STATUTES

Time limits – extradition

In *Hala v Minster for Justice* [2015] FCAFC 13 (16 February 2015) a Full Court concluded the requirements in the *Extradition Act* (Cth) that steps be taken "as soon as practicable" did not show a parliamentary intention that the power to make the decisions would cease if this did not occur. *Snedden v Minister for Justice (Cth)* [2013] FCA 2012 applied. The Court concluded the appellant had not been denied natural justice as nothing in the requesting country's response was new material.

FEDERAL COURT

Appeal – extension of time to file notice of contention

In *Repatriation Commission v Watkins* [2015] FCAFC 10 (11 February 2015) a Full Court refused an extension of time for a respondent to file a notice of contention under Federal Court Rules 2011 (Cth) Ord 36.24 as no explanation of the delay was offered and the grounds had no merit.

Thomas Hurley is a Victorian barrister, telephone 03 9225 7034, email tvhurley@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au. Numbers in square brackets refer to the paragraph number in the judgment.

Robert Glade-Wright's family law case notes

Robert Glade-Wright, author and editor of the family law book

CHILDREN

Mother took children into hiding, fearing father posed a threat to their lives – He to spend no time with the children – Suppression order

In *Dunst* [2014] FamCA 964 (11 November 2014) a mother had taken five children into hiding while the father was imprisoned due to her fear that the "father threaten[ed] their lives" (at [2] and [8]). Austin J found that the father did pose risks of harm to the children "which he either deceptively denied or of which he was bereft of insight" such that there "was no safe alternative but to eliminate all personal contact between the father and the children" ([4]). Austin J said that the "eldest two reject the father outright, either through contempt or fear, but the youngest three" had "more positive memories and attitudes towards him" but also "ambivalent feelings" ([56]). Austin J continued ([61]-[63]):

> "Restoration of the three youngest children's relationships with the father would most likely benefit them, but there is no utility in setting about restoring such relationships if other evidence powerfully motivates a contrary outcome. There would almost certainly be countervailing emotional disturbance for the two eldest children and the mother if the three youngest children's relationships with the father were restored, which is a

> consideration properly addressed under s 60CC(3) of the Act. Moreover, while children usually benefit from both the development and maintenance of good relationships with both their parents, that benefit is annulled when such relationships are abusive (see U v U [2002] HCA 36 … at 285-286; *M v M* (1988) 166 CLR 69 at 76). (…)"

The Court found that an order could not "safely be made" for the children to spend unsupervised or supervised time with the father ([145]-[146]) but did order ([151]) that he may communicate in writing with the children so as to facilitate any prospect of reconciliation. The Court said that the suppression order and injunctions would "impede the father's ascertainment of the mother's residential location and, if he learns of it anyway, prohibits his attendance at or near [their] home and the children's schools" ([153]). The Court (at [155]) dismissed the father's application for permission to obtain details of the children's medical treatment and school progress "as it would compromise the mother's ability to maintain the secrecy of her residence [which would be disclosed in the children's medical records and school reports]."

PROPERTY

Children placed husband in home – Doctor's report that husband had said he wanted a divorce – Wife argued abuse of process as she and husband not separated

In *Stevens* [2015] FCCA 63 (15 January 2015) an 87 year old husband was admitted by his son to an aged care facility on the Gold Coast and later removed but placed in another one in New Zealand near his daughter's home ([5]). In 2011 the Queensland Civil and Administrative Tribunal appointed the Public Trustee of Qld as administrator of the husband's affairs, finding he was "easily influenced, that he exhibits short term memory loss, and as a result is unable to retain the consequences of decisions in his memory" ([6]). The wife alleged the husband's removal from the home was without her knowledge or consent and that the husband's application for property adjustment should be summarily dismissed as the parties had not separated.

Judge Lapthorn dismissed the wife's summary dismissal application and appointed the Public Trustee of Qld as the husband's litigation guardian. The Court (at [20]-[21]) distinguished its ruling in similar circumstances in *Shearer & Defazio* [2013] FCCA 1596 (that it would not in that case be just and equitable to make a property adjustment order in the absence of evidence that the parties' marriage had broken down) by referring to a letter from a doctor annexed to the affidavit of the husband's solicitor saying that the husband had told him he wanted a divorce. Judge Lapthorn said that such issues as whether the husband had been influenced by the children or the relief sought was an abuse of process, the proceedings being "driven by the … children for their own ultimate benefit", could not be determined "without the benefit of having evidence tested" at the final hearing.

PROPERTY

Sex worker failed to prove 'de facto relationship' – No financial interdependence, children or evidence she gave up her sex work for him

In *Kristoff & Emerson* [2015] FCCA 13 (13 January 2015) a sex worker alleged a de facto relationship with the respondent (originally a client of hers) from 2003 (when their relationship "ceased to be a commercial one") until 2011 ([2]).

Judge Brewster found that by 2002 the applicant had given up her sex work "and obtained employment elsewhere" ([5]), that from 2003 she lived at the respondent's property up to five nights per week ([10]), that sexual intercourse was "regular" ([11]), that the relationship was "more significant than a 'friendship'" ([12]) but that the parties "never shared an economic life" ([13]).

After considering s 4AA(2) FLA and the evidence Judge Brewster dismissed the application, saying (at [40]):

> "In this case I am not satisfied that there was a de facto relationship between the parties. Some of the *indicia* of a de facto relationship were present, some were not. The factor to which I attach most weight is the lack of any financial relationship between the parties."

PROCEDURE

Litigation guardian not needed by mother with personality disorder

In *Somerville* (No. 2) [2014] FCCA 2439 (31 October 2014) Judge Altobelli heard a property and parenting case where the mother's counsel raised the issue of the mother's capacity to conduct the litigation, the Court taking "upon itself the responsibility for determining whether a litigation guardian should be appointed for the mother" ([5]). After considering FCCR 11.08(1) and *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114, the Court said (at [9]-[11]) said that there was "ample expert medical evidence before the Court", including that of the court appointed single joint expert Dr. K whose opinion

was that "the mother [was] capable of understanding the nature and possible consequence of the court proceedings." In determining that there was no evidence justifying the appointment of a litigation guardian, Judge Altobelli said (at [23]):

> "Whilst it is unwise to generalise, what this case demonstrates is that just because a person suffers from a personality disorder it does not necessarily mean that they meet the alternative criteria set out in r.11.01(1). (…)"

Judge Altobelli continued (at [12]):

> "Dr. K was cross-examined … He explained that the mother demonstrated a sufficient understanding of aspects of the litigation that he could confidently conclude she understood 'the nature and possible consequences of the proceedings'. For example, she manifested an understanding of the proposals advanced, the role of the Court, the consequences of orders made and the impact on the children. … the fact that, in his opinion, she suffered a personality disorder, did not per se affect her capacity to give adequate instructions."

The Court then considered a report of another expert [Dr. R] (at [16]):

> "The final paragraph of his letter is the relevant one:
>
> "My position is that her reasoning is impaired due to her significant personality disorder and that she does not have the capacity to understand consequences of these proceedings. Her perceptions and reasoning appear to be greatly such as her distorted emotional response, her ambit claims of rape, continued undermining of the children and her propensity to run away and threaten suicide. Therefore I believe that her functioning is diminished and I do not believe that she has the capacity to comprehend the consequences of these proceedings and therefore requires the assistance of a case guardian."

A report of the mother's treating psychiatrist (Dr L) said (at [19]):

> " … While both Dr R's report and Dr K's report elucidated some information regarding Ms Somerville that I was not previously aware of, namely some personality difficulties, I am of the opinion, from my own assessment of Ms Somerville, that she retains the capacity to understand the nature and possible consequences of family law proceedings and also the capacity to give adequate instructions. Ms Somerville displays no cognitive deficit and there is no evidence of major mental illness such as psychosis, mania or severe depression. She seems to be aware of the nature of proceedings and of her own wishes in relation to these and what she hopes to achieve."

Judge Altobelli concluded (at [23]):

> " … Every case is different. Indeed there may be some cases where the evidence demonstrates that a person suffering a personality disorder does lack the understanding or capacity referred to in r.11.01(1). What seems important from Dr. K's and Dr. Lal's evidence is that the mother's cognitive functioning was intact and, that she was quite capable of articulating her views, and the absence of psychosis, mania or severe depression."

FINANCIAL AGREEMENTS

Husband wins appeal against rejection of agreement – Waiver of privilege by wife as to her solicitor's file

In *Bilal & Omar* [2015] FamCAFC 30 (27 February 2015) the Full Court (Bryant CJ, Murphy and Loughnan JJ) allowed the husband's appeal against Henderson FM's decision to set aside a s 90C financial agreement as the wife (who had limited English skills) had not been given intelligible legal advice. The appellant argued that the court below erred by rejecting his argument that the wife had waived legal professional privilege as to her solicitor's file of which he had sought production under subpoena, as proof that she *had* received such advice. The Full Court accepted ([25]-[28]) the husband's argument "that her Honour directed her attention to whether … advice … to the wife … was understood … whereas the wife's … case was that no advice was received."

The Full Court said ([37]-[38]) that her Honour erred by perceiving that "conscious decision on the part of the holder of the privilege" was necessary for there to be a waiver of it. The Full Court (at [40]) cited s 122(2) of the *Evidence Act* 1995 (Cth) by which privilege is lost by "the behaviour of the holder of the privilege", not the intention of the holder of the privilege', concluding (at [45]) that "the trial judge erred in failing to adopt the appropriate test for waiver of privilege, namely inconsistency."

PROPERTY

Husband's inheritance preceded by parties' financial contributions to the inherited property

In *Stone* [2015] FamCAFC 18 (19 February 2015) the Full Court (Ainslie-Wallace, Ryan & Murphy JJ) dismissed the husband's appeal against a property order where he had inherited $2.8m of a net pool of $5.6m. Fowler J, adopting a global approach, had found that contributions favoured the husband 60:40 but made an 8 per cent adjustment under s 75(2) for the wife for her care of the child, the

husband's failure to disclose and the likely disparity of income. The parties' 11 year relationship produced one child (the wife having two children of a prior relationship who lived with them). Both parties worked and each made initial contributions (the wife owned a property bought for $555,000 and sold post-separation for $955,000 and the husband had geared real estate investments and a trust interest).

When the relationship began the husband bought his sister's one-half interest in remainder in their mother's N Street property for $350,000, then spent $1m on improvements to the property ($150,000 being from the wife which he had largely repaid). On the mother's death in 2006 the N Street property comprised $2.2m of the $2.8m inherited by the husband. The Full Court (at [36]) rejected the appellant's argument that the trial judge "failed to attribute proper significance to the value of and time of [the N Street property's] introduction into the parties' relationship", observing (at [39]) that "[b]efore his mother's death both he and the wife moved into the property and made significant renovations to it expending funds accrued during the cohabitation to do so." The Court added that the cost of acquisition of his sister's interest and the $1m spent on improvements amounted to about one half of the value of the property. The s 75(2) adjustment was also left undisturbed.

CHILDREN

Contravention – Whether mother's fear for safety of herself and children was reasonable – No recent act of violence

In *Tindall & Saldo* [2015] FamCAFC 1 (9 January 2015) the Full Court (Bryant CJ, Finn & Strickland JJ) heard the mother's appeal against Austin J's finding that she had contravened by failing to facilitate an order that the child have supervised time with the father. Throughout their relationship the mother endured domestic violence by the father ([13]). While the parties separated in 2008 the husband's ensuing criminal trial, at which the mother gave evidence, began in 2010 ([72]). Finding that the mother had contravened the order without reasonable excuse, Austin J found that the mother's fear for the safety of herself and the child was genuine but unreasonable ([43]). Finn & Strickland JJ (at [73]), noting that "his Honour laid great store in the implication from … 2008 [as to] how the mother … had willingly permitted the child to spend time with the father" said [75] that his Honour erred in finding that "the commencement of the criminal trial and the father's pleas of guilty did not change anything from the mother's perspective", adding (at [77]-[80]):

> "The mother's unchallenged evidence was that as the criminal trial approached her fear for the safety of herself and the child 'increased' believing that the father 'would not accept the fact that he was going on trial quietly' …
>
> The trial commenced, and after the mother was cross-examined, the father changed his plea. The mother's unchallenged evidence about this turn of events was that as far as she was concerned the father would carry out his previous threats to kill her and the child 'for taking him to court to accept responsibility for his many assaults on [her and the child]' …
>
> The mother's evidence was that she believed that the only way to prevent this was to avoid any interaction with the father, and she contravened the order providing for the child to spend time with him.
>
> We accept that his Honour erred by failing to have regard to … the events … surrounding the criminal trial, in finding that the mother's belief was not based on reasonable grounds."

Finn & Strickland JJ continued (at [85]):

> " … Although there is no rule of law that a judge must accept evidence which is unchallenged … a number of authorities establish that it may be 'wrong, unreasonable or perverse to reject unchallenged evidence' (original emphasis) (Scott & Scott [1994] FamCA 12) (…)"
>
> The majority concluded that the trial judge was "wrong" in not accepting the mother's evidence as there was "nothing inherently incredible or improbable in the evidence she gave about the events that occurred at the trial, or as to her beliefs, and the basis thereof."

Finn & Strickland JJ also found error in the trial judge's rejection of the mother's claims that she had been bullied into consent orders by her solicitor, saying "[w]e can find nothing in that evidence that demonstrates the inherent improbability of the mother's claim of being coerced and therefore there was no basis to reject her unchallenged evidence to that effect" (para 93). Bryant CJ agreed with Finn & Strickland JJ except as to duress. The appeal was allowed in part.

SUBPOENA

Wife's interest as beneficiary under a trust – Husband's right of production prevails over trustee's right to privacy

In *Douglas & Ferris & Anor* [2014] FCCA 2785 (19 November 2014) the husband issued a subpoena for the wife's father (guardian of the trust with power to appoint trustees) to produce deeds of trust in which the wife was a beneficiary. The guardian objected. The wife had made no disclosure and said that the value of the trusts were unknown. The guardian said that the wife had never received a distribution ([17]). Judge Riethmuller said (at [14]):

> "There can be little doubt that if the wife has a present interest in significant assets that form the corpus of a trust (subject to the possible defeasance of her interest by determinations of the trustee) that such an interest is arguably a relevant factor for the purpose of ss 75(2) and 79 either in terms of her future property interests or financial resources.

In ordering that the trust documents under subpoena be produced for inspection by counsel for the parties but not the parties, the Court concluded (at [45]-[47]):

> "The reality remains that these are trusts that the wife has significant interest in and in which she is one of a relatively small group of primary beneficiaries. As a result, an analysis of the wife's potential right to inspect does not tell against the discovery sought.
>
> [46] Nothing is before me to show how this would be oppressive beyond that of the husband being potentially becoming aware of details of the trust holdings. (…)
>
> [47] In these circumstances it does not appear to me to be oppressive that the details of the trust become known and be available for inspection provided that protections are in place to ensure that the husband … is not seized of information that he might use for alternative purposes but confined in such a way as to only receive such information as is strictly relevant and as is necessary for him to be aware of."

CHILDREN

Mother wins appeal against parenting injunctions

In *Banks* [2015] FamCAFC 36 (12 March 2015) the Full Court (Thackray, Murphy & Kent JJ) allowed the mother's appeal against an interim parenting order made by Cleary J. The parents were married in Australia but travelled to Thailand (the mother's country of origin) before the child's birth so that the mother could have the support of her family. The child was born in Thailand, the parties moving to Australia when the child was 8 months old. In May 2013 the parties and child went to Thailand "to visit the maternal family" but when the father returned the mother and child did not ([6]). The mother came to Australia to work in the adult entertainment industry for weeks at a time without the knowledge of the father (and without the child) but when the mother told the father she was in Australia he applied for and was granted an ex parte injunction that the mother deliver the child to the father and be restrained from leaving Australia ([13]).

It was also ordered at first instance that the child live with the mother in Australia (an order "neither party sought" and where "the primary judge did not give notice of her intention to make such an order"). The father's solicitor conceded that the mother "had not been afforded natural justice" and that the appeal should succeed, the Full Court to re-exercise discretion (paras 21-22). Citing Goode [2006] FamCA 1346, the Full Court reviewed the "agreed or uncontested relevant facts" that the father had had no contact with the child, save via Skype, for two years; the mother had been the child's primary carer for much of his life; the father accepted that the mother was an appropriate carer; the child was born in Thailand, lived there for the first five months of his life, visited there in 2012, lived there for the last two years; and the child had been diagnosed as having autistic spectrum disorder requiring behaviour modification and speech therapy and had recently commenced school in Thailand (para 37).

The Full Court noted the father's concession that the child should "primarily" live with the mother pending trial ([43]-[45]) and the mother's complaint that the court below had allowed s 60CC(2)(a) (child's relationship with father) to outweigh "the impact upon the child of being required to leave the settled environment in which he ha[d] been living" ([54]). The Full Court said ([66]) that "[s]ignificant weight must be placed on the fact that the child appears to be well settled in Thailand [being] of special importance because of his developmental delay", concluding (at [72]) that "the child's best interests will be better served by remaining in Thailand pending trial, rather than being uprooted and brought to Australia." The injunctions were discharged and it was ordered that the father spend time with the child in Thailand as agreed and via Skype.

SUBPOENA

Objection to production of a will where solicitor had deposed to its contents

In *Sadek and Ors & Hall and Anor* [2015] FamCA 23 (20 February 2015) the wife contended she did not know whether she had any interest in the estate of her deceased father whereupon the husband issued subpoenas to the wife's mother and three brothers ("the appellants") for production of the father's will and probate. The appellants objected, arguing that an affidavit sworn by their solicitor as to the relevant parts of the will obviated its production and that the primary judge could inspect the will to determine whether the affidavit fully disclosed the relevant information. Dawe J dismissed the objection, saying that such a course did "not overcome the obligation to produce the … document in its entirety if [it] is available" ([2]). On appeal the Full Court (Thackray, Strickland & Aldridge JJ) said (at [24]) that as "the appellants accept[ed] that the documents sought had apparent relevance to the proceedings, the subpoenas were appropriately issued" and ([26]) that it was "in the interests of justice for that relevant information to be provided to the husband." Before dismissing the appeal the Full Court added (at [28]):

> "Whilst it may be accepted that the solicitor for the appellants has, as far as he is aware, faithfully recorded what he regards as all relevant information from the will in his affidavit, it is possible that others might not take the same view."

PROPERTY

Expert disagreement as to value of property developer's minority interest in a group of entities

In *Morrow & Steele* [2015] FCCA 251 (13 February 2015) Judge Burchardt heard a property case where the husband, a property developer, held minority interests with other investors in "the [Steele] Group" and where each interest was held via a different company with different levels of interest in each. The valuation of those interests by the single expert ("Mr F") was $3.2m as "value to owner" or $2.8m as "fair market value" (the difference being explained at [30]) and by an alternate expert engaged by the husband ("Mr L") was $1.78m, the experts disagreeing (at [28]-[29]) as to the percentage to be allowed for the minority interest discounts and further discounts for lack of marketability. Mr F (at [36]) "was of the view that there was no real industry standard in respect of minority interest discounts", that "there's some crossover in terms … of what's accounted for under either of those discounts" (at [37]) and that "the minority interest made no difference at all in terms of marketability" ([39]). Upon accepting the lesser of Mr F's two valuations and applying no additional discount for lack of marketability, the Court concluded (at [69]):

> "Bearing in mind that both the experts clearly accepted that there is no precise range to establish minority interest exactly, one is left wondering how it is possible to say which of the rates is appropriate. In the end, however, I am more persuaded by Mr F's 12.5 per cent than Mr L's 16.5 per cent. The first point to be noted is that Mr F was engaged as a single expert witness. He, at all times, conducted himself in that style. Mr L was engaged with the clear aim of reducing the value to be ascribed to the interests of the [Steele] Group."

CHILDREN

Appeal by father against interim parenting order – Leave to adduce evidence which he failed to tender at the interim hearing

In *Samson* [2015] FamCAFC 28 (27 February 2015) the mother applied for a recovery order when the father removed the children from the family home in Town B, taking them to the Blue Mountains where his family of origin lived. An interim parenting order was made by Judge Hughes that the father return to Town B and that the children spend 9 days a fortnight with the father and 5 days a fortnight with the mother. On appeal Finn J rejected the father's grounds of appeal but granted his application to adduce evidence obtained by subpoena only some of which had been before Judge Hughes. The subpoenaed documents included material from the NSW Police as to "their involvement with the mother", from four hospitals as to the mother's admissions "for drug and alcohol overdoses" and "other problems" and from a clinic as to her admission "for detoxification" ([19]). Counsel for the father could not explain why the subpoenaed material which was available on the day of the interim hearing had not been tendered on that day ([20]). The mother and ICL opposed the application to adduce further evidence, arguing that the material should have formed the basis of "a further application to her Honour, which she had in fact invited … and not be sought to be adduced on appeal ([26]). Before setting aside the interim orders and remitting the case for re-hearing, Finn J said (at [29]-[30]):

> "In the present case, in my view, the consequences of not permitting the further evidence to be admitted at this interim stage (even though it would, no doubt, be relied on in the final hearing) may be so grave that it can well be argued that the children's best interests require its admission.
>
> I do not overlook the fact that much of the further evidence was available on 18 December 2014 and was not tendered on behalf of the father (or indeed by the ICL who, I was told, was relying on the father to do so). But I venture to suggest that that consideration could not be decisive in a case involving the safety of children."

Finn J added (at [49]-[51]):

> "Counsel responded [to the question why it was necessary to pursue the appeal] to the effect that for a further application at first instance to have succeeded, it may have been necessary for a change of circumstances to have been established (presumably because of the so called rule in Rice and Asplund (1979) FLC 90-725).
>
> I had, and continue to have, difficulty in accepting this submission given not only her Honour's invitation to re-list the matter, but given also that the receipt of the further subpoenaed material (including the important material from the police) would more than likely have constituted an important change of circumstances (should any such change of circumstances even been required).
>
> Notwithstanding my grave reservations as to the necessity for this appeal, I would not have been justified in refusing to hear the appeal given the parties preparation for it, and so I have heard and determined it."

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26 June 2015

CLANT's 15th Biennial Criminal Law Conference
Criminal Lawyers Association of the Northern Territory

BALI, Indonesia, Prama Sanur Beach Hotel

5–9 July 2015

15th International Symposium of the World Society of Victimology
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PERTH, Australia, Perth Convention and Exhibition Centre, Antje Klupsch +61 2 6260 9272 events@aic.gov.au

24–27 August 2015

CLCs Conference 2015
Community Legal Centres

MELBOURNE, Australia, Hilton on the Park, 192 Wellington Parade, East, events@aic.gov.au

6–9 November 2015

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