PROCEDURAL FAIRNESS

bias – magistrate's communications after judgment

In *Hagen Corporation Pty Ltd v Bikes Top End Pty Ltd* [2015] NTSC 23, Kelly J allowed an appeal on the basis of apprehended bias. A magistrate gave judgment in a matter where one party was the husband of a fellow magistrate and after judgment, asked his fellow magistrate whether her husband's lawyers had picked up that he was more or less inviting them to apply for indemnity costs. Kelly J agreed with the parties that the magistrate had properly heard the matter and given judgment but held that his comments after judgment cast a different light on earlier events, it being possible that a reasonable person would think he had favoured the magistrate's husband. Judicial conduct occurring after a case has been decided can give rise to an apprehension of bias during the case.

PROCEDURAL FAIRNESS

Court disclosing its intended orders to parties

Two decisions recently have considered when the court should disclose to the parties the orders it is considering making so as to accord procedural fairness. In Field v Edwards [2016] NTSC 5, Blokland J held at [48] that a court may need to disclose the fact that it is intending to reject a fact or submission but not that fact that it is considering a sentencing disposition customary for the particular offence. In Nitschke v Medical Board of Australia [2015] NTSC 39 at [143], Hiley J held that a person should be informed of the risk that an adverse finding may be made against them unless the risk necessarily inheres in the subject matter to be decided.

Robert Glade-Wright's family law case notes

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PROPERTY

No error in treatment of wife's redundancy entitlement as an initial contribution

In *Hearne* [2015] FamCAFC 178 (16 September 2015) the Full Court (Strickland, Ryan & Austin JJ) dismissed the husband's appeal in which he argued that Judge Harman at first instance mischaracterised the wife's redundancy entitlement as an initial contribution where she had no right to the redundancy when the relationship began. Strickland J (with whom Ryan J agreed) said (at [97]):

> "There is no doubt that when a trial judge comes to identify the property of the parties, accumulated service cannot be treated as an item of property, but, that is not what the trial judge is doing here. He is assessing the initial contributions of the parties which can comprise items of property such as real estate or chattels or bank accounts, but which are not limited to items such as that. Relevant contributions can equally be the bringing of benefits by a party to the relationship, and those benefits need not be crystallised as at the commencement of cohabitation. Thus, it was quite open to His Honour here, and indeed it has been a common occurrence throughout the entire operation of the *Family Law Act* 1975 (Cth) for accumulated service, which ultimately leads to a redundancy payment, to be taken into account as an initial contribution of a party. The only rider to this is that 'double dipping' cannot occur … by also taking into account the pre-cohabitation service when assessing the receipt of the actual redundancy payment subsequently."

CONFLICT OF INTEREST

Whether confidential information held – waiver of objection

In *Osferatu* [2015] FamCAFC 177 (15 September 2015) the Full Court (Finn, Ainslie-Wallace & Aldridge JJ) allowed the husband's appeal from an injunction made by Foster J restraining Barkus Doolan from continuing to act for him, where a solicitor ('Mr F') joined that firm having previously worked for the wife's solicitors, Watts McCray. It "was common ground that Mr F did not have any direct dealings with the wife" while he was a member of that firm ([1]).

The wife retained Watts McCray in 2011, Mr F left there in 2012 and the parties entered into final parenting orders in 2013 and final property orders in January 2014. Mr F joined Barkus Doolan in May 2014. An undertaking by Mr F that he would not convey any information he may have had concerning the wife to anyone at Barkus Doolan nor involve himself in the wife's case was accepted by her on the basis that she would formally object if there were further proceedings between the parties ([6]).

In February 2015 the husband (as a litigant in person) applied for the re-listing of the case, as to which the wife emailed saying she had "no issue" with his re-engaging Barkus Doolan ([11]). Upon his doing so, however, she objected, applying for an injunction restraining the firm from acting. The Full Court (at [22]) cited *McMillan & McMillan* [2000] FamCA 1046 (FC) as to "the manner in which a client's confidential information is to be protected in family law proceedings," continuing (at [24]-[26]):

> "In an unreported decision of *Stewart & Stewart* (unreported, Family Court of Australia … 17 April 1997) Lindenmayer J said:
>
> > ' … All that is necessary is that the wife swears that she has conveyed confidential information to the solicitors and that she believes, not unreasonably, that that information may be used against her, or at least to her disadvantage, in these current proceedings … '
>
> Of that passage the Full Court in *McMillan* said at [87]:
>
> > 'In other words, the client need only give evidence that he has provided confidential information to the solicitor (or in this case, the law clerk/secretary). The client does not have to divulge the content of that information. (…)'
> >
> > (…) Because the applicants in those cases had given instructions to the solicitor about the very matter in issue, it follows easily that there would be a finding that the solicitor who had moved was in possession of confidential information which is or may be relevant to that matter. It is for that very reason that the passage of Lindenmayer J in *Stewart* commenced with the words 'All that is necessary is that …'. His Honour was simply saying that, in such circumstances, the burden borne by the applicant was discharged by such evidence. Nothing that appears in *Stewart, Thevanez or McMillan* obviates the need for an applicant seeking such relief from discharging his/her burden of proof by adducing cogent and persuasive evidence. This is particularly so where, as here, the circumstances differ from *McMillan*. In this case Mr F had never taken instructions from the wife."
>
> The Full Court concluded (at [48]):
>
> > " … for evidence to be persuasive and cogent [the wife] should have identified the nature of the information received or likely to have been received by Mr F … that was now, or could now be, relevant to the current proceedings. She did not do so. It is not sufficient to say that, as family law proceedings cover a range of matters, any information at all received by Mr F could have been relevant. This was especially so given that three years had passed since he could have received any information and both sets of substantive proceedings … had resolved."

It was also held that the court below erred in giving no reasons as to why the wife's email (waiving objection) did not carry significant weight.

CHILDREN

FCC lacks jurisdiction to make order after transferring case to Family Court

In *Janssen* [2015] FamCAFC 168 (4 September 2015) the Full Court (Strickland, Ryan & Aldridge JJ) allowed the mother's appeal against an order made by Judge Scarlett three months after transferring the proceedings to the Family Court. The mother argued ([2]) that the Court's jurisdiction was exhausted upon its transferring proceedings and that the subsequent interim parenting order was a nullity. The Full Court agreed, saying ([31]) that while "the Family Court has concurrent jurisdiction in relation to the matter types under consideration (save for the limited exceptions referred to in s. 19(2) of the FCC Act) [*Federal Circuit Court of Australia Act 1999* (Cth)] there can only be one proceeding between the parties under the Act pending at the same time in the Family Court and Federal Circuit Court."

PROCEDURE

Litigation guardianship waived for public guardian

In *Public Guardian (Queensland) & Beasley and Ors* (No. 2) [2015] FamCAFC 201 (21 October 2015) the public guardian was appointed for the mother by QCAT under the *Guardianship and Administration Act 2000* (Qld) and instructed Legal Aid (Qld) to act for her in a parenting case but refused to consent to being appointed as her litigation guardian. Judge Jarrett dismissed Legal Aid's application for an order dispensing with such an appointment whereupon the public guardian appealed to the Full Court. May J (with whom Strickland and Austin JJ agreed) said at [81]-[82]:

> " … The public guardian will be able to take instructions from the mother to the extent she is able to communicate them, and brief Legal Aid to appear on her behalf—confirming an informal arrangement which has already occurred. (…)
>
> In circumstances where the court can be satisfied that the mother's interests could be adequately represented and protected, and where there is no barrier to dispensing with compliance with 11.09, it is clear the primary judge should have accepted Legal Aid's application to dispense with the FCC Rules."

CHILDREN

Injunction against father leaving child alone with father's brother set aside

In *Solonose & Squires* [2015] FamCAFC 190 (30 September 2015) Strickland J heard the father's appeal against Judge Connolly's injunction preventing him from leaving his child alone with the father's brother who had an intellectual disability and was alleged to have been 'sexually inappropriate' with the child. The allegation was investigated by the police and the Department of Human Services and although the allegations could not be substantiated the father gave an undertaking to the Department that he would not bring the child into contact with his brother [38]-[39]. He confirmed his undertaking in the court below but the mother expressed concerns about the brother's behaviour [40]. In allowing the appeal Strickland J said at [49]:

> " … it was not open to his Honour to make the order for the reason that it would 'make [the mother] feel a lot more comfortable than the undertaking to the Department' … His Honour needed to be satisfied that there were allegations that required an injunction to be made, and that clearly did not occur. (…)"

PROPERTY

Injunctions requiring husband's consent to wife's business and personal drawings over $1000 varied

In *Cao & Hong* [2015] FamCA 884 (22 October 2015) Forrest J heard the wife's application for variation of injunctions made by Judge Coates before the case was transferred from the FCC to the Family Court. The parties had assets of $200m, of which $27m was the value of property in Australia. The wife managed the Australian investments and the husband managed their assets overseas. Forrest J said (at [19]-[21]:

> "The wife seeks variation of the existing restraints because every payment made in the management of the Australian companies over $1000 requires written consent of the husband without … any exception in respect of payments made in the ordinary course of business or … her reasonable living expenses.
>
> The evidence adduced by the wife demonstrated to my satisfaction that she was having difficulty getting the husband to even consider her requests, as well as difficulty getting him to agree to payment for her personal expenses. At the same time, the husband was not subject to any similar … restraint in respect of his management of their Country D interests and his ability to access money there as he needed it.
>
> The wife deposed to the Australian companies having regular monthly payments of ordinary business expenses that well exceed the $1000 limit and she sought exception … for expenses incurred in the ordinary course of business of those entities. At the same time, she deposed to having personal expenses of around $20 000 per month which, in the past, she has caused to be paid from the accounts of the entities which have, she says, been treated by the company accountants as 'wages' paid to her."

Finding (at [38]) that the $20 000 sought to be accessed by the wife to meet personal and household expenses was excessive, the Court concluded at [37]:

> " … I will grant injunctions that I consider restrain each of the parties … from withdrawing funds from any personal accounts or accounts of the Australian companies or the Country D companies in excess of … $10 000 as opposed to the much smaller sum of $1000 previously provided for, without the consent of the other party or order of this Court, subject to exceptions in respect to drawings made in the ordinary course of business; to meet already existing contractual obligations; for the wife to be able to meet personal

and household expenses of up to $15 000 per month; and for each party to pay legal expenses in these proceedings up to a limit of $200 000."

CHILDREN

Application to exclude unfavourable family report and for leave to obtain another report dismissed

In *Mullaly & Beddoe* [2015] FamCA 891 (23 October 2015) Hogan J dismissed the mother's application to exclude a family report prepared by a psychologist ('Ms E') in a case where the mother was seeking a final order enabling her to relocate the parties' child to the USA. Ms E was appointed after a report was ordered, the mother to provide the father with a list of three potential experts ([3]). The mother objected to the admission of Ms E's report *inter alia* because she was not a Regulation 7 family consultant, "the father's position [being] simply that the mother is dissatisfied with the opinion expressed by Ms E … and is attempting to seek … another opinion … supportive of her desire to relocate with the child to … America" ([13]-[14]). Hogan J said at [22]:

> "Nothing in the Act or Rules requires that all reports prepared by the agreement of parties … be prepared by persons who are 'family consultants'. Section 62G of the Act simply empowers the Court to direct a family consultant to give the Court a report on matters relevant to the proceedings as the Court thinks desirable … and provides that a report … pursuant to the direction may be received in evidence in any proceedings under the Act. (…)"

Hogan J also ([33]-[34]) dismissed the mother's application for leave to adduce evidence from another expert witness under FLR 15.49.

PROPERTY

Transfers of land by husband's father – assessment of contributions

In *Bagby* [2015] FamCAFC 209 (6 November 2015) the Full Court (Bryant CJ, May & Thackray JJ) dismissed the husband's appeal from a property order made by Magistrate Moroni of the Magistrates Court of WA. The asset pool mainly comprised 'Property A' ($610 000) transferred by the husband's father to the parties jointly and 'Property B' ($1.95m) transferred by him to the husband as trustee of a trust for the children's benefit. The magistrate adopted an asset by asset approach, assessing the parties' contributions to Property A as equal ([47]) and the wife's interest in Property B at 30 per cent. No s. 75(2) adjustment was made despite the wife being a Centrelink pensioner.

On appeal the husband argued that the order was unjust, the outcome being more than the wife had applied for or 'outside the range'. Thackray J (with whom Bryant CJ agreed) disagreed, saying that the husband's counsel "conceded that it was open to the magistrate to award the wife more than she sought" ([127]), concluding ([164]-[166]):

> "It should also be noted that His Honour found that the majority of the s. 75(2) factors favoured the wife but decided not to make any adjustment in her favour on account of that fact 'mainly because of the reasonably substantial size of the asset pool under consideration and to the practical results of the Court's determinations on the subject of contributions' … (…) In effect, the magistrate was saying that whatever the wife might have lost on the contributions' swings, she would have made up on the s. 75(2) merry-go-round. Given the length of the marriage [twenty-five years] and the parties' ages, health and employment prospects, I consider that view was well open to His Honour."

PROPERTY

declaration that property husband transferred to new wife was held on trust – business valuation impossible due to his 'dishonest' dealings

In *Lynch & Kershaw & Ors* [2015] FCCA 2712 (13 October 2015) a business valuer "declared himself unable to arrive at a value … because the husband failed to provide all the information requested of him and … the records he did provide were unreliable" ([4]). The husband had also transferred $100 000 from the business to the second respondent, his new wife ('Ms [K]'), after separation which was used to buy 'Property F' (later sold and the proceeds used to buy 'Property J2' registered in Ms [K]'s name). The wife sought a declaration under s. 78(1) FLA that Property J2 was held on trust for the parties.

Judge Terry found ([197]) that "[a]lmost immediately after separation the husband with the assistance of Ms [K] embarked on a deliberate scheme to remove money from the businesses and acquire properties which he hoped could be put beyond the reach of the wife." Upon finding ([196]-[207]) that all purchase moneys had been provided by the husband, that he treated Property F as his own property and that it was he, not Ms [K], who made the mortgage payments on both properties, the Court declared that Property J2 was beneficially owned by the husband under a resulting trust and should be included in the pool. The Court said ([190]) that it was "impossible … to come to a firm conclusion about what has gone missing from the companies since separation." As to the order made, the Court said ([285]-[286]):

> "If the businesses are worth $310 000 as the husband asserts and nothing else is missing then he is receiving about 38 per cent of the asset pool when an amount slightly over 50 per cent might otherwise have been ordered in light of his inheritance and the age difference between himself and the wife. If the businesses are worth $645 425 as the wife asserts and nothing else is missing then he is receiving 53.5 per cent of the asset pool which is within a range of just and equitable outcomes."

CHILDREN

Father took child from mother for 'respite', disappearing with paternal grandmother and child for five years

In *McLeod & Needham & Anor* [2015] FCCA 2808 (1 October 2015) Judge Terry heard a case between mother and paternal grandmother of an eight-year-old child ('X'). The parents began living together when the mother was seventeen and the father twenty, the mother deposing to violent and coercive conduct by the father ([6]). The case did not relate to their older child ('Y'). The father did not take part in the proceedings except to appear in-person on the first day of the hearing to say that he supported his mother. It was found ([10]-[15]) that the mother was unhappy in her relationship, did not cope well after X was born, that when X was three or four months old the father took X with the mother's agreement to give her some 'respite' but instead (in conjunction with the paternal grandmother who at trial claimed the mother had given the child up) "stole X away" to Queensland, remaining out of touch with the mother for the next five years. In that time the mother "struggl[ed] with alcohol abuse and began using cannabis" and, "struggling with her own issues," "did not make very strenuous efforts" to find the child ([21]).

The Court found, however, that "gradually over time the mother got her life back on track. She sought assistance for her depression and anxiety, she obtained a job and in due course she bought a house … subject to a mortgage and re-partnered with Mr C" ([23]). She began parenting proceedings and to spend time with X after hearing from child support that the father was in jail ([24]). X expressed a wish "to stay with the paternal grandmother [who] … needed her because the paternal grandfather had died," the report writer's view being that the child "had been coached to say that" ([94]-[95]). The Court declined to place weight on the child's views as she had had "insufficient experience of the alternative offered by the mother" ([100]). Upon ordering that the child live with the mother and that the grandmother have supervised time for the next twelve months, the Court said ([210]-[211]):

> "There is a very high risk that if X remains with the paternal family her relationship with her mother will fail to thrive due to the antagonism the paternal family feel for the mother and the mistaken beliefs they hold about her which could in turn lead to a failure to take X to changeovers and a failure to facilitate telephone communication. My major concern is that nobody in the [paternal] family is capable of protecting X from exposure to the father's drinking, drug use and violence. (…)"

Thomas Hurley's Federal Court Judgements

December 2015

CONSTITUTIONAL LAW

Implied freedoms – limitation on donations by property developers

In *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) the High Court concluded that provisions in the *Election Funding Expenditure and Disclosures Act 1981* (NSW) that placed a cap on the donations that property developers could make to political parties in NSW were not invalid as inhibiting the implied right to political discourse recognised in *Lange v Australian Broadcasting Commission* [1997] HCA 25. The Court concluded the provisions did not impermissibly burden the implied freedom: French CJ, Kiefel, Bell and Keane JJ jointly; Gageler J; Nettle J; Gordon J sim. Answers to stated questions given.