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Family law judgments

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Property

Contributions can continue during separations – Rise in value of property resumed by government

In *Whiton & Dagne* [2019] FamCAFC 192 (31 October 2019) the Full Court (Aldridge, Kent & Tree JJ) allowed Ms Whiton's appeal against a property division of 75:25 in favour of her de facto partner. An 18 year relationship with 20 separations meant a 12-year cohabitation in total. At first instance a judge of the FCC found proved the wife's allegation that the separations were due to domestic violence by the respondent.

It was also found that the appellant "bore the major share of responsibility as a homemaker and parent for the parties' children throughout the relationship" ([12]) and that the respondent should be credited with an initial contribution of a property at "Suburb B". Its proceeds of sale of $160 000 five years later were used towards the purchase of a property at "Suburb C" for $258 000 which was resumed by the State Government 11 years later for $2 336 288.

On appeal by the wife, the Full Court said (from [13]):

"(...) [I]t appears the trial judge equated each separation with the de facto relationship having then ended, for the purpose of assessing contributions. (...)

[18] … [C]ommencing in mid 1999 with the birth of the parties' first child and continuing … with the birth of [their] second child in late 2000 the wife maintained her contribution as the primary homemaker and parent … irrespective of any … separation …

[19] … [T]he wife maintained external employment for much of the … relationship and provided financial support to the family and to the children (...)

[25] The approach adopted by the trial judge was wrong in law. …"

The Full Court said ([30]):

"The Suburb B property … were … contributed to by the wife in both a financial sense, given her employment, and the payments towards the … mortgage, and by her non-financial contributions … Thus, the trial judge was clearly wrong to treat the $160 000 as solely the husband's contribution and … to find that the wife made no contribution to the acquisition of the Suburb C property."

The Full Court added ([34]), citing *Zappacosta* [[1976] FamCA 56, that "it is well settled … that a … rise in property value brought about by a rezoning or resumption is properly treated as a windfall gain for which neither party can take sole credit".

Property

Interim dollar-for-dollar order granted to wife was ineffectual as husband's solicitors carried their costs

In *Shelbourne* [2019] FamCAFC 196 (4 November 2019) Loughnan J had made a dollar-for-dollar order three months before the trial by which the husband was to pay to the wife's solicitor a sum equal to any amount he paid to his solicitor. The husband did not pay his lawyers any amount, so the amount paid to the wife's lawyers was also nil. In the absence of payment the parties' unpaid legal fees ballooned by the time of trial to $152 000 (the husband) and $264 000 (the wife).

At the final hearing Gill J granted the wife's application for a continuation of the dollar-for-dollar order so as to secure payment of costs paid by the husband post-trial. The Full Court (Ainslie-Wallace, Ryan & Tree JJ) allowed the husband's appeal, saying (from [17]):

"(...) The source of power to make a litigation funding order includes s74 … (by way of interim spouse maintenance), s79 and s80 … (interim property division) and s117 … (interim costs order) … Different considerations will apply depending upon which head of power is sought to be engaged (...)

[21] Plainly in making order 18 the primary judge was exercising discretion under s117 … That discretion must be exercised by reference to … s117(2A) … There is no advertence to those considerations in the primary judge's reasons, and indeed the path of reasoning by which his Honour proceeded cannot be adequately discerned … save that his Honour was of the stated view that not extending the operation of the dollar-for-dollar order 'would defeat' it … It therefore follows that either his Honour did not have regard to the matters in s117(2A) … or … did not sufficiently expose his reasoning as to how he … weighed the matters referred to in the provision. (...)

[25] … The appellant correctly identifies that the effect of [the final dollar-for-dollar order] was to create an additional liability of the husband in the sum of $152 000, together with a corresponding asset … for the wife. That asset and liability were not extant at the time of trial, but only arose in consequence of order 18. The authorities are clear that any litigation funding order needs to be taken into account in determining the final property adjustment … The impact of order 18 ought therefore to have been taken into account … in the division of … property."

Property

Add-back of post-separation livestock sale proceeds in error where husband habitually relied on them

In *Cabadas* [2019] FamCAFC 179 (11 October 2019) Kent J, sitting in the appellate jurisdiction of the Family Court of Australia, heard the husband's appeal against an equal division made by a judge of the FCC of a $901 078 asset pool which included a notional $130 176 received by the husband from the sale of livestock over the previous five years.

Kent J said (at [17]):

" … [There is a] fundamental … error of notionally adding back sums of money that may have been available to a party post-separation, as a notional asset, without any necessary finding to support that approach. Here, it can be seen that the trial judge took no account of the husband's longstanding dependence upon income from livestock sales for his livelihood which continued in the post-separation period; nor did his Honour have any regard to likely business expenses or expenditure offsetting the gross livestock sales income over a five year period between the first recorded sale in August 2013 and trial in August 2018. In short, his Honour gave no consideration to the fact that reasonably incurred expenditure by the husband, either for his own living expenses and support or for business expenses to maintain the livestock/business operation, had to be taken into account as an offset to the gross amount of livestock sales income produced over a period of some five years."

The appeal was allowed, discretion re-exercised and the adjusted pool (absent any notional add back) divided equally. →

Property

Wife's application for financial orders permanently stayed as she failed to contest divorce proceedings in Dubai

In *Bant & Clayton* (No. 2) [2019] FamCAFC 200 (7 November 2019) the parties married in the United Arab Emirates (UAE) and lived there and in Australia. Upon separation the husband was granted a divorce order in the UAE which was unopposed by the wife. The wife later applied for property and maintenance orders in Australia. At the hearing Hogan J held that UAE law did not permit an adjustment of property interests so the UAE divorce did not prevent the wife's application in Australia.

On the husband's appeal, the Full Court (Strickland, Ainslie-Wallace & Ryan JJ) said (from [6]):

"Although the wife was notified of those proceedings and had lawyers acting … for her in Dubai, she did not appear … and orders were made on the husband's application in … 2015. The orders granted the husband a divorce and … had the effect of bringing to an end the wife's rights to seek property orders under the law of Dubai. No appeal was brought …

[8] … [H]er Honour correctly identified … that for a claim of res judicata estoppel to be made out it is necessary for the Court to be satisfied that in prior proceedings a court … over the same subject matter and … parties has by … order … finally … determined the same cause of action (…)

[13] The thrust of the challenge to her Honour's order is that she erred in concluding that the law of Dubai did not allow for redistribution of the parties' assets, thus concluding erroneously that the Dubai proceedings left open the … adjustment of property interests … in the Australian proceedings."

The Full Court ([14]) recited the relevant law of Dubai which, although not analogous to s79, did provide that "a woman … is free to dispose of her property and … [that if one spouse] participates with the other in the development of a property … he may claim from the latter his share therein upon divorce or death" with a right to alimony too ([37]). In allowing the appeal, the Full Court ([22]) cited *Taylor v Hollard* (1902) 1 KB 676 where it was said that "the fact that a party in local proceedings may receive more or less than the foreign proceedings does not prevent a cause of action in estoppel arising", adding ([23]-[24]):

"The doctrine explicitly embraces national differences … and the fact that different law will be applied in the two jurisdictions does not detract from the identity of the cause of action …

The application of the doctrine has been extended to circumstances where a party who might be expected to raise a claim in the proceedings does not. [Henderson [1843] EngR 917 cited] (…)"

Children

Father's application for parenting orders dismissed for non-compliance with s 60I (family dispute resolution)

In *Ellwood & Ravenhill* [2019] FamCAFC 153 (6 September 2019) Kent J (sitting in the appellate jurisdiction of the Family Court of Australia) allowed the mother's appeal against orders made on the application of the father in respect of the parties' daughter (17) and son (nearly 16). His application sought to have the existing, informal parenting arrangement (equal time with daughter but son spending no time with mother due to conflict between them) reflected in an order. In response, the mother applied for the dismissal of the father's application as s60I had not been complied with, arguing that the Court lacked jurisdiction.

The father filed an affidavit as to his not filing a s60I certificate, deposing that mediation had been tried by the parties but failed, which the mother disputed. At first instance, a judge of the Federal Circuit Court directed the parties to attend with a family consultant pursuant to s 11F of the Act. The mother appealed.

In setting aside the order and dismissing the father's parenting application, Kent J said (from [21]):

"(…) [T]he provisions [of s60I(7)] emphasise the requirement for parties to a dispute about parenting orders to make a genuine effort to resolve that

dispute with the assistance of family dispute resolution before application is made to the Court. Only if one of the exceptions contained in subsection (9) applies, can an application be filed without the parties having participated in family dispute resolution. Even then, it can be seen that subsection (10) requires the Court to consider an order for the parties to attend family dispute resolution with a family dispute resolution practitioner. (...)

[28] … [T]he primary judge was in error in proceeding to hear the father's application not having made any finding … that any of the exceptions in subsection (9) applied. In other words, the mandatory requirement of subsection (7) applied, and the primary judge was in error in proceeding to hear the application notwithstanding that that mandatory requirement had not been complied with."

Property

Initial contributions of $4.97m (H) and $500 000 (W) to $12.5m pool assessed at 80:20

In *Daly & Terrazas* [2019] FamCAFC 142 (13 August 2019) the Full Court (Ainslie-Wallace, Aldridge & Austin JJ) considered a nine year cohabitation between a 47 year old husband and 44 year old wife. The parties' 14 and 11 year old children lived with the husband and saw the wife on weekends and on holidays. Finding that the husband's initial contributions were worth $4.97m and the wife's $500 000, Rees J at first instance said that during the parties' relationship they "conducted their financial affairs independently" although "each party invested both formally and informally in properties owned by the other" ([10]) and "each contributed their money and their efforts to the enterprise of their family" ([59]).

The $12.5m pool excluded superannuation, which was worth $342 351 (husband) and $83 619 (wife). The wife had worked professionally and earned income from shares during the relationship. Rees J found that the parties' contributions up to the date of trial were equal, but that their initial contributions warranted an 80:20 contributions based adjustment. The wife then received a 10% adjustment for s75(2) factors, a division of 70:30 in favour of the husband overall. The husband appealed.

In dismissing the appeal, Ainslie-Wallace J (with whom Aldridge and Austin JJ agreed) said (from [20]):

"In short, the argument as to the first ground, shorn of the lawyerly language of the submission, is: '20% is too much'. (...)

[22] The appeal ground invites this Court to do the impermissible, to substitute our determination of what figure is appropriate to reflect the parties' contributions instead of her Honour's. Nothing put to us persuades me that we ought to, and further, her Honour's conclusion was entirely open to her on the evidence. The outcome is not unreasonable or plainly unjust such that a failure properly to exercise the discretion may be inferred (see *House v The King* (1936) 55 CLR 499 at 505).

[23] In my view his challenge has no foundation and must fail."

Spousal maintenance

Applicant may reasonably claim expenses not being incurred due to inability to pay

In *Garston & Yeo* (No. 2) [2019] FamCAFC 139 (16 August 2019) Aldridge J (sitting in the appellate jurisdiction of the Family Court of Australia) heard Mr Garston's appeal against an interim order for spousal maintenance after the breakdown of a same sex marriage. Mr Yeo sought maintenance of $2500 per week, Judge Boyle at first instance accepting that Mr Yeo was not in good health and although looking for work, he had been unemployed since 2014 while receiving a $1000 weekly allowance from Mr Garston. It was ordered that the stipend continue at $1000 per week, the Court rejecting $1500 of Mr Yeo's claimed expenses, including rent, skincare and holidays.

In refusing leave to appeal, Aldridge J said (from [24]):

"The appellant correctly submitted that a person seeking an order for spousal maintenance must satisfy the court, on the evidence before it, that he or she cannot support himself or herself adequately as set out in s72(1) of the Act (*Hall v Hall* [2016] HCA 23 … at [8]). (...) →

[29] A claim for maintenance is not limited by reference to current expenses because an applicant applying for maintenance may not have the ability to pay for commitments necessary to support themselves (s 75(2)(d) of the Act) and thus avoid incurring what otherwise would be a reasonable expense. Therefore, the focus is on what is necessary for support.

[30] Often, and conveniently, the identification of reasonable needs may be done by reference to expenses that are currently being incurred but obviously, that will not be possible or lead to adequate support in all cases. It is reasonable to claim that you need more money than you are currently spending (*Seitzinger & Seitzinger* [2014] FamCAFC 244 … at [53]). Here too, the Financial Statement was prepared very shortly after separation when it would be more difficult to identify the cost of reasonable needs.

[31] It follows that the submission that because a claim is an estimate it must be disregarded cannot be accepted. It also follows that verification of expenditure is not necessarily required. (…)"

Property

De facto partner for 18 months proved "substantial contributions" but not "serious injustice" if order not made

In *Beaumont & Schultes* [2019] FCCA 1831 (17 July 2019) Judge Turner heard Ms Beaumont's application for a property order following a childless de facto relationship lasting 18 months, during which the applicant assisted with renovating properties that had been acquired by the respondent in his sole name.

The Court (at [48]) reviewed the authorities as to the meaning of "substantial contributions" for the purpose of s 90SB(3)(c)(i). While the applicant's contributions to the welfare of the family were found not to have been "substantial" ([126]), it was found [116]) that her non-financial contributions pursuant to s90SM(4)(b) were substantial.

They included cleaning, assisting with installation of fence pailings and with spray painting of the fence, sanding the front deck, painting kitchen cupboards, assisting with preparation for the front of the house, doing 'dump runs', collecting items from hardware stores and preparing food and drinks.

However, in dismissing the application, the Court said (from [135]):

"I find … that the applicant would not suffer a serious injustice if an alteration of property interests did not occur.

[136] I make this finding based on the following:

a. This is a very short relationship of some 18 months.

b. The applicant is leaving the relationship in a similar financial position as the applicant entered it … being in full-time employment and part way through her degree.

c. The applicant made no financial contributions to the acquisition, renovation, maintenance or preservation of the … properties.

d. Whilst the non-financial contributions by way of renovations … were accepted as substantial, in the scheme of the extent of the renovations undertaken, the added value to the properties by the nature of the applicant's contributions is small.

e. In any event the evidence supports that the renovations as a whole added very little to the overall value of the properties with much of the renovation required to make the properties liveable and rentable.

f. The applicant had the benefit of rent free living for the 17 months that the parties cohabitated.

g. The applicant benefited from the financial support provided by the applicant on a day-to-day basis including his meeting the costs of outgoings, contributions towards food and entertainment and towards travel.

h. The applicant had choices as to how to expend her earnings given these benefits and to penalise the respondent in the choices he made to acquire, improve and retain real property during that time would be unjust to the respondent.

[137] As the applicant has failed to establish a serious injustice then the gateway offered by s90SB(3)(c) shuts resulting in the court not having the jurisdiction to alter property interests due to the breakdown of the de facto relationship." ■