

**Family Court CaseWatch - Appeal Cases - March 2010, by Jacqueline Campbell, Forte Family Lawyers, released March/2010**

**Next, it's time for Family Law Case Watch, Appeal Decisions, and with me is Jacqueline Campbell from Forte Family Lawyers in Melbourne. Thank you for agreeing once again to review our cases from the Full Court of the Family Court Jacqueline.**

**Our first case this month is Whitehouse & Whitehouse. The case deals with the accrued jurisdiction of the Family Court and the effect of the death of both parties in the proceedings. What is the background to this appeal?**

This appeal concerned the continuation of property proceedings after both the parties to the marriage died.

Both parties were of an advanced age when they, through their respective case guardians, applied for final property orders. They had each been previously married and had adult children from those relationships. After the death of the husband, the wife's application was amended to seek:

In the alternative that pursuant to the accrued jurisdiction of the Court and at equity it be declared that the husband (and his successors in title) hold his and/or their interest in the property in his or their name, pursuant to an implied constructive or resulting trust

The husband's legal personal representative did not challenge the amendment at the time. The wife died three months after the husband and the husband's legal personal representative challenged the Court's jurisdiction to hear the wife's amended application.

The issue before His Honour Justice Mushin was whether the Court had jurisdiction to make orders, and if so, whether that jurisdiction should be exercised.

**The main issue in the appeal was whether the Court could exercise its accrued jurisdiction after the death of both parties. The Full Court first considered the effect of the death of a party on section 79 proceedings, and the role of section 79(8). What did the Court conclude?**

The Court concluded that to the extent that the application might be seen as being pursuant to section 79(8), no order could be made because all applications pursuant to section 79 had died with the wife.

There was no doubt that after the death of a party, the provisions of section 79(8) allowed the proceedings to be continued. However, once both parties were deceased section 79(8) did not allow the proceedings to continue.

**Why did the Full Court go on to hold that in this case the accrued jurisdiction of the Court had been extinguished?**

As both parties were deceased, there was no dispute remaining between them about which the Family Court could exercise federal jurisdiction. Therefore, no application relying on accrued jurisdiction could attach to a Family Court matter.

The Full Court found that once it was clear that federal jurisdiction was not, or was no longer, properly invoked, no accrued jurisdiction remained in the Court to consider and determine the claim for a declaration or an implied, resulting or constructive trust. Before the hearing and determination of the case, there was no longer any primary federal jurisdiction vested in the Court to determine the federal claim, it having abated by operation of law.

**The Court went on to comment that even if the jurisdiction had not been extinguished this might be a case where the Court would refuse to exercise the jurisdiction. Why?**

The Full Court cited Valceski and Valceski [2007] NSWSC 440; (2007) FLC 93-312 where it was said:

"While there may be a discretion to decline to exercise accrued jurisdiction, it will be an exceptional case in which that discretion can properly be exercised so that the whole of a justiciable controversy is not resolved in the one court."

The Full Court went on to say that it had an element of discretion as to whether or not to exercise accrued jurisdiction. It was argued that the case was out of the ordinary and exceptional. The circumstances were such that the Court considered it should decline to entertain the accrued claim.

What remained of the proceedings was in substance one being prosecuted by the wife's daughter as both an executrix and a beneficiary under the deceased wife's will seeking declaratory relief against or out of the estate of the deceased husband for her own benefit and any other beneficiaries of the deceased wife's estate. Accordingly it was a misuse of the jurisdiction, powers and procedures of the court to allow such a proceeding to continue.

It was devoid of any subsisting moral or legal nexus with the marriage relationship between the deceased husband and the deceased wife.

**Kostres & Kostres is yet another binding financial agreement case. However, this time the dispute was not over compliance issue but rather the interpretation of contentious clauses in the agreement. What was the background to this dispute?**

At the time the parties entered into the financial agreement they both mistakenly believed the husband was still bankrupt. They did not reveal their belief to their lawyers. The parties' mistaken belief about the husband's status meant that the parties did not acquire assets in their joint names during the relationship.

After the parties' marriage broke down, the husband commenced proceedings in the Federal Magistrates Court seeking orders that the wife pay him half of the net value of assets acquired during the marriage. The assets consisted of a retirement hostel business, the real property on which the business was conducted, and a home unit at Surfers Paradise. These orders were sought by way of enforcement of the financial agreement.

In the alternative, at trial, the husband argued that, if the real property on which the business was operated (which was owned by a discretionary trust) did not fall within the terms of the financial agreement, the trust should be regarded as property for the purposes of section 79 and adjusted between the parties.

The Full Court had to consider whether, the husband's argument that the Federal Magistrate erred in failing to conclude the husband and wife acquired the business and the property from their joint funds. The wife asserted that the Federal Magistrate was in error in finding the husband had acquired an interest in the goodwill of the business, rather than finding she alone had acquired the business.

**What principles did the Full Court consider applied in interpreting the terms of the agreement?**

The Full Court considered that as the agreement was made ostensibly to oust the jurisdiction of a court under Part VIII to adjust property interests under section 79 if their marriage broke down, the definition of property in s 4(1)(a) and the provisions of section 79 and the authorities relevant to those sections were important.

The pivotal clause in the agreement did not include all the words of section 79(4) such as "contribution to" assets, nor did they encompass financial contributions to the improvement or conservation of property.

The principle that words “may generally be supplied, omitted or corrected, in an instrument, when it is clearly necessary to avoid absurdity or inconsistency” is a well recognised principle in the law of contract.

The Full Court quoted from the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at paragraph 40:

References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.

The test is objective, not subjective.

**The Court applied these principles to contentious clauses in the agreement. Why did it conclude that the clauses, and the agreement, were ineffective?**

The interpretation of the agreement for which both parties contended required a very broad interpretation of its terms.

The Full Court considered that the purposes of Part VIIIA were to permit parties to arrange their own affairs in the manner they choose, to give certainty, and to avoid delay and costly disputes on marriage breakdown.

While the parties suggested it was appropriate to construe clause 6 by reading into that clause a wider meaning so that the clause was interpreted not only to catch assets purchased by them personally, but also assets purchased in the name of a third party on their behalf, they were not in agreement as to the meaning which should be given to the term “joint funds”, nor did they agree whether the expression “from their own moneys” should, to give intent to their agreement, include the words “or from their sole borrowings”.

The meaning to be given to expressions used in the agreement must be clear and certain. Any term which a reasonable person would imply should be uncontroversial.

These requirements are particularly important when the financial agreement is one made, as in this case, in contemplation of marriage, and deals with unidentified property or financial resources which may be acquired or contributed to by parties in the future and subsequently divided between them, or retained by one party, in the event their marriage breaks down irretrievably.

The Court cannot give meaning to an agreement if its terms are so imprecise or ambiguous that the parties’ intent cannot be discerned.

It was particularly relevant that this agreement, which the parties entered into with the intention of dealing with their property and financial resources during their marriage and if it broke down, did not reflect the terms of section 79 which it sought to bypass. Clause 6 did not refer to “contributions”, either financial or non-financial, and it only referred to a limited extent to “property” and “financial resources”.

**The Court also rejected a submission by the husband of unconscionable conduct by the wife. Why?**

The Full Court referred to the *Commercial Bank of Australia Limited v Amadio* [1983] HCA 14; (1983) 151 CLR 447 and said that the question of unconscionable conduct was generally directed to conduct referable to the formation of the agreement itself.

The unconscionable conduct sought to be relied on was not conduct associated with the making of the agreement itself, nor implied revocation of it. Nor did the husband specifically seek to impugn the

validity of the contract to purchase the business or the property on the basis that the wife's conduct in entering into those agreements was unconscionable.

At the time of the making of those contracts both the husband and wife mistakenly thought the husband had no capacity to hold any property because of his bankrupt status. In short, it was not submitted the agreement, or the contracts were void or voidable.

**Our final property case this month is Essex & Essex. The main issue in appeal concerned two family trusts, but first there was an unsuccessful appeal against an "add back" by the trial judge. What was the background to this issue?**

After separation, the wife altered a withdrawal slip signed by the husband for expenditure for the children's education to increase the amount withdrawn by \$30,000.

The trial Judge added back the sum of \$30,000 withdrawn by the wife from the bank account as a premature distribution of funds to her.

**The trial judge held that the \$30,000 should be added back after finding that the wife had acted "wantonly and recklessly". Why did the Full Court agree?**

The principle that where one party has unilaterally assumed control of, and has improperly disposed of, or diminished the value of, an asset to the detriment of the other party, that the disposal should be regarded as a premature distribution to the party at fault is not in doubt (see *Townsend & Townsend [1994] FamCA 144; (1995) FLC 92-569*). What is often controversial is when the principle applies.

The trial Judge did not consider any part of the \$30,000 to be reasonable or necessary post separation expenditure by the wife.

It was not suggested that, although she had obtained the \$30,000 in a deceitful manner, she "lost" the whole of that sum, for example, by gambling or an illegal activity. These are examples of conduct, if resulting in the loss of funds or a liability incurred will, in an appropriate case, attract the description of negligent, wanton or reckless conduct.

It was arguable that the wife's expenditure of the funds could have been considered in all the circumstances reasonable. The husband's earnings exceeded those of the wife and he occupied the matrimonial home.

The Full Court found that other judges, in the exercise of their discretion, may have found it appropriate to "add back" part only of the \$30,000. But here the question was whether his Honour's decision was "plainly wrong" or outside the reasonable ambit of his discretion. The Full Court was not satisfied his Honour's decision fell into that category when looked at in the context of his judgment overall, including his strong adverse credit findings about the wife, the wife's unilateral removal of the funds, and the failure of the wife to provide appropriate corroboration for her expenditure.

**As I mentioned the main issue in the case was the refusal by the trial judge to treat two family trusts as a financial resource of the husband. What were the background facts here?**

There were two trusts, the N Trust and the S Trust.

The trust deed for the S trust disclosed the husband was named as an income beneficiary. He was not a capital beneficiary, and the terms of the deed precluded him from being appointed as one.

The difference in the provisions of the two trust deeds was relevant. The beneficiaries named in the N Trust deed evinced a clear intention in the drafting of that trust to benefit the husband's brother and his wife. As they did not have children, the wide class of general beneficiaries (who were not named) was understandable.

The S Trust deed evinced a clear intention that the capital of that trust be distributed on vesting, or at such earlier time as the trustee may determine, to the two children of the marriage, the grandchildren of the husband's mother. It also disclosed a clear intent that the husband, as one of the three named income beneficiaries, was entitled to be considered to receive distributions of income until the vesting of the trust.

The Full Court agreed with his Honour that, having regard to the terms of the S trust deed, the attempt to remove the husband as a beneficiary of the trust was probably ineffective. Consequently, at the date of the hearing the husband remained one of three named primary beneficiaries of the trust, and was entitled to be considered by the trustee to receive income from the trust fund's assets. Alternatively, if he had been validly removed as a beneficiary, the husband's brother could, at the conclusion of the proceedings, reappoint him as a primary beneficiary entitled to income.

**The majority of the Court rejected the view of the trial judge, and held that one of the trusts was a financial resource of the husband. On what basis?**

As the sole director of the corporate trustee of the S Trust the husband's brother had control of that trust and was only obliged to consider the husband as one of the three income beneficiaries entitled to the income of the trust. However, the husband's brother conceded that, but for a disqualifying factor (the property proceedings) the husband should have the benefit of assets in that trust. The Full Court's view was that this required the trial Judge to find that the S Trust was a financial resource of the husband.

**Deputy Chief Justice Faulks dissented and held that neither trust was financial resource of the husband. Why?**

In relation to the N Trust, the capital beneficiaries were the children K and B, and Deputy Chief Justice Faulks said it was they who had a potential entitlement to the capital of the trust at some point.

The nomination in the trust deed of the husband as a default beneficiary meant that there was the potential for him to have been the recipient in any year in which the trustee failed to make a determination about distribution among the beneficiaries of one third of the income of the trust in that year.

There was, however, no suggestion that that had ever occurred.

At the date of the proceedings before the trial Judge, the husband was not a beneficiary of the S Trust except perhaps indirectly as the brother of a primary beneficiary and hence as a secondary beneficiary. However, if he had been removed as a beneficiary then he would have been removed implicitly from that category of beneficiary as well. This meant that there was no basis upon which it could be said that the husband could have had an interest in the S Trust such as to constitute a financial resource.

Although it might be argued that by applying for funds on behalf of the children he would be relieved from some financial obligation on his own behalf and hence would benefit indirectly. That was the very fringes of what constituted a financial resource and such a contention might be rejected out of hand for that reason alone as no weight worthy of consideration. It was feasible that his child support assessment could be varied to take account of any money that might have been derived by a child from a trust in their favour. There was, though, no evidence that the husband had any intention of applying to reduce his obligation to pay child support as a consequence of any such advance made through him on behalf of B.

It was common ground that the N Trust was set up for the benefit of the husband's brother and his wife and those who might derive some benefit through either or both of them.

There was no suggestion that his brother was likely to provide any benefit to him.

There was no way that the husband could compel the exercise of the discretion and while he might retain a residual power to seek an order from an appropriate court for a proper administration of the trust, such a remedy would be somewhat empty. There would be no recourse by the husband against a determination not to benefit him.

This might constitute a financial resource but to the extent that it did so, its weight was of no substance.

**Finally Jacqueline a very unusual parenting case, Aldridge & Keaton. What was the story here?**

I don't think it is so unusual. We are seeing more of these types of cases and more are being litigated. For a period of time the applicant and the mother had a same-sex relationship. They lived together for approximately eleven months. Their cohabitation commenced shortly prior to the child's birth in 2006.

The child was born in February 2006 and aged almost three years at the date of the hearing. She was the biological child of the mother and was conceived by artificial insemination with sperm from an unknown donor. The applicant's case was that she and the mother were in a de facto relationship at the date of the child's conception, and hence the child was deemed to be a child of the mother and the applicant, as defined in s 60H of the Act. In other words, the applicant sought to be regarded as a parent of the child.

The applicant sought orders that she be declared a parent of the child and that she be included on the child's New South Wales birth certificate. Additionally, she sought orders for equal shared parental responsibility for the child, and that the child spend time with her.

**A crucial issue in the case was whether the applicant was a parent for the purposes of Part VII. Why was this important?**

Sections 60CC(2)(a) and 60CC(3)(c), (e), and (i) refer exclusively to a parent or parents.

Section 60H uses the expressions "person" and "other intended parent" not "parent".

In section 4, the definition of "parent" is "when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child". The definition of "parent" was not amended at the same time as amendments were made to s 60H.

The applicant sought an order that she be registered on the child's birth certificate as a parent. That registration would have created a **presumption** that the applicant was "a parent" of the child, which presumption, if not rebutted, would appear to put beyond doubt that the provisions of Part VII, including the presumption of equal shared parental responsibility and those sections of section 60CC which specifically refer to a parent would have applied.

The Full Court said that when considering sections 60B(1) and (2) and sections 60CC(2) and (3) it would give a purposive construction, and regard both the birth mother and other intended parent as parents of the child. But other provisions of the Act appeared to be inconsistent with this interpretation.

The Full Court believed that further legislative amendment might be necessary to clarify the non-biological person's status as a parent.

**The applicant argued that the parenting application should be decided in a two step process. Did the Full Court agree?**

Yes.

The Full Court held that a two step approach is appropriate in dealing with an application for parenting orders brought by a person other than a parent, a child, or a grandparent.

In other words is the applicant a person concerned with the care, welfare or development of the child (step 1) and if so, what order should be made in the best interests of the child? This consideration may lead to an order for parental responsibility, an order a child live with, spend time and or communicate with the person, or that no such order be made being (step 2).

**In determining the best interest of a child the Court must consider the matters set out in section 60CC. Some of the provisions refer exclusively to parents. The mother accordingly argued that these matters were irrelevant in this case. What was the view of the Full Court?**

The Full Court disagreed.

The mother's counsel submitted that where no order for parental responsibility had been made, that the Chief Federal Magistrate should not have considered those provisions of section 60CC(3) which relate to parents, but should only have had regard to sections 60CC(3)(b), (d), (f), (l) and (m) (which provisions relate to parents and other persons significant to the care, welfare or development of a child).

The Full Court considered that the Chief Federal Magistrate showed that he was "exquisitely" aware as a result of his finding that the applicant did not satisfy the requirements of section 60H, that those sub-sections of sections 60CC(2) and (3) which refer exclusively to a parent were not matters he was required to consider in his assessment of the child's best interests.

While the Act was, since the introduction of the amending Act, more prescriptive than the prior legislation in mandating matters a court must take into account in determining best interests it was clear that section 60CC(3)(m), which provides a court must consider "any other fact or circumstance that the court thinks is relevant", gives a broad opportunity to a court to consider many diverse matters relevant to the welfare of a child, and may have particular relevance when dealing with an application by a person other than a parent.

Merely because the mother had sole parental responsibility that did not mean that no order for the child to spend time with or communicate with the applicant was the only available outcome.

Although the applicant did not satisfy the definition of a de facto partner at the time of the child's conception, with the mother's agreement, she had an important role, akin to a parent, in the child's life for a significant period of months after her birth.

The Full Court was satisfied that the Chief Federal Magistrate based his consideration of this child's best interests on his determination of relevant matters.

**Jacqueline, many thanks for reviewing these family law appeal cases. Jacqueline Campbell is from Forte Family Lawyers in Melbourne.**

© 2010 Television Education Network Pty Ltd and Jacqueline Campbell , Forte Family Lawyers