Robert Glade-Wright's family law case notes

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PROPERTY

'Fly in fly out worker' was in a de facto relationship

In *Cuan & Kostelac* [2017] FamCAFC 188 (12 September 2017) the Full Court (Strickland, Aldridge & Loughnan JJ) dismissed with costs Ms Cuan's appeal against Judge Baumann's declaration that she and Mr Kostelac had lived together in a de facto relationship. She argued that the parties were never de facto partners, that while she lived at the respondent's home in 'Town L' she was a fly in fly out worker who travelled to live with her children in 'City N' for two weeks after each six-week block of work in Town L. She said that in Town L she lived in the respondent's flat rent-free in exchange for her looking after him, doing his housekeeping and helping him manage his money ([4]). She said that they travelled overseas together between 2010 and 2014 as friends.

Judge Baumann found that the parties lived together in a de facto relationship between April 2007 and late 2010, also granting the respondent leave to issue his property proceedings pursuant to s 44(6). The Full Court said (at [7]) that Judge Baumann in the context of the matters set out in s 4AA(2) of the *Family Law Act* had found:

- A common (though not exclusive) residence in Town L
- A sexual relationship (in Town L only)
- Significant intermingling of funds (Ms C had authority to operate Mr K's bank accounts. $93 000 had passed from his accounts to hers and been used to reduce mortgages over two properties of hers in City N)
- Overseas travel but not as a mutual commitment to a shared life (separate rooms or beds)
- Others in Town L saw them as a couple (although little evidence)
- Evidence of Ms C's children that the relationship was not intimate

The Full Court said (at [15]) that "if the finding of a de facto relationship is open on the evidence then no error will be identified, even if other judges may have come to a different conclusion."

CHILD SUPPORT

Mother wins appeal against setting aside of binding agreement despite father's inadequate disclosure

In *Telama & Telama* (No. 2) [2017] FamCAFC 194 (15 September 2017) the Full Court (Ryan, Kent & Cleary JJ) allowed the payee mother's appeal against Judge Henderson's decision to set aside a binding child support agreement. The payer father successfully argued at first instance that the agreement should be set aside as his income had decreased from $710 000 per annum (when the agreement was made) to $220 000 per annum and he had no other financial resources from which to pay child support. The Full Court said (from [15]):

> "The central issues in this case were whether the respondent's changed financial circumstances constituted an exceptional circumstance for the purpose of s 136(2)(d) [of the *Child Support (Assessment) Act]* and amounted to hardship within the meaning of the provision. (…)
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> [19] The respondent conceded on appeal that he did not comply with his obligations as to disclosure … that he had been served with a Notice to Produce … but failed to provide … his tax … returns for the three most recent financial years … [which] was particularly significant as … his case for the 2013 agreement to be set aside was based on:
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> - A material reduction in his income …
> - That he had since become liable for 'significant and unmanageable debts' including … to the Australian Taxation Office; and
> - That he had since become liable for a significant claim to the liquidator of a company in which he had an interest.
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> [20] Further, it was [his] contention that he would suffer hardship because he could not meet [his] obligations … and had negligible other assets and financial resources on which to call. (…)
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> [22] The trial transcript records her Honour's disquiet at the respondent's inadequate disclosure and her recognition that full and frank disclosure was central to the Court's ability to determine the application. (…)
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> [29] However, in this case the primary judge did indeed make findings as to exceptional circumstances and hardship to the respondent, notwithstanding his inadequate disclosure. In our view, where the fact of non-disclosure was so obvious and material it was necessary for the primary judge to explain how and why the respondent's oral evidence and unsworn explanations were sufficient to meet that deficiency and resolve the confusion created by his failure, for example, to produce necessary and requested documents. Her Honour's reasons do not address that conundrum and in circumstances where the legal onus sat with the respondent the findings as to 'exceptional circumstances' and 'hardship' were not available."

PROCEDURE

Adjournment of property trial sought by wife three days after her discharge from a mental health facility

In *Rusken & Jenner* [2017] FamCAFC 187 (6 September 2017) Murphy J (sitting in the appellate division of the Family Court of Australia) allowed Ms Rusken's appeal against Judge Lapthorn's dismissal of her application to adjourn a property trial and summary dismissal of her initiating application for property settlement. Murphy J said (from [8]):

> "The evidence here relates to significant mental health issues suffered by the wife. … a limited capacity on [her] part … to … conduct those proceedings … [S]ubsequent to trial directions being made by his Honour on 6 February 2017 the wife was admitted to hospital and between then and the date of the proposed trial on 15 May 2017 the wife was subject to an involuntary treatment order pursuant to the Mental Health Act 2016 (Qld) and was hospitalised pursuant to that order apart from periods of day release. She was released on 12 May; noting that the mooted trial was to take place some three days later. It is on that later date that the wife made her application for an adjournment. (…)
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> [35] … [I]t is not insignificant … that although the wife failed to appear before the court on two occasions in June 2015, and despite her being self-represented … she adduced medical evidence, through her brother, which prima facie suggested an appropriate reason for her failure to appear. … [I]t is also significant of itself … that the wife's brother, either on her request or on his own volition, appeared for her, rather than her simply failing to appear.
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> [36] On 15 May 2017 the wife appeared self-represented and tendered a medical certificate which

again sought to explain why she was unable to prepare her case. That certificate indicated that she had been admitted to a mental health facility … between February and May 2017. (…)

[39] In my view, there can be no doubt that the wife was very significantly mentally unwell during, at the very least, the period when she was hospitalised between 9 February 2017 and 12 May 2017.

[40] In my view, justice demands that the orders made … be set aside so as to afford the wife an opportunity to make and prosecute her case for settlement of property."

CHILDREN

'Non-urgent' application for recovery order need not have been urgently listed

In *Quong & Rush* [2017] FCCA 1765 (2 August 2017) upon the separation of the parties in January 2017 the father moved 680 kilometres away with the parties' twelve-year-old son. On 19 July 2017 the mother applied for a recovery order; an order that the registrar urgently list the application and leave to serve at short notice. The registrar dismissed the application, listing it for hearing on 23 October 2017. The mother filed an Application for Review of that decision. Judge Terry said (from [16]):

" … I decided to … list the Application for Review in open court and conduct an [ex parte] oral hearing which took the form of inviting the applicant to make submissions. (…)

[29] The mother visited X in … March 2017. She said that he told her that he liked (omitted) but she said that she believed that this was because he did not want to go against his father.

[30] The mother has frequent telephone contact with X and the father brought the child to (omitted) to spend time with the mother at Easter 2017 … and in the mid-year school holidays. (…)

[33] The mother said that she did not file her application earlier because she was from China and English was her second language and she did not understand that she could have come to court in or about January 2017 to get X back. She said that she also thought (wrongly as it turned out) that she would be able to negotiate with the father to have X returned to her.

[34] In oral submissions the mother emphasised that the reason she wanted an earlier listing … was that the longer her son was in (omitted) the more things he would lose. She said that there were only seventeen students at his school and the facilities in the small town were very limited.

[35] She said that she was afraid that her ex-partner would not look after X as carefully as she would and that he would have a miserable life in (omitted).

[36] … I am not satisfied that [her application] should be listed any earlier than the date given to it by the registrar.

[37] There is no evidence that X is at any risk of harm. He is attending school regularly, the mother is able to speak to him regularly and she has been able to spend time with him during school holidays. The father relocated the child in January 2017 and this is not a case in which at first glance it is likely that a recovery order would be made."

FINANCIAL AGREEMENTS

Fiancée (and as wife) wins appeal to the High Court

In *Thorne & Kennedy* [2017] HCA 49 (8 November 2017) the High Court allowed with costs Ms Thorne's appeal against a decision of the Full Court of the Family Court of Australia. In a joint judgment Kiefel CJ, Bell, Gageler, Keane and Edelman JJ (Nettle and Gordon JJ giving separate reasons) said (at [1]-[2]):

"This appeal concerns … a pre-nuptial agreement and a post-nuptial agreement which replaced it … between a wealthy property developer … and his fiancée … The parties met online on a website for potential brides and they were soon engaged. In the words of the primary judge, Ms Thorne came to Australia leaving behind 'her life and minimal possessions … If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community' … The pre-nuptial agreement was signed, at the insistence of Mr Kennedy, very shortly before the wedding … [where] Ms Thorne was given emphatic independent legal advice that the agreement was 'entirely inappropriate' and that Ms Thorne should not sign it.

One of the issues before the primary judge, Judge Demack, was whether the agreements were voidable for duress, undue influence or unconscionable conduct. The primary judge found that Ms Thorne's circumstances led her to believe that she had no choice, and was powerless, to act

in any way other than to sign the pre-nuptial agreement. Her Honour held that the post-nuptial agreement was signed while the same circumstances continued, with the exception of the time pressure. The agreements were both set aside for duress, although the primary judge used that label interchangeably with undue influence, which is a better characterisation of her findings. The Full Court of the Family Court of Australia … allowed an appeal … concluding that the agreements had not been vitiated by duress, undue influence, or unconscionable conduct [saying at [167] that the wife's 'real difficulty' was that she had received independent legal advice] … [T]he findings and conclusion of the primary judge should not have been disturbed. The agreements were voidable due to both undue influence and unconscionable conduct."

After a discussion of case law as to duress ([26]-[29]), undue influence ([30]-[36]) and unconscionable conduct ([37]-[40]), the majority said (at [60]):

> " … [S]ome of the factors which may have prominence include … (i) whether the agreement was offered on a basis that it was not subject to negotiation; (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement … (iii) whether there was any time for careful reflection; (iv) the nature of the parties' relationship; (v) the relative financial positions of the parties; and (vi) the independent advice that was received and whether there was time to reflect on that advice."

CHILDREN

Court's approval no longer required for Stage 2 treatment of Gender Dysphoria if child can give informed consent or the parentally responsible authorise it

In *Re: Kelvin* [2017] FamCAFC 258 (30 November 2017) a full bench of the Full Court (Thackray, Strickland, Ainslie-Wallace, Ryan & Murphy JJ) heard a case stated by Watts J as to an application by the father concerning the administration of 'Stage 2' medical treatment for Gender Dysphoria for his then sixteen-year-old child ('Kelvin') who was born female but "transitioned socially as a transgender person" from Year 8 ([27]). The Court said at [6] that Gender Dysphoria was "the distress experienced by a person due to incongruence between their gender identity and their sex assigned at birth."

The child's father sought the Court's sanction for the commencement of Stage 2 treatment in accordance with *Re: Jamie* [2013] FamCAFC 110. The Full Court held in that case that the court's approval under s 67ZC FLA was not required in respect of 'Stage 1' treatment (puberty blocking treatment) but that Stage 2 treatment (gender affirming hormone treatment) involving the use of oestrogen or testosterone with irreversible effects would require the court's approval.

Thackray, Strickland & Murphy JJ at [35]-[41] described Kelvin's experience of Gender Dysphoria since he was nine; his anxiety and self-harming; his distress from experiencing female puberty due to not undergoing Stage 1 treatment; the improvement in his mental health since "taking steps towards a medical transition"; his parents support; the necessity of Stage 2 treatment for his future wellbeing and his wish (at seventeen) to commence such treatment.

Their Honours (at [51]) observed that between 2013 and 2017 the Family Court had "dealt with sixty-three cases involving applications for Stage 2 or Stage 3 treatment for Gender Dysphoria" and that "[i]n sixty-two of those cases the outcome ha[d] allowed treatment."

The majority said from [147]:

> " … [T]he Full Court [in *Re: Jamie* held that] Stage 1 treatment is therapeutic in nature, and is fully reversible. Further, that it is not attended by grave risk if a wrong decision is made, and it is for the treatment of a malfunction or disease, being a psychological rather than a physiological disease. Thus, absent a controversy, it fell within the wide ambit of parental responsibility reposing in parents when a child is not yet able to make his or her own decisions about treatment. (…)
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> [149] As to Stage 2 treatment … the Full Court agreed … that although Stage 2 treatment is therapeutic in nature, it was also irreversible in nature (at least not without surgery). (…)
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> [162] The consensus of the applicant, the ICL and all but one of the intervenors is that the development in the treatment of and the understanding of Gender Dysphoria allows this Court to depart from the decision of Re Jamie. In other words, the risks involved and the consequences which arise out of the treatment being at least in some respects irreversible, can no longer be said to outweigh the therapeutic benefits of the treatment, and court authorisation is not required. (…)

> [164] The treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court. (…)
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> [167] We note though that … we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered; e.g. if the parents, or the medical professionals are unable to agree. There is no doubt that the Court has the jurisdiction and the power to address issues such as those."

Ainslie-Wallace & Ryan JJ (at [187]-[188]) agreed upon different reasoning.

FINANCIAL AGREEMENTS

No provision for husband who murdered wife after she began property proceedings

In *Neubert (Deceased) & Neubert and Anor (No. 2)* [2017] FamCA 829 (18 October 2017) the wife was murdered by the husband in 2015 after the ending of the parties' eighteen-year marriage in 2014 when the wife began property proceedings in the Federal Circuit Court, later transferred to the Family Court of Australia. The proceedings were continued by the wife's estate. When the husband shot the wife dead he also shot a friend of hers with whom the wife was travelling, permanently injuring her.

The friend, who intervened in the case, brought civil proceedings in which she was awarded damages of $2.3m which with taxed costs and interest amounted to a judgment debt of $2.5m. The husband was found guilty of murder and sentenced to twenty-five years imprisonment and a cumulative three-year sentence for the grievous bodily harm of the intervenor. The husband was seventy-five years old and ineligible for parole until he was 'almost 90'.

Benjamin J accepted (at [94]) that at the date of the wife's death the Court would have made an order in her favour for the purpose of s 79(8) of the *Family Law Act*, saying ([100]) that "there should be an adjustment … in the light of the findings as to the parties' respective contributions, including the husband's significant initial contributions [land sold during the marriage for $590 000, savings $100 000 and shares $300 000]. … [having] regard to the size of the pool [$2 168 153 excluding the damages]". His Honour ([173]) assessed contributions as to 35 per cent to the late wife and 65 per cent to the husband, ordering that the husband's share be paid to the intervenor and set off against the judgment debt."

The Court then (at [182]) reiterated the statement of *Coleman J in Homsy & Yassa and Yassa*; the Public Trustee (1994) FLC 92-442 that "the husband, having murdered the late wife, cannot have the benefit of the s 75(2) factors" and that "[t]o do so would be offensive to justice and equity."