Robert Glade-Wright's
Family Law Case Notes

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PROPERTY

Treatment of redundancy payment of $459,199 as worth $300,000 due to "taxation implications" was in error

In *Diggelen* [2014] FamCAFC 160 (1 September 2014) the Full Court (Strickland, Ainslie-Wallace & Ryan JJ) considered Johnston J's decision to treat a $459,199 payment the husband had received from his employer for "accrued annual leave, long service leave, severance payment and ETP" (para 25) as having a value of $300,000, his Honour saying (para 27):

> " … it was submitted [for] the wife that there should be added back … the $469,199 (sic) which [the husband] received as his redundancy payment. … To do so would ignore taxation implications. It must be the case that some of this payment was on account of leave. There was no suggestion that the money paid was tax free. This is a most unsatisfactory aspect of the case. Doing the best I can in difficult circumstances I propose to allow $300,000 of this payment to be added back to the pool of property."

In remitting the case for re-hearing, the Full Court said (para 34):

> " … there was no evidentiary basis on which his Honour could have found … that some part of the redundancy payment … was subject to tax … and ought to be brought into account at a lesser amount than that received. We also observe that his Honour's conclusion is at odds with … ss 12-85 of Schedule 1 Taxation Administration Act 1953 (Cth) by reason of which the husband's employer was obliged to retain PAYG payments on the redundancy/termination of employment payment."

PROPERTY

Husband loses appeal where wife won $6 million after separation – Parties "leading separate lives"

In *Eufrosin* [2014] FamCAFC 191 (2 October 2014) the Full Court (Thackray, Murphy & Aldridge JJ) heard the husband's appeal against a property order made where after a 20 year marriage the wife won $6 million six months after separation. Stevenson J had adopted a two pools approach, found the husband had made no contribution to the lottery pool, divided the $2 million non-lottery pool equally and made a s 75(2) adjustment in favour of the husband of $500,000. Stevenson J said that the wife had four sources of funds available when she bought the winning ticket and that "it would be 'pure sophistry' to credit the husband with any contribution to the funds used to purchase the ticket" (para 12). The Full Court said (paras 7-8):

> "The husband contends that the wife used funds from a business that had been run primarily by him … during … the marital relationship to purchase the … ticket. Even if that is accepted, the argument which proceeds from it ignores the reality of the parties' post-separation lives. The parties had put in place a system whereby regular withdrawals of funds were made by each of them from what was formerly a joint asset, and those funds were applied by each of the parties individually to purposes wholly unconnected with the former marital relationship.
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> At the time the wife purchased the ticket … the parties had commenced the process of leading 'separate lives', including separate financial lives. That crucial matter, the importance of which is reinforced by the High Court in Stanford [(2012) 247 CLR 10], renders reference to the sources of the funds or nomenclature such as 'joint funds' or 'matrimonial property' unhelpful in assessing what is just and equitable."

In dismissing the appeal the Full Court said (para 11):

> "(…) What is relevant … is the nature of the parties'

> relationship at the time the lottery ticket was purchased. In our view, the authorities … [and] what was said by the High Court in *Stanford* regarding the 'common use' of property [are] sufficient to dispose of the husband's contention that her Honour erred in failing to find that he contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the 'joint endeavour' that had been the parties' marriage had dissolved; there was no longer a 'common use' of property. Rather, the parties were applying funds for their respective *individual* purposes."

CHILDREN

Choice of supervisor of father – Court prefers commercial agency to father's fiancée

In *Joelson* [2014] FamCA 788 (19 September 2014) the father had a history of being prescribed anti-depressant medication, had threatened suicide and was the subject of a police report expressing "genuine fears that [he] will snap and hurt himself and anyone he holds responsible for the demise of his relationship. A single expert psychiatrist ("Dr R") reported being "dissatisfied with the progress made by the father in appreciating his underlying illness and the steps he needed to undertake … to manage his illness" (para 97). Dr R had recommended that the father's time occur while his fiancée ("Ms Z") was at home but later recanted after Ms Z misled Dr R as to her experience of abuse. While accepting Dr R's recommendation for a review before any progression from supervised time, Loughnan J decided that it was "safer" (para 200) to make a final order for indefinite supervision (paras 198-199) in which it was noted that any application (after 12 months) for removal of the supervision was to be supported by a mental health assessment by the father's treating psychiatrist.

CHILDREN

Unilateral relocation – Morgan & Miles distinguished – Recovery application dismissed

In *Geddes & Toomey* [2014] FCCA 1814 (13 August 2014) Judge Harland dismissed the father's recovery application where the mother had "again moved" unilaterally from Darwin to Queensland with the children (10 and 9) (para 4). The father, a Darwin resident, had the children during school holidays under a parenting order and informally about once a month. The Court (para 18) distinguished *Morgan & Miles* [2007] FamCA1230 (relied on by the husband), saying that "at the time of the unilateral relocation in *Morgan & Miles* the father was seeing the children on a week about basis. In the current case … the father was seeing the children once a month". Upon considering s 60CC factors Judge Harland (para 20) said that it was "clear that the children have a meaningful relationship with both their parents and that this will continue regardless of whether the children are in Darwin or Queensland". The Court also gave weight (para 26) to evidence that "the father pays no child support currently and that the orders … for [his] time during school holidays will not be affected by the move".

CHILDREN

Father's application for child to visit him in prison dismissed – Communication not in the child's best interests either

In *Perks & Doney* [2014] FCCA 2404 (25 November 2014) Judge Dunkley heard an imprisoned father's application to see his 6 year old daughter at the prison once fortnightly and to have telephone calls twice a week and on special days. The mother opposed the application. The father's imprisonment was until 2021, his earliest parole date being in 2018 (para 3). The child ("X") had spent no time with her father since she was 20 months old when the father was taken into custody (para 5). The Court said that the child "likely has little to no memory of him, although she knows *of* him" (para 6). The Court said at paras 39-41:

> "Informed by the s 60B objects, theoretically children are considered to obtain a benefit from a meaningful relationship with both parents, which is safe for them. In this case … no benefit arises for X in having a relationship with her father other than knowing or hearing of her paternal identity. Currently it would not be safe for her to have a relationship with her father because she would likely experience psychological harm. The need to protect X is to be given greater weight than her right to have a meaningful relationship with her father."

In dismissing the application Judge Dunkley took into account the father's recent letters to X which had been "unhelpful and undermining of X's relationship with her mother, and not entirely child focused" (para 45); the father's entrenched disregard for authority including family violence orders (para 66); that X would receive "no benefit from writing to someone she does not know" (para 71); and that while "guards would be present during visits they are not supervisors to the extent that they would closely observe all interactions and conversations between the father and X … [t]he father [having] demonstrated

[his] capacity to say unhelpful and perhaps harmful things in his letters to X" (para 72).

PROPERTY

Husband's $3m inheritance post-separation – Global approach – Wife's superior contributions during and since cohabitation

In *Singerson & Joans* [2014] FamCAFC 238 (10 December 2014) the Full Court (Bryant CJ, Ainslie-Wallace & Crisford JJ) considered a 15 year marriage where the husband inherited $3 million (value at trial) soon after the parties' separation. Total assets were $7.4 million. Both parties appealed Jordan AJ's property order, seeking a re-exercise of discretion by the Full Court. There were two children. Since 1999 the husband had been a retrenched valuer who suffered depression and had "sporadic" employment. The wife was the children's primary carer and a pharmacist earning $250,000 per annum after tax (paras 10-14). In allowing the appeal, the Full Court said (paras 65-66) that "his Honour misled himself … in identifying only the four years between separation and trial as being the appropriate time upon which to assess contributions to the inheritance rather than across their 15 year relationship". The Court found that the wife's contributions during and since cohabitation were "significantly greater … to the property acquired prior to separation" (para 94), holding "[d]espite the timing of the receipt of the inheritance" that "over this long marriage a global approach is appropriate" (para 96). Contributions were assessed as 52.5 per cent in favour of the husband (para 97). No further adjustment was made under s 75(2).

PROPERTY

Case dismissed – Not just and equitable to make an order – Stanford applied – Parties' informal agreement to keep assets separate

In *Fielding & Nichol* [2014] FCWA 77 (28 November 2014) Thackray CJ considered the application by Mr Fielding ("the husband") for an equal property division when the parties' 12 year de facto relationship ended. Ms Nichol ("the wife") sought dismissal of the application so that "each party [kept] the real estate they owned at the start of the relationship" (para 3). The applicant had a block of land. He was 74, the wife 66, both were retired. They lived together in the wife's home. Total assets were worth $465,254. The Court said (para 17):

> "In arguing it would not be just and equitable to make any order altering property interests, counsel for the wife drew on … paragraph 42 of *Stanford* v Stanford [[2012] HCA 52] … argu[ing] that no 'express or implicit assumptions' of the parties about their property were brought to an end by the termination of their relationship. On the contrary, their relationship had been conducted on the basis that neither would ever have any interest in the property of the other."

Thackray CJ observed that "the husband never executed a will in favour of the wife (para 22); that work by him on the wife's property made no "real difference" to its value (para 24); and that he sought an equal property division "because he devoted 12 years of his life to the relationship and … he had anticipated the parties would live out the rest of their lives together" (para 25). After examining other authorities (paras 30-50), the Court held (paras 51-52) that "it would not be just and equitable to make any order altering property interests" given the parties' agreement to keep their financial affairs separate; that their assets were "kept entirely separate"; "the absence of any evidence to suggest the husband refrained from accumulating other assets"; that (with a minor exception) neither made any provision for the other in their wills; the insignificance of the husband's work on the wife's property; his (and his son's) rent-free accommodation; the ages and health of both parties; and that each party had "a significant asset which could be realised to meet needs". The husband's application was dismissed.

CHILDREN

Coercive order requiring mother to relocate is set aside

In *Adamson* [2014] FamCAFC 232 (3 December 2014) the Full Court (Ainslie-Wallace, Murphy and Kent JJ) heard the appeal of the mother of a three year old child ("X") from Judge Altobelli's order requiring the mother to relocate. The child was 12 months old when her parents separated in 2011, the mother relocating from Sydney to Town S (200 kilometres north of Sydney) after the father assaulted her (paras 17-18). The father remained in Sydney but also relocated during the trial in 2013 to Town C on the Central Coast (NSW) (140 kilometres or a two hour drive from Town S). The dispute was the child's time with the father and a coercive order made on the application of the father (notwithstanding that the mother and child had been living in Town S for two and a half years) that the mother relocate to within 20 kilometres of the

father's new home by January 2015. The Full Court (paras 35-41) examined the authorities, in particular *Sampson & Hartnett (No.10)* (2007) FLC 93-350 as to the application of s 65DAA FLA where the Full Court said:

> "To order someone to relocate to another place will require the court to be satisfied that the practicalities of life equally or sufficiently exist in the place to which the party is required to move."

The Full Court said (paras 44-45) that "the trial judge found … even on the mother's proposal, that she and the child continue living in Town S whilst the father remained in Town C with the child spending time with the father as proposed by the mother, the child would continue to have a meaningful relationship with the father" so that "it could not be said that the coercive order was founded upon any identified need, in the child's best interests, essential to establishing or maintaining the child's meaningful relationship with the father". The Court also observed (para 47) that "the trial judge found that it was common to the proposals of both parents that it was in the child's best interests that she should continue living with the mother" and that "it was not the father's proposal that the child should live with him even if the mother did not herself relocate". The Full Court concluded (para 53) that the trial judge's findings did

"not sit conformably with a conclusion that rare or exceptional circumstances existed … such as to justify a legitimate exercise of discretion to make the coercive order". The appeal was allowed, the coercive order discharged, the order as to the father's time with the child varied and the case otherwise remitted for re-hearing.

COSTS

Indemnity costs where husband did $300,000 better than his settlement offer to wife and wife did $950,000 worse than hers to him

In *Lad & Gittins* [2014] FamCA 439 (11 April 2014) at the conclusion of contested property proceedings in November 2013 Austin J granted the husband's application for costs against the wife from the date of his settlement offer to her in May 2013. Austin J took into account s 117(2A)(f) FLA, observing (paras 26-27) that "[t]he result the husband gleaned in these proceedings bettered the offer he made to the wife by some $300,000" and that "the ultimate result was about $950,000 worse for her than the offer she made to the husband", there being "an enormous difference between their offers". The Court added (at para 28-29):

> "One of the arguments raised by the wife about why she ought not be ordered to pay the husband's costs in the face of such offers was that her financial circumstances were not conducive to such an order. I do not accept that submission. It was found that the distribution of the parties' property in accordance with the orders made in November 2013 would result in the husband's retention of property worth approximately $380,000 and the wife's retention of property worth approximately $1.9 million. (…)

Even though the wife is not working, that fact was taken into account in the reasons published by the court in November 2013. It was accepted the wife is 58 years of age, that she still has a dependant minor who will probably remain dependant upon her until the child attains majority in March 2015, and the wife has not been gainfully employed for many years. (…)

Austin J concluded (at para 31):

> "The costs will be payable on an indemnity basis, rather than a party/party basis, from that date [10 May 2013] because of the substantial amount by which the ultimate result was better than the husband's very reasonable offer (see *Colgate-Palmolive Company v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225). That is an overarching consideration, as is the wife's substantially superior financial circumstances." ●