Robert Glade-Wright's family law case notes September 2015

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PROPERTY

'Clever' husband's financial contributions in big money case reduced from 60 to 50 per cent

In *Fields & Smith* [2015] FamCAFC 57 (17 April 2015) the Full Court (Bryant CJ, May and Ainslie-Wallace JJ) allowed the wife's appeal against Murphy J's property order (*Smith & Fields* [2012] FamCA 510). The parties' 29-year marriage produced three children and assets of $32–39m comprising the parties' shareholding in their "very successful construction business" and $10m home. Murphy J ([75]) assessed contributions as 60/40 in the husband's favour, finding that the husband had made "a greater contribution … to the business … by reference to … the stewardship of the company including the plainly clever strategies and planning that have given it such success," also considering as to the wife's parenting contributions ([73]) that 'the parties' children ha[d] been adults for the whole of the [four-year] post-separation."

Bryant CJ and Ainslie-Wallace J delivered joint reasons while May J agreed but delivered separate reasons. Bryant CJ and Ainslie-Wallace J said ([42]-[43]) that "His Honour rejected an argument that there was a particular type of contribution that related to 'special skills' or 'special talents'" which "can fairly said to be settled [law]" (Kane [2013] FamCAFC 205, *Hoffman* [2014] FamCAFC 92) which also holds that "the contributions made by the parties must be evaluated in the context of the facts particular to [each] case."

The majority agreed ([73]) with the wife's counsel that Murphy J's conclusion that the husband's contributions were greater "appear[ed] in conflict with [his] earlier statement that he did 'not consider one [party's contributions] to be more or less "valuable" than the other,'" counsel ([95]) also citing *Bulleen* [2010] FamCA 187 where Cronin J said that "once children become adults the ongoing role" of parent "and later grandparent is no less an ongoing contribution … to the welfare of the family," a contribution the majority [97] said was "something more than a contribution [as] homemaker and/or parent." The majority added ([96]) "that the wife continued her role as a director and a shareholder of the company and continued to make a contribution, even if she was not personally able to do so in the operation of the business."

The Court also held ([114]-[120]) that the trial judge's apparent reliance on a table of 'big money' cases where the wife's entitlement was not held to exceed 40 per cent was in error. In re-exercising discretion, the Full Court ([189]) found, "as the trial judge also found, [that] the nature and form of [the parties'] partnership was that of a 'practical union of lives and property' [which] leads us to conclude that the contributions made by the parties should be treated as equal." The wife's appeal was allowed with costs.

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CHILDREN

Parents had reconciled – Application by former 'de facto father' summarily dismissed

In *Grimshaw & Thanh & Anor* [2014] FCCA 2614 (14 November 2014) Judge Kemp heard an application by a former de facto partner to spend time with an eight-year-old boy whose parents had reconciled. They argued that he lacked standing under s 65C and that his application should be summarily dismissed. The applicant began a relationship with the mother when the child was 19 months which ended when the child was three. The child's parents subsequently reconciled ([12]). The applicant alleged that the child called him 'Uncle Mr Grimshaw' and 'dad' and had asked him to "be his dad and has asked about him and whether he [was] going to see him again" ([14]). The applicant called himself the child's 'de facto father' ([76]). The Court ([29]) was "satisfied that the applicant should be viewed as a … person concerned with the care, welfare or development of the child [s 65C]."

The Court, however, accepted the submission of the parents' counsel ([42]) that "where the parties were in an intact marriage, it would only be in extreme circumstances where there was an obvious risk to the child that the Court would intervene and order the involvement of a third party in the child's life, against the express wishes of the child's parents," citing ([47]) *Church & Overton & Anor* [2008] FamCA 953. The Court added ([76]) that "for the applicant to continue to assert that he is the child's 'de facto father' … suggests a lack of insight [by] the applicant in failing to understand how the child may be potentially confused and conflicted by [his] maintaining that he is a 'father' of the child, when the child lives with his biological mother and father as an intact family unit." The application was summarily dismissed.

PROPERTY

Section 79A – Trust interest ('$ not known') netted wife $1m – Husband failed to pursue inquiries

In *Milford* [2015] FCCA 344 (27 February 2015) Judge Jones heard the husband's application under s 79A(1)(a) FLA that a 2009 consent order be set aside for a miscarriage of justice by reason of suppression of evidence by the wife as to her interest in a family trust. She had given its value as '$ not known' in an Application for Consent Orders where the parties' assets were to be divided equally. Eighteen months after the consent order was made the trust vested early by arrangement with other beneficiaries whereupon the wife received $1m ([17]). The husband's solicitor wrote to the wife's solicitor saying "[t]he fact that our client may not be pursuing a claim on the [C] Family Trust does not in any way mean your client is relieved from her obligation to disclose her interest in that Trust. However we do not wish to engage in any protracted debate on this matter, as our client is concerned at the time it has taken to finalise settlement" ([19]). The Court said ([79]) that during negotiations of the property settlement "the applicant was aware in late 2005 that [another beneficiary] Ms K had transferred her shares … for consideration … in the order of $200 000, $400 000 up to $500 000; … that the Trust, if it was sold, was worth millions … and that the [wife's] share would be 25 per cent, conservatively $500 000." The Court dismissed the application, saying ([83]-[84]):

"In these circumstances, I am not confident that the respondent's failure to fully disclose [the history of share transfers] constitutes 'suppression of evidence' within the meaning of s 79A(1)(a) of the Act.

Even if I did find that [she] had suppressed [that] evidence and her knowledge of the consideration that may have been paid, I am not satisfied … that there has been a miscarriage of justice within the meaning of [the section]."

FINANCIAL AGREEMENT

Wife had no choice but to sign as a condition of the marriage she wanted – Duress

In *Thorne & Kennedy* [2015] FCCA 484 (4 March 2015) the parties met over the internet. The husband was a 67-year-old property developer with assets of $18–24m. The wife was 36, lived overseas, had "no assets of substance" and "her English language skills [were] informally acquired" ([30]). Judge Demack considered a s 90B agreement signed before the parties' wedding and a s 90C agreement signed afterwards. The first one contained a clause that the parties would sign a similar agreement within 30 days to address any concern that the first one was "signed in haste which might be considered to amount to stress and pressure" given its proximity to the parties' impending wedding. On separation the wife challenged the agreements under s 90K FLA. The Court said ([87]-[94]):

"It is submitted [for] the [husband] that to establish duress there must be pressure the practical effect of which is compulsion or absence of choice. The [wife] knew that there would be no wedding if she didn't sign the first agreement. … The husband did not negotiate … The agreement, as it was, was to be signed or there would be no wedding [which] meant that the relationship would be at an end. The applicant wanted a wedding. She loved Mr Kennedy and wanted a child with him. She had changed her life to be with [him]. … [He] knew [she] wanted to marry him. For her to do that, she needed to sign the document. … Ms Thorne's powerlessness arises not only from her lack of financial equality but also from her lack of permanent status in Australia … the prospect of motherhood, her emotional

preparation for marriage … In those circumstances, the wife signed the first agreement under duress … borne of inequality of bargaining power where there was no outcome [for] her that was fair or reasonable."

Judge Demack set aside both agreements, the second one being found ([96]) to be "simply a continuation of the first" and ordered the husband to pay the wife's costs.

CHILDREN

Mother wins appeal against coercive interim order requiring her to relocate – Court's approach to interim hearings

In *Eaby & Speelman* [2015] FamCAFC 104 (27 May 2015) the Full Court (Thackray, Ryan & Forrest JJ) allowed the appeal by the mother who after unilaterally relocating with children to a town 765 kilometres away was ordered to return at an interim hearing by Judge Turner who also ordered that the father spend time with the children. Ryan J (with whom Thackray & Forrest JJ agreed) said (at [13]-[15]) that "[H]er Honour did not make an order in relation to parental responsibility. Given that … the mother sought an [interim] order [as to parental responsibility] it is … surprising that no reasons are given for her Honour's decision not to address this issue" and that the mother "was entitled to have her application determined in accordance with the law." Ryan J continued (at [17]-[18]):

"(…) On the basis that the parties' evidence was in conflict and/or lacked corroboration by an independent source, that evidence was disregarded. (…) It is true that in *Goode* [[2006] FamCA 1346] … the Full Court said that the circumscribed nature of interim hearings means that the court should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. However, that does not mean that merely because the facts are in dispute the evidence on the topic must be disregarded and the case determined solely by reference to the agreed facts. Rather, the proper approach to contentious matters of fact in the determination of interim hearings is as explained … [i]n SS & AH [2010] FamCAFC 13 at [100] … [where] the majority (Boland and Thackray JJ) said:

"The intuition involved in decision-making concerning children is arguably of even greater importance when a judge is obliged to make interim decisions following a hearing at which time constraints prevent the evidence being tested. Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. 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."

CHILDREN

No time given to father released from prison after serving a sentence for child pornography – Unacceptable risk of harm

In *Stack & Searle* [2015] FCWA 44 (12 June 2015) Crisford J dismissed the father's application for parenting orders.He had been released from prison after serving a three-year sentence for indecent dealing with a child, possession of and supplying child pornography ([2]). Further charges of indecent dealing were pending. The mother was granted sole parental responsibility and an order that the father have no time and not communicate with the children and that their surname be changed to hers. Crisford J said (at [26]) that "[t]o be meaningful [within the meaning of s 60CC(2)(a) FLA] a relationship 'must be healthy, worthwhile and advantageous to the child' (*Loddington & Derringford (No 2)* [2008] FamCA 925)." The father alleged that "[when] the parties were together [the] children had a very meaningful relationship with him" [(32)] while "[t] he mother paint[ed] a completely different picture of the father, [saying that] he deliberately cultivated a close relationship with Child A [the eldest child] … in order to groom her ([35])," that he had allowed Child A to see him watching a pornographic video [44] and he was alleged by Child A to have sexually penetrated her [52]. The father had also uploaded images of three-year-old Child B to an international child pornography site ([42]).

The father relied on evidence from his treating psychologist that he had "completed two comprehensive sex offender programs and individual therapy" and that she "support[ed] the father spending supervised time with the children" ([63]) but Child A's therapist, a senior clinical social worker (Dr Hay), described "the father's 'position of denial and minimisation' as a cause for concern" and that despite "his completion of various courses and programs" he "ha[d] never admitted to the charges of sexual abuse of [Child A]" ([68]). The Court preferred Dr Hay's opinion, concluding (at [148]) that "there is an unacceptable risk of harm to the children … [that] some factors taken alone, such as the actual proven abuse and its ongoing impact are enough to say that the risk of harm outweighs the benefit of the children seeing the father."