Robert Glade-Wright's family law case notes

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CHILDREN

Birth mother and partner win appeal against declaration that sperm donor was a parent of their eldest child

In *Parsons and Anor & Masson* [2018] FamCAFC 115 (28 June 2018) a birth mother ("Susan"), while living with her partner "Margaret", had two children "B" (10) and "C" (9) conceived by artificial insemination, for which sperm had been donated by the respondent ("Robert") for B and by an unknown donor for C. Robert sees the children (they call him "Daddy") and was registered as a parent on B's birth certificate while Margaret is on C's birth certificate. Section 60H of the *Family Law Act* deems Margaret to be C's parent ([3]).

At first instance the Court declared Robert to be a parent of B as it was not satisfied that Susan and Margaret were in a de facto relationship when B was conceived. It was held that Robert was a legal parent of B as he had "provided his genetic material for the express purpose of fathering a child he expected to be parent" ([17]). The mother's application to relocate to New Zealand was dismissed. Susan and Margaret appealed.

Thackray J (with whom Murphy and Aldridge JJ agreed) did not need to decide whether the finding that the appellants were not in a de facto relationship was in error. As to the finding that Robert is a 'parent' of B within the meaning of the FLA, the Full Court (at [6]) agreed with the appellant's submission that "her Honour, who was sitting in New South Wales, erred in failing to recognise that s 79 of the *Judiciary Act 1903* (Cth) required her to apply not the FLA but the *Status of Children Act 1996* (NSW)", the effect of which is that "the respondent is conclusively presumed not to be B's father".

Thackray J cited s 14 of the *State Act* which contains four presumptions of parentage arising out of the use of artificial conception procedures, including:

> "(2) If a woman … becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy."

The appeal was allowed, the parenting order set aside and the case remitted for re-hearing.

PROPERTY

Judge who declined to make "manifestly inadequate" consent order disqualified for apprehended bias

In *Silva & Phoenix* [2018] FamCAFC 41 (7 March 2018) Strickland J allowed the husband's [H's] appeal against Judge Kelly's order dismissing [H's] application that he disqualify himself, having refused to make a consent order minuted by the parties. The terms provided for [H] to pay [W] $30 000, nine per cent of the asset pool. A statement of agreed facts was filed and the matter listed for submissions. Judge Kelly was not prepared to make the orders (for being "manifestly inadequate"), at [19] saying *(inter alia)* that he was "concerned that an award of nine per cent for even a relatively brief marriage is not just or equitable and [he] cannot approve it ". The matter was listed for trial. [H] then filed an application for an order disqualifying the judge on the ground of actual or apprehended bias. It was dismissed, whereupon [H] appealed.

Strickland J concluded (at [22]-[24]):

> " … [T]he question is … can it be said that his Honour has pre-judged the issue in dispute. That depends on whether his Honour's comments can be confined to the application … before him, or whether it demonstrates a closed mind that will not be changed when the subsequent hearing takes place.
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> [23] Although an argument could be mounted that it is the former, on the basis that a judicial officer is able to put aside his views in rejecting the consent orders, and bring an open mind to the subsequent hearing when there will be far more evidence put before him, the test is still whether 'a fair-minded lay observer might reasonably apprehend that the judge may not bring an impartial and unprejudiced mind to the resolution of the question that he or she is required to decide'.
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> [24] In my view, it is undeniable that that test is satisfied here. (…)"

The appeal was allowed and an order made that Judge Kelly be disqualified from further hearing the property applications between the parties.

MAINTENANCE

Court erred in considering appellant's property but not his liabilities and in disregarding his support of new partner and her children

In *Elei & Dodt* [2018] FamCAFC 92 (17 May 2018) Ryan J heard Mr Elei's appeal against Judge Boyle's interim order that he pay Ms Dodt maintenance of $1450 per week; her health insurance premiums and $2000 for medical treatment. Ms Dodt, a real estate agent, had been out of the workforce for five years since undertaking IVF.

Ryan J said (from [17]):

> " … [Since] separation [Ms Dodt] had not sought employment in the real estate industry … According to [Mr Elei], pursuant to s 90SF(1)(b)(ii) [FLA], this ought to have resulted in the application for maintenance being dismissed.
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> [18] This submission ignores that s 90SF(1)(b) … enabled the … judge to be satisfied that [Ms Dodt] was unable to support herself adequately 'for any other reason' (s 90SF(1)(b)(iii)). … [T]he … judge determined the question of whether [Ms Dodt] … was unable to support herself adequately by reference to the totality of [her] circumstances and not the narrower ground upon which [Mr Elei] sought to rely. These 'other reasons' included [Ms Dodt's] absence from the paid workforce for five years, that she had been attending a psychologist … had … personal difficulties … and … surgery to her hand … [that she] was impecunious, wished to return to work but required funds … to renew her real estate licence … "

Ryan J concluded from [33]):

> " … [T]o determine capacity to pay by reference to property it was incumbent upon the … judge to consider [Mr Elei's] liabilities and not just his assets. This was not done … " (…)
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> [36] Furthermore … the … judge's approach to [Mr Elei's] support of his [former] partner and her children was erroneous. This expense was disregarded on the basis that the appellant provides support 'to people he has no obligation to support'. The primary judge's expression suggests that she may have mistakenly blurred s 90SF(3)(d) and (e). (…)"

The appeal was allowed in part, the order being set aside except as to the lump sum payable.

PROPERTY

In isolating a contribution to a specific asset in a global approach, court failed to heed risk of ignoring contributions that lacked such a nexus

In *Hurst* [2018] FamCAFC 146 (8 August 2018) the Full Court (Thackray, Ainslie-Wallace & Murphy JJ) heard the wife's appeal against a property order relating to a 38 year marriage where the husband inherited land 14 years before trial ("the Suburb C property"). The land was worth $400 000 when acquired but $1.82m at trial. The parties had three children. The youngest child (13) and the eldest, an adult child with psychiatric issues, lived with the wife.

The net pool was worth $2.66m. Carew J assessed contributions at 72.5:27.5 in the husband's favour, saying (at [14]) that "[i]t cannot be said that the wife has made any contribution to … [the inherited land] other than indirectly by the rates and slashing costs being paid". A 12.5 per cent adjustment under s 75(2) for the wife produced an overall 60:40 division for the husband. The Full Court said (from [15]):

> " … Within the context of [a global] approach a broad assessment is made of the contributions of all types made by both parties across the whole of the period of a very long marriage. Yet, the reasons also evidence one exception to that approach, namely the identified indirect (financial) contributions made to the Suburb C property.
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> [16] There is no error of itself in her Honour considering separately any such contributions …
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> [17] However, there is a danger in doing so. Isolating indirect contributions to but one part of the property interests of the parties in the context of a global assessment of contributions risks ignoring significant contributions made by both parties that do not have a nexus with that particular property. We consider … that her Honour did not heed that risk. The finding that the wife has not made any contributions to the Suburb C property other than the specific indirect contribution to slashing and rates is, in our … view, not open to her Honour on the evidence before her."

Also (at [57]-[65]) discerning error in the trial judge's assessment of s 75(2) factors, the Court allowed the appeal, remitting the case for rehearing.

CHILDREN

Judge avoided determining the issues presented by the parties at an interim hearing

In *Matenson* [2018] FamCAFC 133 (20 July 2018) Murphy J, sitting in the appellate jurisdiction of the Family Court of Australia, allowed the appeal of an unrepresented father against the dismissal of his interim parenting application by an unidentified judge of the FCC relating to children aged 16, 13 and 11. His concern was the lapse of time since he had seen his children despite an earlier order granting time which he alleged the unrepresented mother was contravening.

Despite all parties seeking an order for some time (the father the removal of supervision and the mother and ICL an order that the eldest child see the father as she wished but that the other children spend some time with him) the Court, referring to "an impasse" ([26]), dismissed all interim applications and set the case down for trial in 10 months. In allowing the appeal and remitting the case for rehearing, Murphy J said (from [33]):

> "In the Federal Circuit Court at least, interim proceedings are almost always conducted within huge lists where large numbers of cases seek a hearing. The convoluted and conflicting assertions common to many of those cases cannot be tested. The exquisite difficulties in fashioning interim orders in the best interests of the subject child or children pending a trial (which those same scarce resources dictate may be significantly delayed) is, or should be, obvious.
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> [34] Yet, it is a task which, with all its inherent difficulties, must be confronted not avoided. The jurisdiction of the court has been properly invoked and it must be exercised, albeit it in significantly less than ideal circumstances. (…)
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> [36] At no time did her Honour identify the competing proposals of the parties or identify the issues necessary for her determination. Her Honour makes no reference to matters which she considered uncontentious. Indeed, the references to any evidence are … extremely sparse. … [T]he family report … was alluded to but her Honour did not refer to any particular aspects of that (albeit untested) evidence."

CHILDREN

Section 65DAA not triggered by order for equal shared parental responsibility as to some but not all major long-term issues

In *Pruchnik & Pruchnik* (No. 2) [2018] FamCAFC 128 (11 July 2018) the Full Court (Ryan, Aldridge & Austin JJ) dismissed with costs the mother's appeal against Hannam J's parenting order implementing a change of care for children of 12 and 9 to the father from the mother who was found to have been intermittently withholding the children since 2014 (three years after separation) "without reason" ([2]). It was also found that the children were at risk of rejecting the father unless the family dynamics in the mother's household towards the father changed ([3]). The mother was granted supervised time.

Sole parental responsibility had been sought by both parties (the father as to medical and schooling decisions only) but was granted to the father. On appeal the mother argued that as the presumption of equal shared parental responsibility had not been rebutted under s 61DA(4) the Court failed to apply s 65DAA (court to consider equal time etc if an order is made for such responsibility).

The Full Court (at [35]-[37]) applied authority including *Doherty* [2016] FamCAFC 182

which held that an order for equal shared parental responsibility need not be in relation to every aspect of parental responsibility and that such an order does not trigger s 65DAA. The Court (at [49]-[50]) rejected submissions by the mother and ICL that explicit and cogent reasons (and thus evidence) why the presumption should be rebutted were necessary, given that the parents had agreed that the conditions for the operation of s 61DA(4) were met. The Court added:

> "It follows that against the background of the mother's concession as to the application of s 61DA(4) (a concession which, given the orders sought by the father, he also adopted), it was sufficient compliance with the provision for the primary judge to declare herself … satisfied that 'in these circumstances it is in the children's best interests for the parent with whom the children are to primarily live to have sole parental responsibility for them' … "

PROPERTY

Notional add backs – Court's approach to paid legal fees

In *Trevi* [2018] FamCAFC 173 (6 September 2018) the husband added $175 000 to his property settlement by winning his appeal to the Full Court (Alstergren DCJ, Murphy & Kent JJ) against Thornton J's refusal to add back to the $9.5m pool the wife's legal fees of $437 000. The appellant was a partner in a law firm who earned $30 000 weekly and the wife the primary homemaker and parent to their children.

Those fees were paid from the proceeds of sale of the home. Thornton J also declined to add back the husband's fees as they had been met from his income or "absorbed in-house", his liability being limited to counsel's fees and other outlays ([26] and [67]).

Murphy J (with whom Alstergren DCJ and Kent J agreed) said (from [37]):

> "An order failing to add back legal costs is a pre-emptive decision about one party paying [or contributing to] the other's legal costs [whereas] [t]he statutorily prescribed default position is that neither party pays all or some of the other party's costs. (…)
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> [41] *[Chorn & Hopkins (NHC & RCH)* [2004] FamCA 633 (FC)] … draw[s] a distinction between legal costs met from property that would otherwise be available at trial and legal costs met from funds 'generated by a party post-separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance)'. The proposition there advanced, that such expenditure 'would generally not be added back', also needs to be seen as a guideline informing the relevant discretion rather than determining it. A further distinction is suggested in *Chorn* between funds generated in that manner and '[f]unds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement'."

Upon the husband's appeal being allowed it was ordered that the sum payable to the wife be reduced as the result of the notional adding back of her legal fees.

CHILDREN

Trial judge misapplied High Court's test of "unacceptable risk" in *M v M* [1988] HCA 68

In *Sahrawi & Hadrami* [2018] FamCAFC 170 (4 September 2018) the Full Court (Ryan, Aldridge & Watts JJ) allowed the father's appeal of Gill J's parenting order. The parties married and lived in "Country E" before coming to Australia via the mother's student visa in 2015. Upon separation the mother sought a protection visa, alleging assault and sexual harassment by a neighbour in Country E. She also alleged family violence by the father (allegations he said were fabricated by the mother).

Gill J was not satisfied that such an assault had occurred ([48]) but held ([49]) that the Court could "assign it significance as an uncertain fact" as was "recognised in the seminal High Court case of *M v M* [[1988] HCA 68]", Gill J saying ([146]) that *M v M* (where the High Court held that "the resolution of an allegation of sexual abuse against a parent is subservient … to the court's determination of what is in the best interests of the child", informed by whether an unacceptable risk of such abuse is found to exist) had a "more general application to the facts and considerations underlying a conclusion of what is in the best interests of a child".

Ryan & Aldridge JJ said (at [39]-[40]):

> "It is a fundamental principle that a party who asserts facts bears the evidentiary onus or burden of proving them to the requisite standard. It is apparent that the mother failed to do so to the satisfaction of the primary judge. As the evidence adduced in support of the allegations was not accepted, it could not therefore continue to have a role to play in the fact-finding process.
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> … [T]he question of whether there is an unacceptable risk to a child still requires that there be actual evidence which at least gives rise to the conclusion that behaviour may have occurred or may occur. (…)

CHILDREN

Expert's recommendation for no time was first made from the witness box – Procedural fairness

In *Sagilde & Magee* [2018] FamCAFC 143 (6 August 2018) the Full Court (Strickland, Murphy & Kent JJ) heard the mother's appeal against a parenting order made by O'Brien J of the Family Court of WA that the parties' 12 year old child live with the father and spend no time with the mother. The order followed testimony from clinical psychologist, Dr B, who had provided two family reports. At the trial both parents were self-litigants. The ICL was represented by counsel.

The Full Court said (at [23]):

> "In neither of her two reports did Dr B express any opinion to the effect that the child is potentially at risk of physical harm in the care of the mother if final orders are made which result in the child living primarily with the father. In neither of those reports did Dr B advance any opinion about the … potential effect upon the child … of an order for no time with his mother … In the second of her reports … [Dr B said] 'there appears to be no compelling reason for a change in living arrangements'."

After noting that Dr B was interposed during cross-examination of the mother and that "at no point did counsel for the ICL open any evidence of Dr B that was not contained in her reports", the Full Court said (from [59]):

> "The questioning of Dr B … by counsel for the ICL … led to Dr B giving evidence, again a departure from anything in her written reports, that consideration ought be given to the mother's time being supervised. (…)
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> [65] There is no suggestion that this expert … ever … canvassed with the child his views about the prospect of orders … [that he have] no time with his mother.
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> [66] When the mother's cross-examination was resumed … nothing was put to [her] … about her presenting a … risk of … harm …; nor was the proposition of no time … put to the mother.
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> [67] … [W]e conclude that this self-represented mother had no reasonable opportunity to meet a case that her mental health was such that she posed a risk of physical harm to the child. (…)"

The appeal was allowed to the extent of the case being remitted for O'Brien J to reconsider ordering that the child spend time with the mother.