception (paras 53-55). Judge Phipps at para 65 discussed relevant authority including *Louth v Diprose* [1992] HCA 61 in which the High Court said in the context of a gift procured unconscionably:

> "The jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from … a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest … "

Judge Phipps concluded at para 68:

> "The wife says she considered that she had no choice. She was clearly in a position of special disadvantage and the husband knew so. The prenuptial agreement was not to the wife's advantage. It gave her no rights at all in the future to any of the husband's property. She knew that it was to her disadvantage because Mr C told her so. Nevertheless, she signed it because she considered she had no choice."

CHILDREN

- ***Grandmother's parenting application opposed by parents***
- ***Summary dismissal***

In *Penn & Haughton & Anor* [2013] FCCA 1941 (1 November 2013, published May 2014) Judge Lapthorn summarily dismissed a paternal grandmother's parenting application where the children's parents were "implacably opposed to the children spending time with [her]" (para 2). The parents, who had had no relationship with the applicant since June 2010 (para 29), argued that the grandmother's application should be summarily dismissed as it had no reasonable prospect of success (para 15). His Honour cited relevant authority, saying (para 25) that "any determination of the best interests of [children] should be informed by the family dynamics between the children's parents and grandparents" and that (para 43) "[w]here parents jointly or … a sole parent solely have a strong view in relation to the parenting of their children courts should be cautious about interfering with that exercise of parental responsibility".

PROPERTY

- ***High Court holds that husband should be held to his promises to transfer a property to his lover***

In *Sidhu v Van Dyke* [2014] HCA 19 (16 May 2014) the High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ) considered promises by the appellant husband to transfer to the wife's sister-in-law (with whom he had had a sexual relationship) a cottage on a rural property in the homestead on which the husband lived with his wife. Relying on his promises the respondent lover was prevailed on by him not to pursue her own husband for property settlement and she carried out work on the cottage and adjoining property. In the Equity Division of the Supreme Court of NSW the respondent won an appeal from the first instance decision to the NSW Court of Appeal which held the appellant estopped in equity from resiling from his promises on which the respondent had relied to her detriment, ordering him to pay her a sum equal to the value of the property promised. Upon the appellant's appeal to the High Court, French CJ, Kiefel, Bell and Keane JJ discussed equitable estoppel and the evidence at paras 58-78, concluding at para 86:

> " … no reason has been identified by the appellant to conclude that good conscience does not require that [he] be held to his promises. In particular, it is no answer for [him] to say that

> the performance of his promises was conditional on the completion of the subdivision and the consent of his wife to the transfer to the respondent. His assurances to [her] were expressed categorically so as to leave no room for doubt that he would ensure that the subdivision would proceed and that the consent of [his] wife would be forthcoming."

PROPERTY

- ***Personal insolvency agreement frustrated an interim costs order***
- ***Controlling trustees ordered to release control of property***

In *Beaman & Bond* [2014] FCWA 21 (4 April 2014) the respondent was ordered to pay $100,000 for forensic investigation fees and future legal costs of the applicant after which he signed an authority under s 188 of the *Bankruptcy Act 1966* (Cth) for controlling trustees (second respondents) to take control of his property under a personal insolvency agreement (PIA). The de facto wife applied under s 208 BA for the release of the respondent's property from the controlling trustees on the ground that the PIA was an abuse of Part X BA and would frustrate the Family Court proceedings. Holding that "special circumstances" under s 208 existed to justify an order releasing the respondent's property from the trustees' control, Crisford J said at para 130:

> "The considerable investment in the Family Court proceedings in terms of time, effort and investigation will effectively be frustrated if the PIA is executed and given effect. I find that the removal of [the respondent's] property from the control of the trustees is unlikely to cause unfair prejudice to either the parties … or … creditors. The issues will still be resolved, but in one set of proceedings."

CHILDREN

- ***Parenting order suspended to allow mother to relocate to Thailand for 18 months despite "Level 2" travel warning***

In *Eades & Wrensted* [2014] FCWA 15 (5 March 2014) Walters J granted an application by the mother of children (10 and 4) for suspension of a parenting order (five nights per fortnight to father) to allow her to relocate from Perth to "City A" in Thailand for 18 months where her partner had obtained employment. The mother proposed six trips to Australia during that time. The father opposed the application, citing "political unrest in Thailand … the amount of travel, the effect of the relocation upon the children's schooling … ". Walters J (para 72) concluded that "the sojourn [would] not result in [his] having anything other than an ongoing, meaningful relationship with the children" and was satisfied (para 192) as to "the father's reference to City A's unsavoury reputation … that the mother and Mr D [would] ensure that the children are insulated from the city's seamy side". As to travel advice Level 2 issued by DFAT ("exercise a high degree of caution"), Walters J (para 208) accepted the mother's evidence that she and Mr D were "responsible adults who [would] do everything in their power to ensure that the children [were] not exposed to any unacceptable risks".

CHILDREN

- ***Unilateral interstate relocation for medical treatment for mother who decided to stay away permanently***

In *Whiteside* [2014] FCCA 818 (3 April 2014) the mother unilaterally relocated the children (7, 6, 2 and 8 months) from NSW (where the parties had "co-parented" for 12 months under a parenting plan) to Queensland for urgent medical treatment for herself yet after receiving it she stayed in Queensland. Judge Neville made an interim order that the children live with the mother in Queensland but that the two eldest live with the father at the end of the school term. Directions were made for a family report and an expedited hearing.

CHILDREN

- ***Absent father, Indigenous mother***
- ***Child raised in Brisbane as Torres Strait Islander***

In *Waugh & Bannon* [2014] FCCA 893 (6 May 2014) Judge Baumann dismissed a father's application for time with his eight year old daughter ("[X]") where [X] had "spent no time with [him]" prior to the proceedings and "really does not know of his existence or identity". The mother was "an Indigenous woman who identifies herself as Torres Strait Islander". The parties had a brief relationship in 2004, the father initially disputing that he was [X]'s father. He applied for parenting orders in 2011 after the Child Support Agency reduced his Centrelink benefits when DNA testing proved him to be the biological father. Under interim orders some supervised time had occurred. Judge Baumann (para 41) accepted a forensic psychologist's evidence that the mother's family "adopts the practices of the Torres Strait Island culture, even though the child [lives] in suburban Brisbane … a collective family culture in which other family and kin have a significant say in how the child will be raised and by whom". The Court also (para 45) accepted the opinion of the family consultant that from her observations the father "has not yet grasped the significance to [X] of her extended family and Torres Strait Islander lifestyle", saying that "if an order is made that is not 'accepted emotionally' by the mother and her family it could undermine the 'collective family structure' that supports and has nurtured [X] and which is her reality". ●