Robert Glade-Wright's family law case notes

Robert Glade-Wright, author and editor of the family law book familylawbook.com.au

CHILDREN

Family Court of WA subjects child to chemotherapy against parents' wishes

In *Director Clinical Service, Child & Adolescent Health Services & Kiszko & Anor* [2016] FCWA 19 (24 March 2016) Thackray CJ of the Family Court of WA heard an application filed by Princess Margaret Hospital (PMH) on 18 March 2016 for an order against the wishes of the parents that their child Oshin (who had become ill in December 2015 and was to turn six on 1 April) be required to undergo chemotherapy and radiotherapy. The hearing was listed urgently due to PMH's expression of concern that the parents may remove the child from Australia for other treatment and was preceded by an ex parte Watch List order being made by a magistrate ([5]). The parents were given twenty-four hours in which to secure legal representation ([9]). The father appeared in person and an application by the mother's solicitor for an adjournment to brief senior counsel and adduce expert evidence as to appropriate alternative treatment was denied ([11]-[16]).

The child was diagnosed with a brain tumour which was removed by PMH on 3 December 2015 with the parents' consent although the mother deposed to being "disturbed about Oshin's reaction to the surgery." The father in court said that the child had been having 'hysterical fits' and that "the anaesthetists … were quite disturbed at Oshin's behaviour after his last wake up from the … anaesthetic." The intention of the mother (who had studied naturopathy) was to trial alternative therapies ([28]-[29]) and PMH's Ethics Committee "was 'a little divided' on the question of whether there should be active therapy" ([31]). The Court referred to the mother's evidence that the family was feeling pressured by a 'dismal prognosis' and that "they felt that the doctors were trying to frighten them into complying with treatment" ([36]). The Court said (at [48]):

> "Certainly … there has been fairly consistent advice that if the combined radiotherapy and chemotherapy regime is attempted, studies indicate that there is a 50 to 60 per cent chance of survival after five years. This is the period at which it might be considered that there had been a 'cure'. If chemotherapy only is attempted, then the survival rate might be 30 per cent after five years."

The Court added that "[m]ost significant for the parents to take into account is all the suffering that Oshin will have to go through if he does have the chemotherapy and then

the radiotherapy" ([51]) and that "[p]arents … are probably in the best position to assess the impact of procedures on their child" ([53]) but that "parental power is not unlimited" ([73]).

The Court (at [76]) applied *Minister for Health v AS* [2004] WASC 286, citing the following 'critical statement' by Pullin J:

> "Where faced with the stark reality that the child will die if lifesaving treatment is not performed, which has a good prospect of a long-term cure, it is beyond doubt that it is in child's best interests to receive that treatment … "

The Court continued (at [78]):

> " … The evidence makes clear, beyond all doubt, that Oshin will die within a few months if measures are not taken to prevent his death. The evidence indicates that there is about a 30 per cent prospect of survival after five years if he undertakes the chemotherapy that could commence tomorrow."

Before ordering that chemotherapy commence the Court added (at [80]):

> "It is equally true to say that there is a prospect that there will not be a cure, and I do not proceed in any way on the basis that there is any guarantee of a cure. In fact, there is a high prospect that there will not be a cure … "

Editor's note – cf. *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 in which it was held that the treatment of a thirteen-year-old child with Gender Dysphoria by injections of a drug called Lucrin to stay the progress of puberty did not require the court's approval (i.e. came within the scope of parental responsibility or in that case—as both parents were deceased—State guardianship). Murphy J in that case (at [87]) referred to Rule 4.09 of the *Family Law Rules* (applicable in WA via Rule 4(1) of the *Family Court Rules*) which "provides a list of matters upon which evidence 'must' be given in applications for a 'medical procedure'."

CHILD SUPPORT

Father appeals AAT's assessment of his percentage of care as 60 per cent for time child was at boarding school at his expense

In *P v Child Support Registrar* [2015] FCA 116 (27 February 2015) Katzmann J of the Federal Court of Australia heard an appeal by the father (P) from AAT's assessment of 60 per cent as his percentage of care of a child A whose boarding school fees as a weekly boarder at a private school in Sydney P had paid. A spent alternate weekends and half school holidays with each parent ([6]). P relied on s. 54A of the *Child Support (Assessment) Act 1989* which provides that "the actual care of a child that a person has had … during a care period may be worked out based on the number of nights that the Registrar is satisfied that the child was … in the care of the person during the care period" ([13]). The Court said (at [18]) that, in rejecting P's contention that A was entirely in the care of P when he was boarding because P pays or is responsible for the school fees, the tribunal said:

> "If this is a contention that actual care should be assessed on nights and all nights should be attributed to the applicant while A is in boarding school, I reject it. This contention does not recognise the importance of certain aspects of care for A, other than those relating to his accommodation, food and clothing, and ignores the level of care provided by [M] during this time. She sees or speaks to A every day during the week while he is at school, is involved in parent-teacher meetings and is listed as one of A's emergency contacts. No major decisions about A's health care, medical treatment or education could be made during this period without reference to [M]."

The Court agreed, saying (at [69]) that the tribunal was not bound to determine the percentage of care by reference to s. 54A(3). The appeal was dismissed with costs.

MAINTENANCE

High Court upholds discharge of interim order – Inferred wife could call on her brothers to pay her $150 000 from father's estate

In *Hall v Hall* [2016] HCA 23 (8 June 2016) the High Court dismissed the wife's appeal against an order of the Full Court (FCA) discharging Dawe J's interim maintenance order that the (property developer) husband pay the (medical practitioner) wife interim maintenance of $10 833 per month ([15]). The wife had deposed that she owned two luxury motor vehicles and an interest in her father's estate of an unknown value.

Since the order an affidavit filed in opposition to a subpoena for production of the will disclosed that the father expressed a 'wish' that the wife receive from a group of companies (in which he held shares which he left to the wife's brothers) $16 500 000 on the first to occur of a number of events including divorce and that she receive $150 000 p.a. until the date (if any) of that payment ([20]).

Upon the Full Court allowing the husband's appeal on the ground that the wife's estate interest was a financial resource, the wife appealed to the High Court. French CJ, Gageler, Keane, Nettle & Gordon JJ (Gordon J dissenting) said (at [31]-[32]):

> " … Accepting that … the annual payment … would have been voluntary, the Full Court found that the wife would have received [it] if she had requested it … In drawing that inference … the Full Court noted that the Group was controlled by the wife's brothers and that there was no evidence that the wife had requested [them] to comply with their father's wish once she became aware of … the will. The Full Court saw nothing in the evidence to suggest that any such request, if made, would have been denied. The fact that her brothers had provided her with luxury motor vehicles indicated that the wife had a good relationship with them."

Upon dismissing the appeal with costs, the majority said (from [45]):

> "The Full Court's finding that the wife would have received the annual payment of $150 000 … if she had asked her brothers was well open on the evidence. (…)"

[48] True it is that the wife had not received any payment from the time of their father's death. The reasons for that were wholly unexplored in the evidence. That evidentiary gap was within the power of the wife to fill. It was within [her] power … to lead evidence to provide some explanation. Again, her failure to do so allows the inference to be drawn that such explanation … would not have assisted her case. (…)

[55] Whether a potential source of financial support amounts to a financial resource of a party [under s. 75(2)(b) FLA] turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it."

PROPERTY

Initial contributions adjustment upheld on appeal but not judge's finding that wife's earning capacity was unaffected by marriage

In *Wah & Golay* [2016] FamCAFC 67 (7 April 2016) the Full Court allowed the wife's appeal against a property order but left undisturbed the assessment of contributions as 87.5:12.5 where of a net pool of $3.9m the husband's initial contributions were $2.4m and the wife's $280 000. Rees J had made no s. 75(2) adjustment, finding that the wife's earning capacity was unaffected by the eight-year marriage.

Murphy J (with whom Ryan and Aldridge JJ agreed) said that it was found that "the wife would have $500 000 with which to house and support herself" ([25]) but had "little if any prospect of gainful employment" and that he was "unable to see where her Honour ha[d] given any consideration to … s. 75(2)(d) (wife's commitments enabling her to support herself) ([26]) or the fact that the wife was receiving sickness benefits (s. 75(2)(f)) or that a reasonable standard of living was to be considered too (s. 75(2)(g)) ([27]).

Murphy J referred (at [28]) to Rees J's finding that "there [wa]s no evidence that she had an earning capacity before the marriage" and that she "earned a small amount … during the marriage for a year or so" and said as to s. 75(2)(k) that he was "unable to see how her Honour's finding that the wife's earning capacity was unaffected by the relationship was open to her on the evidence" ([30]) given that the wife's taxable income (in 2003 which "embraced the first seven months of the parties' cohabitation") was $56 900, then $14 300 in the first full tax year of the marriage, whereafter the wife was a full-time homemaker ([29]).

Murphy J held ([49]) that the nil adjustment under s. 75(2) should be increased to 7.5 per cent or about $294 000, giving the wife about $786 000 as ([51]) "the relationship … had a detrimental impact on her capacity to earn income" and "[h]er current standard of living is markedly poorer than the husband's and … than that enjoyed by the parties during their relationship."

PUBLICATION OF PROCEEDINGS

Father allowed to use family consultant's report in his domestic violence case

In *Miller & Murphy* [2016] FCCA 974 (2 May 2016) Judge Brown granted Mr Miller's application to use in domestic violence proceedings the report of a family consultant that contained a child's account of an altercation between the parties that was inconsistent with that of the wife in those proceedings. The Court (at [43]-[45]) considered s. 121(1) of the *Family Law Act* which prohibits the dissemination to the public or a section of the public by any means any account of proceedings arising under the Act which identify a party to the proceedings or a person who is related to, or associated with, a party to the proceedings, saying that the question arising is whether if the report is released it would represent 'dissemination to the public'. The Court cited in *Re Edelsten; ex parte Donnelly* (1998) 18 FCR 434 in which Morling J considered that the reference to the public in s. 121(1) should be read widely and refer to "widespread communication with the aim of reaching a wide audience." The Court concluded that if in the case at hand the report were released it would be read "potentially [by] defence counsel for Mr Miller, the police prosecutor and the presiding magistrate" which "cannot be considered to be a wide audience."

PROPERTY

Exclusion of future tax debt from pool upheld but error found in treatment of debt under s. 75(2)

In *Rodgers* [2016] FamCAFC 68 (4 May 2016) the parties had run a successful tourism business. The wife was to retire from the business and the husband (who was to retain it) appealed to the Full Court (Thackray, Ainslie-Wallace & Murphy JJ) against Crisford J's rejection of his argument at trial that the future tax debts of an entity the parties controlled should be deducted from the $4.9m pool. They were to arise as a result of Division 7A loans of $1.5m which, if forgiven, would trigger a large tax liability ([11]). The Full Court said ([15]):

> " … [T]he husband contended that … $517 000 should be adopted as the liability … in … recognition of the fact that the postulated figures contained differing assumptions … [and that] that figure 'is less than the number that will probably … be paid' … [implying] that if the liability was to be taken up by her Honour … the quantum of that liability could not have been precisely ascertained, even if the calculated amounts of the potential liability were confined by the assumption that the inter-company loans would not be forgiven and the tax consequently crystallised."

Finding no error of law in Crisford J's exclusion of the debts from the pool, the Full Court cited *Campbell & Kuskey* (1998) FLC 92-795 and said ([41]) that "[l]iabilities that are vague, uncertain, unlikely to be enforced and the like might be treated differently because those circumstances might, in the circumstances of the particular case, render it unjust and inequitable for liabilities to be deducted". In allowing the appeal, the Full Court did find error in the trial judge's decision to make a s. 75(2) adjustment in the wife's favour, saying ([80]-[82]):

> "The evidence before her Honour did not allow her to arrive at a present-day value of the future taxation. Conversely, it was clear that none of the calculated sums would be payable immediately or in the future in any such sum. … [T]he evidence is a long way short of providing the 'actual figures' of which the Court spoke in *Clauson* [(1995) FLC 92-595] … [W]e cannot see that her Honour's reasons pay due regard to these significant issues. Her Honour's reasons do not reveal either a consideration of the impact in real terms of the mooted contributions assessment or any attempt to give numerical meaning either to the 'impost' or the 'management' of the taxation to which she refers … "

CHILD SUPPORT

Repayment to husband of funds he settled under a child support trust for fees of school the child did not attend refused

In *Bass & Bass and Anor* [2016] FamCAFC 64 (29 April 2016) the Full Court (Strickland, Murphy and Kent JJ) dismissed the husband's appeal against Aldridge J's refusal to order the refund of $300 000 by a child support trust (CST) under a consent order on the ground that the money was settled by him for the fees for a private school which the (intellectually disabled) child did not attend. Murphy and Kent JJ (with whom Strickland J agreed) said ([19]) that by the consent order "[t]he husband achieved … his … intention of eliminating any … child support for the child". The Court continued ([26]) that "importantly the trial judge made reference to the consent orders providing … for the CST to be wound up on 31 December 2015 … and that upon the winding up of the CST 'the trustee shall hold any residual corpus in the CST for the child absolutely'," agreeing ([28]) "with the conclusion reached by the trial judge … that the CST did not fail by reason of failure of purpose [in that] the CST had several purposes which he identified."

The Court (at [34]) cited a statement from Scott and Ascher on Trusts, approved by Gummow and Hayne JJ in *Byrnes v Kendle* [2011] HCA 26 that "it is necessary, when dealing with the creation of a trust and its terms, to

speak not of the settlor's intention but of the settlor's manifestation of intention", saying ([44]) that "[n]o express term [of the CST] provides for any residue to revert to the husband, nor does any express term allude to any such outcome".

CHILDREN

Family violence allegations should not be ignored at interim hearing because they are contested – Discharge of earlier supervision order set aside

In *Salah* [2016] FamCAFC 100 (17 June 2016) the Full Court (May, Ainslie-Wallace & Cronin JJ) allowed the mother's appeal against Judge Dunkley's interim order that a consent order made a month earlier that due to family violence she alleged against him the father's time with the children be supervised be discharged. The Full Court cited authority as to a court's approach to contested allegations at an interim hearing, including ([39]) *SS & AH* [2010] FamCAFC 13 in which Boland and Thackray JJ said that "[a]part from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims" and that "it is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue." The Court continued ([41]-[45]):

> "The difficulty … is that his Honour … having determined that he could not make any findings, ignored the allegations and found the presumption of equal shared parental responsibility applied. His Honour's comment 'given no other evidence' suggests that his Honour required corroboration or objective support for the mother's allegations in proof of them. To so suggest is an error. Family violence often takes place in private in circumstances where no corroboration is available. (…) His Honour was in error in … failing to pay any heed to allegations which he had earlier regarded as 'significant' and in failing to consider those allegations in the context of an interim hearing."

The Court added ([61]):

> "The … circumstances of the making of the recent consent orders, while not determinative of the issue were, in our view important factual background to the issues before his Honour and were worthy of consideration by him. That his Honour did not consider them is, in our view an error."

Andrew Yuile's High Court Judgements

CRIMINAL LAW

Jury directions – attempted murder – self defence – consent

In *Graham v The Queen* [2016] HCA 27 (20 July 2016), the High Court held to be correct the trial judge's directions to the jury as to an alleged "consensual confrontation" and possible honest and reasonable but mistaken belief as to fact. The appellant had been convicted of attempted murder and unlawful wounding with intent to maim. The offence arose out of a confrontation in a shopping centre between the appellant and another man (Mr Teamo). Both men were members of rival motorcycle clubs. Teamo drew a knife and the appellant drew a gun, shooting Teamo and an innocent bystander. At trial, the appellant alleged self defence. A necessary element of self defence is that the accused responded to an assault, defined as an attempt or threat of force without consent. In his closing, the prosecutor suggested that the confrontation was "consensual" and thus self defence could not be made out, as any threat of force from Teamo was made with consent and thus not an assault. Counsel for the appellant did not directly address the consent point in closing. The trial