Robert Glade-Wright's family law case notes

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JUNE

PROPERTY

Court erred in accepting capitalisation of wife's TPD pension pursuant to s 90MT(2) where no splitting order made

In *Welch & Abney* [2016] FamCAFC 271 (22 December 2016) the Full Court (Murphy, Aldridge & Kent JJ) allowed the wife's appeal against Austin J's treatment of her non-commutable total and permanent disability pension (TPD pension) as an asset with a present capital value of $972 959. The wife began receiving her TPD pension after the parties separated in 2011. At first instance, the net pool was $2 797 777, but this included the TPD pension at its capital value. The Full Court observed at [20]-[21]:

> "The practical effect of the orders for the husband included that he received the entirety of his 40% entitlement of $1 119 111 in cash or other tangible property capable of immediate conversion into lump sum cash or its equivalent (…) and the wife received or retained net tangible (non-superannuation) property worth $368 608 in an overall entitlement of $1 678 666. (…)"

The Full Court said (at [6]):

> " … We consider that the trial judge fell into error in the following respects:
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> a. By adopting, as the present value of the TPD pension, the capitalised amount determined pursuant to s 90MT(2) of the Act. This value (or, more accurately 'amount') is mandated solely for the purpose of a splitting order of a superannuation interest being made. No splitting order was made by his Honour and that decision is not the subject of any challenge on this appeal.
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> b. By disregarding the evidence of the single expert as to the TPD pension entitlement being considered in a similar manner to earnings from employment, and that expert's evidence as to the different nature of the TPD pension entitlement from normal superannuation interests.
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> c. As a consequence of (a) and (b), ignoring the imposition of taxation upon the TPD pension and making orders which leave that substantial burden entirely with the wife.

d. As a consequence of (a) and (b), ignoring contingencies operative upon the TPD pension and making orders which leave those contingencies entirely with the wife, and conversely, relieve the husband of any impact of them."

PROPERTY

Trial judge erred in approach to wife's case that husband's domestic violence made her contributions more arduous

In *Maine* [2016] FamCAFC 270 (22 December 2016), the Full Court (Ryan, Murphy and Kent JJ) allowed the wife's appeal against Judge Vasta's order that the parties' assets be divided as to 65% to the wife and 35% to the husband. The Full Court said (from [47]):

"The wife argued at trial that her contributions were made more arduous by reason of family violence … by the husband. His Honour refers to those allegations … and … to the decision of the Full Court in *Kennon* …

[48] His Honour appears to accept that family violence, as defined within the Act, occurred. His Honour … makes a … finding that there was no 'evidence that illustrates how such conduct has made the contributions by the wife more arduous'.

[49] We consider that this finding by his Honour is erroneous. It ignores … direct evidence given by the wife in her affidavit not challenged substantively in cross-examination and not the subject of any adverse finding by his Honour. The wife gave direct evidence that family violence had made the household tasks and care of the children 'more difficult' … In addition, given the wife's detailed evidence of the history of the husband's drunken violence and abuse over a period of about 20 years; the fact that no finding contrary to that evidence was made; and his Honour's findings [as to the husband's 'propensity to irrationally verbally, and sometimes physically, abuse the wife'] … we are, with all respect, unable to understand how it was not, in any event, an inescapable inference that the wife's contributions – in particular her s 79(4)(c) contributions at the very least – were made 'more onerous'.

MARRIAGE

Court lacks jurisdiction to declare foreign marriage valid where wife was a minor

In *Eldaleh* [2016] FamCA 1103 (21 December 2016) McClelland J heard the husband's application for a declaration that the parties' marriage in the Middle East in 2016 was valid pursuant to s 88D of the *Marriage Act 1961* (Cth). The wife was 16 years old at the time of marriage and 17 at the time of the hearing.

The Court said (from [3]):

"Section 88D of the *Marriage Act* … relevantly provides:

(2) A marriage to which this Part applies shall not be recognised as valid in accordance with subsection (1) if:

(b) where one of the parties was, at the time of the marriage, domiciled in Australia –either of the parties was not of marriageable age within the meaning of Part II;

[4] Under … s 11 … subject to s 12, 'a person is of marriageable age if the person has attained the age of 18 years'.

[5] Paragraph (b) of s 88D(2) refers to 'where one of the parties was, at the time of the marriage, domiciled in Australia' … 'Domiciled' takes its meaning from the *Domicile Act 1982* (Cth) … which, at s 10, relevantly provides:

'The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.' (…)

[7] Although the courtship and marriage of the applicant and Ms Eldaleh took place in the Middle East, it was acknowledged that the applicant was, at the time of the marriage, domiciled in Australia.

[8] … [T]he applicant being domiciled in Australia, s 88D(2)(b) … applies and the marriage is not valid if either of the parties was not of marriageable age, that is 18 years of age."

The Court (at [10]) referred to s 12(1) which provides that "[a] person who has attained the age of 16 years but has not attained the age of 18 years may apply to a judge or magistrate in a state or territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years" and said (at [11]-[12]):

"However, it is clear that the section is directed toward a prospective marriage, rather than facilitating any retrospective authorisation or validation of a marriage.

As such, no mechanism is available under the Marriage Act by which the Court can validate the … marriage … "

CHILDREN – INTERIM HEARING

Child abuse and neglect corroborated by independent witness – Order for Mandarin speaking supervisor at contact centre

In *Xie & Yan* [2016] FCCA 3055 (17 November 2016) Judge Lapthorn heard the mother's application that the father spend no time with the parties' 6 year old child until further order. She argued that if her application was unsuccessful any time should be supervised by a Mandarin speaking supervisor. The Court said (from [25]):

> " … Although the father denies the mother's allegations [of child abuse and neglect], given their serious nature, I propose to act cautiously at this stage. The Court is not able to determine disputed questions of fact, but the affidavit of Mr J … lends some corroboration to the mother's allegations. It gave evidence of observing the father being cruel to the dog … and of leaving the child alone at home. He also relied heavily on others to care for the child. The documents tendered from Family and Community Services … indicate that this child has expressed some fear of the father and disclosed that he had been physically hurt by him. (…)
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> [29] I am satisfied that the child could be protected by either ordering no time or supervised time. If I was to order supervised time, I accept the mother's submissions that such supervision should be conducted by a Mandarin speaker. I do not accept the ICL's argument that any untoward comments that trouble the child would be noticeable by his reactions. It is important that the supervisor be able to understand what is said. The notes of a supervisor may be significant from an evidentiary point of view down the track. If the supervisor is not able to do anything more than record the child's interaction with the father by way of observations of body language, such a report will not be of much value. (…)
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> [31] (…) The father has not seen the child … since April. If he is, ultimately, successful in obtaining orders to spend unsupervised time with the child but is precluded from spending time with him in the interim, the disruption to the child's relationship with him could be profound, particularly given the delays in the Court system and the need for further investigation and reporting to assist the Court to ultimately make its determination.
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> [32] (…) Although supervision at a contact centre is not an ideal environment, when I weigh up the need to protect the child from the risk of harm and the benefit of him having a relationship with the father, I am satisfied a formal supervised arrangement is the best option in the circumstances … a Mandarin speaker to conduct the supervision … "