Family Law Judgments

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Property

Wife's SMS held admissible against her case that $145 000 advance from father-in-law was husband's debt

In ***Phe & Leng*** [2019] FamCAFC 17 (8 February 2019) the Full Court (Alstergren CJ, Strickland & Watts JJ) dismissed the wife's appeal against a property order where Le Poer Trench J found that the husband's father was owed $145 000. The wife alleged that that sum was the husband's debt alone, having been deposited into an account the husband controlled. It was found that it was the parties' debt as the wife in a text message to the husband's sister said that she would 'return' the money to the husband's parents if her child "M can come back to Sydney".

On appeal, the wife argued that her text message was inadmissible being a settlement negotiation within the meaning of s131 of the *Evidence Act 1995* (Cth). The Full Court disagreed, saying (from [28]):

"His Honour put to the wife that the message represented an acknowledgment by her that the loan (in Taiwanese dollars) existed … [T]he wife said the message was …an attempt to … get the husband and his family to return the parties' eldest child to Australia. (…)

[30] … [T]he wife contended … that his Honour should not have allowed the message to have been adduced … because it was a communication made in connection with an attempt to negotiate the settlement of a dispute (…)

[36] The broader view … is that [the exception in] s131(2)(g) … applies where the existence or the contents of otherwise privileged communication contradicts or qualifies existing evidence or an inference from that evidence and the court is otherwise likely to be misled unless the communication is adduced. (…)

[49] … [W]e conclude it was likely that the primary judge would have been misled into accepting the wife's evidence had the message been excluded.

[50] Thus s131(1) of the *Evidence Act* does not apply to exclude the message because s131(2)(g) was enlivened and the wife was not entitled to claim privilege."

Children

Interim coercive order for mother to return and stay in a place where she had not been living was in error

In ***Mareet & Colbrooke*** [2019] FamCAFC 15 (7 February 2019) the mother left the father after a four month relationship. She was pregnant with the parties' child when moving from the Northern Territory (where the father worked) to Queensland via 'Town F' in NSW where her family lived. She alleged stalking and harassment by the father. The child was born in Queensland. The mother signed a lease and moved her possessions there, also enrolling her four-year-old child from a former relationship in kindergarten. A judge of the FCC on the father's application ordered the mother to return with the child to the 'H Region' in NSW to spend time with the father at a contact centre. The mother appealed.

Ainslie-Wallace J (with whom Ryan and Aldridge JJ agreed) allowed the mother's appeal, saying (from [14]):

"While it is undisputed that the *Family Law Act* … provides the power to enjoin a party to relocate (or not relocate), such an injunction should rarely be made … [S]uch an injunction can be avoided if the court gives adequate consideration to alternate forms of access …

[15] Her Honour regarded the issue … as a 'relocation case' … Clearly however, the child's residence was never in the H Region in [NSW]. … Her Honour's characterisation … led her to make significant errors of law.

[16] In particular, her Honour gave no consideration to making orders that the father travel to the D Region in Queensland to see the child. Nor did she turn her mind to the interests of the mother's older child who had been enrolled at pre-school [there] … Instead, her Honour took the view that the mother should be compelled to return.

[17] This order … one directly affect[ing] the mother's right of freedom of movement, in the circumstances of this case was wrong at law. Secondly, her Honour's … order which bound the mother to the H Region of [NSW] from which she could not leave is patently erroneous.

[18] … [H]er Honour's order … [also] took no account of the financial and other burden on the mother consequent on the move … "

Financial agreements

Section 90B agreement was no bar to a spousal maintenance application by wife as it did not comply with s90E

In ***Barre & Barre & Anor*** [2018] FCCA 97 (19 January 2018) the wife applied (inter alia) for interim periodic spousal maintenance in proceedings filed by her under s90K(1)(d) of the *Family Law Act* (material change in circumstances relating to a child) for the setting aside of a financial agreement made by the parties in 2005 under s90B before their marriage. Subsequent to their agreement the parties had two children, aged 11 and 5 at the time of the hearing. The husband opposed the application.

Judge Kemp said (from [37]):

" … [T]he Court does not accept that the … agreement excludes either party's right to make an application for spousal maintenance.

[38] The husband says that, while the actual words 'spousal maintenance' are not referred to as excluded, inferentially they were, as they were not specifically included within the terms of the … agreement as being an excluded item. (…)

[39] The husband, further, says that such an outcome, being no ability to apply for spousal maintenance, would be consistent with the fact that the … agreement was entered into … where both parties were in employment, apparently able to adequately support themselves … and intended to continue to do so in the future. The Court does not accept that submission. While the … agreement contemplated the parties having children, it was silent as to the impact of having children on each of their earning capacities. (…)

[44] … [I]n *Boyd* [2012] FMCAfam 439 Brown FM … considered … s90E and stated:

'Essentially, the legislature requires that any … financial agreement specify which portions of any lump sum or property order conferred thereunder are for either spousal or child maintenance, so that the social security implications of such an order or agreement is apparent.'

[45] The wife referred to that decision and submitted that as the … agreement did not comply with s90E … that was 'the end of the matter' and the wife's spousal maintenance rights were, clearly, preserved." Judge Kemp agreed.

Property

De facto partners reconciled six years after separation, then married but separated again

In ***Borg & Bosco*** [2019] FCCA 66 (18 January 2019) Judge Burchardt heard a property case for parties who were de facto partners from 1999 to 2005. In 2007 they made and implemented a financial agreement to divide their assets. They reconciled in 2011, married in 2013 and in 2017 separated. Their children (18 and 15) lived with the wife. The father spent no time with them. Each party made initial contributions (the husband 'Property A' worth $80 000 and the wife two properties, sold during cohabitation for $87 500).

Under the agreement the husband retained Property A and paid the wife $61 500. The wife applied her settlement towards real estate but sold it and lost all but $6 000 on a business venture. The husband worked as a tradesman on $50 000 per annum while the wife earned $400 per week and provided full-time care for the children since 2000.

The non-superannuation pool at trial was $524 400 – primarily the husband's Property A worth $680 000, subject to a mortgage and his super to which he had not contributed since 2008.

Citing Kowalski [1992] FamCA 54, the Court said (from [58]):

"(…) The Full Court held as the headnote indicates:

'Once a marriage has been celebrated between the parties the entire relationship between them, whether arising out of contributions before, during or after … marriage is entered into or dissolved, falls within the ambit of Part VIII of the *Family Law Act*." (…)

[61] … [T]he weight to be given to discrete periods of the relationship and …

to any period of separation must necessarily … involve the length of the two periods of cohabitation and the length of the separation. (…)

[66] … [T]he financial agreement … represented an equal distribution of the parties' then assets. (…)

[67] Counsel for the husband conceded that bearing in mind the primary responsibilities for the two children … an equal division … was probably somewhat light … It is not … however … appropriate to give a retrospective readjustment in percentage terms. (…)

[68] [From 2005] the parties were wholly separate in their dealings until 2011. They re-partnered for another five … years. (…)

[71] During the second … relationship … both parties did their best. The husband has worked throughout and … he brought into the second … relationship a substantially increased equity in the property … [from] his own payments between 2005 and 2011.

[72] … Between 2011 and 2017 the wife was seeing [the parties'] children into and … through adolescence as the primary home carer … " →

Contributions were assessed as 70:30 for the husband, adjusted by 10 per cent for the wife under s75(2) due to her impaired earning capacity; her carpal tunnel syndrome and her care of the children. The husband's super was split 25 per cent for the wife, it having accrued between 1989 and 2008, a year after the agreement ([78]).

Property

Court's interim appointment of receiver to sell parties' business set aside

In ***Scott*** [2019] FamCAFC 9 (24 January 2019) the wife worked as practice manager in a professional practice in which the husband worked as a professional until 2016, a year after separation, when he set up his own practice. A month earlier the court appointed an independent interim manager to run the practice and directed the parties to remain involved in the business, subject to the manager's discretion.

In 2018 when the wife sought an order that the manager no longer be required to involve the husband in decisions the husband sought the discharge of the manager and the appointment of a receiver. Cleary J removed the manager and appointed a receiver on the basis that the business was dysfunctional and each party would have the chance to buy the business from the receiver.

The Full Court (Ainslie-Wallace, Ryan and Watts JJ) said (from [22]):

"At its highest … the husband's complaints are that the manager acted inconsistently with his appointment in not providing the husband with financial information and the husband said that he would not sign the documents to roll over the financial facility … where he was unaware of the financial state of the business. (…)

[24] (…) [T]he husband's solution to his complaints about the manager and the suggestion that the business was insolvent was that a receiver be appointed to sell the business.

[25] Her Honour's reasons do not indicate the basis on which she concluded that the business was 'dysfunctional' and that management ha[d] been 'shredded' such that the manager's position was untenable …

[26] (…) Her Honour's order, if the receivers exercised their power of sale, would be incapable of being reversed at a final hearing and … the wife's hope of purchasing the business as a going concern would be lost. To sell the business would also bring the wife's employment to an end."

Property

'Equalisation' of parties' superannuation entitlements set aside

In ***Bulow*** [2019] FamCAFC 3 (18 January 2019) the Full Court (Strickland, Murphy & Kent JJ) considered a 20-year marriage between the wife (a registered nurse) and the husband who had worked for the Australian Government as an engineer. The wife had superannuation worth $289 705 in two accumulation accounts in the growth phase and the husband a defined benefit interest in the Commonwealth Public Sector Superannuation Scheme (PSS) in the growth phase worth $636 013.

At first instance Judge Heffernan ordered that the parties' super entitlements be 'equalised' by a splitting order under s90XT(1)(a) of the *Family Law Act* which allocated a base amount of $173 154 to the wife. The husband appealed, arguing that the Court erred in its approach, particularly given that throughout the 4 years since separation he had increased contributions from 2 per cent to 10 per cent of his salary.

The Full Court allowed the appeal, saying (from [17]):

" … [W]here the superannuation interests of both parties to family law proceedings are accumulation interests, few difficulties are usually encountered. However, an accumulation interest in the growth phase (as held by the wife in this case) and a defined benefit interest in the growth phase (as held by the husband in this case) differ in several important respects.

[18] Those differences include the method by which the ultimate benefit is calculated; the risk to the member inherent in each and, very importantly, the effect of a s90XT(1)(a) order (an order which allocates a base amount to the non-member spouse). Each and all of those differences can, and very often do, have a dramatic impact upon the justice and equity of a proposed splitting order and, in turn, its place within just and equitable orders for settlement of property. (…)

[20] Crucially … defined benefit funds … are not regulated by Part 7A of the SIS Regulations … It is therefore fundamental to a consideration of any proposed splitting order that the Court consider the governing rules of such funds contained within their specific trust deeds. It is those rules which will determine the effect of any splitting order on the underlying interest within that particular fund. As an example, within a defined benefit fund the fund's rules can dictate that a splitting order has significant effects on the formula by which a member's ultimate entitlement is calculated."

Information

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