Family Law Judgments

ROBERT GLADE-WRIGHT Founder & Senior Editor, The Family Law Book

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Children – Threshold hearing on Rice & Asplund – Application dismissed

In *Mahoney & Dieter* [2019] FamCAFC 39 (7 March 2019) the Full Court (Alstergren DCJ, Ryan & Kent JJ) dismissed the mother's appeal against dismissal of her application for variation of a final parenting order made by the Family Court Division of the District Court of New Zealand (NZ) and registered in 2018 in Australia where the father lived with the parties' child pursuant to that order. The order, made after a finding that the mother posed a risk of harm, removed the child from the mother's care and permitted the father to relocate with the child from NZ to Australia, the mother to spend supervised time with the child during school holidays in NZ.

The mother later obtained a medical report that she was mentally stable, and applied to the Family Court of Australia for the child to spend unsupervised time with her (and ultimately live with her in NZ). Austin J dismissed the application as the mother had failed to establish a sufficient change in circumstances to warrant reconsideration of the order.

On appeal, the Full Court said ([10]):

"In describing the reason for the child's removal from the mother's care … the [NZ] court explained that:

' … The transfer was necessary for the welfare and safety of [the child] because of the mother's intense fixed and wrong beliefs about the father's behaviour … These beliefs are not related to his parenting … If [the child] learns about these beliefs the damage to her will be adverse and lifelong.'"

The Court continued ([12]):

"At the final parenting hearing the mother attributed the cause of her parental difficulties … to … a brain injury and hypothyroidism, which she had addressed. However, the evidence before the [NZ] court revealed that the mother continued to hold fixed and wrong beliefs about the father's behaviour … (including that the child was conceived through rape). (…)"

The Court concluded ([39]):

"A proper reading of the [NZ] judgment demonstrates that … the decision turned not on whether or not the mother had a mental illness, but that [her] fixed beliefs … whatever their genesis or label, posed a risk of harm to the child. (…) "

Property – Transfer of house by husband to sister and brother-in-law held to have been for good consideration

In *Deodes* [2019] FamCAFC 97 (11 June 2019) the wife lost her appeal from dismissal of her application for a declaration that a property the husband transferred without her knowledge to his sister and brother-in-law weeks before the parties' wedding was held on trust for the husband. The husband had owned the property since 1992; the parties began living together in 2001 and the transfer was in 2004.

The husband and transferees gave evidence that at the time of transfer the property was worth $232 000 and that the consideration paid to the husband was $152 000, the $80 000 balance being credited against a debt the husband then owed to his sister. The wife claimed that there was an oral trust between the husband and transferees to hold the property on trust for the husband.

At trial Magistrate Walter of the Magistrates Court of Western Australia found that the $80 000 loan was then owing, held that the property had been transferred for good consideration and dismissed the wife's application for a declaration of trust.

The Full Court (Strickland, Kent & O'Brien JJ) agreed, concluding (at [29]):

"Her Honour found that the husband owed the second respondent $80,000 at the time of the transfer. She was not persuaded that the transfer was designed to defeat any claim the wife might have. She was satisfied that appropriate market value had been paid, and that the husband benefited from the sale by the discharge of his debt secured by mortgage, the discharge of his debt to [his sister] … and the receipt of cash. (…) "

Children – Mother's secretly taken video of hand overs admissible – Her audio of father's private conversations with the children inadmissible

In *Coulter & Coulter (No. 2)* [2019] FCCA 1290 (15 May 2019) Judge Heffernan heard the father's application to exclude the mother's secretly made video recordings of the father's attendance at her home for hand overs and two audio recordings of conversations between him and the children.

After referring to a court's discretion (under s 135 the *Evidence Act 1995* (Cth)) to exclude evidence if its probative value is substantially outweighed by the risk of prejudice, being misleading or wasting time or (s 138) exclude improperly or illegally obtained evidence unless the desirability of admitting it outweighs the undesirability of doing so, the Court said ([10]-[11]):

"I am satisfied that it was not improper for the mother to make the video recordings of the two hand overs. … Hand overs occur in circumstances where the mother has a legitimate interest in her personal safety … and in preventing the children from being exposed to conflict and unpleasantness between the parties. At the time that the mother made the video recording, it is her evidence that she had been having ongoing difficulties of that sort with the father. The mother had an ongoing concern about the father's apparent obsessiveness with matters personal to her and his abusive, coercive and controlling behaviours and past episodes of violence. She was in the process of seeking an intervention order against him to deal with those issues. … Recording his behaviour was not improper in that context, even allowing for the secrecy with which it was done. In considering the question of impropriety, I also give weight to the conclusion … that the conduct in recording the hand over was not contrary to a relevant Australian law.

In my view, it was improper of the mother to make secret audio recordings of private conversations between the father and the children. It involved a significant breach of trust with respect to the children, who were entitled to privacy in their conversations with their father irrespective of any motives he may have had to enlist them in his dispute with the mother."

The Court found ([12]-[23]) that the video was not illegal but that the audio contravened the *Listening and Surveillance Devices Act 1972* (SA) and that ([24]-[25]) discretion should be exercised to exclude the audio recordings because the desirability of admitting that evidence (as relevant to the mother's case of parental alienation) was outweighed by the undesirability of doing so, having regard to the children's right to have private conversations with their father.

Property – No error in Court's treatment of non-commutable military pension as a financial resource (income stream)

In *Carron & Laniga* [2019] FamCAFC 115 (8 July 2019) the Full Court (Aldridge, Kent & Austin JJ) considered a property case where the wife had been made redundant from the Australian Defence Force and had interests in the Military Superannuation Benefits Scheme. The first was in the growth phase and the second was in the payment phase as a non-commutable pension of $520 per fortnight.

At trial, neither party sought a splitting order. The wife's expert provided a notional capital valuation of the pension interest of $230 148, but otherwise confirmed that this amount could not be "cashed out" in any way. Judge Egan treated the wife's growth phase interest as property, but found that the pension interest was a financial resource. The husband appealed, arguing that both interests were "property".

The Full Court said (from [29]):

"The wife opposed her MSBS pension being attributed any notional capitalised value because it could not be commuted and the husband did not seek any … splitting order in relation to it, as the trial judge correctly recognised. (…)

[36] In property settlement proceedings, there is no need to ascertain the capitalised value of a superannuation interest, much less one in the payment phase being paid in the form of a non-commutable pension, unless a … splitting order is sought in relation to the interest (*Welch & Abney* [2016] FamCAFC 271 … At trial, neither party sought a … splitting order in respect of the wife's MSBS pension.

[37] The Act only provides that a superannuation interest must be valued before it is amenable to a splitting order (s 90XT(2)) (…)

[39] Relevantly, the wife's entitlement to the MSBS pension crystallised in 2000 following her redundancy from employment in the armed services, shortly after the parties' marriage in 1998. She is entitled to receive the pension for life, during which time it cannot be commuted or alienated. While it will continue to be a modest income stream for her, it will not be enough alone to sustain her and she will always need to supplement it with other income from paid work. Such features of the pension made it readily identifiable as a financial resource rather than an asset. (…)"

Children – Judge erred by restraining overseas travel without considering relevant matters set out by Full Court in Line & Line

In *DeLuca & Farnham and Anor* [2019] FamCAFC 100 (13 June 2019) Le Poer Trench J had ordered that neither party remove the children from Australia without the written consent of the other or an order and that the children's names be placed on the watch list. The mother appealed so as to facilitate visits to family in Europe by the children. →

The Full Court (Strickland, Kent & Watts JJ) said (from [34]):

" … The primary judge had an obligation to give adequate reasons which allowed the parties to understand why his Honour assessed the risk of flight as being too great … (*Bennett* … [1990] FamCA 148 …)

[35] In *Line & Line* [1996] FamCA 145 … the Full Court set out … relevant matters … :

4.49 The … degree of risk that the departing parent … will … choose not to return. In assessing that, … considerations are the existence (or otherwise) of continuing ties … the existence and strength of possible motives not to return (…)

4.50 … [W]hether the country … is … a signatory to the [Hague Child Abduction Convention] … [although] there may be little to prevent him or her … travelling on to a non-convention country.

4.51 [T]he financial circumstances of both parties, … hardship … the departing parent would suffer by the imposition of security at a particular level as compared with the hardship which the non-departing parent would suffer if the security were fixed at a lower level. …

[36] The primary judge did not discuss why he assessed the risk of flight of the parties … as too great, and why he put the travel restriction in place until 2027. Most of the considerations referred to in Line were not explored. (…)

The Full Court re-exercised discretion, making an order for overseas travel.

Child Support – Paternity declaration under s 106A CSAA made four years after refusal of mother's application for child support assessment

In *Calafiore & Netia* [2019] FamCAFC 132 (2 August 2019) the parties' child was born after separation. The mother's application for child support assessment in May 2013 was refused, the father (who was not named on the birth certificate) disputing paternity. Four years later the mother applied for a paternity declaration under s 106A of the *Child Support (Assessment) Act*. The respondent submitted to a paternity test which confirmed that he was the father. A judge of the FCC declared paternity but declined to order that child support be backdated to the child's birth, saying that it was "the CSA's decision as to when the father pays child support from" ([9]).

On appeal, Kent J (with whom Tree and Hogan JJ agreed) said (from [23]):

"Following the making of an assessment application, if the registrar refuses the application on the grounds that the registrar 'was not satisfied under s 29 that a person who was to be assessed … is a parent of the child', the applicant may apply to the Court under s 106A of the CSAA seeking a declaration that the 'person should be assessed in respect of the cost of the child because the person is a parent'.

[24] Then, as occurred here, if the Court grants that declaration, s 106A(6)(a) provides:

'(a) If the reason referred to in paragraph (1)(b) was the only reason for the Registrar refusing the application – the Registrar is taken to have accepted the application for administrative assessment of child support.'

(Emphasis added)

[25] It follows, then, that the declaration granted by the trial judge … operated retrospectively, pursuant to s 106A, to render the father liable for child support from the commencement of the 'child support period' being the day the mother made her application on 2 May 2013. (…)

[40] Her Honour's conclusion … that it [was] a matter for the CSA to determine the date upon which the assessment would commence was an error of law."

The appeal was allowed and the case remitted for re-hearing.

Property – Joint decision to obtain disability insurance – Contributions based adjustment made for wife who paid the premiums

In *Falcken & Weule* [2019] FamCAFC 140 (16 August 2019) the wife suffered a stroke during a 21 year marriage, receiving $235 152 from her income protection insurer. Having found a net asset pool of $1.8m, a judge of the Family Court of Western Australia assessed contributions at 53:47 favouring the wife, with no further adjustment under s 75(2). In dismissing the husband's appeal, the Full Court (Strickland, Aldridge & O'Brien JJ) said ([14]-[15]):

"The evidence relied on by the husband demonstrates that at some stage during the marriage the parties agreed that they should each obtain income protection insurance … Thereafter, the wife paid the premiums, seemingly from her income. Nonetheless, it was a joint decision to use family funds to obtain income protection.

We accept that this can be a relevant consideration but we do not accept the husband's contention that it follows … that there has been an equal contribution to the receipt and use of the benefits of the policy."

The Court referred (at [16]-[21]) to the authorities and said (from [22]):

"The upshot of these authorities is that a joint decision to take out insurance is a contribution by both parties. It is worth recording that in none of these cases was that contribution regarded as being anywhere close to equal.

[23] The primary judge recognised the disability insurance payment was received by the wife for being totally and permanently disabled. It was compensation for her not being in a position to receive income for what would otherwise have been the rest of her working life.

[24] It was, however, not used by the wife to support her over those years, but was entirely spent on

supporting the family prior to separation.

[25] Consistent with the above authorities, the primary judge found that this was a significant contribution by the wife.

[26] Although his Honour did not expressly refer to the joint decision to take out insurance, that does not mean that it was not taken into account. (…) "

Property – Husband granted sole occupancy of his pre-marital property – Wife also ordered to remove her caveat

In *Tailor* [2019] FamCA 383 (2 July 2019) McEvoy J an 83 year old wife and his 90 year old husband lived together in a house which he had owned for 30 years before their marriage. The husband had other assets and the wife owned an apartment. Conflict led to the wife obtaining an intervention order. The husband filed an application for sole occupation of the house which the wife opposed, arguing that the parties could continue living together. The wife lodged a caveat, alleging that she had stayed in the marriage due to an agreement that she would receive the house in the husband's will and that the husband had broken his promise by revoking that will.

The husband (who had undertaken through his lawyer not to deal with the property without notice) also sought an order for the removal of the wife's caveat, opposed by the wife who argued an equitable interest. The husband deposed ([23]) that "the presence of the wife … [wa]s causing him acute strain and distress in circumstances where he is extremely elderly and unwell, and that her presence cause[d] difficulty to his carers (…)".

McEvoy J granted sole occupancy, accepting the husband's submission [41] that a court must consider what is 'proper' for the purpose of s 114(1) and the Full Court's rationale in *Davis* [1982] FamCA 73 where it was said:

"All that is necessary … is that the Court should regard the situation between the parties as being such that it would not be reasonable to expect them to remain in the home together."

Concluding ([50]) that "in all the circumstances it would not be reasonable … to expect the parties to continue to reside in the … property together', the Court also ordered the wife to remove her caveat, saying ([61]-[73]) that the wife had failed to satisfy the court that "there [wa]s a serious question to be tried … to justify … the preservation of the status quo"; that it [wa]s … arguable that the caveator ha[d] a caveatable interest" and, if so, that "the balance of convenience favour[ed] the retention of the caveat".

Spousal maintenance – Section 44(3) time limit did not apply to wife's maintenance application where two prior orders had been satisfied

In *Blevins* [2019] FCCA 1923 (11 July 2019) Judge Baker heard an Initiating Application for spousal maintenance of $400 per week, filed 23 years after the parties separated (21 years after their divorce). The parties were 69 and 71. A final maintenance order was made in 1999, requiring the husband to pay $750 per month until 8 July 2009 and providing that "thereafter the wife shall be at liberty to seek the payment of further spousal maintenance".

In 2009 a further final order was made for lump sum maintenance of $275 000 which contained a notation that the payment would "finally determine any obligation by the former husband to provide … maintenance to the former wife". In 2017 the wife lost her ability to claim an aged pension, saying that she was reliant on her savings and superannuation, which did not generate enough income to support her. The husband sought dismissal of the application, arguing that the wife was out of time and that he would suffer prejudice if leave were granted, he having remarried and attempted to achieve finality through the previous orders.

The Court ([37]-[38]) cited *Atkins & Hunt* [2016] FamCAFC 230 (FC) (followed in *Lambton & Lambton (No. 2)* [2017] FamCAFC 230) in which it was said:

" … [Section] 44(3) does not impose an impediment to the wife pursuing an order for maintenance pursuant to s 74 … so as to seek the revival of 'an order previously made in proceedings with respect to the maintenance of a party'. Indeed … the Act contemplates applications for maintenance that sit squarely outside any 'finality' said to be effected by the earlier section."

Judge Baker concluded ([40]-[41]):

"The … maintenance order made in proceedings with respect to the maintenance of the applicant in 1999 is an order previously made. The order was properly made within time. I consider that the applicant therefore does not need to obtain leave pursuant to s 44(3) …

This means that potentially the respondent may be required to pay … maintenance, if he has the ability to pay and the applicant can demonstrate a need. This will be determined at trial." ■

Information

Robert Glade-Wright, author and editor of the Family Law Book familylawbook.com.au