

Family Court CaseWatch - October 2008, by Wendy Kayler-Thomson, Forte Family Lawyers, released October/2008

Full Court decisions - our first case is McMorty & Barney, a property case in which the father argued that he had been denied natural justice. What was the background to this dispute?

Answer: This was a parenting case heard in the Federal Magistrates Court. The case involved a couple who had lived together for 10 months. Their child was a little over 2 years old at the time of the hearing. There were allegation and counter-allegation about family violence and the parenting capacities of each parent. The major appeal point revolved around the Federal Magistrates' Order that the mother have sole parental responsibility for the child. The father argued he did not receive natural justice in relation to the making of that order because during the mother's counsel's final admissions the Federal Magistrate made a comment that parental responsibility should be shared. The mother's counsel also conceded that point during his submissions. As a result that father's counsel didn't make any submissions opposing a sole parental responsibility order because it did not seem that there was a possibility that such an Order would be made. However, the Federal Magistrate then made an Order giving the mother sole parental responsibility.

What principles are applied with regard to the denial of natural justice?

Justice Coleman who sat as a single judge appeal court relied on the High Court's decision in the case of *Stead*. He found that the onus lay with the father only to show that he was denied natural justice and that there was a possibility of a different outcome had natural justice been given. The onus was on the mother to establish that a properly conducted trial could not possibly have produced a different outcome. That was a very high burden for the mother to establish. Justice Coleman found that although it was possible the outcome could have been the same if the father's counsel had addressed the Court on the issue of a sole parental responsibility order, it wasn't the inevitable outcome and therefore the appeal was successful.

Gaspaldi & Gaspaldi is another full Court appeal. A number of issues were raised, but the interesting one is the treating of the payment to the husband as compensation for personal injury. What was the story here Wendy?

The parties were married in 1990 and had 2 children who were aged 12 and 13 at the time of judgement. In 1998, about 7 years before separation the husband was involved in a serious accident. He was in hospital for 5 months and then spent about 4 years on crutches after the accident. He subsequently made a claim for damages and received a net amount of about \$945,000. The net asset pool at the time of trial was about \$1.36 million.

What was the basis of the appeal with regard to contributions?

The trial judge determined that the assets should be divided in the proportions of 70% to the husband and 30% to the wife. The Trial judge found that the contributions had been made 75% by the husband, but then made a 5% adjustment in the wife's favour on account of Section 75(2) factors. The husband appealed on a number of grounds, but in relation to contributions it was argued that the trial judge made 3 errors in the assessment of the parties' contributions. The first was that the trial judge made an error in law as to the way the Court should take into account personal injury damages. There was an unfortunate paragraph in the Trial Judge's reasons where he suggested that personal injury damages were similar to a party having received a substantial lottery win. The second ground was in relation to the trial Judge's focus on the different roles that the parties undertook during the marriage. The Trial Judge expressed the opinion that once spouses had reached an agreement about how they would organise their financial and non financial contributions during a marriage, then the Court should subsequently find that those contributions are equal. The third ground related to a comment made by the Trial Judge to the effect that the fact that the wife earned less money during the marriage than the husband was not relevant.

Did all those grounds of appeal succeed?

The husband failed on two of the ground and succeeded on one. He failed in relation to the challenge that the Trial Judge had not properly stated the law in relation to the treatment of damages payments. The Court found that the Trial Judge's lottery win analogy was not helpful but found that taking into account the entire judgement the trial Judge had probably taken into account the damages payment as a contribution made by the husband. The husband also failed on the ground in relation to the wife's income contribution during the marriage. The Full Court found that in this case the difference between the parties' income contributions had been offset by the additional contributions the wife had made as homemaker and parent. However the husband was successful in relation to the assessment of contributions where the parties have reached agreement as to their respective roles during the relationship. The Court found that the Trial Judge's attitude that such an agreement during the marriage meant that contributions should be regarded as equal was an incorrect statement of the law. The Court is required to undertake an evaluation of the respective contributions of the husband and wife. The Full Court held that although in many cases the financial contribution of one party will equal the indirect contribution of the other as homemaker and parent, that is not necessarily correct in every case.

What does this case tell us with regard to the correct way to treat contributions to a marriage?

The Full court found that the following general principles could be said to arise from the cases in relation to contributions. Firstly, there's no presumption of equality of contribution or partnership. The second is that there is a requirement to undertake an evaluation of the respective contributions of each party. The financial contributions of one party are not necessarily equal to the contributions as homemaker and parent of the other.

The full Court held that in evaluating the roles performed by each party there may arise special factors attaching to the performance of the particular role of one of them which may take the contribution outside the normal range. The Full Court found that that the Trial Judge had properly assessed three particular aspects of contributions being in this case an initial contribution made by the husband, the contribution of his damages award and the wife's more arduous homemaker and parenting duties during the period of the husband's convalescence.

We have an interesting case on waste from the Family Court of Western Australia. The case is M & M. What was the allegation of waste here Wendy?

There seemed to be a high level of bitterness and resentment between these two parties. After separation the parties' financial situation became quite troubled. Despite that, the husband purchased, without notice to the wife, a new property selling the family motor vehicle, taking out a substantial low doc loan and using his credit card to buy it. As soon as he had acquired that property he then proposed the immediate sale of the former matrimonial as he said he could no longer afford to pay the mortgage on both properties as well as child support. The wife would not agree. The husband then fell into arrears of the mortgages. The former matrimonial home was ultimately sold by the bank at a substantially lower price than what the parties had originally valued it at and the arrears in the mortgage on the new property increased by about \$60,000 as a result of the husband's failure to meet repayments.

What did Chief Justice Thackray have to say about the relevant principles?

The Wife asked his Honour to make a contribution finding in her favour based on the husband's conduct post separation. His Honour referred to the judgement of His Honour Justice Baker in the *Kowaliv* case. In that case Justice Baker found that financial losses incurred by the parties should be shared between them (although not necessarily equally) except in circumstances where either one of the parties had embarked upon a course of conduct designed to reduce or minimise the value of matrimonial assets or where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which reduced their value. Chief Justice Thackray found that the husband had acted recklessly in purchasing the second property at a time when he knew that he could not afford it. The Wife gave evidence that the husband had told a real estate agent that he

would like to see the wife "in the gutter" and Chief Justice Thackray said that that best described the husband's intention and conduct. Chief Justice Thackray increased the assessment of the wife's contribution by 3% as a result of the husband's conduct.

In Prior & Prior the stepfather of a child made an application to adopt a stepchild. First of all what is the Family Court's role here?

The Family Court is not often involved in adoption matters. However Section 60G sub section 1 of the *Family Law Act* provides that the Family Court may grant leave for proceedings to be commenced for the adoption of a child. That is, grant leave for such proceedings to be commenced in a State Court. If such leave is granted or not granted or not applied for, it can have an impact on the parenting Orders that can be made in relation to the child by the Family Court subsequently. For instance, a parenting Order that is in force in relation to a child stops being in force on the adoption of a child unless leave has not been granted. Importantly, a person's parental responsibility for a child ends on the granting of an adoption unless leave was not granted and further, if a Court grants leave for adoption proceedings to be commenced a child ceases to be a child of a marriage upon the adoption order being made.

So what was the story in this case?

The application for leave pursuant to Section 60G was made by the mother of the child and her husband. The child was about 7 years old at the time of the hearing. The child had no contact with the biological father and the father had not sought to pursue contact with the child or to be involved in making decisions about the child. The father was in arrears of child support by about \$40,000. The child regarded his stepfather as his father and called him "dad".

Why was Justice Benjamin prepared to grant leave in this case?

His Honour relied upon the judgement of His Honour Justice Chisholm in the matter of *Fogwell & Ashton* and also on the observations of Justice Strickland in a more recent case of *Rohlach & Dodderidge*. In the latter case Justice Strickland observed that Section 60G does not specifically provide that the child's best interests are to be the paramount consideration in determining whether or not to grant such leave, but found that whether or not granting leave is in the best interests in the child is the most appropriate way to determine the matter. It is important to note that if leave is granted pursuant to Section 60G, this is not a finding about the merits of the adoption per say and the parties are still required to go to the State Courts and convince that other Court that an adoption is appropriate. Justice Benjamin determined that the provisions of Section 60CC are an appropriate way to determine whether or not to grant leave. He assessed the relevant sub sections of Section 60CC and found that granting leave for the adoption was in the best interests of the child in this case.

Elsewhere on the program this month we're reviewing the impact of indigenous cultural factors on parenting Orders. Moses and Barton is just such a case. Why were cultural factors relevant there?

The case involved 2 parties, neither of which was the biological parent of that child. The applicant, Ms Moses, was born in Papua New Guinea but relocated with her family when she was 3 to a Torres Strait Island and she was raised and brought up in the Torres Strait Islander culture. Mr Barton was a Torres Strait Islander and grew up in the Torres Strait. He was the child's great uncle.

The child was almost 11 at the time of the trial. When she was just a few days old the child's biological parents gave the child to Mr Barton and his then wife pursuant to a traditional custom of Torres Strait Islanders. This custom involves the permanent giving of a child from one family to the other with mutual consent. It usually occurs within an extended family. The child takes the surname of the receiving family and is brought up as their child. This is a wide spread practice in Torres Strait Islander families and is integral to islander society and the development of social and economic bonds between families. It is regarded as strengthening the social structure through kinship and reciprocity and its strongly connected to wider aspects of customary laws which define Torres Strait Islanders.

Mr Barton's wife died when the child was 4 months old. He subsequently formed a relationship with Ms Moses and the child was brought up within their family. Ms Moses lived in Cairns and the child lived most of her life in Cairns. Mr Barton travelled between Cairns and the Torres Strait Islands where he was a fisherman. At the time of the trial the child was living with Ms Moses in Cairns and was attending school there and had expressed a desire to stay at school in Cairns.

What was the Court's view of the relevant law?

Section 60B and Section 60CC apply but there were particular parts of Section 60B and Section 60CC which Counsel for Mr Barton urged the Court to pay particular regard to. In Section 60B the culture of the Torres Strait Islander is specifically referred to and the child's right to maintain a connection with that culture, to have the support, opportunity and encouragement necessary to explore that culture and to develop a positive appreciation of that culture are specifically referred to. The court found that whilst there are these additional specific matters in the legislation relevant to the circumstances of indigenous children, nowhere is it said in the legislation that they are to prevail over the objects, primary considerations and other additional considerations in making parenting orders.

So what affect did the cultural factors have in this case?

But for the cultural issues the Trial Judge would probably have ordered the child to remain living with Ms Moses in Cairns. The child had expressed a wish to stay at school in Cairns, although the child did indicate that she had a very close and loving relationship with each of the parties. The Court found that both of the parties were able to provide appropriately for the ongoing care of the child but that Mr Barton could offer the experience of her heritage and culture as a Torres Strait Islander that Ms Moses could not. Whilst it was found that Ms Moses had a good understanding of Torres Strait Islander culture, and would promote the child's understanding of her culture, it was Mr Barton who was given the responsibility for the child's upbringing within the custom of Torres Strait Islanders and that it was in the child's best interest that that fact of her life be recognised and respected.

In Border & Border (No.2), one of the parties asked the presiding judge to disqualify himself on the basis that that parties counsel had previously cross examined the Judge as a witness in a case. How did Justice Fowler summarise the law in this matter?

This was an application for disqualification on the basis of apprehended bias of the Judge not actual bias. His Honour referred to the High Court decision of *Johnson* which sets out the test to be applied in Australia as to whether or not a judge is disqualified by reason of the appearance of bias. The test is whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial and unprejudiced mind to the resolution of the question the Judge is required to decide.

Did the Judge disqualify himself?

The judge did not disqualify himself. It seemed that the applicant's concern was that his own counsel had cross examined the Judge as a witness and presumably that the Judge did not enjoy the experience and that he therefore might be biased. However the Judge informed the Court that after that experience as a witness he instructed the same Counsel to act for him in two cases where he was the Plaintiff. The Judge described the relationship between himself and Counsel as professional. The Judge found that a reasonable and informed observer would not apprehend any bias.

Whitlam & Whitlam - no relation from what I can see - was a nasty divorce involving a violent husband. Justice Watts made property orders. Of interest to us is His Honour's decision to make an adjustment to contributions based on a so called Kennon factor. What's all this about Wendy?

This is one of those rare cases where an argument based on the case of Kennon was successful. The wife asserted that as a result of conduct by the husband during the course of the marriage the contributions made by her were made significantly more arduous. The case of Kennon refers to the necessity for there to be a course of conduct which makes the circumstances of one parties

contributions all the more difficult and that they ought to receive credit for that. The Trial referred further to the case of Steven's decided in 2005 where the Court found that the term "course of conduct" was a broad one and that conduct does not necessarily need to occur frequently to constitute a course of conduct although a degree of repetition is obviously required.

What adjustment was made in this case and why?

The Judge gave the wife an extra 10% on contributions for the Kennon factor. the Judge found on the balance of probabilities relying on the test in the case of *Brigginshaw* that the husband had assaulted the wife on a number of occasions including one indecent assault and one attempted indecent assault. The Court preferred the evidence of the wife over that of the husband and found that there had been significant domestic violence over a period of a number of years which made the wife's contributions, particularly in the role of homemaker and parent, more arduous.

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