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Précis Paper

Recent Developments in Family Law

A discussion of important recent Court decisions and legislative changes in the area of family law

Discussion Includes

- *Elford & Elford* [2016] FLC 93-694
- *Chancellor & McCoy* [2016] FAMCAFC 256
- *Calvin & McTier* [2017] FamCAFC 125
- *Welch & Abney (No. 2)* [2015] FamCA 1116
- *Surridge & Surridge* [2017] FamCAFC 10
- *Morein & Morein* [2017] FamCA 510
- *Searson & Searson* [2017] FamCAFC 119
- Recent changes to the *Family Law Act 1975* (Cth)
- Total and Permanent Disability (TPD) claims and Hurt on Duty pensions, particularly as they arise in relation to members of the emergency services

Précis Paper

Recent Developments in Family Law

1. In this edition of BenchTV, Chris Othen (Barrister, Waratah Chambers, Sydney) and Catherine Spain (Barrister, Waratah Chambers, Sydney) discuss important developments in family law, including recent Court decisions, and changes to the *Family Law Act 1975* (Cth).

Elford & Elford [2016] FLC 93-694

2. The parties in this case started cohabiting in 2003, until their separation in 2012. The husband had adult children from a previous relationship. The wife had younger children from a previous relationship, who came to live with her and her new partner.

3. In 2004, the husband won the lottery. He won $622,000, which he put into a term deposit. He did not touch this term deposit until after the separation.

4. When the parties separated, the wife made an application for an adjustment of property. She argued that the money from the lottery win was essentially a contribution on behalf of both of them. He argued that it was a contribution on his behalf alone.

5. At first instance, His Honour Judge Roberts said that it was a contribution on the husband's behalf alone. He reasoned that this was because the parties had kept their finances separate throughout the relationship, for example:
    - they did not have a joint bank account
    - the wife had received money from the sale of a property prior to the relationship that she kept herself
    - the husband had received money from an inheritance that he kept himself

6. The judge also looked at the manner in which the lottery ticket was purchased. The husband had been purchasing lottery tickets using the exact same numbers for 10 years prior to his win. He had an account from which he withdrew funds to purchase lottery tickets each week, and into which he put funds from any winnings he might have made. The wife did not make any contributions to this account.

7. The wife appealed to the Full Court. On appeal, the Court rejected the wife's argument that there is a notion of community of property in Australian law. It found that the mere fact that the parties were married did not mean that they owned their assets jointly. So the husband's contribution in terms of the lottery win was a contribution on his part alone.

8. The Court upheld the earlier finding that the husband get 90% of the property pool, and the wife get 10%. In this case, the lottery win was a major part of the assets to be divided.

Chancellor & McCoy [2016] FAMCAFC 256

9. This case involved a de facto same-sex relationship which had lasted 27 years. The couple kept their finances entirely separate, for example:
   - they had separate bank accounts
   - they each bought properties separately under their own names
   - neither one of them made any provision for the other financially (like in a will, or life insurance policy, for example)

10. At the end of the 27-year relationship, the respondent had assets worth twice as much as those of the applicant.

11. The applicant was arguing for a property adjustment.

12. Her Honour determined, following *Stanford v Stanford* [2012] HCA 52, that it would not be just or equitable to make any order at all altering property interests in this case. Her Honour referred to the couple's separation of finances to support the finding that there should not be any property adjustment. She also held that it would be unfair if the applicant were able take advantage of the fact that the respondent had saved and invested more wisely than she had done herself.

13. The applicant appealed to the Full Court. The Full Court upheld the decision of Justice Turner, and agreed that it would not be just or equitable to make any order altering the property interests.

14. This is an important case to be considered by solicitors when giving advice to clients entering into de facto relationships in relation to how they should conduct their financial affairs during the relationship. A key feature of this case was the Court's close attention to detail in the evidence in proving the separation of finances.

Calvin & McTier [2017] FamCAFC 125

15. This case involved an attempt to use *Stanford v Stanford* [2012] HCA 52 to change the law in respect of how we deal with post-separation contributions.

16. In this case, a husband received an inheritance from his father's estate four years after separation. He spent some of that money, and by the time it came to the hearing, the amount that remained was the equivalent of about 32% of the property pool.

17. At the hearing, the wife argued that the inheritance should be included as part of the property pool. The husband argued that it should be quarantined on the basis that there was no connection between the inheritance itself and the marriage.

18. The trial judge included the inheritance in the property pool. He awarded the husband 65% of the entire asset pool, and the wife, 35%.

19. The husband appealed this decision, essentially arguing the same thing - that the inheritance be quarantined, because in this case, there was no connection between the inheritance and the marriage, so there should be no order made in relation to that particular item of property. The husband argued that, in accordance with Stanford, it had to be just and equitable to make an order in relation to a particular item of property.

20. The Full Court rejected this argument. The Court held that *Stanford v Stanford* involved a question as to whether there should be an order for the division of property at all, not a question of division of property in relation to particular items.

21. The Court also upheld some earlier decisions, like *Farmer v Bramley* (2000) FLC 93-060, for example. It was held in *Farmer v Bramley* that it is up to the discretion of the trial judge to decide whether to quarantine a particular asset (such as an inheritance received post-separation), or include it as part of the property pool. In these earlier decisions, the Courts did not consider the timing of the introduction of the property to be the sole determinant; they considered it necessary also to look at contributions made throughout the period of the relationship.

22. The Full Court in the case of *Bonnici and Bonnici* [1992] FLC 92-272 also pointed out the discretionary nature of the decision that the trial judge has to make. *Bonnici and Bonnici* is the long-standing authority on post-separation inheritances.

23. So the attempt in the case of *Calvin & McTier* to overturn the longstanding law in relation to post-separation contributions failed.

Two interesting decisions handed down recently in relation to Total and Permanent Disability (TPD) claims and Hurt on Duty pensions, particularly as they arise in relation to members of the emergency services

24. A problem frequently encountered in practice is:

- what to do with a valuable pension scheme that is paying out an income stream
- how to assess contributions made to it
- how to assess its value

It is a difficult problem, because often the person receiving the income stream needs it, but the person not receiving it has made contributions to it.

Welch & Abney (No. 2) [2015] FamCA 1116

25. The wife in this case was receiving a TPD entitlement in the form of an income stream. It could not be commuted to a lump sum, or cashed in; it had to be taken as an income stream. The wife was receiving this income stream monthly, and it was subject to tax.

26. The income stream (because it was a superannuation entitlement) was valued in accordance with the Regulations. The capital needed to be invested by a person in order to reduce an income stream for the life of that person is looked at when income streams are valued for the purposes of the Regulations. This produces very large figures. In this case, it was about 35% of the asset pool (around $1 million).

27. No one sought a splitting order in this case. The wife retained her pension, but she retained it at the capital value in the assessment of contributions in the assessment of the asset pool. So she received 35%, made up of her pension, and little else.

28. It went to appeal, at which point the Full Court said there were two problems:
    1. No regard had been given to the contribution made by the wife of the lump sum figure - a contribution that ought to have been given more weight
    2. The Full Court said that it was not a capital sum available to her – she could not commute it and produce a lump sum of money *because it was an income stream*, and the nature of it being an income stream has to be taken into consideration.

    So the original decision was overturned.

Surridge & Surridge [2017] FamCAFC 10

29. This case involved a female police officer who was hurt on duty.

30. The officer was receiving approximately $50,000 per year, as a monthly income, it was subject to tax, and she was entitled to it for life. In this case, the husband was able to earn a very significant income (approximately $340,000 a year). The wife receiving the pension was responsible for the care of the two children of the marriage.

31. The husband in this case sought a superannuation splitting order. Again, the income stream was valued for the purposes of the Regulations, and again, it came out as a very large figure of over $1 million.

32. The Full Court found the trial judge was correct to reject the superannuation splitting arrangement, because it was producing income that the wife needed.

33. The effect of splitting a superannuation entitlement that produces an income stream is a reduction of the income of the person otherwise receiving the pension.

34. But the Full Court found that the trial judge, in considering the capital value of the scheme as valued in accordance with the Regulations:
    1. did not give sufficient consideration to the contribution made by the wife, and
    2. failed to have regard, in the property adjustment proceedings, to the fact that the pension was an income stream, not a commutable lump sum.

35. So again, the original decision in this case was overturned on appeal.

36. Interestingly, the Full Court went on to re-exercise the discretion, and gave some guidance about how to approach such a case. Essentially, the Full Court's approach was to not treat the pension at its capitalised value, but to instead treat it as a pension in the hands of the wife, effectively at the third stage. The Court went on to say that it was not disregarding that there is a way of calculating a lump sum value for such an income stream, and referred to the fact that we do not normally do that with income from other sources.

37. Cases such as these still raise difficult questions:
    1. How do you fairly assess contributions when the income is necessary for someone's support?
    2. How to have regard to that with the other assets?

38. The case offers practitioners, in advising clients as to what might occur in a case like this, insight into the value of properly thinking about the nature of these pensions in payment, and not getting too excited when they come out with a very high capital value.

<u>Recent changes to the Family Law Act 1975 (Cth)</u>

39. Arbitration has been available to parties for a long time under the Family Law Act.

40. The Chief Justice of the Family Court has recently said that there could be more use of arbitration as a way of reducing the burden on the Family Court system, but the take-up of it has been, perhaps surprisingly, low (although it does seem to be increasing).

41. The reason for its slow take-up has been identified as the lack of access to Court coercive processes to obtain documents and information from both parties to the case, and third parties.

42. Recent changes to the Family Law Act now permit a person to have their case arbitrated without the sanction of a judge, or court proceedings. But if in that process a party cannot obtain the documents it needs from another party, it can go to the Court as a 'stand-alone action' just to use the Court's coercive processes to support the arbitration. These changes were made in the hope of making arbitration more attractive as an alternative to Court proceedings.

43. Under section 13E of the Family Law Act, the Court can be asked to refer cases to arbitration.

44. The organisation AIFLAM accredits lawyers to be arbitrators. The referral is voluntary - it takes place by agreement. Parenting cases cannot be referred to arbitration - only financial cases can be referred to arbitration.

45. Once the referral has taken place, the parties enter into an arbitration agreement with the arbitrator, which sets out how much it will cost, and what is expected of parties in preparing for arbitration. It is not dissimilar to the process parties go through with a Court Registrar. The process if flexible, in the sense that it is collaborative, and agreed to by private arrangement. However, once the matter is in the hands of the arbitrator, parties must comply with the arbitrator's requirements, much like they must with a judge's. But it occurs privately and quickly, and parties have a lot more control over the outcome. In many ways the process of arbitration is similar to that of the Court.

46. Once a decision has been made, the arbitrator writes out an award (similar to a Court order) setting out directions to parties, and reasons for the award (similar to a judgment). The award can then be registered, at which point it will have the force of a Court order, and is capable of being enforced like a Court order.

47. A party who is unhappy with the award has two options:

    - have the award reviewed by a judge on the basis that an error of law has been made

- exercise the right to have the award set aside on the basis of how the arbitration was conducted

48. Under s 13K of the Family Law Act, alleged bias or lack of procedural fairness are grounds to apply for the award to be set aside by a judge. Similarly under s 79A, miscarriages of justice alleged to have occurred by reason of fraud, duress, or suppression of evidence, are grounds to apply for the award to be set aside

Parenting and the law: when should sole parental responsibility orders be made?

Morein & Morein [2017] FamCA 510

49. Often in cases where there is high conflict between the parties, the argument for sole parental responsibility is made in favour of one of those parties, on the basis that it would be nearly impossible for the parties to make long-term decisions jointly.

50. Justice Rees in this case, however, made an order for equal shared parental responsibility for the parties in high conflict, reasoning that to give one party sole parental responsibility would be to inflame that conflict.

51. In this case, the parties had three children. The evidence was that all three children had been to therapists over the years as a result of suffering anxiety and depression due to the high conflict between their parents.

52. It was never in doubt that the children would live with their mother. The issue in contention was the amount of time the children would spend with their father.

53. Her Honour decided to make an order that the parents share parental responsibility for two main reasons:
    - because the children might suffer further psychological harm if, instead, one party was given sole responsibility, and
    - because the parents had managed to reach agreement on some major issues in the past.

    Courts often say that is it to the children's benefit to have both their parents involved in decisions about the important aspects of their lives.

54. Under s 65DAA (5) of the *Family Law Act*, the Court must consider if it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each

parent in certain circumstances. Equal time arrangements often fail to work in situations where there is a high level conflict between the parties. Her Honour distinguishes between day-to-day decision-making from long-term decision-making in respect of this.

Searson & Searson [2017] FamCAFC 119

55. This case considered the rule in *Rice v Asplund* (1979) FLC 90-725 – that is, the need to show a significant change of circumstances before reopening parenting orders – and involved a consent order.

56. The parties were able, after litigation, to come to an agreement based on both parents living in Victoria.

57. 18 months later, the mother filed an application seeking permission to relocate. She said circumstances had changed since she had entered into the consent order. She claimed those circumstances to be her having developed a relationship with a person living in another state, and the financial struggle she faced in her current location. The father claimed that those circumstances already existed when the consent orders were made,

58. At the Federal Circuit Court, Her Honour Judge Harland accepted the father's submissions. Her Honour found that no change or circumstances sufficient to change the orders had been made out. The mother appealed, and the case went to the Full Court.

59. His Honour Justice Murphy referred back to the important decision of Justice Warnick in *Rice v Asplund,* and all the familiar principles in that decision were affirmed in this case. They were:

- firstly, the best interest principle
- secondly, that the nature and extent of change is closely connected with how the rule is applied
- thirdly, that the decision to dismiss an application as a preliminary matter is a decision on the merits

60. Ultimately, His Honour distilled the various authorities on the issue down to a question of whether the applicant had made out a prima facie case for changed circumstances.

61. If the applicant successfully makes out a prima facie case for changed circumstances, then there would be a further question of whether it was sufficient change to justify changing the orders.

62. Ultimately, the case was decided on its facts, and the appeal was upheld. It was an opportunity for those familiar principles in *Rice v Asplund* to be restated.

BIOGRAPHY

Chris Othen

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Chris was admitted as solicitor in England in 1999 and practiced primarily in family law. Chris was admitted to the Bar in 2011 and was accredited as a specialist in family law by the Law Society of the NSW. His reputation as a specialist in family law has also been recognised by his recommendation in Doyle's Guide as a Leading Family Law Barrister in Australia in 2017. Despite practicing primarily as an advocate, Chris is also accredited as an arbitrator of financial disputes under the Family Law Act.

Catherine Spain

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Catherine was admitted as a solicitor in NSW in 1994 and called to the bar in 2012, specialising in family law proceedings in the Federal Circuit Court of Australia and the Family Court of Australia. Catherine has been a member of the NSW Bar Association Family Law Committee and a contributing editor to the Lexis Nexis Family Law Reports. She also publishes articles in the NSW Law Society Journal and presents CLE Seminars to family law solicitors.

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