Robert Glade-Wright's family law case notes

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PROPERTY

Decision that an application filed at 7:40 pm be treated as filed that day contrary to FLR 24.05(2) set aside

In *Frost (Deceased) & Whooten* [2018] FamCAFC 177 (17 September 2018) the late husband's legal personal representatives appealed against Cronin J's decision to treat the wife's property application filed electronically at 7:40 pm (where at 11 pm the husband died in hospital from injuries sustained the previous day) as filed on that day, not after his death pursuant to FLR 24.05(2) which provides that an electronic filing after 4:30 pm ACT time is taken to have been filed the next day.

The Full Court (Alstergren DCJ, Aldridge & Kent JJ) said (at [8]):

"His Honour considered that this order should be made because otherwise the strict application of the Rules would deny the respondent the right to litigate, which would be an injustice … However, this appeal is primarily concerned with whether or not the Court had jurisdiction to make any order at all and not whether the circumstances worked an injustice upon her."

Having agreed that the application properly invoked a matrimonial cause for property orders, the Full Court allowed the appeal, saying (at [55]):

" … [B]y the operation of r 24.05(2) the Initiating Application was taken to be filed on the day after the deceased died (notwithstanding the automatically issued note placed on it to the effect it was filed the day before). Thus … the Court had no jurisdiction to proceed as there were then no proceedings between the parties to the marriage as one had died the day before. (…)

The Court added ([73]) that it could not "use the Rules to extend or vary time so as to acquire that jurisdiction" as "[t]o do so would be to alter the parties' substantive rights … create a cause of action where none then existed [and] subject the deceased's estate to proceedings under s 79 notwithstanding that the period in which those proceedings could be commenced … had expired".

Mr Gadzen wins appeal against leave to proceed granted to Ms Simkin 7 years out of time – No hardship to an applicant with an uncommercial claim

In *Gadzen & Simkin* [2018] FamCAFC 218 (16 November 2018) the Full Court (Murphy, Aldridge & Kent JJ) allowed Mr Gadzen's appeal against leave granted to his former de facto partner by Judge Cassidy to apply for property orders seven years out of time. The parties' childless relationship lasted 8 years. While the respondent's initial contributions were $83 000 (mostly superannuation) the appellant's initial contribution was $4.75m. The parties had entered into a non-binding agreement during their relationship which the appellant had implemented in part by buying the respondent a property and paying mortgage payments in respect of it.

Judge Cassidy found that the wife would suffer hardship if she were not granted leave, having regard to her financial circumstances. The appellant appealed, arguing that the respondent could not have a *prima facie* case worth pursuing once the likely costs of her claim were considered and that the Court had failed to consider those costs.

The Full Court agreed, saying ([3]):

> "(…) [I]t is fundamental to [a determination of hardship] … that consideration is given to whether an applicant for leave demonstrates a *prima facie* or arguable case of substance having regard to all the circumstances of the case, taking into account the likely cost to be incurred by the applicant in pursuing the claim. Here … the trial judge did not undertake that consideration. … "

Re-exercising the discretion, the Full Court found that the wife had failed to establish hardship and dismissed her application, saying ([59]):

> " … [The respondent] has received $467 121 in post-separation benefits (including the superannuation contribution of $100 621 made [by the appellant] in 2007). … She holds net property … worth $134 600. … She estimates that she will expend approximately $150 000 pursuing her claim. We are unable to see how … [her] potential claim … could conceivably approach, let alone exceed, that which she holds together with that which she has received."

CHILDREN

After a final parenting order an issue not previously dealt with does not involve the rule in Rice & Asplund

In *Cameron & Brook* [2018] FamCAFC 175 (13 September 2018) the parties had equal shared parental responsibility for their child K under a final parenting order made by consent when K was 11. When asked to sign an application for K's selection in an overseas student exchange program in which her school participated the father refused. He also failed to attend family dispute resolution which the mother arranged as required by the order.

The mother's application for an urgent interim order that the father sign the form, failing which she be granted sole parental responsibility for doing so (filed as part of an initiating application for a final order in the same terms) came before Judge Coates on the eve of selection interviews. The Court agreed with the father's case that the Court lacked jurisdiction and dismissed the application, whereupon the mother appealed (the appeal hearing coming on before the extended deadline for interviews).

The Full Court (Strickland, Murphy & Kent JJ) said (from [33]):

> "(…) The mother seeks to vary an aspect of the … order. The Court has … jurisdiction and power to determine that question if the parties cannot agree (…)
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> [35] (…) [W]hen parents cannot or will not do that which they should … the Court's powers are not excluded but, rather, enlivened, if its jurisdiction is properly invoked.
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> [36] (…) [A]lthough finality of litigation is desirable … final orders made in relation to … children are not final in the same sense as orders made, for example, relating to property settlement. …
>
> [37] We are not persuaded that the situation here is analogous to a case invoking the application of the 'rule in Rice & Asplund'. … There is here no attempt to reagitate issues previously agitated or issues addressed and settled by the consent orders … The … application involves a new question relating to an aspect of parental responsibility … that was not … in the contemplation of the parties at the time of the original consent orders."

The appeal was allowed with costs fixed at $11 192 and an order made that the mother have sole parental responsibility for the enrolment.

Retrial settled after mother's belated inspection of subpoenaed documents led her to concede that her abuse allegation against father was mistaken

In *Challis* [2018] FamCA 773 (27 September 2018) a parenting case was reheard by Carew J after the father won an appeal from another judge's positive finding of child sexual abuse against the father, a finding the Full Court said was "neither sought by the parties nor was it open on the evidence" ([5]).

The mother alleged that there was an unacceptable risk of harm to the children spending unsupervised time with the father due to allegations of sexual abuse made by the mother's daughter of a previous relationship ("Ms D" now 19).

At the retrial the content of subpoenaed documents were put to the mother who said she had not seen the documents, despite a previous order requiring each party to inspect them ([4]). After reading them the mother conceded that her allegations were mistaken.

The Court said (from [4]):

> "One particular order that I made required each party to arrange a time with the Registry to inspect all documents produced to Court pursuant to subpoena as soon as reasonably practicable. (…) [R]egularly parties do not seem to be aware of all relevant evidence or it might be they have closed their minds to all but evidence that supports their point of view.
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> [5] In any event and despite this very clear requirement the mother conceded during cross-examination that she had not done so. Her solicitor accepts responsibility for this failure but, however it occurred, it was most unfortunate and frankly alarming that not only one trial but a second trial proceeded with the mother being apparently oblivious to significant relevant evidence. (…)
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> [12] Today the parties asked for time to have discussions and reached an agreement [for equal shared parental responsibility and equal time].
>
> [13] What no doubt became apparent to the mother … was that Ms D was experiencing significant personal issues relating to underage sex with a boyfriend, bullying at school, extreme stress as a result of being caught in the middle of the dispute between her mother and step-father, truancy, risk taking behaviour etc. at the time the allegations were first raised by the mother. (…)
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> [26] … [A]dults repeatedly present to this Court stating that they make allegations … because 'they believe their child' but in truth it is their own interpretation of what a child says that they 'believe'.
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> [27] … [T]he mere making of an allegation should not impose on children a lifetime of supervision. It is necessary to carefully consider the evidence, assess it and evaluate it, which the mother has now done in the full knowledge that she finally has all the bits of the puzzle. … "

Court erred by staying mother's contravention application pending her compliance with previous costs order

In *Dautry & Wemple* [2018] FamCAFC 237 (3 December 2018) Austin J (sitting in the appellate jurisdiction of the Family Court of Australia) heard the mother's appeal against the Federal Circuit Court's dismissal of her application to vary a parenting order and an order staying her contravention application against the father until she paid $6 500 payable under a costs order made following her failed appeal against the parenting order.

Austin J dismissed the first ground of appeal but allowed the second, saying (from [29]):

"The primary judge did not purport to make the stay order in reliance upon s 102QB(2) of the Act or r 13.10 of the *Federal Circuit Court Rules 2001* (Cth), since the father did not contend the mother's contravention application was frivolous, vexatious, or an abuse of process.

[30] The order made by the primary judge to stay the prosecution of the contravention application was purportedly premised on both the principles discussed by the Full Court in *Fahmi & Fahmi* [1995] FamCA 106 … ('*Fahmi*') and the application of s 69F of the Act. (…)

[35] For the *Fahmi* principle to apply so as to deny an applicant an audience before the court, the applicant's contempt must occur in the same cause or proceedings then pending before the court (…)

[36] In this case, the mother's alleged contempt related to her failure to satisfy a costs order made in the course of her failed appeal against interim orders … in the proceedings which were concluded with final orders in December 2014. Accordingly, her contempt … was not of orders made in these proceedings, which were not instituted until November 2017."

Austin J added ([40]-[42]) that s 69F on which the father also relied "is intended to invest the court with broad discretion as to whether an application under Part VII … filed by an applicant who has failed to comply with a past order … is entertained" but that "when the discretion under s 69F … is enlivened, its exercise is motivated by the same type of considerations discussed in *Fahmi* … and depends upon the balance which must be struck between the applicant's right to procedural justice and countervailing public policy … ". It was held that the reasons given for the stay were inadequate.

DIVORCE

Forum non conveniens – Complete relief was available in India (where wife lived) but not in Australia

In *Talwar & Sarai* [2018] FamCAFC 152 (10 August 2018) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) allowed the wife's appeal from a divorce order made by Judge Tonkin.

Both Indian by birth, the parties met in India in February 2013 when the husband (an Australian citizen) visited there and they arranged to be married. He returned to India in August 2013 for the wedding; returned to Australia in September 2013, applying for a wife's partner visa but withdrawing his sponsorship for that visa in December 2013, alleging that the parties had separated. The wife brought proceedings in India under the Indian Penal Code, the Protection of Women from Domestic Violence Act and the Dowry Prohibition Act.

The husband applied for divorce in the FCC on 10 March 2017, the wife on 10 April 2017 applying in the Family Court of India for an injunction restraining the husband from continuing his divorce application. Absent a Response by the wife a divorce order was made by a registrar on 12 May 2017. On 27 May 2017 the Family Court of India made the injunction. Upon a review sought by the wife the divorce application was reheard by Judge Tonkin who held that Australia was not a clearly inappropriate forum and granted the divorce order.

After citing High Court authority ([19]] holding that "[i]f the court is satisfied that Australia is a clearly inappropriate forum in which to determine the proceedings the court must stay them" the Full Court remitted the case, saying ([97]):

" … [T]he exercise of the … judge's discretion miscarried in the following ways:

- on the face of s 13 of the *Hindu Marriage Act* a divorce was available in India … ;
- complete relief was therefore available to the parties in the Indian proceedings;
- undue emphasis was placed on the husband's '*prima facie* right' to proceed with his proceedings in Australia;
- the injunction against the husband continuing with his divorce application was ignored; and
- the … judge did not have proper regard to the effect of her orders upon the wife, who would not be divorced in India."

CHILD SUPPORT

Change of care post-binding child support agreement terminated under s 80D(2A) created arrears that could not be set aside

In *Rake* [2018] FCCA 3181 (5 November 2018) Judge Harland heard the father's application for a stay of a binding child support agreement made in 2015 when the child "[X]" lived with the mother. It provided for him to pay the mother $1 006 per month, each parent to pay half school fees, books and uniforms. In 2017 [X] began living with the father, creating arrears whereupon the child support registrar began garnishing his wage.

The father also applied for the setting aside of the agreement and a release from all arrears from the day [X] started living with him. Between the filing of his application and the hearing s 80D(2A) CSAA came into effect. After reciting it, Judge Harland said (from [24]):

"The real issue of concern for the applicant is the arrears that have accrued since [X] came into his care.

[25] … [I]t is common ground that [X] has spent hardly any time with [the mother] since July 2017. Section 80D(2A) … provides that 28 days after a change of residence the agreement automatically terminated. (…)

[27] The applicant told the Court that DHS told him that they would not stop garnishing his wage without an order for a stay. Given the effect of the legislation, it is not possible to order a stay of the agreement given the agreement had already been terminated and no longer exists.

[28] The respondent's counsel encapsulated the issue the Court now has to consider which is whether or not the Court has any power to retrospectively set aside arrears incurred pursuant to a now terminated agreement. (…)

[30] The difficulty the applicant faces is that s 136(1) … applies … where a party seeks to set aside an agreement. In this instance, the agreement has been terminated so there is no agreement to set aside. (…)

[49] Whilst it seems unfair that the applicant is required to pay child support for a child in his full time care, when parties enter into a binding agreement they are contracting out of the administrative child support system. (…)

[52] … I am satisfied that s 136 does not apply and therefore the applicant fails to meet the first hurdle. Given this, it is not necessary to consider whether [he] has demonstrated … exceptional circumstances and that [he] would suffer hardship … The application must be dismissed.