[2005] FamCA 432

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE
FAMILY COURT OF AUSTRALIA
AT BRISBANE

Appeal No. NA31 of 2004
File No. BRF1611 of 1998

BETWEEN:

I

Appellant Wife

-and-

I

Respondent Husband

REASONS FOR JUDGMENT OF THE FULL COURT

CORAM: **Bryant CJ, Finn, Coleman, Warnick & O'Ryan JJ**
DATE OF HEARING: **21 September 2004**
DATE OF JUDGMENT: **2 June 2005**

APPEARANCES:

Mr T D North of Senior Counsel (instructed by Jones Mitchell Lawyers) appeared on behalf of the appellant.

Mr Kent of Counsel (instructed by McPhee Lawyers) appeared for the respondent.

APPEAL SUMMARY

MATTER:	**I and I**
APPEAL NUMBER:	NA 31 of 2004 (BRF 1611 of 1998)
CORAM:	Bryant CJ, Finn, Coleman, Warnick and O'Ryan JJ
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CATCHWORDS:

FAMILY LAW – APPEALS – PROPERTY SETTLEMENT – Determination of the pool of property for division – Trial Judge found to have erred in applying contribution assessment of equality and 20 per cent s 75(2) adjustment in favour of the wife to a pool of property (valued at $365,500) but which excluded a home acquired post-separation by the husband (which had a net value of approximately $300,000), the husband's superannuation interest ($89,000) and the wife's superannuation interest ($29,000) – This result held to be manifestly unjust.

FAMILY LAW – APPEALS – RE-EXERCISE OF THE DISCRETION – Contributions by the parties to the time of separation regarded as equal and the post-separation contributions taken into account to arrive at a 65-35 per cent division of the total pool in favour of the husband on the basis of contributions – Section 75(2) factors warranted a 10 per cent adjustment in the wife's favour.

Caselaw cited:

House v The King (1935) 55 CLR 499

Appeal allowed.

Discretion re-exercised.

Directions made for the filing of written submissions as to costs.

1. Proceedings for property settlement between the wife and the husband were determined by Bell J by orders made 14 May 2004. For reasons he gave ex tempore, the learned trial Judge divided certain property of the parties, 70% to the wife, the balance to the husand. Other property, notably a house purchased by the husband post-separation, was not included in a table of assets to which the percentage for division was applied.

2. The order of the trial Judge provided that the wife obtain a transfer to her of the husband's interest in the former matrimonial home, upon payment to him of $99,150.00. Against this order the wife appeals.

3. In short, she seeks the transfer to her of the husband's interest in the former matrimonial home and that he pay to her a cash adjustment necessary for her to receive "…60% of the net pool of property of the parties".

4. It is primarily to the question of what should form the pool of assets that this appeal is directed. Grounds 1, and 3 to 5(ii) of the Amended Notice of Appeal filed by leave at the hearing of the appeal, go to that point. Grounds 2 and 5(iii) challenge the way in which the trial Judge dealt with (or failed to deal with) contributions of the wife. Ground 6 asserted a failure to give adequate reasons and ground 7, added upon oral application at the hearing by leave, asserted that the result was plainly unjust or inequitable.

5. We will return to the grounds of appeal after a short background discussion of the trial Judge's reasons and recognition of the principles applicable to the appeal.

Short background

6. The information provided under this heading is taken from the reasons of the trial Judge or from passages of the evidence before the trial Judge, to which we were taken by counsel for the husband, Mr Kent. There being no cross-appeal, the husband did not challenge the trial Judge's findings, but his counsel took the court to certain passages for the purpose of resisting "attempts to extend findings beyond evidentiary basis", and was not challenged in so doing.

7. The parties commenced cohabitation in 1984 and married in September that year. There are two children of the marriage, respectively born June 1989 and November

1991. The parties separated in September 1995. A decree nisi was pronounced on 20 April 1998. On 6 October 2003, Carmody J granted leave to the wife to institute proceedings for property settlement.

8. As the appeal does not challenge the trial Judge's dealing with contributions made by each party at the commencement of, or during, cohabitation it is unnecessary to say much about those matters.

9. Both parties were teachers. The wife provided the primary care to the children, and though she gave up work for certain periods, she returned to work as a contract employee. The husband continued as a teacher and obtained additional qualifications in human movements and psychology.

10. Subsequent to separation the husband purchased a property ("the R Street property") with the sum of $65,000.00 provided by way of interest free loan (or perhaps gift) from his parents and with the balance obtained by way of mortgage.

11. In 2002 the husband took a voluntary redundancy payment of approximately $53,000.00. Initially, the husband paid this sum in reduction of the mortgage over the R Street property, but as he was subsequently unemployed for a time, he redrew most of that money.

12. The husband paid child support throughout the period between separation and trial, in accordance with a schedule set out in the affidavit of evidence in chief of the wife. Between mid 1997 and December 1999 the husband paid between about $30 and $20 a fortnight more than the pertinent assessment. Following his redundancy, for a period of perhaps up to 14 months he paid a reduced amount of $250 per month, which however, was more than assessed. He also paid some school fees.

13. Nonetheless, the wife deposed that she bore the majority of the children's expenses.

14. The husband had contact with the children which equated to them being in his care for about one-third of the time.

15. In November 2003 the husband repartnered.

16. At trial, the property at R Street was worth $360,000.00, whereas it had cost the husband $153,000.00 in September 1997.

17. Between separation and trial, the husband's superannuation interest had grown from a few thousand dollars approximately to $90,000.00 approximately and that of the wife from an unknown, (but apparently small) figure, to $30,000.00 approximately.

18. At the time of trial the wife was working 4 days per week. She had placed herself on a list seeking permanent employment.

The judgment of the trial Judge

19. As to the formulation of the asset pool for division, his Honour recognised that the husband's redundancy package was made up of 3 components, holiday pay, long service leave and incentive payment. As a result of taking the redundancy, the husband was unable to seek re-employment with the relevant Government Department for a period of 12 months. The trial Judge addressed an argument that the whole of the redundancy package received by the husband should be written back into the pool. In the course of doing so, he made findings about the wife's contributions to the package. He said:

> 11. …I regret I cannot accede to that request. As far as I am concerned – and this will apply particularly to some other matters that I am going to raise, the contributions of the wife to this fund were, in effect, negligible except for a submission which I will be touching upon which was made by hand (sic) in relation to this and to the other assets which I will not include in the pool.
>
> 12. Save for a period, I think of one-fifth of the long service leave entitlement were contributed by the wife. There was a period I think of five years during which he accumulated some long service leave entitlement and one-fifth of the figure which was set out in that document to which I have referred, comes to approximately $5,000, and I will take that in consideration as part of the assets to be distributed between the parties.

20. The trial Judge regarded contributions up until the time of separation as "…well nigh equal" and this finding was not challenged in the appeal. Turning to matters occurring post-separation, his Honour said:

> 14. …We have seen over a period of nine years that the mother has made, I consider, a much heavier contribution to the welfare of the children and the father. She receives much less money than he does, I think something around $44,000. He is receiving something like $57,000.

21. Shortly after that passage, his Honour turned to discuss the R Street property, purchased by the husband post-separation. Again, in the course of that consideration, he made findings about the wife's contributions, which findings were the focus of at least one of the appeal grounds. He said:

> 16. …It could not be suggested by the wife that she made any direct financial contribution to the husband's acquisition of that property. Further, it must be said, that any improvement in the value of the property – he purchasing it for considerably less than $360,000 – can only be, …due to the massive increase in values of properties throughout the … area."
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> 17. Hamwood did submit, however, that I must consider that because the mother has in fact relieved the father from a considerable amount of financial stress because she has assisted considerably and, in all probability, more in a financial way than the husband, that he has been relieved from that stress of making further financial contributions to the wife on behalf of the children. That may be the case but I am more of an opinion that this is a question of a s75(2) factor and that there should be a weighting in favour and a considerable weighting, in my opinion, in favour of the wife because of what clearly, in my opinion, has been her accepting the greater financial responsibility for the children.
>
> …
>
> 19. I do not believe on the material before me that he has been sufficiently financially supportive of the children.…

22. Having turned, perhaps surprisingly while discussing contributions, to the issue of s 75(2) factors, his Honour continued:

> 20. Not only is there a weighting, as far as I am concerned, in favour of the mother in relation to that, but there is also a weighting in favour of the mother in relation to the disparity, not only of earnings, not only of security of tenure perhaps in the position, and notwithstanding the fact that the husband is a contract employee as well, he is quite confident that his contract will be renewed. She is not quite as confident but is hoping for an improvement in her salary by getting permanent employment instead of four days per week.

23. The trial Judge then returned to discuss particular assets and the question of contribution to them:

> 21. I also consider the two matters – we now get onto the superannuation question. As at the date of separation it has fallen, I think from the husband, that the entitlement by himself and his wife to any superannuation would have been about two and a half thousand dollars. Since then it has increased from that figure to something like $89,000 to $90,000 and also that

the wife's superannuation, which I must say I do not remember any evidence of its valuation at separation, has in all probability increased from virtually nothing to what it is today of some $30,000.

22. What then, can it be said, that either of them have made by way of contributions to the respective superannuation holding? I am of the opinion none. I do not believe that I should include those amounts of moneys as assets of the parties, as I am entitled to do since the Act amendment. But I once again take into consideration the fact that the husband's superannuation is far more valuable than the wife's and this is particularly emphatic in so far as the s75(2) factor is concerned.

23. The next question is the fact that he has a house. He has a house in his own name, notwithstanding the fact that he does owe some moneys on it, being some $64,000 which he is repaying at something in excess of $400 per fortnight. He has an equity in that house of a considerable amount, that being something like $300,000 or thereabouts. This, once again, puts him in a much stronger position financially than the mother. I am clearly using an asset by asset test in this case. I do not believe that this is a case which in any way could use an "in globo" attempt because of the disparity in contributions or, in some cases, the nil contributions by the parties to some of the assets of them or either of them.

…

24. His Honour then identified the assets to which he would apply a percentage division and he considered what that percentage should be:

25. …these are the assets that I will take into consideration in relation to the distribution of the property between the parties: the [T] Road property; the husband's car; the wife's car; the wife's furniture; the husband's furniture. Which, according to my maths, plus the $5,000 for long service leave, comes to $365,500.

26. How then am I do distribute the property? As I have said, I do believe that up until separation, which was a considerable number of years ago, the contributions were well nigh equal. But since then, as I have said, and because of the length of time that has expired, it is quite clear to me that the mother's contribution and the father's much superior position under s75(2) requires me to give a substantial weighting in favour of the wife, and I consider that that weighting should be 20 percent. Consequently, I am of the opinion that the property to which I have here and before should be divided as 30 percent to the husband and 70 percent to the wife.

According to my mathematics, that would require me to order that upon the wife paying him $109,650 less the property which he already has, that is $10,500, it would mean that upon her paying to him the amount of $99,150 that he transfer to her all

> the right, title and interest in the [T] Road property and that the ownership of the property in the possession of each of them vests therein.

Principles applicable to the appeal

25. The principles applicable to the appeal against discretionary orders have been discussed in numerous cases, but having regard to ground 7, which asserts that the result was plainly unjust or inequitable, and which we intend to discuss first, what was said by Dixon, Evatt and McTeirnan JJ in *House v The King* (1936) 55 CLR 499, at pp 504-505 is apposite:

> "…It may not appear how the primary judge has reached the result embodied in his orders, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the ground that a substantial wrong has in fact occurred."

The grounds of appeal

Ground 7

> That the result was plainly unjust or inequitable.

26. The actual assets possessed by the parties at trial, as set out in the table that follows totalled $773,500.00. Including the $5,000.00 written back by the trial Judge, the total was $778,500.00.

TABLE

T Road property – joint	$380,000.00
R Street property – husband	360,000.00
Husband's car	3,000.00
Wife's car	1,000.00
Wife's furniture	5,000.00
Husband's furniture	2,500.00
Wife's superannuation	29,000.00
Husband's superannuation	89,000.00

Total:	**$869,500.00**
Liabilities:	
T Road property – joint	$32,000.00
R Street property – husband	64,000.00
Net pool of existing assets	**$773,500.00**

27. The asset pool taken by the trial Judge, namely $365,500.00, was significantly less than one-half of the actual assets of the parties. The award to the wife of 70% of that asset pool, equalling $255,850.00 plus her superannuation, equals 36.5% of the actual assets of the parties.

28. This was a case in which, at the time of separation of the parties, the children were approximately 6 and 4 years of age respectively and where since then, the wife has continued with their primary care while earning an income through a work pattern established during the cohabitation. That pattern produced less income than the husband and the trial Judge also accepted that the major financial responsibility for post-separation child care had fallen on the wife. This was also a case in which there was no doubt that s 75(2) factors favoured the wife, these being the ongoing primary care of the children, currently a lesser capacity to earn than the husband – and though she might, if permanent employment was obtained, earn more it would still not match the husband's capacity – and with, as his Honour found, less security of employment. In such a case, notwithstanding that the increase in value of the husband's superannuation and the R Street property represented some 50% approximately of the asset pool, we consider that for the wife to receive 36.5% of the total assets of the parties, was manifestly unjust and inequitable.

29. Put another way, to adjust by only 20% of the much reduced asset table to reflect post-separation contributions, the disparity in earning capacities and security of tenure, and the wife's on-going child care was manifestly unjust in circumstances where the actual asset pool was more than double the limited asset table used.

30. Such a conclusion being reached, it may not be strictly necessary to identify where the trial Judge erred but, in deference to his Honour and to the submissions of the parties, we think it is possible to identify some errors in approach which likely contributed to or caused the ultimate miscarriage. Discussion of those errors is also relevant to the other grounds of appeal.

31. The trial Judge expressed that he was adopting an asset by asset approach (as he was certainly entitled to do in a case such as this). However, in our view this his Honour failed to do correctly. At no stage, as part of the assessment of contributions, did his Honour measure the contributions of the wife, particularly post-separation, pursuant to s 79(4)(c), against the contributions of the husband post-separation, namely the acquisition and maintenance of the R Street property and the growth in his superannuation. Had he done so then, albeit the percentages for the wife used in respect of at least notional division of those assets may well have been less than the percentage used in respect of other assets, such as the former matrimonial home, the former assets would nonetheless have been brought into account.

32. It appears to us that the asset by asset approach taken by his Honour may also have led his Honour to overlook the disparity in the financial circumstances of the parties which flowed from his orders. In particular it is not clear that his Honour took account of the fact that the wife had 36.5% of the total assets while the husband retained 63.5%. Certainly this does not seem to us to be adequately reflected in the percentage adjustment for s 75(2) factors when added to the matters referred to in paragraph 27.

33. True it is that the trial Judge recorded the wife's post-separation contributions, but he took them into account, not as contributions to those assets (albeit less than contributions to other assets), but with his consideration of relevant s 75(2) factors when applying a percentage adjustment to the much reduced asset table. In our view, this likely caused the distorted result identified.

34. Thus, we are of the view that there is merit also in the grounds challenging the exclusion of the husband's home and superannuation entitlements from the pool of assets, at least in circumstances where a failure to take an "in globo" approach was not replaced by a proper adoption of the asset by asset approach.

Other grounds of appeal

35. In view of our findings, we do not think it necessary to further consider the other grounds of appeal.

Re-exercise of discretion

36. Both parties wished us to re-exercise the discretion and neither was in a position to put any further evidence before us.

37. We propose to address an asset pool of $778,500 as we consider that this approach is most likely to ensure that all relevant factors are taken into account in an appropriate way.

38. Neither counsel suggested that the nature of a superannuation interest required it to be treated differently from other property. Nor was it suggested that, if re-exercising, we should treat the redundancy package any differently to the approach of the trial Judge.

39. Starting from the point that contributions to the time of separation were of equal weight, we have regard to the contributions post-separation which have already been discussed. While the post-separation contributions of the wife are significant, the fact that the asset pool includes the husband's post-separation asset of the value of the R Street property and his increased superannuation entitlement is the most significant factor. We assess contributions to the time of trial at 65% to the husband and 35% to the wife.

40. The relevant s 75(2) factors have also been discussed. These favour an adjustment to the wife. Having regard to the following factors:

- the considerable size of the asset pool
- although the wife earned less than the husband, the differential was not so great after tax is taken into account, and in any event she is looking for permanent work
- although the wife will still have the major responsibility for the care of the children and, consistent with the findings of the trial Judge, the greater financial responsibility for them, the husband is paying child support commensurate with his income
- if all the assets are included, on a contribution based assessment, the differential in their capital positions is not as great as it was on the approach taken by the trial Judge

we think that a 10% adjustment is sufficient, so that overall we would adjust 55% to the husband and 45% to the wife.

41. 45% of $778,500 is $350,325. The wife already has (assuming she retains the former matrimonial home):

T Road property (net)	$348,000.00	
Car	1,000.00	
Furniture	5,000.00	
Superannuation	29,000.00	383,000.00

42. Therefore, the adjustment from the wife to the husband for her to retain the home will be $32,675.00.

43. No additional factors were put before us or appear to us to call into question the justice and equity of this result.

ORDERS

(1) That the appeal be allowed.

(2) That Order 1 of the orders of the Honourable Justice Bell made 14 May 2004 be amended by the substitution for "$99,150", of the figure "$32,675".

(3)(a) That each party be at liberty to file and serve any written submissions in relation to the costs of the appeal within 28 days of the date hereof.

(b) That each party have a further 28 days in which to file and serve any written submissions in answer to any submissions filed by the other party.

(c) That each submission have endorsed on the cover sheet the date on which a copy of that submission was served on the other party.

I certify that the 43 preceding
Paragraphs are a true copy of the reasons for
judgment delivered by this
Honourable Full Court.

Associate