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Matters to Which We Don't Often Turn Our Minds

Section 85A of the *Family Law Act*

Costs Applications in Parenting Matters

Contempt in Family Law

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Part 1:

Thinking Outside the Pool

Section 85A of the *Family Law Act*

Introduction

Section 85A

1. Section 85A of the *Family Law Act 1975* ("**Act**") permits the Court to make Orders adjusting property which falls within a settlement made in relation to a marriage. Crucially, this means that the Court has power to adjust property interests which are *outside the matrimonial property pool* available for adjustment under s 79 of the Act, provided that the facts of the case fit within s 85A(1).

2. The section provides as follows:

> ***85A Ante-nuptial and post-nuptial settlements***
>
> *(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.*
>
> *(2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.*
>
> *(3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.*

3. There is limited case law in relation to s 85A.

4. In this paper, I rely heavily on the first-instance judgment of Cronin J in *Rice*.[1] I was the solicitor for the applicant wife in that case. To the best of my knowledge following extensive research (both in preparing the wife's case in *Rice* for trial, and again in preparing this paper), there is no other reported case in which an application under s 85A was successful, and only a handful of cases where the section was discussed at all. *Rice* is particularly interesting because it relates in its entirety to s 85A, as the matrimonial property pool was virtually non-existent.

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[1] *Rice v Rice* (2015) 52 Fam LR 618 ("**Rice**").

5. In *Rice*, Cronin J found that s 85A "*is intended to make certain property subject to the orders that could be made under s 79.*"[2]

6. Unlike s 106B of the Act, s 85A is not directed at ill-intended transactions. There is no requirement of an intention to defeat a claim. So much is clear from the wording of the section. Cronin J confirmed in *Rice* that s 85A is not restricted to being "*a vehicle to claw back assets which had been put beyond the power of the Court*".[3]

7. His Honour held that

> "*the fundamental question is whether or not parties other than the husband and wife are holding assets which, by virtue of [the subject settlement], the assets* [sic] *have been put beyond the reach of the Court to such an extent that the Court cannot do justice.*"[4]

No De Facto Equivalent

8. There is no corresponding section in Part VIIIAB of the Act. There is, therefore, no relief of the kind available under s 85A with respect to de facto financial causes.

How s 85A Works

Ancillary Power

9. The section does not confer an independent power upon the Court, but rather an ancillary power to another matrimonial cause.[5] In other words, there must be some head of power to which the application of s 85A may attach. So much is obvious from the words "*in proceedings under this Act*" in s 85A(1).

Requirements to Fall within s 85A

10. The remainder of s 85A(1) may be broken into the following elements:

    10.1. The Court may make an order for the application of the subject property for the benefit of the parties to the marriage, or their children. This is consistent with the Court's power to adjust property *within the matrimonial pool* for the benefit of the parties' children, as well as for the benefit of the parties.[6]

    10.2. The subject property must have been dealt with by an ante-nuptial or post-nuptial settlement. I discuss what constitutes a "settlement" below.

    10.3. The settlement in question must have been "*made in relation to the marriage*". I discuss this below.

    10.4. Any order which the Court makes under s 85A must be just and equitable. These are the concepts of justice and equity with which we are all familiar.

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[2] Rice at [83].
[3] *Rice* at [82].
[4] Ibid.
[5] *Greval v Estate of the late Greval; Sandalwood Lodge Pty Ltd (Intervener)* (1990) FLC 92-132.
[6] Act s 79(1)(d).

How s 85A is Applied

11. Cronin J, in *Rice*, summarised the effect of s 85A(2) as follows:

> "*If the facts do fit within s 85A, the provision is remedial and Part VIII of the Act applies rather than any other determination according to equitable principles."*[7]

12. In that case, the property in question (several parcels of farm land, on one of which stood the family home) had been transferred to two of the parties' adult children, who had been joined to the proceedings, with certain rights (including a right of occupation for life) reserved to the parties.

13. His Honour agreed with the submissions made on behalf of the applicant wife that, if the Court found that there was a nuptial settlement in relation to the marriage in satisfaction of s 85A(1), s 85A(2) required that the matter effectively be treated as a s 79 matter as between all four parties.[8]

No Circumvention of Financial Agreements

14. The meaning of s 85A(3) is self-evident: s 85A cannot be used to circumvent the ousting of the Court's jurisdiction by a financial agreement.

A Settlement in Relation to the Marriage

15. In *Rice*, Cronin J observed that a "*nuptial settlement has to create a right, property or interest for at least* [one of the parties to the marriage] *if s 85A … is to be applied.*"[9] Where "*assets originally held by one of the parties to the marriage have been transferred to another person by way of an absolute gift, there is no basis to suggest that there was a settlement.*"[10]

Settlement

16. "Settlement" is not a well-defined term. Cronin J discussed its meaning at length in *Rice*.[11] The following are some of the matters which his Honour considered:

    16.1. The definition of "settlement" found in the *Settled Land Act 1958* (Vic)

> "*includes* inter alia*, an agreement under which or by virtue of which instrument, any land is charged, whether voluntarily or by way of family arrangement for the benefit of other persons.*"[12]

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[7] *Rice* at [1].
[8] See, generally, *Rice* at [125] – [160].
[9] *Rice* at [90].
[10] *Rice* at [83].
[11] See, generally, *Rice* at [100] – [117].
[12] *Rice* at [102].

16.2. In *Gill*,[13] a case involving construction of a will, Harvey J found that a personal obligation on a beneficiary to provide board for the deceased's daughters was capable of attracting the intervention of equity. Cronin J concluded that "*Equity will intervene if a settlement requires that intervention.*"[14]

16.3. Referring to the English decision of *Re Brace*, Cronin J indicated that a merely precatory condition to provide a benefit would not be enough to constitute a settlement.[15]

16.4. Cronin J referred *Burke v Dawes*,[16] where Dixon J endorsed the word "tenancy" being interpreted "*as ordinarily understood arising out of an agreement under which the person in possession was allowed to occupy in consideration of some kind of rent.*"[17]

16.5. His Honour found that the "*right of occupation for life*" retained by the wife in *Rice* "*gives rise to an equitable interest under the settlement between all of the parties.*"[18]

16.6. It did not matter that the wife's right to remain living on the property was inalienable. Cronin J found that there "*was a quasi-contract which created an interest in the land for the wife and the husband despite the transfer of the legal title.*" His Honour contemplated whether the daughters could have sold the property while the husband and wife lived there, and reached the view that they could not.[19]

16.7. His Honour noted that **many authorities "*confirm that the question is whether the registered proprietor's powers of alienation, devising and transmission are restrained by the limitations of the settlement.*"**[20] (My emphasis.) The key element is that **the legal owner's power to deal with the subject property is fettered in some way**. If the transfer to the legal owner was absolute, there is not settlement for the purposes of s 85A.

In Relation to the Marriage

17. Section 85A was discussed in *Kennon v Spry*,[21] in separate judgments, by Heydon J and Kiefel J (as her Honour then was). The other Justices did not consider it necessary to discuss s 85A in any detail.

18. Heydon J found that the words "made in relation to the marriage" in s 85A(1) could not apply to a trust which was settled 10 years before the parties' marriage.

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[13] *Gill v Gill* (1921) 21 SR (NSW) 400.
[14] *Rice* at [103] – [104].
[15] *Rice* at [105].
[16] *Burke v Dawes* (1938) 59 CLR 1.
[17] *Rice* at [106].
[18] Ibid.
[19] *Rice* at [110].
[20] *Rice* at [113].
[21] *Kennon v Spry* (2008) 238 CLR 366 ("**Kennon v Spry**").

19. Kiefel J found that a settlement made in relation to the marriage might involve:

> "*A disposition of property for the purposes of regulating the enjoyment of settlement property …* [but] *it is necessary that it provide for the financial benefit of one or other of the spouses. It may imply some kind of continuing provision for them.*"[22]

20. In *Anison*,[23] Hogan J summarised what her Honour apparently considered to be the most important elements of Kiefel J's reasoning in *Kennon v Spry* with respect to the words "*in relation to the marriage*" in s 85A(1), as follows:

> "*a) s 85A (1) was intended to have a wide operation to property held for the benefit of the parties on a settlement and to which they have contributed and it is intended to apply to settlements whether they occur before or during marriage; and*
>
> *b) the essential requirement of the section is that there be a sufficient association between the property the subject of a settlement and the marriage the subject of proceedings; and*
>
> *c) s 85A (1) does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made and it is sufficient for the purposes of the section that the association of which it speaks ("made in relation to") be present when the Court comes to determine the application of the property settled under s 85A (1).*"[24]

21. Whilst Kiefel J was part of a majority with respect to the balance of the appeal in *Kennon v Spry*, there was no majority view with respect to s 85A. The question of whether a settlement which pre-dates the marriage can be a settlement "in relation to the marriage" remains unsettled.

22. *Rice* sheds no light on this, as the settlement in that case was made some 30 years after the parties married.

Where Might s 85A Apply?

23. The dearth of reported s 85A cases means that there are almost no examples of scenarios which clearly fall within the section.

24. On the other hand, s 85A is a potentially powerful weapon in the family lawyer's armoury, which may be used to access property outside the pool as we know it.

25. I expect that the most common potential application of s 85A may be in relation to trust property which cannot be said to be the property of a party in the usual application of s 79.

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[22] *Kennon v Spry* at 437, as set out in *Rice* at [120].
[23] *Anison & Anison and Anor* [2015] FamCA 973 ("**Anison**").
[24] *Anison* at [69].

26. However, it is clear from *Rice* that the term "settlement" encompasses more than a formally established trust. The settlement in that case was a "quasi-contract" which arose primarily out conversations between the husband, the wife and the daughters.

27. I have no answers beyond the *Rice* scenario, but, to my mind, the following questions are interesting:

    27.1. Where the husband and wife place property in a trust of which their children are the corpus beneficiaries, but the husband and wife are income beneficiaries only, would that trust constitute a settlement for the purposes of s 85A?

    27.2. In the following scenario,[25] is the trust a settlement *in relation to the marriage*? Is the home subject to adjustment under s 85A?

        27.2.1 The matrimonial home, originally bought for the parties as a wedding gift by the wife's parents, is subject to a mortgagee sale after the husband's business venture fails (about 10 years after the parties marry, and about 20 years before they separate).

        27.2.2 The wife's mother establishes a family trust of which the parties' children, but not the parties, are the beneficiaries. The wife's mother funds the acquisition of the home by the new trust from the mortgagee to enable the family to continue to live there, but to protect it from further risk associated with the husband's future ventures.

        27.2.3 The wife's mother is the appointor of the trust. There is a corporate trustee, of which the wife and the wife's mother are the directors and shareholders.

        27.2.4 The family continues to live in the home for the remainder of the marriage.

        27.2.5 At the time of trial:

            27.2.5.1 the husband and wife are the directors and shareholders of the corporate trustee;

            27.2.5.2 the wife is the substituted appointor of the trust; and

            27.2.5.3 the wife continues to live in the home with the adult children.

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[25] From a real case. The wife contended that the home was outside the pool. The husband contended that the home was in the pool, but did not plead s 85A, and had not joined the children to the proceedings. The children went on affidavit (for the wife) to assert their rights under the trust. The matter ultimately settled on the morning of the first day of the trial, so this issue was not determined.

Part 2:

The Respondent could not believe the application had been made

Costs Applications in Parenting Matters

Conventional Wisdom

28. For as long as I have been practising, I have heard people say words to the effect that one just does not make costs applications in parenting matters. This seems to be virtually a consensus position.

29. When I was a first-year solicitor, I drafted a letter of offer in a messy[26] parenting matter. I included the (fairly standard) heading "Without prejudice, save as to costs". My principal signed the letter, but commented to me that "*you can't really make Calderbank offers in parenting matters; you can't get a costs order*".

30. In early 2019, I mentioned to a colleague at the Victorian Bar that I had recently prepared written costs submissions in an international relocation matter.[27] The colleague, who is often briefed to appear for Independent Children's Lawyers, found the concept morally offensive.

31. At the first return hearing of that costs application,[28] my opponent made an oral application for summary dismissal. The sole submission in support of the application was to the effect of "*your Honour, you don't make a costs application in parenting matter, and especially in a relocation matter.*"

32. In the responding written submissions, the same practitioner posited, inter alia:

    32.1. "*The Respondent Father disputes an Order ought to be made in the Mother's favour for him to pay her costs in a matter that was not only solely a children's* ***matter but also an international relocation case***" (emphasis in original);

    32.2. "*the binary nature of this particular case, being an International Relocation Case, does in no way support the making of an Order for costs*";

    32.3. "*other members of the bench refuse to make costs Orders at all in children's matters for example Judge* [omitted] *of Melbourne*"; and

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[26] The father was found (by the now Chief Magistrate of Victoria) to have committed family violence against the two children, both of whom had Autism Spectrum Disorder and various physical ailments.

[27] I had hoped to be able to report on the outcome of that matter in this paper. Unfortunately, I am still awaiting a decision.

[28] It was initiated by way of an Application in a Case, pursuant to *Federal Circuit Court Rules 2001* r 21.02(1)(b).

32.4. "*the Respondent could not believe the application had been made for costs in the first place*".

33. But, conventional wisdom aside, what's the law?

No Distinction in the Act or the Rules

34. *Family Law Act 1975* s 117(1) provides that:

> *Subject to subsection (2), subsections 45A(6) and 70NFB(1) and sections 117AA and 117AC, each party to* ***proceedings under this Act*** *shall bear his or her own costs.* (my emphasis)

35. Section 117(2) provides that:

> *If,* ***in proceedings under this Act****, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4), (4A), (5) and (6) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.* (my emphasis)

36. Section 117 applies to proceedings under the Act generally. It does not draw a distinction between financial and parenting matters.

37. Nothing in Part 19.4 of the *Family Law Rules 2004*, nor in Division 21.2 of the *Federal Circuit Court Rules 2001*, draws any such distinction.

No Distinction in the Leading Cases

38. The leading cases to which we[29] tend to refer in our costs submissions in family law matters are, admittedly, overwhelmingly of a financial nature. However, the important statements, which help us to interpret s 117, are not, of themselves, limited to only certain types of matters.

39. *Penfold* tell us that:[30]

> "*As subsec. (1) is expressed to be subject to subsec. (2), the former must yield whenever a judge finds in a particular case that there are circumstances justifying the making of an order for costs.*"

40. *I & I (No 2)*, [31] provides that the matters in s 117(2A):

> "*must all be taken into account and/or balanced in order to determine whether the overall circumstances justified the making of an order for costs.*"

41. These principles apply equally to all proceedings under the Act.

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[29] Or, at least, I.
[30] *Penfold & Penfold* (1980) FLC 90-800.
[31] *In the Marriage of I (No 2)* (1995) FLC 92-625.

42. Similarly, the examples of circumstances which may give rise to indemnity costs being ordered, set out by Holden CJ in *Munday v Bowman*[32] with reference to *Colgate-Palmolive v Cussons Pty Ltd*,[33] are as applicable to parenting matters as they are to financial matters:

    42.1. "*Where it appears that an action has been commenced or continued in circumstances where a party properly advised should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive or because of some wilful disregard of the known facts.*"

    42.2. "*Evidence of particular misconduct causing loss of time to the court and to other parties.*"

    42.3. "*The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.*"

    42.4. "*An imprudent refusal of an offer of compromise.*"

43. In relation to relocation cases,[34] it bears remembering that there is longstanding authority that "*relocation cases are not a separate category within the Family Law Act*".[35]

The Full Court on Costs in Parenting Matters

44. The majority[36] in *Hawkins & Roe*,[37] allowing an appeal against a costs order in a parenting matter, held:[38]

> *While the categories of occasions when costs may be ordered is not limited, the occasions on which such an order should be made in a parenting dispute should have some particular features. Where there is a complete absence of preparedness to compromise in the face of unambiguous expert evidence, where false allegations are made, or where one party is clearly motivated by self interest rather than the best interests of a child, then a judge may well conclude that there are circumstances justifying an order.*

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[32] (1997) FLC 92-784.
[33] (1993) 46 FCR 225.
[34] In the context of which I drew costs submissions earlier this year, and in relation to which many practitioners appear to consider costs applications particularly egregious.
[35] *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 at p 84,914.
[36] May an Ainslie-Wallace J.
[37] (2012) 47 Fam LR 526.
[38] At p 549.

45. Thackray J, dissenting, after traversing the authorities on appellate interference in discretionary decisions, said:[39]

> *I also respectfully agree with May and Ainslie-Wallace JJ that the "general rule" that each party will pay their own costs is not often displaced in parenting cases, and that the nature of such litigation is quite different to a commercial dispute in other courts. However, the statute itself does not differentiate between parenting and financial cases. The discretion given to a trial judge to determine a costs dispute, even in a parenting case, is a very wide one, and I am not persuaded there is an adequate basis for overturning the order.*

46. The Full Court[40] in *Wrensted & Eades*[41] unanimously held:[42]

> *We agree with his Honour's analysis of the statements by the majority in* Hawkins & Roe*, and are much attracted to what Thackray J said in dissent. The examples given by the majority of circumstances in which a costs order may be made and their statement that in such circumstances "a judge may well conclude that there are circumstances justifying an order for costs" does not fetter the wide discretion reposing in the trial judge as long as they are seen as examples rather than requirements. However* ***if the majority*** *in* Hawkins & Rowe*, by use of the words "the occasions on which such an order should be made in a parenting dispute should have some particular features",* ***were intending to indicate that certain features need to be present before a costs order can be made, we respectfully disagree. The wide discretion in s 117(2) of the Act and lack of distinction between categories of family law cases (including the lack of distinction between parenting and property cases) would in our view render such a conclusion plainly erroneous, place a fetter on discretion which does not have a legislative basis and require us to depart from that conclusion***. (emphasis added; citations omitted).

47. In *Wrensted*, the Full Court dismissed an appeal against a costs order made against the "left-behind" father where an order had been made permitting the mother to relocate overseas with the children for a fixed period, in circumstances where that father had, inter alia, been wholly unsuccessful, had conducted himself poorly, and had rejected an offer of settlement.

But, They Have the Right to Fight for their Kids

48. One of the key motivators for the conventional wisdom that one doesn't make costs applications in parenting matters appears to be[43] the idea that a parent should have the right to run their case to fight for their children. Indeed, this was a major flank of my opponent's responding costs submissions in my recent relocation matter.

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[39] At p 551.
[40] Comprised of Bryant CJ and Finn and Strickland JJ.
[41] (2016) FLC 93-697.
[42] At p 81,153.
[43] Again, this is based solely on my own experience of working with other practitioners.

49. For that position to make sense would require that s 117(2A)(e) not apply to parenting matters. As set out above,[44] s 117 does not distinguish between parenting and other proceedings.

50. The Full Court in *Wrensted* unanimously held that:

> *Plainly the father was 'wholly unsuccessful' before his Honour because he was unsuccessful in his opposition to the relocation. That outcome is not altered by the fact that the father might have been entitled to oppose the relocation and to present his arguments in support of his position. Indeed, as quoted by his Honour, Thackray J, in* Hawkins & Roe *correctly observed that 'even a meritorious case can be "unsuccessful" when the other case is found to have greater merit'."*[45]

51. That Full Court held that there was no merit in the ground of appeal that, "*the primary judge when considering whether one party was* 'wholly unsuccessful*' … failed to consider or adequately consider … the clear merit in*" one of the bases upon which the appellant had opposed the relocation.[46]

Still a Matter of Discretion

52. Whatever the subject matter, the determination of a costs application remains a matter of discretion for the trial judge. The "general rule" under s 117(1) remains that, ordinarily, each party will bear their own costs.

53. One of the matters on which Thackray J agreed with the majority in *Hawkins & Roe* was that that "general rule" is not often displaced in parenting matters.[47]

54. In advising a client on the prospects of succeeding in a costs application in a parenting matter, one must turn one's mind to the same matters to which one turns one's mind in any other costs application: the matters in s 117(2A).

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[44] At [34] – [36].
[45] *Wrensted* at p 85,151.
[46] *Wrensted* at pp 81,148, 85,151.
[47] See above at [45].

Part 3:

Flagrant Challengers

Contempt in Family Law

A Confession

55. Contempt is a matter to which, until about two weeks ago, I had not turned my mind.[48] Consequently, this part of my paper is little more than a brief overview of how contempt is dealt with under the *Family Law Act 1975*.

Section 112AP of the Act

56. *Family Law Act 1975* s 35 provides that:

> *Subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.*

57. Section 112AP makes up the entirety of Part XIIIB – Contempt of Court. It is the section to which s 35 is subject.

Application of s 112AP

58. Section 112AP(1) sets out the required elements for a finding of contempt under the Act:

> *Subject to subsection (1A), this section applies to a contempt of a court that:*
>
> *(a) does not constitute a contravention of an order under this Act; or*
>
> *(b) constitutes a contravention of an order under this Act and involves a flagrant challenge to the authority of the court.*

Contempt other than Contravention

59. Section 112AP(1)(a) needs little explanation. It relates to conduct which falls within the ordinary meaning of the word "contempt".

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[48] When I initially agreed to present a paper at this conference, I had intended to just reheat my earlier paper on s 85A (which I had previously presented in about 25 minutes). A few months ago, the organisers told me that they wanted me to fill an hour. We agreed on the paper title set out in the program, and I was to come with the "other things to which you don't often turn your mind". Two weeks ago, I asked some colleagues for ideas, and one suggested contempt. I downloaded about 100 recent cases from AustLII about an hour before leaving for Melbourne Airport last week, and spent some jetlagged hours in Sliema separating the wheat from the chaff.

60. Some neat examples of such conduct arose in *Medapati & Revanka (No. 3)*,[49] where the husband:

    60.1. "*told the Court many times during the hearing that the proceedings were 'moot' and that they did not matter to him*";

    60.2. "*sought to intimidate* [the judge]*, seemingly believing … that he might be able to intimidate* [the judge] *into finding in his favour*"; and

    60.3. "*insincerely said to* [the judge] *at one point* 'I forgive you for your ignorance'" and then "*blatantly lied to the Court when he was asked to confirm that is what he said*".

61. Forrest J was "*quite satisfied that the husband* [had] *contemptuous feelings towards*" his Honour and the Court.

What Constitutes a Flagrant Challenge to the Authority of the Court

62. The alleged contemnor must have known both the contents of the contravened order, and what the order meant.[50]

63. Johns J has put it as follows:

> *In order to establish a contempt, I need be satisfied that there has been a deliberate defiance of a court order, as distinct from a breach of a court order.*[51]

64. As the words "flagrant challenge" are not defined in the Act, the Court has adopted the dictionary definition:[52] "glaring, notorious or scandalous".[53]

65. The Full Court in *Kendling*[54] approved the following passage from *English*:[55]

> *it must be established that the respondent knew of the undertaking or order and that his act or omission in breach of that order or undertaking was a wilful, that is, a deliberate act by him as distinct from accidental or inadvertent. It is not necessary in addition to establish that the conduct was contumacious; that is, it is unnecessary to show that the act or omission was done with a deliberate intention to break or disregard the undertaking or order.*

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[49] [2018] FamCA 965 at [65] – [69].
[50] *LGM v CAM* (2006) FLC 93-267.
[51] *Wilkins & Currie* [2017] FamCA 323 at [23].
[52] Typically, the Macquarie Dictionary.
[53] See, for example, *Millar & Oakley (No. 2)* [2018] FamCA 48 at [41].
[54] *Kendling and Anor & Kendling* (2008) FLC 93-384 at p 82,890.
[55] (1986) FLC 91-729 at p 75,294.

Beyond Reasonable Doubt

66. The Full Court in *Tate*[56] held that an application that a person be dealt with for contempt is "properly characterised" as "a proceeding for an offence" and that,

> *Accordingly, the proceedings are criminal proceedings as defined in the* Evidence Act *and thus the standard of proof to be applied is as set out in s 141(1) of that Act, namely proof beyond reasonable doubt.*

Sentencing

67. Kent J, in *Cluny & Skinner (No 2)*,[57] conveniently summarised "general principles or guidelines" with respect to sanctions for contempt. Essentially:

    67.1. Section 112AP provides the code for dealing with sentencing. State and federal sentencing laws have no application.

    67.2. The sentencing judge has a wide discretion, which is to be exercised transparently.

    67.3. Review of punishments in other cases is of limited assistance, as each case turns on its own facts.

    67.4. As the section provides no maximum term of imprisonment, the exercise of the discretion is particularly difficult.

    67.5. Whilst the purpose of contempt proceedings is normally to coerce compliance with orders, another purpose may be punishment, for the purposes of individual and general deterrence, and for retribution. Retribution may be called for because effective administration of justice requires demonstration that the court's orders will be enforced.

Contempt vs Division 13A Contravention Proceedings

68. A party aggrieved by way of contravention of a parenting order may elect to seek that the offending party be dealt with for contempt (if the requisite flagrant challenge exists), in addition to, or rather than, seeking that the offending party be dealt with under Division 13A of Part VII.

69. In *Wylie*,[58] Forrest J held:

> ***Section 112AP(2)*** *of the Act expressly empowers the Court to punish a person for contempt of the Court "[i]n spite of any other law". I consider that provision* ***confers power on the Court to hear and determine contempt proceedings against a party regardless of whether proceedings have or are being brought against the alleged contemnor pursuant to Division 13A of Part VII of the Act*** *or a provision of any other State or*

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[56] *Tate and Tate* (2002) FLC 93-107, following *Witham v Holloway* (1995) 183 CLR 525.
[57] [2017] FamCA 547 at [10].
[58] *Wylie & Wylie* [2018] FamCA 627 at [18].

Commonwealth legislation, such as the Queensland Criminal Code. As Coleman J went on to say in McClintock & Levier:

> *In my view it is not without significance that the legislation does not exclude from the operation of s 112AP breaches of parenting orders. Nor does Division 13A of the Act purport to exclude any breaches of parenting orders from the operation of s 112AP. That state of affairs cannot have eventuated through inadvertence.* ***I thus perceive there to be two kinds of proceedings with respect to breaches of parenting orders.***

(my emphasis)

Where the Contravention Constitutes a Crime

70. Where a person chooses to prosecute a contempt based on an alleged contravention of a parenting order, but without prosecuting a contravention under Division 13A, the obligation under s 70NFH to either adjourn or dismiss the contravention proceeding where the alleged contravener is subject of criminal proceedings arising out of the contravention is not mandated.[59]

71. However, the Full Court in *Sahari*[60] said:

> *Where the alleged facts constituting the contempt also constitute a crime the court has a careful and considered discretion to exercise. In some cases protection of the applicant will demand urgent action. In others the applicant's protection can be left to the processes of the criminal law.* ***Where only the affront to the court's authority is involved and the same facts constitute a crime, the criminal processes should first be allowed to take their course. When they are concluded the court may then turn to the question whether the disobedience of its order merits further punishment in the public interest.*** (my emphasis)

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[59] *Wylie & Wylie* [2018] FamCA 627 at [19].
[60] *Sahari and Sahari* (1976) FLC 90-086.