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Hot cases in family law 2016

In the last 12 months or so there have been some significant cases under the *Family Law Act 1975*. Those dealt with in this article cover:

- Spousal maintenance
- The definition of "financial resource"
- A lottery win early in the marriage
- Grounds for setting aside financial agreements
- The standing of creditors and a trustee in bankruptcy to apply to set aside a financial agreement
- Whether a financial agreement can be both a s 90B and a s 90UC financial agreement
- Commercial surrogacy arrangements

High Court on spousal maintenance and financial resources – *Hall v Hall* (2016) FLC 93-709

In a rare foray into the *Family Law Act 1975* (FLA), and an even rarer foray into the entitlements of parties to an order for spousal maintenance and particularly interim spousal maintenance, the High Court granted special leave to the wife to appeal against a decision of the Full Court of the Family Court.

The High Court considered:

- The meaning of "financial resources" in s 75(2)(b), and particularly whether "financial resources" in s 75(2)(b) was confined to present legal entitlements; and
- Whether it was open on the evidence before the Full Court for it to find that the wife was able to support herself adequately within s 72.

The trial judge in *Hall & Hall (No 3)* [2013] Face 975 ordered that the husband pay to the wife interim spousal maintenance of $10,383 per month together with school fees and related expenses for the children. The husband 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 trial and in the appeals, the issue was not the husband's ability to pay spousal maintenance under s 72 FLA, but the ability of the wife to support herself.

The wife's father had died in 2009, but probate had not been granted. The wife had not produced a copy of her father's Will and she said she did not know the particulars of her late father's estate. There was no evidence before the court as to any asset, financial resource or income to which the wife might be entitled. The trial judge said that the absence of information about the nature and extent of any interest of the wife in the estate of her late father meant that no such interest could be take into account as a financial resource of the wife in determining the wife's application for maintenance.

The husband attempted to subpoena the Will of the wife's late father. The subpoena proceedings were reported as *Hall & Hall and Anor (Objection to subpoena)* [2014] FamCA

407. The objections were dismissed. An affidavit was sworn by a solicitor acting for one of the brothers and filed in support of the brother's opposition to disclosure of the Will. The solicitor said there were concerns for the personal safety of the family and for that reason an application for probate had not been made and the production of the Will was opposed.

The property dealt with in the Will included shares in companies within the V Group. The V Group was one of the largest business enterprises in South Australia. Under the Will, all of the father's shares were given to the wife's brothers and none were given to the wife apart from some which she had received prior to her father's death.

One clause of the Will related to the wife. The wife's father expressed the "wish" that the wife should receive from the V Group a lump sum payment of $16,500,000 on the first to occur of a number of specified events. One of the specified events was that the wife and the husband divorced. The father also expressed a "wish" that the wife should receive from the V Group annual payments of $150,000 CPI indexed until the date (if any) that the lump sum payment of $16,500,000 was made. The husband's case in the High Court concentrated on the "wish" for annual payments of $150,000 to the wife.

The wife deposed that she had recently spoken to one of her brothers who had explained the contents of the Will to her. She stated that she had "not received any income or capital payment from my late father's estate."

The husband applied to discharge the maintenance order under s 83(1)(c) to discharge the order on the basis that there was "just cause for so doing". These proceedings were reported as *Hall & Hall (No 3)* [2014] FamCA 406. His application was dismissed.

The husband sought leave to appeal to the Full Court of the Family Court. At the hearing in the Full Court, which was reported as *Hall & Hall* [2015] FamCAFC 154, the wife adduced further evidence, being a letter from one of her brothers explaining that neither the $150,000 annual payments nor the lump sum payment of $16,500,000 were to be paid to the wife and that as executor the brother had no obligation to the wife in respect of these amounts. The letter re-emphasised the voluntary nature of the payments as wishes of the wife's father.

The Full Court found there was evidence that demonstrated that the wife was able to support herself adequately as she would have received the payments of $150,000 per annum from her brothers if she requested it. There was nothing in the evidence to suggest that any such request, if made, would have been denied. The Full Court considered that the fact that her brothers had provided her with luxury motor vehicles indicated that she had a good relationship with them.

The Full Court granted the husband leave to appeal, allowed the appeal and discharged the interim maintenance order retrospectively from the date the maintenance order was made - over one and a half years previously.

The wife sought leave to appeal to the High Court. She had two broad grounds of appeal:

- A failure of process
- Substantive reasoning

The failure of process argument was that the wife's ability to request the V Group to make a voluntary annual payment to her was not raised by the husband at first instance. She said that she had met and defeated his argument that she had a legal entitlement to the payment. If it had been apparent that the husband was alleging that she was able to request that the V

Group make a voluntary annual payment, she would have placed further evidence before the court on that issue.

The substantive reasoning argument was:

(a) It was not open on the evidence to infer that the voluntary annual payment would have been made to her if she requested it.

(b) Even if it was established that the voluntary annual payment would have been made to her if she requested it, that did not constitute a proper basis for concluding that she was able to support herself adequately within the meaning of s 72(1). Her ability to obtain a voluntary payment by asking for it was not a "financial resource" within the meaning of s 75(2)(b) and the Full Court did not and could not form an opinion that it was a fact or circumstance which the justice of the case required to be taken into account so as to bring it within s 75(2)(o).

The High Court majority rejected the failure of process argument. There was no ambiguity in the husband's argument before the Full Court that the inference should be drawn that the annual payment of $150,000 would be given to the wife if she chose to ask her brothers for it. The inference was more readily drawn given the wife's failure to adduce evidence about it. The wife was fully aware of the risks of running her case on the basis she did.

The term "financial resources" was defined by the High Court, so as to extend to potential sources of financial support if the factual inquiry supported that the source could reasonably be expected to be forthcoming were the party to call on it. The majority said (at para 56):

> "Here, on the Full Court's finding of fact, the annual payment from the Group was a financial resource of the wife so as to be a matter within s 75(2)(b). The payment was available to her if she asked for it. The availability of the payment was the subject of specific provision in the father's will. The making of the payment was at least a moral obligation of the wife's brothers, who were in any case well-disposed towards her."

The High Court majority found that the annual payment was also relevant under s 75(2)(o), saying (at para 58):

> "Because it bore centrally on the ability of the wife to support herself adequately, the availability to the wife of the annual payment from the Group was also a fact or circumstance in respect of which it was open to the Family Court to form the opinion that the justice of the case required that it be taken into account."

The emphasis by the High Court on the "moral obligation" of the wife's brothers was curious, given the criticism expressed by the High Court majority in *Stanford v Stanford* (2012) FLC 93-518 about the Full Court of the Family Court's finding (at para 12 of the High Court) that :

> "… the many years of marriage [of the parties] and the wife's contributions demand that those moral obligations be discharged by an order for property settlement."

The High Court majority said in *Stanford* (at para 52):

> "Whether it was just and equitable to make a property settlement order in this case was not answered by pointing to moral obligations. Reference to "moral" claims or obligations is at the very least apt to mislead."

It is difficult to reconcile the attitude of the High Court to moral claims in *Hall* with those expressed in *Stanford*. Although the High Court was dealing with a property claim under s 79 in *Stanford*, and in *Hall* it was dealing with whether a maintenance order ought to have been

discharged, the wording of the relevant legislative provisions in both cases made reference to it being "just" and there was a legislative pathway for the court to follow in each case which did not include "moral" obligations of the parties or third parties.

There was a strong dissenting judgment by Gordon J in *Hall*. Matters which Gordon J said (at paras 72–78) counted against the drawing of the inference were:

- The wife was not provided with a copy of the Will when her father died;
- The wife was not provided with a copy of the Will when she asked for one after separation;
- The wife had not received any income or capital from her father's estate;
- The brothers' conduct suggested an unwillingness to disclose the contents of the Will to the wife and to comply with their father's stated wish in relation to their sister;
- There is a difference between having a good relationship with someone and being willing to give them large sums of money on a regular basis;
- At best, if the wife made a request for payment, that was only an "intermediate step" to the payment being made;
- There was a distinction between the capacity of the Group to pay and the willingness of the brothers to cause it to pay; and
- A finding that two luxury vehicles had been purchased by the brothers personally for the wife was different to the Group making a voluntary annual indexed payment of $150,000 net of tax.

Justice Gordon concluded (at para 91):

> "However, it cannot be said that the father's wish ... was a source of financial support which, if the wife requested, the wife could reasonably expect would be available to her to supply a financial need."

The proceedings in the Family Court continued after the High Court decision. The husband applied unsuccessfully to discharge the orders that the wife have sole use of the former matrimonial home and that he pay the outgoings of the home. These proceedings were reported in *Hall & Hall (No 4)* [2016] FamCA 746. The husband asserted that the financial circumstances of the wife had changed because the contents of the Will were known, and that the wife was entitled to a gift of $16.5 million and annual payments of $150,000. The wife relied upon material annexed to her most recent affidavit which clearly indicated that the executor of her father's estate and her brothers who controlled the V Group, would not make the voluntary payments to the wife. The trial Judge found that the financial resources to which the husband referred (the wife's entitlement or financial resource arising from her late father's estate) were not available to the wife at that time.

Lottery win during a relationship – *Elford & Elford* (2016) FLC 93-694

Elford & Elford 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. He topped it up with savings of $27,000 and the sum of $650,000 remained intact in the husband's bank account at the end of the marriage. At the start of the relationship, before the lottery win, the wife had superannuation and non-superannuation property of about $130,000 and the husband had $535,000. The net pool at the end of the relationship was about $1.4 million.

The trial judge found that the Wife was entitled to 10% of the pool. The husband in *Elford* never intended the weekly purchase of lottery tickets to be "a joint matrimonial purpose". Judge Roberts 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."

The Full Court dismissed the appeal.

Roberts J effectively treated the husband's lottery win as Kay J's gold bar in *Aleksovksi & Aleksovski* (1996) FLC 92-705. The Full Court said that the trial Judge's approach was consistent with *Eufrosin & Eufrosin* [2014] FamCAFC 191, although in that case the wife's lottery win was after separation.

So, what does *Elford* mean for the erosion principle? Has the principle that over time, initial contributions lose value, itself been eroded? Have such cases as *Bonnici & Bonnici* (1992) FLC 92-272, *Burke & Burke* (1993) FLC 92-356 and *Pierce & Pierce* (1998) FLC 92-844 been over-ruled?

The approach taken by the trial Judge in *Elford* is similar to that of Justice Guest in a dissenting, notorious judgment in *Farmer & Bramley* (2000) FLC 93-060 where he said:

> "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."

In *Elford* the early contribution of the lottery win by the husband was not offset by any later contributions of the wife. The finding of fact that the parties kept their finances quite separate during the relationship, and to a large degree, their finances, was very important. This is also consistent with the asset by asset approach of *Norbis v Norbis* (1986) FLC 91-712. For a recent instance of the more usual global or holistic approach to contributions by the Full Court see *Singerson & Joans* [2014] FamCAFC 28.

Latest developments in financial agreements – *Saintclaire & Saintclair*e (2015) FLC 93-684, *Piper & Mueller* (2015) FLC 93-686 and *Kennedy & Thorne* (2016) FLC 93-737

Saintclaire

The Full Court over-turned the trial judge's decision that the agreement was not binding for technical deficiencies and should also be set aside for undue influence and unconscionable conduct.

The Full Court found the errors were a mutual mistake and that the true intention of the parties was plainly evident. The agreement was intended to be a s 90C agreement - which is made during a marriage - but instead it was described in the certificates and the recitals as a s 90B agreement – which is made before a marriage. The Full Court distinguished other cases where the Full Court had found that this type of error in a certificate could not be rectified, so there is some inconsistency in the case law in this area.

As the wife's postnatal depression had resolved about 11 months prior to the agreement being executed, the Full Court said it was not relevant to the wife's argument that there had been undue influence. In addition, the Full Court found that the husband had an intimate

knowledge of the stresses under which the wife laboured, but those "stresses" (such as her indebtedness) did not amount to a "special disadvantage" and nothing about the husband's negotiating with knowledge of them amounted to unconscionable conduct.

The Full Court found that the trial judge was in error in not distinguishing between "actual undue influence" and "unconscionable conduct". Although the Full Court did not say this, many of the reported cases do not distinguish very well between the different requirements of duress, undue influence and unconscionable conduct. Some of the requirements are overlapping, but *Saintclaire* is a warning to plead these grounds carefully.

The Full Court was satisfied that the intention of the parties was plainly evident and drew a distinction between the facts in that case and *Senior & Anderson* (2011) FLC 93-470, but it is certainly not clear that the earlier case has been over-ruled. See also *Raleigh & Raleigh* [2016] FamCA 625, a decision of Justice Watts.

Piper & Mueller

The agreement purported to be under both s 90B and s 90UC. The Full Court upheld the trial judge's finding that the agreement was binding.

Ryan and Aldridge JJ said (at paras 32,34):

> "Here, the parties were in a de facto relationship and thus entitled to enter into a financial agreement under s 90UC. They were also contemplating marriage by reason of which they were entitled to enter into a financial agreement pursuant to s 90B…
>
> Thus, it is possible for parties to enter into an agreement under s 90UC which is binding and operates while they continue in a de facto relationship and by operation of law ends immediately upon their marriage. On the other hand, a s 90B financial agreement only comes into operation when the parties marry. The two agreements therefore are complimentary, not exclusionary. Both may be binding on the parties from the time of execution but, as we have explained, only one can have operative effect."

The Full Court suggested that it is possible to have a combined agreement, although the Full Court only needed to find in that case that the agreement was binding during a de facto relationship, not that it was binding after the parties were married as they never married. It is, therefore, possible to have two separate agreements in the one agreement. However, to meet the advice requirements of both types of agreement in the one agreement is, in the writer's view, still a challenge.

Kennedy & Thorne

The wife argued she signed the agreement under duress. At all times she was financially and emotionally dependant on the husband. She had permanently left and cut her ties with country B, but was in Australia only on a limited visa. The husband told the wife that if she did not sign the agreement, the wedding was off. He told the wife and her solicitor that the agreement was non-negotiable. The wife was advised by her lawyer both verbally and in writing not to sign the agreement. The wife signed, and she also signed a second agreement in similar terms to the first one after the wedding. The wife's position had not changed. She was again advised not to sign, but she did so.

The Full Court said (at paras 163, 165, 167):

> "There is no doubt that the wife was reliant on the husband both financially and emotionally, and she looked to him to provide for and to care for her, but the husband met that expectation, and the wife accepted it. Thus, that cannot be seen as an element of illegitimate or unlawful pressure …
>
> In relation to the agreements specifically, the fact that the husband required an agreement before entering the marriage cannot be a basis for finding duress. Nor can the fact that a second agreement was required. Further, … the wife's concern was not as to what would happen to her financially whilst the husband was alive, but as to what would happen if he died. That was her focus, and that was dealt with to her satisfaction in the agreements …
>
> However, the real difficulty for the wife in establishing duress is that she was provided with independent legal advice about the agreements, she was advised not to sign them, but she went ahead regardless."

The Full Court said that a finding of financial inequality could never provide a reasoned basis for duress. The correct test for duress is whether there is "threatened or actual unlawful conduct", and not the test identified by the trial judge. There needed to be a finding that the "pressure" was "illegitimate" or "unlawful". It is not sufficient that the pressure may be overwhelming and that there is "compulsion" or "absence of choice".

Relevantly, the trial judge found that the wife's concerns lay in what provision would be made for her in the event the husband pre-deceased her, and not what she would receive upon separation. The agreements provided for the wife to receive what she sought in that regard.

There are lessons from *Kennedy & Thorne*:

- There is a need to distinguish properly between duress and undue influence, and apply the correct test;
- It is more difficult ,and may be impossible, to argue that duress can exist where there has been independent legal advice;
- The "temporary visa" cases with respect to duress may be in doubt. These include *Blackmore & Webber* [2009] FMCAfam154 and *Moreno & Moreno* [2009] FMCAfam 1109.

Bankruptcy and setting aside financial agreements – *Grainger & Bloomfield and Anor* (2015) FLC 93-677

In *Official Trustee in Bankruptcy & Galanis* [2014] FamCA 832, Justice Rees found that the trustee in bankruptcy of a discharged bankrupt did not have standing under s 90K(1)(aa) *FLA* to apply to set aside a financial agreement made subsequent to the bankrupt's discharge. Even if the husband was still bankrupt, Rees J's interpretation of s 90K(1)(aa) meant that the outcome would have been the same. The trustee appealed. An application for the hearing of the appeal to be expedited was dismissed in *Official Trustee in Bankruptcy & Galanis* [2015] FamCAFC 212.

In *Grainger & Bloomfield* the Full Court considered similar issues. The creditor, Ms Bloomfield, sought to set aside a financial agreement. Did she have standing? Section 90K(1)(aa) refers to creditors. The Full Court found Ms Bloomfield had standing to apply to set aside the agreement under the *Family Law Act* despite the bankruptcy. Interestingly, trustees in bankruptcy do not have standing, and must presumably rely upon their rights under the *Bankruptcy Act 1966*.

There may be implications for s 75(2)(ha) in property settlement and maintenance applications as that section refers to "creditors" and not to trustees in bankruptcy.

The "baby Gammy" case dealing with commercial surrogacy. What happened to baby Pipah? – *Farnell & Anor and Chanbua* (2016) FLC 93-700

This case received much media attention. The surrogate, Mrs Chanbua, gave birth to twins in Thailand. Gammy remained with the surrogate but Pipah came back to Australia with the commissioning parents. The surrogate applied to the Family Court of Western Australia for Pipah to live with her, Gammy and her husband in Thailand. She was motivated in part by her discovery that Mr Farnell, the commissioning father, was a convicted paedophile.

In making his decision Chief Justice Thackray recognised that Gammy appeared to be thriving in the care of Mrs Chanbua and her extended family. However, in relation to Pipah, who by that stage was aged almost 2 ½, he said (at para 66):

> "I have decided that Pipah should not be removed from the only family she has ever known, in order to be placed with people who would be total strangers to her, even though I accept they would love her and would do everything they could to care for all her needs."

The Family Court of Western Australia made orders giving the commissioning parents, the Farnells, equal shared parental responsibility of Pipah and for Pipah to live with them. However, Thackray CJ found that Pipah was not a child of their marriage and that the State law applied to Pipah's parentage. The Registrar of Births Deaths & Marriages was directed to register Pipah's birth to show her surname as that of Mrs Chanbua's maiden name, and her parents as Mrs Chanbua and Mrs Chanbua's husband. The Registrar was permitted to record on the birth certificate, if he considered it appropriate, that the Farnells had equal shared parental responsibility.

The surrogate/birth mother, Mrs Chanbua, and the Farnells are required to keep each other informed about Pipah's welfare and the Farnells are required to engage Pipah in important Buddhist events. The Farnells may, if they wish, provide Mrs Chanbua with copies of Pipah's school reports, photographs of themselves and Pipah and presents for Gammy. Contact between the two families electronically or face-to-face is as agreed between the families from time to time.

A safety plan was put in place for Pipah, given Mr Farnell's history of child sexual abuse. Thackray CJ could do this in the same case as the FLA proceedings as the Family Court of Western Australia, unlike the Family Court of Australia, can exercise state child protection jurisdiction. Thackray CJ did not, however, consider that there was significant risk of Mr Farnell re-offending as the offences for which he had been convicted had occurred many years ago, and if he had re-offended since, it was likely that given the publicity to the case, the victims would have made police reports.

Thackray CJ debunked some media myths. He found that the Farnells:

- did not abandon Gammy in Thailand;
- did not seek to access Gammy's trust fund for Pipah's welfare needs or to meet their legal costs;
- never applied to the court for access to Gammy's trust fund for any purpose.

However, Thackray CJ was not prepared to find that, even for a short time, the Farnells did not consider an abortion or contemplate pulling out of the arrangement. He could not make that finding as the Farnells refused to allow their lawyer to view their emails. Thackray CJ

was somewhat sympathetic to the Farnells on this issue, given the invasion of their privacy which had already occurred, but he assumed that there were matters in their emails that the Farnells did not want known.

The Farnells were also found to have lied about the source of the egg. It was a donor egg, not one of Mrs Farnell's. In late October 2016, it was reported in the media (not in this judgment) that no charges will be laid against the Farnells for perjury as it was not in the public interest.

Thackray CJ expressed some strong views on surrogacy:

- If he had heard the case earlier he might have decided that it was in Pipah's best interests to live with her birth mother and twin brother;
- "The appalling outcome of Gammy and Pipah being separated has brought commercial surrogacy into the spotlight";
- "The dilemmas that arise when the reproductive capacities of women are turned into saleable commodities";
- "Surrogate mothers are not baby-growing machines … They are flesh and blood women who can develop bonds with their unborn children";
- There was a lack of evidence of long-term impact on birth mothers, the children themselves and the other children of birth mothers;
- "I accept it is for others to decide whether the manifest evils associated with overseas commercial surrogacy can be overcome by importing the problem into Australia";
- There is a lack of alignment of immigration laws (which give citizenship to children born of overseas commercial surrogacy arrangements citizenship) and state laws with respect to parenting and birth certificates.

The Baby Gammy case demonstrated how complex overseas surrogacy arrangements are, and some of the many things that can go wrong. One matter for certain is that the parties that entered into the arrangement now have an ongoing relationship and ties which they never envisaged. It is also a further example of a case where a Family Law Court was not prepared to just rubber-stamp children born of overseas commercial surrogacy arrangements as being in a child's best interests. The case was heard over 7 days and resulted in a lengthy judgment of 190 pages.

The introduction of procedural and evidentiary requirements into the *Family Law Rules*, combined with the strong statements of judges in several cases, including the Baby Gammy case, are a reminder that parents should not embark on overseas surrogacy arrangements thinking that they are guaranteed to obtain parenting orders in Australia.