Family Law Judgments

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

Children

Artificial conception – Sperm donor wins bid in High Court for fatherhood

In *Masson v Parsons* [2019] HCA 21 (19 June 2019) the High Court allowed Mr Masson's appeal against a declaration by the Full Court of the Family Court of Australia that he, as a sperm donor, was not a parent of the child. The appellant had provided sperm to the mother in the belief that he would father the child, would be named on the birth certificate and enjoy an ongoing role in the child's life.

The Full Court of the Family Court found that because the birth mother and her wife were not de facto partners at conception 60H of the *Family Law Act* did not apply. It was held that s79 of the *Judiciary Act 1903* (Cth) applied such that the *Status of Children Act 1996* (NSW) applied, which presumed that the donor father was not a parent. In making that decision, the Full Court held that s60H "leaves room" for the operation of State laws as to parentage, there being nothing in the *Family Law Act* that "otherwise provides".

Rejecting that decision, the High Court held that Part VII of the *Family Law Act* "leaves no room for the operation of contrary State or Territory provisions" ([45]); that the Full Court was wrong to invoke s79 of the *Judiciary Act* to "pick up" the NSW *Status of Children Act*; and that whether or not a person was a "parent" under the *Family Law Act* is a question of fact and degree, determined according to the "ordinary, contemporary understanding of a 'parent' and the relevant circumstances of the case at hand" ([29]).

Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ said ([3]) that the appellant "had an ongoing role in [the child's] financial support, health, education and general welfare and … enjoys what the primary judge [Cleary J] described as an extremely close and secure attachment relationship with the child", agreeing with Cleary J who said, relying on Cronin J's reasoning in Groth & Banks [2013] FamCA 430, that while the appellant did not qualify as a parent under s60H he qualifie[d] as a parent otherwise than under that provision ([24]).

Property

Long marriage – Husband's initial contribution of land soared in value due to rezoning

In *Jabour* [2019] FamCAFC 78 (10 May 2019) the Full Court (Alstergren CJ, Ryan & Aldridge JJ) allowed the wife's appeal against Judge Mercuri's contributions-based assessment of two-thirds: one third in favour of the husband after a 25-year marriage that produced three adult children.

The husband owned a half interest in three parcels of land (30, 30 and 44 acres) at cohabitation, having bought them from his father in 1975 for $26 000. After 11 years of marriage, he sold his interest in the 30 acre lots to acquire all of the 44 acre lot. Originally used for a farm, the property was rezoned for residential use in 2010 and was sold in October 2017 for $10 350 000. The net pool was $9 033 913 plus superannuation of $371 686.

At first instance, the Court found ([125] of its reasons) that the parties' contributions during cohabitation were equal; observed that the value of the property represented almost 90% of the non-super pool; cited *Williams* [2007] FamCA 313 and *Zappacosta* [1976] FamCA 56; and concluded that the husband "bringing … Property A … into the relationship has made a significant contribution which needs to be appropriately recognised in the division of property between the parties".

The Full Court ([31]) accepted the wife's submission that "the primary judge erred in seeking a nexus between contributions and a particular item of property when assessing contributions holistically over a long marriage and when considering the assets of the parties on a global basis … quarantining from the assessment of contributions, all of the other contributions made by the parties … ".

Before reassessing contributions at 53:47 in favour of the husband, the Full Court said (at [43]):

" … [T]he Court in Williams somewhat overstated the importance of the increase in value of a piece of property at the expense of 'the myriad of other contributions that each of the parties has made during the course of the relationship' (Williams at [26])."

Children

Final order made after discrete trial as to unacceptable risk at which father found to pose such a risk

In *Rodelgo & Blaine* [2019] FamCAFC 73 (26 April 2019) the Full Court (Strickland, Kent & Hogan JJ) dismissed the father's appeal against a parenting order made by Judge Jarrett after a discrete hearing as to whether the children were at risk of harm from either parent. After finding that the father did pose such a risk, Judge Jarrett directed each party to file written submissions as to whether a further hearing was necessary or final orders should be made based on the finding of risk ([34]).

The mother and ICL supported final orders. The father objected. Judge Jarrett made a final order that the mother have sole parental responsibility, that the children live with her and spend supervised time with the father not less than two hours each fortnight. The father appealed, arguing that he had been denied procedural fairness.

The Full Court said that the trial judge's approach "was permissible pursuant to Division 12A of Part VII of the Act" ([6]) and cited s69ZN as to the principles for conducting child-related proceedings, s69ZQ(1) by which a court "must decide which of the issues … require full investigation and hearing and which may be disposed of summarily ([7]) and s69ZR as to the court's power to make findings and orders at any stage" ([8]).

The Court continued at [35]-[36]:

" … [T]he trial of the discrete issue involved each of the parents and the[ir] witnesses … giving oral evidence and being cross-examined. … [T]he family report writer and … the expert psychiatrist were the only … witnesses who did not give oral evidence … but … [they did provide] written reports … [the facts contained in which] were not in contest.

[36] … [B]oth the mother and the ICL provided written submissions … that it was in the children's best interests for the Court to proceed to make final orders. Whilst … the father sought to have a further hearing … there was no agitation by [him] to the effect that he wanted the opportunity to cross-examine either of the expert witnesses before the Court proceeded to make final … orders. His written submissions … [were] largely a re-agitation of complaints about the mother … "

Children

Expressions "supervised time" and time spent "in the presence of" may be used interchangeably

In *Elias* [2019] FamCAFC 53 (28 March 2019) the Full Court (Ainslie-Wallace, Aldridge & Austin JJ) dismissed the father's appeal against a parenting order where it was found that he posed an unacceptable risk of harm for a child. It was ordered that the child live with the mother, that she have sole parental responsibility and that the father's time be supervised at a contact centre, or by the father's sister, or a combination of both. He appealed, arguing inconsistency between the Court referring to "supervised time" and time "in the presence of" another person.

The Full Court said (from [30]):

" … [W]e … do not regard the word 'supervision' or the phrase 'in the presence of' as terms of art that have different meanings. The ordinary meaning of both suggests that constant presence is required of a person overseeing the child or children spending time with the parent subject to the supervision order. More particularly, it is our view that in the ordinary course the phrase 'in the presence of' does not entail a lesser form of supervision which would permit, in the context of this case for example, the child to be left alone with the father, especially for significant periods of time. (…)

[40] … [Johnston J's reasons] strongly suggest that his Honour was using the word 'supervisors' and the phrase 'in the presence of' interchangeably. As they are not terms of art – or, for that matter, defined by the Act – this does not, contrary to the father's submission, demonstrate loose thinking on the part of the primary judge or that his Honour conflated two distinct concepts. (…)

[43] We consider that the phrase 'in the company of' is no different to 'in the presence of' – both connote constant presence. The primary judge clearly understood this to be so and used the words interchangeably as meaning the same thing. It is an arid exercise in semantics to seek to find a difference of substance in the primary judge's choice of words, let alone one which demonstrates appealable error."

Property

Court relies on family violence findings in earlier parenting case in support of a Kennon decision

In *Adair* [2019] FamCAFC 70 (29 April 2019) the Full Court (Strickland, Ryan & Austin JJ) dismissed the husband's appeal with costs of $15 000. Before ordering that three properties be transferred to the wife, Rees J had found that the wife's contributions should be given greater weight, having been more arduous as a result of the husband's violence. In previous parenting proceedings Hannam J had found that the husband had assaulted the wife and his three eldest daughters and posed an unacceptable risk of harm to those children such that he should spend no time with them. The Court relied on those findings in the property case. The husband appealed.

The Full Court said (from [35]):

"The husband acknowledged [that] the law does enable findings of one spouse's violent conduct towards the other to reflect in that way in property settlement orders (*Kennon* [1997] FamCA 27 … [but] contended it was impermissible for the primary judge to rely upon the prior findings … [in the parenting case].→

[36] … [T]he husband … asserted that Hannam J's findings about his past violent conduct were not admissible in the property … proceedings (s91 [EA]) … [nor] by reliance upon … res judicata or issue estoppel (s93(c) [EA]). … [H]is submissions must be rejected. (…)

[38] Section 91 … only operates to prevent the use of prior … findings of fact to prove the existence of facts which are the subject of dispute in subsequent proceedings. Before the primary judge it was not controversial [that] the husband had behaved violently towards the wife and the children, so the existence of that basal fact was not genuinely in issue. (…)

[39] Importantly, s190(1) [EA] enables a court, with the parties' consent, to dispense with … provisions of the *Evidence Act*, including Part 3.5, within which s91 is located. (…)

[41] The inference [to be drawn from the husband's failure to object to the admissibility of the prior reasons is that] the parties consented to the dispensation of Part 3.5 … in respect of Hannam J's findings."

Property

Affidavit of bookseller adduced by husband to value his book collection held inadmissible as expert evidence

In *Isaacson* [2019] FCCA 522 (6 March 2019) Judge Wilson considered a dispute in a property case as to the value of the husband's book collection, which the husband contended was worth $183 905 while the wife said it was worth $384 421. The husband's alleged expert (Mr C) filed a 97 page affidavit as to which the Court said (from [26]):

"Mr C gave as his occupation the following which he said entitled him to express an expert opinion in the case – 'I am the owner/proprietor of Company where I sell books and collectables. I specialise in old books. I opened my first book store in Suburb D in 1995 and have been selling and grading books for nearly 23 years. I currently hold a second-hand dealer's licence.' (…)

[28] That was the extent of Mr C's statement of his training, study or experience in the field of valuing second-hand books. (…)

[30] … I do not accept Mr C as an expert (…)

[31] Mr C did not depose to any study of books especially second-hand books that would take him into the realm of a specialist. … At all events Mr C did not depose to training or study that enabled him to express specialised knowledge in the value of books.…

[32] (…) It is true that Mr C deposed to opening a book store … and that he owned a book store. He then said he had sold and graded books for 23 years. He gave no information as to what he did in the course of selling or grading books. He gave no experience as to the method, technique, skills, requisite criteria … by which he could assert that his 'experience' … enabled me to receive his evidence as that of an expert (…)"

Upon it being held that the affidavit of the wife's alleged expert was also inadmissible due to the failure of that witness to attend for cross-examination, an order was made that the book collection be sold.

Property

Granting of application for leave to proceed out of time filed after respondent's death during case set aside for want of jurisdiction

In *Simonds* (deceased) & Coyle [2019] FamCAFC 47 (26 March 2019) Ms Coyle instituted a de facto financial cause in May 2017. Two months later her partner (Mr Simonds) died after filing a Response in which he alleged that separation occurred in October 2013, such that the application was out of time. In May 2018 (10 months after her partner's death) Ms Coyle filed an amended application for leave to proceed. Judge Egan found that separation did occur in October 2013 but under s44(6) of the *Family Law Act* granted Ms Coyle leave to continue the proceedings against the respondent's estate under s90SM(8). The executors' appeal to the Full Court (Strickland, Murphy & Kent JJ) was allowed unanimously and Ms Coyle's property application was dismissed.

Strickland J said (from [25]):

"… [H]is Honour did not have jurisdiction under s39B(1) … to entertain the Amended Initiating Application filed by the de facto wife … because there was no financial de facto cause instituted. (…)

[27] His Honour … failed to deal at all with the question of whether he had jurisdiction. Without addressing that issue his Honour simply proceeded on the basis that despite the death of the de facto husband, he could grant leave to the de facto wife to institute proceedings for property settlement (…)

[30] His Honour has also sought to grant leave 'nunc pro tunc'. That is a rule of practice and procedure to regularise the records of the court, and it cannot create jurisdiction where there is none. In other words, if there was no jurisdiction to entertain the [amended] application filed on 25 May 2018, the court still did not have jurisdiction at the time his Honour made the orders."

Property

Negative pool although husband was to retain business with annual turnover of $4m – Treatment of his director loans

In *Keating* [2019] FamCAFC 46 (21 March 2019) the Full Court (Ainslie-Wallace, Ryan and Austin JJ) allowed the wife's appeal against a property order made by Judge Baumann (as his Honour then was). Non-superannuation assets of $1 784 854 were valued at a deficit of $804 805 net of the husband's director loans relating to his failed tax venture. His business still traded, with an annual turnover of $4m. At first instance, contributions to non-super were

assessed at 70:30 favouring the husband due to his initial contribution of the business; contributions to superannuation ($710 824) being assessed as equal. No adjustment was made under s75(2).

The pool being assessed at a negative value, it was ordered that the wife receive her possessions, a super split of $119 000 and half of any payment to the husband as the result of a pending class action relating to the venture. The wife appealed, arguing that the trial judge did not engage with her argument that the husband's director loans were not matrimonial debt.

Ainslie-Wallace & Ryan JJ said ([23]-[24]):

" … [H]is Honour went no further than to say that the wife was 'aware' that the investment scheme was unsuccessful … Whether or not she was aware that the scheme had failed was irrelevant. The issue was whether she knew of and supported the husband's investment in the scheme to the extent that she should shoulder half of the resulting debt. In the result, his Honour's decision to fix both parties with responsibility for the debt was made ' … because [the debt] actually exists' (…)

[24] His Honour's finding that the wife was 'aware' that the investment scheme failed falls considerably short of engagement with the reasons why the wife said she ought not to be fixed with joint responsibility for the debt. The same applies to the finding that the debt 'actually exists'. Although parties would ordinarily be expected to take the good with the bad, there was no active engagement by the primary judge with the wife's case that the husband should bear sole responsibility for the debt and why."

Children

Father's contravention application was met by mother's application for variation of parenting order – Which should be heard first

In *Maddax & Danner* [2019] FamCAFC 38 (5 March 2019) a parenting order was made in 2016 in respect of a child, now aged 9. Subsequent to that order the father appealed, filed a parenting application which was summarily dismissed and withheld the child in Germany after a holiday causing the mother to apply for a return order under the Hague Child Abduction Convention. After the return of mother and child the father returned too 13 months later and filed an application alleging 100 contraventions by the mother who applied for variation of the order.

Judge Turner adjourned the contravention application for 16 weeks, sought a family report and suspended the father's time with the child (the child not having seen her father for 19 months). The father appealed, arguing that the Court erred in not dealing with his contravention application before suspending his time and adjourning the case.

In dismissing the appeal, Murphy J said (from [21]):

"… An … adjournment is a procedural order and … discretionary. …

[22] … [T]he father's argument seems to suggest that adjourning his contravention application involved an error of principle … that her Honour was bound to deal with his … application on that day and, it seems, in priority to any other application. (…)

[48] It will be observed [from s70NBA(1) of the *Family Law Act*] that an inquiry into the variation of parenting orders can take place irrespective of whether a contravention is established or not. That is in my view important. It places the best interests of children as central not only to parenting orders but also to a consideration of how asserted or established contraventions might be dealt with. (…)

[52] The powers given to the Court in applying [the] principles [enunciated in s69ZN(6) and (7) as to 'principles for conducting child-related proceedings'] are referenced as mandatory duties contained in s69ZQ. In particular the Court must 'decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily' and 'decide the order in which the issues are to be decided' (…)

[53] The assertion by the father that her Honour erred, as a matter of principle, by adjourning his contravention application must be rejected.

Information

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