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Family Court proceedings are fraught enough as it is with the emotional issues involved. But the necessity of splitting assets etc frequently brings in tax and superannuation issues … and therefore much complexity (and more emotional angst). A recent Family Court case has highlighted the importance the Court attached to a report prepared by a financial planner. It is worth noting.

The financial planner's report was found to be reliable evidence of the intentions of the clients in *Hampton & Farley & Ors* [2013] FamCA 213 (Coleman J, 5 April 2013). This case also illustrated the importance of clearly identifying the client.

The best interests obligations in the *Corporations Amendment (Future of Financial Advice) Act 2012* ("the FoFA reforms") are mandatory from 1 July 2013. It is however beyond the scope of this article to consider the impact of the FoFA reforms, if any, to financial planners in circumstances similar to those of the financial planner in this case.

Background

Mr and Mrs Farley Snr separated after a de facto relationship of about 10 years. Mr Farley Senior ("the husband") and Mr Farley Junior ("the son") were equal partners in a farming partnership and had equal shares in a corporation which owned farming land. The husband had been married before and the son was from that marriage. The wife brought an application under the *Family Law Act 1975* for an order altering the husband's property interests.

The wife proposed that the husband pay her approximately $1m by:

- personally, or through the partnership or corporation, paying her cash of $463,000. She was prepared to accept payment by instalments; and
- splitting his interest in the Farley and Son Pty Ltd Superannuation Fund (an SMSF) so as to give her a base amount of $537,000.

The husband, the son, the partnership and the corporation argued that the husband did not beneficially own the farming land or the farming business, even though he was registered as a legal co-owner of both.

The son sought orders along the following lines:

- A declaration that there was an agreement that the husband would, in consideration of the son working in the farming business almost exclusively, and allowing the husband to work in other enterprises, transfer all his right, title and interest in the farming business to the son.

- A declaration that the husband held on constructive trust for the son all of his right title and interest in the farming business.

- Alternatively, a declaration that the husband was estopped (or prevented) from:

  (a) denying the existence of the agreement, and/or

  (b) denying the existence of the constructive trust which arose from the agreement.

The husband sought an order that he pay the wife the sum of $150,000 in full satisfaction of her claims against him, the partnership, the corporation and the superannuation fund. Although it was not clear how he would satisfy her claims, he wanted to avoid the realisation of any corporate assets or of any real estate. The husband otherwise sought orders in identical terms to the son.

The asset pool

The wife submitted that the net assets of the parties were worth about $2.4m. The most significant component of this was the husband's valuation of the legal interest in the partnership at about $1.2m, which he said he held beneficially for the son.

If the husband and the son were correct, the "property of the parties" available for the Family Court to divide between the husband and the wife, was only valued at about $690,000.

The parties agreed that the husband's interest in the superannuation fund was worth $549,726 and the wife's interest was $17,245. The Court was asked to treat the superannuation interests as "property". Although superannuation is not "property", it can be "treated as property" under s 90SM(2) of the Family Law Act. Coleman J said it was clearly appropriate to do so, particularly as the wife, being retired and over her preservation age, was able to access any entitlement she was awarded by way of splitting order (see *Coghlan and Coghlan* [2005] FamCA 429).

In relation to the non-superannuation pool, Coleman J said (at para 26):

"*It is both logical, and necessary, in the circumstances, to first determine the beneficial ownership of the husband's interest in the partnership and the corporation*".

This approach accords with the High Court's recent statements in *Stanford v Stanford* [2012] HCA 52 where the majority said that the first step or preliminary step of the process of making a property settlement is (at para 37):

"*First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to 'altering the interests of the parties to the marriage in the property'* [emphasis added]. *The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order*."

Although *Stanford* refers to making a property settlement order under s 79, which applies to legally married couples, this aspect of *Stanford* is also applicable to making property settlement orders under s 90SM between de facto couples.

The financial planner's report

In 2004, 5 years prior to the separation, the financial planner gave verbal advice to the husband and the wife as well as to the son and his wife. However, the written report made it clear that the advice was only given to the husband and the son. The report said, in relation to the circumstances of the husband and the son:

"We are preparing this plan for both the husband and the son as many of their assets are held jointly".

In relation to "your objectives", the financial planner stated in the report:

"We understand that if either the husband or the son were to die their land holdings and business assets are to remain in the Farley bloodline ie: for the benefit of the children and grandchildren.

Both the husband and the son would like the wife and the son's wife looked after by leaving assets other than farm and business to them.

Specifically, the husband would like the wife to have the options remaining in their home as she wishes. He would also like to provide approximately $500,000 from his estate to her to fund her living costs. The husband is currently considering how to accumulate this amount either in Superannuation cash or life insurance.

The son wishes to leave his wife $900,000 to cover her living costs. This will most likely be funded by insurance ...

You are currently considering your wishes in the unlikely event that yourselves and your children were to pass away at the same time".

The broad wishes of the 4 participants in the financial planning meeting were listed as:

"1. To preserve the assets that you have accumulated.

2. Ensure that your beneficiaries are adequately provided for in the event of your death.

3. To consider avenues available for protection of the capital from claims either by creditors or other family members.

4. To take advantage of available tax planning opportunities.

In essence you wish to ensure that in the event of your death there will be an orderly (and tax efficient) transfer of assets to your beneficiaries".

The report made recommendations as to how to implement the "objectives", the first of which was that the husband and his son have new Wills prepared. The husband made a Will which reflected the financial planning report. In his Will, he gave $500,000 to the wife, which to the extent possible, was to be paid from his superannuation fund. The wife was also to have a life interest in the homestead building and curtilage (ie not in the farming land).

The report made no recommendations about what would occur in the event of a separation of either of the 2 couples involved. Coleman J said (at para 143):

"*It is tempting to speculate about why that was so, but the Court cannot, and does not so speculate*".

Coleman J considered that the financial planning report carried significant weight, saying (at para 58):

"*The financial planning report however, prepared as it was five years prior to the separation of the husband and wife, and at a time when the evidence does not suggest there to have been any basis for scepticism about the continuation of the relationship between the husband and wife, provides a more reliable reflection of the intentions of the parties than does evidence of those matters seven years later, and at a time when each party has a vested interest in suggesting a particular version of events*".

Outcome

The Family Court found that the husband did not have a beneficial interest as a partner in the partnership or as a shareholder in the corporation. However, he had legal interests, being loan accounts in both, which meant that the net property pool was greater than he and the son contended. The Court found that the property pool was about $1.3m.

The Court ordered that the husband and the son do all acts necessary to transfer the real property to the husband and the son and and/or to the corporation upon trust:

- for the husband as life tenant;
- for the son in remainder.

The Court was able to make orders requiring the son to do these things as he was a party to the proceedings.

The Court ordered that the husband split his superannuation entitlement of about $550,000 so as to give $500,000 to the wife. She effectively received this as cash as she was retired and over her preservation age.

It is important to reflect that a report of a financial planner may be evidence in family law litigation, which means that the financial planner may be called to give evidence as to the client's legal and equitable interests and any advice given. A financial planner needs to be clear when giving advice, of the limits of that advice, including which client is being advised. Financial planning reports can clearly have life outside of the immediate financial needs of the client(s).