Recent developments in family law ~ March 2018

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Wallis & Manning [2017] FamCAFC 14

» Property

» Use of "comparable cases"

The parties separated after a 27 year marriage. The husband had received significant gifts from his family early in the marriage, but the parties otherwise agreed that their contributions were equal.

At first instance the assessment on contributions was 70% to the husband, with a s 75(2) adjustment in the wife's favour for a final division of 60% to the husband and 40% to the wife.

On appeal, the wife challenged the assessment of contributions, asserting:

> 28 ... error by her Honour "making an assessment that was well outside the range reasonably available in the circumstances".
>
> 29 The wife's written argument contends that "in all the circumstances, the contribution-based assessment is simply outside the range of appropriate outcomes". ...

In relation to the assertion of a "range of outcomes" to which the trial judge was bound to adhere, the Full Court, per Thackray, Ainslie-Wallace & Murphy JJ, said:

> 41 The assertion of a "range", without more, cannot (and indeed should not) assist a trial court in the exercise of the relevant discretion. In the context of an appeal, while "the area of immunity from appellate interference" is marked by that same "generous ambit of reasonable disagreement" inherent in a very wide discretion, a ground or argument which asserts that a result falls outside "the range reasonably available in the circumstances" or that a result is "plainly wrong" does not illuminate error; rather, it begs the question of how such an error is to be illuminated. [Footnote omitted.]

The wife also asserted that:

> 29 ... "[h]er Honour did not have regard to the assistance of any authorities concerning contributions in long marriages"

In this aspect of the appeal, the Full Court considered whether there were any guidelines in respect of cases involving "long marriages". The Court had regard to *Norbis v Norbis* (1986) 161 CLR 513 and concluded:

> 44 ... that "[t]he expression of guidelines must be undertaken cautiously" and that "[d]etailed guidelines are unsuitable for application to circumstances which are quite diverse". The expression "long marriages" is not itself susceptible to precise definition and the factors embraced by a marriage that meets any such description are so diverse that the desired expression of "the relative [and relevant] importance of those factors" would be elusive if not impossible. [Footnotes omitted.]

The Full Court then considered the use of comparable cases. In reviewing the authorities (including *Norbis*, *Mallet v Mallet* (1984) 156 CLR 685, and *G & G* [2001] FamCA 1453) on the exercise of discretion and use of comparable cases, the Full Court said:

> 45 ... Reference to comparable cases serves a principle central to the exercise of a wide discretion, namely, that like cases should be treated alike. That end seeks to avoid "arbitrary and capricious decision-making" which is the antithesis of "consistency in judicial adjudication". [Footnote omitted.]

The Full Court considered the authorities that purportedly did not support the use of comparable cases in s 79 cases, concluding:

> 58 ...we are unable to agree that anything said by the Full Court in *Fields & Smith* "decries" the use of comparable cases, although the Full Court there make it plain, and with respect we agree, that *if* comparable cases are used to *inform* the discretion, some analysis of those cases so as to ascertain their comparability should be undertaken...

> 63 To the extent that any or all of those cases stand for the propositions that comparable cases cannot or should not be used by trial judges in seeking to promote consistency in results in arriving at just and equitable assessments or suggest that the Full Court cannot or should not have reference to comparable cases in determining if a trial assessment is "plainly wrong" or are otherwise "unhelpful" within that process, we respectfully disagree and would hold to the contrary. ...
>
> 67 While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79.
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> 68 The word "comparable" is used advisedly. The search is not for "some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made". Nor is it a search for the "right" or "correct" result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability – for "what has been done in other (more or less) comparable cases" – with consistency as its aim. [Footnote omitted; emphasis in original.]

At trial the wife had cited four cases as being comparable on their facts and submitted that they provided guidance as to the paramaters of reasonable discretion in the proceedings. The Full Court noted that the wife's submissions in no way sought to compare the facts with the case under consideration and that:

> 73. "[n]o argument was made to her Honour as to any consistency emerging from those authorities, nor is there any attempt to canvass a number of different authorities, particularly from the Full Court, so as to seek to establish any such comparability".

The Full Court held that the bald assertion that the assessment was "outside the range" was not sufficient to establish judicial error.

The appeal was, however, allowed on the ground that the trial judge had made an error in relation to the gifts to the husband. The Full Court then re-exercsied the discretion and made orders for an equal division.

Judgment was delivered in February and the issue of how to use comparable cases then appears settled... until December, when the Full Court delivers judgment in *Anson & Meek*.

Anson & Meek [2017] FamCAFC 257

» Property

» Comparable cases

The parties had been married for 5 years. The husband brought in over 95% of the property at commencement of the relationship. There were no children and the parties' contributions during the relationship were equivalent. The trial judge found that the husband's contribution based entitlement was 80%, and that after adjustments for s 75(2) factors the ultimate division was 60% to the husband 40% to the wife.

The husband appealed, asserting that the assessments were "outside an acceptable range particularly having regard to the short period of cohabitation and the overwhelming financial contribution made by the [husband]". Among the purported errors identified was a failure to consider comparable cases.

The Full Court in this case was formed by Murphy, Aldridge & Cleary JJ. Justice Murphy, who it must be remembered had been a member of the Full Court in *Wallis*, gave reasons consistent with that earlier decision.

Aldridge and Cleary JJ, however, said:

> 126 We do not consider that the existing authorities obliged the primary judge to consider the comparable cases at all, let alone obliged her to conduct an analysis of the comparable cases so as to identify both the factors that indicate a lack of comparability and those that do not. …
>
> 128 It is important to note at this stage that the Court [in *Wallis*] did not suggest that comparable cases could or should be used to set a range or a norm by which cases should be determined. However, if the aim in the use of comparable cases is "to promote consistency in results" or for similar cases to be treated similarly, then we respectfully suggest that is, in fact, the identification of a norm of some kind. ...
>
> 150 ... if the point of *Wallis* was that comparable cases could be looked at so as to derive a consistency in the application of principle then we would agree. However, their Honours did not say so or identify how the use of comparable cases would lead to consistency. As we have already observed, if the aim of consistency is consistency of results, then

> we would suggest that this aim focuses on mathematical equivalence – in reality to set some kind of norm or range, which, of course, was expressly eschewed in *Wallis* and the authorities upon which it relies. ...
>
> 158 In our opinion, the fact that two different judges acting upon the same evidence may properly reach different conclusions greatly diminishes the value of comparable cases. This is especially so in this jurisdiction where there is almost an infinite variation in the rich factual detail that attend both parenting and property cases. The concern is amplified when the Court is proffered just a selection of cases said to be comparable as opposed to an analysis of all cases that could be said to be comparable. ...
>
> 162 It also needs to be asked why a decision already made in a similar case has a greater value than the decision of the judge hearing the current matter, unless it is said that consistency in outcome is of such importance that it fetters the exercise of discretion in subsequent matters. ...
>
> 165 The Court does not say how it is that having regard to the facts and results of earlier cases leads to consistency in approach. Presumably it will do so when the trial judge considers that the facts of the earlier case are sufficiently similar so that regard should be had to how the discretion was exercised – that is, to the result. We do not see how this is other than the court's judgment being influenced or "overborne by what other minds have judged right and proper for other situations" or other than the setting of a norm, range or expected outcome for cases involving similar facts.
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> 166 Thus we also see difficulties in the application of *Wallis*.

Ultimately, the Full Court allowed the appeal on the grounds that the award was so unreasonable that the discretion must have miscarried.

Simic & Norton [2017] FamCA 1007

» Costs

» Referral of solicitors to the Legal Services Commissioner

This was a property and parenting (and child support departure) matter in the Family Court at Sydney. The parenting issues were settled during the hearing, and the property case settled on the seventh day of the hearing.

Consistently with the Rules, the parties had provided costs notices. The parties had legal costs and disbursements of around $860,000 in total. While the judgment does not reveal the property pool, his Honour described the parties as "ordinary people" and the costs as "outrageous" and "eye-watering".

In his reasons, his Honour Justice Benjamin – whose usual location is Hobart – had this to say about the Sydney Registry:

> 2 … I have observed what seems to be a culture of bitter, adversarial and highly aggressive family law litigation. Whether this win at all costs, concede little or nothing, chase every rabbit down every hole and hang the consequences approach to family law litigation is a reflection of a Sydney-based culture by some or many litigants or whether it is an approach by some legal practitioners or a combination of both, I do not know.

His Honour went on to review some of the output of the legal representatives and what the clients had received for their money:

> 15 Attached to the affidavits of the parties were copies of correspondence between the solicitors. Some of this solicitor correspondence was included as part of the five hundred pages of exhibits to the father's affidavit. I have read each and every one of those letters.
>
> 16 During her cross-examination of the father, senior counsel for the mother questioned him about the tone, length and appropriateness or otherwise of some of those letters.
>
> 17 Some of those letters were inflammatory and reflected the anger of the parties or one or other of them. The letters were at times accusatory. They were often verbose and at times involved unnecessary tit for tat commentary. Some of the letters served little or no forensic purposes.

18 The father conceded in cross-examination that on some days multiple letters were sent by his solicitor to the other party's solicitor.

19 Solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients.

20 The solicitors are professional legal practitioners and charge significant hourly rates for their time and skills. To that end, they must ensure that correspondence and communication is necessary, balanced, considered and relevant.

21 Parties to family law litigation can often be distressed, anxious, angry, upset and emotional. Many have little experience in court process and this may be their one, and hopefully only, interaction with the civil legal system. They are generally unsophisticated litigants in terms of costs and rely on the provision of fair, reasonable, competent and proportional professional services by their legal representatives. …

26 For legal practitioners to be entitled to be paid costs in this Court, or any court for that matter, there is the following underlying criteria:-

(a) It needs to be reasonable to carry out the legal work to which the legal costs relate;

(b) The legal work must be carried out in a reasonable and professional manner;

(c) The quantum of legal costs and disbursements must be fair and reasonable, in all of the circumstances; and

(d) The legal costs and disbursements must be proportionate to the issues in dispute.

27 In this case the parties have spent an 'eye watering' total of about $860,000 in legal costs and disbursements.

28 Legal practitioners have a duty to minimise costs and to reduce conflict.

As family law practitioners, we deal with people at their lowest ebb: confused, stressed, frightened, and angry. Often, it is difficult to get coherent instructions, or to explain to a frustrated parent that you should not be writing a letter to the ex-spouse's lawyer every time little Johnny comes to changeover with a skinned knee, or when little Janey's homework is not finished. Communication has frequently broken down to the point where the parents cannot speak to each other – and should be actively discouraged from texting angry! – and they rely on their legal representative to express their concerns in a more rational way.

There is a fine line between constructive communication assisting a client through a difficult situation, and irrelevant, antagonistic correspondence – and that line is often in the eye of the beholder, In this case, the beholder was the court and, ultimately, the Legal Services Commissioner.

This case is, in my view, a tool in your arsenal: while you may have an insistent, cranky client in your ear, the threat of a referral to the OLSC tends to focus the mind on whether this or that communication is relevant or necessary.

Taronite & Mabra (Costs) [2017] FCWA 72

» Costs disproportionate to issues

Disproportionate costs are not, it seems, limited to procedings in Sydney. In this case, Justice O'Brien of the Family Court of Western Australia considered the wife's application for indemnity costs, her costs totalling $438,653.84. The Husband's costs were around $135,000.

His Honour said:

> 6 The asset pool available for division between the parties was found by me at trial to amount to $2,723,383.00. The expenditure by the parties of something in excess of $570,000.00 in legal fees, in a case which raised no difficult issues of law and was not forensically complex, is, to state the observation as neutrally as possible, both unfortunate and difficult to understand.

His Honour, properly, divided the question of costs into two: were there circumstances warranting an order for costs? If so, what order is just?

Having considered the circumstances of the case, his Honour found that, while neither party was blameless, the overall conduct of the proceedings justified an order for costs in the Wife's favour.

His Honour went on to say:

> 101 Even when it is established, as it is in this case, that there are circumstances which justify an order for costs, the court is empowered only to make such order for costs as it considers just.
>
> 102 That in turn necessitates a consideration of the reasonableness of the costs incurred and for which compensation in the form of an order is sought. Even the most recalcitrant of litigants cannot be ordered to compensate the other party for fees incurred which are themselves unreasonable or unnecessarily incurred ...
>
> 103 The fees charged to, and paid by, the wife in these proceedings are staggering. They are entirely disproportionate to the complexity of the case and the nature of the matters in issue in the proceedings.

His Honour noted that in family law there are demanding clients, and that such clients can generate additional work. However, a lawyer's duty is clear at common law and reflected in the rules of court.

> 111 Lawyers are entitled to charge reasonable fees for work reasonably required to be done and which requires the skill of a lawyer. They are not entitled to charge for unnecessary work, duplication of work or work related to the administration of their practice. They are not entitled to charge at a lawyer's hourly rate for work which could, for example, readily be done by a courier or an unskilled clerk.

While his Honour did not undertake an assessment of the quantum, the judgment nevertheless provides a non-exhaustive list of examples raising "significant concerns" about the wife's legal costs (at [112]):

» A "Disbursement" for preparation of the costs agreement – for which a client cannot be charged "fees", the judge noting the use of the word "disbursements" to describe the item, perhaps to avoid that violation;
» Fees for preparation of notifications as to costs – an obligation that arises under the Rules and, in his Honour's view, one for which it is inappropriate to charge fees;
» Solicitor's hourly fee charged for delivery of documents to counsel – work that clearly could be done for less than $350/hr;
» A charge of $1282.00 for 3.7 hrs of solicitor's work drafting a letter reporting on a 2 hour interim hearing, at which independent counsel appeared and provided their own report;
» A charge of $1400 for 2.7 hrs of solicitor's work to attend a hearing that ran for 23 minutes, with a separate charge for reviewing the judgment handed down on that occasion;
» Charges of between $510 and $720 to prepare a letter apparently dealing with the children's non-attendance at events;
» Multiple instances of charges of 0.1 hrs for drafting and then another 0.1 hrs for emailing correspondence;
» Charges of over $54,000 for preparation of the Wife's trial affidavit, which included 75 annexures, only 44 of which

were relied on and, "even then, many of the annexures were of limited, if any, evidentiary value";

» A charge of 2 hrs for attendance at a 15 minute readiness hearing, and a further charge for perusing the "entirely standard" orders and reporting to the client;

» For the first day of trial, in addition to fees for Senior Counsel, a charge of $3739 for 2 lawyers, and an additional $2070 for preparation of "trial notes";

» On the second day, apart from Senior Counsel's fees and a $2,810 charge for attendance of an instructing solicitor, a charge of $1,696 for "trial notes", a telephone call from Senior Counsel, and "reviewing legislation";

» A charge of $1200 for a letter "reporting on attendance" at the trial, at which the client was present at all times.

His Honour made no findings in regard to his concerns, as there had not been any formal assessment nor had the solicitors been given the opportunity to explain the bills. His Honour proposed to forward a copy of the reasons to the Legal Practitioners Complaints Committee.

His Honour had the following observations:

> 117 … this was not in any sense a complex case. The legal issues raised, such as they were, were not difficult. The asset pool was simple. The factual disputes were not complicated, nor of great significance to the outcome.
>
> 118 The expenditure by the parties of legal fees in excess of $570,000.00 in those circumstances is entirely disproportionate to the matters in issue. I accept that to a certain degree at least, as reflected in my findings above regarding the conduct of the proceedings by the husband, it was at times necessary for the wife to take the initiative and the steps required to progress the matter. I accept, therefore, that it might reasonably be expected that she would in those circumstances incur legal fees somewhat higher than those incurred by the husband, and that it is reasonable for her to look to him for some compensation relative to that imbalance.
>
> 119 I cannot accept, however, that the nature of the proceedings nor the way in which they were conducted by the husband could in any sense justify the wife incurring legal fees in an amount more than treble those incurred by him.
>
> 120 For the most part, the responsibility for the significant disparity in fees incurred by the parties must be borne by the wife and those advising her; it is not possible on the information available to me to properly apportion that responsibility between client and lawyer nor on the present application is it my function to do so.
>
> 121 The husband does, however, for the reasons outlined earlier bear some responsibility for the disparity. It is appropriate in all the circumstances for him to make a contribution to the wife's costs proportionate to that responsibility.

His Honour then determined the amount to be paid:

> 127 As in many cases, this is a matter in which it is appropriate for the husband to be ordered to contribute towards the wife's costs, as distinguished from being ordered to pay her costs of the proceedings or any specific component of them.
>
> 128 For the reasons set out above, that contribution will only be modest by comparison to the amount of fees actually incurred. While I am satisfied that the husband's conduct of the proceedings increased the wife's costs I reject any suggestion that the entirely disproportionate total of those costs is attributable to him, beyond the limited extent reflected in the order which I propose to make.
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> 129 In all the circumstances, I consider that an order requiring the husband to contribute towards the wife's legal costs in the sum of $20,000.00 is just.

Britt & Britt [2017] FamCAFC 27

» Property proceedings

» Kennon argument

» Family violence evidence

» Distinction between admissibility and weight

These were property proceedings following a 30 year marriage. The parties were farmers and had lived on a property the husband brought into the relationship.

The wife raised a *Kennon* & *Kennon* (1997) 22 FamLR 1 ("*Kennon*") argument, contending that the husband was violent to her during the relationship and that this made her performance of her role in the marriage more difficult.

In *Kennon*, Fogarty & Lindenmayer JJ said at 24:

> ...where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79.

On objection by the Husband the trial judge rejected much of the Wife's evidence about violence in the relationship, and where evidence of violence was admitted the judge did not accept it, finding that the Wife was not a witness of credit.

On appeal, the Full Court considered whether the evidence of violence was properly rejected. At [25] the Court said:

> The primary judge, on the application of counsel for the respondent, rejected parts of the appellant's evidence as to family violence, essentially on the basis that the evidence was not in "proper form". The primary judge considered that the evidence consisted of conclusions, was "just too general" and lacked particularity. In particular, her Honour was critical of adjectives such as "regularly", "routinely", "repeatedly" and "often". This was because these words lacked specificity and were too general. Her Honour was of the view that such evidence gave no indication as to "whether [the family violence] happened once a week or once a decade". Further, scattered throughout the transcript are statements made by the primary judge to the effect that the evidence was not relevant to the issues before the court.

The evidence rejected at trial is included the appeal reasons at [26] and include the following:

> "[The respondent] dominated me throughout our relationship. He has been violent and aggressive towards me prior to the time I commenced cohabitation with him. He regularly forced me to have vaginal and anal sex with him without my consent, often causing me considerable pain and discomfort, throughout our relationship. Our first sexual interactions were without my consent. He routinely punched and beat me and was verbally rude and aggressive throughout our relationship. He also routinely denigrated me in public, called me a "slut" and "scum", and regularly told people, including our children, that I was having affairs with other people. He regularly drank heavily. He would drink until he was extremely intoxicated. He was always violent, aggressive and abusive after drinking, particularly towards me. On numerous occasions during the marriage he said;
>
> 'Why don't you pack your shit and fuck off'
>
> and
>
> 'You are just a bloody [dodo] ([a reference to] my maiden name). Without me you'd be back in the gutter where you started from. That's where you really belong'."

And:

> "[The respondent] regularly left me alone on the property for days at a time while he went away socialising and drinking. Sometimes he left in the afternoon saying he was going to the local hotel for a drink and would not return for a day or more. He regularly came home extremely intoxicated. When he was in this condition he was always aggressive and violent. On these occasions he would punch me, hit me, try to choke me and grab me and drag me around by my hair. It usually took him more than a day of sleeping to recover. Usually he had no recollection of what he had done to me when he awoke".

Was the evidence admissible?

The Full Court returned to s 55 and s 56 of the Evidence Act:

> s 56: … evidence that is relevant in a proceeding is admissible in the proceeding...

and s 55:

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

The Full Court referred to *IMM v The Queen* (2016) 330 ALR 382, in which the High Court clearly explained the effect of ss 55 and 56:

> 38 … There can be no doubt that the reference to the effect that the evidence "could" have on proof of a fact is a reference to the capability of the evidence to do so. The reference to its "rational" effect does not invite consideration of its veracity or the weight which might be accorded to it when findings come to be made by the ultimate finder of fact.
>
> 39. The question as to the capability of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue is to be determined by a trial judge on the assumption that the jury will accept the evidence. This follows from the words "if it were accepted", which are expressed to qualify the assessment of the relevance of the evidence. This assumption necessarily denies to the trial judge any consideration as to whether the evidence is credible. Nor will it be necessary for a trial judge to determine whether the evidence is reliable, because the only question is whether it has the capability, rationally, to affect findings of fact. There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.
>
> 40. Because evidence which is relevant has the capability to affect the assessment of the probability of the existence of a fact in issue, it is "probative". Therefore, evidence which is relevant according to s 55 and admissible under s 56 is, by definition, "probative". But neither s 55 nor s 56 requires that evidence be probative to a particular degree for it to be admissible. Evidence that is of only some, even slight, probative value will be prima facie admissible, just as it is at common law.

The Full Court applied the principle to the evidence which had been rejected at first instance:

> 38 The proposed evidence went to the relationship between the parties. In proceedings under the Family Law Act, evidence of relationships and the parties' contributions to their property is commonly given in general terms and in terms which are redolent of being a conclusion. Affidavits would be excessively long otherwise. For example, parties often describe "relationships commencing" or starting "to live together" and this evidence is routinely and unremarkably admitted. Judges use their experience and, importantly, all of the evidence in the case to understand such statements.
>
> 39 It is true, of course, that complaints of family violence raise serious issues. Even so, there is not a higher standard for the admissibility of evidence of family violence compared to evidence on other issues. In determining whether or not allegations of a serious nature have been proven, the Court will apply s 140 of the Evidence Act, but such a task is undertaken after issues of admissibility have been decided.

In considering whether evidence could be rejected merely for being a conclusion, the majority said:

> 40 ... There is nothing in the Evidence Act that prevents evidence being given as a conclusion (save for expert opinion expressed as conclusions which can only be given by expert witnesses). The test remains that posed by s 55 and s 56. Thus a trial judge is required to consider whether the proposed evidence has sufficient, even if slight, probative value to make it admissible. If the nature of the conclusion is such that it has no probative value, the evidence should be rejected.

The Court noted the danger in rejecting evidence as irrelevant:

> 44 ... A determination, at the threshold of the hearing, that evidence is irrelevant because the fact or proposition contended for cannot be established must be undertaken cautiously and carefully. This is because such a consideration is, in effect, a summary determination of that issue. Accordingly an approach similar to summary dismissal applies and the evidence should only be rejected if there is no reasonable likelihood of the fact or proposition being established...
>
> 45 It must be recalled that s 57 of the Evidence Act permits evidence to be admitted provisionally. If there is a doubt as to whether a fact or proposition is capable of being established, the evidence as to that fact or proposition can be admitted provisionally and the issue can be revisited when the evidence is complete.

The Court said that "generality" was no bar to admissibility, again being a question of weight:

> 50 ... The statements made by the primary judge, to the effect that the evidence was too general and was a conclusion, confuse admissibility with weight. Whilst the evidence could have been more specific ... any generality went to the ultimate weight to be given to the evidence and not to whether it should be admitted or not. ...
>
> 54 Evidence is commonly given in general terms and when taken in conjunction with other evidence it can be tolerably clear what is meant. One would not expect any person who had been in a long relationship to remember the exact nature and frequency of recurring events throughout that relationship, let alone specific dates.
>
> 55 Ultimately, the court will need to deal with that evidence, in the light of all of the material before it, in order to determine whether particular conclusions or inferences can be drawn. At that stage, the weight to be given to the evidence is critical. However, that occurs at the end of the hearing. It does not occur early in the hearing and not when dealing with objections to evidence.

The Full Court concluded that rejecting the evidence was an error and the matter was remitted for rehearing. What weight the previously rejected evidence will ultimately have at rehearing will be interesting to see.

Bondelmonte & Bondelmonte [2017] HCA 8

- » Parenting
- » Best interests
- » Children's wishes

The parties to these proceedings had equal shared parental responsibility pursuant to orders made in 2014. In January 2016, the father took the boys on a holiday to New York. The mother had consented to the holiday and the children were to return to Australia on 1 February 2016.

In late January the father's solicitor informed the mother that the father had decided to remain in the United States indefinitely and that the sons wanted to stay with him.

The mother filed an urgent application which came before Justice Watts in the Family Court.

His Honour made interim orders that the sons be immediately returned to Australia, concluding it was in their best interests that they remain here pending determination of whether they should live in Australia or relocate to the US.

The Court accepted the evidence of the father as to the views which had been expressed by the boys, that they wished to continue to live with him in New York.

The father argued that a 'wishes report' should be obtained whilst the children were in New York. The Court rejected this argument, preferring a family report upon their return to Australia to address the children's wishes along with all other relevant factors.

His Honour was disturbed by the father's behaviour ain retaining the boys and involving them in the contravention of Orders, noting that if the Court sanctioned his actions it would send a poor message about appropriate parental behaviour.

His Honour concluded that s 60CC required a balancing of the children's expressed wishes against the damage being done to the relationships between mother and sons, father and daughter, and between the siblings.

The father appealed to the Full Court (*Bondelmonte & Bondelmonte* [2016] FamCAFC 48).

The father contended, inter alia, that the trial judge had not given appropriate weight to the views of the children. The majority of the Full Court firstly noted that a judge is not obliged to make orders consistent with a child's wishes, and that the obligation is to consider the weight which such views should be given, then to determine how giving effect to a child's wishes accords with the child's best interests.

The majority concluded that his Honour's approach was available to him and that the appeal should be dismissed.

In dissent, Justice Le Poer Trench concluded the appeal should be allowed. His Honour said:

> 153 ... when the behaviour of either of the parents in a parenting case is confronting to the Court, even to the point of being a clear challenge, that imperative, which requires the Court to make orders in the child's best interests, requires a judge to look past the abhorrent, disrespectful, challenging and distasteful behaviour of parents to consider what order is actually required to cater to the child's best interests.

The father appealed to the High Court, arguing that his Honour Justice Watts had failed to adequately take into account a material consideration, namely the views expressed by the children.

Section 60CC(3)(a) requires that in deciding what is in a child's best interests, one of the considerations is:

> any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views

The High Court (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) said:

> 34 The focus placed by the father upon the prescribed consideration stated in s 60CC(3)(a) tended to elevate the views expressed by a child to something approaching a decisive status. In some cases, it may be right, in the exercise of a primary judge's discretion, to accord the views expressed by a child such weight, but s 60CC(3)(a) does not require that course to be taken. They are but one consideration of a number to be taken into account in the overall assessment of a child's best interests.
>
> 35 The terms of s 60CC(3)(a) itself may be taken to recognise that, whilst a child's views ought to be given proper consideration, their importance in a given case may depend upon factors such as the child's age or maturity and level of understanding of what is involved in the choice they have expressed. Children may not, for example, appreciate the long term implications of separation from one parent or the child's siblings. Section 60CC requires that attention be given by the court to these matters.

The High Court rejected the argument that a Court is obliged to seek a child's views in parenting proceedings before making a parenting order. The High Court said:

> 43 It [s60CC(3)(a)] requires that the views which have been "expressed" by a child be considered. The term "consider" imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained. [Footnote omitted]

The father also submitted that his own actions in retaining the children had coloured the trial judge's assessment of the children's wishes and may have motivated his Honour's decision to order the return of the children. The High Court considered that his Honour was not motivated to give less weight to the children's views by reason of the father's actions, but that if his Honour had done so, that would have been taking into account an irrelevant consideration.

Thorne & Kennedy [2017] HCA 49

» Financial agreements – s 90B, s 90C
» Setting aside for unconscionable conduct and undue influence – s 90K, s 90KA

The parties met on the internet in 2006. Ms Thorne was 36 and living in the Middle East. She had no substantial assets. Mr Kennedy was 67 and living in Australia. He was a property developer with assets of at least $18 million.

In February 2007 Ms Thorne came to Australia. The parties were to be married on 30 September that year.

On 19 September Mr Kennedy told Ms Thorne they were going to see a solicitor to sign an agreement. He said that if she did not sign the wedding would not proceed. 4 days before the wedding, Ms Thorne signed a 'pre-nuptial agreement' under s 90B. She received legal advice and signed contrary to that advice.

Shortly after the wedding, a further agreement was signed under s 90C in almost identical terms to the s 90B agreement. Ms Thorne again signed against legal advice.

The parties separated in 2011. There were no children of the relationship.

Ms Thorne commenced proceedings to set aside the agreements, and for property settlement orders and maintenance. Mr Kennedy died during the trial and was substituted as a party by the executors and trustees of his estate.

At issue in the case was whether the agreements were liable to be set aside on the grounds of duress, undue influence, or unconscionable conduct.

Section 90K(1) provides that a court may make an order setting aside a financial agreement if the court is satisfied of matters including, in s 90K(1)(b), "the agreement is void, voidable or unenforceable" and, in s 90K(1)(e), "a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable". Section 90KA then provides, in part, that the question whether a financial agreement is valid, enforceable or effective "is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts".

The accuracy of advice given to Ms Thorne by her solicitor, Ms Harrison, was not controversial. The key features were:

1. The agreement provided for Ms Thorne to receive maintenance during the marriage of the greater of (i) $4000 per month or (ii) 25% of the net income from the management rights of a proposed development. Ms Harrison observed that the $4,000 per month contained no provision for increase and was a very poor provision from someone in Mr Kennedy's circumstances.
2. Ms Thorne would be permitted to live rent free in a penthouse located in the proposed development and her family would be permitted to live rent free in a unit located in that development. Ms Harrison noted, however, that Ms Thorne had informed her that the local council had refused planning permission for the proposed development.
3. If Ms Thorne and Mr Kennedy separated within the first three years of marriage, with or without children, then Ms Thorne would get nothing. The rights described above would also cease.
4. If Ms Thorne and Mr Kennedy separated after three years, without children, Mr Kennedy would only have an obligation to pay a single lump sum of $50,000 to Ms Thorne. This payment was indexed to the Consumer Price Index if the separation occurred after 1 July 2011. Ms Harrison described this amount as "piteously small".
5. If Mr Kennedy died while they were living together and while they had not separated then the agreement provided that Ms Thorne would be entitled to (i) a penthouse in the proposed development or, if that were not possible, a unit she chose in the same city not exceeding a market value of $1.5 million; (ii) 40% of the net income of the management rights of the proposed development or $5,000 per month, indexed annually, whichever was the greater; and (iii) the

Mercedes Benz car that was presently in her possession or a replacement vehicle of the same or higher value.

In setting aside the agreements, the primary judge relied on six matters which led to her Honour to conclude that Ms Thorne had "no choice" or was "powerless" in entering into the agreements:

1. The financial inequality of the parties;
2. Ms Thorne's lack of permanent status in Australia at the time;
3. Ms Thorne's reliance on Mr Kennedy for all things;
4. Ms Thorne's emotional connectedness to their relationship and the prospect of motherhood;
5. Ms Thorne's emotional preparation for marriage; and
6. The public nature of the upcoming marriage.

In the decision at first instance (*Thorne & Kennedy* [2015] FCCA 484) the primary judge described Ms Thorne's circumstances in these terms:

> 91 She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions in (country omitted). She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.
>
> 92 Every bargaining chip and every power was in Mr Kennedy's hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear.

The Full Court allowed the appeal, in effect upholding the financial agreements.

Ms Thorne was successful in the High Court in restoring the first instance decision to set aside the agreements, the plurality determining that the primary judge's conclusions were open to her on the evidence, holding:

> 59. … Each of the factors which the primary judge considered was a relevant circumstance in the overall evaluation of whether Ms Thorne had been the subject of undue influence in her entry into the agreements. In combination, it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. In other words, the extent to which she was unable to make "clear, calm or rational decisions" was so significant that she could not aptly be described as a free agent. [Footnotes omitted]

On the application of the vitiating factor of undue influence to financial agreements the plurality said at [60] these factors may have prominence:

> 60... (i) whether the agreement was offered on a basis that it was not subject to negotiation;
>
> (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
>
> (iii) whether there was any time for careful reflection;
>
> (iv) the nature of the parties' relationship;
>
> (v) the relative financial positions of the parties; and
>
> (vi) the independent advice that was received and whether there was time to reflect on that advice.

The plurality also said:

> 56. …Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable even for agreements of this nature.

Holland & Holland [2017] FamCAFC 166

» Property

» Inheritance post-separation

The parties had a 17 year relationship. There were 2 children of the relationship aged 14 and 17. Four years after separation the husband received an inheritance from his brother of $715,000.

The orders made by the trial judge represented a 62% division of assets to the wife, 38% to the husband; however, the divided asset pool excluded the inheritance, the trial judge instead treating that as a financial resource of the husband.

The "exclusion" of the inherited property was a central issue in the appeal. The Full Court considered in detail the concepts of "after-acquired property", "exclusion", and "financial resource".

The Full Court reiterated that the concepts of "after-acquired property" and "exclusion" involve the risk of error in that it is contrary to longstanding authority to suggest that post-separation property will only be included if there is a direct connection between the marriage and the property.

The Full Court also reiterated the principle from *Stanford* that it is:

> 18 ... "necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to common law and equitable principles, the existing legal and equitable interests of the parties in the property..."

The Full Court noted that the expression "financial resource" requires similar caution. A s 79 order can alter the parties' interests in respect of property, but not in relation to financial resources. Financial resources are nonetheless important to s 79 orders, by reference to s 75(2) factors.

Inherited property is sometimes labelled as a "financial resource" in circumstances where the Court is actually considering the property as part of an asset by asset approach. The Full Court cautioned against this, noting that the term "financial resource" should be confined to interests which do not fall within the definition of property.

Thus the Full Court concluded that her Honour erred in referring to the husband's interest in the inherited property as a "financial resource" and that it was, instead, property of the husband.

The Full Court said it is wrong as a matter of principle to refer to any existing legal or equitable interests in property to be "excluded" from consideration in s 79 proceedings and that:

> 26 More often than not, the expression is used to indicate that particular property, or a particular category of property, or superannuation interests, are to be treated separately from other property for the purpose of a consideration of s 79(2) or for the purpose of assessing contributions

The Full Court cautioned against the categorisation of property by reference to a characteristic such as "inheritance" or "after-acquired property", as to do so may lead to an erroneous argument that unless contributions to that property can be established the property ought to be excluded.

The Full Court concluded that her Honour erred in principle, as the inherited property had been excluded from consideration.

However, it was open to her Honour to conclude that the inherited property should be assessed separately from the other property in a two pool approach, and that by reference to contributions the wife could be assessed as having no entitlement in the property.

To reach such a conclusion there would need to be findings which included the interest in the property and findings in relation to contributions of all types. Her Honour had not undertaken such an asset by asset assessment in relation to the inherited property.

The key proposition from this appeal it that there is no basis for excluding from consideration any property in which the parties have an existing legal or equitable interest. Nevertheless the nature of a particular interest or interests in property and when and how it was acquired, utilised, improved or preserved may be very relevant to each or all of three central questions:

» should a s 79 order be made at all;

» whether contributions should be assessed "globally" or "asset by asset" or by reference to two or more "pools"; and

» the nature and extent of each party's contributions.

Drew & Jensen [2017] FCCA 656

» Parenting

» Ex parte recovery

» Duty of disclosure

The parties were parents of children aged 5 and 2. At the end of the parties' relationship the mother moved out of the family home taking the children.

The father commenced recovery proceedings in a Magistrates Court. An order was made *ex parte* on the basis of the evidence filed by the father.

The recovery order was executed by the Police, and the children were placed in their father's care. The mother commenced proceedings in the FCCA.

At the interim hearing both proposed that the children live with them, and spend time with the other parent.

The Judge closely examined the evidence the father had put before the Magistrate at the recovery application, and observed:

> 45 It goes without saying that it is critically important for any party who brings parenting proceedings to present all relevant information to the Court. If it were possible to have an even higher duty of disclosure in these circumstances, it arises when ex parte Orders are sought. Thus, the evidence the Father gives at paragraphs 12-16 is relatively benign, and even if it did not provide assurance to a judicial officer making an urgent decision, at the very least it did not raise anything to be concerned about.
>
> 46 The difficulty for the Father, however, is that this particular evidence, on which he relied in order to gain the recovery order, was plainly misleading in what it does not tell the Court. Moreover, the matters about to be discussed were plainly known to the Father.

The objective material before the court indicated that the father had been violent in a previous relationship and had been convicted of that violence. The allegations made by the mother in the present case were consistent with the nature of that violence.

The Court stated:

> 54 Let it be very clear – it is the opinion of this Court that any parent who has been violent to a former partner in the past, who has been convicted of the same, and who does not spend time or communicate with children from a previous relationship for reasons that include that violence, must put that material before the Court in all circumstances, let alone when ex parte Orders are sought.

The Court referred to *The Best Practice Guidelines for Lawyers Doing Family Law Work* (prepared by the Family Law Council and Family Law Sec on of the Law Council of Australia), which provides:

> 3.1 An application for an injunction may be made by one party without notice to the other (an 'ex parte' application). In such a case, the applicant's lawyer is under a duty to inform the court of any matters within the lawyer's knowledge which are not protected by legal professional privilege and which would support an argument against the granting of an injunction or limit the terms of the injunction adversely to his or her client.
>
> 3.2 If an injunction is appropriate, an ex parte application should be discussed. The issues to consider are:
>
> - whether the client may be in danger, whether valuable property is about to be dissipated, or whether vital evidence is about to be destroyed or removed if proceedings are not instituted on an ex parte basis
>
> - the seriousness of the threat to the client, property, or evidence, including whether it is urgent and imminent the likelihood of the court granting an ex parte order, which it will only do if there is a real and urgent need to protect a person or property
>
> - whether proceedings ex parte may escalate the danger to the clients, and
>
> - the court's preference for alternative measures, such as permission to bring the application on short notice.

After reviewing several authorities on the principles of disclosure, as well as in relation to ex parte applications, the Court concluded:

> 32 Lest there be any doubt, this Court considers that the obligation of disclosure discussed in these authorities apply as much to parties as to their lawyers. When a party fails to disclose relevant information to the Court in a parenting case, this may reflect adversely on their capacity to provide for the emotional needs of the child [s60CC(3)(f)] (because of the emotional trauma associated with the recovery for example) and their attitude to the child and to the responsibility of parenthood [s60CC(3)(i)]. It is, in any event, certainly a fact or circumstance that a Court might consider relevant [s60CC(3)(m)].

As practitioners, we must remember our duty to the Court is paramount, and there is a positive duty not to mislead the Court.

For ex parte applications the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provide:

> 19.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:
>
> 19.4.1 are within the solicitor's knowledge,
>
> 19.4.2 are not protected by legal professional privilege, and
>
> 19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
>
> 19.5 A solicitor who has knowledge of matters which are within Rule 19.4:
>
> 19.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the solicitor to disclose those matters under Rule 19.4, and
>
> 19.5.2 if the client does not waive the privilege as sought by the solicitor:
>
> (i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so, and
>
> (ii) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

Amendments to the Family Law Rules – commenced 1 March 2018

» Amendments apply to the Family Court of Australia only (not the Federal Circuit Court of Australia).

Five major changes:

1. **Exhibits and annexures are no longer to be attached to affidavits (or otherwise filed)**. Documents that are to be relied on must be referred to in the body of the affidavit and tendered. Hard copies of any document intended to be used in conjunction with an affidavit and tendered, must be served on the other party contemporaneously with the affidavit.

» However, *the ban on annexures to affidavits does not apply to the affidavits of single experts and adversarial experts appointed pursuant to Divisions 15.5.2 or 15.5.3*. Lawyers may still annex those expert's reports to their affidavits. Typically this will include expert reports from valuers and private family report writers.

» The ban on annexures to affidavits will apply to evidence of other professional witnesses as defined in Rule 15.41(1), such as treating medical practitioners and contact centres. It is open to lawyers to seek directions in anticipation of trial to allow reports from such professionals to be annexed to trial affidavits. But for the purposes of affidavits filed prior to the first return date, the evidence of those professionals will need to be included in the body of the affidavit.

2. Two new 'Notice of Risk' forms have been approved - one for use in current cases and one to be used in conjunction with Applications for Consent Orders. The form 'Annexure to Proposed Consent Parenting Order' has been abolished.
3. It is no longer necessary to file a Superannuation Information Form with an Application for Consent Orders, provided an alternative document is filed which allows the Court to determine the value of the superannuation interest, such as an up to date member statement.
4. A new Submitting Notice has been created, to be used in situations where a party is served with an Initiating Application, Response, Reply or Notice of Appeal and they do not wish to contest the making of the orders sought. The party filing the notice must provide an address for service and state in the notice that they will submit to any order the Court may make. The notice must indicate if the party wants to be heard as to costs.
5. A new Notice of Contention in appeals is to be used when the respondent to an appeal does not seek to cross-appeal, but seeks to have the Order affirmed on grounds other than those relied on by the first-instance Court.

Other changes include:

» Copies of documents in answer to a subpoena and the documents can now be produced in any electronic form capable of being printed without loss of content.

» Multiples copies of consent orders sought no longer need to be filed if the orders are filed electronically.

» The addition of "safety concerns" as a factor for consideration in transfer of venue applications.

» A new rule governing undertakings to the Court, including that oral undertakings must be subsequently reduced to writing and filed, and providing that an undertaking to pay damages is to submit to any order the Court might consider just for the payment of compensation.

» Cost Assessment Orders now have the force and effect of an Order of the Court.

» Deputy Registrars' delegated powers have been extended to include inter alia the making of location orders; dismissing cases in certain circumstances; the appointment of a case guardian.

» Family Violence Orders: if a copy of a current FVO is unavailable, it is no longer necessary to file an undertaking to file it.

New Practice Direction – Federal Circuit Court

Practice Direction No 2 of 2017

Interim Family Law Proceedings

Part 1 Preliminary

1. This Practice Direction sets out arrangements for the management of interim proceedings in the family law jurisdiction in the Federal Circuit Court of Australia.

2. This Practice Direction commences **1 January 2018** and supersedes the following Information Notices:

> *Notice to Litigants and Practitioners – Interim Proceedings-Adelaide Registry;*
>
> *Notice to Litigants and Practitioners – Interim Parenting Proceedings – Sydney, Newcastle and Canberra Registries*.

3. The conduct of proceedings in the Court is governed by the *Federal Circuit Court of Australia Act 1999* and the *Federal Circuit Court Rules 2001*. Consistent with its legislative mandate, the Court applies the rules of court flexibly and with the objective of simplifying procedures to the greatest possible extent.

4. ***It is expected that parties and their representatives will assist the Court to ensure that proceedings are conducted expeditiously and consistently with the objectives of early identification of the issues in dispute requiring adjudication and the efficient use of judicial resources.***

Commencing proceedings

5. Proceedings in the Court are commenced by an Initiating Application supported by an affidavit. Interim orders may be sought at the time of filing an Initiating Application for final orders or during the proceedings by way of an Application in a Case. Applications for any interim orders must be supported by an affidavit. In financial matters they must also be supported by a financial statement or an affidavit of financial circumstances.

6. Pursuant to section 51 of the *Federal Circuit Court of Australia Act 1999* the Court directs that, unless express leave is granted by the Judge into whose docket the matter has been allocated, affidavit material in support of an interim application must not:

» exceed 10 pages in length for each affidavit;
» contain more than 5 annexures.

Interim hearing

7. The Judge determines whether to conduct an interim hearing on the first return date of an Initiating Application, or Application in a Case. The Judge will also determine whether to deal with all or part of the application and/or the Response as filed.

8. Any interim hearing will be conducted as an abridged process with a circumscribed scope of inquiry. Only those issues, specifically identified by the Judge as the subject matter of the interim hearing, will be dealt with.

9. The relevant facts to be relied on by a party at an interim hearing must be set out succinctly in their affidavit material complying with paragraph 6 above. Division 15.4 of the *Federal Circuit Court Rules 2001* sets out the rules in relation to affidavits.

10. Where the respondent seeks interim orders additional to those sought by the applicant, and the applicant opposes the orders sought, the applicant may file a second affidavit in answer, complying with paragraph 6 above, and setting out:

» any additional orders sought;
» any additional relevant facts relied on in opposition to the respondent's orders.

Failure to comply

11. Parties and practitioners should expect that failure to comply with any part of this Practice Note will result in loss of hearing priority, or adjournment of an interim hearing with costs orders.

12. In particular, if a party proposes to rely upon an affidavit which does not comply with paragraph 6 above, parties and practitioners should expect that:

a. in the discretion of the Judge,

» non complying affidavits will not be read; or
» the responsible party will be required to select 10 pages out of their non complying material that they seek to rely upon;

b. Specific costs orders may be made.

13. Documents filed less than 48 hours prior to hearing (electronically or otherwise) ('a late document') cannot be relied upon at the hearing without leave of the Court. A party or practitioner seeking to rely upon a late document must seek leave to tender a copy of it at the commencement of the hearing.

14. This Notice can be found on the Court's website: www.federalcircuitcourt.gov.au

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With thanks to Christopher Lawrence and Richard Maurice for their kind assistance in preparation of this presentation.

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