Robert Glade-Wright's family law case notes

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CHILDREN

Mother allowed to relocate to wherever she was posted in her employment with the Australian Defence Force

In *Wendland* [2017] FamCAFC 244 (21 November 2017) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) dismissed the father's appeal against Judge Vasta's order that permitted the mother (who had worked for the Australian Defence Force for eighteen years since she was twenty) to relocate their child (four) to wherever she was posted. The child lived with her in Town H in Queensland, spending time with the father each week and "it was not known if, when or where the mother might be posted". The father argued that "until the location of any posting was known informed decisions could not be made as to … the child's best interests" ([5]). By the time of the appeal, however, the mother had been posted to another State.

The Full Court said (from [10]):

> " … [During the relationship] [t]he child was placed in on-base day care where the mother was working and the paternal grandmother also took care of the child. The father continued to work full time.
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> [11] The primary judge found that … the parties planned to move as a family in the event the mother was required to work elsewhere. (…)
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> [29] … [H]is Honour … clearly [took] into account … the … report writer['s] … opinion that a relocation would diminish the relationship between the child and the father and paternal grandmother. (…)
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> [33] It was submitted that the order … erroneously gave the mother a 'blank cheque' as to the child's future (…)
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> [35] The … judge … correctly noted … that the mother is likely to be subject to further postings. (…) [and] was of the view that the order he made was supported by s 60CC(3)(l) [an order least likely to lead to further proceedings] … This course was … open on the evidence. (…)
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> [41] … [T]he … judge was not obliged to accept the opinion of the … report writer. … It is for … [him] to determine the weight to be given to it: see *Muldoon & Carlyle* [2012] FamCAFC 135 … at [105] (…)
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> [57] [T]he … judge found that the order proposed … permitted the child to spend time with the father in a manner [air travel] that was reasonably practicable

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> and could be afforded. … [T]his finding was open on the evidence. (…)
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> [73] (…) [W]eight was given to the … report writer's opinion, but … also … to the mother's freedom to pursue her career and to live where she wished and … the effect on the child if the mother were forced to abandon her career and remain living in Town H. Significant weight too was given to the finding that in the event of a relocation the child would still maintain a meaningful relationship with the father, albeit one of a different nature.

PROPERTY

Husband brought 96.5 per cent of $2m pool into short childless marriage – Assessment of 60:40 set aside by Full Court

In *Anson & Meek* [2017] FamCAFC 257 (7 December 2017) the Full Court (Murphy, Aldridge & Cleary JJ) allowed the husband's appeal against Judge Hughes's property order in the case of a childless couple who were married for five years. The wife left her job as a CEO @ $180 000 p.a. to live with the husband in Asia before the couple returned to Melbourne. The wife had undergone failed IVF treatment. Before cohabitation the husband owned 96.5 per cent of the parties' property, including a farm worth $1.86m at trial. Total assets in Australia were valued at about $2m. His pre-marital assets in 'Country T' ($1.76m) were placed in a separate pool and considered as to s 75(2) only. Judge Hughes assessed contributions as to the $2m pool as 80:20 in favour of the husband, adjusted by 20 per cent for the wife under s 75(2).

Murphy J (with whom Aldridge and Cleary JJ agreed) said ([30]) that the trial judge erred in finding that contributions were equal during the marriage, in that part of the wife's stressful IVF was pre-cohabitation ([31]) as was her non-financial contribution to the acquisition of the farm by providing advice as to its purchase ([32]); the husband's financial contributions pre and post-separation were 'overwhelming' ([36]) and the post-separation increase in the farm's value represented 30 per cent of the cohabitation period ([48]). It was also held that her Honour's finding as to the duration and quantification of the wife's impaired future earning capacity was flawed ([53]-[82]). The case was remitted for rehearing by another judge.

CHILDREN

Full Court allows mother to relocate for two to four years overseas where her partner was posted

In *Boyle & Zahur and Anor* (No. 2) [2017] FamCAFC 263 (14 December 2017) the Full Court (Thackray, Murphy & Carew JJ) allowed the mother's appeal against Justice Gill's dismissal of her application to relocate overseas with the parties' two daughters (12 and 11) for the duration of the posting of her partner, a government agency employee, to 'Country H' for 2–4 years. The children who lived with the mother spent alternate Friday, Saturday and Wednesday nights with the father under a consent order. In remitting the case for rehearing the Full Court said (from [91]):

> "There … is no issue that the children should have a relationship with their father. There … is no issue that the children love their father and want a relationship with him and … that they would miss their father if they moved to Country H. Equally, there … is no issue that the reduction in face to face time with their father (noting, again, that the proposed move was temporary) was not ideal. These matters are the axioms upon which the vast majority of so-called 'relocation cases' proceed. Yet, the task is to fashion orders which best meet the best interests of the children by reference to the proposals of the parties or those fashioned by the Court (subject to procedural fairness …) by reference to 'the reality of the situation'.
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> [92] As a consequence, orders that contemplate a continuation of the existing orders which thwart the legitimate desire of the mother and are contrary to the wishes of relatively mature children, involves a conclusion that those orders are more in the best interests of the children than other available alternatives.
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> [93] A central inescapable fact in this case is that parental hostility and conflict to which the children were exposed and the impact upon the children … arose during the currency of the existing orders which his Honour's judgment and orders would see continued."

PROPERTY

Wife's application filed electronically after 4:30 pm accepted (despite FLR 24.05(2)) as filed before husband's death hours later

In *Whooten & Frost* (Deceased) [2017] FamCA 975 (29 November 2017) the wife filed a property application when she learned that the husband (from whom she had been separated for two years) had been placed on life support after a farming accident. Her application—for an order that she be excused from particularising her final orders until the husband had made full and frank disclosure—was electronically filed at 7:40 pm. The husband died at 11 pm.

His estate relied on FLR 24.05(2) (an electronic filing "after 4:30 pm according to legal time in the [ACT] is taken to have been received … on the next day when the … registry is open") to argue that the wife could not apply after the husband's death (22) and that her application needed amendment to claim some relief if it was to invoke jurisdiction ([44]). Cronin J disagreed (at [45]):

> " … The jurisdiction … is enlivened by a party filing an application seeking a matrimonial cause. Did the wife's application seek that the court exercise its jurisdiction in relation to 'proceedings between the parties to a marriage with respect to the[ir] property … ? Clumsily though the words may have been expressed, I accept that the wife invoked the jurisdiction seeking orders with respect to property. (…)"

The wife sought an order under FLR 1.14 to extend time under the rules, the estate a decision that the rule "should not be applied because the rules cannot create a substantive right" ([47]). Cronin J, however (at [49]-[51]), cited the judgment of McHugh J in Gallo v Dawson [1990] HCA 30 who said that rules of court 'cannot become instruments of injustice'. Applying Rules 1.14 and 1.09 ("if a doubt exists in relation to … practice a court may make such order as it considers necessary") it was held that the wife's application should be treated as having been filed when it was filed electronically.

PROPERTY

When heads of agreement at a mediation involving a third party take effect is a question of fact

In *Thatcher & Thatcher & Ors* [2017] FCCA 3008 (6 December 2017) heads of agreement at a mediation between the husband, wife and their two sons related to the property case between husband and wife and a case by the sons against their parents in the Supreme Court of Victoria where they claimed an interest in a farming company. The sons agreed to pay the husband $800 000 and interest of 3.5 per cent p.a., the husband agreeing to transfer properties to the wife. After orders were made the husband refused to settle, arguing that he was entitled to interest since the mediation.

Judge Riethmuller said (from [8]):

> "(…) As the High Court … [said] in Masters v Cameron [1954] HCA 72 … [as to] heads of agreement … :
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> A. The parties may intend to be bound immediately, although desiring to draw up their agreement in a more formal document at a later stage; or
>
> B. They intend to be bound immediately, but do not intend to have … [it] take effect until … a more formal agreement; or
>
> C. They may intend to postpone … contractual relations until a formal contract is … executed (… *Chesire & Fifoot Law of Contract* … 10th ed, 2012, 5.24).
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> [9] … The fact that … [an] agreement is informal … does not preclude it from being immediately binding. (…) Ultimately … it is a matter for the Court to determine the parties' intention … objective[ly] … having regard to the language used and their conduct. (…)
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> [15] … [T]he heads of agreement could [not] be considered a binding financial agreement (…)
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> [17] The land … was held in part by the wife, yet the payment was entirely to the husband. Without finalisation of the … [case] the wife was potentially required to transfer her interest … for the husband to receive $800 000 … without any certainty that the[ir] agreement … would become binding.
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> [18] In these circumstances, I am not persuaded that the heads of agreement were … binding … until … the … orders were made …
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> [29] … I am satisfied that the sons were ready, willing, and able to settle … and that … settlement did not proceed … because the husband sought … interest … prior to … the … orders … [thus] it is not appropriate that he be permitted to insist on interest … "

PROPERTY

Parties not in a de facto relationship despite their lengthy sexual relationship and two children – Elias principle

In *Weldon & Levitt* [2017] FCCA 3072 (11 December 2017) Judge Riley dismissed Mr Weldon's property application, granting Ms Levitt a declaration that the parties did not have a de facto relationship and accepting her evidence that they were 'boyfriend and girlfriend' ([3]) and that while they did have two children together they lived in the same house for less than one of the sixteen years they had known each other.

The Court said (from [33]):

"The respondent was unemployed and in receipt of … [benefits] from 2001 until the present … She did not … tell Centrelink that she was in a de facto relationship. (…)

> [68] The applicant acknowledged … that the respondent alone bought Property B, Property C and Property A. …
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> [73] The applicant exhibited … an application for an intervention order … by a police officer … [in] 2014 on behalf of [the] respondent … [which] said that … the … [parties] were in a de facto relationship for about twelve … years (…)
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> [115] In … Elias … (1977) FLC 90-267 Goldstein J held that the parties were bound by their statements to governmental authorities. (…)
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> [116] More recently, however, the Elias principle has fallen into disfavour. (…)
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> [117] In *Sinclair & Whittaker* [[2013] FamCAFC 129 at [65]] the primary judge found that a de facto relationship existed, notwithstanding the applicant's statements to governmental authorities and lenders that she was single. That finding was not disturbed on appeal. (…)
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> [120] The respondent's child support application was … based on her claim that the … [parties] were not in a de facto relationship. (…)
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> [126] … [T]he respondent's statement in an intervention order application … that the applicant was her former intimate partner tends to go the other way … it supports the proposition that the applicant was merely her boyfriend.
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> [127] The net effect … is that the court is required to look at all of the evidence, including statements to governmental authorities … and assess whether, in all the circumstances, the parties were a couple living together on a genuine domestic basis. (…)"

PROPERTY

Parties suppressed evidence of husband's $606 000 debt in their Application for Consent Orders

In *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* [2018] FamCAFC 37 (26 February 2018) a majority of the Full Court (Strickland and Murphy JJ) allowed an appeal by the trustee in bankruptcy against Stevenson J's dismissal of its s 79A application. Austin J dissented. The trustee argued at trial that consent orders should be set aside as the parties had entered into a scheme to defeat a creditor by applying for those orders without divulging that 'Mr S' was suing the husband for $606 000 (judgment was entered against him a week after the orders were made) or notifying Mr S of the proposed orders.

The trial was bifurcated, the Court only hearing and determining the s 79A issue. At first instance, the wife conceded that there was a miscarriage of justice but persuaded Stevenson J not to exercise discretion to set aside the order, her Honour finding that the wife had no involvement in the husband's debt to Mr S; that the debt was not incurred for a matrimonial objective; and that the trustee would find itself in no better position if the order were set aside.

Strickland J said (from [46]):

> "This appeal highlights the difficulties in bifurcating the s 79A and the s 79 proceedings, rather than determining both issues together as is generally the preferred option … (e.g. see … Patching (1995) FLC 92-585).
>
> [47] The … difficulty … is … that in exercising … discretion [under s 79A] the court is entitled to take into account the likely outcome of the s 79 proceedings, if the orders are set aside (…)
>
> [85] The debt was incurred during the marriage on any view of the date of separation. (…)
>
> [87] It is readily apparent that the … projects [linked to the loan] … were intended to benefit the marriage relationship. (…)"

Murphy J concluded his reasons by saying (at [195]):

> " … It would in my view be … a highly exceptional case for a conscious abuse of the court's process—in effect a fraud on the court—to not result in orders being set aside … "

PROPERTY

Husband's tax debt and gambling losses produced net deficit – Wife's initial contributions and s 75(2) needs – Wife to pay 10 per cent of that debt

In *Snipper & James and Anor* [2018] FamCA 7 (12 January 2018) Watts J considered a twenty-one-year marriage that produced three children and a net pool of $1.28m excluding tax debts. The husband owed the ATO $2.01m and the wife owed the ATO $113 000, creating a total net deficit of $842 000. The ATO intervened to seek $713 000 from the wife, being her debt plus $600 000 towards the husband's tax debt.

The wife and husband were found to have adopted 'traditional roles' ([277]). The wife "brought in about $2.5m from outside the marriage" ([283]). The husband's gross annual salary was $589 000 but it was found that he lost more than $1m from gambling ([294]). Without the tax debts, the Court assessed contributions as 80:20 in the wife's favour and made a further 15 per cent adjustment for her under s 75(2) ($1.2m before tax provision).

After observing (at [252]) that if the whole of the tax debt was deducted the wife would receive nothing under s 79, the Court said (from [303]):

> " … [T]he Commissioner submits that … where the husband's … income has been used … to support the wife and the children there is no reason why the wife ought not, at least in part, 'take the good with the bad' (…)
>
> [305] The Commissioner maintains that the wife along with the husband should bear responsibility for the husband's taxation debts … prior to separation. (…)
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> [306] The wife … argues that the monies lost in gambling … [and the capital introduced by her] were of such magnitude … that it would not be open to conclude that she received benefit from the husband's … income in respect of which tax had not been paid. (…)
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> [320] … [T]he husband … envisages that he will be employed … for the next fourteen years. … [I] f the Commissioner entered into an arrangement over a fifteen-year period to receive payment of the outstanding debt then I could see no reason why … the debt could not be paid off (…)
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> [323] … [I]t is just and equitable for the wife to make a payment of $200 000 towards the husband's tax debt. This … is ten per cent of the husband's debt … It is eighteen per cent … of the net assets of $1 113 281 … the wife has after she has paid her tax debt."

PROPERTY

Pre-Part VIIIB order that husband pay wife 25 per cent of his super when he qualified for payment – Wife's attempt to enforce order after husband's death dismissed

In *Heyman & Heyman & Anor* [2018] FCCA 129 (6 February 2018) a consent order made in 2002 (pre-super splitting) provided that the husband authorise his super trustee to pay the wife 25 per cent of the funds available to him once he qualified for payment ([28]). The husband remarried in 2008 and notified the wife that he planned to transfer his super to a pension, saying that he would leave 25 per cent in the fund for her. The wife requested payment by the trustee who replied requiring a splitting order to that effect (to which the wife did not respond).

The husband died in 2012, his new wife being executor of his estate. The trustee paid the rest of the husband's super to the new wife as a dependent. The wife applied for the setting aside of the 2002 order under s 79A(1)(b) or (c) (impracticability or default) as she had not yet received 25 per cent of the husband's super. Upon the application of the new wife, Judge Middleton summarily dismissed the wife's application.

The Court said (from [53]):

> "The Applicant had an opportunity to enforce the consent orders at the time the husband received 75 per cent of his superannuation entitlement. She chose not to. (…)
>
> [61] It is clear on the evidence that no monies were received into the estate of the late Mr Heyman from the relevant superannuation fund. Accordingly order 3.1 cannot be enforced. (…)
>
> [79] As against the Second Respondent the Applicant has no standing in which to bring Family Court proceedings for the adjustment of property against her."