

Post-separation Property "Windfalls" - Crack the Champagne or Back to Court?

Television Education Network

Melbourne 10 Point CPD Conference

27 March 2016

Jacqueline Campbell

Partner

Forte Family Lawyers

Introduction

When one of the parties receives a "windfall", such as an inheritance or a Tattsлото win, after separation, the recipient may seek to "quarantine" it on the basis that the other party had not contributed to it. Even if it is not quarantined, should the contribution of a post-separation "windfall" be given more weight than one received during the relationship? This paper looks at the history of "windfall" cases – both during the relationship and after separation – how they are taken into account in the assessment of contributions and s 75(2) factors. The recent Full Court decision of *Elford & Elford*¹ illustrates how fraught it can be to try to predict the outcome where there is a windfall early in a relationship.

There are two possible approaches: a "fractional contemporaneity" or "two pool" approach where contributions to the windfall are assessed differently to contributions to other property or a holistic or global approach to contributions where they are relevant, despite the timing difference.

Comparable cases – the controversy about their importance

After years of university study about the importance of precedent and *stare decisis*, family lawyers have been challenged when advising clients and predicting outcomes by the breadth of the court's seemingly unfettered discretion. In cases like *Fields & Smith*² the Full Court seemed to dismiss the idea of relying on earlier cases as a guide to decision-making. Bryant CJ and Ainslie-Wallace J in the Full Court said, in relation to the use by the trial judge of a table of comparative cases prepared by one of the party's counsel:

The problem with the table is that it gives no indication of the relevant facts in the particular cases ... With all due respect to his Honour, the table can only form 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.³

They considered that the apparent reliance on the table by the trial judge may have led him into error and acted as a fetter to the exercise of his discretion. The third member of the bench, May J, also allowed the appeal and in a brief judgment did not refer to the offending table but to the trial judge ignoring the wife's post-separation contributions.

Bryant CJ and Ainslie-Wallace J analysed a number of cases and compared factors such as the length of the relationship, and the nature, form and characteristics of the contributions made by the parties, including the timing of contributions.

¹ (2016) FLC 93-695

² (2015) FLC 93-638

³ (at para 117)

Patrick Parkinson has recently written some interesting articles about discretion⁴, which may have assisted the Full Court to adopt a fresh approach. In *Wallis & Manning*⁵, although not conceding that *Fields & Smith* dictated that comparable cases could not be relied upon, Thackray, Ainslie-Wallace and Murphy JJ said:

While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79

The word “comparable” is used advisedly. The search is not for “some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made”. Nor is it a search for the “right” or “correct” result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability – for “what has been done in other (more or less) comparable cases” – with consistency as its aim.⁶

It is early days, but hopefully “comparable cases” will help bring more predictability to family law property settlements. This paper may be a more useful guide to legal practitioners than otherwise.

Contributions - the basics

The starting point in considering the assessment of contributions must always be the High Court's judgment in *Mallet v Mallet*.⁷ In separate judgments the High Court rejected in strong terms, the notion or presumption of equality of contributions as a normal or proper starting point after a long marriage. Gibbs CJ said:

The respective value of the contributions made by the parties must depend entirely on the facts of the case and the nature of a final order made by the court must result from a proper exercise of the wide discretionary power... unfettered by the application of supposed rules for which the *Family Law Act* provides no warrant.⁸

Contributions are assessed at the date of trial, not the date of separation. There is a tendency for parties, and sometimes the courts, to look at contributions differently after separation, as if there are "two pools". However, Bryant CJ and Ainslie-Wallace J in *Fields & Smith*⁹ (for example) referred to several cases¹⁰ where the Full Court had cautioned against automatically assessing contributions differently after separation, as s 79(4) requires a "holistic" assessment of the parties' contributions. There is a tension between these two approaches.

⁴ e.g. “Why are decisions on family property so inconsistent?” (2016) ALJ 90(7), 498-526; “Constitutional Law and the Limits of Discretion in Family Property Law” (2016) Federal Law Review 44(1), 49-75

⁵ (2017) FLC 93-759

⁶ Paras 67-68

⁷ (1984) FLC 91-507

⁸ at 210

⁹ (2015) FLC 93-638

¹⁰ e.g. *Dickons & Dickons* [2012] FamCAFC 154; *Lovine & Connor* (2012) FLC 93-515 and *Bolger & Headon* [2014] FamCAFC 27

In *Fields & Smith*, the trial Judge had assessed the wife's post-separation contributions as less than her contributions during the marriage, and assessed the husband's contributions, which were primarily financial, as being greater than those of the wife both during cohabitation and after separation. The wife's contributions were primarily as a parent and homemaker. Following separation, her role had altered because the children had left home and the parties no longer belonged to a household where they provided each other with mutual support. After a 29 year marriage the trial Judge distributed the property on the basis of contributions as to 60% to the husband and 40% to the wife and made no s 75(2) adjustment.

Before the Full Court, the wife pointed to the "implicit prejudice" of failing to acknowledge the intrinsic changes to the role of a long term homemaker and parent as the children grow older, where the parties had accepted and agreed on that role during the marriage. Bryant CJ and Ainslie-Wallace J agreed that there was a potential for prejudice but pointed out that s 75(2) could be used to take account of matters other than contributions where it was appropriate to do so. Also relevant though, was that there was no evidence that new assets had been acquired or existing assets improved or conserved due to the efforts of one party rather than another following separation, despite the husband's observations that he had made greater post-separation contributions than the wife. May J found that the trial judge had "impermissibly ignored the wife's continuing contributions" and that the proper exercise of discretion ought to have led to a finding that the property be divided equally.

The problem of comparing financial contributions with homemaking and parenting contributions was described in *Norbis v Norbis*¹¹ (the ultimate High Court decision on the asset-by-asset approach) in a passage recently quoted by Ainslie-Wallace and Ryan JJ in *Stone & Stone*.¹² Mason & Deane JJ said in *Norbis*, whilst stating that the general preference was for a global approach, that this was for reasons of convenience:

Although it is natural to assess financial contributions under s 79(4)(a) by reference to individual assets, it is also natural to assess the contribution of a spouse as homemaker and parent either by reference to the whole of the parties' property or to some part of that property. For ease of comparison and calculation it will be convenient in assessing the overall contributions of the parties at some stage to place the two types of contributions on the same basis, ie on a global or, alternatively, on an "asset-by-asset" basis. Which of the two approaches is the more convenient will depend on the circumstances of the particular case. However, there is much to be said for the view that in most cases the global approach is the more convenient.¹³

It is problematic that some contributions such as inheritances and lottery wins are capable of precise assessment in monetary terms but perhaps only in historical monetary terms, and other

¹¹ (1986) FLC 91-712

¹² [2015] FamCAFC 18

¹³ at 523

contributions, such as parenting, are incapable of measurement in monetary terms¹⁴. The Full Court in *Fields & Smith* accepted that assessing the contributions of a homemaker/parent after the children had grown up as less than those of the primary income-earner could be unfair and that s 75(2) factors (presumably s 75(2)(j) and (k)) were relevant.

Relevance of timing of contribution

An early and often quoted case on the relevance of the timing of a particular contribution when contributions are being assessed is *Aleksovski & Aleksovski*.¹⁵ During an 18-year marriage each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Late in the marriage, the wife received a large capital sum due to a personal injury claim arising from a motor vehicle accident. Baker and Rowlands JJ said:

It is therefore necessary that trial Judges weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation and then translate such assessment into a percentage of the overall property of the parties or provide for a transfer of property in specie in accordance with that assessment.

It really comes down to questions of weight. Whilst weight would and must be given to a contribution which a party makes shortly before the separation, less weight may be given to a contribution made by one of the parties to a marriage early in the cohabitation period of a long marriage, particularly in circumstances where the contribution has gone into the parties' assets or been used up in the payment of family expenses.¹⁶

Kay J, in a more frequently quoted passage, albeit the minority judgment, said:

In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it. The Judge must weigh up various areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital. A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship. What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less

¹⁴ e.g. *Lovine & Connor* (2012) FLC 93-515 at 41-42

¹⁵ (1996) FLC 92-705

¹⁶ at 83,437

than directly proportional weight because of those other elements.¹⁷

All three judges allowed the appeal by the husband. The majority considered that less weight may be given to a contribution made by a party early in a long period of cohabitation than one made shortly before separation. This "erosion" principle is discussed later in this paper. Kay J considered that the time at which the contribution was made did not necessarily affect the outcome. All contributions needed to be weighed up.

Cronin J in *Murdock & Tucker*¹⁸ quoted with approval the above passage of Baker and Rowlands JJ. He said:

There is also a risk that the isolating of one or more items of property creates an artificial approach where percentages are applied to certain items but not others. Such a focus can ignore long and consistent contributions because of the attraction of a very recent financial one. That attention may also ignore long periods of homemaker and parent roles.¹⁹

In *Bolger & Headon*²⁰ the Court was required to weigh up the wife's inheritance received at around the time of separation (valued at \$250,000 at the time of trial), as against the husband's initial contribution of \$774,900. The trial Judge accepted the submission of the wife's counsel that she should receive a 7.5% credit for her contribution in a \$1.5 m pool. The trial judge gave the husband a 7% credit his contribution. The husband appealed. The Full Court said that the trial Judge erred in assessing the wife's inheritance at 7.5% while assessing the value of the husband's initial contribution made 7½ years earlier as requiring an adjustment of 7%.

A further difficulty with the approach of the trial Judge was that she assessed contributions by attributing specific percentages to each component of the contributions and used 50/50 as a starting point. This was described by the husband's Counsel as "a suppressed assumption that you start from equality"²¹ - an approach which was erroneous and inconsistent with *Mallett*.

The Full Court in *Bolger* quoted the above passages from *Aleksovski* and then quoted from the Full Court in *Dickons & Dickons*, emphasising a holistic rather than a mathematical approach to the assessment of contributions.²²

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

¹⁷ at 83,443

¹⁸ [2015] FamCA 23

¹⁹ at para 69

²⁰ [2014] FamCAFC 27

²¹ at para 15

²² [2012] FamCAFC 154

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. ... 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.

Doing so is also consistent with ... the well-established recognition in the authorities ... 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.

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.²³

The Full Court also quoted favourably the following passage from the Full Court in *Lovine & Connor*²⁴ on the difficulty of weighing up contributions when not all are measurable in money terms:

As part of the process of ultimately determining just and equitable orders under s 79 there is included a complex of discretionary assessments and judgments of many components of contribution, only some of which are capable of measurement in money terms and then often only in historical, rather than present, money terms. Any dictate to the effect that in the course of assessment each disparate component part or kind of contribution must be assigned a discrete and identifiable value or percentage is antithetical to the nature of the discretion involved.²⁵

The Full Court (in a bench which included Kay J) said in the earlier case of *Williams & Williams*,²⁶ that looking at the value of an initial contribution at the commencement of cohabitation without looking at its value at the time it was realised or at the time of the trial was incorrect, although it was important to weigh up all contributions. The Full Court said:

We think that there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties. Thus where the pool of assets available for distribution between the parties consists of say an investment portfolio or a block of land or a painting that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value at the time of hearing or the time it was realised rather than simply pay attention to its initial value ... But in so doing it is equally as important to give recognition to the myriad of other contributions that each of the parties has made during the course of their relationship.²⁷

²³ at paras 24-26

²⁴ (2012) FLC 93-515

²⁵ at para 42

²⁶ [2007] FamCA 313

²⁷ at para 26

Consistently with *Williams*, in *Agius & Agius*²⁸ the Full Court looked at the values of the assets brought into the relationship by the wife at the time of trial and not just at the times they were purchased. The wife won a Tattsлото prize of about \$450,000 shortly prior to the commencement of the 10 year period of cohabitation. At the commencement of cohabitation, the husband had no significant assets whereas the wife had 2 properties and the balance of her Tattsлото winnings. A third property was purchased during the marriage in the name of the husband largely using the wife's Tattsлото winnings. The wife's father also lent monies to assist the wife with the purchase of all 3 properties. The wife always earned substantially more than the husband.

The Federal Magistrate found that the husband's contribution based entitlements were 25% of a pool of about \$1m, which meant that he could retain the cheapest of the 3 properties, being the one purchased during the relationship. There was no s 75(2) adjustment.

In upholding the decision of the Federal Magistrate, the Full Court referred to the fact that at the time of trial the 2 properties which the wife owned at the commencement of cohabitation were worth \$775,000 and represented approximately 72% of the current net assets. The third property, which was retained by the husband (although the husband had made no financial contribution to it) had a value of \$250,000. At the commencement of cohabitation, the wife's 2 properties and the balance of her Tattsлото win were approximately \$645,000 which amounted to about 60% of the pool at trial.

"Erosion" Principle

Despite Kay J's often quoted passage from *Aleksovski*, later contributions are usually given more weight than early contributions. This is known as the "erosion" principle.²⁹ For example, in *Bonnici & Bonnici*³⁰ and *Burke & Burke*³¹ the courts credited the recipient of an inheritance received shortly prior to or after separation entirely with that contribution, effectively quarantining it from the pool. By contrast, in cases such as *MVB & SDB*³², early inheritances were not given much weight.

A different approach was taken by Cronin J in *Sinclair & Sinclair*³³ where he suggested that greater weight might be given to early contributions:

The longer the relationship, the greater the importance of the early non-financial contributions because like an initial financial contribution from which more wealth grows, they form the foundation of the relationship. They set up needs and obligations

²⁸ [2010] FamCAFC 143

²⁹ *Pierce & Pierce* (1998) FLC 92-844

³⁰ (1992) FLC 92-272

³¹ (1993) FLC 92-356

³² (2005) FamCA 389

³³ [2012] FamCA 388

of the parties about support for one another and children. They set up assets that require ongoing maintenance and preservation. Thus, what happened from 1959 to 1985 in this case is important. The inherited wealth had not significantly materialised until towards the end of that period and it has the tendency to distract attention from the importance of the early period of this relationship when both parties worked extremely hard at whatever commitments they had made to each other to fulfil. True it is also that some of those contributions are offset by the benefits received but all this shows the inability of the law to simply process the outcome by some mathematical formula.³⁴

The Full Court in *Pierce & Pierce*³⁵ added a gloss to the erosion principle:

In our opinion it is not so much a question of erosion of contributions but a question of what weight is to be attached in all the circumstances, to the initial contributions. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution.³⁶

Most recently, in *Wallis & Manning*³⁷ the Full Court summarised the position with reference to *Aleksovski*, *Dickons* and other cases as:

By those central submissions the parties approached the assessment of contributions by suggesting that “an adjustment” should be made to a result reached otherwise by reference to a miscellany of other contributions. Her Honour adopted a similar approach. Such an approach is by no means uncommon to both the presentation of cases and the structure of judgments. It is convenient in this case, as it is more broadly, so as to describe a contribution or contributions of a particular type said to have particular importance and to distinguish it or them from other contributions.

Yet, that approach must also ensure that the “myriad of other contributions” and the duration over which, and circumstances in which, the miscellany of other s 79(4) contributions were made is not accorded a subsidiary role. The essential s 79(4) task is for “trial Judges [to] weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation”.³⁸

Early "Windfall" Cases

A lottery win during a marriage was originally regarded as a “windfall” and treated differently to other contributions. For example, in *Mackie & Mackie*³⁹ the husband’s lottery win after separation was quarantined and not considered part of the property pool or a financial resource. It does not appear to have been relevant under s 75(2). However, in *Holmes & Holmes*⁴⁰ Cohen J said that although the winnings were those of the wife, it was relevant to take into account the effort made to achieve the contributions as well as the amount of the contributions. Also relevant was that the

³⁴ at para 96

³⁵ (1999) FLC 92-844

³⁶ at p 85,881

³⁷ (2017) FLC 93-759

³⁸ at paras 19-20

³⁹ (1981) FLC 91-069

⁴⁰ (1990) FLC 92-181

wife used the winnings for the benefit of the family. Cohen J said:

It seems to me that the extent of contribution is not a mere product of the amount contributed. I think, for example, the effort made to achieve it is relevant, as is the time when it was made and all the other circumstances surrounding its making.⁴¹

In *Holmes*, the wife's lotto win of \$666,666 one year prior to separation and the significant increase of \$360,000 to the husband's superannuation due to a takeover after separation, were not attributable to any particular contributions or efforts of the parties, but were dealt with by the Court as "windfalls". They did not give either party a greater entitlement on the basis of contributions and contributions were assessed as equal. There was no s 75(2) adjustment and the pool was divided equally.

Cohen J in *Holmes* referred to *McTaggart & McTaggart*,⁴² *Zappacosta & Zappacosta*⁴³ and *Anastasio & Anastasio*⁴⁴ and listed the relevant considerations as:

- little effort was put into the purchase of the ticket
- family money was used for it
- the wife regarded the fruits as "family money", but, nevertheless, determined its use in a way which, to some extent, was inconsistent with her own feelings about it
- the use of the winnings occurred within the context of a subsisting marital relationship of longstanding, and appeared to have been intended to further that relationship
- ignoring any contribution to the price of the winning ticket, the winnings were brought into the pool of family assets by the wife, and no contribution to the house was made by the husband.

In *McTaggart*, the trial judge viewed the husband's \$500,000 lottery win as a "windfall" rather than the result of labour or skill of the husband. It was not therefore considered to be a contribution by the husband.

In *Zappacosta* the land increased in value because of re-zoning during the marriage. Cohen J noted that the increase in value was "not due to any particular effort or act of either of the parties". It was "simply a windfall" and was not a relevant consideration under s 79.

In *Anastasio* there was a strong thread in the evidence that the parties were striving together with the ultimate object of buying a home. The purchase of lottery and raffle tickets were examples of their attempts to achieve this objective. The syndicate name on the ticket was "New Home". The Court dealt with the winnings as joint winnings, because the ticket was purchased for the benefit

⁴¹ at 78, 216

⁴² (1988) FLC 91-920

⁴³ (1976) FLC 90-089

⁴⁴ (1981) FLC 91-093

of the relationship.

Zyk

In *Zyk & Zyk*⁴⁵ the Full Court reviewed earlier cases dealing with lottery wins and said that the use of the term “windfall” created conceptual difficulties within s 79. The term “contribution” was preferable. The critical question was by whom the contribution was made. Two years after the marriage the husband was in a two-member syndicate and the other member bought the winning ticket. The wife had no involvement in buying the ticket, but the husband's share of the winnings was used for joint purposes. The Full Court said:

The use of the term "windfall" creates conceptual difficulties within s 79 and can lead to inconsistent outcomes.... The approach of treating it as a contribution is consistent with the treatment of gifts from family as a contribution by or on behalf of that party ...

In our view, the critical question in such cases is - by whom is that contribution made? In the ordinary run of marriages a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue. Where both parties are in receipt of income and where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly: see *Anastasio*. Where one party is working and the other is not the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties...

In the sort of case to which we have referred above the conclusion would be that the ticket was purchased by joint funds and the contribution of the prize would be seen as a contribution by the parties equally. There may be cases where the parties have so conducted their affairs and/or so expressed their intentions that this would not be the appropriate conclusion, but in the generality of cases with which this Court would normally deal this appears to us to be the correct approach and the correct outcome.⁴⁶

The Full Court in *Zyk* pointed out that the treatment of the lottery as a “contribution” rather than a “windfall” was correct, but also made an important difference to the outcome. Treating it as an equal contribution by both parties rather than as a “windfall” to one party, resulted in a significant adjustment to overall contributions.

Farmer & Bramley

*Farmer & Bramley*⁴⁷ was a controversial case. By this time, under the principles in *Zyk*, “windfalls” such as lottery wins and inheritances were assessed in the same way as other contributions.

⁴⁵ (1995) FLC 92-644

⁴⁶ at paras 49-51

⁴⁷ (2000) FLC 93-060

The husband in *Farmer & Bramley* won \$5 million in a lottery over 18 months after separation, but prior to the parties' divorce. The wife had made contributions after separation to the welfare of the family. The issue was whether these contributions, together with her financial and non-financial contributions during the marriage, justified a s 79 order that she receive a proportion of the lottery proceeds. The hearing was almost 5 years after separation.

The parties lived together for 12 years. There was no property of any value at the time of separation. The parties' financial circumstances were at all times modest. The husband was a heroin addict in the early part of the marriage and the wife supported him financially and emotionally through his addiction. She also financially supported him while he was studying and assisted him with his literacy skills. The wife's endeavours assisted the husband to obtain full-time gainful employment. At the time of the hearing, the child of the marriage was almost 15 years of age. The child lived with the husband for approximately two years after separation but otherwise lived with the wife. The husband did not have regular contact and did not pay child support.

After the husband won the lottery he arranged his financial affairs to reduce his child support liability to nil. He gambled over \$100,000. He denied to the court he won the lottery, saying that his mother won instead. The wife remarried 12 months after the lottery win. In March 1998 (just prior to the expiration of the time she could do so without the leave of the court), the wife applied for a \$1 million property settlement. The husband had a new partner and a child.

Purdy J, at trial in *Farmer & Bramley* relied very heavily on the decision of *Bradley v Weber*⁴⁸ and gave \$750,000 or 15% of the winnings to the wife. Whether there needed to be a direct connection between the property interests to be adjusted and the parties' contributions was only a minor issue at trial in *Farmer*. The major issue at trial was whether the lottery prize belonged to the husband or to his mother. Purdy J held that the full amount of \$5 million was available for allocation between the parties because of:

- the wife's significant financial and non-financial contributions throughout the marriage;
- the disparity in the parties' financial circumstances;
- the wife's ongoing care of the child without financial and practical support from the husband;
- the s 75(2) factors weighed very heavily in the wife's favour.

⁴⁸ [1998] FamCA 90

In *Bradley v Weber*, the wife on appeal received 20% of the winnings, being an increase to \$225,000 from the \$125,000 ordered at trial. The wife in *Farmer* received a lesser percentage at trial, 15%, because Purdy J considered it relevant that:

- she had a shorter period for the future care of the child. The wife in *Bradley* had the care of two young children;
- the lottery win in *Bradley* of \$1,270,000 was received only six months after separation, whereas in *Farmer* it was received about 20 months after separation;
- there was a larger property pool.

The husband in *Farmer* appealed. His appeal was dismissed by a 2:1 majority, Guest J dissenting. The majority upheld the award of \$750,000 to the wife. Guest J would have given the wife only \$140,000, being \$50,000 for post-separation contributions to the child and \$90,000 for s 75(2) factors.

Finn J (with whom Kay J agreed in a separate judgment) considered that the wife “made a contribution generally to the marriage even though no direct contribution to the Lotto win”.⁴⁹ She considered the wife's contribution to be significant and said “life cannot have been all roses” for her. In relation to the assessment of the wife's contributions to the husband's post-separation Lotto win, Finn J said:

If it was to be determined that a majority of the community considered that one spouse should, as a general rule, have no entitlement to share in property either by good fortune or good management acquired after separation by the other spouse, then the Act would need to be amended to make this clear.⁵⁰

Guest J quoted favourably from *Hirst & Rosen*⁵¹ where Nygh J said that s 79 did “not entitle the Court to adopt ‘a soup kitchen’ approach”. Guest J expressed a view which was controversial at the time, that contributions required “fractional contemporaneity”:

The occurrence (or time) of the contribution to the welfare of the family and the actuality of property under consideration must either partially or substantially co-exist. Save in the circumstances to which I will later refer, a party cannot make a contribution of any complexion pursuant to the provisions of s 79(4)(a), (b) and (c) of the Act if the property at the time of that contribution was not in existence. For to say otherwise would invest the post-separation acquired property with a retrospective identity ... Although there need not be a specific nexus between the property and the contribution, they both must occupy the same time and space, that is, have parallel or fractional contemporaneity. If this were not so, it would disavow the clear law that the time at which a contribution was made to an asset or income is relevant. This is particularly germane in situations where a party has acquired an unexpected asset long after the

⁴⁹ at 87,945

⁵⁰ at 87,948

⁵¹ (1982) FLC 91-230 at 77,251

marriage had broken down and the parties had separated.⁵²

An interesting aspect of *Farmer* was that the hearing was almost five years after separation. If the proceedings in *Farmer* were heard immediately following separation, there would have been no property of any significance. The wife received credit for her contributions during the relationship and post-separation when the property did not exist. However, the same result could also have arguably been reached by the court in reliance on s 75(2) factors rather than on contributions.

Recent "windfall" cases

In *Jarrott & Jarrott (No 2)*⁵³ the Full Court made property orders following a successful appeal by the husband in *Jarrott & Jarrott*.⁵⁴ The Full Court did not accept that the trial judge erred by including the husband's post-separation inheritance of \$110,000 in the asset pool, but for the purpose of re-exercising her Honour's discretion, considered it preferable to treat the inheritance separately. In words which echoed those of Guest J in *Farmer*, the Full Court, consistently with the *Bonnici* and *Burke* line of authority, said:

That is because the inheritance was received after the separation of the parties, and the wife made no contribution, direct or indirect, financial or non-financial, to its acquisition, conservation or improvement. In those circumstances, however viewed, and at whichever "step" it is considered, the significance of the inheritance ultimately turns on its impact as a financial resource of the husband pursuant to s 75(2) of the Act.⁵⁵

The total pool, including the inheritance, was about \$2.18 million. The trial judge made a 5% adjustment in favour of the husband for post-separation contributions, largely consisting of his inheritance. This resulted in a disparity of 10% in his favour of \$200,000. The Full Court was not satisfied that this disparity was appropriate. Re-exercising the discretion, the Full Court excluded the inheritance from the pool and made a 2% adjustment for contributions - a dollar value of \$45,000 - making a disparity of \$90,000. It then made a s 75(2) adjustment in the wife's favour for the husband's post-separation inheritance. Other factors under s 75(2) favoured the wife (such as the majority care of two children), so a 10% s 75(2) adjustment was appropriate.

Interestingly, the outcome for the parties differed little after two Full Court hearings. While the husband was successful in his appeal, increasing his entitlements of the pool from 65% to 68% and quarantining his inheritance from the pool, the payment he made to the wife was reduced by about \$40,000 from \$765,000 to about \$722,000. His legal costs were surely greater than his

⁵² at 87,977

⁵³ [2012] FamCAFC 72

⁵⁴ [2012] FamCAFC 29

⁵⁵ at para 9

increased share of the pool.

In *Sinclair & Sinclair*⁵⁶ Cronin J found that about $\frac{3}{4}$ of the property pool of \$7.3 million was unrelated to the direct contributions of the parties, having come from the wife's father many years previously, after cohabitation commenced. The husband sought property of \$1.8 million. Cronin J assessed the husband's contributions as half of 25%, or 12.5%. From a pool of \$7.3 million his contribution-based entitlement was \$912,000. In considering s 75(2) factors, important matters were the disparity in the parties' capital and income-earning power. Standard of living was also a factor and a s 75(2) adjustment in favour of the husband would have little, if any, impact on the wife's standard of living, but would affect the husband's standard of living. Cronin J gave the husband a further \$200,000 to assist him secure housing and a future income stream.

Cronin J relied on a number of cases where a party receiving a post-separation inheritance was able to retain the bulk or all of the inheritance. These included:

- *Schirmer & Sharpe*.⁵⁷ All property was included in the pool, although the inheritance was received after separation. The husband received 10% for his contributions and a further 2.5% for s 75(2) factors. The husband's 12.5% of the pool was \$105,184. The total net property at the time of separation of \$9,000. By the time of the hearing the total net property was about \$833,333, primarily because of inheritances received by the wife in the 3 years post-separation. During the relationship the wife's parents provided the parties with virtually rent-free accommodation and after separation the husband paid little or no child support. The husband relied on Kay J's statement in *Aleksovksi* quoted above, but the Full Court did not see that this assisted him. The Full Court upheld the trial judge's decision.
- *Mistle & Mistle*.⁵⁸ At the time of separation the assets totalled \$4.2 million after a 23 year marriage. The husband received an inheritance of \$9.5 million after separation. Le Poer Trench J quarantined the inheritance and divided the \$4.2 million as to 80% to the wife and 20% to the husband.
- *Elgabri & Elgabri*.⁵⁹ Near the end of the 25 year marriage, the husband inherited \$527,000. Coleman J assessed the parties' contribution-based entitlements to the non-inherited assets valued at \$826,072 as 50%. He assessed the wife's contribution-based entitlements to the husband's inheritance as 5% and then gave the wife a further 7.5% as a s 75(2) adjustment of the non-inherited assets. The result was that the inheritance was quarantined, but the wife received about 60% of the non-inherited assets.

⁵⁶ [2012] FamCA 388

⁵⁷ (2005) FLC 93-213

⁵⁸ [2010] FamCA 29

⁵⁹ [2009] FamCA 227

Fielding

In *Fielding & Fielding*⁶⁰ Crisford J gave greater credit to the husband than to the wife for the contribution of a lottery win of about \$300,000. Although the wife had provided the husband with the \$30 to buy the winning Tattsлото ticket and physically collected the winnings, the parties saw the winnings as the husband's money. The attitudes of the parties to the buying of tickets, which they both bought from the same newsagency, were different. The owner of the newsagency which sold the ticket gave evidence. The husband regularly bought 12 to 25 game tickets whereas the wife spent no more than \$2 or \$3. The newsagent, his wife and the parties had a champagne celebration after the win at which there was a discussion about how the winnings were to be used. The newsagent knew that the winnings were to be paid into the husband's sister's bank account. The husband wanted to avoid payments to his creditors including to his former wife and for a business debt. The winnings were initially placed into the wife's account and an immediate payment was made towards the husband's outstanding child support and most of the balance was paid into his sister's account. The husband was the driving force behind using the funds to purchase a property in the name of his sister on trust for his children.

Crisford J found that the parties pooled their funds, at least to some extent, and apportioned a 65% contribution to the win to the husband and a 35% contribution to the wife. In relation to the property purchased in the name of the husband's sister, Crisford J found that it was held on a resulting trust in favour of the husband and the wife.

Eufrosin

In *Eufrosin & Eufrosin*,⁶¹ the husband argued that he had contributed to the wife's gambling win of \$5 million received six months after separation. There was uncertainty as to the source of the funds used to purchase the ticket. Stevenson J accepted that the source was the wife, rather than the husband:

A significant issue in the proceedings was whether the husband made any contribution to the \$5 million which the wife received from the gambling win. As noted, the wife had available funds from four sources when she purchased the winning ticket. The money could have come from funds provided by Ms W, money paid to her by Eufrosin Pty Limited and debited to her loan account, her own tax refund of \$6,000 or an unquantified sum being the return of Mr G's school fees. The money used by the wife to purchase the winning ticket could have come from any one of these sources or multiple combinations thereof. It is thus impossible to identify the precise source of the funds used by the wife to purchase the winning ticket. In my view, the husband cannot simply assert that the purchase money came from *'joint funds'*.⁶²

⁶⁰ [2012] FCWA 86

⁶¹ [2013] FamCA 311

⁶² at 106

Stevenson J agreed with the wife that it was “pure sophistry” to credit the husband with a contribution to the funds used for the purchase of the winning ticket. She referred with approval to the English decision of *S v AG*⁶³ where Justice Mostyn remarked:

The price of the ticket, £1 or £2, is so inconsequential as can be safely disregarded. Arguments that the £1 or £2 derives from the joint matrimonial economy are, it can be said, pure sophistry. The money could just as easily have been found on the pavement.⁶⁴

Stevenson J adopted a two pool approach. Pool 1 consisted of the assets, liabilities and financial resources at separation (although not necessarily at that value or quantum) and Pool 2 consisted of the assets, liabilities and financial resources representing the balance of the wife's share of the lottery win. The net property in Pool 1 were \$2,437,987 and in Pool 2 were \$3,368,530.

Stevenson J assessed the parties' contributions to Pool 1 as equal and that the husband made no contribution to Pool 2. No s 75(2) adjustment was made to Pool 1. The husband argued for a 33.3% (or \$1,111,615) adjustment in his favour in relation to Pool 2. The wife argued that it should be only 5% (or \$168,426). Section 75(2)(b) was relevant because as a result of the contributions assessment, the wife had over \$4.5 million and the husband, after a 20 year marriage with 2 adult children, had just over \$1.2 million. Stevenson J rejected both proposals and made an adjustment of \$500,000 out of Pool 2 to recognise the husband's future needs.

On appeal in *Eufrosin & Eufrosin*⁶⁵ the Full Court rejected the significant focus by the husband at trial on the source of funds used by the wife to purchase the winning ticket. The parties were living "separate" lives, including separate financial lives. The Full Court said:

That crucial matter, the importance of which is reinforced by the High Court in *Stanford*, renders reference to the sources of the funds or nomenclature such as “joint funds” or “matrimonial property” unhelpful in assessing what is just and equitable.⁶⁶

The Full Court said this approach was consistent with *Zyk* and *Anastasio* where the tickets were purchased during the relationship:

As this Court in *Zyk* made clear, the source of funds should not “determine the issue” of how a lottery win should be treated for s 79 purposes. What is relevant, in our view, is the nature of the parties' relationship at the time the lottery ticket was purchased. In our view, the authorities just cited, together with what was said by the High Court in *Stanford* regarding the “common use” of property, is sufficient to dispose of the husband's contention that her Honour erred in failing to find that he contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the “joint endeavour” that had been the parties' marriage had dissolved;

⁶³ [2011] EWHC 2637

⁶⁴ at para 11

⁶⁵ [2014] FamCAFC 191

⁶⁶ at para 8

there was no longer a “common use” of property. Rather, the parties were applying funds for their respective *individual* purposes.⁶⁷

The Full Court upheld the two pool approach and the orders made by the trial Judge.

Senno & Bailey

In *Senno v Bailey*⁶⁸ the defendant entered a competition and won a home. In 2014, the plaintiff sought leave to apply for orders for a property settlement under Part 3 *Property (Relationships) Act (NSW) 1984*, six years after the parties' separation. The parties elected for the leave application to be dealt with separately from the substantive application. The Court had to decide whether there was a reasonable claim to be heard including the strength of the claim.

The plaintiff referred to *Zyk & Zyk*⁶⁹ where the Full Court reviewed earlier cases and decided that the use of the term "windfall" was misleading and the appropriate term was "contributions". The defendant submitted that *Zyk* was of little use as the parties did not equally contribute to the competition and to its prize.

In *Senno v Bailey* no ticket was purchased, although the initial telephone call, which lead to the inclusion of the defendant in the selection process, was made on a telephone line for which the parties both paid. The competition required the defendant to watch *Neighbours* and listen to *2WS Radio*. At the end of each episode of *Neighbours*, there was a list of contestants' names on the screen. The defendant had to call *2WS Radio* within 30 minutes to verbally register after her name appeared as a contestant. She received a registration form in the mail which she completed and returned and then had to be present at Glenmore Park on the day of the draw. About 400 people were chosen and each had to select a key from a pot and see if the key opened a padlock on a door set up on a stage. The defendant was the 53rd person to try to open the door. Her key worked and she won a new house at Glenmore Park in New South Wales and a puppy. The house was transferred into the defendant's name and the parties lived there until separation. At separation, the defendant moved out and the plaintiff continued to occupy the house.

Macready AsJ found that the parties' relationship was a joint partnership. They both received income, and therefore, they jointly contributed to the cost of the telephone call. Although the home would not have been won if the defendant had not gone through the steps to secure the prize, it did not require her to use any skill. There was conflicting evidence about who drove the parties to the competition venue. The principles in *Zyk* might apply as the defendant entered the

⁶⁷ at para 11

⁶⁸ [2011] NSWSC 679

⁶⁹ (1995) FLC 92-644

competition for the parties' joint benefit. The prize should be considered as a contribution by both parties rather than a windfall to the defendant.

Macready AsJ referred to other authorities, such as *Waring v Ellis*⁷⁰ where the plaintiff had won \$500,000 in Lotto. Young CJ in *Waring v Ellis* decided that the moneys used for the ticket were the plaintiff's on the simple basis that the plaintiff bought the ticket and the proceeds were his. He rejected the defendant's claims that she bought the ticket or that the ticket was bought on the basis that they would share the winnings. The plaintiff deposited the proceeds into a newly opened joint account, thus allowing the money to be used for joint purposes. Young CJ referred to *Van Rassel v Kroon*⁷¹, in which Dixon CJ set out the general rule in relation to lottery tickets:

The person in whose name the lottery ticket issues obtains the legal title to what is a chose in action. If he is the applicant he obtains custody of the ticket and is in a position to exercise whatever rights the ticket confers and deal with it as he chooses.⁷²

In *Waring* it was relevant that the plaintiff placed the winnings into a joint account and allowed the winnings to be used for joint purposes such as holidays and the purchase of real estate, albeit that the property was purchased in the defendant's sole name. The winnings became joint funds. The plaintiff received a sum equivalent to 50% of the property purchased from the winnings plus some other amounts.

Singerson & Joans

In *Singerson & Joans*⁷³ the Full Court did not adopt the "fractional contemporaneity" approach of Guest J in *Farmer & Bramley*, Roberts J in *Elford* and the Full Court in *Eufrosin, Jarrott (No.2)* and *Fielding*. Although the Court took a "two pool" approach, the outcome was that the wife received a significant proportion of an inheritance, based on her contributions prior to it being received as well as her post-separation contributions. The husband's father died in February 2009, in the same month as, but just prior to the parties' separation. The husband received an inheritance of approximately \$3 million. During the marriage the wife made greater contributions to the responsibilities of caring for the children, and her financial contributions (except for the inheritance) were much greater. After initially working as a professional, she operated a successful business. The husband was retrenched in 1991 and suffered from depression from time to time in the years that followed. His employment since 2001 had been sporadic. Separation occurred 4 years prior to trial, during which period the parties shared the care of the children.

⁷⁰ [2005] NSWSC 467

⁷¹ [1953] HCA 3; (1953) 87 CLR 298

⁷² at 302

⁷³ [2014] FamCAFC 238

The trial judge's assessment was that the wife receive 60% of the property excluding the inheritance (valued at \$4,806,000) and a 20% share of the husband's inheritance (valued at \$2,619,105). This translated to the wife receiving 46% of the combined property and the husband receiving 54%. In practical terms, the wife retained \$3,408,000 and the husband retained \$4,017,000 of the total pool of \$7,425,000.

On appeal, the husband sought 40% of the property (excluding the inheritance) and to retain the balance of his inheritance. This equated to about 61% of all the property. The wife sought 65%, but her position before the Court was to seek 55% of all the property, including the inheritance.

The trial Judge adopted an asset by asset approach, but compared the ultimate result to outcomes based on other possible approaches including a global approach. The Full Court found that the trial Judge, in desiring to give the parties a speedy resolution by delivering judgment promptly after the end of the trial:

... intermingled his assessments on contributions with s 79(4)(e) matters when utilising a separate approach. In doing so we find he fell into the error identified by Nygh J of "mistaking the trees for the forest."⁷⁴

The relevant passage by Nygh J from *G & G*⁷⁵ (and approved by the Full Court in *Norbis v Norbis*⁷⁶) was quoted by the Full Court in *Singerson & Joans*:

At the moment the Family Court is divided between those who favour the so-called global approach and those, of whom I am one, who seek to achieve some degree of precision. In my view, despite what was said in *Norbis* [by the Full Court of the Family Court], both approaches are legitimate unless the High Court rules otherwise provided that those who take the global approach heed the warning that the origin and nature of the different assets ought to be considered and that those who favour the more precise approach do not mistake the trees for the forest, i.e. add up the individual items without standing back at the end to review the overall result in the light of the needs of the parties.⁷⁷

The Full Court found that the trial Judge used some expressions unwisely but accepted that an appellate court should not be overly critical of an *ex tempore* judgment given shortly after a hearing as a trial Judge should not be penalised for dispensing justice in a practical and timely fashion. However, the Full Court was critical of the manner in which the trial Judge assessed the wife's contributions to the husband's inheritance. It said:

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

⁷⁴ at para 45

⁷⁵ (1984) FLC 91-582

⁷⁶ (1986) FLC 91-712

⁷⁷ at para 43

which to assess contributions to the inheritance rather than across their 15 year relationship.

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.⁷⁸

The Full Court therefore impliedly dismissed any notion of a "fractional contemporaneity" being a requirement in the assessment of contributions and gave the wife 73% of the property excluding the inheritance, which was 47.5% of all the property including the inheritance, with the net result that the wife retained about \$3.6 m and the husband retained about \$3.9 million. The Full Court concluded that over a period of approximately 15 years cohabitation and a further 4 years between separation and the trial, the wife made significantly greater contributions to the property acquired prior to separation, both in a financial sense and as a homemaker and parent. The Full Court said:

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.

On this basis and utilising the trial judge's 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.

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.⁷⁹

The husband's position after the appeal was over \$100,000 worse than it was before (without taking legal costs into account).

Bishop

It is difficult to reconcile *Singerson & Joans* with such cases as *Eufrosin*. Perhaps the answer lies, unsatisfactorily for legal practitioners and clients, in the wide discretion which can be exercised under s 79 as emphasised by the Full Court in *Dickons & Dickons* and *Bolger & Heedon* quoted earlier in this paper. An example of this arose in *Bishop & Bishop*⁸⁰ where the

⁷⁸ at paras 65-66

⁷⁹ at paras 96-8

⁸⁰ (2013) FLC 93-553

court had to weigh up the husband's initial contribution and the wife's inheritance received later in the marriage. The trial judge considered he was constrained by the authority of *Bonnici*⁸¹ to leave the wife's inheritance out of the calculation of the pool. The Full Court said:

We agree ... that his Honour was not constrained by what the Full Court said in *Bonnici* about the treatment of inheritances. As the Full Court emphasised in that decision, and as we cannot emphasise too strongly, each case in this jurisdiction will depend on its own facts or circumstances.⁸²

The Full Court did not, however, interfere with the trial judge's decision on this ground, as taking the inheritance into account as a s 75(2) factor only, was an approach which was open to him.

The husband referred to the unfairness of the different treatment of his initial contribution in 1982 with the wife's inheritance received before separation. The Full Court said:

It is relevant to mention in this context that counsel for the husband endeavoured to persuade us that it was in some way inconsistent, or even unjust, that the wife's inheritance had been effectively quarantined, while the rural property which could be traced to an initial contribution by the husband was included in the so-called "asset pool", and that the husband's contribution of that property was ultimately given no greater weight than the wife's contributions to the parties' property (being property other than her inheritance and both parties' superannuation interests).

The difficulty with such an argument is that although the husband brought some rural property (subject to a mortgage) into the marriage, over the years of the marriage, that property, and the property subsequently acquired with the proceeds of sale of the first property, were used for the benefit of the family (as a home and a source of income), with the wife having made significant financial and non-financial contributions to both properties. On the other hand, the husband was found to have made no contribution to the wife's inheritance.

His Honour cannot be said to have been wrong in having treated, in what can be termed, separate categories, property to which both parties had contributed and property to which only one (or perhaps neither) had contributed. Whether each party's contributions to the property to which they had contributed were adequately recognised by his Honour is a different consideration, and is one to which we will return.⁸³

The appeal was allowed on other grounds. Comparing *Bishop* to *Bolger & Headon*, which appears to have similar facts, is not particularly helpful.

⁸¹ (1992) FLC 92-272

⁸² at para 28

⁸³ at paras 30-32

The latest word

Elford

*Elford & Elford*⁸⁴ involved a lottery win by the husband of \$622,842 in January 2004, about a year after cohabitation of slightly less than 10 years commenced. The husband had been using the same numbers since 1995 and always paid for the weekly tickets. He retained the winnings in a separate account, topped up by about \$27,000 from his savings and that sum of \$650,000 remained intact at the end of the marriage.

Roberts J distinguished the facts from those in *Anastasio & Anastasio*.⁸⁵ The husband in *Elford* never intended the weekly purchase of lottery tickets to be "a joint matrimonial purpose" of the type in *Anastasio*. Roberts J quoted from *Eufrosin & Eufrosin*⁸⁶ the passage which referred to the "common use" of property discussed in *Stanford v Stanford*.⁸⁷ He then said:

In my view, it is not only "*the nature of the parties' relationship at the time the lottery ticket was purchased*" that sets this case apart from so many of the decided "lottery winnings" cases; it is also the manner in which the husband and the wife conducted their financial affairs after those winnings were received by the husband in 2014. Those winnings were placed into an account in the husband's sole name and that is where they remain to this day. The parties also kept all their other finances separate for the entirety of their relationship.

In view of those circumstances, I consider it appropriate to treat the husband's lottery winnings of \$622,842 in January 2004 as a contribution by the husband alone.⁸⁸

The wife initially sought \$480,000 from the husband, but reduced her claim to \$360,000. The husband sought to pay her \$50,000 after initially seeking that her claim be wholly dismissed. At the time of trial the husband's assets were worth \$1,313,500 and the wife's were \$89,600. At the time of the lottery win and taking into account the win, their respective assets were \$1,158,000 and \$130,000.

Roberts J assessed the wife's contributions as 10%. Based on contributions and after taking into account \$14,800 used by the wife from the sale of shares to pay her legal costs, the husband would have to pay the wife \$51,000 to bring her proportion of the pool up to 10%. The husband was older, in poor health and effectively blind. The wife worked full time and had three children but the husband had no legal liability to support them. Their respective incomes were similar. No adjustment was made for s 75(2) factors. Roberts J effectively treated the husband's lottery win as Kay J's gold bar in *Aleksovski*.

⁸⁴ [2014] FCCA 2531

⁸⁵ (1981) FLC 91-093

⁸⁶ [2014] FamCAFC 91

⁸⁷ (2012) FLC 93-518

⁸⁸ at paras 53-4

Perhaps not surprisingly, the wife appealed. She failed, although as a majority the Full Court said:

Some or all of us **may** have reached a decision different to His Honour but that circumstance does not warrant appellate interference. In the absence of any demonstrable criteria by which it is said that His Honour's decisions [sic] was "plainly wrong", we are in the position of being asked to provide a "second opinion" as to the appropriate exercise of discretion. We are unable to persuade ourselves that the result is outside the parameters upon which reasonable judicial minds might differ.⁸⁹
[emphasis added]

Is superannuation treated differently?

Arguably, contributions made prior to cohabitation or after separation to superannuation are treated differently than other financial contributions. Although a formula approach to the assessment of contributions to superannuation was rejected by the Full Court in *M & M*⁹⁰ as being rarely useful, parts of superannuation entitlements are often quarantined in the assessment of contributions. The "erosion" principle does not seem to apply.

The Full Court found it impossible in *Linch & Linch*⁹¹ to discern how the trial judge arrived at 15% as the wife's contribution-based entitlement to the husband's pension entitlement. The husband's total period of membership and contribution to the fund included 19 years of pre-cohabitation membership compared with less than six years of membership during cohabitation. Although the wife was affected by the events post-2005 which led to the husband commencing sick leave in May 2009, it was the husband who was injured.

The Full Court was critical of the trial judge for a lack of adequate reasons in arriving at 15% as the contribution-based entitlement, but also for failing to "refer to, and more importantly, take into account the impact on the husband of that finding of 15%. That impact is the permanent reduction of the husband's future income."

The Full Court said the trial Judge also failed to consider "the other side of the coin". The wife was entitled to \$175,000 of the husband's superannuation but as his superannuation was an invalidity pension in the payment phase and was considered an unrestricted non-preserved fund, the wife could receive her entitlement in cash. She did not need to retain it in a superannuation fund of her own provided she met a condition of release. Although the trial judge made a traditional splitting order, it did not have the usual outcome. The husband would not have the same opportunity to receive a cash sum and had a limited expectation of receiving any significant lump sum by way of commutation.

⁸⁹ at para 64

⁹⁰ (2006) FLC 93-281

⁹¹ [2014] FamCAFC 69

As there were issues with respect to the valuation of a real property owned by the husband at the commencement of cohabitation, the matter was remitted for retrial.

In *Bevis & Bevis*⁹² after a 27-year relationship the parties had four children, one of whom was still under 18 at the time of trial. The two younger children were aged 10 and 16 at the time of separation five years previously. The parties had:

- superannuation, mostly in the husband's name, of \$750,000,
- equity of \$186,000 in a unit in the husband's name purchased using his inheritance of about \$280,000 received approximately two years after separation, and
- negligible other non-superannuation assets.

During cohabitation the husband had accumulated a substantial interest in a defined benefit fund of approximately \$426,000 together with a smaller accumulation fund of about \$39,000. The wife's superannuation was worth \$23,000 at the time of trial but there was no evidence of this value at the date of separation. The husband's superannuation entitlements had increased in value by \$261,606 during the period post-separation. He argued that he had contributed about \$80,000 by means of contributions by his employer as part of his salary package.

The trial judge stated that the husband had to be given credit for his direct financial contributions to superannuation but the situation was not clear cut. The wife had made indirect contributions to the husband's ability to put \$80,000 into his fund post-separation because she had made an indirect contribution to his income earning capacity. In addition, there were other forces such as interest on the funds or the effect of his years of service and salary level or both which had been at work with respect to the remainder of the increase. The trial judge considered that a 3% adjustment in the husband's favour (equal to about \$21,800) was a proportionate response to the husband's post-separation contributions and assessed contributions to the husband's superannuation as being 53% for the husband and 47% for the wife.

With respect to the wife's superannuation, the trial judge recorded that the wife had made a direct financial contribution to her entitlement after separation but to the extent that she was able to do so it was in part due to her education during the relationship in which she had received some support from the husband. The trial judge assessed contributions to the wife's superannuation as being in the proportions of 53% in favour of the wife and 47% by the husband.

⁹² [2014] FamCAFC147

The effect of the trial judge's findings in relation to contributions was that the husband was entitled to superannuation worth \$396,359 and the wife was entitled to superannuation worth \$345,188.

The trial judge made an order that the wife receive 50% of the husband's superannuation which gave her an additional 3% or about \$21,800 over and above her contribution based entitlement. She was also able to retain the whole of her own superannuation.

The Full Court dismissed the husband's appeal.

In *Ritter & Ritter*⁹³ there was unchallenged expert evidence as to the value of the husband's pension at the commencement of cohabitation. O'Reilly J quarantined this figure and gave the husband full credit for the dollar value of this contribution.

In *Boyle & Boyle*⁹⁴ Riley J reduced the amount of superannuation to be split with the wife by \$20,000 being an estimate of the husband's post separation employer contributions and interest, but considered that the wife contributed to the post separation growth as this was attributable to the fund manager managing the amount accrued during the relationship well.

Where are we now?

Fundamentally, Tattsлото wins, inheritances and similar "windfalls" are not a special category and should be dealt with like other contributions. In recent years, it is rare for a recipient to be able to completely quarantine a "windfall" regardless of when it was received. The Court is required, pursuant to s 79(4), to assess the contributions made by the parties to the property of the parties and adjust the legal and equitable interests of the parties taking into account relevant matters under s 79, including the s 75(2) factors.

Whilst an asset by asset approach may be used and thus reduce the non-recipient's entitlements on a contribution basis to the "windfall", the "windfall" should not be ignored and should be taken into account in the assessment of contributions. If the court takes a "fractional contemporaneity" approach and assesses the contributions by the other party to the "windfall" as non-existent, the "windfall" is likely to be a factor under s 75(2).

The timing of the receipt of the "windfall" may be relevant to whether or not the other party made contributions to it. The Full Court has said that in such cases as *Singerson & Joans*, *Dickons & Dickons* and *Bolger & Headon*, contributions should be assessed holistically and continues to expressly reject any notion that there is a requirement in the *Family Law Act* of "fractional

⁹³ [2014] FCCA 2640

⁹⁴ [2014] FCCA 2576

contemporaneity". Although the legal principles to be applied are apparently clear, an unstated requirement of "fractional contemporaneity" has been implied in some cases such as *Jarrott*, *Bishop*, *Sinclair*, *Fielding* and *Eufrosin*. The recent case of *Elford* is an example of the inheritance, despite it occurring during the relationship, being treated as a "gold bar". Furthermore, and in contrast to non-superannuation, a holistic approach in the assessment of contributions to superannuation is often not adopted.

When I presented an earlier version of this paper, I finished by saying that it would be helpful if the Full Court looked at the inconsistencies in the application of the guidelines for assessing contributions and gave further and consistent guidance as to how the principles are applied. The Full Court has now done this – following *Wallace & Manning*, practitioners should look at earlier cases carefully and present those to the court which most closely match the facts of the case with which they are dealing. It is not enough, however, to summarise the cases in table form. A careful analysis of the comparable cases is required. As the authorities on windfalls are not particularly consistent, you should be able to find one that suits the facts of your case and an outcome which is favourable to your client.

In summary, you should:

- Locate comparable cases and take particular note of factual differences and similarities;
- Look at whether the non-recipient made any direct contributions to the windfall – e.g source of funds;
- Look at contributions overall;
- Consider the timing of the contribution;
- Examine how the parties conducted their financial affairs;
- How was the windfall used – was it used by both parties?
- How did the parties see the windfall – did they see it as a joint windfall or the property of one of the parties?
- If you believe it can be considered to be quarantined from the rest of the property pool, is it still a financial resource which will affect the division of the non-quarantined property?