

**Family Court CaseWatch - Appeal Cases - July 2011, by Wendy Kayler-Thomson, Forte Family Lawyers, released July/2011**

**Next, it's time for Family Law CaseWatch, Appeal Cases, and with me is Wendy Kayler-Thomson from Forte Family Lawyers in Melbourne. Wendy, welcome back to Sound Education in Family Law, and thanks for joining us once again.**

**Our first case this month, Harries and Harries, is an international child abduction case. What was the background here?**

The husband was a Canadian citizen and the wife was an Australian citizen. They were married in Australia, but had moved to Canada shortly after the birth of the first child. The husband had returned to Canada to study law there. The second child was born in Canada. After the birth of the second child the wife was hospitalised for a few weeks suffering from post partum psychosis. After her release the family travelled to Australia. Within about 2 weeks, although in Australia, the husband filed an application for divorce and property settlement in Canada. Shortly thereafter he returned to Canada and the wife and children remained in Australia. The children were aged about 3 years and about 8 months at the time of the trial.

Orders were made by the Canadian Court shortly thereafter that the husband have sole custody of the children, and proceedings were then brought by the Central Authority in the Family Court of Australia seeking the return of the children to Canada pursuant to the Hague Convention.

The wife opposed the application on 2 grounds:

1. That the husband had consented to the children remaining in Australia within the meaning of the Regulations;
2. That there was a grave risk that the return of the children to Canada would expose the children to physical or psychological harm or otherwise place them in an intolerable situation with the meaning of the Regulations.

The trial judge was not satisfied that the wife had established that there was clear and unequivocal evidence of consent having been given by the husband to the children remaining in Australia. However he did find that there was a grave risk to the children or that they would be placed in an intolerable situation if they were returned, and he refused to order their return to Canada.

The husband, as a person affected by the Orders (although not a party to the proceedings) appealed. There were 3 main grounds of appeal:

1. That the trial judge erred in finding that there was a grave risk to the children if they were returned
2. That even if it were open to the trial judge to find there was a grave risk to the children or that they would be placed in an intolerable situation, the trial judge erred in not exercising his discretion to order the return of the children.
3. That the husband was denied procedural fairness at the trial by the judge allowing the wife to introduce medical evidence and not allowing the husband the opportunity to present evidence in response.

**The case is good illustration of the problems created by the speed with which these matters need to be heard. Here the father claimed that he had been denied procedural fairness. On what grounds?**

At a procedural hearing before the trial orders were made for the filing of further trial material by the Central Authority, and for the wife to be able to file a response to what was categorised as "evidence in chief". In the wife's responding material she filed updated reports from her treating psychologist and psychiatrist admitting new evidence, in particular that the wife's health would be compromised if

she was to return to Canada. That new evidence was filed 2 days before the start of the trial. During the course of the trial itself the trial judge granted leave for the calling of oral evidence to address the objections made to the late affidavit material. However the husband argued on appeal that the granting of leave caused even further prejudice to him as further fresh evidence was given orally by the wife's medical witnesses, particularly in relation to the risk of the wife suiciding.

### **Did the Full Court accept the father's submissions concerning procedural fairness?**

The Full Court didn't accept those submissions because the trial judge had given Counsel for Central Authority the invitation to make an application for an adjournment during the course of the trial. Of course this highlights the time pressures created in Hague proceedings. By the time of the trial the husband had not seen the children for some time. An adjournment, whilst curing the problem created by the new evidence by allowing the Central Authority time to get its own medical evidence, would have caused further delay in the husband seeing the children. But the Full Court said that because the Central Authority didn't seek an adjournment, the husband cannot later claim he did not receive procedural fairness.

### **The father went on to contest the judge's finding that the children would be exposed to a grave risk of harm. Did the Court consider that the trial Judge had taken the correct approach to this question?**

The Full Court found that the trial judge had properly addressed this question, including by reference to the relevant High Court and Family Court decisions on the proper approach to considering "grave risk of harm". The main risk argued by the wife was the risk to her of a serious relapse in her mental health if she returned to Canada, and the impact that relapse would have on the children. The trial judge was particularly concerned about the impact on the baby, who had very little experience of being cared for by the husband. The Central Authority had asserted at trial that the husband was willing to consent to a number of conditions being imposed on him if the Court ordered the return of the children. This related to various practical measures to provide the wife with sufficient support to attempt to reduce the risk of a relapse of her health, including providing her with funds to pay rent. The trial judge found that even though the husband would consent to those conditions, the conditions would not remedy the risks to the children.

### **The father also argued that the Judge had incorrectly exercised the Court's discretion to refuse an order for return of the children. Did the Full Court agree?**

The Full Court found that the trial judge correctly exercised the discretion, including by the proper assessment of the factors set out in the English decision of *TB v JB* in the exercise of that discretion. That English case was approved of by the Full Court in *HZ* (2006).

### **Our next case, *Drysdale & Drysdale*, is an appeal against an interim maintenance order. What's the background here?**

This is an appeal heard by a single judge of the Family Court against an interim order for spousal maintenance made by a Federal Magistrate. The Federal Magistrate ordered the husband to pay to the Wife \$500 per week in interim spousal maintenance.

### **The husband first argued that the wife had failed to meet the requirements of section 72 of the Act. How did the Full Court deal with this submission?**

Section 72 of the Act requires a person seeking spousal maintenance to establish that they are unable to support themselves by reason of factors set out in the section. Counsel for the Husband made an ingenious argument that the threshold test in Section 72 required the Wife to not only establish that she was unable to support herself by reason of her having the care of the children of the marriage, but also that due to age or physical or mental incapacity she was not able to find appropriate gainful employment. The appeal Judge made short shrift of that argument pretty quickly. It would not make sense for those factors to be conjunctive - on the husband's Counsel's argument a

person who was unable to work because of a physical disability would only be able to seek maintenance if they also had the care of a child under the age of 18.

**The husband then argued that the wife's application must fail because she had not particularised her personal expenses. Why was the fact that this was an interim application crucial to the Court's decision on this issue?**

In her Financial Statement the wife did not differentiate between those expenses she incurred for her own needs and those she incurred for the needs of the children. The Federal Magistrate came to a conclusion about the wife's reasonable weekly needs in supporting herself and the children, and found that even if she had exaggerated some of her expenses, she still did not have an income anywhere near the expenses she had on a weekly basis. The Appeal Judge reviewed the earlier decisions of the Court, including the Full Court's decision in the case of Stein which suggested that a spousal maintenance order could not be made by reference to undifferentiated expenses. However he found that on an interim basis, where it was not possible to test all the evidence or where all the evidence was not complete, it was open to the Federal Magistrate to consider all the wife's undifferentiated expenses of the household.

**Does the Court's decision suggest that the husband may have been successful if this had been a final application?**

Yes it does, and that seems proper. By the time of the trial the wife ought to have been in a position to differentiate between her personal expenses and those of the children, and there would be the opportunity to test that evidence.

**Why did the Full Court also reject the husband's submission he did not have the capacity to pay the maintenance?**

The appeal Judge found that the Federal Magistrate had appropriately considered the income and financial resources available to the husband. The husband was involved in a home insulation business and it was argued that after the government rebate scheme collapsed, the business had suffered and the husband was not able to afford the \$500 per week in maintenance. The Federal Magistrate had taken into account both the turnover and profitability of the business, and also the husband's own evidence about the business funds that had been used by him for personal expenses such as payment of legal fees.

**Manolis and Manolis is a property case. What was the story here?**

One of the main points of disagreement at trial was the amount of the husband's initial contribution, and what weight to be given to it. The parties had been married for almost 30 years. The husband's initial contribution comprised his interest in a business. The husband argued that the business was sold by him prior to the commencement of the relationship for \$400,000 and that money represented his initial contribution. The Court file regarding the husband's dispute with his first wife was produced, including a finding in those proceedings that the husband had only received \$40,000 from the sale of the business.

**The Federal Magistrate made an order splitting the property 55/45 in favour of the husband. On what basis?**

The Federal Magistrate found that this was a long marriage and that the parties' contributions were equal. She also found that there should be no adjustment for future needs. But then, in a section of the judgement under the heading "Discussion about proposed methods of adjustment - Justice and Equity", the Federal Magistrate made an adjustment of 5% in favour of the husband for the fact that his initial contribution gave the parties what she called a "springboard" to their later wealth.

**Why did the Full Court grant the husband's appeal?**

The Full Court found that the Federal Magistrate had not properly approached the fourth step of the property settlement process. Relying on the Full Court's judgment in Hickey, the Full Court found that it was not open to the Federal Magistrate to make an adjustment in the fourth step that was inconsistent with her earlier findings that the parties' contributions were equal.

**Why did the Full Court then go on and order the same property division as the Federal Magistrate, that is 55/45 in favour of the husband?**

The Full Court found that the husband ought to have received a 5% adjustment in his favour at the second step to take into account his initial contribution and the fact that it gave the parties a springboard for a later business enterprise.

**Lenova & Lenova is an unusual case dealing with the power of the Court to vary consent orders other than under section 79A. This was a very acrimonious property dispute Wendy.**

Final property orders were made by consent between the parties, and their 2 adult sons who had been joined to the proceedings. One of the terms of the consent orders involved the wife granting a lease to the husband to allow him to have the use of a shed which adjoined the wife's home. The terms of the lease were to be at the sole discretion of the husband, save for the payment of a nominated maximum rent.

**The husband submitted a lease for execution by the wife and the wife went to Court to have the lease varied. Was she successful?**

The husband first applied to the Court for an order pursuant to section 106A that a Registrar be appointed to sign the lease on the wife's behalf. The wife sought orders to vary the terms of the lease that had been presented to her by the husband. The trial judge made orders to vary the terms of the lease that had been presented to the Court. The husband appealed, arguing that the orders varied the terms of the consent orders.

**The issue then was whether the trial Judge had the power to vary section 79 orders in this way. Did the Full Court accept that there is a power to vary section 79 orders other than under section 79A?**

The Full Court found that the Court does have the power to make machinery or consequential orders after section 79 orders have been made, but not orders which change the substance of the orders.

**Why did the Full Court nevertheless find that the variations in this case were beyond power?**

The Full Court found that the orders made by the Judge to vary the terms of the lease affected the proprietary leasehold right given to the husband under the consent orders, and that therefore his orders were not machinery or consequential orders.

**Wendy, Many thanks for reviewing our Appeal cases this month. Wendy Kayler-Thomson is from Forte Family Lawyers in Melbourne.**

© 2011 Television Education Network Pty Ltd and Wendy Kayler-Thomson , Forte Family Lawyers