RECENT FAMILY LAW AND PROPERTY DIVISION UPDATE

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Date: March 2016

FOLEY'S LIST

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INTRODUCTION

I have been asked to talk to you today about three cases in particular and some additional new decisions. That task is, of course, an enviable one to attempt in one hour. At best I can attempt to give you a "potted summary" plus a lengthy paper that you might read or refer to if these issues arise in your practice. I give you **my** view of these cases, rather than any other view, except where indicated. You, of course, may have your own view as clearly did the unfortunate Husband and cross appellant in one of the cases discussed below. I say "unfortunate" due to the costs orders made against him both in the wife's appeal and his cross appeal.

The advertised program had three cases advertised and I shall discuss those in a slightly different order.

I hope to give you some guidance so that you can advise your clients.

SPECIAL CONTRIBUTIONS

FIELDS V SMITH [2015] Fam CAFC 57 (17 April 2015)

I note that this case has already had many papers written on it including seminars given by Mr Berger for Legalwise. Nevertheless, I have been asked to speak on it again.

This matter was an appeal from the decision of Murphy J [2012] FamCA 510 (6 July 2012).

The Full Court of Bryant CJ, May and Ainslie-Wallace JJ heard the appeal on 26/11/13. The delay in judgment perhaps gives some indication of the dreadful pressure upon our courts.

Ms Fields appealed His Honour's decision that provided the parties divide their assets 60/40 in the Husband's favour. Ms Fields sought a 50/50 division; Mr. Smith cross-appealed and said he did not get enough, in part, because of the treatment of his contributions and, in part, because of section 75(2) factors. He asserted he should have received a 70/30 division.

These parties were married for 29 years. They married at age 21 (H) and 18 years (W) respectively. At 15, the Husband had left school and commenced a carpentry apprenticeship. By marriage, he had built a house with borrowed funds on a block of land he owned. Neither party argued this as a "springboard" after 29 years of marriage.

The Wife, shortly after marriage, received a compensation payment used to pay down the debts of the parties. Again, that was not seen as significant nor argued as such. As can be seen, these humble beginnings were mere "chicken feed" as to what was to come through hard work and the "joint endeavor" of the parties, terminology used by the Full Court.

Within 16 months of marriage, the wife had the parties' first child and there followed two more children in the early years of the marriage. In those early years, the Husband managed to build a home every 2 years whilst working full time and, by 1990, the parties moved interstate and started what became an enormously successful construction company (later two companies, known as the Y group).

They sold their home to provide the company with initial capital and rented for some time. Whilst the Wife was involved in the companies, both as a director and shareholder and otherwise had some not insignificant input, the Husband, back in those times, was not disputed to be the "driving force".

In 2006, the parties sold some shares to employees so that the parties' shareholding became 84% rather than 100%. Also in 2006 they bought land and commenced building what no doubt was an amazing home. This house was not finished at separation and the Wife completed the interior decoration and other works post-separation.

These parties' assets totalled, on one view, $32 Million and, on another, closer to $40 Million. Of that, the Y group was worth somewhere between $22 Million to $29 Million.

The parties separated in 2008 after the Husband commenced a relationship with his new wife in 2007. The new wife lived overseas and the Husband began spending a lot of time overseas from 2007 onwards.

Post-separation, the Wife became unwell with severe depression and could not attend Directors' meetings but sent her delegates with instructions.

In 2009, the Husband remarried and the Husband and his new wife had a child together in 2010. The parties' children were all adults and were all independently working in the business.

On any view, the great Australian dream went wrong at the end!

There were 8 central matters that the wife put in her appeal, listed at para 26 of the judgment - repeated for you below:

> *26. In oral argument before us senior counsel for the wife contended that there were eight central matters that required consideration and identified them as follows:*
>
> *1. The husband's post-separation contributions.*
>
> *2. The husband's post-hearing contributions (agitated by the husband's cross-appeal).*
>
> *3. The diminishing role as homemaker and parent as the children grew older.*
>
> *4. The adequacy of reasons supporting his Honour's apparent conclusion about contributions at the date of hearing.*
>
> *5. The adequacy of reasons supporting his Honour's conclusion in relation to the overall assessment of contributions.*
>
> *6. The use of a table of so-called "comparable" cases.*
>
> *7. Section 75(2) and other factors.*
>
> *8. Overlapping with others, why, on an analysis of his Honour's reasons, and on findings he made, was a disparity of between $6.5 million and $8 million warranted on the basis of contributions after a 29 year union?*

The Full Court in a joint judgment of Bryant CJ and Ainslie-Wallace J (May J concurring) made comment on two important statements by His Honour in his judgment; the first was a reference to *Mallet v Mallet*, and the second was the issue of "Special contributions".

I repeat those paras from the Full Court decision quoting His Honour below:

> *34. His Honour commenced his reasons for judgment by observing that the issue which divided the parties was "the quantification of the respective contributions made by each of them throughout the course of the relationship" (at [4]). His Honour then noted:*
>
> *4. ... Each concedes that the other has made significant contributions. But, the evidence reveals that those significant contributions – which, it is conceded by each, were exemplary – were made predominantly (but, it ought be noted, not exclusively) within*

differing "spheres" [see Mallet v Mallet [1984] HCA 21; (1984) 156 CLR 605 at 636] and that each of them played different roles within each other's "sphere". Each party agrees that the wife's predominant contributions have been directed to the home, children and family and that the husband's predominant contributions have been to the business. However, as might be thought unsurprising in the context of a functional 29-year relationship, each party asserts contributions of significance outside of their "sphere" and within the other's "sphere".
(footnote omitted)

35. *Importantly, in our view, his Honour then said:*

5. Although, as will be seen, there are disputes between the parties about the nature of specific contributions each has made to the other's "sphere" as broadly just described, ***in my assessment those disputes are all, in the scheme of things, minor****; the gravamen of what divides the parties in these proceedings is an assertion by the husband that his contributions should be seen as "special" or "unique" or "out of the ordinary" and an assertion by the wife that the wealth of the parties, of whatever type and however described, is as a result of an economic, domestic and emotional "partnership" such that it is unjust or inequitable to distinguish between their contributions.*
(emphasis added)…"

FULL COURT MAKES IT CLEAR NO PRICIPLE OF SPECIAL CONTRIBUTIONS EMERGES FROM SECTION 79 OF THE FAMILY LAW ACT

If the reader wants a clear statement on the issue of "special contributions" by the Full Court then this is what was said;

42. It will be clear from the passages that we have referred to that his Honour rejected an argument that there was a particular type of contribution that related to "special skills" or "special talents", with the result that such a finding "is productive of a particular finding, or range of findings in respect of contribution". Full Court decisions have supported that view (see Kane & Kane [2013] FamCAFC 205, Hoffman& Hoffman [2014] FamCAFC 92) and the jurisprudence can be fairly said to be settled. In particular, the Full Court in Hoffman said:

52. In each case, we consider that the point being made is that there is no principle or guideline (or indeed anything else emerging from s 79), that renders the direct contribution of income or capital more important – or "special" – when compared against indirect contributions and, in particular, contributions to the home or the welfare of the family...
(emphasis in original)

> *43. If it is necessary to make the point again, and to highlight it for the purpose of this appeal, we add our endorsement to what has been made clear in the authorities referred and to the Full Court's comments in [52] of Hoffman,* ***that the words of s 79 do not provide endorsement for any category of contribution related to any class of property (for example, high wealth) being, by virtue of that category or class, more valuable or important that another. In each case the contributions made by the parties must be evaluated in the context of the facts particular to that case.*** *(Counsel's emphasis)*

From para 46 to 56, one can read the Full Court repeating those parts of his Honour's judgment where His Honour seemed to make a correct analysis of the contributions of each party. I shall not repeat those in this paper and the reader can read these paragraphs for themselves.

Suffice to say that His Honour did not ignore the difficulties of moving house every two years with young children, moving to Queensland after 11 years, selling up, renting and putting everything on the line for the company.

It is worth noting that His Honour **did** countenance the contribution to investment decisions by the wife approving and agreeing on same, as a director and equal shareholder, and her giving consent to the new shareholders plus the constant reinvestment in the company over the years.

His Honour went on in the trial judgment to say of the wife's contributions as a homemaker and parent (repeated from para 57 of the Full Court);

> *57. Acknowledging what has been raised in a number of previous cases as to the role of homemaker and parent, his Honour said:*
>
> > *63. A contribution by one party in the role of home-maker and parent and to the welfare of the family more generally that allows the other party to their union the physical and mental space to pursue income and capital generation is, in my view, an often-neglected, yet extremely important contribution.* ***I consider that this is what occurred in this particular marriage; the former contribution being made by the wife so as to allow the latter contributions by the husband. Again, I do not consider the one to be more or less important (or "valuable") than the other.***
> > *(emphasis added)*

When one reads all of this, one must think **where** did the trial judge, and **how** did the trial judge then come to a conclusion of 60/40 the Husband's way?

His Honour went on in his trial judgment to talk of the POST-SEPARATION CONTRIBUTIONS. Argument was put for the Husband that if His Honour did not find that the contributions up to separation were weighted in the Husband's favour then they should significantly be so post-separation.

A reading of the case from paras 66 to 69 reminds one poignantly how the marriage ended for the wife. She battled severe depression for those ensuing years but, even with that, still managed to finish the home the parties had commenced building and attend some directors' meetings.

However, His Honour took the view that the "stewardship of the business" fell upon the Husband and that the contributions of the wife as a homemaker and parent to the welfare of the family were reduced by virtue of the children being adults for the four year separation period.

Set out below is para 70 of the Full Court repeating what his Honour said at para 73 of the trial judgment:

> *70. At [73], however, his Honour introduced to his reasons for judgment what, on the wife's submissions on appeal, is the first controversial element. His Honour said:*
>
> > *73. **Again**, however, I consider there is a disparity in the contributions made by the respective parties, and, again, I consider there is a significant difference in the contributions between the parties in what might be called the stewardship of the business. **In addition**, the parties' children have been adults for the whole of the post-separation period and that fact, and the separation itself, results in the nature and extent of the contributions made by each of the parties to the welfare of the family being reduced accordingly. That is the more so for the wife whose pre-separation time was taken up primarily in that role.*
> > *(emphasis added)*

As the Full Court points out far eloquently than this writer can, this paragraph seemed totally at odds with those of His Honour's preceding it.

The Full Court's emphasis in the above paragraph is made to point out that His Honour seems to be saying by the use of the word "again" that he has evaluated the Wife's pre-separation contributions as LESS than the Husband's and then, post-separation, they are even more devalued, despite what His Honour had said previously.

However, notwithstanding a finding by the Full Court that His Honour had therefore **not** provided adequate reasons, at least in respect of the pre-separation period, the Full Court pointed out that there is NO requirement to attribute different percentages to different periods of the relationship and there is only demonstrable error if it can be demonstrated in the **overall** result that an appeal can succeed (see Full Court at para 75).

That was not the end of the matter however.

His Honour went on to provide comment on his **overall** assessment and one gets the impression by the heavy highlighting that the Full Court did not agree with para 75 of His Honour's decision repeated at para 76 of the Full Court judgment and repeated with Full Court highlights (the Full Court highlighted the whole paragraph!) below;

> 76...
>
> > *75.* ***However, an analysis of those contributions points to a greater contribution having been made by the husband directly to the business, predominantly by reference to the design of the [buildings which the business constructs] and sells so successfully and to what I will call the stewardship of the company including the plainly clever strategies and planning that have given it such success and to the financial and other planning that have led to it doing, relatively speaking, remarkably well in very adverse macro-economic conditions. These are important contributions in which it is, in my view, both appropriate and just to distinguish between the parties to this lengthy union. I consider that disparity to be particularly evident and pronounced in the period post-separation.***

Despite His Honour having said this, he then went on at length to make seemingly contradictory statements to the above passage. I repeat those paras as repeated by the Full Court at paras 77 and 78 of the Full Court decision below for the reader as it really is quite extraordinary;

> *77. His Honour then considered "the origin, nature, form and characteristics of the property and the nature, form and characteristics of this particular union", noting that there were:*
>
> > *76. ... many aspects to the differing contributions – made predominantly in different "spheres" – in which I do not consider it just to draw any distinction between the contributions made by each of the parties.*
> >
> > *77. Specifically, I reject the notion that any such distinction should be drawn because this might be described as a "big money case" or because, per se, the husband's predominant contributions have been made to a very successful and valuable business as distinct from the wife's predominant contributions which were and are made indirectly and, in particular, contributions made to the welfare of the family. In that respect, I also reject the notion that one "sphere" or "role" should be seen as, of itself, more important, or more inherently "valuable", than the other.*
> >
> > *78. I do so for a number of reasons. First, the terms of s 79 suggest no such thing. Secondly, doing so risks giving insufficient or "token" weight to the "sphere" comprising contributions to the welfare of the family or other indirect contributions and doing so is contrary to authority...*
> >
> > *79. Indeed, during his evidence the husband referred to a very good example of that symbiosis within the context of the business. He referred to the apparently continual good-natured debate between the construction arm and the marketing arm of the business as to which of the two was more responsible for the business's success. As he acknowledged, there can be no resolution to the debate because the comparison is between apples and pears. But, significant to the instant discussion, each contributes to the whole by complementing the other and the whole is, as a result of the efforts of each arm, greater than the sum of its individual parts.*
>
> *78. His Honour then rejected at [80] the notion that justice and equity required a distinction between the contributions of the parties by reason of the husband being "possessed of "special skills" or because his contributions [could] or should be described as "special"...". However, his Honour then went on to say:*
>
> > *81. However, I consider that an analysis of the nature, form and characteristics of the contributions of varying types made by each of the parties renders it just and equitable that any assessment of those contributions should favour the husband.*

The Full Court went on to look at further comments by His Honour about the "…stewardship of the company, the design of the buildings and the 'clever strategy and planning'…", all matters that seemed to influence His Honour **without reconciling them with the prior comments that would have suggested equality of pre-separation contribution.**

Further, there was little, if any, evidence to support a contention that the Husband's post-separation "stewardship" of the company in fact existed. See Full Court at paras 88 to 90 and in particular paragraph 92 where the Full Court repeats verbatim the submissions of senior counsel for the wife.

See also the comments at para 134 regarding an unwarranted presumption in big money cases of some "special contribution".

THE "REDUCTION" ATTRIBUTED TO WIFE'S WELFARE CONTRIBUTIONS POST-SEPARATION

The Full Court made comments on this that, in my view, are significant and worthy and I have repeated them below:

> *93. If there was a diminution of the contributions of the wife to the welfare of the family post-separation, that was not the subject of any direct evidence. We do not suggest that her role had not altered, that much is evident from the fact the children had left home and she and the husband no longer belonged to a household in which mutual support was provided. But as senior counsel for the wife submits, the husband's role changed as well during that period, and there was a lack of evidence on a number of other relevant matters.*
>
> *94.* ***Senior counsel for the wife submitted that, absent evidence, the approach of the trial judge to the wife's diminishing contribution in her principal sphere is an argument which leads into murky waters or, as he submitted at [46] of the wife's summary of argument, is "controversial" and would mean that in a marriage of a long duration the negative****: (Counsel's highlights)*

... trend line perhaps starts when the children leave home, the parties are only having take away meals and there is a housekeeper and/or regular use of a Laundromat. ***In other words, the value to be given to a contribution as homemaker either ceases or becomes less relevant, even in a case where, as here, there is no evidence that the further accumulation or conservation of wealth is the consequence of the post separation efforts of the "male"/"breadwinner"/"business empire" builder after the notional retirement of the primary homemaker and parent****...(counsel's highlights)*

95. In support of that proposition he cited Cronin J at [170] of Bulleen & Bulleen [2010] FamCA 187 where his Honour said:

> ***Whilst parenting as an occupation might stop or become less burdensome once children become adults, the ongoing role of both parents and later grandparent is no less an on-going contribution. Section 79(4)(c)refers to the contribution to the welfare of the family constituted by the parties and any children. ... For one party to then say such a previously agreed role was no longer a contribution to the welfare of the family cannot be right. Importantly, I do not accept that society would see it that way.*** *(Counsel's highlights)*

96. It has also to be remembered that the wife continued her role as a director and a shareholder of the company and continued to make a contribution, even if she was not personally able to do so in the operation of the business. It is not without relevance that the parties agreed that the roles they had in the business would continue after the cessation of these proceedings so as not to disrupt the business. The wife's shareholding remained tied up in the business and is an indirect contribution to its continued operation. That is a matter, in our view; of considerable significance in considering whether or not there is any diminution in the wife's contributions by virtue of changes in the role of parenting and homemaker.

> *97. Notwithstanding those factors, it is inevitable in some cases that a very significant contribution to the welfare of the family will be of a different kind when parties have separated and the family is no longer constituted by the husband, wife and children. That does not mean that the role completely ceases – in some cases it might take another form such as where a wife became a significant carer for a grandchild. It is also to be noted that s 79(4)(c)requires the court to consider "the contribution made by a party to the marriage* ***to the welfare of the family*** *...****including any contribution made in the capacity of homemaker or parent****" (emphasis added). Thus, in our view, the wording of the section itself contemplates a contribution to the welfare of the family as being something more than a contribution in the capacity of homemaker and/or parent. The section has been given wide interpretation and there is no reason to read it down (see Nemeth & Nemeth [1987] FamCA 12; (1987) FLC 91-844 and W & W (1997) FLC 92-723).*

One has to only imagine what might be had the Full Court held otherwise. In every case, where the children had grown up and got on with their own lives, the parent who had stayed at home to nurture them, and devoted themselves to the welfare of the family and continued to devote themselves to the welfare of the family and to homemaking, would be seen to have ever-decreasing contributions the longer the matter did not get before the court!

THANK GOODNESS FOR FOGARTY J!

The Full Court went on to quote Fogarty J in the decision of **Waters and Jurek [1995] FLC 92- 635.** If the reader has not read this decision then I suggest you do. I repeat the quote of his Honour repeated by the Full Court below at para 101;

> *101. This point was made eloquently by Fogarty J in Waters & Jurek (1995) FLC 92-635 at p 82,379:*
>
> > *In most marriages, there is a division or roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests – as individuals and as a partnership. The parties make different contributions to the marriage, which the law recognizes cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Homemaker contributions are to be given as much weight as those of the primary breadwinner.*

> *On separation, the partnership, and the division of roles and responsibilities which it produced, come to an end. Individually, the parties are left largely in the personal situations that the marriage has assigned to them. However, the world outside the marriage does not recognize some of the activities that within the marriage used to be regarded as valuable contributions. Home-maker contributions, for example, are no longer financially equal to those of the breadwinner. Post-separation, the party who assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open or, if they are, time is required before they can be accessed and acted upon.*
> *When the marriage ends, especially where that marriage has been a long one, one cannot separate the parties as individuals from the people they became in the context of the marriage relationship, and the allocation of roles, duties and responsibilities which it entailed.*
> *...*
> *An order under s. 79 would be unjust and inequitable in its operation if it failed to address the manner in which the value of the parties' roles, adopted in the course of, and for the purposes of the marriage, can be altered by the fact of separation. Those roles can be instantaneously converted into liabilities. The equality of the parties' positions is terminated.*
> *This Court values different kinds of contributions of the parties' equally while the marriage subsists. It would be inconsistent with the equality which that position recognizes not to take into account the transformation which the termination of the relationship results in, at least in terms of the capacity for present and future income generation.*

The Full Court noted at para 100 the "implicit prejudice", as Senior Counsel for the wife had put it, of an approach of diminishing the wife's contributions to the welfare of the family because of children growing up and moving on. The Full Court noted two matters; firstly, that section 75(2) allows the court to take into account other matters other than contributions where appropriate and, secondly, in this case no new assets were acquired post-separation (see para 102).

See also the comments of the Full Court at paragraph 189 in relation to the Husband's cross appeal repeated below;

> *189.* *Each of the parties contributed over a lengthy marriage to the acquisition, conservation and improvement of the assets, which they owned at the date of hearing. In our view, to place greater weight on the contributions made by the husband in his sphere does not do justice to the wife's contributions in the various capacities that we have outlined. Giving appropriate weight to the contributions of both parties and where, as the trial judge also found, the nature and form of their partnership was that of a "practical union of lives and property" (at [79]), that leads us to conclude that the contributions made by the parties should be treated as equal.*

The Full Court went on, in the cross appeal judgment, to deal with the issue of post-separation contributions, and made it clear that, in this case the facts being there was no new property acquired, the Wife remained in her role as a director, and the Husband and the Wife were, to a large degree, stepped back from the day to day running of the business, were significant matters to take into account when assessing post-separation contributions.

The Full Court said at paragraph 192;

> *192.* *That is not to say, however, that in different cases, differences in contributions might not be relevant. However, in this case when the provisions of s 79(4) are considered, it is clear in our view that the contributions by the wife under sub-ss 79(4)(a) and (b) to the acquisition, conservation and improvement of the property, and under s 79(4)(c) to the welfare of the family generally, including as homemaker and parent, should not result in any diminution of her interest when it is seen that the property of the parties has not changed or increased in any meaningful way after separation.*

HIS HONOUR'S USE OF A "TABLE OF DECISIONS"

Whilst not the topic I am specifically asked to address, one cannot leave this case without some discussion of "what His Honour did next."

At para 109, the Full Court reproduces the table produced by His Honour with references to what we all call some "big money cases".

The Full Court made two very important points about that "table".

- Firstly, it SETS A CEILING of 40% for any wife.
- Secondly, under its various headings, it had things wrong.

As the Full Court said in relation to the first matter;

> *115. The fetter on the discretion lies, in our view, in the apparent reliance on the table which then has the appearance of acting as a ceiling which prevents the wife from effectively being considered as entitled to any more than 40 per cent, or suggests a result in a particular range should follow.*

In relation to the second matter, the Full Court said this at paras 116 and 117;

> *116. Equally importantly, however, the process of considering "other cases where there is a reasonable degree of comparability with the case under consideration" cannot be effectively achieved by the bald statements in the table produced. Indeed, his Honour himself at [89] suggests "**authorities different to those collated might be produced in an alternative table and be said to be illustrative of a different 'range'"** (counsel highlights). We agree with his Honour and therefore find the inclusion of the table in his reasons for judgment all the more concerning. If, as we perceive, his Honour did place reliance on the table, in saying at [89] that he was unable to "simply cast aside as irrelevant" cases which "have a genuine semblance of consistency", his Honour was apparently referring to the table produced. Otherwise, there would be no point in producing it at all.*

> *117.* ***The problem with the table is that it gives no indication of the relevant facts in the particular cases****. Headings such as "Assistance with children by husband", "Work by wife in business", "Dependent children (post trial)", and "Trust problems" give no indication of how, as his Honour suggests, those cases have a "genuine semblance of consistency" with the present case, other than in the most broad sense possible. One of the cases, Webster, indeed did not involve the wife at all and it was in fact a husband who received the amount set out in the table. The Whitely case involved an entirely different case and was about the contributions of a wife/muse to a very successful artist.* ***With all due respect to his Honour, the table can only inform the glibbest of comparisons, and although it may be a seductive tool, it cannot illuminate the valuing and weighing of contributions in this particular case and carries with it the danger, if relied upon, of detracting from the individual requirement to make orders that are just and equitable in an individual case****. And further, as his Honour points out, there are cases, which would support a higher percentage, which were not part of the table at all.*
> *(Counsel's highlights)*

Further the reader should take note of May J's short judgment where she talks of His Honour:

> (A) Ignoring his own findings on the evidence preferring to rely upon the purported "stewardship" of the business post-separation (the findings being the business and its new partners ran itself with little input from either party and the Husband was away for much of the time)
> (B) Diminishing the wife's contributions by doing so.
> (See para 200 of the judgment).

There is one other take home point from this case.

Counsel for the Husband seemed to argue a nexus to property had to be shown insofar as welfare contributions were concerned.

The Full Court had this to say about the nexus argument at paragraph 98 repeated below;

> 98. *In this case, the wife did continue to make contributions to the welfare of the family, which his Honour seems to have noted at [72]. Whilst s 79(4)(c) does not require a nexus between the contributions to the welfare of the family and the property itself, s 79(4)(b) does. The wife's contributions, as director of the business, and arguably indirectly to the welfare of the family by enabling the business to continue, which fall within s 79(4)(b) then require a consideration of those contributions in the context of the acquisition, conservation or improvement of the property of the parties.*

SUMMARY

"Special contributions" in this case were first and foremost not proven. The Full Court has made it clear that any attempt to argue same after a particularly long marriage where joint endeavour was first and foremost in the parties' respective roles will not generally meet with success.

SINGERSON v JOANS [2014] Fam CAFC 238 (10 December 2014)

PRE- AND POST-SEPARATION CONTRIBUTIONS AND POST-SEPARATION WINDFALLS

Not exactly a "recent decision". However, this case is useful for a discussion of the treatment of contributions **pre- and post**-separation and the treatment of an **INHERITANCE RECEIVED PRE-SEPARATION AND ANOTHER RECEIVED POST-SEPARATION.**

The facts of this case are not easily ascertained without a full reading of the judgment. For instance, one only discovers the Husband received a substantial inheritance from his mother during the marriage at paragraph 55 of the Full Court decision.

The parties were together for almost 15 years and married for 13 of those years. They had children aged 13 and 10 at trial who were in a shared care arrangement. In 1999, the Husband was retrenched from his job as a property valuer and was employed sporadically post-2001. He suffered depression on an ongoing basis after losing his job.

In 2004, the Husband commenced receiving his part of his interest in his mother's estate; there was $70K in cash and the benefit of rental from a property from 2004 until 2007 and then a subsequent cash amount of $450K used to pay out all the parties' debts.

The wife worked in health services and, in 1994, bought a business with a Ms N, her business partner, and another business in 1999. Post-separation the Wife and Ms N sold a retail arm of one of the businesses for $81K.

Just before separation, the Husband's father died leaving a significant estate to the Husband and his Sister. That estate was found to be worth around $2.6 Million and the other assets of the parties including the Wife's share in the two businesses around $4.8 Million, a total of around $7.4 million.

At trial, the judge divided this on the basis the wife got 60% of the other assets and 20% of the inherited assets giving her a global amount of 46% and 54% to the Husband.

On appeal, the Husband sought 40% of the other assets, and to keep his inheritance, or 61% of the total. On appeal, the Wife sought 55% of all the assets.

As the Full Court said at para 35 … *"the treatment of the inheritance lies at the heart of the matter..."*

There is a useful discussion on the use of an asset-by-asset or global approach to such cases contained at paragraphs 39 to 46.

Turning to the treatment of the inheritance however, there were three main grounds of appeal see paragraphs 48 and 49 of the Full Court judgment below;

> *48. Ground 1 of the amended notice of appeal is as follows:*
>
> *1. The finding of the learned Trial Judge that the wife made an indirect contribution towards the property inherited by the husband at around the time of separation was against the evidence and the weight of the evidence and wrong in law.*
>
> *49. Grounds 2 and 4 of the amended notice of cross-appeal are as follows:*
>
> *2. Having found that the wife made a greater contribution to which a 10% allocation was appropriate, the decision of the learned Trial Judge to reduce the adjustment to the wife to only 5% in consideration of that greater contribution was against the evidence and the weight of the evidence and wrong in law, and the reasons of the learned Trial Judge either cannot be discerned or were an error.*
>
> *4. Whilst the learned Trial Judge was entitled to determine the value of contributions on an asset by asset basis, the learned Trial Judge fell into error and his findings were against the evidence and the weight of the evidence in determining the husbands [sic] inheritance received post separation should be assessed as a contribution at 20% in favour of the wife.*

The Full Court understood and made allowances for the trial judge delivering an ex tempore judgment only the day after a long trial. However, there was some criticism of the use of terms such as "significant adjustment" when referring to contributions in the sense that it would appear that His Honour had commenced with an "equality principle" rather than an evaluation of contributions. (See paragraphs 50 to 54 of the Full Court decision).

There was similar criticism of the use of the term "special contributions" when referring to each of the Wife's greater efforts as a homemaker and income earner, and the Husband's inheritance received during the marriage at paragraph 56. There was further criticism of His Honour using a "scoreboard approach" on contributions both pre- and post-separation. If one reads the excerpts from the trial judgment, in the Full Court decision at paragraphs 55 to 57, then one can glean how His Honour "gave" the wife 10% for her additional contributions as a homemaker and parent and primary bread-winner and then "deducted" from that 5% because of the Husband's inheritance received during the marriage. His Honour then went to "add" 2.5% to the wife for her post-separation parenting contributions and, later on, dealt separately with the wife's "entitlement" to the post-separation inheritance.

Dealing with the scoreboard approach during and post-separation first, the Full Court had this to say at paragraphs 61 and 62 repeated below;

> *61. Distilling contributions by means of a calculation or mathematical equation is generally unhelpful.*
>
> *62. In Dickons & Dickons (2012) 50 Fam LR 244 the Full Court said:*
>
> > *23. **We wish also to refer to the approach of the federal magistrate in attributing percentages to differing periods within the relationship, or types of contribution made. There is in our view little to be gained, and much to be said against, approaching the task of assessing contributions by attaching percentages to components of it**. (The same, it might be said, applies to attributing a percentage to each of the relevant s 75(2) factors).*

24. *There can be little doubt that the classification of contributions by reference to terms such as "initial contributions", "contributions during the relationship", and "post-separation contributions", can be helpful as a convenient means of giving coherent expression to the evidence in a s 79 case and to giving coherence to the nature, form and extent of the parties' respective contributions.* ***However, the task of assessing contributions is holistic and but part of a yet further holistic determination of what orders, if any, represent justice and equity in the particular circumstances of this particular relationship. So much is clear from the terms of s 79 itself and, in particular, s 79(2). The essential task is to assess the nature, form and extent of the contributions of all types made by each of the parties within the context of an analysis of their particular relationship.***

25. *Doing so is also consistent* ***with the demands of authority that the ultimate assessment of contributions should be made without "...giving over-zealous attention to the ascertainment of the parties' contributions..." (Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513 at 524) and the well-established recognition in the authorities (acknowledged specifically by her Honour in this case) that the process required of the Court by s 79 is the exercise of a wide discretion, not the performance of a mathematical or accounting exercise.***

26. ***The necessarily imprecise "wide discretion" inherent in what is required by the section is made no more precise or coherent by attributing percentage figures to arbitrary time frames or categorisations of contributions within the relationship. Indeed, we consider that doing so is contrary to the holistic analysis required by the section and, in the usual course of events, should be avoided.***

    (Counsel's highlights)

POST-SEPARATION INHERITANCE AND WIFE'S CONTRIBUTIONS

Remembering that the Husband's inheritance from his father only vested upon the death of his father just before separation, the Full Court was critical of His Honour only assessing the Wife's contributions to same for the four years post-separation rather than the whole of the marriage.

The first instance comments said this (repeated from paragraph 64 of the Full Court decision);

> *64. The trial judge then moved to consider s 79(4)(e) of the Act as it related to the matrimonial property before returning to consider the wife's entitlement to the separate category of the husband's inheritance. In this regard he said:*
>
> *151. On this distinct approach it is necessary to consider the entitlement of the parties in a different light. Given the circumstances through which the husband acquired the property, the basis for any claim against it by the wife is necessarily much more limited. She made no financial or other direct contribution to the acquisition or maintenance of that property.*
>
> *152. The wife's entitlement must arise by virtue of her indirect contributions over the last four years during which the husband has held that property and any ongoing contributions of that type in the future. The wife has assumed primarily responsibility for the boys' care, both physically and financially over the last four years, and that primary obligation is likely to persist. The duration of that commitment from the date of separation when the boys were only nine and six years of age to the time of their independence will represent a very significant ongoing contribution to the welfare of the family when measured against the duration of the relationship itself.*

The Full Court held that this approach, in assessment of the wife's contributions to this property, was incorrect and not in accordance with the legislative requirements. Their Honours said at paragraphs 65 and 66 as follows;

65. *We are of the view that his Honour misled himself, and thus fell into error, in identifying only the four years between separation and trial as being the appropriate time upon which to assess contributions to the inheritance rather than across their 15 year relationship.*
66. *Section 79(4) of the Act is clear. There is nothing to suggest that any category of contributions needs to be quarantined and applied solely to particular assets. The court is mandated to look at the totality of what the parties have contributed in a financial and non-financial sense, including contributions to the welfare of the family and to the acquisition, conservation and improvement of assets. The court is required to evaluate the significance of all the various contributions to the property, notwithstanding there may be different categories of that property*.

The Full Court went on to discuss the confusion that His Honour's approach caused. I repeat the relevant paragraphs from the Full Court judgment below. It is apparent from these paragraphs that the Court viewed His Honour's approach as starting with an asset-by-asset approach, mixing that up with a global approach, and in the course of doing so, the reader could form the view that His Honour double accounted for contributions and section 75(2) factors in his analysis (of what was supposed to be an analysis of contributions);

67. *His Honour in paragraph 152 alluded to making an assessment for future contributions, perhaps more appropriately referred to as obligations. However, the wife's care of the children was a factor his Honour had already taken into account earlier in the judgment in his assessment of the matrimonial estate both in relation to contributions and s 75(2) matters.*
68. *We have previously referred to his conclusion, at paragraph 134, on the wife's contributions.*
69. *In dealing with the same issues but specifically in relation to prospective factors his Honour says:*

> 135 *The care of the children again looms as a significant consideration in this regard. [The child J] is 13, [the child A] is 10. As the matter currently stands, the wife is likely to need to continue to meet all or the vast bulk of the responsibilities for the ongoing care of [J] and to also assume a significant portion of the responsibility for the ongoing care of [A]. These responsibilities are likely to span a period of no less than eight years, a not insignificant period when measured against the length of the marriage itself.*

70. *His Honour then concludes his s 75(2) assessment of what he earmarks as the matrimonial property as follows:*

> 145 *On the approach I have adopted to date, I have been considering the adjustments for past contributions and future needs and obligations measured against that portion of the estate acquired by the parties during the marriage, which I have identified as "matrimonial property". On that approach, when further considering the future circumstances, it is necessary to also consider the property and financial resources to be retained by each of the parties. In that context, I need to take account of the husband's retention of any estate property.*
>
> 146 *It will follow that, given the lack of direct contributions to the acquisition of the husband's interest in the estate by the wife, her entitlement to share in that property will be assessed at a lower rate than the assessments I have made in the property acquired by the joint efforts of the parties.*

71. *His Honour then proceeded to deal with the next asset category under the heading "Entitlement to Share in the Husband's Post-separation Asset Acquisition".*

72. *At paragraph 153 his Honour states:*

> *That factor properly resulted in some loading in the wife's favour in relation to the matrimonial pool. In my view, on this approach it should also give rise to some modest share in the property acquired by the husband at about the time of separation.*

The context of the reference to "that factor" is unclear. A plain reading of this part of his Honour's judgment does not explain whether it refers specifically to contributions or the matters set out in s 75(2) of the Act. Our earlier reference to para 135 of the judgment, set out above, lends itself to the latter interpretation. If this is correct then clearly contributions should have been considered before s 75(2)matters.

73. *In contrast is his Honour's remark that:*

> *154 I have concluded that a 20 per cent share in the estate property finds an appropriate balance between the need to recognise the significance of the wife's ongoing contribution when measured against the fact that the contributions to the acquisition of that property must clearly be seen to come from the husband himself and to have emerged at the end of the relationship.*

This suggests, however, his Honour was referring to contributions rather than s 75(2) matters.

74. *The confusion which results from this uncertainty could lead to the conclusion that his Honour may well have taken into account the same factor of the wife's obligation to care for the children in the future, both in terms of contributions and again in his assessment of the matters set out in s 75(2).*
75. *Having adopted an asset-by-asset approach his Honour has then failed to maintain any separation of the categories he designated. As a result of the unusual manner in which his Honour dealt with the husband's inheritance it is impossible to say that he did not double count the wife's contributions or conflate s 75(2) matters with contributions.*

The above point is made clearer at paragraph 80 to 82 of the Full Court decision where the court says;

> *80. Unfortunately as earlier noted, a degree of confusion is imported into the judgment when the wife's entitlement to the inheritance is considered at paragraph 146.*

81. *At this stage in the judgment his Honour was dealing with the separate category of matrimonial property. His Honour has not yet addressed the contributions to the inheritance. However, paragraph 146 is misleading in that it proceeds to determine an adjustment pursuant to s 75(2) of the Act before his Honour had considered the issue of contributions to the husband's inheritance. In doing so his Honour must already have taken account of the husband's inheritance and thus his superior financial position.*
82. *His Honour proceeded to do what can only be called a rather tortured mathematical cross-check of other possible approaches. Superimposed on this is the confusion about how he assessed the matters set out in s 75(2) of the Act. Given our view that there has been a muddling of the asset-by-asset approach with a global approach a cross-checking of any result is rendered meaningless.*

SO HOW DID THE FULL COURT APPROACH THE EXERCISE WHEN IT RE-EXERCISED THE DISCRETION?

The Full Court listed the legal and equitable interests of the parties including the H's father's estate interests.

The Full Court then assessed contributions, during the marriage and post-separation, and said at paragraphs 94 to 96;

94. *We have no difficulty accepting that over a period of approximately 15 years cohabitation and a further four years between separation and the trial that the wife made the significantly greater contribution to the property acquired prior to separation. In particular we refer, as did the trial judge, to her greater contribution both in a financial sense and in terms of her care of the home and for the children.*
95. *The parties' respective roles remained much the same throughout the entire relationship in every sense. The husband introduced a substantial sum of money late in the marriage and after the parties had separated. This has made a noticeable impact on the property pool.*

> *96. Despite the timing of the receipt of the inheritance we consider that over this long marriage a global approach is appropriate. The contributions the parties made to various components of their assets are assessed carefully and then looked at holistically to arrive at an overall assessment.*
>
> *97. On this basis and utilising the trial judges' largely unchallenged findings of fact we would assess the parties' contributions to all their property to the date of trial as 52.5 per cent in favour of the husband.*
>
> *98. This assessment acknowledges the initial contributions of the husband and also his post separation inheritance. However, this is more than matched by, inter alia, the considerable contributions of the wife to the family including her post separation contributions.*

Just pausing for a moment there, I note that the inheritance that vested at just before separation (see table of assets and liabilities of parties at paragraph 91 of the Full Court) represents 35% of all the assets combined.

However, put another way as the Full Court did at paragraph 101 and 102 this meant the Wife received 73% of the non- inheritance property or 47.5 % of all the property.

Remembering that the judgment at first instance provided the wife with 46% of all the property, the Full Court made clear that whilst such a percentage adjustment would militate against any interference in the amount for the wife, the monetary amount was significant.

The Full Court made no adjustment for section 75(2) factors on appeal, despite each party seeking an adjustment. Put simply at paragraph 100 Their Honours said this;

> *100. Given the outcome on contributions and the manner in which the property is likely to be divided we do not consider any further adjustment is required.*

THE SLIP RULE

TRASK & WESTLAKE [2015] CAFC 160 (14/8/15)

The reader might note when reading *SINGERSON v JOANS* above that there is a later decision of the same name amending some of the figures in the earlier decision of the Full Court.

The values of the assets and hence, the Wife's entitlement to a cash amount was amended under Rule 17.02 of the Family Law Rules which relevantly provides as follows:

> ***FAMILY LAW RULES 2004 - RULE 17.02***
>
> ***Varying or setting aside orders***
>
> *(1) The court may at any time vary or set aside an order, if:*
>
> *(a) it was made in the absence of a party; or*
>
> *(b) it was obtained by fraud; or*
>
> *(c) it is interlocutory; or*
>
> *(d) it is an injunction or for the appointment of a receiver;*
>
> *or*
>
> ***(e) it does not reflect the intention of the court**; or*
>
> *(f) the party in whose favour it was made consents ; or*
>
> ***(g) there is a clerical mistake in the order; or***
>
> ***(h) there is an error arising in the order from an accidental slip or omission**.*
>
> *(2) Subrule (1) does not affect the power of the court to vary or terminate the operation of an order by a further order.*

As the reader can see, I have highlighted the key sub sections or rule 17.02 relevant to the discussion of our next case.

In *TRASK & WESTLAKE* [2015] CAFC 160 (14/8/15) (per Thackray, Ryan and Murphy JJ), we see some similar discussion of the Full Court of issues previously raised.

Trask is another decision of a differently constituted Full Court where the issue of post-separation contributions by the stronger financial party was again argued. It is interesting to note the discussion and findings of this Full Court in relation to that aspect of the appeal.

The parties cohabitated for 13 years and were married for 11 of those years. They had four children who were aged 15, 13, 11 and 9 at the time of the first instance trial in 2013.

They separated in 2009 and, during the period of separation up until trial, the Husband had secured an extraordinary highly paid position with company E. His income in 2010, 2011 and 2012 respectively was, in round figures, $2 Million, $3.44 Million, and just over $1 Million in those years.

In addition, he received income by way of other payments including redundancy of $2.577 Million.

At trial, the trial Judge assessed both the pre- and post-separation contributions of the parties as equal and then "adjusted" by 10 per cent in favour of the Wife for 79(4) (e) matters.

The orders provided for each to keep mortgaged properties and other properties in Australia, and for a sale of two properties, one in England and one in Australia.

It was not disputed that (repeating paragraph 5 of the Full Court);

> 5. *The parties "conducted their relationship on the basis that the husband would pursue his career and the wife would be the homemaker and primary carer of the children" (at [83]). The trial judge found that (at [79]):*

> *... the husband frequently took new positions to advance his career and to increase the family's income. These new positions often required the family to relocate, both within Australia and internationally. The wife therefore frequently moved residences and countries with small children to enable the husband to take up these new employment opportunities.*

At trial, the Husband was unemployed. The Husband argued on appeal that the contributions should not be seen as equal because of his significant cash injections of funds from his income post separation to the parties' assets and liabilities. He provided a calculation of this as a percentage of the total value of all the property of the parties.

The Full Court said of that approach at paragraphs 14 to 16 of Their Honours' joint judgment;

> 14. *The husband's written outline of argument calculates the percentage of the total value of the property represented by the husband's post-separation cash injections. That can be a useful measuring stick, but the assessment of contributions remains "a matter of judgment and not of computation" (In the Marriage of Garrett (1984) FLC 91-539 at 79,372)[2]. That it must be so is emphasised by the fact that the percentage figure pertaining to direct financial contributions is being compared to the extremely important contributions made by the wife in maintaining a home as a single parent to four children dealing with the separation of their parents. Those contributions are not susceptible to any such mathematical calculation.[3] His Honour plainly, and with respect correctly, recognised that the wife's contributions did not cease upon separation but, rather, continued in circumstances made more difficult by the fact of separation. His Honour plainly accorded significant weight to those contributions.*

15. *Central to his Honour's assessment of the parties' respective post-separation contributions are the findings to the effect that the husband had arrived at his position with Company E by dint of his talents, dedication and hard work but also by dint of the contributions made by the wife across the years preceding that employment. The years of cohabitation had embraced roles for the parties agreed between them that had led them to the point where one of them, the husband, received tangible recognition of, as his Honour put it, the "experience, knowledge and opportunities he had obtained in his earlier employment"(at [84]). The contributions of the wife are much less tangible. The lack of tangible recognition, or the fact that they are not susceptible to a dollar calculation, does not render them less important.*[4]
16. *Once those principles are accepted the quintessentially discretionary task confronting his Honour was to compare contributions of a different nature with different characteristics. His Honour plainly did so carefully. Despite the manner in which the challenge is framed, we think that, in truth, the husband's challenge is not one directed to the application or misapplication of principle at all but, rather, an assertion that his Honour should have given greater weight to the husband's post-separation contributions and less to the wife's different contributions.*

Not surprisingly, the Full Court found that the question of weight was discretionary and His Honour had carefully considered this and other matters relevant to his "adjustment" in the case.

THE FRAMING OF THE ORDERS

The problem for all in this case was the way, at first instance, His Honour framed the orders - two properties were to be sold, ("the sale assets") and there were CGT payable and other costs associated with the sale of those assets. His Honour wanted to achieve a 60/40 division of all of the assets of the parties in favour of the wife.

The way His Honour dealt with this was to provide a proportionate analysis of the assets as they existed and then equate that to the sale assets so that this reflected a division of all assets on a 60/40 basis. Thus, he said that on the maths, of the sale assets the wife should get 87.43% and the Husband 12.57%. That calculation applied to the sale assets "intact" and not sold. However His Honour went on to make orders that he said would provide the wife with 87.5% of the NET sale assets and the Husband 12.5% of it. He indicated at paragraph 136 of the Trial judgment (repeated at 33 of the Full Court decision) that "*…This will enable the burden or benefit of the variations to the above values to be borne by the parties in the determined proportion".*

The problem was that the parties had agreed values on these two properties and that was not going to be their sale price. Dependent upon the sale price, the variation could favour the wife significantly or otherwise (given that, she agitated that His Honour intended that be the effect ie. a variation of the 60/40 split one presumes she knew the variation was going to work in her favour).

As the Full Court said at paragraph 35 of the judgment;

> 35. *If his Honour intended the orders to effect, ultimately, the assessed division of property of 60 per cent in favour of the wife (save for minor discrepancies), the method employed is flawed. The wife contends that this is not what his Honour intended. She asserts that the use of the expression "these will not, of course, be the final figures" and his acknowledgement that the percentage to be applied to the ultimate net sale proceeds "... will not give exact expression to the percentage determined above [i.e. 60%]" (at [136]), indicate a different intention by his Honour. That intention was, she contends, to allow, as an exercise of discretion, any percentage difference over or below the assessed 60 per cent resulting from the application of the specified percentage to the final net sale figures, to lie where it fell.*

However, as the Full Court said, if that WERE the intention of His Honour (and there was no issue that in the exercise of his discretion he could make orders that meant the final figure MIGHT be above or below 60% to the Wife) then one could not find a clear indication of that intention OR reasons to support it.

Thus, Their Honours said at paragraph 37;

> *37. Axiomatically, however, if that be the judgment, adequate reasons must make that abundantly clear, and all the more so because of the ubiquity of orders intended to reflect, with precision, a result expressed in percentage terms. It is that consideration which finds reflection in Noetel (*now referred to as **TWN & PAQ [2005] FamCA 677 (30 June 2005)** *relied upon by the appellant husband. If orders are intended to reflect with precision the judgment expressed in percentage terms, those orders must acknowledge that the property may sell for a price different to the current estimated value.*

Their Honours went on to make a demonstration of the result being skewed by using an analysis of the ultimately agreed figures for the two properties at trial as compared to the figures the Husband had contended were the values.

I set out the relevant paragraphs for you below so you can see the significant dollar result (in the millions) (I do not attach the tables that are in the judgment);

> *41. His Honour's percentage formula makes no allowance for the fact that, as the assumed values of the two properties rise or fall they bear a greater or lesser proportion of the total value of the pool. That is, using his Honour's formula would produce the assessed percentage entitlement only if the new values bore the same proportion to the total value of the pool as the original agreed values. Axiomatically, if they have risen or fallen, and the values of the balance of the property remain the same (as is assumed) they do not.*

42. *In light of the arguments before us and the frequency with which orders of the instant type are made, it is helpful we think to illustrate mathematically the proposition just advanced. His Honour's calculations can be illustrated as follows: (PLEASE SEE TABLES IN THE CASE)*
43. *To illustrate the difference if his Honour's formula is applied to different sale prices, it is convenient to assume, purely for illustrative purposes, the values which the husband sought to lead before his Honour but which his Honour rejected in favour of the values earlier agreed between the parties.*
44. *In dollar terms, the disparity between the parties by reference to his Honour's orders is, as referred to above, approximately $1.422m. The disparity in the illustrated example of 25.77 per cent represents a dollar disparity by reference to the assumed sale values of approximately $2.041m.*

Clearly, there was an issue with the statement of his Honour regarding a 60/40 split and the various results that might occur, given the use of a formula that simply did not achieve that effect unless every property remained at its current agreed value.

The parties agreed that if the Full Court held the view that His Honour's calculations were erroneous then the Full Court could amend via the "slip rule". The Full Court did not accept this was a matter for the slip rule to be applied.

SLIP RULE PRINCIPLES

The principles that attract and attach to "the slip rule" are espoused and referred to in the authorities set out in the decision at paragraphs 45 and 46.

In summary:

- *Courts have an inherent or implied jurisdiction to amend judgments which do not correctly state what was actually decided and intended;*

- *An order ... might be made in the action for the correction of the records of the court to make certain that they truly represented what the court had pronounced or had intended to pronounce;*
- *It is open to the parties to correct any mistake that might otherwise be the subject of the application of the slip rule by agreeing to vary the orders;*
- *It applies "... where the proposed amendment is one upon which no real difference of opinion can exist [and] it does not apply where the amendment is a matter of controversy;*
- *Nor does it extend to mistakes that are the consequence of a deliberate decision; and*
- *While the rule permits of correction for accidental slips or omissions of counsel, deliberate but mistaken acts or omissions may not be correctable by the application of the rule.*

The Full Court considered the above and noted that there was a mistaken but deliberate calculation that His Honour accepted that was urged upon him at trial for then counsel for the Husband (see paragraph 47 of the judgment).

The Full Court considered that the trial Judge erred in making orders, which did not reflect the judgment. It was more than simply fixing up a formula, remembering that the wife argued at first that the order as made was entirely intended.

The end result was that the Full Court upheld the appeal and then re-exercised the discretion and made orders that, in the end, the parties agreed upon. Not surprisingly, they agreed on the usual type of formula we see dealing with sale and costs to provide a 60/40 split!

DID THEY ALL LIVE HAPPILY EVER AFTER??

There were subsequent applications, and written submissions seeking costs, made by both parties. The Full Court held that each party bear their own costs but we do find out in that judgment that the London property sold for more than anticipated and the Husband had apparently become the proud owner of a restaurant.

TWO MORE CASES

WELCH & ABNEY (no 2) [2015] Fam CA 1116 (Austin J 14/12/15)

This case revisits the type of evidence one must have to make out a proper "*Kennon*" argument.

The parties commenced cohabitation in 1995, married in 1996, and finally separated in 2011. They were together for 16 years. They had two children who lived with the wife upon separation and neither had contact with the husband. The eldest was an adult at trial. The husband paid the wife child support.

The wife was generally employed as a university senior lecturer until that was terminated on medical grounds in February 2011. After separation, the wife became entitled to receipt of a total and permanent disability pension ("TPD pension") under an insurance policy annexed to her superannuation interest. The pension could not be commuted and would continue to be paid to her until she became entitled to receive her superannuation interests at 65 years of age, provided her medical condition continued to preclude her fitness for employment. She additionally received a monthly payment under her income protection policy with CommInsure.

The husband was also in full-time paid employment until he became a full-time PhD student in 2002 for some months. In 2003, he resumed full-time employment, as a university lecturer, and he also had his employment terminated, post-separation, in December 2013.

He then became entitled to a monthly payment under his income protection policy with CommInsure, which he would continue to receive until retirement age of 65 years, so long as his medical condition likewise precluded him from employment.

The parties' financial circumstances improved significantly after separation. The wife received several lump sum amounts, as compensation for her unfair dismissal from employment, as workers' compensation for permanent impairment, and as personal injury damages, and the husband successfully applied for release of his superannuation interests.

The husband, at commencement of trial, objected to a tranche of the wife's first affidavit headed "Husband's Controlling and Abusive Behaviour".[2] The wife conceded she adduced the evidence for two purposes - only one concerns us here. She said the evidence was to demonstrate the nature of the husband's behaviour and the manner in which it allegedly affected her contributions (see *Marriage of Kennon* [1997] FamCA 27; (1997) 22 Fam LR 1).) The husband's objection was sustained and the evidence was rejected.

One wonders just what the affidavit said. However, from this judgment we are reminded of the requirements to advance, let alone sustain, a *Kennon* argument.

As his Honour said in this case (at paragraph 18);

18. As to the first purpose, the evidence did not possess the probative value the wife inferentially asserted. At worst the evidence was irrelevant, but even at best, its probative value was substantially outweighed by the danger that its admission would invite cross-examination and induce debate that would unduly waste time (s 135(c) Evidence Act 1995 (Cth)). To determine the admissibility of the evidence-in-chief it was necessary to contemplate the prospective validity of the Kennon argument on the strength of the wife's own evidence. If, when accepted at its highest, it could not support a Kennon submission then it was futile to receive it (see S & S [2003] FamCA 905 at[37]-[40]).

His Honour went on to quote *Kennon* at length. He said this at paragraph [19];

19. The relative rarity of a Kennon case should not be overlooked, for otherwise many property settlement cases would descend into unnecessarily bitter contests over the attribution of fault for marital discord and breakdown and divert attention from the statutory formulation of s 79 of the Act. In Kennon the majority stated (at 24):

> ***Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79...***
> (Counsel' s highlights)

> *In the above formulation, we have referred only to domestic violence, for the reasons which we indicated earlier, but its application is not limited to that... However, it is important to consider the "floodgates" argument. That is, these principles, which should only apply to exceptional cases, may become common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this court to fault and misconduct in property matters – a circumstance which proved so debilitating in the past... However, in our view, s 79 should encompass the exceptional cases which we described above...*
>
> ***It is essential to bear in mind the relatively narrow band of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party.*** (Counsel's highlights) *It is not directed to conduct which does not have that effect and of necessity it does not encompass...conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions).*

One gets a real flavour of the Wife's lack of evidence for a *Kennon* argument from the other evidence that His Honour spoke of in the case - see paragraph [20] repeated below;

> *20. This case did not fall within the exceptional category identified by the Full Court. Remembering the parties cohabited from 1995 until 2011,* ***other evidence adduced in these proceedings belied the wife's intended Kennon submission****. For example:*
>
> *In November 2009, after some 14 years of cohabitation and barely a year before final separation, the wife solemnly and sincerely declared in a statutory declaration prepared for use in other litigation that she was "happily married".[3] She said in cross-examination that her statement in the statutory declaration was truthful at the time she made it.*

> *She also later said in cross-examination "we had the perfect marriage until I stopped doing what I was told", which she allegedly did in 2011, proximate to their separation.*
>
> *She also told her doctors throughout 2009, 2010, and 2011 of her admiration for the husband, telling them he was "very understanding" and "supportive" and "there had been no major difficulties in their relationship" The wife tried to resile from such approbation in cross-examination, saying she would not have criticised the husband to them because she knew he would later read their reports, but that merely implied she deliberately gave false accounts to her own doctors about the husband's qualities. She may be prepared to falsify her accounts when it suits her, but it is more likely her compliments about the husband to the doctors were accurate.*

His Honour noted there was one incident of violence **at the end of the marriage** but that conduct at the end of the marriage is specifically excluded in the *Kennon* decision.

The decision also highlighted that the wife had some serious emotional health issues from 2008 on but these were the very issues that she had claimed were as a result of problems she encountered in the work place. See paragraph [23] repeated below;

> *23. Although there was an abundance of evidence about the wife's impaired state of emotional health from 2008 onwards, there was no expert evidence to causally link such ill health to any conduct of the husband. The absence of such a causal link is critical, if not fatal (see Kennon at 18; S & S at [41]-[48]). On the contrary, all of the evidence attributed her ill health to problems she encountered in her workplace, which was why she was retired on medical grounds in February 2011 and why she was able to later successfully sustain workers compensation*

> *and common law damages claims against her former employer.* ***Any nexus between the husband's misconduct and the wife's matrimonial contributions being rendered qualitatively greater would be purely speculative, not validly inferred.*** *(Counsel's highlights)*

His Honour went on to point out that whilst the Wife might have held an honest view that her Husband's behaviour exacerbated her health issues, that did not make it true nor was it the cause of her health issues. He said at paragraph 24 that in retrospect, the wife's opinion that the husband's behaviour *"… exacerbated [her] psychological condition" may be honestly held, but that does not make it objectively true. In any event, significantly,* ***she only thinks the husband's conduct "exacerbated" her condition, not that it was the principal cause. On her own evidence, if her psychological ill-health made it more difficult for her to contribute in the parties' household, the difficulty was only tangentially related to the husband's conduct.*** *(Counsel's highlights)*

SUMMARY

If one is even considering advising a client about a Kennon type of claim, consider first if there is evidence of conduct throughout the relationship that was of such a nature that it meant that the act of making contributions was made more onerous for your client. Consider also how you are going to prove that.

RE-OPENING A CHILDREN'S CASE

HOLINSKI v HOLINSKI [2015] FamCA 772 (24 August 2015)

In this case, the Husband sought leave to re-open the case after a lengthy hearing and before judgment to introduce fresh evidence.

An indication of the gravity of the father's complaints filed within an affidavit accompanying the application to re-open is contained in the following paragraphs from the judgment;

13. *Firstly, if the evidence of the father were accepted, serious issues about the mother's parenting capacity are raised. I do not accept the submission made by the mother that these allegations are simply more of the same.*
14. *The allegations of extremist views held by the mother in the proceedings, if they were found to have been proven, could have been managed by various orders, many of which I note were agreed to by the mother. For example, a focus in relation to the issue of child discipline was the mother's view that striking a child was an appropriate method of discipline, which was opposed by the father. However, the mother did agree to a restraint on physical discipline. Setting aside the level to which that restraint was enforceable, it still was a method, if what the father had said was true, would have been available to manage that particular area of concern.*
15. *Similarly, a concern in relation to health had been that the mother preferred that the children were not vaccinated but by the time of the proceedings, the mother had in fact had the children vaccinated and had agreed to an order that in future they would be vaccinated in accordance with the Health Department guidelines.*
16. *In other words, the sorts of matters that the father raised, would be able to be managed by orders and particularly some of those that had been proposed by the Independent Children's Lawyer and agreed to by the parties.*
17. ***The new allegations contained in the father's affidavit, however, are matters that relate to the mother's judgment and if they were found proved, they could not possibly be managed by means of specific orders restraining her. Rather, if proved, they do go to the heart of the mother's exercise of parental responsibility**.*
18. *I also accept the Independent Children's Lawyer's submission**, that if they are not proved and have been found to have been brought maliciously or as the mother***

alleges, in a further effort to control the mother, then they are significant factors going to the father's bona fides in these proceedings.

19. *The **second matter** I find is that the evidence sought to be adduced by the **father could not have been discovered by reasonable diligence on his part beforehand as the underlying asserted facts had not, at that stage of the trial, arisen. Those matters are that the mother either condoned or arranged for L to provide inappropriate written material to children at a pre school and that the mother administered vinegar to the children as a means of discipline and, as I say, neither of these matters had arisen at the time of the proceedings**.*
20. *While the issue of finality is relevant, and it was noted by Cronin J in the matter referred **to that leave would not be given to a party to shore up something lacking or disputing or missing in the trial**, I am of the view that the two matters referred to in the father's affidavit are of a different type and the significance is of a greater magnitude than the evidence that was given at trial. **This is not giving the father an opportunity to add something that was lacking or missing at the trial, but if accepted is significant evidence that was not available at the time and which, in my view, may affect the result at the trial.***
21. *So far as **the issue of prejudice to the par**ties is concerned, I accept that the further proceedings, if they are reopened, will involve further cost to both parties. However, the issue will be contained within a **couple of hours and is limited to a short affidavit by each party and possibly the issuing of a further subpoena**.*
22. *It is possible that, depending upon the outcome of the proceedings if reopened, a costs application could in any event be made in relation to just that part of the proceedings, depending upon the result.*
23. *It is also submitted, on behalf of the mother, that the further prejudice to her is that she wishes, in effect, to get on with her parenting of the children **and have finality in these proceedings**.*
24. *While finality is an issue that would clearly benefit not only the parents but the children, in my **view the resolution of the issue that has been raised in the father's affidavit is of such significance in relation to the parenting capacity of the mother, if true, and the father's bona fides in the proceedings if untrue,***

> ***that it is of greater significance to the best interests of the children than finality***. *Especially, as I would ensure that, if the proceedings are reopened, that they would be determined and a judgment given before the end of the year which was really the only matter of concern of the Independent Children's Lawyer.*

Hannan J relied upon the decision of Cronin J in *Naczek & Dowler (No. 4) [2008] FamCA 653 (23 June 2008)* where His Honour had reviewed a number of authorities in relation to re-opening cases at large, considered the effects of Division 12A on children's proceedings, and considered what principles might apply to the question of re-opening children's proceedings.

Some guidelines that were followed by Cronin J and Hannan J included;

a) when it was so material that the interests of justice required it;

b) the evidence if believed, would most probably affect the result;

c) the evidence could not by reasonable diligence have been discovered before; and

d) no prejudice would ensue to the other litigant because of the lateness of that evidence.

At Paragraph 11 of the judgment the trial judge quoted his Honour in Naczek;

> *11. Cronin J also had particular regard to the fact that these proceedings were conducted under Division 12A of Part VII of the Act which requires the court to give effect to certain principles in the section in performing duties, exercising powers and making decisions about the conduct of child related proceedings. His Honour had particular regard to the active direction, control and management of the proceedings by the trial judge and the way in which the court was to decide the manner in which evidence comes before it. He said, at [26]:*

> *It is clear therefore that the focus in a child-related proceeding should be on determining what evidence will assist in determining what is in the best interests of a child. Those principles and the provisions strongly point to the fact that a court is to decide what evidence will assist it. Whilst there is undoubtedly a requirement that all litigants be accorded natural justice, the judge ultimately bears the responsibility under Division 12A to decide what of the proffered evidence, he or she will find of assistance in the determination.*

It is interesting to compare the decision in HOLINSKI with the second decision regarding re-opening the matter in the same case.

In *HOLINSKI v HOLINSKI* (No2) [2015] Fam CA 1085, Hannan J had to subsequently determine the mother's application for a further re-opening than the limited one granted above (a 2 hour hearing with cross examination on the issue of giving the children vinegar and inappropriate material provided at kindergarten).

In this subsequent judgment, the mother made complaint of an incident that occurred she said on the day of filing her affidavit in the prior re-opened issue. However, she was late in filing that affidavit. The complaint appeared to be one that was "more of the same" rather than any new issue. Hannan J reiterated principles relevant to the determination at paragraph 3. I repeat these for the reader below;

> *3. They refer to matters such as evidence being so material that the interests of justice require it; that the evidence, if believed, would probably affect the result; that the evidence could not by reasonable diligence have been discovered before and no prejudice would ensue to the other litigant.*

The court determined that these issues were "more of the same" and did not warrant a re-opening of the case.

SUMMARY

It is my own experience that, whilst children's proceedings are in a somewhat different category to commercial matters, re-opening might invite from one's opponent far more than that which the re-opening was for. It might be like letting Pandora's Box fly open and **only** in serious cases should one embark upon such a course.

Of course, a judge has the power to re-open of their own volition - albeit that is very rare. In such circumstances one must keep in mind in submissions if trying to contain the matter, that re-opening on a specific issue (that might fundamentally affect the outcome of the case) is a different matter to allowing the case to be re-opened "at large".

One must be mindful of the objects and duties set out in the legislation including to bring the proceedings to finality for the child or children; and balance that against the seriousness of the allegations.

Thank you for taking the time to read this paper.

ROBYN WHEELER

FOLEY'S LIST

OWEN DIXON EAST

MARCH 2016