

OVERVIEW OF CHANGES IN THE LAW

Hot cases in family law 2017

JACKY CAMPBELL, NOVEMBER 2017
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Even before the delivery of the judgment by the High Court in *Thorne & Kennedy* on 8 November 2017, a financial agreement case, there have been major developments under the *Family Law Act 1975* (FLA) in case law in 2017. This paper covers:

1. *Wallis & Manning* - contributions and comparable cases.
2. *Calvin & McTier* - property acquired after separation.
3. *Surridge & Surridge* - hurt on duty pension.
4. *Official Trustee in Bankruptcy v Galanis* - standing of a trustee in bankruptcy.
5. *Bondelmonte & Bondelmonte* - High Court parenting case.
6. *Bernieres & Dhopal* - commercial surrogacy.
7. *Thorne v Kennedy* - High Court

1. *Wallis & Manning* (2017) FLC 93-759 – contributions and comparable cases

In university law courses, the importance of precedents is emphasised – *ratio decidendi* and *obiter dicta* are prevalent phrases. Bewilderingly, family lawyers advising clients are confronted with the breadth of the court's seemingly unfettered discretion and unpredictability of outcomes. The Full Court in *Wallis & Manning* (2017) FLC 93-759 gave some hope that a more consistent approach may be adopted in the future. In addition, the Full Court had to deal with the assessment of contributions where significant contributions were made on behalf of the husband at the beginning of a long marriage.

The law before *Wallis & Manning*

In cases like *Fields & Smith* (2015) FLC 93-636, the Full Court seemed to confirm that earlier cases could not be relied on as a guide to decision-making. Bryant CJ and Ainslie-Wallace J said, in relation to the use by the trial judge of a table of comparative cases prepared by the husband's counsel:

"The problem with the table is that it gives no indication of the relevant facts in the particular cases ... With all due respect to his Honour, the table can only form the glibbest of comparisons, and although it may be a seductive tool, it cannot illuminate the valuing and weighing of contributions in this particular case and carries with it the danger, if relied upon, of detracting from the individual requirement to make orders that are just and equitable in an individual case."

Bryant CJ and Ainslie-Wallace J considered that the apparent reliance on the table by the trial judge may have led him into error and acted as a fetter to the exercise of his discretion. The third member of the bench, May J, also allowed the appeal, but did not refer to the offending table. She was critical of the trial judge for ignoring the wife's post-separation contributions.

Professor Patrick Parkinson has written some thought-provoking articles about discretion. For example, in "Why are decisions on family property so inconsistent?" (2016) 90 ALJ 498 at 518, Professor Parkinson said, "the idea that the discretion of the trial judge is so open-ended, and that the exposition of principles and guidelines ... would unlawfully fetter the discretion of the judge, is a misunderstanding of the judicial discretion ... In the exercise of judicial discretion, the trial judge needs to draw upon principles and standards which find their origin in law, rather than in the objective values of the individual trial judge".

Professor Parkinson drew upon the High Court in *Norbis v Norbis* (1986) FLC 91-712 and quoted Mason & Deane JJ, who said (at 75,174):

"With all respect to those who think differently, we believe that the sound development of the law, in this area as in others, is served best by following the tradition of the common law. The genius of the common law is to be found in its case-by-case approach. The decision and reasoning of one case contributes its wisdom to the accumulated wisdom of past cases. The authoritative guidance available to aid in the resolution of the next case lies in that accumulated wisdom. It does not lie in the abstract formulation of principles or guidelines designed to constrain judicial discretion within a predetermined framework. There is no reason to think that the traditional approach, when applied in the family law area, leads to arbitrary and capricious decision-making or that it leads to longer and more complex trials."

The reference to "arbitrary and capricious decision-making" in *Norbis* was echoed by the High Court in *Stanford v Stanford* (2012) FLC 93-518 which referred to the risk of "palm tree justice" and said that the Court has a wide discretion, but that it must be exercised in accordance with the legal principles laid down in the FLA.

Wallis & Manning – the use of comparable cases

In *Wallis & Manning*, although not conceding that *Fields & Smith* dictated that comparable cases could not be relied upon, Thackray, Ainslie-Wallace and Murphy JJ relied on *Norbis* and said:

"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

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."

The Full Court analysed a number of cases and compared factors such as the length of the relationship, and the nature, form and characteristics of the contributions made by the parties, including the timing of contributions. The analysis of each case was very detailed and very lengthy. By contrast, the Full Court said that the table in *Fields & Smith* was inadequate as it only summarised cases by setting out matters such as the length of the relationship, the size of the pool

and the number of children post-trial; summarised contributions in single words such as “modest”, “some”, “minor”, “negligible” and “significant”; and gave outcomes in percentage and dollar terms.

It is early days, but hopefully the acceptance of “comparable cases” will bring more predictability to family law property settlements.

Contributions

The parties were married for 27 years and their three children were all adults by the end of the marriage. The net property was about \$1.91m, consisting predominantly of three pieces of real property upon which the parties conducted a farming business. The husband’s father gifted to the parties a half share of a farming property two years after marriage, and another farming property one year later. The trial judge assessed contributions 70% / 30% in favour of the husband and gave the wife 10% for s 75(2) factors. Judgment was not delivered until three years after the trial.

The wife appealed, arguing that the trial judge gave excessive weight to the contributions by the husband’s father and insufficient weight to her contributions. The wife argued that it should be inferred from the reasons for judgment that the trial judge wrongly considered that the farming land at Property W was part of the gifts by the husband’s father. This was important because the historical gifts were a central determinant of the contributions assessments. The inordinate delay in the delivery of the judgment strengthened the wife’s arguments.

The Full Court considered there was merit in the wife’s submissions. The trial judge confused the manner of acquisition of the various properties; the extent and timing of the husband’s father’s gifts were erroneously taken into account in assessing contributions, and the inordinate delay in the delivery of judgment impacted upon how the errors expressed under the heading “contributions” were viewed by the Full Court. The Full Court said (at [86]):

“What might otherwise be regarded as, for example, infelicities in expression in a judgment timeously delivered (when the evidence is fresh in the mind of the judge) or, for example, an erroneous transposition of findings earlier made in the judgment, should not safely be subject to the same assumptions when judgment is delivered three years after the hearing. As but one example of the issues that intrude when there is an inordinate delay in the delivery of reasons and omissions are apparent, it is not known whether the “background” component of the reasons was written a long time earlier or later than the “contributions” section of the reasons.”

The Full Court allowed the appeal, provided an opportunity for the parties to provide further submissions, and re-exercised its discretion. It considered in detail a number of comparable cases to which it had been referred by the parties and others which it considered to be comparable. The Full Court assessed contributions as 57.5% / 42.5% in the husband’s favour, being a disparity of 15% or about \$294,000. After taking into account s 75(2) factors at 7.5%, the property was divided equally between the parties.

2. *Calvin & McTier* (2017) FLC 93-791 – property acquired after separation

The husband in *Calvin & McTier* (2017) FLC 93-785 received a substantial inheritance 4 years after separation. The trial judge dealt with the property globally and divided all the property, including the husband's inheritance, so that the husband received 65% and the wife 35%.

The husband appealed. He argued that the inheritance should not have been included in the property to be divided, but did not contend that if the inheritance was properly available for division, that the percentage division of 65/35 was erroneous.

The parties had an 8 year relationship and 1 child. The child was cared for equally by the parties on a week about arrangement. The husband brought significantly more assets into that relationship than the wife.

The wife commenced proceedings 3½ years after the divorce and was given leave under s 44(3) to pursue a property settlement claim.

The trial magistrate found that the net value of the assets and resources to be divided between the parties was \$1,340,319 of which, in percentage terms, the remaining inheritance of \$430,686, accounted for approximately 32%. Contributions during the relationship were found to be equal. The trial magistrate assessed contributions as 75%/25% in the husband's favour and made a 10% adjustment in favour of the wife for s 75(2) factors to reflect, in particular, the disparity in the parties' incomes and earning capacities.

One of the grounds of the husband's appeal was "the degree of 'connection' – or, more accurately, the lack of connection – between the inheritance and the parties' matrimonial relationship". The Full Court rejected the husband's argument that the High Court's judgment in *Stanford v Stanford* (2012) FLC 93-518 supported Guest J's dissenting judgment in *Farmer & Bramley* (2000) FLC 93-060 in which Guest J required that contributions have "fractional contemporaneity". The Full Court concluded that the Court retained a discretion as to how to approach the treatment of property acquired after separation and could have included the inheritance amongst the property to be divided and deal with all the property globally, or dealt with it separately but still assess contributions and s 75(2) factors. The appeal was dismissed.

The Full Courts in *Holland & Holland* [2017] FamCAFC 166 and *Widmann & Widmann* [2017] FamCAFC 602 approved *Calvin & McTier*.

3. *Surridge & Surridge* (2017) FLC 93-757 – hurt on duty pension

In *Surridge & Surridge* [2015] FamCA 493, Foster J adopted a two-pool approach with the wife's pension being a discrete second pool and the parties' other superannuation and non-superannuation assets being in the primary pool. The wife was in receipt of a hurt on duty pension

under the *Police Regulation Superannuation Act 1906* (NSW). She received a pension of \$900 net per week increasing to about \$1,000 per week net at the time of trial. Foster J referred to the difficulty of assessing contribution-based entitlements to the type of superannuation interest held by the wife and quoted favourably from Watts J in *Schmidt & Schmidt* (2009) FamCA 1386. In *Schmidt*, the court assessed the wife's contribution to the hurt on duty pension entitlement at 10%. In *Schmidt*, the parties were together for 7½ years and the husband was in the police force for just over 21 years prior to his retirement.

In *SurrIDGE*, the wife was aged 46 and her eligible service period commenced in June 1987. The parties commenced a relationship in 1991 and married in 1996. They separated in August 2012. Contributions to the primary pool were assessed as equal. A s 75(2) adjustment of 12½% was made in favour of the wife who had the continuing care of the children aged 16 and 15 with little prospect of financial support from the husband. The s 75(2) adjustment also took into account unexplained funds received and disbursed by the husband of \$800,000.

Justice Foster found that the wife was employed for 9 years with the police force prior to cohabitation. He seems to have made an error here. They apparently married nine years after she started with the police force but had 4 years of cohabitation before their marriage.

The value of the wife's future pension was determined according to fund specific factors at \$1,022,821. No lump sum was payable in the future to her but the effect of a splitting order was to allow an immediate lump sum to be paid to the husband or for a rollover of that lump sum to another superannuation fund or a combination of the two. The effect of any splitting order was to commensurately reduce the wife's pension.

The wife's contribution-based entitlement to the income stream was found by Foster J to be overwhelming and it was difficult to find any contribution-based entitlement of the husband to it. The pension was in effect unearned income, indexed and payable during the wife's lifetime. The consequence of any splitting order of the pension entitlement was to commensurately reduce the wife's pension and procure an immediate cash payment to the husband leaving the wife with the reduced periodic income.

His Honour made a modest adjustment of 5% in relation to the wife's pension in favour of the husband which equated to an approximate lump sum of about \$20,000. The outcome was that the wife had a cash equivalent of about \$1,621,250 from the primary pool less an adjustment of \$20,000 in favour of the husband from the pension pool leaving a net figure of \$1,601,250. She otherwise retained her pension intact. The husband had an entitlement of \$993,050 including the \$20,000 adjustment of the wife's pension.

On appeal, in *SurrIDGE & SurrIDGE* (2017) FLC 93-757, the Full Court found that Foster J's approach to the wife's hurt on duty pension was erroneous, even though both parties urged him to

adopt that approach. The Full Court considered it (at [13]) to be “a matter of significance and is productive of injustice. We consider ourselves bound to correct it”. The Full Court found that it was not just and equitable to make a splitting order in respect of the wife’s pension. Indeed, there was “... a compelling case for not doing so” (at [27]).

The reasons for this conclusion were:

1. Importantly, the property and superannuation interests of the parties permitted justice and equity to be achieved without such an order. The wife had only a possible residual capacity for some form of future part-time employment, her pension income of \$50,000 per annum was modest and she had the continuing full-time care of two children, one of whom was only 12, and had little prospect of receiving child support or other financial assistance from the husband, although he had a significant earning capacity.
2. Once the trial judge determined not to make a splitting order, there was no requirement to value the interest (s 90MT).
3. The wife could never receive the calculated lump sum amount *in specie*. Nor could she commute any part of the pension to a lump sum. Her only entitlement was to an income stream for so long as she remained entitled to receive the pension. If no splitting order was to be made but an assessed percentage entitlement was attributed to the lump sum on account of the husband’s contributions (even if those contributions were assessed to be modest as the trial judge considered them to be) the husband was receiving a lump sum entitlement from a lump sum that the wife could never receive.
4. The pension was taxed, but the scheme-specific methodology by which the capital sum was calculated referred to the gross amount of the pension.
5. If the wife’s pension was to be included in the parties’ assets and liabilities, even if part of a separate pool, her very significant contributions to it needed to be considered and the trial judge did not do so.
6. The proper way to deal with the wife’s pension was under s 79(4)(e) as income in the hands of the wife.

There was no actuarial assessment of the “value” of the projected income stream of the husband of \$340,000 per annum based on his earning capacity (as he had chosen not to work, his projected income was irrelevant), to compare to the lump sum calculation of the wife’s pension income stream.

The Full Court increased the wife’s entitlements overall to 75% by way of a s 79(4)(e) adjustment of 25%, mainly because of large transactions made by the husband which were unexplained and

significantly depleted the pool on top of the other s 75(2) factors in the wife's favour. They could not be precisely quantified because of the husband's attempts to mislead the wife and the court.

In *Goudarzi & Bagheri* [2016] FamCA 205 the trial judge dealt with a pension in the payment phase (which was not a hurt on duty pension) as a financial resource. On appeal in *Goudarzi & Bagheri (No 2)* [2017] FamCAFC 190 the Full Court said this was a permissible, but not the only, approach to pensions in the payment phase. This seems to limit the impact of *Surridge* to hurt on duty pensions, and possibly particular hurt on duty pensions, or at least make it uncertain as to whether the approach taken in *Surridge* extends beyond those types of pensions to all pensions in the payment phase.

4. *Official Trustee in Bankruptcy v Galanis* (2017) FLC 93-760 – standing of trustee in bankruptcy

The ability of a trustee in bankruptcy to set aside a financial agreement after the husband was discharged from bankruptcy was considered by the Family Court in *Official Trustee in Bankruptcy & Galanis* [2014] FamCA 832 and by the Full Court of the Family Court in *Official Trustee in Bankruptcy & Galanis* (2017) FLC 93-760; [2017] FamCAFC 20. The Official Trustee was unsuccessful both before the trial judge and on appeal.

The matrimonial cause under consideration was (eab) of s 4 which gives the court power to deal with (eab) "third party proceedings (as defined in s 4A) to set aside a financial agreement."

The trustee argued that it had standing to bring the proceedings as it was a "government body" within **s 4A(1)(b)(iii)** which provides:

"(1) For the purposes of paragraph (eab) of the definition of *matrimonial cause* in subsection 4(1), *third party proceedings* means proceedings between:

(a) any combination of:

(i) the parties to a financial agreement; and...

(b) any of the following:

(i) a creditor

(iii) a government body acting in the interests of a creditor;

being proceedings for the setting aside of the financial agreement on the ground specified in paragraph 90K(1)(aa)."

Section 90K(1)(aa) enables financial agreements to be set aside because a party entered into the agreement for the purpose (or one of the purposes) of defrauding a creditor or with reckless disregard for that creditor's interests.

The trial judge, Rees J, found that the Official Trustee was not a government body but a statutory trustee. She also found that it would be completely anomalous if one category of trustee (the

Official Trustee) were advantaged by the right to make an application under the FLA where another trustee, who was not the Official Trustee, did not have that right.

The trustee also argued that the matter was a “matrimonial cause” within **s 4(1)(cb)** being:

“(cb) proceedings between:

- (i) a party to a marriage; and
- (ii) the bankruptcy trustee of a bankrupt party to the marriage; with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings:
- (iii) arising out of the marital relationship ...”

Although the husband was discharged from bankruptcy under s 149(1) *Bankruptcy Act* (“BA”) and the bankruptcy had ended, the bankrupt still had some ongoing obligations to the trustee. The trustee retained the right to make claims against the bankrupt in certain circumstances, limited by s 127(1) BA:

“After the expiration of 20 years from the date on which a person became a bankrupt, a claim shall not be made by the trustee in the bankruptcy to any property of the bankrupt, and that property shall, subject to the rights, if any, of a person other than the trustee in respect of the property, be deemed to be vested in the bankrupt, or a person claiming through or under him or her, as the case may be.”

In determining whether a trustee in bankruptcy could initiate proceedings against a discharged bankrupt at any time prior to the expiration of 20 years after bankruptcy, Rees J considered the Explanatory Memorandum to the 2005 amendments to the FLA and the BA and concluded that the term “bankrupt party” in s 4(1)(b) did not mean a party to a marriage who had been discharged from bankruptcy and said (at [49], [52]):

“The emphasis appears to be on closing off the avenue, which may have previously existed, that allowed a debtor to alienate property using a financial agreement so as to make that property unavailable, to his or her trustee in bankruptcy, for the payment of creditors. ...

If the legislature intended that the provisions of the Act would apply to give jurisdiction to the Family Court of Australia to deal with proceedings between a party to a marriage and the trustee in bankruptcy of a discharged bankrupt, then those words could have been included.”

Rees J dismissed the trustee’s application and ordered that the trustee pay the wife’s costs on a solicitor/client basis.

The Full Court in *Official Trustee in Bankruptcy & Galanis* (2017) FLC 93-760 agreed with the trial judge and noted (at [457]):

“As we pointed out at the commencement of these reasons, and as was accepted by the parties, in this case the Official Trustee can pursue its claim against the wife in other courts without any need to set the agreement aside. What is in issue in this case is whether the Court has jurisdiction in determine the trustee’s claim to set the financial

agreement aside.”

The Full Court contrasted Australian Securities & Investments Commission (ASIC) with the Official Trustee. ASIC is a Commonwealth entity for the purposes of the *Public Governance, Performance & Accountability Act 2013*. Section 18AA BA states that the Official Trustee is not a Commonwealth entity.

The *Civil Law & Justice Legislation Amendment Bill 2017* includes proposed amendments to the BA, to clarify that the Family Court has bankruptcy jurisdiction when a trustee in bankruptcy applies to set aside a financial agreement.

5. *Bondelmonte & Bondelmonte* (2017) FLC 93-765 – High Court parenting case

This appeal to the High Court concerned orders made for the return of two boys to Australia from New York, where they remained after the conclusion of a holiday with the father, in breach of a parenting order which had been made by the Family Court of Australia. The father's appeal was particularly concerned with:

1. The way in which the trial judge had taken into account the children's wishes;
2. The interim living arrangements for the children upon their return to Australia.

The two boys were aged nearly 17 and nearly 15 at the time the interim orders were made by Watts J on 8 March 2016. Their sister was nearly 12 years of age.

In January 2016, despite the father not providing the period of notice required by the 2014 parenting orders, and under some pressure from him, the mother reluctantly agreed to allow the two boys to travel to New York for a holiday with the father. The girl was not included in the holiday. The boys were flown by the father, business and first class, to New York on 14 January 2016. By 25 January 2016 the father had decided that it was in his financial interests to remain in the United States rather than to return to Australia. On 29 January 2016 his solicitor informed the mother's solicitor that the father had decided to live indefinitely in the United States and that the boys would remain with him.

The mother filed an application for the return of the boys, in addition to proceedings brought in the United States under the Hague Convention (which did not apply to the elder boy because of his age). The father did not seek any changes to the 2014 parenting orders and sought only to resist the mother's application.

The evidence of the father was that the boys had each expressed a desire to remain living with him in New York. He wanted the hearing to be adjourned so that an expert in New York could interview the boys and provide a report as to their wishes.

If the primary judge decided that they should return to Australia, a major question was where the boys should live on their return. This question was complicated by a number of factors. The father did not say whether he would return to Australia in the event that orders were made for the boys' return. It was therefore not known whether the boys could live with him. The elder boy had been living with his father for some time after his parents' separation and was effectively estranged from the mother, although she had attempted to maintain contact with him. The younger boy was living with the father, although he divided his time between the mother and father; and the daughter remained living with the mother but spent weekends with the father. The evidence was unclear as to the amount of time that the two youngest children were spending with each parent.

Accepting that one or both of the boys might elect not to live with her, the mother advised the Family Court that she would not oppose the boys living with the father's mother, a course which the ICL appeared to consider acceptable.

The matter could not be resolved on the first hearing date before the trial judge and was adjourned. Counsel for the father filed further evidence of conversations with the father's mother, to the effect that, due to her frailty, she was unable to care for the boys. The father made no submissions as to alternative possible living arrangements for the boys.

Two further options were considered by the primary judge to meet the contingency that the father did not return to Australia and the boys chose not to live with the mother. They were reflected in the orders made by the trial judge, who ordered that, in the event that the father returned to Australia with the boys, they could continue to live with him. If he did not return, the boys were to live with the mother if they chose to do so, or they could live in accommodation provided by the father together with paid supervision services, to which the mother consented in writing. Alternatively, each of the boys could live separately with the mothers of respective friends of theirs. The boys' mother had obtained undertakings from the respective mothers, who each agreed to accommodate a boy. Collectively, these orders were referred to as "the interim parenting orders".

Statutory provisions

The following relevant statutory provisions are in the FLA:

Section 60B(1) - The objects of the Part are to ensure the best interests of children are met by reference to certain criteria, which include ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Section 60B(2) - The principles underlying the objects in s 60B(1) are that children have the right to know and to be cared for by both parents and a right to spend time with both parents on a regular basis.

Section 60CA - "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

Section 64C - "A parenting order in relation to a child may be made in favour of a parent of the child or some other person."

Section 65D - "In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting orders as it thinks proper."

Section 60CC - Section 60CC(1) - Requires the court to consider the matters set out in s 60CC(2) and (3), in determining what is in the child's best interests. **Section 60CC(2)(a)** relevantly provides that a primary consideration is "the benefit to the child of having a meaningful relationship with both of the child's parents". Section 60CC(3) provides for additional considerations, which include:

"(a) 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".

Section 60CC(3) states other additional considerations which are relevant:

- the nature of the relationship of the child with each of the parents (s 60CC3(b)(i))
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from his or her parents and any other child with whom he or she has been living (s 60CC(3)(d)(i) and (ii))
- whether the practical difficulty and expense of spending time with a parent will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis (s 60CC(3)(e))

Section 60CD(2) - "The court may inform itself of views expressed by a child:

- (a) by having regard to anything contained in a report given to the court under s 62G(2); or
- (b) by making an order under s 68L for the child's interests in the proceedings to be independently represented by a lawyer; or
- (c) subject to the applicable Rules of Court, or by such other means as the court thinks appropriate.

Section 60CE - "Nothing in this Part permits the court or any person to require the child to express his or her views in relation to any matter."

Section 65C - "A parenting order may be applied for by:

- (a) either or both of the child's parents;
- (b) the child; or
- (ba) the grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child."

The High Court stated (at [29], - [30]) that the issues to be determined were:

- the trial judge wrongly discounted the boys' views about remaining in New York because he formed an adverse view of the father's actions
- the trial judge was required to put in train a process by which the boys' views as to each of the alternative living arrangements, and in particular their possible accommodation with other families, could be ascertained.
- whether parenting orders could be made in favour of strangers to the proceedings who had not made an application for those orders themselves.

In relation to the importance of a child's views, the High Court said (at [34], [38]):

"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.

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 Full Court considered that the trial Judge took into account the boys' views and the effects of the boys' views and concluded that they were best dealt with through the intervention of the family consultant in Australia, via the mechanism which had already been established by the 2015 orders. The trial judge declined to have a "wishes report" undertaken in New York because he doubted its utility. He considered that the views expressed by the boys had been "contrived" by the father.

The father argued that adverse comments made by the trial judge about him, necessarily detracted from a proper consideration of the boys' views and the paramount consideration of what was in the boys' best interests.

The High Court considered that the father's conduct was relevant to the children's best interests (at [39]):

"It would have been remarkable if the primary judge had not commented upon the father's conduct. It involved a breach of the 2014 parenting orders and it had the potential to undermine the possible relationships that family members might have in the future, a matter to which the processes put in place by the 2015 orders had been directed. Furthermore, the father's flagrant disregard of the parenting orders was a matter relevant to the child's best interests under s 60CC(3)(i). It evinced an attitude

towards the responsibilities of parenthood that, if left unchecked, would likely send a poor message to boys who, on the evidence, were highly impressionable."

However, the High Court rejected the argument that the trial Judge was motivated to give less weight to the boys' expressed preference to stay in New York because of the father's actions.

The father submitted that a dispositive parenting order could not be made before the views of the child were known concerning the particular parenting order. The High Court disagreed (at [43], [44]):

"Section 60CC(3)(a), whether or not read in conjunction with the other provisions in Pt VII, neither expressly nor impliedly requires the court to seek the views of a child. It 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.

Section 60CD(2) provides a mechanism by which the court may inform itself of the views expressed by a child, but it does not do so in terms which would oblige the court to do so in every case. It certainly would not oblige the court to do so in the case of interim, temporary arrangements and in respect of each aspect of a parenting order affecting a child."

It was relevant that the orders made for where the children would live upon their return from New York were interim orders and the arrangements temporary. Interim orders do not, of course, require as intense examination by the Court as final orders.

The High Court (at [46]) referred to the urgency of the return of the boys to Australia, in part because the boys were due to return to their schooling in Australia. It was not necessary to seek the views of the boys on every aspect of the interim orders affecting them, which, in any event, were hardly likely to assist the Court. It was clear "that the ascertainment of the boys' views on these matters was not statutorily mandated."

The trial judge took steps to ascertain the boys' views, by leaving in place the 2015 orders concerning the family consultant, who could ascertain them after the boys' return to Australia.

Parenting orders - "any other person"

The other contentions raised by the father were that the Family Court could not make a parenting order in favour of strangers to the proceedings where those people had not made an application and where there was no evidentiary basis to establish that they came within the list of possible applicants in s 65C.

The ICL's response was that s 65C refers to a person's standing to bring an application for parenting orders. The persons referred to in the order were not applicants for parenting orders.

They were persons in whose favour such orders were made on the application of the mother. Section 64C provided that a parenting order may be made in favour of a parent of the child "or some other person". The High Court agreed with these submissions.

The father submitted that there was simply not enough known about those persons to justify the making of that parenting order. The High Court rejected this argument and said (at [51]):

"Far from being strangers to the Family Court, the Court had information that the persons were mothers of longstanding friends of the boys; the Court had undertakings from the mothers to offer "nurturing and care" and to implement arrangements for monitoring homework and transport to and from school respectively; and the Court was aware of the proposed sleeping arrangements of the boys. It may be that more information would be desirable before making a long term parenting order in favour of such third parties. But, as has been emphasised, the present case concerned the making of interim orders in circumstances of some urgency. Plainly, in those circumstances, there was sufficient evidence to ground the making of [the] order ..."

6. *Bernieres & Dhopal* (2017) FLC 93-793 – commercial surrogacy

The commissioning parents to a surrogacy arrangement appealed against the trial judge's failure to make the orders which they had sought, namely:

- declarations of parentage in relation to the child pursuant to s 69VA FLA
- leave to apply for a step-parent adoption pursuant to s 60G.

The Full Court clarified whether declarations of parentage can be made in commercial surrogacy arrangements. There have been different views adopted by single judges in cases such as *Dennis and Anor & Pradchpet* [2011] FamCA 123, *Dudley & Chedi* [2011] FamCA 502 and *Ellison and Anor & Karnchanit* [2012] FamCA 602.

Background

The parties entered into an international commercial surrogacy arrangement. The husband's sperm was used with ovum donated anonymously. The child's DNA was matched with the husband's DNA and a finding of the "relative chance of paternity" of 99.995% was made. The child received an Australian Certificate of Citizenship by Descent and an Australian passport. The birth mother consented to this.

Statutory provisions

60H(1) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent, and

(d) if a person other than the woman and the other intended parent provided genetic material – the child is not the child of that person.

60H(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

60H(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act. ...

60H(6) In this section:

This Act includes:

(a) the standard Rules of Court; and

(b) the related Federal Circuit Court Rules

The words “artificial conception procedure” are defined in s 4 of the Act as including:

a. artificial insemination; and

b. the implantation of an embryo in the body of a woman.

Regulation 12C provides that, for the purpose of s 60H(1)(b)(ii), the *Status of Children Act* is prescribed. In relation to s 60HB(2), s 14 of that Act is prescribed (reg 12CA). There are no laws prescribed in relation to s 60H(3).

60HB(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

- (a) a child is the child of one or more persons; or
- (b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

Regulation 12CAA of the Regulations sets out the prescribed laws referred to in s 60HB(1), and for Victoria it is against the *Status of Children Act*.

The Full Court noted that s 60HB was introduced into the FLA in 2008 at the same time as s 60H was amended by the substitution of a new s 60H(1).

The Revised Supplementary Explanatory Memorandum accompanying the *Amending Act* explains these amendments in terms (quoted at [47]):

- “76. This item repeals s 60H(1) and substitutes a new s 60H(1) that deals with both married and opposite and same-sex de facto couples. Opposite-sex de facto couples were previously covered in s 60H(4). This subsection is repealed.
- 77. These changes will mean that s 60H(1) applies, as well as to married couples, to current or former de facto partners who are of the same-sex and to current or former de facto partners who are of different sexes where children are born as a result of artificial conception procedures. This would mean that female same-sex de facto couples would be recognised as the parents of a child born where the couple consent to the artificial conception procedure and one of them is the birth mother. In addition, genetic material from other than the couple must be used with the relevant donor’s consent. The provision provides that the child is to be the child of the woman giving birth and her de facto partner. ...
- 81. New s 60HB deals with children born under surrogacy arrangements. It provides that where a court order has been made under a prescribed law of a State or Territory relating to the parentage of a child that order will determine the parentage of the child.”

Section 69VA - "As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth."

The Full Court said in relation to s 69VA (at [50] - [51]):

"This section is in that part of the Act (Part VII) where a number of general provisions dealing with parentage, presumptions and declarations of parentage appear, and the obvious question is whether specific sections such as ss 60HB and 60H prevail over these general provisions where they conflict. The answer to that question is assisted by the rule of statutory construction known as *generalia specialibus non derogant*. That provides that if there is a specific section or sections of the Act that apply, then that section or those sections prevail, particularly where, as here, the specific sections, namely s 60HB and the amended s 60H were enacted after the general (*Commissioner of Taxation v Hornibrook* [2006] FCAFC 170; (2006) 156 FCR 313).

The proposition that ss 60H and 60HB prevail over the general provisions can also be supported by a consideration of the meaning and effect of those two sections. As Chief Judge Thackray explained in *Farnell & Anor and Chanbua* (2016) FLC 93–700 at [143]; [2016] FCWA 17 at [231]:

"Sections 60H and 60HB, at least to the extent that they expressly determine the status of children coming within their ambit, would be rendered meaningless if they were not interpreted to displace the presumptions in Division 12 [of the Act]. It should also be noted that ss 60H and 60HB appear in Subdivision D of Division 1 of Part VII, which is entitled "Interpretation – how this Act applies to certain children". I conclude that while the rules of maternity and paternity in ss 60H and 60HB are not expressed as non-rebuttable presumptions, in effect they are, and they therefore trump the rebuttable Division 12 presumptions. (Footnotes omitted)

We agree with that interpretation."

The Full Court referred to Ryan J in *Mason* who expressed (at [33]) a:

"preliminary view that for the purposes of the Act, the 2008 amendments evince an intention by Parliament that the parentage of children born as a result of artificial conception procedures or under surrogacy arrangements will be determined by reference to those provisions and not the general parentage provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parentage."

Ryan J said that the effect was that unless an order is made in favour of the applicant pursuant to state law, the provisions of the FLA did not permit the Court to make a declaration of parentage in his favour. She agreed with Watts J in *Dudley and Anor & Chedi* [2011] FamCA 502, who determined that ultimately state law will govern the determination of parentage of children born under surrogacy arrangements and that state law will be recognised by federal law.

The Full Court agreed with Ryan J's preliminary view, and said (at [53]):

"Significantly this interpretation does not leave it open to find that where, as in Victoria, the relevant State legislation does not apply to the particular circumstances of the case, that lacuna can be filled by recourse to s 69VA. That is the approach though that Johns J in *Green-Wilson & Bishop* [[2014] FamCA 1031] where her Honour reasoned as follows (at [44]):

"In circumstances where the state legislation is silent with respect to the determination of parentage of children born of commercial surrogacy procedures (which are not prohibited in Victoria), I am satisfied that it is appropriate to make a declaration with respect to a child born of such procedures who is now living in Victoria. To do otherwise would be to elevate public policy considerations (as to the efficacy or otherwise of commercial surrogacy arrangements) above a consideration of the welfare of children born of such arrangements. In my view, the interests of the child must outweigh such public policy considerations."

The Full Court said (at [54]):

"In our view it is not possible to discard the plain meaning of legislation where public policy considerations may not be seen to be in the best interests of the children affected."

In relation to s 60H, the Full Court said (at [57]) that although "theoretically s 60H could apply to a surrogacy arrangement, a close consideration of the section reveals otherwise". On its plain meaning, s 60H(1) did not make the commissioning parties the parents of the child. It was designed to cover conventional artificial conception arrangements where the birth mother and her partner were to be the parents of the child.

The commissioning parents argued that the words "the other intended parent" in s 60H(1) must be "read down so as to require the other person (being the 'other intended parent') to intend to be the parent of the relevant child". In other words, interpreting that phrase as a substantive provision rather than a definitional provision. This approach was rejected by Watts J in *Re Michael: surrogacy arrangements* [2009] FamCA 691. The use of those words in s 60H(1) was considered *in extenso* (at full length) by Thackray CJ in *Farnell* who, after examining the debates in Hansard when the *Amending Act* was introduced into Parliament in 2008 concluded (at [220]):

"Hansard provides no support for the proposition that Parliament countenanced the possibility that a man and woman who commissioned the birth of a child, whether in Australia or overseas, would be afforded the status of a parent of that child without a court order made under state surrogacy laws. It is equally untenable to suggest that Parliament, in referring to "intended parent" in s 60H(1), had in mind the husband or partner of a woman who had agreed to be a surrogate mother."

The Full Court concluded (at [62] - [65]) that s 60HB specifically addresses the position of children born under surrogacy arrangements, leaving s 60H to address the status of children born by means of conventional artificial conception procedures. The plain intention of s 60HB is to leave it to each of the States and Territories to regulate the status of children born under surrogacy arrangements, and for that to be recognised for the purposes of the Act. In other words, s 60HB covered that field. As a result, s 69VA was not available because s 60HB covered the field, and s 60H did not apply. The unfortunate result was that the parentage of the child was in doubt. No order had been made under the relevant State legislation (and nor could there be). There was no question that the father was the child's biological father, but that did not translate into him being a parent for the purposes of the FLA. Further, the mother was not the biological mother, and thus was even less likely to be the "legal parent."

In relation to s 69VA the trial judge considered that reliance upon s 69VA for the declaration was of no assistance as it was not an independent source of power.

The Full Court (at [69]) agreed with the approach of the trial Judge and also Johns J in *Green-Wilson & Bishop* [2014] FamCA 1031. It was "not open to fill the legislative vacuum identified by Johns J by judicial interpretation; it could only be done by legislation."

In the alternative, the appellants sought a declaration under s 67ZC that each of them was a parent.

67ZC(1) "In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children."

67ZC(2) "In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

The Full Court said (at [703]) that "the literal meaning of s 69ZH(2) of the Act is that for s 67ZC to apply the child must be 'a child of a marriage'."

The definition of "child of a marriage" is in s 60F(1):

60F(1) "A reference in this Act to a child of a marriage includes, subject to subsection (3), a reference to each of the following children:

- (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- (b) a child of the husband and wife born before the marriage;
- (c) a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife.

Importantly, s 60F(4A) provides:

"To avoid doubt, for the purposes of this Act, a child of a marriage is a child of the husband and of the wife in the marriage."

Therefore, the child in this case was not within the definition in s 60F(1). The commissioning parents argued that the definition in s 60F(1) was not exhaustive and could be extended such that s 67ZC could apply where it was necessary to ensure the welfare of the child.

Whilst the Full Court accept that the definition in s 60F(1) was not exhaustive, it was not apparent how s 67ZC could be utilised to expand that definition that the child could be found to be a child of a marriage.

Although a number of judges at first instance could have applied s 67ZC to advance the welfare of children who were not children of a marriage (e.g. *Re Alex (Hormonal Treatment for Gender Dysphoria)* (2004) FLC 93–175; *Re Lucy (gender dysphoria)* [2013] FamCA 518), as

Re Lucy demonstrated, the application of s 67ZC to children other than children of a marriage was not without controversy. The Full Court distinguished these cases (at [79]):

"However, we have found that in relation to children born under surrogacy arrangements, the intent of the legislature is that s 60HB covers the field, and is the operative provision in the Act concerning parentage of those children. The effect of this is that even if in some respects s 67ZC could arguably apply to the child here, in relation to parentage, this general provision could not prevail over the specific provision, namely s 60HB. Moreover, the application of s 67ZC is not at large; if it were, there would be no need for s 60H, s 60HB, or even s 69VA."

A further impediment was that the appeal was conducted without a contradictor. It was therefore (at [80]):

"not the vehicle to address the larger question of whether s 67ZC could permissibly be applied to a child who is not a child of a marriage."

The Full Court concluded that s 67ZC could not be utilised to make a declaration of parentage, but for different reasons than the primary judge who had proceeded on the basis that s 67ZC only applies where the child is a child of a marriage, whereas the Full Court's finding was based on the circumstance that s 60HB covers the field. Although his Honour was correct in concluding that s 67ZC could not be utilised to make a parenting declaration, the outcome was correct for reasons other than his Honour expressed.

Leave to adopt

The commissioning parents also submitted that the primary judge erred in failing to find it was in the best interest of the child for them to be given leave to adopt.

The relevant provision is s 60G of the FLA, which provides:

60G(1) "Subject to subsection (2), the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent."

60G(2) "In proceedings for leave under subsection (1), the court must consider whether granting leave would be in the child's best interests, having regard to the effect of paragraph 60F(4)(a), or paragraph 60HA(3)(a), and of sections 61E and 65J."

The commissioning parents sought leave to apply for a step-parent adoption, but complained that the trial judge failed to address that application. The Full Court agreed that the judge did not address the question in the balance of his reasons for judgment, after identifying it earlier as an issue before the court.

Prima facie, there was merit in this ground of appeal. However, the transcript revealed a different story. The primary judge only needed to address s 60G if there was a declaration of parentage in

favour of the commissioning father, but not in favour of the commissioning mother. As a declaration was not made in favour of either party, on the commissioning parents' own case the primary judge was not obliged to address the application pursuant to s 60G.

In any event, for s 60G to apply there must be a "prescribed adopting parent". In s 4(1) a "prescribed adopting parent", in relation to a child, is defined as:

- "a. a parent of the child, or
- b. the spouse of, or a person in a de facto relationship with, a parent of the child; or
- c. a parent of the child and either his or her spouse or a person in a de facto relationship with the parent."

Neither party came within that definition.

Following the hearing of the appeal, and pursuant to orders allowing them to do so the commissioning parents provided written submissions addressing the question of whether the commissioning father was a "parent" for the purposes of s 60G. The commissioning parents conceded that under the *Status of Children Act* he was not a parent but suggested he was a parent for the purposes of the *Adoption Act 1974* (Vic) or the dictionary definition of "parent" applied by the Full Court in *Tobin & Tobin* (1999) FLC 92–848 could be utilised.

The Full Court could not discern a definition of a "parent" for the purposes of the Adoption Act, and using the dictionary definition of a "parent" overlooked that what needed to be addressed was whether the commissioning parent was a "parent" within s 60G. Not only was the dictionary definition of no assistance, but also the meaning of "parent" under the Adoption Act, if it could be discerned, was of no assistance.

Whilst the Full Court has now clarified the law with respect to making parenting orders with respect to overseas surrogacy arrangements, it has conceded that there is a lacuna - a legislative gap - for these children. Effectively, they are left without any legal parents.

7. *Thorne & Kennedy* [2017] HCA 49; (2017) FLC 93-807 – Duress, undue influence, unconscionability and a "bad bargain"

In its first examination of financial agreements, the High Court in *Thorne v Kennedy* [2017] HCA 49; (2017) FLC 93-807 set aside two financial agreements, casting considerable doubt on the viability of financial agreements which are a bad bargain for one of the parties. Unanimously, the High Court set aside the two agreements for unconscionable conduct. The plurality also set them aside for undue influence. It was unnecessary to decide whether there was duress.

This paper was not intended to cover that decision, which was handed down 7 days before this presentation, but it is certainly a "Hot Case" of 2017. A more detailed explanation of the decision is

given in my article, "*Thorne v Kennedy* – Has the High Court hung financial agreements out to dry?" which can be accessed from <http://www.wolterskluwercentral.com.au/category/legal/family-law/>

The wife's lack of free choice, which gave rise to the plurality upholding the trial judge's finding of undue influence, was based on the following findings of the trial judge:

1. Her lack of financial equality with the husband;
2. Her lack of permanent status in Australia at the time;
3. Her reliance on the husband for all things;
4. Her emotional connectedness to their relationship and the prospect of motherhood;
5. Her emotional preparation for marriage; and
6. The "publicness" of her upcoming marriage.

In relation to unconscionable conduct, the plurality (and the other 2 judges separately in minority judgments) referred favourably to the trial judge's findings that the wife's powerlessness and lack of choice but to enter into the agreements pointed inevitably to the conclusion that she was at a special disadvantage. The husband was aware of the wife's special disadvantage and it was, in part, created by him:

1. He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it.
2. She had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements, even though she knew in advance that there was to be some type of document.
3. The wife and her family members had been brought to Australia for the wedding by the husband and his ultimatum was not accompanied by any offer to assist them to return home.

The High Court plurality said these matters increased the pressure which contributed to the substantial subordination of the wife's free will in relation to the agreements. The husband took advantage of the wife's vulnerability to obtain agreements which, on the uncontested assessment of the wife's solicitor, were entirely inappropriate and wholly inadequate.

For the purposes of this paper, perhaps the most important aspect of the judgment is the attitude of the High Court to "a bad bargain". Whilst the Full Court of the Family Court has, in relation to s 90G(1A) said that parties are free to enter into "a bad bargain", the High Court did not agree that in relation to s 90K "a bad bargain" will always be upheld, and considered that a bad bargain may contribute to it being set aside. The terms of the agreement were so unfavourable to the wife – a

bad bargain – and the plurality considered those terms to be relevant to a finding of undue influence. It said (at [56]) that the trial judge:

“was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. 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.”

The plurality set out factors which it identified as being relevant to whether a financial agreement should be set aside for undue influence (at [60]):

1. Whether the agreement was offered on a basis that it was not subject to negotiation;
2. The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement;
3. Whether there was any time for careful reflection;
4. The nature of the parties' relationship;
5. The relative financial positions of the parties; and
6. The independent advice that was received and whether there was time to reflect on that advice.

The decision raises many questions.

Conclusion

Until *Thorne v Kennedy*, perhaps the most important case delivered in family law this year was *Wallis & Manning*. It is comforting that the Full Court is reflecting on and trying to improve the predictability of judgments and put some constraints around the breadth of judicial discretion.

Most of the cases dealt with in this paper lead to more questions than they answer. Even in *Bernieres & Dhopal*, in which the Full Court was quite decisive in its dismissal of the commissioning parents attempt to be the child's legal parents, as the Full Court said, there was "a legislative vacuum" with respect to the child's parentage.

The breadth of the impact of *Surridge* is unresolved. The assessment of initial contributions and post-separation contributions is, as determined in *Calvin & McTier* and *Wallis & Manning*, still discretionary. The standing of a trustee in bankruptcy to set aside a financial agreement was stated

clearly to be not under the FLA, but under the BA - a rather unsatisfactory outcome given the aims of the 2005 amendments to harmonise bankruptcy and family law. *Bondelmonte* is perhaps the only case which gives clear guidance.

A detailed analysis of *Thorne & Kennedy*, is beyond the scope of this paper. However, legal practitioners are likely to be more wary of advising client entering into financial agreements where there is unequal bargaining power and it is a "bad bargain" for one of the parties.

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