High Court declines opportunity to determine guidelines for post-separation "windfalls"

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Two members of the High Court, including the Chief Justice, recently declined the opportunity to develop principles for the assessment of post-separation windfalls and contributions generally.

In *Singerson v Joans* [2015] HCA Trans 195 the High Court refused the husband's application for leave to appeal against the decision of the Full Court of the Family Court in *Singerson & Joans* [2014] FamCAFC 238. The husband received a $3 million inheritance after separation. The wife had otherwise made greater financial and homemaking contributions during the relationship and greater homemaking contributions post-separation. The husband suffered from depression and had sporadic employment for much of the marriage.

The Full Court of the Family Court re-exercised the discretion and, taking a holistic - or global - approach rather than an asset-by-asset approach, gave the wife 73% of the property excluding the inheritance and 47.5% of the total property including the inheritance. There was no adjustment under s 75(2) *Family Law Act*. The net result was that the wife retained about $3.6 million and the husband about $3.9 million.

In the High Court, the husband's counsel agreed with Nettle J that the husband's complaint was that the Full Court gave too much of his inheritance to the wife. Nettle J asked why that was an error of principle.

French CJ commented on the problem of re-exercising discretion:

> "The risk one gets into is poking around in the entrails of discretion and starting to generate rules out of what are guidelines appropriate to particular cases."

All of the assets other than the inherited assets were in the name of the wife and the wife's counsel said that the Full Court had to decide how much the wife gave to the husband, taking a broad brush approach.

The wife's counsel described the wife's contributions as "exceptional" which was an intriguing choice of word given the recent decision of the Full Court of the Family Court in *Kane & Kane* (2013) FLC 93-569 where the notion of "special skills" or "special contributions" was rejected. However, the wife's counsel did make a submission which reflected the words of the majority of the Full Court of the Family Court in *Fields & Smith* (2015) FLC 96-638 at para 168 as to the task of assessing contributions globally, including in the post-separation period, when he said:

> "But the reality is that the courts take a broad brush analysis and say this is not a marriage where the parties pull the weight equally; this is a marriage where her contribution was really exceptional both before and after separation, and we have to apply that to the whole of the property of the parties because that is what the Act requires."

The husband's counsel contended that there were different approaches by the Full Court to inheritances and in the post-separation lottery cases. He said that it was appropriate for a guideline to be developed. The wife's counsel denied that there was any need for a guideline as the Full Court knew exactly what to do.

French CJ summarised the position of the husband's counsel as:

> "Well, the bottom line, as far as your contentions go, is that the Full Court was exercising a broad statutory discretion in which there are a number of permissible pathways of reasoning, and that the pathway it took was within that framework."

The husband's counsel, in reply, said that to say that homemaking contributions somehow applied to property acquired after marriage "does violence to the words of the statute". The two members of the High Court who heard the application did not seem to accept this argument as special leave was not granted.

In refusing the application for special leave, French CJ concluded:

> "In our opinion, the approach adopted by the Full Court to the exercise of a discretion under s 79 does not disclose any error of principle or otherwise which would warrant the grant of special leave on any of the grounds set out in the draft notice of appeal."

Upholding the exercise of discretion and the absence of guidelines for post separation "windfalls" seems at odds with the rather harsh words directed to the Full Court of the Family Court by the High Court in *Stanford*. The High Court majority quoted four members of the High Court in *R v Watson; Ex parte Armstrong* [1976] HCA 39 observing about proceedings for maintenance and property settlement:

> "The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down".

Unfortunately, the High Court had the opportunity in *Singerson v Joans* to develop some principles to guide the Family Law Courts and legal practitioners when dealing with "windfalls" and the assessment of post-separation contributions, but it declined to do so.

The unexplained contrast between the outcomes in the Full Court of the Family Court in such cases as *Singerson & Joans*, as opposed to the "fractional contemporaneity" approach reminiscent of Guest J in *Farmer & Bramley* (2000) FLC 93-060 taken in *Eufrosin & Eufrosin* [2014] FamCAFC 191, remains. The position remains unsatisfactory as there is little or no guidance from the High Court as to when and whether the Family Law Courts should take an asset by asset approach or a global approach. This is a particularly acute problem when there have been post-separation "windfalls".