CONTEMPT IN THE FACE OF THE COURT

Time for charge

In *Jenkins v Todd (No 1)* [2016] NTSC 15, Kelly J held that the court has inherent jurisdiction to punish contempt on which there is no statutory limitation; while the court has power to deal with contempt summarily, this is not mandatory; trial for contempt before another judge may be appropriate as it minimises the possibility of perceived bias; contempt proceedings may be heard after the proceedings in which they are alleged to have occurred are complete; and a judge is not required to indicate during proceedings their intention to charge with contempt. Barr J had directed the registrar to apply by summons under r 75.06 of the *Supreme Court Rules 1987* (NT) to punish a self-represented litigant for contempt in the face of the court for constantly interrupting and speaking over his Honour. The litigant had argued that only Barr J could deal with him and that the contempt trial had to be held before the proceedings in which the contempt was alleged were completed.

LESSORS WITHOLDING CONSENT

Matters for consideration

In *Perry Park Pty Ltd v City of Darwin* [2016] NTSC 27 Kelly J held that a lessor could take into account matters other than its property interests in reasonably withholding consent to improvements by a lessee. The lessor City of Darwin conducted public consultation in determining whether to grant consent. Kelly J held at [38] that s 134 of the *Law of Property Act* (NT), implying a term that consent must not be unreasonably withheld, does not require the parties (or the court) to ignore the express terms of the lease as to what a landlord can (or indeed must) take into account in determining whether to grant or withhold consent where those matters are not themselves unreasonable, or such as to lead to an unreasonable decision. It is only an express term in the lease "to the contrary" – (ie to the effect that consent may be unreasonably withheld) that must be ignored by virtue of s 134.

Robert Glade-Wright's family law case notes

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FINANCIAL AGREEMENTS

Full Court holds that a s. 90UC agreement is not invalid by also being under s. 90B

In *Piper & Mueller* [2015] FamCAFC 241 (18 December 2015) the Full Court (Ryan, Murphy & Aldridge JJ) dismissed with costs Mr Piper's appeal against Judge Willis' decision to hold an agreement made under both s. 90UC and s. 90B to be binding under s. 90UJ(1A). Ryan & Aldridge JJ (with whom on this issue Murphy J in separate reasons agreed) said (at [29]–[31]):

> "In our view, it is unremarkable for a document to contain more than one agreement. An obvious example is a document which contains, as an adjunct to a primary agreement, a guarantee. There is no necessary conflict between people being … in a de facto relationship and also contemplating marriage. … Subject … to any provisions of the Act, there is no reason why a single agreement could not deal with the distribution of … assets on the breakdown of their de facto relationship or the ending of their subsequent marriage. However, it is … clear that financial agreements under Parts VIIIA and VIIIAB are quite distinct."

The Court said at ([33]–[34]) that "the Part VIIIA exclusion contained in s. 90B(1)(aa) [where another agreement is in force under that Part] does not preclude a Part VIIIAB financial agreement and *vice versa*. This is a powerful indication that the two … agreements can exist concurrently and in the one document … [a] notion … reinforced by the fact that only one of these financial agreements could have operative effect at any one time."

The Court continued (at [37]):

> "As to the submission that different types of advice would need to be given so as to ensure the validity of the agreements, it is not readily apparent to us that this would be so. (…)"

PROPERTY

De facto property application dismissed – Not just and equitable to make an order

In *Chancellor & McCoy* [2016] FCCA 53 (25 January 2016) Judge Turner considered a twenty-seven-year de facto relationship between a childless, same sex couple—the applicant Ms Chancellor and respondent Ms McCoy. The Court found that Ms McCoy acquired a property in her name the year after the relationship began; that the parties lived in and renovated that property, Ms McCoy funding the renovations, Ms Chancellor "assisting with the labour" and paying "$100 to $120 a fortnight to Ms McCoy" during "most of the relationship" ([52]); and that Ms Chancellor bought a property in 2002 in her name, renovations to that property being funded by Ms Chancellor, Ms McCoy "assisting with the labour" ([11]).

After citing *Stanford* (2012) 293 ALR 70, *Bevan* [2013] FamCAFC 116 and other case law (from [25]) the Court concluded ([59]) that "it would not be just and equitable to make an order altering the property interests." The Court said that the parties for twenty-seven years "conducted their affairs in such a way that neither party would or could have acquired an interest in the property owned by the other" in that there was no intermingling of finances; each acquired property in their own name, remained responsible for their own debts and was able to use their wages as they chose without accounting to the other party; neither party provided for the other in the event of their death and at separation neither was aware of the assets the other had acquired. Ms Chancellor's application for a property order was dismissed.

PROPERTY

Finding of shorter life expectancy due to ill health in the absence of expert evidence set aside

In *Fontana* [2016] FamCAFC 11 (9 February 2016) the Full Court (Strickland, Murphy & Watts JJ) allowed the husband's appeal against a property order made by Collier J in which the wife was granted an adjustment of 4.5 per cent under s. 75(2) in respect of a $1.7m pool based on findings that included the husband's life expectancy. It was found that he suffered renal failure and diabetes, was "dependent on dialysis three or four times weekly" ([5]), that "[his] needs … are likely to subsist for a shorter time than … the wife's needs" ([19]) but that the Court was "unable, on the material available … to put any realistic figure on his life expectancy" ([23]). After citing case law, in particular Lawrie (1981) FLC 91–102, the Full Court said ([26]–[27]):

> "The guidance provided by these … cases has been followed in subsequent cases where there has been clear expert evidence, which was accepted, relating to shortened life expectancy of a predictable duration arising from a medical condition (see *T & D & Anor* [2006] FamCA 1248; *Miklic & Miklic and Anor* [2010] FamCA 741; *Jurlina & Jurlina* [2014] FamCA 284).
>
> In this case his Honour, having … said that he was unable to make even an educated guess, let alone a finding, about the husband's life expectancy, has … reached a conclusion that the husband's needs are likely to subsist for a shorter time than the wife's needs. His Honour was in error in making that finding … where he had explicitly found that he could make no conclusive finding in relation to the husband's life expectancy."

PROPERTY

Setting aside of consent order due to husband's non-disclosure of inconsistent valuation he gave to his bank upheld

In *Pearce* [2016] FamCAFC 14 (11 February 2016) the Full Court (Murphy, Aldridge & Forrest JJ) dismissed the husband's appeal against an order made by Dawe J under s. 79A setting aside a final order (made by consent) for the husband's failure to disclose to the wife "significant information" ([2]). The Full Court said (at [19]–[21]):

> "Her Honour found that there was a lack of disclosure causative of miscarriage of justice by reason of the husband's failure to disclose a representation made by [him] to a bank … that D Street had a value of $700 000 [not $550 000 which he claimed before the consent order].

> Her Honour was plainly of the view that if that representation had been disclosed … the wife would have been put on notice of the discrepancy between that representation as to value and the significantly different representation as to value made relatively contemporaneously in the consent orders. She was denied that knowledge, and the consequent opportunity to make such further or other enquiries as she might choose, as a consequence. She was also denied the opportunity to negotiate a settlement whose terms may have reflected that difference.
>
> The impugning of 'the integrity of the judicial process' which, as her Honour recognised, lies at the heart of s. 79A's requisite miscarriage of justice occurred here not because the property may or may not have had a particular value, but because the wife's consent was not a fully informed consent."

PROPERTY

Initial contributions ($959 000 by husband and $168 000 wife) – Seven-year marriage – Two children – $4.25m pool

In *Telfer* [2016] FCWA 2 (4 January 2016), a case before Walters J of the Family Court of WA, a seven-year marriage produced two children (of six and eight) and assets of $4.25m although the wife made initial contributions of $168 000 and the husband $960 000. As separation occurred in 2011 post-separation contributions were also considered. The husband worked in the building industry, undertaking studies which led to his qualifying as a builder (and an income of $585 358) when the parties separated whereas the wife was a teacher in part-time work (income $32 926) while caring for the children.

After citing *Williams* [2007] FamCA 313 as to the relevance of initial contributions Walters J concluded ([234]):

> "In all the circumstances … I conclude that between 60 per cent and 65 per cent of the overall property pool should be awarded to the husband [for] his contributions from the commencement of cohabitation to the date of trial … As it would be intellectually dishonest of me to choose either the higher or lower figure within the range I have specified, I shall fix the midpoint – being 62.5 per cent – as being appropriate."

An adjustment of 7.5 per cent was made under s. 75(2) in favour of the wife for the husband's "very substantial" earning capacity and the wife's care of the children, producing an overall division of 55:45 in favour of the husband.

DIVORCE

Validity of foreign marriage under Part VA of the Marriage Act

In *Ghazel and Anor* [2016] FamCAFC 31 (4 March 2016) the Full Court (Finn, May & Austin JJ) heard the wife's appeal against Hogan J's dismissal of her application under s. 88D of the *Marriage Act 1961* (Cth) ('MA') for a declaration of validity of the parties' marriage which was valid under the law of Iran. The wife (who was born in England) married the husband in Iran in 1981. Hogan J said that the law of that country "permitted a husband subject to certain conditions to take up to three additional wives. Thus, the marriage of the parties in Iran can be described … as a 'potentially polygamous marriage'" ([2]). Hogan J had held that the definition of marriage in s. 5(1) MA as a union "to the exclusion of all others voluntarily entered into for life" meant that under Part VA (s. 88B(4) MA) a marriage solemnised in a foreign country "must be monogamous for it to be recognised in Australia" ([10]).

The Full Court disagreed, saying (at [23]–[26]) that under s. 88D MA a foreign marriage recognised as valid under the relevant foreign law shall be recognised in Australia as valid except where at the time of the marriage a party was married to another person, was not of marriageable age or was within a prohibited relationship; or the consent of either party was not real.

The Full Court observed that "[a] potentially polygamous marriage is not expressly included in the exceptions to the … rule of recognition … in s. 88D(1)" and noted the explanation of the Solicitor-General (the intervener) that the exception as to a party at the time of the marriage being married to another person "was 'a first in time rule' [which] would only preclude recognition of a second marriage not of a first potentially polygamous marriage" ([36]).

The appeal was allowed and a declaration made that the marriage was valid.

PROPERTY

Stay of wife's property case under T*rans-Tasman Proceedings Act 2010* (Cth) – 'The more appropriate court' in NZ – Connecting factors

In *Nevill* [2016] FamCAFC 41 (17 March 2016) the Full Court (May, Ryan & Murphy JJ) upheld an order made by Kent J staying the wife's property proceedings brought initially in the Federal Circuit Court. Kent J did so after holding that the High Court of New Zealand was "the more appropriate court" within the meaning of s. 19 of the *Trans-Tasman Proceedings Act 2010* (Cth) (the TTP Act). The husband had applied for the stay under s. 17 on the ground that a New Zealand court was the more appropriate court to determine the matters in issue. The Full Court said (at [5]):

> " … the Australian court is given a discretion that is constrained by two matters. First, the court must take into account a number of matters prescribed in s. 19(2). Secondly, the court must not take into account 'the fact that the proceeding was commenced in Australia'. Otherwise, the discretion is at large. (…)"

The Full Court said (at [30]):

> "Stripped to its bare essentials, the submission … is that there was a juridical disadvantage for the wife in proceeding in New Zealand which his Honour did not take into account in considering s. 19(2)(e) … [and which] is said to derive from the different system in New Zealand by which settlements of property … are decided, which … the wife contends might result in her receiving less … than … she might receive from an Australian court."

Kent J had rejected the wife's claimed juridical disadvantage ([32]), saying that s. 19(2) expressly excludes any juridical advantage from proceedings being instituted first in Australia. His Honour added ([33]) that "the 'clearly inappropriate forum test' established … in *Voth v Manildra Flour Mills Pty Ltd* [[1990] HCA 55] … is fundamentally different to the 'more appropriate forum test' … to be applied under the TTP Act" and ([38]) that "the … question should be answered not by reference to juridical advantage … but to the connecting factors with the law of New Zealand as compared to the law of Australia."

In dismissing the wife's appeal with costs, the Full Court ([38]–[41]) agreed with Kent J who held that 'connecting factors' overwhelmingly favoured the law of NZ, those factors being that the parties were both NZ nationals who lived for most of their married life there; most of their substantial property was acquired there; and their respective trusts were NZ trusts.

PROPERTY

$90 000 withdrawn by wife from her superannuation to invest in a business that failed not added back

In *Martin & Wilson* [2016] FCCA 235 (11 February 2016) Ms Wilson withdrew $90 000 of her superannuation at separation to establish a business but lost it when the venture failed. After citing *Miller* [2009] FamCAFC 121 (in which the Full Court followed *AJO & GRO (Omacini)* [2005] FamCA 195 (FC)) Judge Phipps said (at [23]):

> "The evidence does not show that the expenditure … was reckless, negligent or wanton. The respondent may have been naive in thinking that she could successfully conduct a (business omitted), but the evidence does not show that the success of the venture was impossible or even improbable. It may have been successful in which case the applicant would have benefited."

The Court added (at [25]):

> "Another consideration is the small value of the … pool. If the $90 000 was added back … the respondent's share of the property available for distribution would be very small if not completely eliminated unless there was a contribution assessment and adjustment very much in her favour. (…)"

No adjustment was made in her favour under s. 90SF(3) despite uncertainty about her employment, the Court ([35]) "taking into account the loss of her superannuation as a circumstance which the justice of the case requires to be taken into account [under s. 90SF(3)(r)]" and adding ([36]):

> "If the respondent had remained in her employment she would still have that income and would have $90 000 superannuation … [and] no adjustment would be appropriate. (…) The applicant had no part in the respondent's decision to use her superannuation … He did not know of [the business] and had no opportunity to assess the risks and influence the use of the money. The respondent took the risk."

PROPERTY

Bankrupt husband's largest unsecured creditor granted leave to defend wife's property claim – Trustee did not intend to do so

In *Vincent & Anor* [2016] FCCA 227 (12 February 2016) the husband became bankrupt after the wife applied for a property order. The wife sought to pursue her claim against the bankrupt estate comprising $659 704 including superannuation with unsecured creditors of $667 847 ($625 000 of which was owed to a single creditor who had been given leave to intervene) ([5]). The trustee in bankruptcy did not intend to defend the wife's application ([8]). Judge Riethmuller said (at [13]):

> "(…) Ordinarily the trustee in bankruptcy is the appropriate person to bring or defend proceedings. It is open to the court to direct the trustee to do so. However, there is a practical problem if the trustee is not in funds and the creditors cannot fund the suit. In such a situation it would be unjust to the creditors not to allow them to represent themselves …

The Court continued (at [19]–[20]):

> "The … wife is pursuing a claim against the estate of the bankrupt, pursuing an inchoate right under s. 79 which could potentially prioritise the wife's claim over that of the creditors. There is a significant issue as to how the s. 79 discretion should be exercised in these circumstances, as I identified in 'Family Law Bankruptcy: An Alternative conception' (2014) 28 Australian Journal of Family Law 290.
>
> I am satisfied that on the present material the intervenor has a *prima facie* case that the husband's property or part thereof should not be settled on the wife under s. 79 … Significantly, this is not a case where the intervenor is pursuing a claim, rather she is now defending the bankrupt estate against a claim by the wife."

The Court added (at [24]):

> "This is not a case where [the intervenor's] resistance to the wife's claim is either speculative, untenable or even merely arguable. If the trustee later decides to participate in the case directions can be made so that the wife need only defend against the trustee if needed, to ensure the practical and efficient conduct of the proceedings."

The intervenor was granted leave to intervene to defend the bankrupt estate. The husband remained a party "to enable him to defend [his significant unvested superannuation] interests" ([26]). It was also ordered that if the husband or intervenor sought to make a claim against either spouse so as to augment the bankrupt estate they should seek leave and file and serve a Statement of Claim particularising such claim.