

## Recent Case Updates in Family Law

By

Sarah Damon

### ***Jabour & Jabour* [2019] FamCAFC**

Alstergren CJ, Ryan and Aldridge JJ

First instance decision of Mercuri J, in the Federal Circuit Court of Australia.

Case relates to a long marriage and the husband's initial contributions significantly increasing in value due to rezoning of the property.

#### **Facts**

- Relationship of 25 years (met in 1988, married in 1991 and separated on a final basis in May 2015.)
- Parties had three adult children at the time of the hearing.
- Pool was \$9 million.
- Major asset was Property A, a parcel of land which had been rezoned and had therefore increased exponentially in value.
- The main issue in this matter was whether this appreciation in value was a contribution of the husband alone (who brought the property into the relationship) or whether it was a joint contribution?

#### **Initial Contributions**

- Husband:
  - Property A – land he had acquired when he was 12 years of age with his father.
  - Wife did not dispute that this land had been brought into the relationship by the Husband.
- Wife:
  - Had no assets of significance at the commencement of the relationship.

#### **Contributions During the Relationship**

- *“The parties quite properly agreed that their contributions during the relationship ought to be treated as equal.”* [at p74]
- The parties operated business together during the relationship and raised their three children together.

- There was also a reconfiguration of Property A during the relationship, land was bought and sold by the Husband.

### Post Separation Contributions

- Husband made a number of post separation contributions, being the payment of loans and expenses of the family following separation. On this basis, he sought an adjustment in his favour.
- Husband also inherited post separation, but there was some discussion as to whether any of this remained at the time of the hearing.

There were no 75(2) adjustments sought by either party.

### Wife's Case

- Wife sought a split of 50/50 and equalisation of superannuation.
- The wife argued that "*in addition to the fact that this was a long marriage which produced three now adult children and the myriad of contributions made by the parties over that period, the wife also argued that [Property A] ought to be treated no differently to other assets of the of the parties.*" [at p124 of original judgment]

### Husband's Case

- Husband sought a split of 70/30 in his favour.
- His position was that he should receive a significant loading in his favour for the initial contribution of Property A.

### Judgment at First Instance

- 66/34 in favour of the Husband
- The reasoning given was that "*the husband in bringing [Property A] into the relationship, has made a significant contribution which needs to be appropriately recognised in the division of property between the parties,*" [at p125 of the original judgment]

### Appeal Points

- Did the primary judge fail to give adequate reasons for determining the contribution-based entitlements as 66% to the Husband and 34% to the wife?
- Did the primary judge misdirect herself as to the jurisprudence on contributions?
- Did the primary judge err in law in her findings about the weight she attributed to the husband's post-separation contributions?
  - The repayment of the parties' debt to the husband's mother by the husband.

- Did the evidence support a finding that the husband paid child support at a rate higher than he ought to have paid?
- Was there evidence to support the finding that the husband paid all the outgoings for the parties two properties after separation?
- Was there evidence to support the findings that:
  - A) the husband paid the family expenses for a family holiday to country F and the wife's expenses on a holiday in Country G;
  - B) the husband made a payment of \$2,000 to the wife during the period of reconciliation; and
  - C) the husband met the children's living expenses while they lived with him at the former matrimonial home until its sale?

### Held

- The appeal succeeded on most points.
- The split was altered to, 53/47 in favour of the Husband. The Court said that the rezoning of the property was essentially a windfall gain and therefore a contribution of both parties.
- It was held that "*the evidence established that, throughout the relationship, the parties' contributions to Property A 'were of precisely the same nature and extent that each made in their respective roles and spheres'.*" [at p86]

### ***Frederick & Frederick [2019] FamCAFC 87***

Judgment of Strickland, Aldridge and Austin JJ

First instance decision of Harper J.

Matter related to the setting aside of a Financial Agreement.

### Facts

- Parties enter into a s90B Financial Agreement in 2007, shortly after the birth of their first child.
- Parties subsequently marry in 2007 and have a second child in that same year.
- 10 year relationship.
- In 2009 the oldest child is diagnosed with "*atypical autism, mild functional/adaptive impairment and, subsequently pica*" [at p7]
- Mother is the primary carer of the child, who requires a high level of care.

- 11 January 2017, Husband files Initiating Application seeking a declaration that the Financial Agreement was valid and binding on the parties.
- Wife responded seeking that the agreement be set aside due to a significant change of circumstances and due to the unconscionable conduct of the Husband at the time of entering into the Financial Agreement.

### **Initial Contributions**

- Husband owned properties and companies (which owned property) at the commencement of the relationship. These properties and companies were the subject of the Financial Agreement.
- Wife, it appears had no assets of significance. She was on a Bridging Visa which was due to expire shortly after the signing of the Financial Agreement.

### **Terms of the Financial Agreement**

- 4 properties of the Husband included in the schedule of the Financial Agreement.
  - 2 of those no longer existed at the time of the hearing.
  - The two remaining properties were:
    - a property valued at approx. \$2.2 million; and
    - a company which owned 2 properties.
- The Wife was only entitled to “*any increase in value of that asset (being the Husband’s properties and company) or its replacement.*” [at p15]
- “*The Wife was not permitted to make any claim to any further property that might be acquired by the Husband during the relationship or after the marriage in his sole name with money accumulated from his sole earnings or income.*” [at p16]

### **Judgment at First instance**

- No evidence was produced as to the values of the properties at this hearing. This was because it was a hearing in relation to the setting aside of the Financial Agreement only and not a Final Hearing.
- His Honour found:
  - The diagnosis of the oldest child was a material change;
  - Both parties had a caring responsibility;
  - BUT – that no hardship would be suffered by the Wife if the agreement was not set aside.
- Declaration made that the Financial Agreement was binding and enforceable.

- Notably His Honour held that “*the Court was unable to undertake any meaningful comparison between the different positions, if the Financial Agreement was, or was not set aside.*” [at p144 of the original judgment]

## Appeal

- 10 grounds of appeal – however, grounds 2,4,5 and 6 were argued together.
- Grounds 2,4,5 and 6 were “*Did the primary judge err by not giving any weight to the Husband’s evidence about the current values of the assets?*”
  - Found Harper J was erroneous by not giving any weight to the Husband’s evidence.
- Second main appeal point, was ground 7 – “*Did the primary judge wrongly take into account the lack of child support assessment and the possibility of spousal maintenance?*”
  - Noted that this point did not need to be fully evaluated as the first few grounds were successful.
- Husband sought to argue that even if the Wife succeeded in her grounds of appeal “*the appeal must still be dismissed because there was no evidence before the Court as to the value of the assets held by the Husband at the time of the agreement.*” [at p66]
  - This argument was unsuccessful as the Husband had not raised this argument at first instance.
- Court also looked at the two pools:
  - If the agreement remained in place the pool would be \$680,000;
  - If the agreement was set aside the pool would be approximately \$5 million.

## Held

- Appeal was allowed and the Agreement was set aside on the basis of the Wife suffering hardship if it was not.
- Essentially it was found that if the Agreement was not set aside there would be an inadequate amount in the smaller pool to satisfy the Wife’s 75(2) claim.

## ***Kolar & Kermit [2019] FCCA 817***

Riethmuller J

Case relates to a Kennon argument and the relocation of a mother and her children from Victoria to New South Wales.

## Facts

- 12 year relationship, ending in early 2018.
- Three children of the relationship, all under 10 years of age.
- At separation, the Mother left with the children to New South Wales. She obtains an Apprehended Violence Order in New South Wales.
- His Honour made interim orders, ordering the Mother return to Victoria, with the children, until Final Hearing.

### **Parenting**

#### **The Mother's Case**

- The Mother sought to relocate to New South Wales with the children.
- Her family lived there and she had employment set up there.
- She sought sole parental responsibility in relation to education, but joint for all other matters.
- She currently lived within 10km of the Father. She frequently sees him at the shops and driving past her at the children's school and felt concern for her safety due to the significant Family Violence perpetrated by the Father during the relationship.
- The Mother suffered anxiety and depression, which she said was as a result of significant Family Violence perpetrated against her. She did not deny her mental health concerns.

#### **The Father's Case**

- The Father alleged the Mother was a heavy drinker with significant mental health issues.
- He sought that the children remain living in Victoria and the parties have shared care of the children.
- He also sought equal shared parental responsibility.
- The Father did not initially suggest an alternative if the Mother was able to move, but in oral evidence said he was considering moving to New South Wales if the Mother was permitted to relocate.
- The Father said he was used to travelling past the children's school and so he did it as a matter of routine and not to seek out or scare the Mother.

#### **Family Violence**

- The Mother alleged that the Father had been psychically violent during the relationship and had made a threat to kill. She noted this is why she fled to New South Wales.

- She had a diary of photographs and descriptions that she had collated over a number of years to show her injuries.
- She had reported injuries to her GP and to her psychologist.
- She also claimed the Father smacked the children, leaving welts and bruises on them.
- The Father had been charged with four breaches of an IVO and one charge of recklessly causing serious injury.
- The Father denied all allegations and said that the Mother was the aggressor and he only acted defensively. He said the bruises in the photographs produced by the Mother were from him defending himself against her.
- His Honour found that most of these incidents had occurred, with the exception of some of the incidents relating to the smacking of the children.

### Family Report

- Recommended the Mother remain in Melbourne with the children and for the children to spend time with the Father on a 6/8 basis.
- She did not take into account any Family Violence.
- His Honour commented on the Family Report Writer's evidence that he "*found Ms L unimpressive as an expert witness. She appears to have approached the case without considering the difficult nuances that arise in cases involving family violence.*" [at p139]
- "*Ms L said that her impression of the father is that he conveyed respect towards the mother as a parent, but not trust, although noted she thought he trusted her parenting abilities. Whilst this is the impression that the father gave Ms L, it is difficult to reconcile with the other evidence of the father.*" [at p138]

### Findings in relation to Parenting

- His Honour found that the children enjoy spending time with their Father but that their primary attachment was to their Mother.
- His Honour noted that the "*children were likely to suffer a difference in the qualitative nature of the relationship with the mother if she is forced to remain in Melbourne, as a result of the impact of living in Melbourne upon her functioning.*" [at p253]
- His Honour then went on to say, "*I am persuaded that if the children continue to live in Victoria this is likely to result in a real reduction in the Mother's capacity to provide emotional support and nurturing for the children,*" [at p254]
- His Honour was satisfied that Family Violence had occurred in the relationship and felt the Mother's mental health issues would largely resolve if she was permitted to relocate with the children.

- His Honour was persuaded that “*the best interests of the children in this case are served by the children living with their Mother in New South Wales.*” [at p268]
- The Mother was permitted to relocate and she was given sole parental responsibility in relation to the education of the children and equal shared parental responsibility in relation to other matters.
- His Honour further noted that if the Father relocates to New South Wales, any changeover is to be at the commencement and conclusion of school so that he does not come into contact with the Mother.

## **Property**

### **Initial Contributions**

- Father:
  - Property with equity of around \$500,000 at the commencement of the relationship, a car and savings of \$18,000.
  - \$645,000 in super.
- Mother appears to have no assets of significance at the commencement of the relationship.

### **Contributions During the Relationship**

- Father purchased the former matrimonial home for \$500,000, which had a mortgage of \$530,000.
- Parties received a number of large cash gifts from the Father’s parents.
- The parties also loaned significant amounts of funds to friends and family during the relationship. Some of which are paid back and other which are not.

### **Post Separation Contributions**

- Father had sole use of the former matrimonial home until the Mother returned from New South Wales.
- He was to pay the mortgage pursuant to Interim Orders, but relied on previous payments which had been advanced by the parties.

### **75(2) Factors**

- Three main factors:
  - Father’s significantly higher income earning capacity;
  - Care of the children; and
  - Family Violence committed by the Father.



- The Father attempted to argue that the Mother had frequently placed her hands over his mouth during arguments. His Honour noted “*it is unnecessary to determine this technical question in this case as it is not conduct that in any sense can be said to have provoked or caused incidents and would certainly not attract a Kennon’s case adjustment, on either approach as outlined in Keating & Keating [2019] FamCAFC 46*” [at p313]

#### **Father sought**

- 70/30 in his favour, based on his significant initial contributions.

#### **Mother sought**

- 65/35 in her favour, on the basis of section 75(2) factors, being that she had the care of the children and she sought an adjustment in her favour due to the significant Family Violence perpetrated by the Husband during the marriage.

#### **Findings in Relation to Property**

- The total pool was agreed between the parties as \$1,258,829 (exclusive of superannuation).
- His Honour found as follows:
  - On contributions – 60/40 in favour of the Father.
  - On 75(2) factors – an adjustment of 15% to the Mother.
  - Overall 55/45 in favour of the mother.