Robert Glade-Wright's family law case notes

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COSTS

Discontinuance of appeal – Conduct of parties during trial is relevant to appeal costs under s 117(2A)(g)

In *Parke & The Estate of the Late A Parke* [2016] FamCAFC 248 (24 November 2016) the husband appealed the setting aside of a financial agreement by Judge Howard who found that the husband acted dishonestly in his financial dealings ([23]-[24]). The mother was granted expedition of the appeal. Two weeks after the husband's death his personal representative discontinued the appeal. The wife applied for her costs of her expedition application, the appeal and her costs application on an indemnity basis in the sum of $119 500.

May & Ryan JJ said ([18]) that the filing of a Notice of Discontinuance "does not automatically lead to a costs order". The wife's counsel argued ([24]) that the husband's "deplorable" conduct, including the finding that he had forged the wife's signature in relation to their superannuation funds, "deserved" an indemnity costs order. The majority said (at [30], [36] and [52]):

> "No offers to settle … were made after the Notice of Appeal was filed. The question therefore is whether offers to negotiate in the trial proceedings can be considered in a costs application for the appeal. Additionally, should the husband's conduct during the trial … and his failure to make any offer to settle, be considered … relevant …?"
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> We are of the opinion that … the criteria in s 117(2A)(b)-(f) … are matters which are limited to the appeal proceedings because in each case those sections refer to 'the proceedings'. However, other matters … may be considered by reason of … s 117(2A)(g) which does not contain the limitation of 'the proceedings'. …
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> … Although the circumstances relating to the trial might attract an order on an indemnity basis, it could not be justified in the conduct of the appeal. Taking into account the timing of … the Notice of Discontinuance we are of the view that costs should not be ordered on an indemnity basis."

The wife was awarded party/party costs of the three proceedings sought. Murphy J agreed but fixed those costs at $51 000.

PROCEDURE

Publication of proceedings – Use of Family Court documents in Supreme Court case between interrelated parties did not offend s 121

In *R Pty Ltd atf the Fletcher Trust & Jones and Anor* [2016] FamCA 928 (4 November 2016) Carew J granted an application for leave to use in Supreme Court proceedings between interrelated parties documents produced in earlier property proceedings between Ms Fletcher and Mr Jones ([1]). The applicant was R Pty Ltd which became trustee of the Fletcher Trust (FT) upon the death of Ms Fletcher and continued the proceedings as her personal representative. Mr Jones had a group of entities some of which were in partnership with the Trust. The property case was resolved by a consent order for the assignment of debt to the group and an indemnity of Ms Fletcher. The order noted that "all matters relating to the assets of [FT] will be resolved outside the jurisdiction of the Family Court" ([16]).

Carew J ([38]) accepted the submissions for both parties that "the proposed use of the documents is not a breach of s 121 because it is not intended to publish or disseminate within the meaning of s 121(1) and in any event the proposed use is an exemption within the meaning of s 121(9)(a)."

The Court added ([64]):

> " … it could not be said that the dispute is the same in both courts nor … that the parties are the same. However I accept … that there is a commonality of subject matter and interrelationship between the parties. Further, it was … anticipated at the time of the consent order that the disputes relating to the assets of FT would be determined in another jurisdiction."

CHILDREN

International child abduction – Interim order for return of child to China where mother unilaterally removed child from father's care

In Hsing & Song [2016] FamCA 986 (17 November 2016) the father applied for the immediate return of a four year old child to the People's Republic of China. Both parents were Chinese citizens but met as students (and married) in Brisbane. The child was born in Australia and lived here for his first ten months with the mother and her mother while the father returned to China for treatment for a serious illness that left him paraplegic, requiring the use of a wheelchair for mobility. The mother took the child to China in 2013 for the child to live with the father and his parents while the mother returned to Australia to run and sell their business there.

A consulate document was in evidence where the mother had agreed to the child living in China until February 2018. The mother travelled there to see the child for birthdays and celebrations. She returned to China in April 2016, taking the child with the agreement of the father to visit her family there, but in August 2016 she absconded with the child to Australia ([21]).

Forrest J referred (at [26]) to the father's evidence that from July 2014 to June 2015 the child attended childcare in China and from June 2015 to June 2016 kindergarten for five days a week at a school in their neighbourhood and ([32]) that from the age of ten months to four years the child was mostly cared for by the father with help from the paternal grandparents.

Forrest J said ([38]-[39]) that as China is not a signatory to the Hague (Child Abduction) Convention the case would be heard not under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) but the jurisdiction of the Court under s 69E FLA, the child being an Australian citizen (and present in Australia) when the application was filed. His Honour added ([43]) that "the Court must, nevertheless, still regard the best interests of the child as the paramount consideration", citing *ZP v PS* [1994] HCA 29 and other authorities which "countenance an order … for the immediate return of a child to another country from which the child has been taken, upon a summary hearing, if the Court, having regard to the best interests of the child … determines that should happen."

Forrest J so determined after considering the matters set out in s 60CC and made an interim order accordingly.

FINANCIAL AGREEMENTS

Husband appeals order setting aside agreement under s 90K(1)(d) – Hardship must result from the material change in circumstances

In *Fewster & Drake* [2016] FamCAFC 214 (4 November 2016) the Full Court (Strickland, Aldridge & Kent JJ) allowed the husband's appeal against Foster J's decision to set aside a s 90C financial agreement under s 90K(1)(d) and order that he pay interim spousal maintenance of $1500 per week. When the 2006 agreement was signed the wife was pregnant with the parties' first child. A second child was born in 2009. Foster J applied *Pascot* [2011] FamCA 945 as to s 90K(1)(d).

Aldridge & Kent JJ said ([47]-[48]) that s 90K(1)(d) follows the form of s 79A(1)(d) but that under s 79A(1)(d) the change in circumstances must be "of an exceptional nature" for the section to apply, whereas the change in circumstances under s 90K(1)(d) must be "material". The majority said ([50]-[51]):

> "Essentially, the analysis in *Pascot* separates the words of the subsection into three steps [material circumstances since agreement relating to child; hardship; court may set agreement aside]. However, this test omits the critical words 'as a result of that change' [as to hardship]. Those words provide a necessary link between the changing circumstances and the hardship. According to the clear terms of the subsection, the hardship must result from the material change in circumstances, and not from some other cause.
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> … [I]n applying the test from *Pascot* and not the terms of the section itself, the primary judge overlooked this requirement and thereby fell into error."

The majority said (from [65]):

> "The husband correctly submits that the words 'as a result of the change' indicate that the relevant hardship … is the hardship which is caused by the change in circumstances. It is the changed circumstances which must give rise to the hardship, and not the agreement itself. (…)
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> [66] The primary judge referred … to the agreement failing to contain any provision for the increased responsibility for the child. His Honour concluded … that the agreement 'inevitably creates "hardship" for the wife'. That is to pose an incorrect test …
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> [67] We turn now to the second aspect of this challenge. The concluding words of s 90K(1)(d) are 'if the court does not set the agreement aside'. Logically and inevitably those words require the court to undertake some comparison between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside. It is only by doing so that the court can … determine whether there will be hardship if the agreement is not set aside. The primary judge did not undertake such a comparison.
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> [68] Finally, we accept the husband's submission that the hardship required by the section is something more than unfairness. (…)"

Strickland J agreed. The Full Court also found error in the maintenance order made. The appeal was allowed and the maintenance application remitted for re-hearing.

PROPERTY

27 year same sex relationship – Full Court upholds decision not to make a property order

In *Chancellor & McCoy* [2016] FamCAFC 256 (2 December 2016) the Full Court (Bryant CJ, Thackray & Strickland JJ) dismissed with costs Ms Chancellor's appeal against Judge Turner's decision that it would not be just and equitable to grant her application for a property order. The trial judge found that there had been no intermingling of finances or joint bank account; each acquired property in their own name; each was responsible for their own debts and could use their earnings as they chose without explanation ([27]).

The Full Court said (at [35]-[36]):

> "It was … submitted that the absence of 'future plans or goals' was not a relevant consideration … Although her Honour did not say so … we understand her reference to the absence of 'future plans or goals' to be part … of her findings about how the parties kept their affairs separate and conducted their financial lives without being accountable … to the other party. (…)
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> There was … 'common use' of the homes owned by the respondent, but there was also a modest periodic payment by the appellant referable to her occupation of those homes. Furthermore, her Honour made no findings that would point to any 'express and implicit assumptions' [per *Stanford* [2012] HCA 52 at [42]] that the parties would ultimately share in the other's property. On the contrary, her Honour properly placed

significance on the fact that neither had taken any steps to ensure that the other would receive their property or superannuation in the event of death, and indeed the respondent had executed a will giving her entire estate to her parents. In the absence of evidence of any assumption by the parties that one would benefit on the death of the other, it would not have been open to her Honour to conclude, without evidence, that there was any assumption that there would be some redistribution of wealth upon termination of the relationship by means other than death."

CHILDREN

Mother loses appeal against order for hyphenation of child's surname

In *Reynolds & Sherman* [2016] FamCAFC 240 (29 November 2016) the Full Court (Ryan, Murphy & Aldridge JJ) dismissed with costs the mother's appeal of Judge Baumann's order that the parties' three year old child have the surname "Reynolds-Sherman". The parties had a relationship for one month and never lived together. The child lived with the mother. The Full Court said (from [71]):

> "The mother submitted that it would be confusing if the child did not have the same surname as the parent with whom he lives … [and] that … the child will be attending the same school as the mother … ([who] is training to be a teacher) and that it will be embarrassing for the child to constantly explain to people why they have different surnames. (…)
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> [73] … [T]he primary judge … rejected, the mother's submission … [and] the experience of this Court demonstrates it is now common for children to have a different surname from at least one of their parents, even in intact relationships.
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> [74] We consider that the finding was one that could be made on the evidence and that no error has been shown."

The Full Court (at [92]) approved Judge Baumann's conclusion that he was "satisfied that it is in the best interests of [the child] that he have a surname which accurately reflects his heritage. To do so enhances his sense of identity with both his father and the mother and their extended families".

CHILDREN

Interim relocation from southern NSW coast to Darwin allowed

In *Larsson & Casey* [2016] FamCA 971 (16 November 2016) Gill J allowed the mother's appeal against an interim order of a Local Court when transferring the case to the FCC at Canberra which restrained her from relocating a child in her care to Darwin. The parties who had two children, 'C' (born in 2002) and 'B' (born in 2006), separated in 2007. While both children initially lived with the mother, C began living with the father in 2012. From 2014 the parents lived 500 km apart, B living with the mother and C living with the father. The mother remarried ('Mr Larsson') and had two children of her new relationship. The mother sought permission to take B with her to live in Darwin, Mr Larsson having moved there for work (with the children of that relationship). The father opposed relocation of B, proposing that if the mother moved to Darwin B should live with him and C.

> [27] … [I]n consideration of meaningful relationship[s] between each parent and each child, the settled arrangements engaged in are indicative that each parent treated the arrangements as sufficient for the maintenance of their relationship with the child that was not living with them. (…)
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> [30] Until the commencement of the proceedings B was living in a settled arrangement with his mother, Mr Larsson and his two younger siblings. He is described as having a close relationship with his younger siblings and to be functioning well under the primary care of his mother. The relationship with his brother and father was maintained primarily through 50% of the school holidays, although this year he has been able to spend seven other occasions with his father and brother. (…)
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> [33] If B relocates to Darwin there will be no change in the time he spends with his father and brother on school holidays. (…)
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> [42] … the move to Darwin will involve some, but acceptable change to the time B spends with his father and C. It involves no change to the time C spends with his mother. This case, unlike many that involve a significant increase in distance, does not also involve a substantial change in the time spent with each parent."

The mother was granted permission to relocate with B to Darwin and the case was listed before the FCC at Canberra for further directions.

CHILDREN

Order for s 11F conference upon father reapplying for parenting orders six months after failing at trial held to be in error

In *Hart & Sellwood* [2016] FamCAFC 254 (2 December 2016) it was ordered in June 2015 after a trial that the parties' child live with the mother and spend three nights on alternate weekends with the father. Six months later the father re-applied for the orders he had previously sought (five nights per fortnight). The mother objected, relying on *Rice & Asplund* (1979) FLC 90-725 in arguing that it was not in the child's best interests to be the subject of further litigation. At a preliminary hearing Judge Myers granted the father's oral application under s 11F of the *Family Law Act 1975* that the parties and child attend with a family consultant so that a Children's and Parents Issues Assessment could issue ([5]). The mother appealed to the Full Court (Ainslie-Wallace, Ryan & Murphy JJ).

In allowing the appeal with costs, the Full Court said (from [33]):

"The … challenges raised by the mother can be distilled to a single proposition … whether the primary judge erred in the exercise of his discretion in making the s 11F order by failing to take into account relevant considerations … and … that his Honour was required to consider the best interests of the child in considering whether to involve the child in a further report and yet further conflict between his parents about him.

[34] As to the latter point, it is well settled that a Rice and Asplund threshold issue is to be determined by reference to the best interests of the child (*Marsden & Winch* [2009] FamCAFC 152 …*Walter & Walter* [2016] FamCAFC 56). (…)

[39] … his Honour failed to take account of a number of aspects of the evidence directly relevant to the exercise of … discretion. … [The] reasons for judgment contain numerous findings which would undoubtedly have given the primary judge serious reason to doubt whether a s 11F order would be in the best interests of the child. (…)"

Andrew Yuile's High Court Judgements

TAX

Income tax – A ssessable income

In *Blank v Commissioner of Taxation* [2016] HCA 42 (9 November 2016) the High Court considered whether amounts received by the appellant on the termination of his employment as part of an employee incentive profit participation plan were ordinary income and assessable for income tax. The appellant was involved in the plan through various agreements with companies in the corporate group of his employer. Ultimately, the appellant had an entitlement to "deferred compensation". Pursuant to that entitlement, after the termination of his employment the appellant relinquished his claims under a profit sharing agreement and assigned shares he held in one of the companies. He thereby became entitled to a lump sum paid in instalments. The High Court noted that reward for services in the form of remuneration or compensation is obviously income, and that is so even if the payment is in a lump sum or deferred until after retirement. In this case, the Court held that the instalments paid to the appellant were deferred compensation for the services performed and were therefore income according to ordinary concepts. French CJ, Kiefel, Gageler, Keane and Gordon JJ jointly. Appeal from the Full Federal Court dismissed.