Robert Glade-Wright's family law case notes

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PROCEDURE

Full Court grants adult son access to his parents' 1977 court file pursuant to FLR 24.13

In *Carter* [2018] FamCAFC 45 (6 March 2018) the Full Court (Ainslie-Wallace, Murphy and Aldridge JJ) allowed the appeal of a 53-year-old son against Johns J's dismissal of his application for access to his parents' 1977 court file. After their separation in 1976 he lived with his mother and three siblings until he was 15 when he began living with his father. When 17 he boarded with another family.

His wish was to search the court record in the hope of "mak[ing] some sense of" why his family became "dysfunctional" and to better understand why he was separated from his siblings ([17]-[20]). Johns J limited the son's access under FLR 24.13 to his parents' consent parenting orders, refusing leave to search the rest of the file.

Ainslie-Wallace J (with whom Murphy and Aldridge JJ agreed) said (at [22]-[23]):

> "The primary judge found that the appellant had a proper interest in the proceedings to make the application (r 24.13(1)).
> However, she refused the appellant access … because … she was concerned as to what benefit he might obtain from inspecting the file … Her Honour said … that she was not persuaded 'that the pursuit of such information is reasonable'."

Ainslie-Wallace J concluded (at [36]-[38]):

> "Her Honour was obliged to consider whether the appellant's request to access the file was reasonable in light of his stated purpose … This purpose was that he wanted to look at the file to see whether there was anything in it which might make sense of his living arrangements after his parents' separation and to undertake an 'autopsy' on his family history …
>
> Her Honour determined that the access sought was not reasonable in light of that purpose, not by reference to the dictates of the rule but by reference to … whether to inspect it would provide him with answers.
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> In my view, her Honour erred by having regard to irrelevant matters when determining the question of reasonableness of the request for access and the matters to which she referred were unsupported by evidence before her."

PROPERTY

Competing approaches to valuation of 'rural lifestyle property'

In *Granger* [2018] FCCA 51 (12 January 2018) a 'rural lifestyle property' was valued by single expert 'Mr L' at $595 000 but by the wife's valuer 'Mr J' at $800 000. The valuers agreed ([35]) that the property was not commercially viable and that there were a limited number of comparable sales. Judge Terry preferred Mr L's valuation, saying (from [39]):

> "There are problems with Mr J's approach. First, he used the carrying capacity of the property to arrive at a figure which represented the bottom of his range but he conceded … that the property was not … commercially viable … and that this was not an appropriate method … to value this property. (…)
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> [43] … Mr J determined the values of the various components of the land (wooded, improved pasture, cleared) by extracting rates from other sales which he said were not comparable.
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> [44] … [T]here was a dispute about whether Mr J had correctly identified the amount of improved pasture … (…)
>
> [46] I cannot … be satisfied … that the property has the higher proportion of cleared land … [I]f the carrying capacity method is discounted as a proper valuation method Mr J's only method of valuing it was the component method. He had no regard to sales material (…).
>
> [50] Mr J was firm … that there were no comparable sales … but there is some sales data and Mr J … did not make any attempt to cross-check his component approach with any of [it]."

NULLITY

Wife remarried before determination of her divorce proceedings – Visa considerations

In *Kirvan & Tomaras* [2018] FamCA 171 (21 March 2018) the wife married 'Mr D' overseas in 2015 but moved to Australia on a student visa in 2016. She declared her marriage in her visa application but a month later advised the Department of Immigration that she and Mr D had separated. She then filed divorce proceedings, but due to service difficulties a divorce was not granted until late 2017. In the meantime the wife began living with the respondent, marrying him in mid-2017.

Berman J said (from [18]):

> "The parties were concerned as to the cultural integrity of their cohabitation … [being] not married. They decided to marry notwithstanding that each of them knew that the wife's marriage to Mr D was not yet formally dissolved. The wife contends … that the parties felt that the 'marriage was not valid any longer'. (…)
>
> [21] The wife seeks a decree of nullity on the basis that at the time of her marriage … she was still married to Mr D. (…)
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> [26] The submissions of the wife's solicitor were unconvincing. It was also apparent that the wife's solicitor's experience is predominantly in migration law and his involvement with the parties seemed to be concerned with an application for the parties to secure a visa … (…)
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> [28] I was left with the distinct impression that the application for a decree of nullity was ancillary to other applications … pending pursuant to the Migration Act … (…)
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> [30] The … [marriage] certificate reflects that each of the parties were 'Never Validly Married'.
>
> [31] Whilst it may have accurately described the husband's marital status, it did not apply to the wife. (…)

The Court declared her latest marriage a nullity on the ground that she was lawfully married to another person. In referring the parties to the Commonwealth DPP, the Court concluded (from [58]):

> "It is difficult to view the wife's conduct and perhaps that of the husband as anything less than a wilful disregard of the requirement that she make full and frank disclosure in relation to her marital status.
>
> [59] The evidence … strongly supports the proposition that the wife and by implication the husband, were prepared to … misrepresent … that at the time of the marriage ceremony the wife … [was not] married to Mr D.
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> [60] Whilst the Court has the discretion as to whether

the papers should be referred, I consider … th[is] conduct … to be blatant in order to undergo a marriage ceremony … where they knew that it was not permissible to do so.

[61] It is a matter for the relevant authorities as to whether the parties or either of them will be the subject of prosecution [for bigamy]."

FINANCIAL AGREEMENT

Wife with limited English signed an agreement after 10 to 20 minutes with a lawyer without understanding it

In *Purdey & Millington* [2018] FCCA 213 (7 February 2018) Judge Jones held that a financial agreement was not binding. The parties married overseas in 2003, whereupon the husband returned to Australia. The wife emigrated here in 2005, studying English for a few months until she became pregnant (the first of two children). She tried to enrol in TAFE courses but was told that she should first complete English lessons. The parties separated in 2014.

In the week before the wife left a financial agreement was made under s 90C. It provided that the husband retain $460 000 of property in his name; the wife retain $5 500 of property in hers; and that she receive $25 000 from the sale of joint property. The wife was paid but sought a declaration that the agreement was not binding. There were statements of independent advice by her then lawyer 'Ms J' and the husband's solicitor 'Mr K'.

The Court said ([41]) that Ms J's statement gave rise to "an evidentiary onus … on the wife to disprove or throw into doubt any inference or conclusion to be drawn from Ms J's statement." The wife said ([45]-[46]) that her English was limited, that she had no interpreter and did not understand the document until she saw Legal Aid later.

The agreement was drafted by Mr K "on his computer" in a 10 to 20 minute meeting attended at times by both parties, who also separately consulted their solicitors ([49]-[52]). Ms J was found ([64]-[65]) to have "skated on the edge of propriety" (for keeping and producing no file notes) and "not … be[ing] a witness of truth", the Court finding ([84]) that "the evidence … [wa]s sufficient to throw into doubt the inference which can be drawn from Ms J's statement … [of] independent legal advice for the following reasons:

1. the arrangement for the wife to be provided with legal advice was not independently made by the wife. …
2. there is no record … [of Ms J's meeting with the wife];
3. … [There] was insufficient time for Ms J to have explained to the wife, … [her] rights …, the effects of the … agreement on her rights and … [its] advantages and disadvantages … (…);
4. the husband … paid the fee for the meeting between Ms J and the wife;
5. the husband was present for … the meeting between Ms J and the wife;
6. the absence of any file notes … support an inference that there was a lack of proper engagement … of competent legal service and … of any legal advice at all."

PROPERTY

De facto thresholds – Evidence that parties 'presented as a couple' meaningless – Bald denial without contrary evidence also inadequate

In *Crick & Bennett* [2018] FamCAFC 68 (13 April 2018) the Full Court (Ainslie-Wallace, Aldridge & Watts JJ) dismissed Mr Crick's appeal against Judge Tonkin's declaration that a de facto relationship existed while he lived in Ms Bennett's home from 2001 to 2014. He argued that despite having a child in 2003 they had lived apart under one roof since 2004, never acquiring any joint property nor operating any joint account.

The Full Court said (at [9]-[10]):

" … [O]n many occasions the respondent gave evidence that the parties went out to particular events where they 'presented as a couple'. The appellant simply denied that they did so. … [T]he evidence does not add to those bald descriptions and denials to give any indication of what actually occurred at these events. It is difficult to understand what is meant by the phrase 'presented as a couple'. If it meant that the parties arrived at a function or event together and left together, then the phrase adds little to the evidence … already before the Court. If it is intended to suggest something else … it is not clear to us what that might be.

The appellant accepted that the parties attended many family, social and school events with the child but denied that when they were at these events the parties presented as a couple. He did not set out any facts or

circumstances that could illuminate his assertion and, as with the respondent's evidence along similar lines, it is impossible to attribute any probative weight to that evidence."

The Full Court continued (from [64]):

"The appellant submitted that the notion of a 'couple', of itself, is not a relevant consideration for the purposes of s 4AA(2).

[65] That is not entirely correct. The ultimate task of the court is to determine whether the parties had 'a relationship as a couple living together on a genuine domestic basis' (s 4AA(1)(c)). The concept of a couple is thus part of the test. How that test is met is determined by the considerations required by s 4AA(2). None of those directly refers to 'couple'. It is here that care needs to be taken not to add a gloss to the words of the section …

[66] … [T]he primary judge rejected many, but importantly not all, references to 'presenting as a couple' … on the ground that they were conclusions (… we assume by this that her Honour rejected th[at] evidence because it had no probative value – see Britt & Britt (2017) FLC 93-764 at 77,105–77,107). (…)

[69] Shorn of the gloss of 'presenting as a couple', it is clear that the primary judge found that between 2002 and 2013 the parties attended many social and family events and school functions with the child. These events included family Christmases and birthdays … at the home of the parties [and] the homes of other relatives. The parties … visited the respondent's sister (almost weekly) over the summer …

[70] This was significant evidence of the public aspects of the … relationship and supported a finding that there was a de facto relationship. If the appellant wished to contend that the parties' conduct at those events led to a different conclusion then it was incumbent on him to adduce evidence to support that proposition."

PROPERTY

Escort agreed to move interstate with former client if he bought her a house – Gift or loan

In *Higgins* [2018] FamCA 243 (15 February 2018) an escort (respondent) and her client (applicant) married after associating for some years but never living together. Each lived with a de facto partner and the respondent had a daughter. Meeting in 2006, the applicant was 64, the respondent 31. She was charging $275 per hour or $1500 overnight for her services until late 2007 when the applicant began supporting her and her daughter.

The respondent said ([34]) that she was to provide the applicant with 'companionship' in return, although she continued working as an escort until 2010, saying ([36]) that she considered 'repulsive' some things about the applicant. In 2010 she agreed to move from Brisbane to Melbourne if he bought her a house. He intended to live in a house near hers upon selling his business. He bought a house in her name for $1.1m structured as a loan from his company 'PPL'. She signed a loan acknowledgment.

The parties married in 2012 (still not cohabiting) but 'separated' in 2015. PPL sued to recover the loan, the respondent seeking a declaration that the property was hers. She also sought maintenance.

Cronin J said (from [41]):

"The respondent claimed that she was spending time with the applicant and as a consequence, made 'sacrifices' and 'endured' his behaviour because of his earlier statement that he would buy her a house. That endurance included talking with him each night that she was away from him and reassuring him of her interest in him by replying to his text or email messages. She bought him gifts but with his credit card. Throughout these periods apart, the respondent continued to live with her partner and daughter … [which] was always known to the applicant. As such, it defies logic to say that this was anything other than a commercial arrangement except with friendship considerations thrown in.

[42] (…) The applicant was besotted with the respondent and generous because she fulfilled his needs. (…)

[48] (…) [T]he applicant agreed [to buy a house in her name] and then said he would also buy a home for himself near [her] so that they could 'see each other regularly'. That is … what happened.

> As to the loan acknowledgment, the Court (at [134]) cited Israel v Foreshore Properties Pty Ltd (in liq) (1980) 30 ALR 631 where it was held that "[w]hether a contractual relationship arises depends 'upon all the circumstances' so [that] all of what occurred is relevant." (…) The Court said (from [141]):
>
> "The applicant wanted the respondent close by to continue an arrangement which suited them both and … the conversations until at least after settlement were [about] a gift because otherwise the respondent would not have come to Melbourne. (…)
>
> [147] … I find that … the funds of PPL … needed to be documented for tax effective purposes."

Cronin J said ([180]) that unconscionability could not arise either "because the applicant got what he bargained for", concluding ([212]) that "it would not be just and equitable to alter the respondent's interest in her house."

Her application for maintenance was dismissed and she was ordered to repay $180 000 paid as an interim property settlement.

CHILDREN

Reversal of care to father after alienation by mother – Moratorium on commencement of mother's time appealed by father

In *Goldman* [2018] FamCAFC 65 (12 April 2018) Cleary J had ordered that the parties' 13 and 11-year-old children (who had primarily been living with the wife since separation) live with the husband. Her Honour found ([7]) that the wife was focused on punishing the husband and "turning the children's affections away from him", causing emotional harm to the children and posing an unacceptable risk of harm continuing. It was found that the children (according to the single expert) had a "close dependent relationship" with the wife which was "enmeshed" thus "not conducive to good future mental health."

Cleary J ordered that the wife's time with the children be supervised and that that time not begin until four weeks had elapsed from the date of the order. The father appealed, arguing due to risk of harm for no contact between wife and children for 36 months or as recommended by the single expert.

In dismissing the appeal, the Full Court (Strickland, Murphy & Aldridge JJ) said (from [16]):

> " … [T]aking [the single expert] Dr G's evidence as a whole, there is a recommendation of a suspension of time for a period between one and six months, although in cross-examination, he did express a preference for a three to six month period. There was a positive recommendation against the husband's proposal of 36 months.
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> [17] It is apparent that the primary judge was well aware of the close relationship the children had with the wife and that this was a matter that bore directly upon the length of any moratorium on time. Her Honour described that relationship as the children's 'most significant relationship' because the wife had 'provided their care all their life'. (…)
>
> [18] The primary judge was acutely aware of the effect that a moratorium on time would have on the children. Thus, her Honour had to balance the need for the moratorium to be for a period sufficient to allow the children to settle down with the husband but not so long as to cause them to be overly distressed about not seeing the wife. (…)
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> [20] It can be immediately seen that the period provided for in the orders of 'not less than four weeks' before time commenced is within the range recommended by Dr G … "

PROPERTY

Unit trust controlled by husband but owned by his 99-year-old father was not 'property'

In *Harris & Dewell and Anor* [2018] FamCAFC 94 (25 May 2018) the Full Court (Strickland, Murphy & Johnston JJ) dismissed an appeal against Rees J's property settlement by the wife who argued that the asset pool should include units of the E Unit Trust which were controlled by the husband although his 99-year-old father was sole unit holder. The shares of the corporate trustee (FPL) were owned by the father (67 per cent) and husband (33 per cent). The director of FPL was a solicitor who acted on the husband's instructions.

Rees J had found that the husband controlled the trust, but that the units were not property but a financial resource of the husband. Rees J ([66]) cited Stephens [2007] FamCA 680 in which Finn J said that "no earlier authority … [has held] that control alone without some lawful right to benefit from the assets of the trust is sufficient to permit the assets … to be treated as property of the party who has that control."

The Full Court said (from [67]):

> " … [P]roperty … of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the 'puppet' or 'creature' of that party. (…)
>
> [68] Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. … [I]t is in that sense that Finn J speaks of 'some lawful right to benefit from the assets of the trust'. (…)
>
> [71] The husband did not have powers vested in him, or in any entity which he controlled or would do his bidding, that permitted of that result for him. The evidence was certainly to the effect that the current director of the trustee FPL … would likely do the husband's bidding. However, the trustee does not have ultimate control over the vesting of trust property. That … has at all times rested with, and currently rests with, the father."

PROPERTY

Declaration that farm was owned by mother-in-law's company on trust for wife's company due to a family agreement set aside

In *Camden Pty Ltd & Laue and Ors* [2018] FamCAFC 91 the Full Court allowed an appeal by the farm's owner (Camden P/L run by the husband's mother) due to FCWA's failure to apply case law as to an intention to create contractual relations.

Walters J held ([44]-[45]) that an agreement was made "partly orally and partly by conduct" for its transfer to Barkers P/L run by the late husband who farmed it with the wife. A transfer was signed but not registered but the husband's mother was to receive a monthly stipend for life, the husband to pay all debt.

The Full Court ([53]) cited *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 at [25]:

> " … [T]he word 'intention' ['to create contractual relations'] … is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties."

And *Secola v McCann* (No 2) [2011] WASC 342 at [18]: "If the parties' intention is equivocal, evidence of subsequent conduct may be adduced to establish whether an agreement was concluded."

The Full Court ([55]) said that the following factors did not point to an intention to create legal relations:

- That any agreement was never reduced to writing;
- The husband always felt he had a moral obligation to maintain his mother after his father's death;
- The parties' businesses had historically been operated independently and only became entwined after the death of the husband's father;
- The 'agreement' was reached in a social context and did not involve any lengthy or serious discussions; and
- Property B was Camden's only income-producing asset and the "agreement" resulted in it being transferred outside of Camden.

CHILDREN

Denial of relocation to NZ upheld – Judge's reference to Morgan & Miles 'checklist' was not in error

In *Molloy & Reid* [2018] FamCAFC 89 (11 May 2018) the Full Court (Thackray, Murphy & Aldridge JJ) dismissed the mother's appeal against Tree J's refusal of permission for her to relocate to New Zealand. An order was also made for equal shared parental responsibility and that the children live with the mother, but spend time with the father four nights per fortnight (with an extra night for the eldest child).

The Full Court said (at [16]):

> "After reciting paragraphs 79 to 81 from *Morgan & Miles* [2007] FamCA 1230 … and without making any further comment about their content, his Honour … discussed each of the identified issues, determination of which he had earlier said was 'likely to substantially impact upon the outcome' …

The Court continued (at [27]-[29]):

> "The essence of the argument here was that the judge had led himself into error by focusing on the 'checklist' of issues … supplied by Boland J in … *Morgan & Miles*. The mother's summary of argument went so far as to assert that his Honour had relied on Morgan & Miles 'as the basis of his decision-making' … where neither party had referred to the case in argument.
>
> [28] Relying on … *Deiter* [2011] FamCAFC 82 counsel for the mother drew attention to what were said to be dangers associated with judges having regard to 'checklists' which place 'glosses' on an already complicated statute, thereby 'obscuring' the law. It was argued that … the primary judge had 'let the checklists control the outcome' …
>
> [29] We accept that the Full Court in *Deiter* … commented adversely on the way a magistrate had applied the 'checklist' in *Morgan & Miles*, but nothing said by the Full Court there proscribed efforts by trial judges to paraphrase the law in the way Boland J had done in the earlier case. Indeed, it might reasonably be said that careful paraphrasing of legislation can illuminate the law and demonstrate that it has been correctly understood. The difficulty the Full Court saw in *Deiter* … was not that the magistrate had regard to the 'checklist' in *Morgan & Miles* but … that he may have misunderstood the nuances in one item on the list and hence misapplied what Boland J had said."

PROPERTY

Small pool – Disabled child – Provision made for carer wife set aside as inadequate

In *Causey* [2018] FamCAFC 81 (19 April 2018) Murphy J allowed the wife's appeal against Judge Turner's 70:30 property division at an undefended hearing. The parties, married 22 years, had four children, the youngest of whom was intellectually disabled.

The Court found the net pool to be $266 160 including super. It ordered that the wife retain the home but pay the husband $21 613. The parties were to retain their personalty of which the husband's super was $58 236 (22 per cent of the pool). The wife's marital and six years of post-separation contributions produced an adjustment for her of 10 per cent. Another 10 per cent was granted under s 75(2).

Murphy J ([34]-[35]) noted the husband's failure to disclose his means and evidence that both parties contributed income to the family; that the wife was homemaker, parent and income earner (the former being a 'significantly greater' contribution than that of the husband); and that her contributions were 'made in difficult circumstances', including family violence.

Murphy J ([37]) held that her Honour's finding that contributions to separation were equal "was not reasonably open on the evidence", referring to evidence of the wife's "significant capital contributions to the home [and its maintenance] … while the husband made none"; the minimal child support paid by the husband and his arrears; his help with her full-time care of their disabled child being "minimal at best"; the wife's need to access her super to meet expenses and provide financial help to the husband post-separation.

The assessment of 10 per cent i.e. $26 600 "markedly undervalued the wife's contributions" over 28 years, as would a 20 per cent adjustment ([39]-[40]). Murphy J added ([43]-[44]):

> "The adjustment made under s 75(2) … fails … to take account of the cost and arduous nature of the ongoing care of the parties' child which will continue long into the future. That care impedes the wife from obtaining full-time work. That in turn impedes the wife from earning her way out of the financial difficulties inherent in the breakdown of this relationship."

As to the potential for a splitting order for the husband's super, Murphy J said ([51]-[52]) that the husband's retention of it "might be seen as generous to him" but that the wife acknowledged that co-operation from the husband was likely to be "non-existent" so that any splitting order would require her to seek enforcement orders.

Discretion was re-exercised, the wife to receive the home and the husband to keep his super, an overall division of 78:22 in the wife's favour.