

REMARKS BY THE HONOURABLE PETER UNDERWOOD AC,  
GOVERNOR OF TASMANIA, OPENING THE 15<sup>TH</sup> NATIONAL  
FAMILY LAW CONFERENCE, HOBART, SUNDAY  
14<sup>TH</sup> OCTOBER 2012

As Governor of Tasmania it is a great pleasure for me to welcome you all to our beautiful island State for this, the 15<sup>th</sup> National Family Law Conference. I understand that there are around 700 delegates registered for this conference and that you have come here from all the States and Territories of Australia, from our neighbour New Zealand and from other overseas countries. I warmly welcome each of you and I hope that many of you have been able, or will be able to find a little time to look around Tasmania before you go home.

Now I open a lot of conferences but I think that this is the first conference that not only opens at the end of the day, but one at which the first item on the programme is a party! And I thought; Ah yes but it is a lawyers' conference - say no more. I well recall attending and addressing a newly formed group of law students when I was Chief Justice. Actually, I thought my talk went down quite well. People laughed at the right places and nodded wisely at the serious message that I wanted to convey and clapped enthusiastically at the end. On the way out the President who was escorting me to the door asked me how much my fee was. I asked him what he meant and he said the fee for the talk. I was taken aback and looked horrified. I drew myself up to my pompous best and lectured him that Judges don't ask for fees to deliver speeches, especially to law students as it is part of a judicial officer's

duty to do that sort of thing etc. etc. and he said "Oh that's good because we don't have much money and we're saving up to get someone really good to speak next year."

I note that the theme for this conference is "out of the Wilderness" and I have been reliably informed that it is a wordplay linking Tasmania's identity as a wilderness State - and I am talking natural beauty wilderness here not political wilderness - and family law practitioners having to work their way out of the statutory and present wilderness of Family Law. All I can say is that I hope you lawyers have better luck than the bushwalker lost in the bush in the south west of Tasmania when he came upon a river. He was trying unsuccessfully to find a way across the river when he saw a man on the opposite bank. He called out to the man "How do I get to the other side?" The man looked up and down the bank and shouted "But you *are* on the other side."

When I open a conference I like to say a few words about something relevant to the work and interests of participants and as a former Chief Justice of Tasmania I would like to modestly think that I still have some wisdom to impart about the law. However my experience with Family Law matters ended with the enactment of the Family Law Act in 1975 and was firmly rooted in matrimonial fault as a basis for divorce and division of property. Of the seven or so matrimonial faults that could lead to the making of a decree, such as wilful or constructive desertion, habitual drunkenness, and cruelty, not surprisingly adultery was the most popular. Not infrequently couples

would agree that one of them would commit adultery by arrangement and sometimes the payment of a fee to find a willing correspondent, and surprise surprise just a right moment a private detective would burst into the hotel room and take a few pictures; hence the expression in flagrante delictu. However, there were a few drawbacks to all of this one of which was that there should be no suggestion that one of the parties connived in or consented to the commission of this matrimonial wrong or there would be no decree. Another was the statutory requirement that if the petitioner had him or herself committed a matrimonial wrong he or she had to disclose that fact to the judge – it was like he was a priest and the petitioner was in the confessional – in which case the judge had a discretion to refuse to grant a decree even if the adultery was proved. The mechanism for making the confession was by way of what was called a discretion statement. In this document the petitioner would confess his or her wrong – usually adultery and it would be sealed up and filed in the Court. At the end of the evidence the judge would declare that he was satisfied that the respondent had committed adultery and then a heavy silence would fall while His Honour ripped open the envelope containing the discretion state and read it to himself. He usually expressed a few profound legal principles like “Ah Hum” – “I see” and then proceed to pronounce a decree of divorce.

*I well recall one morning when I was waiting in court with my client, an attractive young woman, who was the petitioner in the first case in the undefended divorce list that morning. I wasn't looking forward to the encounter for the judge was known to be the original grumpy old man when the*

*judge's associate – a respectable middle aged retired army colonel came in to check that we were ready to start. He took one look at me and my client and then hissed at me, his face as white of a sheet, “Can I see you outside”? We went out into the corridor and he asked in quivering voice whether my client had filed a discretion statement? The colour only returned to his face when I assured that there was no discretion statement but I didn't believe him as he went off to get the judge, saying, “No reason, no reason – just enquiring*

But talking about discretion I see that there is a session scheduled for Tuesday entitled “The end of discretion? Prescriptive versus enabling legislation. Should Family Law impose a prescriptive pathway to decision making or should judicial officers have a broad discretion to make decisions that are ‘just and equitable’ or ‘in the best interests of the children? “I see that you will have eminent speakers from London, New Zealand and Canberra to give you the benefit of their expert knowledge and experience on this topic and I'm sure it will be an interesting session because it is an interesting topic isn't it? Discretion brings with it uncertainty and generally speaking, that is not a good legislative outcome. However, while there are many in the general community and many practitioners think that the law should be certain and predictable I have always subscribed to view that prescriptive orders almost invariably lead to injustices and that retention of judicial discretion is necessary to take account of the individuality of each case, thus to reach orders that are “just and equitable” as is prescribed by s79(2)

As indicated earlier, Family Law is not my area of expertise and you are the people best placed to consider the variety of systems

available to distribute matrimonial property and their benefits and draw backs.

A small but stark illustration of injustice due to prescriptive was a relatively minor appeal I heard from a magistrate ordering forfeiture of a fisherman's boat to the Crown because he had breached a Fisheries regulation by having in his boat more than 2 - I think it was - crayfish pots in his boat. In the circumstances forfeiture to the Crown of the equipment used to commit the offence was mandatory. The offence was committed when two friends who were on holiday at a sea-side resort, ran down to the beach to put their boats to sea to go and pull their pots because the weather was turning bad. One of them couldn't start his engine so his friend said, "I'll get yours as well as mine". This he did and when he got back to the shore a Fisheries Inspector was waiting for him. The appeal had to be dismissed as neither the magistrate or an appeal judge had any discretion in the matter. I was told that the unsuccessful appellant said the law was indeed an ass and that he believed it was all my fault!

Well, the outcome of that session is likely to be interesting as no doubt will be the outcomes of the other sessions in the programme. However, right now the only matter for consideration is the party and the enjoyment of tonight's food and wine.

I wish you a most successful conference, I congratulate the organising committee on bringing together such an interesting and

valuable conference program and I sincerely wish our visitors an enjoyable time in our wonderful State.

I declare the 15<sup>th</sup> National Family Law conference open.