High Court to consider spousal maintenance

Jacky Campbell
Forte Family Lawyers

In a rare foray into the *Family Law Act 1975*, and an even rarer foray into the entitlements of parties to an order for spousal maintenance and particularly interim spousal maintenance, the High Court has granted special leave to the wife to appeal (*Hall v Hall* [2016] HCA Trans 23) against a decision of the Full Court of the Family Court.

The husband had been ordered by Dawe J to pay interim spousal maintenance to the wife. Dawe J later dismissed the husband's application to discharge this order. The husband appealed to the Full Court of the Family Court *inter alia* against both the interim order for maintenance and the dismissal of his application for discharge of the maintenance order.

Interim maintenance order

Dawe J ordered in *Hall & Hall* [2013] FamCA 975 that the husband pay maintenance to the wife of $10,833 per month, together with school fees and related expenses for the children. He was also paying the mortgage, rates, taxes and utilities on the former matrimonial home. His total payments for the wife and children were $28,000 per month.

At the time of the hearing in December 2013 when the interim maintenance order was made, the parties had only been separated since September 2013. The wife's application for interim maintenance was for urgent spousal maintenance under s 77 *Family Law Act 1975,* which has a lower threshold than the usual test for spousal maintenance:

> "Where, in proceedings with respect to the maintenance of a party to a marriage, it appears to the court that the party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable."

The usual test for spousal maintenance is in s 72(1) which provides:

> "A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason;
>
> having regard to any relevant matter referred to in subsection 75(2)."

The wife's father had died in 2009, but probate had not been granted. The wife did not produce a copy of her father's Will and she said she did not know the particulars of her late father's estate. Dawe J said (at paras 14-15):

> "Presently, therefore, the wife may be entitled to an asset or financial resource or income that is not known. However, it appears that it is not currently an asset which the Court can take into account as a basis upon which to offset the wife's claim to be presently unable to support herself adequately.
>
> Similarly, the unknown value of the wife's shareholding in her family's businesses at this interim stage does not form a sufficient basis upon which to offset the wife's interim claim."

The values of the husband's extensive business interests and real estate were also unknown. He did not deny that his income was $4 million per annum, although he claimed a taxable income of $80,340. The wife had a limited income.

Application to discharge maintenance order

The husband's applications to discharge the maintenance order and to discharge certain injunctions against him were heard in March 2014 by Dawe J and reported in *Hall & Hall* [2014] FamCA 406. His applications were on the grounds that:

- There was information to show that the wife had received, or would receive, shares from her late father's estate of the approximate value of $7.2 million and she was therefore able to support herself.
- The husband had recent information from the ATO which cautioned about him continuing to draw from the loan accounts against the various commercial entities, rather than disclose a greater taxable income.

The values of the husband's property interests were still unresolved and, in relation to the wife's interest in her deceased father's estate, there remained considerable dispute about what interest, if any, the wife had in her late father's estate.

Dawe J considered that the maintenance order should stand, and noted (at para 51):

> "If the husband is successful in his appeal and the order for spouse maintenance is set aside an appropriate adjustment will be capable of being made on final determination of the property settlement proceedings."

This statement was consistent with a similar statement Dawe J made in her reasons when she made the interim maintenance order. She dismissed the husband's applications.

Appeals to the Full Court of the Family Court

In *Hall & Hall* [2014] FamCA 154, Thackray, Strickland and Aldridge JJ dismissed the husband's appeal against the interim maintenance order but allowed the appeal against his application for the discharge of the interim maintenance order.

The Full Court was not prepared to draw the inferences that the husband sought in relation to the interim maintenance proceedings, based on the wife's failure to disclose her "assets" and her failure to call evidence as to the value of her shares and her interest in the estate of her late father. The husband argued that Dawe J should have inferred that the disclosure of those "assets" and the evidence of value "would not have supported her case that she could not support herself adequately". The Full Court considered that the urgent nature of the application and the short time between separation and the hearing affected whether those inferences could properly be drawn.

However, the Full Court was prepared to draw inferences in the other appeal and discharged the order for interim spousal maintenance on the grounds that:

1. Although Dawe J recognised that there was an application before her to discharge the spousal maintenance order, and there was new evidence in relation to the wife's shares, she failed to consider, and indeed make any finding as to whether there was sufficient new evidence before her to discharge the interim spousal maintenance order.

2. There was evidence before the court by that time that the wife was able to support herself adequately. There was an expression of wish in her late father's will that she should receive from the V Group an annual payment of $150,000, net of income tax, from the date of his death until she received payment from the V Group of an amount of $16.5 million.

The Full Court found in relation to the second of these grounds (at paras 151-153):

> "The evidence relied on is … that in the Will of the wife's late father he expressed the wish that V Group provide the wife with $150,000 per annum, net of income tax. To repeat, there is no evidence that the wife has requested this payment from her brothers, who it is common ground control V Group, or in particular, that any request that she has made for her father's wish to be carried out has been rejected. Indeed … the letter from the wife's brother … states that "[a]ny voluntary payment by [V] Group to [her] is entirely a matter for [V] Group and its Directors". Importantly, there is no suggestion here that there would be an objection by this brother to such a voluntary payment.
>
> The inference from the evidence is that, if requested, the wife would receive that benefit, and we make that finding.
>
> To also repeat, the evidence from where that inference can be made is that the wife has a good relationship with her brothers, it is a wish expressed in the Will of their late father and the brothers provide the wife with late models of luxury motor vehicles, possibly through the V Group (although that is unclear on the evidence)."

Application for leave to appeal to the High Court

The High Court granted leave to the wife to appeal, despite Dawe J's orders having been made in interim or interlocutory proceedings. When the High Court queried the utility of the appeal, the wife argued that the matter had not finally been set down for trial and a distinction had to be drawn between interlocutory matters going to practice and procedure and ones which determined substantive rights, as in this case. There was also an argument as to whether or not the wife was able to make a fresh application for interim spousal maintenance or was limited to only making a prospective application. If she was required to make a fresh application, the wife argued that maintenance could not be granted to her retrospectively to the date when the original interim order was made.

The crucial point before the High Court was whether an inference under *Jones v Dunkel* [1959] HCA 8; [1959] 101 CLR 298 could have been drawn in circumstances where the wife had not provided evidence to the Court. The inference drawn by the Full Court was that the wife would receive the money if she asked for it. However, the Full Court said that she did not have an entitlement as it was only a voluntary payment, and did not characterise it as a financial resource either.

Part of the wife's case before the High Court was that there was no evidence before the Family Court as to whether she was prepared to ask for the money or whether, if she asked for the money, she would receive it. The wife also contended that the Full Court had shifted the statutory responsibility of the husband to support his wife under s 72 *Family Law Act* and imposed that responsibility on the wife's brothers.

The husband contended that the interim maintenance order must be discharged in circumstances where the wife had not “chased up” her assets and had not brought forward evidence that she had done so. He also argued that the wife was content for his application to discharge the maintenance order to proceed on the basis of the trial Judge knowing that the wife had made no request for her payment and that the brothers had not taken a position one way or the other, even though she and her brothers knew that the terms of the Will were before the Court. The wife had run her case on the basis that she was prepared to let the Court draw inferences in a context where she had not provided information to the Court about her entitlements.

The husband argued that the wife now wanted an opportunity to carry out certain acts which might constitute evidence, but he said it was too late for her to do that. She had the opportunity to give that evidence beforehand and had chosen not to do so.

The High Court Appeal

It appears that in the appeal the High Court will have the opportunity to consider such matters as:

- Procedural fairness, including whether or not the wife had the opportunity to meet the assertion before the trial judge that she could receive $150,000 per annum from her father's estate;
- When can inferences be drawn in accordance with *Jones v Dunkel*?
- Was the right of the wife to ask for $150,000 per annum from her father's estate a financial resource?
- Could the wife demonstrate that she could not support herself when she might be able to be supported from her father's estate?

Maintenance orders are not made frequently in the Family Law Courts. They are probably under-utilised, so it is possible that the High Court's consideration of maintenance will have limited impact.

If, however, the High Court uses the opportunity - as it did in *Stanford & Stanford* (2012) FLC 93-518 - to make broader statements of principle, the impact could be far-reaching. The meaning of "financial resource" and the circumstances in which inferences can be drawn are two aspects of the appeal which have the potential to significantly affect other aspects of family law.

March 2016