Robert Glade-Wright's family law case notes

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CHILDREN

Full Court held that alternate weekends, special days and holidays amounted to 'substantial and significant time'

In *Ulster & Viney* [2016] FamCAFC 133 (28 July 2016) Ainslie-Wallace & Ryan JJ dismissed the father's appeal against Judge Bender's order allowing the mother to relocate from Melbourne 85km away to Gippsland where she obtained work. From separation the children spent alternate weekends and Thursday nights with the father and two hours with him on alternate Mondays to coincide with the children's piano lessons in which he was 'keenly involved' ([43]) until the mother relocated two months later without notice. The father withheld the children, negotiating an interim order for six nights a fortnight (the mother returning to Melbourne), but at the final hearing a year later his time was limited to alternate weekends; alternate Fridays (after school to 7 pm); special days (Jewish holidays) and school holidays.

While the whole court disagreed that "daily routine" under s 65DAA(3) requires seeing the children every day (as argued for the father) the majority rejected his contention that the final order was not an order for "substantial and significant time." Strickland J dissented, saying (at [5]):

> "It is beyond doubt that the time the children are to spend with the father is 'extremely limited' and pales in comparison with the … time they enjoyed with him prior to separation and under the interim orders. The magnitude of that change and its effect on the relationship between the children and the father is amply described by the family report writer … :
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> > ' … Such a proposal entails the children moving from seeing [the father] six nights per fortnight to only two. This is a high magnitude change. The children and [the father] enjoy a strong … relationship which would be eroded and compromised if their time with him is reduced to such an extent. This would entail a significant loss for them which would not be in their interest.'"

PROPERTY

Wife wins appeal against decision that advances secured by mortgages in favour of husband's father retrospectively were loans

In *Bircher and Anor* [2016] FamCAFC 123 (15 July 2016) the Full Court (Strickland, Murphy & Hogan JJ) allowed the wife's appeal against Judge Demack's order where the pool was $185 171, $165 493 of which was superannuation so that the parties were "effectively litigating over … $20 000" ([16]) due to a ruling that $64 467 held in a solicitor's trust account was not an asset but a debt payable to the husband's father in repayment of two loans he was found to have made to the husband during the marriage (secured by mortgages retrospectively). The Full Court (at [46]-[47]) examined evidentiary inconsistencies between husband and father and between advance terms and mortgages, saying (from [56]):

> " … we do not regard it as sufficient to find that 'the loan was real and the interest properly sought' without making a finding as to the terms of the loan and the evidence accepted by her Honour which sustains that finding. While … conversations between … husband and [father might have been] 'recorded … with … great … particularity' in the [father's] affidavits it is not clear … how … inconsistencies between the accounts given by the [father] (many of which, inadmissibly, purport to give evidence of what was in the husband's mind …) are dealt with. (…)
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> [58] … it is not to the point that the interest that '[the father] sought to enforce is a reasonable amount and that it is reasonable, given that he loaned this money in 2001/2002, that there be interest … owing'. (…)
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> [60] Her Honour also does not address the fact that the husband (i.e. the borrower) does not … depose to the terms of the agreement … [or] to the rate of interest or how it might be calculated … (…)
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> [62] (…) In essence, the wife asserted that the existence of the mortgages was a recent invention or that they were created so as to deny her a property settlement … That issue was not … 'neither here nor there' as her Honour found at [35]; it was central to the wife's case."

PROPERTY

Not just and equitable to make a property order sought by husband's estate where 'financially destitute' wife was in poor health with dependent adult children – *Stanford* applied

In *Paxton* [2016] FCCA 1689 (7 July 2016) a property application filed by the husband who then died was continued by his estate under FLR 6.15(3). The wife sought to remain in the home. Judge Wilson said (at [6]):

> "Both parties agreed that the … home would have to be sold if any division of property … were to be ordered. … [T]the wife is in very poor health … financially destitute … has no apparent prospects of employment and the adult son of the marriage, himself mentally infirm, lives with the wife and she cares for him. Any sale of the … home will occasion very considerable hardship to the wife. Conversely, the husband is dead."

The Court also referred (at [18]) to the wife's evidence that her twenty-nine year old daughter (who also lived with her) "suffered from … cerebral palsy … had learning difficulties … had not worked since leaving school and received social welfare benefits" and that "it was likely that her children would continue to depend upon her well into the future having regard to their physical and intellectual difficulties."

Judge Wilson at [34] cited *Stanford* (2012) 247 CLR 108 in which "[t]he High Court held that it had not been shown that, if the wife had not died, it would have been just and equitable to have made an order under s 79" (relying on ss 79(2) and 79(8)(b)(ii)); also citing *Bevan* [2013] FamCAFC 116 in concluding that it was not just and equitable to make a property order. Applying *Stanford*, the Court said ([58]) that it was "wholly erroneous for Mr Paxton … as his late brother's personal representative to proceed … on the premise that the husband had (or Mr Paxton now has) the right to have the former matrimonial asset divided between the wife and the estate." The Court added ([65]) that "[i]n *Stanford* the court addressed the error made at first instance where the court did not take into account the consequences to the surviving spouse if a property settlement order was made."

CHILDREN

Indigenous father loses appeal against order permitting non-Indigenous mother to attend traditional smoking ceremony with child

In *Lokare & Baum* [2016] FamCAFC 135 (28 July 2016) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) dismissed with costs an Indigenous father's appeal against Rees J's order that the parties' daughter (five, who was eight months at separation) live with the (non-Indigenous) mother in Sydney, spend time with the father in Darwin and attend a traditional smoking ceremony at which she could be accompanied by the mother, the father to meet their accommodation and travel costs. The father argued on appeal that Rees J (at [64]) had erred by requiring him or his family to allow the mother to be present at the smoking ceremony and ([18]) failed to properly apply s 61F FLA which requires the court to "have regard to any kinship obligations and child-rearing practices of the child's Aboriginal culture."

The Full Court noted ([24]) that the child had lived in the primary care of the mother since her birth and since separation the distance between the parents' homes meant that the time spent by the child with her father had been limited and not included overnight stays and ([29]) that Rees J recorded that the father "having taken offence at a submission made to the Principal Registrar by the mother's counsel [the father] rang his sister [who] as a result … withdrew her permission for the mother to attend the [smoking] ceremony."

The Full Court continued (from [47]):

> " … Her Honour did not, as the father contended, determine the child's best interests solely by reference to the financial capacity of the parties. Her Honour determined that the child's best interests would indeed be served by her being able to be immersed in her culture with her indigenous family, but, as her Honour correctly noted, in assessing that, she was obliged to consider how, practically, that could be achieved. As her Honour said:
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> > 'The orders which are sought by the father cannot practically be implemented as neither party can afford the cost.'
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> [48] Finally it was argued that the effect of her Honour's orders was to foreclose finally any prospect that the child could attend the ceremony. We do not agree with that proposition. Her Honour specifically noted … that the mother would facilitate the child spending time with the father if he could fund the travel and accommodation." (…)
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> [66] Her Honour's order was:
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> > "The mother shall be permitted to be present during the 'smoking ceremony'."
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> [67] Her Honour's order does not, as the father submits, compel the mother's participation in the smoking ceremony and we reject this submission."

CHILDREN

Artificial conception – Egg donor held to be a parent

In *Clarence & Crisp* [2016] FamCAFC 157 (18 August 2016) the Full Court (Thackray, Ainslie-Wallace & Aldridge JJ) dismissed with costs the birth mother's appeal against a parenting order made in respect of her daughter who was conceived with an egg supplied by the respondent by a medical procedure performed on 11 July 2011, the Court saying (at [3]):

> "If the parties were in a de facto relationship on that day [of conception] then they were both the child's 'parents' for the purposes of [s 60H of] the *Family Law Act 1975* … "

At first instance, Berman J found that while the parties were living separately at the date of conception they were in a de facto relationship, so that the respondent was a parent. It was common ground that the parties had commenced a de facto relationship in 2004 but the appellant argued that they separated on 21 March 2011 when the respondent left the home, whereas the respondent argued that she continued to spend four or five nights a week at the birth mother's home until August 2011.

The Full Court said ([12]-[13]):

> "His Honour found that although the respondent had not stayed overnight as often as alleged, she was nevertheless a 'frequent visitor' to the parties' former home. (…)"

The Full Court continued (at [18]-[19]):

> "His Honour found that in the period from 6 May 2011 to 26 July 2011 there had been 850 text messages between the parties on topics which ranged 'from the mundane to the highly personal' … "

The Full Court concluded (at [27]-[28]):

> "Although we conclude there is no basis for complaint by the appellant, we nevertheless consider that his Honour misdirected himself … when he posed the question

> of whether the parties had 'separated'. While that is a question which must be asked in the case of a married couple seeking a divorce, it is a potentially misleading question in cases such as the present, where the issue is whether a de facto relationship existed at a particular point in time. However, his Honour ultimately answered the real question he was required to consider when he found … that 'the de facto relationship endured and continued beyond the date of conception'.

Accordingly, we accept the submission of senior counsel for the respondent that nothing turns on the trial judge's discussion of whether the parties had 'separated' …"

CHILDREN

Contravention – Father loses appeal for costs against mother found in 'serious contravention' of parenting order

In *Roffe & Huie* [2016] FamCAFC 166 (19 August 2016) Murphy J (sitting in the appellate jurisdiction of the Family Court of Australia) dismissed the father's appeal against an order that he and the mother pay their own costs of his successful contravention application. While initially contesting the application, the mother admitted her contravention of a parenting order by withholding the child from time to time without reasonable excuse. At first instance Judge Demack found the mother's conduct to have been "a serious contravention of children's orders" ([3]) and placed her on a bond for twelve months, conditional on her complying with court orders and attending a family consultant.

Murphy J held that the trial judge was not in error in ordering the parties to pay their own costs as the case came within the exception to the mandatory provision in s 70NFB(1)(a) of the *Family Law Act* where "the court is satisfied that it would not be in the best interests of the child concerned to make [an order that the person who committed a contravention pay the applicant's costs]."

Murphy J concluded at [31] that there was "sufficient evidence for the trial judge to find that the mother was in poor financial circumstances and potentially could not satisfy a costs order without the sale of her home [in Australia]," the father having argued at [34] that the mother could realise the property she owned in South East Asia.

PROPERTY

Injunctions made restraining guardians of family trust from changing the terms of its deed of settlement

In *Josselyn and Ors* [2016] FamCA 557 (8 July 2016) Watts J granted Ms J injunctions in respect of her former de facto partner's control of a family trust. After separation Mr J changed the appointment power from his business partner to his brother then added two children of his first relationship as directors of the corporate trustee (he having previously been its sole director). Mr J had also begun arguing that the trust's assets were no longer relationship property. Ms J's case was that Mr J's post-separation dealings evidenced risk of an intention to defeat her property claim.

After referring to the relevant statutory provisions, Watts J (at [13]) cited *Mullen & De Bry* [2006] FamCA 1380 in which the Full Court said that "[i]n some cases, the possibility (based on some evidence) of an intention or scheme may, with other factors, be sufficient to establish the probability of an objective risk of disposal with the intent to defeat an order (original emphasis)." Watts J continued (at [46]-[47]):

> "Even if a benign view was taken of all the changes the husband has made since separation to the roles he has in various entities, the expressed view by the husband's lawyers in the letter of 5 May 2016 is some evidence of the possibility of an intention to put assets outside the reach of the de facto wife by the restructuring he has undertaken.
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> That apparent risk may ultimately turn out to be without any foundation. However, there is no downside in making the orders sought by the wife pending further order to guard against that risk."

Watts J concluded at [51]:

> "Senior counsel for the husband said that in respect of the order seeking restraint of distribution of income that the operation of those orders … would create the difficulty of retained profits in the trust and the taxation consequences flowing from it. … I make no order preventing the trustees from distributing income. It is unlikely that income earnt on the investments of the trust in one year, if dissipated, is something that could not be properly adjusted at the final hearing in circumstances where the wife seeks one half of the overall assets held by the parties. However, the injunctive order, as it applies to the corpus of the trust, is a different matter."

FINANCIAL AGREEMENTS

Subpoena issued by mother for production of father's criminal record – Compliance costs of $1970

In *Shand & Sharrock & Anor* [2016] FCCA 2234 (5 September 2016) the mother applied for directions in a parenting case as to whether $1970, claimed by the South Australian Police (SAPOL) as the cost of compliance with a subpoena issued on the mother's behalf for production of extensive police incident reports and details of pending proceedings against the father (potentially 39 items), was reasonable.

Before compliance SAPOL sent the mother's solicitor an estimate of $2746, inviting her to withdraw or vary her subpoena. The mother revised her request (for which SAPOL estimated $1970) but then requested all of the documents she initially sought, SAPOL ultimately accepting the lesser figure.

The documents were produced via DVD. The mother's solicitor argued that SAPOL's charge was excessive and that "by reference to the *Federal Circuit Court Rules*, which allow a scanning fee of $0.71 per page, and the time … he believe[d] it would take a clerk to identify the files and burn them on to a DVD, a more reasonable fee would be around $210" ($500 being conceded as reasonable) ([42]).

Judge Brown referred, however, to SAPOL's evidence "that it is only since 1 July 2010 that [it] has imposed a fee for the production of police incident reports … to recover what SAPOL management viewed as the *'labour intensive process of reviewing and providing those reports'*" ([46]) and that "the process … requires liaison with the police personnel involved and close scrutiny to prevent breaches of confidence and provide anonymity for any third parties named or affected by any particular category of documents" ([52]). In holding $1970 to be reasonable and payable by the mother, the Court said (from [84]):

> " … different considerations must apply to large government instrumentalities, such as police, hospitals and emergency services, which are routinely tasked to supply large numbers of records generated in the course of discharging their statutory obligations. (…)
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> [86] In discharging these various and important responsibilities, SAPOL necessarily creates significant records relating to many individuals in many and various situations. (…)
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> [98] … it would be nonsense if the court was to determine that a person who has subpoenaed a multiplicity of such documents should … be granted a discount … because of the quantity of documents sought resulting in an exponential increase in cost.
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> [99] Rather, the court should encourage those who would issue subpoenas to consider closely the range and subject matter of the documents sought and tailor their subpoenas appropriately and carefully. Such an approach … is also calculated to serve the interests of the administration of justice."

FINANCIAL AGREEMENTS

Wife alleged duress – Her 'real difficulty' was that she had received legal advice

In *Kennedy & Thorne* [2016] FamCAFC 189 (26 September 2016) the Full Court (Strickland, Aldridge & Cronin JJ) allowed an appeal by the husband's estate against Judge Demack's decision to set aside financial agreements under s 90B and s 90C for duress under s 90K(1)(b). The parties met on a dating site ([6]). The husband was a sixty-seven year old property developer with assets of $18m ([8]). The wife was thirty-six and lived overseas when the parties met. At separation after three years, the wife challenged the agreements. The husband died and his case was continued by his estate.

Citing authority, the Full Court said ([71]-[74]:

> " … There needed to be a finding that the 'pressure' was 'illegitimate' or 'unlawful'. It is not sufficient … that … [it] may be overwhelming … that there is 'compulsion' or 'absence of choice'. (…) … 'inequality of bargaining power' cannot establish duress. … In any event … [t]he … husband was at pains to point out to the wife from the outset that his wealth was his and he intended it to go to his children. The wife was aware of that … and … acquiesced … [T]he trial judge found that the wife's interest lay in what provision would be made for her [if] the husband pre-deceased her … not what she would receive upon separation. … "

In declaring both agreements to be valid, the Full Court concluded ([165]-[167]):

> " … the fact that the husband required an agreement before entering the marriage cannot be a basis for finding duress. Nor can the fact that a second agreement was required. (…) Again … it was not … the case that the agreements were non-negotiable. Changes were made by the wife through her solicitor, and … were accepted by the husband. However, the real difficulty for the wife in establishing duress is that she was provided with independent legal advice about the agreements, she was advised not to sign them but she went ahead regardless."

PROPERTY

Great grandparents' application for time dismissed under s 102QB – Vexatious proceedings order also made – Meaning of s 65C(c)

In M*ankiewicz and Anor & Swallow and Anor* [2016] FamCAFC 153 (16 August 2016) a Full Court majority dismissed an appeal by great grandparents against Watts J's dismissal under s 102QB of their application for time. A vexatious proceedings order was also upheld, the appellants being found to have "acted in concert with … their son who ha[d] frequently instituted vexatious proceedings" ([2]). Ryan and Austin JJ said (from [14]):

> " … [T]he appellants were found to lack standing to apply for parenting orders … in 2009. When they commenced fresh proceedings … in 2013 it was necessary for them to prove they then had standing under s 65C(c) … (…)
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> [15] … [B]ecause it was possible [they] had acquired standing since 2009 so as to permit prosecution of their fresh application … [Watts J] had both the authority and duty to decide whether their application lay within the limits of the Court's jurisdiction. (…)
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> [16] It therefore follows that [his Honour] had *jurisdiction* … but no *power* to exercise under Part VII … unless they proved their standing, since jurisdiction and power are distinct concepts … Because jurisdiction and standing both mark out the boundaries of judicial power (*Kuczborski v Queensland* [2014] HCA 46 …), it was necessary for [his Honour] to entertain the appellants' application to determine whether or not they had acquired standing.
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> [17] However, before deciding whether the appellants had acquired such standing, the … judge … ma[d] e … orders … under s 102QB(2)(a) to dismiss their … application and s 102QB(2)(b) to restrain them from bringing any further parenting applications. … His Honour incidentally found … [that] there was no evidence to suggest any change in circumstances about [their] lack of standing since dismissal of the … proceedings in 2009, but that finding was made after having … found that s 102QB was enlivened … (…)"

The majority concluded ([20]-[21]) that the fact that his Honour "could have, but did not … decide the proceedings by dismissal of the application due to … lack of standing … did not strip the proceedings of that characterisation" so that his "exercise of power under s 102QB … was … valid … while exercising jurisdiction in proceedings brought under the Act." Murphy J dissented, saying ([77]) that "the appellants did not have standing to seek parenting orders … [so] that the orders … were not validly made and should be set aside." Murphy J (at [78]-[93]) examined the meaning of s 65C.

PROPERTY

Wife's application for partial settlement of $10m to buy a new home dismissed – Likely cash flow and tax effects were unknown

In *Sully (No. 2)* [2016] FamCA 706 (25 August 2016) Stevenson J dismissed the wife's application for a partial property settlement of $10m to buy a new home for herself and the children. The husband estimated the net value of his business (X) as $55m after tax. Upon receiving $1.1m from the husband the wife discontinued her interim maintenance application. The home was worth $10m, the husband had property of $9m in his name and the wife $7m in hers (her investment properties returned net rental income of $3700 per week) ([14]-[15]).

After citing *Strahan (Interim property orders)* [2009] FamCAFC 166 the Court noted ([25]-[29]) the husband's evidence that he had no access to funds outside X; that its funds were reserved as working capital; that X would require capital for a development project; that a large tax debt would be generated if $10m were extracted from X; and that X's ability to honour commitments to third parties may be compromised. Stevenson J added ([29]) that such money could not be extracted from the parties' assets without a sale of the home which "would mean that the four children [and husband] … would need to be re-accommodated," although ([35]) "the children's future living arrangements are far from clear" ("the parties' son J having refused to spend time with the wife since separation and the husband seeking final orders for primary residence"). The Court was not satisfied that the order sought would be just and equitable.

CHILD SUPPORT

Binding child support agreement declared void for uncertainty for leaving an essential term to be settled by future agreement

In *Bassett & Teale* [2016] FCCA 2177 (24 August 2016) parents of children of seventeen and fourteen had spent six years litigating about the terms of a binding child support agreement made in 2009 ([2]). The agreement included provisions that the husband pay child support according to the administrative assessment, that he pay 65% of private school fees, "reasonable education costs" and "reasonable extracurricular expenses" for each child, the wife to pay 35%. In 2012, the parties agreed to parenting orders that included a notation that the parties intended to enter into a "fresh" child support agreement which would define or … vary … the 2009 agreement.

Judge Small said (from [36]):

> "The husband's argument is that the 2009 agreement is void for uncertainty because the parties were not *ad idem* when they signed it, as the ensuing disagreements about their obligations … show them not to have had a common understanding about … 'reasonable education costs' and 'reasonable extracurricular expenses' …
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> [37] There is some force to the husband's argument on this point. (…)
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> [39] The very fact that the parties have been in dispute about the meaning of those terms virtually ever since they signed the … agreement indicates that they were not in agreement in relation to their meaning at the time of signing it. (…)
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> [50] As Menzies J said in *Thorby v Goldberg* [(1964) 112 CLR 597] … approving the statement of Sugarman J in the NSW Supreme Court in the same case:
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> > 'It is a first principle of the law of contracts that there can be no binding and enforceable obligation unless the terms of the bargain, or at least its essential or critical terms, have been agreed upon. So, there is no concluded contract where an essential or critical term is expressly left to be settled by future agreement of the parties.'
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> [51] That statement was quoted with approval … by Fogarty J in *Weiss & Barker Gosling* [(1993) FLC 92-399] …
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> [52] There is no dispute that the clauses which oblige the parties to pay 'reasonable educational costs' and 'reasonable extracurricular expenses' are 'essential or critical' to the 2009 agreement. (…)
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> [53] … the determination of what constitutes 'reasonable education costs' or 'reasonable extracurricular expenses' relied on the agreement of the parties from time to time *after* the signing of the 2009 agreement.
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> [54] In other words, an 'essential or critical term is expressly left to be settled by future agreement of the parties'.
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> [55] For these reasons I will make a declaration that the 2009 agreement is void for uncertainty."