THE HIGH COURT ASKS "WHAT IS A PARENT?" AND OTHER RECENT CASES

by

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About the Presenter ….

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Chris Dimock is an Accredited Family Law Specialist.

He first practised as a Solicitor in the United Kingdom before moving to Australia in 1983. He has since been practising exclusively in the Family Law area in this country.

In 1983 he joined Sly & Russell, as it then was, assuming responsibility for all their family law matters. He joined Cutler Hughes & Harris in 1989, where he became a Partner and headed up their Family Law Department. He became an Accredited Specialist in Family Law when the Law Society of New South Wales introduced its Accreditation Scheme in 1993.

Chris became a sole practitioner in November 2002, when he established the firm of Dimocks Family Lawyers.

Chris is a member of the Family Law Section of the Law Council of Australia and is a former Convenor of the Family Law Committee of the City of Sydney Law Society.

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1. *Masson v Parsons* [2019] HCA 21

1.1. Significance

In this case the High Court was asked to determine whether a sperm donor could be a parent, in circumstances where there is no definition of what is a "parent" in the *Family Law Act 1975* ("the FLA").

1.2. The Facts

In 2006 the appellant provided his semen to a close friend to artificially inseminate herself. At the time he believed that he would be involved in the child's life, by fathering the child and providing financial support. His name was entered on the birth certificate. The child lived with the mother and her female partner. The donor, however, continued to play an ongoing role in the child's life, financially supporting the child and "*enjoying a close and secure attachment relationship with the child"*.

In 2015, the mother and her partner decided that they wished to relocate to New Zealand with the child. The donor filed an application in the Family Court, seeking to restrain the mother from relocating. He also sought:

- shared parental responsibility; and
- for the child to spend substantial and significant time with him.

1.3. Earlier Decisions

Cleary J. found that the donor provided his genetic material for the express purpose of fathering the child, and that he expected to help the parent by providing financial support and care. She concluded that s60H of the FLA is not an exhaustive list of the persons who may qualify as a parent, and that the donor was a parent of the child within the ordinary meaning of the word "parent".

In the Full Court, Thackray J. - contrary to the primary judge's reasoning - held that Section 14 *Status of Children Act* (NSW) applied, as if it was a law of the Commonwealth.

S 14 of the Status of Children Act reads:

> *(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed NOT to be the father of any child born as a result of the pregnancy.*
>
> *Any presumption arising under subsections (1) – (3) is irrebuttable.*

The Full Court decided that the appellant was to be irrebuttably presumed *not* to be the parent of the child.

1.4. The High Court Decision

In a majority judgment, the High Court held that state laws applied only where there was a gap in the law governing the exercise of federal jurisdiction. However, the Court found that there was no gap here, and that the FLA provides comprehensively for how the Family Court is to determine who is a parent.

The Court also dismissed any suggestion that the father was merely a sperm donor and stated:

> *"To charactise the biological father of a child as a sperm donor suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case".*

1.5. Conclusion

The High Court found that ss 60G and 60H of the FLA not exhaustive of the persons who qualify as parents of children born of artificial conception.

A person may qualify as a parent of a child born if the person is a parent of the child within the ordinary meaning of the word. According to the High

Court, the word “parent” is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word “parent” and the relevant facts and circumstances of the case at hand. It found that the donor was a parent within the meaning of the FLA.

2. *Frederick & Frederick* [2019] Fam CAFC 87

2.1. Significance

This was an appeal from a decision of a Federal Circuit Court Judge, who had upheld the husband’s application seeking a declaration that a Financial Agreement was valid and binding. The wife had applied to set aside the Financial Agreement on several grounds, one of which was pursuant to Section 90K(1)(d) of the Act, which relevantly provides as follows:

> **“90K Circumstances in which Court may set aside a financial agreement or termination agreement**
>
> *“(1) A court may make an order setting aside a financial agreement… if, and only if, the court is satisfied that: …*
>
> *(d) since the making of the agreement, a material change in the circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child … a party to the agreement will suffer hardship if the court does not set the agreement aside…”*

2.2. The Facts

The case concerned a Section 90B (pre-nuptial) Agreement that was entered into in 2007, the parties marrying later that year. They had two children, the eldest of whom was in 2009 diagnosed with atypical autism and mild functional impairment. At age 7, the child was still non-verbal and required a high level of care.

The Agreement was by all accounts poorly-drafted, and limited the wife's entitlements to a share of any increase in the value of the assets listed in the Schedule to the Agreement. The Schedule ascribed certain values to three parcels of real estate.

The trial Judge correctly accepted that the relevant test under s90K(1)(d) of the Act was to determine hardship by undertaking *"some comparison between the position of the child, or the person with caring responsibility, if the agreement remains in place and the position of that child or person if the agreement is set aside"*.[1]

At the trial, there had been no evidence as to the value of the three real properties, other than the values ascribed by the husband to the properties in his Financial Statement, and some concessions made by him in cross-examination. The trial judge described this evidence as "*little better than conjecture".* He dismissed the wife's application to set aside the agreement because the lack of evidence as to the current values meant that the Court was unable to compare *"the different positions, if the financial agreement was, or was not, set aside".*

2.3. The appeal

On appeal, the Full Court found that:

- the insertion of values for the real estate in the schedule to an Agreement was unremarkable; and
- it was clearly intended by the parties that any increase in value would be calculated by reference to the values nominated in the Schedule.

The husband was accordingly estopped from disputing facts that were agreed at the time that the Agreement was entered into, and upon which the parties subsequently based their conduct.

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1 *Fewster & Drake* (2016) FLC93-745.

The Full Court also found that the husband's evidence as to the increased values of the properties should have been given at least some weight, though it would inevitably carry less weight than that of a professional valuer.

In conclusion, the Court found on the evidence that there had been an increase in value of the relevant assets of up to $583,599, based on the values in the husband's Financial Statement. If the agreement was set aside, the total value of the assets ($5,015,984) would be available for division. It found that the wife's contributions, together with the Section 75(2) factors arising from her care of the child, could not be adequately compensated out of the smaller pool. It therefore found that hardship had been established, and set aside the Agreement.

3. *Jabour & Jabour* [2019] Fam CAFC 78

3.1. Significance

This case involved a number of challenges to the trial judge's assessment of contributions in property proceedings: firstly because of the weight that he attached to the husband's introduction of an asset, at the start of a long marriage; and second, in his treatment of what was in effect a "windfall".

3.2. The Facts

The parties were married for about 24 years. The husband, at the time of marriage, had a one-half interest in three blocks of land, that his father had gifted to him. Seven years into the marriage, in 1998 the husband and his co-owner divided two of the blocks of land. In 2001, the husband sold his interest in the two blocks of land for $215,000. From the proceeds, the husband acquired the co-owner's interest in the third block, for $105,000.

In 2010, the husband's block of land was rezoned to permit residential development, resulting in a significant increase in its value.

At trial, the husband's property was valued at $10,350,000 and represented more than 90% of the total asset pool.

The trial judge found that, leaving aside the husband's introduction of the family property, the parties' contributions were equal. However, having regard to the husband's *"significant contribution"* of the family property at the time of the marriage, he assessed the parties' contributions as being 66% in the husband's favour, and 34% to the wife. No adjustment was sought or made pursuant to s75(2) of the Act.

3.3. The Appeal

The appeal was largely centred on the trial judge's treatment of the husband's initial contribution.

Both the trial judge and the Full Court referred to the Full Court decision in *Pierce v Pierce* (1999) FLC92-844, the import of which was that *"the weight to be attached to an initial contribution must be assessed against the rubric of all of the contributions, both financial and non-financial, made by the parties over the course of their relationship"*.

The Full Court found that the trial judge had incorrectly weighed the myriad of other contributions made by the parties over 24 years of marriage on the one hand, against the contribution made by the husband by his introduction of the family property, on the other: instead, he should have treated that initial financial contribution as one of the myriad of contributions that were made. It noted the wife's evidence that when the parties became aware of the possibility of rezoning, several years before it occurred, they decided to delay the sale of the husband's property and in the meantime lived a "*modest lifestyle*". The Full Court found that the trial judge's approach had the effect of minimising the many other contributions that were made by a couple who appeared to work very hard.

In relation to the sudden increase in the value of the husband's property, caused by the rezoning, the Full Court pointed to a long list of authorities

which indicated that a windfall such as this, or a lottery win, should be regarded as a contribution by both parties[2].

The Full Court concluded that her Honour had misdirected herself as to the principles to be applied, and upheld the wife's appeal. The Court re-exercised the discretion by varying the asset split from 66/34 in favour of the husband, to a 53/47 split in his favour. This led to a differential in the husband's favour of $542,035, "*which appropriately reflects the various contributions".*

4. *Sfakianakis & Sfakianakis* [2019] Fam CAFC 54

4.1. Significance

This decision of the Full Court contains a useful synopsis of the various types of costs orders that can be made pursuant to s117 of the Act.

4.2. The Facts

The husband had been wholly unsuccessful in his appeal. The wife sought an order that he pay her costs of the appeal. She relied in part on an offer, made some 5 months before the appeal was heard, to settle the appeal for a payment of $580,000. The husband had not accepted the offer, and the primary judge had ultimately ordered him to pay to the wife the sum of $588,726 by way of property settlement.

4.3. The Decision

The Full Court delivered a judgment in which it noted that the following types of costs orders could be made:

- for assessment on a party and party basis;
- for assessment on a trustee basis (more generous than party and party); and

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2 See also, *Zappacosta v Zappacosta* (1976) FLC90-089.

- the court could also order costs in a fixed sum, describing such a costs order as a *"special costs order"*.

A special costs order could be assessed by reference to a particular period of time, or a set of events.

The Court noted with approval the decision in *Colgate–Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, in which the court indicated that indemnity costs orders were appropriate where proceedings had been conducted *"in wilful disregard of known facts or clearly established law",* such as to cause "*undue prolongation of a case by groundless contentions".*

In the present case, the court decided that although the wife should receive an award of costs greater than party and party, an award of indemnity costs was not appropriate. It found that the husband's refusal of the offer of compromise was not, by itself, sufficient to justify an order for indemnity costs. Such orders were, the court noted, exceptional. [3]

However, the Court decided that in the circumstances of the case a special costs order was warranted and so it made a special costs order against the husband in an amount of $21,985.83.

5. *Blevins and Blevins* [2019] FCCA 1923

5.1. Significance

In this case the court considered whether or not a wife required leave to commence proceedings under s44(3) FLA. She had filed an application for spousal maintenance, about 22 years following a divorce order.

Relevantly, s44(3) requires than an application for the leave of the Court be made, if the following proceedings are to be commenced more than 12 months after a divorce order takes effect:

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3 The Court referenced, as an example, *D & D (costs) No. 2* [2010] FLC93-435

"… proceedings of a kind referred to in paragraph (c), (caa), (ca) or (cb) of the definition of ***matrimonial cause*** *in sub section 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party…"*

5.2. The Facts

The parties had separated in 1996, and divorced in 1998. The wife was 69, the husband 71.

An order was made in 1999 requiring the husband to pay spousal maintenance of $750 per month until July 2009. At that time the wife made a further application for maintenance, and a final order was made requiring the husband to pay her lump sum maintenance of $275,000. The orders contained a notation that the orders "*finally determined any obligation by the former husband to provide spouse maintenance to the former wife".*

In 2019, the wife filed a further application seeking maintenance of $400 weekly. The husband sought the dismissal of her application on the basis that the wife was out of time. He argued that the 2009 order was final, and that a further order for spousal maintenance against him, would cause him hardship.

5.3. The Decision

Judge Baker found at the outset that since there was no spousal maintenance order in force, s83 (which gives the court power to vary a maintenance order) did not apply.

However, the judge followed the Full Court's decision in *Atkins & Hunt* (2016) FamCAFC 230, in which the court found that the limitation period of 12 months in s44(3) did not apply to a matter where there had been "*an order previously made*" for the payment of maintenance. He found that

the 1999 order was “an order previously made”, which had properly been made within time. He therefore found that the wife did not require leave pursuant to s44(3), and that the husband could be required to pay further maintenance.

6. *Ellwood & Ravenhill* [2019] FAM CAFC 153

6.1. The Question

How critical is the requirement imposed by s60I FLA for persons to attend for family dispute resolution, before applying for Parenting Orders?

6.2. The Facts

Consent Parenting Orders had been entered into in 2008, but as the children grew older, one of them moved to an equal-time arrangement, whilst the 15 year old son chose not to live with the mother at all.

In April 2017, the mother had filed a Contravention Application, which was settled by consent.

In October 2018 the father commenced proceedings for parenting orders. In his Application he indicated that he had an s60I Certificate, but this had been obtained for the contravention proceedings and predated his Application by more than 12 months. The mother sought that the father’s Application be dismissed, due to his non-compliance with s60I.

The trial judge nonetheless proceeded to make parenting orders.

6.3. The Appeal

The mother appealed, seeking that the parenting orders be set aside and the husband’s Application dismissed. Both parties were self-represented at the Appeal.

The trial judge had adopted a adopt a pragmatic approach, noting that the existing parenting orders were not being followed and that both parties acknowledged that changes to those orders were necessary. She said to

the wife, "*Can we get over the subsection 9 provisions. I mean, at the end of the day, let's not talk academics…".* However, she did not give reasons, when dismissing the mother's application.

In his judgment, Judge Kent rejected the mother's argument that the court did not have jurisdiction to make the orders made by the primary judge, due to the lack of a s60I Certificate. He noted that s60I (11) expressly provides that the validity of an order made in parenting proceedings is not "*affected by failure to comply with sub section (7)"*. However his Honour then held that the failure to comply with S60I (7) may amount to legal error, such that it could be set aside on appeal.

That is what he proceeded to do. He noted in particular:

- that the Explanatory Memorandum to the original Bill referred to S60I(7) as *"the key operational provision*"; and
- that the primary judge did not address the question raised by the mother and did not even consider whether any exceptions to the requirement for an S60I Certificate applied.

7. *Coulter & Coulter (No. 2)* [2019] FCCA 1290

7.1. Significance

The case arose from a father's application to exclude certain evidence that the mother proposed to introduce at trial. His application was made under s135 *Evidence Act 1995* (Cth), whereby a court can refuse to admit evidence if its probative value is "*substantially outweighed"* by the danger that the evidence might be unfairly prejudicial; misleading or confusing; or cause or result in undue waste of time.

Section 138 of that Act meanwhile gives a court the discretion to admit evidence that was obtained *"improperly or in contravention of an Australian Law"*.

7.2. The Facts

The evidence included two video recordings made by the mother at two separate handovers in June 2015, and two audio recordings of conversations between the father and the children. All of the recordings were made without the father's knowledge.

The video recordings were made by the mother at her home, where she had installed a video recording device in her hallway. It was not clear how the mother had come to make the audio recordings. The substantive proceedings included allegations by the wife of physical violence and controlling behaviour by the father.

7.3. The Decision

The judge found that the mother had legitimate concerns about her and the children's safety. He found that it was not improper for the mother to have made the video recordings of the two handovers. He also found that they were not made in contravention of South Australian Law, in particular the *Listening and Surveillance Devices Act 1976* (SA), which allows a recording which is "*for the protection of the lawful interests of that person".*

However, the judge found that the audio recordings amounted to a *"serious invasion of the father's privacy and the rights of the children"*. He noted that "*the ubiquity of smart phones means that every person potentially has a tracking device in their pocket*", and that if the court were to readily admit evidence that was otherwise improperly or illegally obtained, there would be *"widespread covert recording of private conversations*" leading to *"the unnecessary prolongation of disputes"*.

He allowed the video recording of the changeovers into evidence, but disallowed the voice recordings.

8. *Zubcic & Zubcic* [2019] FLC 93-918

8.1. Significance

The case concerned an appeal from final property orders that were made by Rees J.

Multiple grounds of appeal were argued before the Full Court, but only one was found to have merit. That concerned the trial Judge's interpretation of certain sub-paragraphs of Section 75(2) of the Act, which requires the Court to take into account the following sub-paragraphs in particular:

> *"(e) the responsibilities of either party to support any other person…*
> *(l) the need to protect a party who wishes to continue that party's role as a parent; and…*
> *(o) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account".*

8.2. The Facts

The parties lived together for more than 22 years and during their marriage had three children, the youngest of whom (at the time of the trial) was 19 years of age. G had been diagnosed with autism in 2001, and following the parties' separation in 2013, continued to live with the wife.

The trial judge found that the net pool of assets amounted to $4,857,729 and made orders which provided for the wife to receive 55% of the net pool, amounting to $2,671,750. From the husband's 45% share, the judge ordered him to pay $65,000 to the wife, by way of adult child maintenance.

In assessing the parties' contributions, Her Honour found that, post-separation, the wife had been the sole carer for the child, and that *"from mid-2013 onwards, it is the wife who has been responsible for G's every need, emotional, physical and financial".* She took into account the wife's future responsibility for the care of G. However, ultimately she found that it

was only the wife's *financial responsibility* of caring for G that could be taken into account; and, given that she was proposing to make an order for adult child maintenance, she decided that no adjustment should be made in favour of the wife under Section 75(2) FLA.

8.3. The Decision

The Full Court reaffirmed that when assessing contributions under Section 79(4) of the Act, the Court could only look at contributions up to the date of the hearing, leaving consideration of the relevant factors arising thereafter and into the future, to be addressed under s75(2). [4]

The Court also affirmed that there was no basis in sub-paragraphs (e), (l) or (o) to limit the responsibility to financial responsibility, citing previous Decisions of the Full Court in which S75(2)(o) had been applied in property proceedings involving a parent with ongoing care of a significantly disabled adult child. [5]

The Court said that s75(2)(o) was *"expressed in the widest terms and forms part of the suite of provisions that recognises more than merely financial matters"*. The trial judge had been in error by not taking into account all aspects of the wife's ongoing responsibility to care for G.

The Full Court proceeded to re-exercise the discretion. It found that the adult child's needs were substantial and that there "*clearly needs to be an allowance to the wife because she continues to be responsible for G's physical and emotional needs".* It accordingly reversed a 5% adjustment in favour of the husband by reason of his greater contributions, to arrive at an equal division of the net asset pool, thereby effectively deciding that a 5% adjustment should be made in favour of the wife, by reason of s75(2).

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4 The Full-Court referenced, as an example, *Pittman & Pittman* (2010) FLC 93-430

5 E.g. Zaruba & Zaruba (2017) FLC 93-776; *Lint & Lint* [2011] Fam CAFC115

9. *Phe & Leng* [2019] Fam CAFC 17

9.1. Significance

Here the Full Court considered the admissibility pursuant to s131(1) of the *Evidence Act 1995* (Cth) of statements made during the course of negotiations.

Section 131 of the *Evidence Act* is in the following terms:

"(1) Evidence is not to be adduced of:
(a) a communication that is made between the persons in dispute, or between one or more persons in dispute and a third party in connection with an attempt to negotiate a settlement of the dispute; or
(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute".

However, s131(2) of the *Evidence Act* states that Subsection (1) does not apply if:

"(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence…"

9.2. The Facts

The wife's appeal arose from property proceedings, in which the husband had contended that the pool included a loan by his father of $145,000. This sum had been applied to the purchase of the former matrimonial home. The wife denied that such a loan existed.

The evidence at the trial had included a text message from the wife to the husband's sister, stating that, provided their child was allowed to return to Sydney, "*I am willing to give up everything in Taiwan and return the $3,000,000 they had put into the… property to show my sincerity*". The trial judge had inferred from the SMS that the wife knew that the husband's family had contributed about $100,000 towards the purchase of the home.

9.3. The Appeal

The wife argued that her text was a communication made in the course of trying to negotiate a settlement, and was therefore inadmissible.

But the Full Court found that s131(2)(g) applied, because the wife's evidence as to the existence of the loan contradicted the contents of an *"otherwise privileged message".*

Whilst acknowledging that parties should be free to negotiate when attempting to resolve disputes, it stated that:

> *"it is not sound policy to permit a party to assert something is "white" when attempting to negotiate a settlement and then give sworn evidence that it is "black", without the court knowing the witness had previously said that it was "white" and the witness being exposed to being tested upon the assertion made during the settlement negotiations.*

The wife's appeal was dismissed.

Chris Dimock

10 March, 2020