

OVERVIEW OF CHANGES IN THE LAW

Hot Cases in family law - 2018

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Introduction

The most important cases in 2018 have been diverse. This paper looks at some of these. Financial agreements continue to raise new legal issues, and defining a de facto relationship continues to be far more problematic than one would expect. An unusual case involved the ability of an adult child to access the court file of his parents. In two cases, the Full Court explored the issue of who is a parent.

1. Who is a parent?

The issue of who is a parent under the *Family Law Act 1975* (Cth) ("FLA") involves the interaction of State and Territory law (with respect to the registration of births, the regulation of artificial conception and domestic surrogacy) and the parentage presumptions in the FLA.

The Full Court of the Family Court has recently considered the issue in two cases:

- *Shaw & Lamb* (2018) FLC 93-826
- *Parsons and Anor & Masson* (2018) FLC 93-846.

***Shaw & Lamb* (2018) FLC 93-826**

The proceedings involved a domestic altruistic surrogacy arrangement in Queensland, where the birth mother, the surrogate, had refused to consent under the surrogacy legislation to the intended parents being registered as the parents of the child. The appellant was the birth mother of the child. She appealed from Order 7(b), which provided:

"The parties do all acts and things, including signing [sic] any necessary documents, to cause the child's birth registration details to be amended to ensure that:
... (b) [the male respondent] is entered as the father of the child on the child's birth certificate."

It was not in issue before the trial judge that the respondents (the intended parents) would have equal shared parental responsibility and the child would live with them. The appellant sought time with the child. The trial judge ordered that the appellant "have time with the child as may be determined by the [respondents] at their sole discretion". The appellant did not appeal that order.

The Full Court approved the trial judge's recognition that he was bound by the Full Court's decision in *Bernieres & Dhopal* (2017) FLC 93-793. This decision was handed down while the trial judge's decision was reserved. Although the trial judge expressed doubts about *Bernieres*, he followed it.

The two aspects of the trial judge's decision in which he followed *Bernieres*, which were not challenged in the appeal were:

1. The plain intention of s 60HB FLA was to leave it to each of the States and Territories to regulate the status of children born under surrogacy arrangements;

2. As no "parentage order" had been made under the *Surrogacy Act 2010 (Qld)*, the question of who was a "parent" was to be determined by reference to the *Status of Children Act 1978 (Qld)*.

The trial judge also found that the combined effect of s 177 *Surrogacy Act (Qld)* and s 23(4) *Status of Children Act (Qld)* meant that the father was a parent of the child and that, consistent with *Bernieres*, the FLA recognised that status. The appeal challenged this finding.

The trial judge did not make a finding that the preconditions necessary for the application of s 23 *Status of Children Act* were met. Section 23(4) sets out the presumption as to the status of the adults involved where donor sperm is used under Queensland law. It provides:

"Also, the man who produced the semen has no rights or liabilities in relation to any child born as a result of the pregnancy happening because of the use of the semen unless, at any time, he becomes the husband of the child's mother."

The preconditions for s 23 are set out in s 20, which provides:

This subdivision applies if —

- (a) a married woman undergoes a fertilisation procedure other than with her husband's consent; or
- (b) a woman who is not married and does not have a de facto partner or civil partner undergoes a fertilisation procedure; or
- (c) a woman who has a de facto partner undergoes a fertilisation procedure other than with her partner's consent; or
- (d) a woman who has a civil partner undergoes a fertilisation procedure other than with her partner's consent."

The Full Court found there was no agreement between the parties that the trial judge was entitled to proceed on the assumptions necessary to found the application of s 23. There weren't evidence or submissions to enable the trial judge to address the applicable presumptions, and the trial judge's reasons did not address the necessary preconditions. The Full Court therefore found (at [47]) that:

"His Honour failed to consider and make findings as to a matter central to a question of law which required determination".

Although the specific errors were not pleaded in the grounds for appeal, the trial judge was required to consider the assumptions in s 23 as it was a central question of law which required determination. As a result of his failure to do so, the Full Court found that the trial judge's reasons were inadequate.

The Full Court, conscious of the fact that a rehearing would involve the persistence of conflict and further costs, said (at [62]) suggested that it was likely that even if the correct pathway had been followed, the trial judge's finding under s 23(4) would probably have been the same:

"We will say no more than this. *If* it be established that s 16 of the *Status Act* does not apply and *if*, in lieu, it be established that one of the preconditions within s 20 does not apply, we are, as informed currently by the arguments before us, by no means convinced that his Honour erred in his interpretation of s 23(4). Very careful consideration might be given to the statutory provisions and to his Honour's reasons."

Parsons and Anor & Masson (2018) FLC 93-846

The first and second appellants (the biological and birth mother of B and C, and her partner) wanted to relocate to New Zealand with the children B and C, aged 10 and 9 years. The respondent wanted the children to remain in Australia and wished to continue spending regular time with them.

The appellants cohabited before they were married in New Zealand in 2015, prior to same-sex couples being able to marry in Australia. The first appellant was the biological and birth mother of both B and C, who were both conceived by artificial insemination. The girls lived with the appellants, but had spent time with the respondent, who was B's biological father and was registered on her birth certificate. Both B and C called him "Daddy".

The identity of C's biological father was unknown, but s 60H *Family Law Act 1975* (Cth) ("FLA") deemed the second appellant to be her other "parent". She was shown as this on C's birth certificate.

The trial judge found that the respondent was "a legal parent of B", gave him extensive time with both girls and restrained the appellants from moving with the girls to New Zealand. The appellants were given equal shared parental responsibility of the girls on the basis that they must consult with the respondent before making any long term decisions.

The appellants challenged most of the orders, including the respondent's input into parental responsibility. The respondent and the Independent Children's Lawyer opposed the appeal.

There were three main issues in the appeal:

1. The finding that the respondent was a "parent" of B within the meaning of the FLA. The appellants submitted that the trial judge, who was sitting in New South Wales, erred in failing to recognise that s 79 of the *Judiciary Act 1903* (Cth) ("JA") required her to apply the *Status of Children Act 1996* (NSW) ("the State Act"). The effect of the State Act was that the respondent was conclusively presumed **not** to be B's father.
2. The trial judge's method of ascertaining the best interests of the children. The appellants said this was flawed, not only as a result of the erroneous finding that the respondent was B's "parent", but also because the trial judge effectively treated him as if he was also C's "parent".
3. The finding that the appellants were not in a de facto relationship when B was conceived. That finding precluded a finding that the second appellant was legally B's "parent", and paved the way for the ultimate finding that the respondent was B's "parent". The Full Court was not persuaded that there was merit in this argument.

The statutory provisions

Three statutory provisions were expressly considered:

1. Section 79(1) of the JA provides that State or Territory laws mandatorily govern, where applicable. It states:

"The laws of each State or Territory ... shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

2. Section 14 of the State Act, which the appellants said was "picked up" by virtue of s 79(1) of the JA, lays down a series of presumptions of parentage of children born as a result of artificial conception procedures. Of particular relevance were s 14(2) and 14(4):

"(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

...

(4) Any presumption arising under subsections (1)–(3) is irrebuttable."

3. Section 60H of the FLA also deals with the status of children born as a result of artificial conception procedures. It states:

- (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.
- (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.
- (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.

The Full Court noted, in relation to the above (at [14]) that:

- (a) The State Act was prescribed for the purposes of s 60H(1)(b)(ii) - Regulation 12C of the *Family Law Regulations 1984* (Cth) ("the Regulations");
- (b) Section 14 of the State Act was prescribed for the purposes of s 60H(2)(b) - Regulation 12CA of the Regulations;
- (c) No law had been prescribed for the purposes of s 60H(3).

Section 109 *Constitution* was not expressly referred to, but was referenced by the Full Court:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The trial judge's reasons

The trial judge accepted that both the second appellant and the respondent had standing to apply for parenting orders, regardless of whether they were "parents". They were persons "concerned" under s 65C FLA. However, it was still necessary for other purposes to make a finding as to who were the legal "parents" of both girls.

The trial judge disagreed with the approach taken in *Re Patrick* (2002) FLC 93-096 and agreed with the approach taken in *Re Mark* (2003) FLC 93-173 and *Groth & Banks* [2013] FamCA 430. Her reasoning was repeated (at [17]) by the Full Court, and in summary was:

- For the respondent to be a legal parent, the evidence must at least support findings that he provided his genetic material for the express purpose of fathering a child he expected to parent, and was unaware of the de facto relationship which was asserted to have been in existence between the appellants at the time of conception.

- In *Re Patrick*, Guest J held that the biological father of a child conceived in an artificial insemination procedure by a male known donor to a same sex female couple was only regarded as a parent if there was a specific State or Territory law which expressly conferred that status on a "sperm donor" for the purposes of the FLA. As there was no law in Victoria making him a parent, he found that the sperm donor was not a parent.
- She agreed with *Re Mark* [2003] FamCA 822. A gay male couple entered into an overseas surrogacy agreement with a surrogate who carried the pregnancy. One of the men, Mr X, provided his sperm. An anonymous donor egg was used. Justice Brown found that the ordinary meaning of the word "parent" encompassed a person in Mr X's position, saying:

"Mr X provided his genetic material with the express intention of fathering (begetting) a child he would parent. He is not a sperm donor, (known or anonymous), as that term is commonly understood. The fact that the ovum was fertilised by a medical procedure, as opposed to fertilisation in utero through sexual intercourse, is irrelevant to either his parental role or the genetic make-up of Mark."
- She agreed that the intention and belief of a party to an artificial insemination process is a factor to be taken into account, but where there is a challenge to a biological parent being a legal parent, biology is a part of the answer.
- If the evidence supported a finding that the respondent (at [95]) "took part in the artificial insemination process believing that he was fathering a child whom he would help to parent, by financial support and physical care, then absent other legally disqualifying factors, he is a parent in the ordinary meaning of the word".
- She agreed with Cronin J in *Groth & Banks*, that s 60H of the FLA should be interpreted as expanding rather than restricting the categories of people who can be parents. This proposition was consistent with the absence of an exhaustive definition of the term "parent" in s 4 of the FLA. The trial judge, however, mis-stated the facts of *Groth & Banks* (at [97]) as being "a man and a woman who had separated as a couple agreed to undergo IVF and raise the child as separated parents". This was not correct. The parties, who had many years before been a couple, agreed to undergo IVF, with the male assisting the female to have a child as a known sperm-donor, but not as a parent or father. He changed his mind sometime after the child was born and wanted to be known to the child as a father and as a parent. In *Groth & Banks* the mother relied on the relevant state legislation (of Victoria) which contained an irrebuttable presumption of law that if a woman becomes pregnant as a result of an IVF procedure and a child is born, the man who produced the semen used in the procedure is not the father of the child. Justice Cronin referred to "the fact that a child has two parents who are his or her biological progenitors permeates the language of the Act", and concluded that "biology is the determining factor unless specifically excluded by law". If the mother had been in a de facto

relationship with a woman or a man, s 60H(1) would have excluded the sperm-donor from being a father or parent. It was only because she was single that Cronin J was able to conclude that he was the father.

The trial judge in *Parsons & Masson* concluded that the appellants were not partners in a de facto relationship when B was conceived in December 2006, and the respondent believed that he would take on parental responsibilities as a parent and he provided his sperm for that purpose. She concluded that the respondent was the biological father and legal parent of B.

Who legally is B's "parent"?

Justice Thackray (with whom Murphy and Aldridge JJ agreed) noted that the line of authority followed by the trial judge effectively postulated that the relevant law is to be found in the FLA. The appellants submitted, in effect, that this was a constitutional heresy given there was a State law with obvious application to the circumstances. Justice Thackray agreed with the appellants. As the case was heard in the federal jurisdiction, it was mandatory for s 79 JA to be applied.

Justice Thackray quoted (at [22]) the plurality of the High Court, which said when considering the operation of s 79 JA in *Rizeq v Western Australia* [2017] HCA 23; (2017) 91 ALJR 707 (at [56]):

"The simple constitutional truth is that State laws form part of the single composite body of federal and nonfederal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction – because they are laws."

Justice Thackray quoted Kiefel CJ in the same case, who said (at [7]) that it was well accepted that in federal jurisdiction State and federal courts can apply both Commonwealth and State laws, which together with the common law of Australia, comprise a "single though composite body of law".

Justice Thackray explained (at [24]) that s 79 JA operated to fill a gap. However, the gap was not in s 60H, but rather one "created by virtue of the fact that state legislatures lack competence to regulate what a court does in the exercise of federal jurisdiction". He quoted (at [25]) the plurality in *Rizeq* which said at [63] that s 79 JA:

"fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction."

Justice Thackray accepted the appellants' argument that the only issue that required consideration was whether the parenthetical exception in s 79 JA was invoked – i.e. was there something in the Constitution or in some law of the Commonwealth, which made s 79 JA ineffective in picking up the

State law which would have required the trial judge to find that the respondent was not a parent of B?

Does the FLA otherwise provide?

Justice Thackray asked (at [29]) whether there was something in the FLA that had the effect that the State Act could not apply. Did the ambit of the FLA so reduce the ambit of the State Act that the provisions of the former were irreconcilable with those of the latter, with the result that, to use the wording of s 79 JA, the FLA “otherwise provides”?

He found nothing in s 60H FLA which “otherwise provides” in relation to the “picking up” of s 14 of the State Act, since 60H “leaves room” for the operation of all of that provision. Put another way, there was nothing irreconcilable between the provisions of s 14 of the State Act and s 60H FLA, or indeed any other part of the FLA.

The mere fact that s 60H FLA provided for laws to be prescribed for certain purposes did not create inconsistency between the FLA and laws like the State Act (referring to s 109 *Constitution*). Inconsistency could only arise, according to Thackray J (at [31]), if the State law provided that:

- "(a) a married or de facto couple who satisfied the terms of s 60H(1)(a) and (b)(i) must be treated as **not** being the parents of a child born as a result of an artificial conception procedure; or
- (b) that the person who provided the genetic material but was not the “other intended parent” must be regarded as being a parent of the child (and that law had not been prescribed as a law to which s 60H(2) or s 60H(3) applied)."

There were no State laws so providing, and therefore no inconsistency in what Thackray J had previously described as “a coherent national legal framework” (*Farnell & Anor and Chanbua* [2016] FCWA 17; (2016) FLC 93-700 at [301]). In particular, there was no State law providing for a man to be treated as being the father of a child born as a result of an artificial conception procedure who would not be treated as such by s 60H(1) or s 60HB FLA.

Justice Thackray noted (at [34]) that the presumption in s 14 was irrebuttable. As the respondent was not married to the first appellant, or in a de facto relationship with her, it followed that the respondent was presumed not to be the father of B, and ought not be treated as being B's parent for the purposes of the FLA.

It followed that all three bases upon which the trial judge found that the respondent was B's “parent” could not be supported by reference to the text of the FLA alone:

1. While as a matter of ordinary English usage the word “parent” is satisfied by identifying the male whose gametes were used for a child to be conceived, biology alone is not determinative

in deciding who is a “parent” for the purposes of the FLA, since a biological connection is not required - e.g. adoption, surrogacy and artificial conception procedures involving consenting partners.

2. There was nothing in the FLA to suggest that the expectation of a man that he will “parent” a child born using his genetic material is relevant in determining whether he is a “parent” for the purposes of the FLA.
3. There was nothing in the FLA to suggest that the state of knowledge of the putative father about the nature of the mother’s relationship with another person is of any relevance to his status in relation to the child. If the child is born to a woman who is married to, or in a de facto relationship with, another person, and the provisions of s 60H(1) are otherwise satisfied, then regardless of his state of knowledge, the male who provided the genetic material is not the father of the child, since the child is deemed not to be his.

The respondent sought to support the trial judge’s finding by arguing, consistent with *Groth & Banks*, that s 60H FLA should be understood as enlarging, rather than limiting, the category of persons who are entitled to the status of “parent”. The logical extension of this argument was that a child could have more than two “parents”, “which would lead to awkward consequences” in applying the FLA. The appellants refuted any suggestion that the FLA allows children to have more than two parents. They pointed out that provisions such as ss 60B and 60CC were framed on the clear assumption that a child can have only two parents. This was said to follow from the use of the word “both” when referring to “parents”.

Justice Thackray accepted the appellants’ interpretation. It was consistent not only with all dictionary definitions of “both”, but also with those sections of the FLA where reference is made to “both parties to the marriage”. There was, therefore, merit in Ground 1.

Justice Thackray noted that he pointed out in *Farnell* (“the baby Gammy case”) there was a serious divergence of judicial opinion in the area. This problem arose from the fact that the FLA did not make express provision for the status of **all** children born as a result of an artificial conception procedure or surrogacy arrangement. He did not say so expressly, but the State and Territory laws also cover those areas, and, relevantly, the registration of births.

Justice Thackray said (at [59]) that in *Bernieres & Dhopal*:

“it was made clear that the fact a man is the biological father “does not translate into him being a parent for the purposes of the [federal] Act” (at [65]). However, the Full Court recorded that it had not heard argument as to whether the provisions of s 60H impliedly exclude a sperm donor from recognition as a “parent”. The Court was therefore unable “to express any informed view about the same” (at [59]). No reference was made to the effect of s 79 of the *Judiciary Act*.”

He referred to the most recent decision of the Family Court dealing with artificial conception, *Shaw & Lamb* (2018) FLC 93-826, but noted that it concerned surrogacy and also concerned proceedings in Queensland where the legislation was different to the equivalent law in New South Wales. The few remarks which were potentially relevant were *obiter*, and the Full Court acknowledged (at [60]) that any opinion it expressed was “hypothetical”. Justice Thackray concluded that there was no binding authority preventing adoption of the appellants’ argument.

What about the past authorities?

Justice Thackray concluded *Re Mark* was no longer good law, in part because the *Status of Children Act 1974* (Vic) had been amended.

Justice Cronin turned his mind to s 79 JA in *Groth v Banks* [2013] FamCA 430, but did not deal with it correctly, saying (at [35] and quoted at [75] of the Full Court):

"Section 79 of the *Judiciary Act* makes clear that the laws of Victoria are binding on this court if it is exercising federal jurisdiction unless those laws are otherwise provided by the law of the Commonwealth. The *Status of Children Act* [Vic] is not binding here, because Part VII of the Act has provided an applicable and sufficient law as to parentage as required by ss 79 and 80 of the *Judiciary Act*."

Justice Thackray disagreed, saying (at [76]):

"It is not the function of a court to decide whether a Commonwealth law is 'sufficient' where there is a State law which *prima facie* has direct application. It is also not a case of looking for a “gap” in the federal legislation in the sense advanced by the respondent, but rather acknowledging that the State law must be applied unless the federal law 'otherwise provides'.

Justice Thackray concluded (at [78]), in relation to s 109 of the *Australian Constitution* which provided that in the event of inconsistency of two validly enacted laws, the Commonwealth law prevails -

"in matters such as the present no issue of inconsistency between Commonwealth and State law arises. The task is to consider the operation of two laws which have the same source – and the question then becomes one of statutory interpretation."

In *B v J* (1996) FLC 92-716, Fogarty J accepted (at 83,620) the possibility that the law should be interpreted such that “the term ‘parent’ in Commonwealth legislation is to be given the meaning ascribed to it in State and Territory legislation”.

Justice Guest reached his conclusion in *Re Patrick* without referring to s 79 JA, by saying at [291]:

"The effect of s 60H(3) of the [federal] Act is that where under a prescribed law of a State or Territory the child is a child of a man, the child is also to be regarded as his child under the *Family Law Act*. Thus a child is to be regarded as the child of the biological father and the biological father a 'parent' *only* if there is a specific State or Territory law which expressly confers that status on a semen donor for the purposes of the *Family Law Act*..."

Justice Thackray explained this approach (at [82]):

"In other words, if State legislation lays down a presumption that the members of a class of men are **not** to be regarded as fathers of a specific class of children, then a court is obliged to apply that presumption unless it is repugnant to the FLA. This is so, not because of the operation of any provision in the FLA, but rather by operation of the JA. Subject to this understanding, *Re Patrick* should now be regarded as correctly stating the law."

Is it important to determine who the parents are?

Justice Thackray emphasised (at [90]) the importance of determining, as a preliminary question, which of the parties answers the description "parent". The court's power is conditional upon this determination, given the terms of both 61DA (which applies in every case) and s 65DAA (which applies whenever an order for equal shared parental responsibility is to be made). Although he agreed (at [91]) that there is no jurisdictional necessity for an order granting parental responsibility to be made prior to a court making some other form of parenting order, it is necessary to determine whether the presumption in favour of equal shared parental responsibility applies – and in order to do so it is necessary to determine who are the child's parents.

2. Access of a Child to Court File

It is usually assumed that access to a court file will not normally be allowed by non-parties. There are limited exceptions, such as for research (r 24.13(1)(d) *Family Law Rules 2004*) or by the Australian Taxation Office (*Commissioner of Taxation & Darling* (2014) FLC 93-583). The Full Court of the Family Court recently considered a request by an adult child of the parties to a marriage to access his parents' file.

***Carter & Carter* (2018) FLC 93-828**

An adult child appealed against a refusal by the trial judge to grant him access to his parents' Family Court file. At the time of the hearing before the trial judge, the appellant was aged 53. He was the second-oldest of four children. The appellant's parents separated in 1976. Initially, he lived with his siblings and his mother. In 1979, at aged 15, he moved to live with his father. At age 17, he lived as a boarder with another family. The primary reason he sought access to the court file was (at [17]):

"He wishes to better understand, hopefully from reading the court file, why those arrangements were made and why he was separated from his siblings."

He explained further (at [20]):

"I've had treatment for mental illness and that access to the file may help in my treatment and recovery. Both my parents have declined to grant me access to the file. They appear to have reversed that today"

Rule 20.13 *Family Law Rules 2004* sets out the matters to be considered when determining whether to grant access to a court file. Relevantly, it provides:

- "(1) The following persons may search the court record relating to a case, and inspect and copy a document forming part of the court record: ...
- (c) with the permission of the court, a person with a proper interest:
- (i) in the case; or
- (ii) in information obtainable from the court record in the case; ...
- (3) In considering whether to give permission under this rule, the court must consider the following matters:
- (a) the purpose for which access is sought;
- (b) whether the access sought is reasonable for that purpose;
- (c) the need for security of court personnel, parties, children and witnesses;
- (d) any limits or conditions that should be imposed on access to, or use of, the court record."

The trial judge found that the appellant had a proper interest in the proceedings to make the application (r 24.13(1)), but refused access to the file (at [23]) because she was concerned as to what benefit he might obtain from inspecting the file and because her Honour thought that it was unlikely that an inspection of the file would provide him with the answers he seeks. She was not persuaded "that the pursuit of such information is reasonable".

The trial judge expressed her concerns about the impact upon the appellant's mental health if he was permitted access to the file, and expressed concern for his well-being. She was also concerned about the impact on the appellant's parents and siblings if access was granted and that, to allow access, would encroach upon the privacy to which his family members were entitled. She inspected the court file and told the appellant (at [27]):

"I'm not sure that the file is going to give you the answers to the questions. I'm very cautious. I've looked at the file and I can say to you I don't think you're going to get the answers to the questions you seek because it's a very thin file. It's a very thin file because it appears that matters between your parents, particularly with respect to the care arrangements were largely resolved at a very early stage. And the file tells us very little more about the decisions that they may or may not have taken in the aftermath of the court proceedings."

The trial judge only allowed the appellant to inspect the parenting orders made by consent in 1977, and no other parts of the file.

In summary, the appellant was successful on appeal as:

- *Prima facie* the stated purpose was reasonable; and
- Whether or not the appellant would derive a benefit from access to the file was not a relevant consideration.

Justice Ainslie-Wallace said (at [39]):

"The correct application of the rule should have been once proper interest is established the question whether access is reasonable, not whether the appellant will benefit from that access."

Justice Ainslie-Wallace was critical of the trial judge's finding that, having inspected the file, the file "may" contain information personal and private to the appellant's siblings without making a clear ruling, particularly when the appellant's parents did not indicate that they held such concerns. The consent of the appellant's parents to his application was highly relevant and any concerns about the security of the appellant's siblings would presumably have been raised by them.

Justice Ainslie-Wallace confirmed that r 24.13 directed consideration to security, not privacy, and that these were entirely different matters. She concluded (at [44]) that:

"having regard to questions of privacy, I am of the view that her Honour erred by taking into account irrelevant issues. So too, her Honour's concern for the fractured family relationship is not a matter that falls for consideration in her determination and is a matter irrelevant to the conclusion of the issues before her."

Rather than denying access to the file, the trial judge could have placed restrictions on that access, such as prohibiting the photocopying of documents on the file. She did not do this.

The Full Court allowed the appellant access to the file, but only to inspect it and not to photocopy it. The Full Court refused the appellant's request for an order that the reasons not be published and that the previous reasons published (of the trial judge) be removed from the Family Court website and Austlii. The Full Court noted that the reasons for the judgment of the trial judge had already been published and it was important that (at [56]):

"the first instance reasons do not stand alone and these reasons can provide guidance on the issue of access to court files in future matters."

Furthermore, the anonymisation process under s 121 FLA which ensured that parties could not be identified made publication of certain particulars an offence.

3. Is there a de facto relationship?

The application of the definition of a de facto relationship continues to be problematic. These two cases don't advance the discussion greatly, but give further clarification.

Crick & Bennett (2018) FLC 93-832

Mr Crick appealed from a declaration under s 90RD *Family Law Act 1975* (FLA) that a de facto relationship existed between the parties from late 2001 to June 2014. During that period Mr Crick

lived in Ms Bennett's home and they had a child together in 2003, but the sexual relationship ceased in either 2004 or 2005 and the parties slept in separate bedrooms from around that time.

After a year or two of residing in Ms Bennett's home, Mr Crick started transferring weekly sums to Ms Bennett - after the child was seven months old. These payments were later increased. Ms Bennett paid all the bills, bought all the groceries and was the primary homemaker and primary caregiver for the parties' child. The parties acquired no joint property and operated no joint bank account.

Mr Crick submitted that the parties were in a de facto relationship for only two years. The Full Court set out the relevant legislative provision, s 4AA FLA:

"Meaning of de facto relationship

- (1) A person is in a **de facto relationship** with another person if:
- (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

- (2) Those circumstances may include any or all of the following:
- (a) the duration of the relationship;
 - (b) the nature and extent of their common residence;
 - (c) whether a sexual relationship exists;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property;
 - (f) the degree of mutual commitment to a shared life;
 - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of children;
 - (i) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (5) For the purposes of this Act:
- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

- (6) For the purposes of subsection (1), 2 persons are **related by family** if:
- (a) one is the child (including an adopted child) of the other; or
 - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
 - (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect."

The Full Court noted that the trial judge faced difficulties in applying the legislation to the facts, because of two factors (at [8]-[9]):

1. The cursory and conclusive nature of the evidence which was adduced by both parties. One example was the lack of evidence as to the nature of the payments made by the appellant to the respondent commencing after the child was born of \$300 per week and then \$500 per week. The respondent described this as a contribution "towards living expenses" whereas the appellant described it as "board". Another example was the respondent's evidence that the parties went out to particular events where they "presented as a couple". The appellant simply denied that they did so. The evidence did not add to those bald descriptions and denials by giving any indication of what actually occurred at these events. It was difficult to understand what was meant by the phrase "presented as a couple". If it meant that the parties arrived at a function or event together and left together, then the phrase added little to the evidence that was already before the Court. If it was intended to suggest something else, then it was not clear to the Full Court what that might be.
2. A further difficulty followed from the above. The trial judge found "that the parties demonstrated they were a couple when they attended together" or that "the parties frequently presented as a couple" (at [46] and [47]). The parties presented their cases this way, but their submissions did not reflect the wording of FLA. Section 4AA FLA is phrased in terms of the parties being "a couple" or having a "commitment to a shared life". The Full Court was critical of the phrase used by the trial judge of "presented as a couple" and did not know what was meant by it.

The Full Court was also critical of the trial judge for not having referred to the Full Court judgment of *Sinclair & Whittaker* (2013) FLC 93-551, which emphasised the importance of using the words "couple living together on a domestic basis". It quoted *Sinclair* at [13], discussing the decision of Murphy J in *Jonah & White* (2012) FLC 93-522 (at [93]-[94]):

"... When dismissing the appeal from his Honour's decision the Full Court did not disagree with his Honour's statements of principle but did not apply anything other than the statutory test (*Jonah & White*...). At 86,682 their Honours said:

'It is immediately apparent that the touchstone for the determination of whether a de facto relationship exists is the finding that the parties to it are a "couple living together on a genuine domestic basis".'

Comments made in the course of discussing facts are not to be elevated to the status of the provisions of the statute or substituted for the statutory test. This is because, taken on their own, they either add nothing to the statutory test or, if they do, they are adding an impermissible gloss. Thus it is not appropriate to consider the facts other than in the light of the statutory test."

During cross-examination, both parties conceded that parts of their affidavits were not entirely correct. The Full Court said that this was not surprising, given the length of time which had elapsed,

but it meant that the trial judge had little on which to base any determination as to the parties' credit. By contrast, the wife's sister's evidence was accepted by the trial judge. The parties and the child regularly attended her home for barbeques, particularly during the summer, and attending for family Christmases, and they always presented as if they were "together".

The Full Court concluded (at [70]):

"However, two things are apparent. Reference to the evidentiary context in which her Honour found from time to time that the parties "presented as a couple" (or a similar expression) makes it tolerably clear that the expression was intended to refer to the conduct to which the evidence referred in an unfortunate rolled-up expression. Secondly, as can be seen from the primary judge's reasons at [58], her Honour was aware of the legislative test. We incline to the view that her reasons, when read as a whole in conjunction with the evidence, demonstrate that she did not inform herself by reference to an incorrect test but she understood and applied the legislative test."

The Full Court dismissed the appeal.

Nord & Van (2018) FLC 93-833

Mr Nord appealed from a s 90RD declaration that the parties were in a de facto relationship between February 2009 and March 2014. He contended that the parties were never in a de facto relationship, but only had an affair. Ms Van contended that the parties were in a committed de facto relationship.

The Full Court, with the leading judgment delivered by Justice Kent (with whom Murphy J and Alstergren DCJ agreed), confirmed that the Full Court in *Dahl & Hamblin (2011) FLC 93-480* was correct and leave to appeal was not required to appeal from a s 90RD declaration. Justice Kent said (at [12]):

"In my judgment once a s 90RD declaration is made it has the effect of finally determining rights of parties as regards the existence of a de facto relationship for the purposes of Part VIIIAB of the Act such that the order or judgment can be regarded as final in the sense described in the authorities..."

At trial, there was a "vast divergence" between the versions of events put by each party, which meant that the trial judge had to determine the credibility of each party in order to determine the facts. He preferred the evidence of Ms Van and her daughter to the evidence of Mr Nord and his wife, Ms D. The trial judge found (at [16]) that Ms Van was "remarkably precise, clear, consistent and plausible throughout". By contrast, the evidence of Mr Nord was (at [17]) "in places implausible, internally inconsistent and, at certain points, simply contradictory". On appeal, part of Mr Nord's case challenged the adverse credit findings made by the trial judge concerning Mr Nord and his wife.

The Full Court referred to the significant authorities which emphasised the disadvantageous position of appellate judges compared to a trial judge when findings of fact rely upon the assessment made of credibility of witnesses. The appellant's counsel conceded this.

The trial judge found that a de facto relationship existed between the parties for the period claimed by Ms Van, based on the following factors:

- The length of the parties' relationship being from February 2009 to March 2014;
- Mr Nord's lengthy stays with Ms Van particularly during periods in which his wife, Ms D, was travelling;
- Ms Van's financial dependence on Mr Nord, including via Mr Nord's purchase of an "investment property" in his sole name in which he allowed Ms Van to live with the parties' child and Ms Van's other children rent-free for more than three years;
- Mr Nord's regular attendance at Ms Van's home to spend time with the parties' child and Ms Van's other children;
- The parties' ongoing sexual relationship; and
- The birth and care of the parties' child.

Mr Nord unsuccessfully disputed the costs order against him. One of his arguments was (at [47]) that even though he was wholly unsuccessful in the s 90RD declaration proceedings, he may be successful in the subsequent s 90SM proceedings such that either no alteration should be made to the parties' property interests, or that he only be required to pay Ms Van a small sum. He contended that the trial judge erred in determining the issue of costs and that it ought to have been determined at the final hearing. This argument was rejected. Mr Nord was, as the trial judge observed, wholly unsuccessful with respect to the issue which occupied the three days of the trial. It was well open to the trial judge to order costs.

4. Financial Agreements

The debate over the implications and application of *Thorne v Kennedy* (2017) FLC 93-807 has continued in 2018. As yet, there has not been a flurry of judgments under the *Family Law Act 1975* (FLA) referring to *Thorne v Kennedy*. Instead, most of the cases referring to *Thorne v Kennedy* have been non-family law cases. As of 20 October 2018, the only case reported in Austlii dealing with financial agreements and relying on *Thorne & Kennedy* was a decision of the Federal Circuit Court in *Frederick & Frederick* [2018] FCCA 1694 in which the facts were similar in some respects to those in *Thorne v Kennedy* but the judge decided the agreement should not be set aside. This decision has been appealed to the Full Court of the Family Court. This paper also discusses *Jess & Garvey* (2018) FLC 93-827, which looks at the application of *Anshun* estoppel to applications with respect to financial agreements.

***Jess & Garvey* (2018) FLC 93-827**

The Full Court considered whether *Anshun* estoppel applied where the wife had not raised causes of action at an early stage in proceedings issued by the husband to enforce a s 90B financial agreement. The agreement was signed and the parties married in 2006.

After the parties' separation in 2015, there was correspondence between the parties' solicitors regarding the financial agreement. The wife's solicitors reserved the wife's position with respect to the financial agreement.

On 11 March 2016, the husband filed an Application in a Case seeking that the financial agreement be enforced as if it were an order of the court and specifically sought orders as to how the agreement should be enforced.

The husband's solicitors wrote to the wife's solicitors, and this was considered to be important by the Full Court (at [95]):

"In the event that your client contends that the agreement is one other than one binding upon the parties, this is not a matter that your client has sought to put in issue to date, notwithstanding prior requests seeking to ascertain your client's position. If your client contends, would you advise by reply both as to the same and provide particulars as to the legal and/or financial basis for any such contention."

On 12 April 2016, the wife filed a Response to the husband's Application in a Case, seeking that the husband's application be dismissed or, in the alternative, if the court determined to enforce the agreement, that it be enforced in a particular manner as set out in the wife's Response.

At the hearing of the parties' respective applications on 27 May 2016, the wife's position was that there was no agreement, because the purported agreement was void for uncertainty. No other grounds were raised by the wife as to why the agreement should not be enforced. This aspect of her Response was dismissed.

Five months later, on 1 November 2016, the wife filed an Amended Initiating Application seeking:

"That pursuant to s 90K of the *Family Law Act (Cth)*, or alternatively pursuant to s 90KA, the Court order that the Financial Agreement entered into between the parties on 3 August 2006 be set aside or alternatively a declaration be made that the said Financial Agreement is not valid, enforceable or effective."

In the alternative, she sought that the agreement be enforced in a particular manner.

The wife was ordered to provide particulars of the grounds on which she sought that the agreement be set aside or declared to be not valid, enforceable or effective. The trial judge summarised these particulars (at [105] of the Full Court):

"a. Pursuant to s 90K(1)(d) there has been a material change in circumstances since the agreement was entered into and as a result the children or the respondent will suffer hardship if the agreement is not set aside;

- b. Pursuant to s 90K(1)(b) or (e) the agreement should be set aside as a result of unconscionability at the time of entering into the agreement;
- c. Pursuant to s 90K(1)(a) the agreement should be set aside as a result of the non-disclosure of a material matter amounting to fraud;
- d. There is no agreement generally at law because it was abandoned;
- e. There is no agreement generally at law because it was a sham."

The husband filed a Further Amended Response, seeking that the wife's Amended Initiating Application be summarily dismissed. The trial judge dismissed the wife's application to set aside the agreement or declare it to be not valid, enforceable or effective.

The trial judge (at [108]) applied the principle articulated in *Henderson v Henderson* [1843] EngR 917; (1843) 67 ER 313 at 319, and approved by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45 (at [22]); (1981) 147 CLR 589 at 598, that:

"where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

She also cited (at [109]) the following passage from the judgment of Murphy J (of the High Court) in *Anshun* (at 605):

"In this instance, the issue now sought to be raised was plainly open to be agitated in the previous litigation. The judgment in that case is inconsistent with the judgment now sought by the plaintiff. To preserve the orderly administration of justice the earlier judgment should be treated as conclusive on the question of indemnity. There is no discretion to allow the raising of that issue against the unwilling defendant; the attempt to do so is properly characterized as an abuse of process."

The trial judge dealt with the argument that the *Anshun* principle is not available where the earlier action is interlocutory and the orders do not finalise the proceedings. The Full Court interpreted the trial judge (at [112]) "as saying that the fact that all aspects of the proceedings have not been finalised does not preclude the application of the *Anshun* type estoppel".

Her Honour found "much force" in the husband's argument that it was "too late for the [wife] to raise fresh grounds upon which to attack the financial agreement" (at [43]) and said, at [71]:

"The [wife], despite 'notice, invitation and opportunity', elected to limit her [previous] challenge to the financial agreement to one of uncertainty. The [husband] invited the [wife] as early as August 2015 to indicate her position in relation to the financial agreement. Her position, both in her filed Response to the Application in a Case and articulated by her Queen's Counsel at the hearing on 27 May 2016 made her position

abundantly clear, namely, if she lost on her argument as to uncertainty the next step would be how the agreement should be enforced and the [wife] had set out the order she would seek in that event."

Her Honour further found that there were no special or exceptional circumstances which would cause the application of the *Anshun* principle to be unjust (at [74]).

The wife had two arguments on appeal:

1. There were different causes of action before the court on 27 May 2016 and 17 July 2017. The cause of action before the court in May 2016 was (at [117]) "whether the essential terms of the agreement were so lacking or uncertain that there was in fact no agreement". However, the cause of action before the court in July 2017 was "a claim to set aside the financial agreement pursuant to s 90K (and/or s 90KA) of the Act for reasons that had nothing to do with any claim of uncertainty". Entirely different questions were raised, and the resolution of the earlier proceedings could not prevent the pursuit of the later proceedings.
2. The earlier action was interlocutory and the *Anshun* principle did not apply in those circumstances.

The Full Court found (at [121]) that the manner in which the wife framed her case in May 2016 was that there was no impediment to the agreement being enforced as a "financial agreement" under the FLA. In fact, she advanced the very opposite position; she argued that it *should be* enforced, if it was not void for uncertainty.

The Full Court agreed with the trial judge (at [122]) "that the wife had 'notice, invitation and opportunity' to argue her case that the agreement should not be enforced". She had the opportunity in the 2016 proceedings to advance her arguments in denial of the husband's particularised assertions as to how the agreement should be enforced. The Full Court held (at [123]):

"Thus it was not open to the wife to subsequently pursue a claim to set aside the agreement for reasons that could, and should have been put before the court previously, in the context of determining the issue of enforceability."

The issue before the court in May 2016 (at [125]) was whether the agreement should be enforced, and the wife had been put on notice by the husband that she should bring forward all arguments that went to that issue, and plainly that would include any claim to set aside the agreement pursuant to s 90K (and/or s 90KA). The court had also ordered that the wife respond to the application for enforcement, and the wife clearly had the opportunity to present all her arguments as to why the agreement should not be enforced. Nevertheless, she chose to limit her challenge to a claim that the agreement was void for uncertainty, and she went further and set out how the agreement should be enforced if it was not void for uncertainty. Moreover, shortly after filing her Response the wife filed

an Initiating Application predicated upon the financial agreement being enforceable and seeking an adjustment of any property of the parties not caught by the financial agreement.

The Full Court (at [127]) held that the claims pursuant to s 90K and/or s 90KA were -

“so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding”.

The relevance of an earlier order being “interlocutory” as opposed to “final” is to differentiate between when an issue had been finally determined between the parties and when it has not. In this case, the Full Court held (at [134]) that the issue of the enforceability of the agreement was finally determined.

An application for special leave to appeal to the High Court was refused in *Jess & Garvey* [2018] HCASL 202 on the ground that the appeal did not "enjoy sufficient prospects of success".

The lessons from *Jess & Garvey* are:

1. A party may be estopped from raising other grounds upon which an agreement should not be enforced, where one ground has already been raised and dismissed;
2. The party seeking enforcement of an agreement should, at an early stage, invite the other party to raise all possible arguments. This forces the other party to set out their case, locks them in, and once these arguments are determined means that it is likely that different arguments cannot be raised later;
3. The party seeking to enforce the agreement may be advantaged by an early application to enforce the agreement before the other party has properly formulated the causes of action which are likely to be successful, bearing in mind the risks of a costs order will deter the raising of all vaguely possible arguments.

***Frederick & Frederick* [2018] FCCA 1694**

The case of *Frederick* is under appeal, and the appeal is likely to be heard early in 2019. It is dealt with here, as the facts are somewhat similar to those in *Thorne v Kennedy* (2017) FLC 93-807, so any decision of the Full Court of the Family Court is likely to assist legal practitioners and clients understand how the Family Law Courts will interpret the High Court's decision in *Thorne v Kennedy* and the breadth of vitiating factors such as undue influence and unconscionable conduct. The Full Court may be asked how to apply s 90K(1)(d) and how estimates of values of property protected by a financial agreement should be regarded in the absence of valuations or other independent evidence of value.

The parties in *Frederick* entered into a financial agreement on 5 February 2007. It is not clear from the judgment on what date the parties married in 2007, but the writer understands it was 9 February 2007 - four days after the agreement was signed by the wife. The husband asserted that the parties separated in July 2007. The wife asserted that the date of separation was 22 July 2013.

The husband's application for divorce was contested by the wife, and at the time of the hearing of the parties' respective applications regarding the financial agreement, a divorce order had not been made and there had been no determination as to the date of separation.

The husband sought to enforce the financial agreement and the wife sought that it be determined not to be binding or, if it was binding, that it be set aside pursuant to s 90K(1)(b), (d) or (e), or the general law.

The terms of the agreement quarantined the husband's property at the time of the agreement but did not quarantine increases in the value of the husband's property after the date it was signed. It was the wife's case, although this was not expressly stated by the trial judge, that the husband's estimates of the values of his property in the agreement were too high, which had the effect that there was nothing, or very little, for the wife to claim if the financial agreement was enforced. It appears from the judgment that there was evidence that values were lower at some point between 2007 and 2018, and then increased again in 2018 to values similar to the values stated by the husband in 2007.

The parties met in an overseas country in 2003, which the writer understands to be the Philippines. The husband travelled regularly to visit the wife in the Philippines and leased an apartment in which the parties lived when he travelled there. The parties' first child was born in 2005 and was 12 years old at the date of the trial.

The wife and the parties' first child arrived in Australia in 2006. The wife's bridging visa expired on 14 April 2007, which was about two months after the agreement was signed and the parties married. The parties had a second child in 2007, who was 10 years old at the date of trial. The wife was pregnant at the time she signed the agreement.

The wife sought to impugn the agreement on three grounds:

1. A failure to comply with the s 90G FLA requirements meant that the agreement was not binding;
2. Since the making of the agreement, a material change in circumstances had arisen relating to the care, welfare and development of the parties' older child, and, as a result of the change, the wife, who had caring responsibility for the child, being a party to the agreement, would

suffer hardship if the court did not set the agreement aside (s 90K(1)(d)). The material change was constituted by the disabilities suffered by the child, and the level of care she required.

3. The financial agreement was vitiated by undue influence by the husband, such that the financial agreement was "void, voidable or unenforceable" (s 90K(1)(b)) or the husband engaged in conduct in respect of making the agreement which was in the circumstances unconscionable (s 90K(1)(e)).

The trial judge preferred the evidence of the husband, who generally answered questions directly. By contrast, the trial judge found that the wife was an unsatisfactory witness, saying (at 41):

"For example, I observed that the wife often made long pauses before answering difficult questions, and she often failed to give responsive answers. Her evidence was characterised by exaggeration and reconstruction. In particular, her evidence about the circumstances in which the financial agreement was signed was unconvincing and implausible in important respects."

The agreement had handwritten amendments made by the wife's solicitor, which were agreed to by the husband after some initial resistance. One of these amendments was to exclude from the property protected by the agreement "any increase in asset or the matrimonial home or replacement asset or assets purchased from the sale or refinance of that property". A second amendment meant that the wife was not required to vacate any residence owned by the husband prior to the date of the agreement upon the husband giving the wife 30 days' written notice.

The parties gave different versions of the circumstances under which the agreement was signed. There was no dispute though that the wife's visa was due to expire and that the husband had told the wife that he would not have married her without a binding financial agreement.

The wife's version of events surrounding the signing of the financial agreement was summarised by the trial judge (at [59]):

- a. As at 2007, the wife had a limited command of English;
- b. She was pregnant with the parties' second child Y;
- c. She was not provided with a copy of the financial agreement before or after 5 February 2007;
- d. She suffered extreme morning sickness during the pregnancy and, on the morning of 5 February 2007, she had barely slept the night before;
- e. The husband told her to "*get ready*" because he was taking her "*somewhere*", to which the wife replied "*can't you see I am sick with your baby I don't want to go anywhere.*" According to the wife, the husband said "*I don't care. You have to come with me*" and he dragged her out of the house;
- f. She was so ill on 5 February 2007 she was crying and felt very sick in the car on the way to Mr Soulos' office. She had not been able to eat;
- g. When they arrived at Mr Soulos' office the wife said to the husband, "*I am so sick and can't even get out of the car.*" She was in shock;
- h. She was stressed and scared because she thought she was going to lose her husband and X;

- i. She was being pushed to sign something she had never seen, had never had the opportunity to read or take to someone who could translate it for her or take to a solicitor of her choice;
- j. She was in obvious distress and crying;
- k. Mr Soulos asked the wife if she had read the document, to which she replied "Yes" because, even though she had not read the document, she just wanted to get home;
- l. Mr Soulos dealt with her in a brief and perfunctory manner, and did not explain what he was doing;
- m. Mr Soulos made changes to the document which he did not explain and which the wife did not want; and
- n. After the appointment with Mr Soulos the husband was angry about the changes made to the document, but he agreed to them.

The evidence was unclear as to whether the wife saw the financial agreement prior to the conference with her solicitor, Mr Soulos. However, the trial judge found on the wife's evidence that Mr Soulos would have reasonably understood that the wife had not only read the financial agreement but was sufficiently proficient in English to be able to read it.

The husband gave evidence that he drove the wife to Mr Soulos' offices and left her there for two hours. He said he took the parties' child to the park, and when he picked up the wife, she didn't appear upset. The wife denied the appointment was of two hours' duration and said that the parties' daughter X had a very short attention span and would not have stayed at the park for two hours. She said that she did not understand a lot of what Mr Soulos said, as he "used big words". She was not advised by Mr Soulos that the agreement was unfair and that she should not sign it. She said:

"All I know is that if I did not sign Mr Frederick would not marry me and I would be sent back home with [X] and I never want to be separated from [X]. I love her very much."

The trial judge found that Mr Soulos was a credible witness. He had been in practice as a solicitor for about 30 years at the time the agreement had been executed. Mr Soulos had no recollection of the wife or meeting her in conference. However, he denied providing advice to a client who was in shock, crying, with whom he was unable to communicate, or for whom something was obviously wrong. He denied making any changes without instructions. In cross-examination he maintained his denials, explaining that "there was no way" he would have forgotten "a woman coming in to sign a document crying and not wanting to sign it". The trial judge found (at [71]) that "it was not surprising that Mr Soulos would not remember the wife, given he met her only once, over ten years before, unless there was something extreme or unusual about her presentation".

Mr Soulos' file had been destroyed, but he had retrieved copies of three letters from the digital file. In one of the letters Mr Soulos confirmed that he had explained the terms and conditions of the agreement to the wife, and they discussed the amendments to the agreement. The letters did not confirm that the advice had been given as required by s 90G(1), a matter not specifically noted by the trial judge.

The trial judge rejected the wife's evidence, noting (at [80]):

"In order to accept her version, it would be necessary to find that Mr Soulos, who had been in practice for 30 years at the time, having never met the wife before, but faced with her as a client manifestly crying and distressed, ill and unable to speak English properly, gave her either no, or at best cursory advice, unilaterally formulated amendments without explaining them to her, then sent out correspondence containing false factual assertions about what transpired at their conference. There is no obvious reason why Mr Soulos would conduct himself professionally in such an irresponsible fashion."

The trial judge could not understand why the wife had told Mr Soulos she had read the financial agreement, because she just wanted to get home. He explained his reasons (at [82]):

"This was even though, according to the wife, she was crying, shocked and disoriented on 5 February 2007, because the husband was suddenly and unexpectedly demanding, at the eleventh hour before the wedding, she sign a financial agreement, which she had never seen. If this was true, the wife's response to Mr Soulos, saying she had read the financial agreement, was remarkable. Apart from a desire to "get home", no reason was given by the wife as to why she could not have explained her situation to Mr Soulos, if it was true, but instead actively mislead him. This reinforces the impression that her version of events is not convincing."

It is possible that the wife did not explain the situation to Mr Soulos because she was subject to undue influence or unconscionable conduct, just as the wife in *Thorne v Kennedy* signed an agreement which her lawyer told her she should not sign because it was the worst she had ever seen. This scenario was not considered by the trial judge.

At the time the agreement was signed, the wife rejected a proposal by the husband that, rather than the changes proposed by her solicitor to the agreement, that he buy her an apartment in the Philippines. The wife said she responded:

"I just want to be with you and the children. I don't want an apartment."

The wife's evidence was that she preferred her solicitor's amendments to the husband's offer of the Philippines apartment. The trial judge found that this showed that she knew and understood the amendments, and that they protected her. However, and this was not expressly considered by the trial judge in this part of the judgment, the wife was also clear that she wanted to live in Australia with her children and feared that in the event of a separation she could be forced to return to the Philippines, leaving her child or children in Australia.

The trial judge rejected the wife's evidence that in 2007 her command of English was insufficient for her to read and understand the financial agreement.

Although the trial judge accepted that the husband said to the wife words to the effect "if you don't sign a BFA, I won't be able to marry you", he found (at [89]) that it was "more likely than not that the wife knew the husband wanted a financial agreement and accepted this as a reasonable proposal".

The trial judge preferred the husband's evidence concerning the preparation and execution of the financial agreement and that the husband had told the wife he wanted a financial agreement to protect his assets before 5 February 2007. The trial judge did not make a finding as to when the wife became aware that the husband considered an agreement to be necessary and what the terms of it would be, but (at [90]) concluded:

"I do not accept that the husband made a sudden and unexpected demand for the signing of the financial agreement at the eleventh hour before the wedding."

The trial judge rejected other aspects of the wife's evidence, including that she was obviously ill or tired and that she presented to Mr Soulos crying or obviously distressed.

The trial judge found that the s 90G(1) requirements were satisfied, being the requirements which were in operation between the 2003 and the 2009 FLA amendments, as identified in *Wallace & Stelzer* (2013) FLC 93-566.

The wife's case in relation to s 90K(1)(d) relied on the severe disabilities of the child X - who had been diagnosed with atypical autism, mild functional/adaptive impairment, and PICA (which is an eating disorder). After the agreement was signed, X was diagnosed as having a range of serious developmental delays and disabilities. She developed unsafe behaviours, sleep disturbances, challenging behaviours, and a period of chronic diarrhoea. At age 7 she was not toilet trained and was still non-verbal. The husband agreed in cross-examination that X's care was expensive and that she would require a high level of care for the rest of her life.

The trial judge relied on *Fewster & Drake* (2016) FLC 93-745, and was satisfied (at [129]) that "the diagnosis of X's disabilities, the presentation of challenging behaviours and the costs of care were material changes of circumstance 'since the making of the agreement' and that these were changes 'relating to the care, welfare and development of a child of the marriage'". He held (at [130]) that:

"the birth of a second child in combination with a severely disabled older child constitute a material change of circumstances in this matter".

The wife argued that if the financial agreement was not set aside, she would suffer hardship. The trial judge found this second part of s 90K(1)(d) to be the more difficult question. In order to undertake some comparison between the position of the wife, if the financial agreement remained in place, and her position if it was set aside, the trial judge said he required evidence of not only the current value of the property that would fall into the available pool if the financial agreement was set aside, but also, as the husband submitted, there must be some evidence of the current value of the property or "financial resources" excluded from the operation of the financial agreement.

There was no valuation evidence or other evidence of value of any property as at the date of the hearing, apart from some estimates of the value of Property A given by the husband. These estimates

ranged from \$2,200,000 to \$2,300,000 over the period between 2007 and 2017. There was evidence that in 2014, for the purposes of proceedings in another court, the husband valued Property A at \$1,800,000. On that basis Property A first fell then rose in value over a decade. The husband gave a value of \$2,200,000 for Property A in the financial agreement. The husband attributed the same value to the property in his Financial Statement filed 10 years later on 11 January 2017. In cross examination, the husband estimated \$2,300,000 as the value. If this evidence were to be accepted, it would also entail accepting that the value of Property A had either not changed in over a decade, or had risen by \$100,000 only. The wife relied on this evidence to submit that she could expect to share at most in a capital gain of \$100,000.

Schedule 1 of the financial agreement specified that the company called Business A owned two properties with a total net value of \$1,937,409. In his financial statement filed in 2017, the husband estimated the value of these shares to be \$1,809,457 which was less than the value in the Schedule.

There was no evidence of the current value of any of the property. The trial judge found that it was not possible to form a view about whether their value had increased or not since the date of execution of the financial agreement.

The husband's evidence of value of Property A could be seen as supportive of the wife's argument of hardship if the financial agreement was not set aside. The wife submitted that the trial judge should accept the husband's evidence of value, but the trial judge rejected that submission on the basis that the husband's estimate was little better than conjecture (which argument presumably applied to the initial estimates of values in the financial agreement). There was no evidentiary basis upon which to form a view about the possible movement, or stability, in the value of any assets, including Property A. The wife adduced no evidence herself of the value of any assets, despite bearing the onus of establishing hardship. The trial judge concluded (at [144]):

"Consequently, the court is unable to undertake any meaningful comparison between the different positions, if the financial agreement was, or was not, set aside".

The trial judge found that there were also deficiencies in the wife's evidence as to:

- Her statement that she suffered hardship because she cared for the two children "on an almost full-time basis with no financial support from the husband" so she had to work part-time. There was no evidence of child support departure assessments or orders;
- She made no claim for spousal maintenance;
- Whether the wife was unable to support herself without an income-tested pension, allowance or benefit when the financial agreement came into effect (s 90F).

The claim under s 90K(1)(d) failed.

In relation to the wife's claim that the agreement should set aside for undue influence under s 90K(1)(b), the trial judge accepted that there were some factual similarities with *Thorne v Kennedy*. He set these out (at [156]):

"I accept that there was limited time for careful reflection, the husband stood in a much stronger financial position to the wife and she relied upon him for financial support. Although the evidence is not clear, I also accept that there was a risk that the wife may have been compelled to return home to the (country omitted) once her visa ran out on 14 April 2007, unless she married the husband. I accept that the terms of the financial agreement are very favourable to the husband."

However, the trial judge also found that there were critical differences (at [157]):

"The evidence in the present matter does not establish that the financial agreement was offered on the basis that is [sic] was not the subject of negotiation. The wife gives no evidence to that effect. It is true that such a conclusion could be inferred from the husband's statement that he would not marry the wife unless she signed the financial agreement. However, in other respects the facts do not support this conclusion. I have found that the parties discussed the need for a financial agreement prior to 5 February 2007. The wife argued she was not in a position to negotiate improved terms. However, improved terms were in fact negotiated, against resistance by the husband. Despite her evidence to the contrary, I have made findings above that the wife did know of the amendments made by Mr Soulos and accepted them. Her evidence is clear that the husband reacted badly to the amendments, but took advice and accepted them. The wife argued that the amendments "*could not be said to be favourable or satisfactory*". Even that submission is questionable. Although the terms of the financial agreement clearly favoured the husband, the changed terms were favourable and an improvement. On her own evidence, as discussed above, the wife perceived the amendments to be more favourable to her than a payment of \$300-350,000 or an apartment in the (country omitted)."

In relation to the wife's emotional circumstances, the trial judge rejected the wife's evidence and found that the wife was not agitated but was prepared to accept the agreement.

The wife argued that the terms of the financial agreement "are and were grossly unacceptable" and that this was a factor indicating undue influence. The trial judge distinguished the facts from those in *Thorne v Kennedy*:

1. The wife gave no evidence of the advice she received. Her evidence was that she received no advice and, even if she had, would not have been capable of understanding it. Her evidence was rejected;
2. Mr Soulos had no recollection of the advice he gave. However, the trial judge was satisfied by a combination of Recital G, the annexed certificates, and the evidence of, and the letters sent by Mr Soulos, that the wife received independent legal advice about the effect of the agreement and the advantages and disadvantages to her of making the financial agreement;

3. The wife knew that the advantages to her included a share of the increase in value of the husband's assets listed in Schedule 1. The wife believed the amendments protected her, otherwise "I probably would have taken his offer of money".
4. There was not legal advice to similar effect as the advice in *Thorne v Kennedy*. It could not be concluded that the wife signed the agreement despite advice not to do so;
5. The plurality in *Thorne v Kennedy* did not suggest that grossly unreasonable terms could, in themselves and without more, support a finding of undue influence. The scope for significant imbalance between the parties in terms of financial agreements was well recognised;
6. The trial judge could not conclude that there would not have been an ongoing relationship if the financial agreement was not signed. It is difficult to discern from the judgment what evidence there was of this, as the evidence appeared to be to the contrary. The trial judge may have assumed that the de facto relationship may have continued even if the parties did not marry. He did not refer to the visa issue at this point of the judgment. He did note though, that without a financial agreement the wife had rights to apply under Pt VIIIAB of the FLA;
7. The wedding was a small one in a registry office, with no relatives in attendance. It lacked the element of "publicness" in *Thorne v Kennedy*;

The trial judge concluded (at [172]), rejecting the claim of undue influence:

"I am not satisfied that in all the circumstances the fact that the wife signed the financial agreement is an indicium that her circumstances so seriously affected her state of mind *"as to have rendered her incapable of making a judgment in her own best interests."* Rather the findings I have made lead to the conclusion that the wife formed a view that the financial agreement, as amended, gave her some protection, not that it was *"grossly unreasonable"*. I am satisfied that the wife was not powerless and remained a sufficiently free agent to act in her own interests."

He similarly rejected the claim of unconscionable conduct (at [179] and [181]):

"In the present matter, I have found that the wife's command of English was sufficient to understand any advice given to her, and the explanation of the terms of the financial agreement. I have concluded already that the wife in the present matter was not subject to undue influence, or unable to make a judgment in her own best interests. She formed the view that the financial agreement gave her some protection. She may have been able to return home or receive money from the husband. Whatever limitations there were upon her options, they were not eliminated or as severely confined as in *Thorne*. This leads to the conclusion that she was not subject to a special disadvantage for those reasons ...

In the present matter the evidence about the emotional connectedness between the parties is difficult to evaluate, in light of the view I have formed about the reliability of the wife's evidence. Her evidence suggested the parties were in love at the time of marriage, and they already had a child. The husband's evidence was not inconsistent with this. I am satisfied there was a close emotional connection ... I am not satisfied the connection was of such a nature as to render the wife sufficiently vulnerable to create a special disadvantage."

He also concluded that in relation to the husband's behaviour (at [184]) that the:

"discussion between the parties concerning a financial agreement prior to, together with the events on, 5 February 2007, preclude a finding that the husband extorted a benefit from the wife. Nor did he passively accept a benefit in unconscionable circumstances."

Conclusion

There are some important reminders of the law which can be drawn from these judgments, including:

- Section 109 *Constitution* refers to inconsistency and does not necessarily make the whole of a State or Territory law invalid.
- Section 79 *Judiciary Act* operates so that State, Territory, Federal and common law comprise a "single though composite body of law".
- An adult child may be given access to their parents' Family Court file. It is necessary to look at r 20.13 *Family Law Rules* and apply it, rather than extraneous considerations.
- Use the wording of the FLA - e.g. s 4AA refers to "couple living together on a genuine domestic basis", not other descriptions of couples.
- *Anshun* estoppel can apply to set aside financial agreements. Some practical repercussions of this are set out earlier in this paper.
- The effects of *Thorne v Kennedy* are still being considered. The circumstances in which undue influence and unconscionable conduct may be found to have occurred are not settled.