

**Family Court CaseWatch - Appeal Cases - June 2009, by Wendy Kayler-Thomson, Forte Family Lawyers, released June/2009**

**Next it's time for our first CaseWatch program this month, Family Court CaseWatch, and it's my pleasure to welcome back Wendy-Kayler Thomson from Forte Family Lawyers. Wendy, great to see you again and thanks for joining us this month.**

**Our first case is McClintock & Levier, an appeal against a substantial custodial sentence for a contravention of parenting orders. What was the story here?**

The mother was sentenced to six terms of six months imprisonment to be served concurrently following her admission of having breached parenting orders on six occasions. There was one child of the marriage who was 11 years old. In June 2007 the mother left the place in New South Wales where the parties lived and travelled to Queensland. As result she breached the order providing that the father spend alternate weekends with the child. The situation was compounded when the mother then moved to Western Australia. She enrolled the child in school there under her new partner's surname and her whereabouts were unknown for a considerable period of time. A recovery order was made and eventually the mother and the child were located by the police, some 13 months after the mother first left New South Wales.

**What do the relevant provisions of the Act tell us?**

Division 13A of the Act deals with the consequences of failing to comply with parenting orders. Subdivisions E and F dealing with contraventions for which there is no reasonable excuse, and they are contraventions of both a serious and less serious kind. Section 70NFB provides that a term of imprisonment may be imposed for contraventions of a serious kind. The test is that the Court must be satisfied beyond reasonable doubt that grounds for making the contravention order are made out, the maximum term for is 12 months, and the Court must be satisfied that it would not be appropriate to deal with the contravention by any other sentence such as a suspended sentence, a bond or a fine.

**Why did the FM in this case order a six month custodial sentence?**

The Federal Magistrate considered the factors which mitigated against a custodial sentence in this case. He made a finding that it was not in the child's best interests that his mother be incarcerated. He also took into account that the child had been removed from the mother's care and now lived with the father, which in effect provided compensatory contact to the father. He also took into account that he had made a costs order against the mother. However the Federal Magistrate said that he was going to approach the matter having regard to the criminal law principles of sentences. He adopted as a guideline the principles of the ACT Crimes (Sentencing) Act. The Federal Magistrate then considered that he needed to make an order in the best interests of children generally and that a term of imprisonment may act as deterrence to other parents against acting in the way this mother had done.

**Justice Coleman characterised the appeal as raising three broad issues. The first concerned the role of Division 13A in the Court imposing penalties.**

Justice Coleman asked whether the provisions of Division 13A constituted a "code" which precluded the Federal Magistrate from taking into account matters which were not expressly stated in that code. Justice Coleman found that he wasn't, because of the discretion of the Court to take into account the circumstances of the case. Justice Finn agreed and said that it didn't matter whether or not Division 13A was a code or not, the Federal Magistrate was still able to take into account the factor of general deterrence in sentencing. Justice Cronin agreed, but he also pointed out the different emphasis between Division 13A which deals with the powers of the Court to made orders to enforce compliance with parenting orders, and Parts XIII A and B, which deal with sanctions and punishment for contempt of Court.

**The second ground was that the FM's discretion miscarried, because he had regard to matters which were irrelevant, and failed to consider matters which were relevant. What conclusion did the Court reach on this issue?**

There was significant argument about whether Division 13A was simply coercive in nature, in that the aim of that division is to seek to enforce parenting orders, or whether it also can be punitive – that is, punish for breaching orders. The question was whether the factor of deterrence could only be considered by the Federal Magistrate in relation to the deterrence of the mother from breaching orders again in the future, or whether general community deterrence was a valid consideration for the FM. The Court found that the “punishment” of the mother and the general deterrence of the community from breaching the Court's orders were not factors that the Federal Magistrate could take into account under Division 13A. Those matters would only have been relevant to a contempt of Court application.

**Why did the Court find that the sentence imposed was manifestly excessive?**

The Full Court found that the Federal Magistrate erred in not taking into account the possibility of ordering a suspended sentence. The Full Court found that the sentence of imprisonment was manifestly excessive. They re-exercised discretion and sentenced the mother to a six month sentence suspended after 16 days (to take into account the time served by the mother to that point).

**Loude and Loude is an appeal against property orders, on the grounds that the Court failed to take into account the contributions of the husband. What were the facts, Wendy?**

This was relationship of about 14 years in length. There were two children of the marriage aged 17 and 14 by the time of the judgement on the appeal. The wife was a teacher and the husband self-employed. The asset pool was about \$2.2million. The Federal Magistrate at trial gave the wife 77.5% of the asset pool – 75% for contributions and a further 2.5% for needs. Not surprisingly the husband appealed arguing that the judgement was manifestly unjust. The husband argued that the Federal Magistrate gave inappropriate weight to the wife's initial contributions, did not adequately take into account the husband's contributions and failed to take into account the disparity in the parties' financial position following the contribution based assessment when considering the future needs adjustment.

**What conclusion did the Court reach on the issue of contributions during the marriage?**

There was no dispute between the parties that their initial contributions were in the ratio of 65% by the wife and 35% by the husband. The Full Court found that the Federal Magistrate failed to give appropriate weight to a number of factors including the wife's concession that the husband was the primary breadwinner during the marriage, that the husband's initial contribution in the form of a property allowed the parties the benefit of occupation of a home until they purchased the matrimonial home, the husband's contributions to the acquisition of the home and a business property and the benefits that the parties obtained by virtue of the husband's business.

**What about post-separation contributions?**

The Full Court found that the Federal Magistrate failed to give weight to the husband's payment of the home mortgage after separation which allowed the wife occupation of the home. She also collected rent from a boarder during this time, and the Full Court said that those two factors allowed the wife to maintain and add to her superannuation.

**There were significant delays between the time of the trial, the time of the judgment and the judgment on appeal. How did the Full Court deal with this problem?**

There was a delay of 12 months between the end of the trial and when judgement was delivered. There was then a further delay of about 11 months before judgement was delivered on the appeal. There were some significant changes in circumstances in that time, including a substantial increase in the value of one property and a change in the living arrangement for one child. The husband sought

leave to adduce further evidence at the appeal and asked the Full Court to re-exercise discretion, rather than remit the matter for a re-trial. The Full Court said it had four options where there had been changes in circumstances since trial. The first would be for the parties to submit a joint statement of relevant facts; the second would be to make findings about contributions and needs on the evidence at trial and remit the matter to a single Judge as to whether there needed to be any adjustment to those findings because of changes in circumstances since the trial, they could remit the matter for a limited re-hearing or remit the matter for a complete re-hearing. The Full Court agreed to re-exercise discretion, but only taking into account the asset pool as it had been found at trial.

### **How did the Full Court then apply the usual four step approach?**

The Full Court gave the wife 60% on contributions and no further section 75(2) adjustment.

### **Doriemus & Vanderhum, our final appellate case this month, concerned an appeal against a refusal of a Registrar to extend time for the service of an itemised bill of costs. What went wrong in this case?**

The husband had been ordered to pay the wife's costs of an unsuccessful appeal. The husband subsequently lodged an application for special leave to appeal to the High Court. The wife's solicitor gave evidence that he was not aware of the requirement to serve an itemised costs account within 28 days of a request, and that he had thought that the costs issue would be sorted out once the special leave application had been dealt with. The wife then made an application to extend the time for service of the itemised account. The Registrar refused that application and the wife then sought a review of that decision.

### **What were the competing arguments of the parties in this case?**

It was argued by the wife that there would not be any injustice to the husband in the allowing the matter to proceed out of time. She argued that if she wasn't allowed to proceed she would be deprived of proper compensation for her costs of the appeal. It was argued by the husband that if the wife was not successful in getting an extension of time, her harm could be remedied by an action against her solicitor.

### **Why did the Court allow the appeal?**

This of course was a review of the registrar's decision, not an appeal. So the Court conducted a re-hearing of the wife's application to extend time. The Court found that the Family Law Rules do not specify the matters that are to be considered when determining an application to extend or shorten time. The Court found it had a broad discretion in determining the matter, but that guidance had been given by the Full Court in *OP v HM* that the fundamental issue is whether an extension of time will enable the Court to do justice between the parties. The Court granted the extension of time, finding that there was little prejudice to the husband, and that a remedy against her solicitor would not meet the justice of the situation for the wife.

### **Next, we have a case on ethics for family lawyers, which concerns the duty to the court. It's *Brott and the Legal Services Commissioner*. What were the facts?**

Mr Brott had acted for the wife in Family Court proceedings. Subsequently there was a costs dispute between Mr Brott and the wife, during the course of which the trial judge referred a particular letter to the Legal Services Commissioner. Mr Brott had written a letter to the wife before the trial advising her that he could not act for her at the trial unless she put money into his trust account. Mr Brott knew that the wife would use the letter in support of an application to adjourn the trial.

### **What happened before VCAT?**

Mr Brott was charged with misconduct by the Legal Services Commissioner and the matter was heard by VCAT. The essence of the charge was the Mr Brott prepared and signed the letter knowing that it was false and misleading. Mr Brott was found guilty and barred from practice for four and half years.

**The appeal turned on whether the letter was false or misleading. What conclusion did the Court of Appeal reach?**

Mr Brott sought leave to appeal to the Supreme Court of Victoria, and the Court of Appeal granted that leave and determined the appeal. Mr Brott argued that the Tribunal had found that when he wrote the letter he thought it to be true. The Court of Appeal disagreed with that argument. It found that the Tribunal had found that at the time he wrote the letter Mr Brott knew that he would continue acting for the wife even if she didn't put money into trust and that he also knew that he had a costs agreement with the wife which secured payment of his costs by way of a charge over the wife's property. The Tribunal had found that Mr Brott had believed that he could rationalise the writing of the letter because his client had asked for it, but that did not take away the fact that he knew that it was false and misleading.

**What does the case tell us about the family law practitioner's duty to the Court?**

The decision re-emphasizes the duty that legal practitioners owe to the Court not to mislead it, despite any request that we might receive from a client.

**Starling and Darby is a dispute over consent orders, but the issue was what powers the Court had to resolve that dispute. What was the background to this case, Wendy?**

The parties had negotiated a very complicated set of final consent orders to deal with their complex financial arrangements, with order being made in December 2005. Circumstances then arose which led to the parties disagreeing about the interpretation and enforcement of those orders, which led to the husband making an application to the Court in November 2006 seeking certain payments to him from monies held in trust. The major preliminary issue to be determined was what was the nature of the application made by the husband and what jurisdiction did the Court have to make the orders sought by the husband.

**There were three bases on which it was argued by the applicant that the Court could resolve the dispute. What were they?**

The husband argued that the Court had jurisdiction to deal with the matter by making a mandatory injunction under section 114(3). He also argued that Chapter 20 of the Family Law Rules which provides for enforcement of property orders could be relied upon, although none of the remedies provided for in that chapter (such as an enforcement warrant) were specifically sought by the husband. The third basis argued by the husband was section 34 of the Act, which is a general power to make orders within its jurisdiction.

**Was there an alternative?**

The Court was not attracted to any of the three bases for jurisdiction argued by the husband. The husband had sought to file further affidavits, including one by a forensic accountant, in support of his argument about how the Orders ought to be implemented. The judge was of the view that if he was asked to adjudicate on some aspects of the orders, he would be interfering with the fundamental basis of the bargain reached between the parties, which may mean that that orders no longer represented at least one of the parties understanding of what the overall deal was. The judge was of the view that the only remedy available was an application to set aside the entire orders pursuant to section 79A. He therefore dismissed the husband's application.

**In your view, what is the best thing to do where there is an intractable dispute over the meaning of orders?**

I can understand entirely why the husband did not bring section 79A proceedings. The value of the property that was the subject of the disputed clauses of the consent orders was about \$131,000. Section 79A proceedings would cost the parties considerable legal fees and further delay. Arbitration may be a very viable alternative in these situations.

**Wendy, thank you for reviewing this interesting group of cases this month. Wendy Kayler-Thomson is from Forte Family Lawyers in Melbourne.**

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