FORTÉ
FAMILY LAWYERS

MAINTENANCE

Hall, the High Court and spousal maintenance

JACKY CAMPBELL, AUGUST 2016

The High Court considered spousal maintenance and the term “financial resources” in *Hall v Hall* (2016) FLC 93-709. An earlier article discussing the decisions of the trial judge and the Full Court in detail and can be read here.

Overview

The High Court, in *Hall*, considered:

- The meaning of “financial resources” in s 75(2)(b) *Family Law Act 1975* (“FLA”);
- Whether it was open on the evidence before the Full Court for it to find that the wife was able to support herself adequately; and
- Whether “financial resources” was confined to present legal entitlements.

The majority judges were French CJ, Gageler, Keene and Nettle JJ, but there was a strong dissent by Justice Gordon.

The wife's appeal to the High Court was from an order of the Full Court of the Family Court which discharged an interim maintenance order in her favour. Although the order was described by the trial Judge as having been made on an urgent basis under s 77, in subsequent proceedings the parties treated it as an interim order under s 74(1).

The High Court majority was critical of the delays in the proceedings, noting that an objective of s 97(3) FLA is that the proceedings are “not protracted” and an objective under r 1.04 of the *Family Law Rules 2004* is that “each case is resolved in a just and timely manner”.

Prerequisites for a maintenance order

The High Court majority outlined the legislative prerequisites for making a spousal maintenance order under Pt VIII of the FLA.

Section 72(1) is the “gateway” to the operation of spousal maintenance. It provides that:

> “[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... having regard to any relevant matter referred to in [s] 75(2).”

The liability of a party to a marriage to maintain the other party is imposed by s 72(1), and is crystallised by the making of an order under s 74(1). Section 74(1) provides that:

> “[i]n proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with this Part.”

A court exercising the power conferred by s 74(1) is obliged by s 75(1) to take into account the matters referred to in s 75(2). This “comprehensive checklist” includes, relevantly for this case:

> s 75(2)(b) – “the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment”
>
> s 75(2)(o) – “any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.”

The High Court distinguished between permanent orders, interim orders and urgent orders.

Prerequisites for discharging an order

There is also the power under s 83(1)(c) to discharge the order “if there is any just cause for so doing”.

This imports a need for the court to be satisfied of circumstances which justify the court considering the threshold requirement again (*Astbury & Astbury* (1978) FLC 90-494). The court must find “just cause” on the basis of the wording of the Act (although these cases were not referred to by the High Court, see *Wreford & Caley* [2010] FamCAFC 21 at para 56 and *Lutzke & Lutzke* (1979) FLC 90-714). For the purpose of considering whether to discharge an order, the court is specifically required to have regard to ss 72 and 75 and the applicant for discharge of the order can re-open examination of the threshold requirement of s 72(1).

Circumstances of the parties

The parties were married for 12 years and had two children. The husband was a property developer and the wife was a medical practitioner. Their respective incomes were not discussed by the High Court, but it was accepted in the lower courts that the wife could not support herself adequately from her own earnings. At trial she was earning $300 per week.

The wife disclosed in her sworn documents in November 2013 that she was the owner of two luxury motor vehicles which had been purchased for her by her brothers. She also disclosed that she had an “interest” in the estate of her late father, the value of which was not known to her. Her father had died four years previously, having started the family business in which she had never had an active role. The business was run through a corporate structure controlled by her brothers. She did not have a copy of her father's will and did not know the particulars of her father's estate.

The husband deposed to his net worth as being $21 million and his taxable income as $80,340, with unspecified drawings “from various entities as and when needed”.

The trial judge ordered that the husband pay to the wife the sum of $10,833 per month by way of spousal maintenance pending the final determination of the proceeding.

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 trial judge found that she was satisfied on the evidence as to the wife's need for maintenance and the husband's ability to pay.

The terms of the wife's father's will

After the delivery of the judgment, the husband attempted to subpoena the Will of the wife's late father. These proceedings were reported as *Hall & Hall* [2016] FamCA 143. The husband was unsuccessful, but 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 an annual payment of $150,000 until the date (if any) that the lump sum payment of $16,500,000 was made.

Application to discharge the maintenance order

Based on the disclosure by the wife's brother's solicitor as to the terms of the Will insofar as they related to the wife, the husband filed an application to discharge the interim maintenance order. He relied on the "benefit" of the annual payment which her deceased father had conferred on the wife.

In response, the wife filed an affidavit setting out 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" but did not say whether or not she had requested payment from the V Group in accordance with the wishes expressed by her father in the Will.

The trial judge delivered judgment 3 months later, dismissing the husband's application. This was reported as *Hall & Hall (No.3)* [2014] FamCA 406. The reasons made no reference to the evidence or the issue about whether or not the wife might be able to obtain the annual payment of $150,000 from the V Group.

Delays in appeal to the Full Court

The husband's application for leave to appeal to the Full Court was lodged in July 2014. The application was heard in November 2014 and judgment in relation to both the application for leave and the appeal itself, was delivered in August 2015. The High Court majority said the delay was unexplained and on any view, the delay was unacceptable. Section 97(3) FLA states:

> "In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted."

This was described by the High Court as an "objective" and was linked to r 1.04 *Family Law Rules 2004*, which states:

> "The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties that is reasonable in the circumstances of the case."

Decision of the Full Court of the Family Court

At the hearing before the Full Court the wife adduced further evidence, being a letter from one of her brothers explaining that neither the $150,000 nor the 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 stated as wishes of the wife's father.

The Full Court found that the trial Judge erred in failing "to consider, and indeed make any finding as to whether there was sufficient new evidence before her to discharge the interim spousal maintenance order" (at para 131 of the Full Court and para 29 of the High Court).

The Full Court found there was evidence that demonstrated that the wife was able to support herself adequately as she would have received the payment 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.

Appeal to the High Court

The wife appealed to the High Court on the following grounds:

1. A failure of process - the wife's ability to request the V Group to make a voluntary annual payment to her was not raised by the husband on appeal at first instance. She said that she had met the 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 Group make a voluntary annual payment, she would have placed further evidence before the court on that issue.

2. Substantive reasoning:

   (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 husband contended that the annual payment of $150,000 was not voluntary but was an equitable obligation. The High Court found that it was unnecessary for it to address that argument.

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 majority said (at para 44):

> "Throughout the proceedings, at first instance and on appeal, the wife was on notice of the risk of a finding being made that she would have received the annual payment of $150,000 if she had asked her brothers for it. The fair inference is that she chose to run that risk, hoping that it would not eventuate and conscious that such evidence relevant to that finding as she might adduce would not assist her case."

The finding was open

The Full Court majority found that it was open on the evidence before the Family Court for the court to find that the wife would have received the $150,000 annual payment if she asked for it. Although she had not received it since her father's death, the reasons for this failure were wholly unexplored. That evidentiary gap was within the power of the wife to fill and her failure to lead evidence allowed the inference to be drawn that such explanation as she was able to provide would not have assisted her case.

The High Court majority described (at para 47) the affidavit of the brother's solicitor and the letter from the brother as being "cleverly worded". The documents were "most informative in what they do not say: that the Group … was inclined not to pay".

As the brothers had received the benefit of their father's testamentary largesse, the High Court majority said (at para 46) that:

> "… the brothers were at least under a moral obligation to honour their father's wish that the wife receive the payments from the Group", to which he had referred in the Will. The Group undoubtedly had the wherewithal to make the payments, and there was no evidence to suggest amorality or personal animus on the part of any of the three brothers which might in turn suggest that they might not fulfil that moral obligation."

The finding that the wife would have received the payment if she asked for it was relevant under both s 75(2)(b) and s 75(2)(o).

Moral Obligation

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 that (at para 12 of the High Court):

> “… 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. First, such references appear to invite circular reasoning. On its face, the invocation of moral claims or obligations assumes rather than demonstrates the existence of a legal right to a property settlement order and further assumes that the extent of that claim or obligation can and should be measured by reference to the several matters identified in s 79(4) … Moreover, if the word “moral” was being used in this context with some wider meaning or application, it is important to recognise that it is used in a way that finds no *legal* foundation in the Act or elsewhere. It is, therefore, a term that may, and in this case did, mislead. The rights of the parties were to be determined according to law, not by reference to other, non-legal considerations.”

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 pathway for the court to follow in each case which did not include “moral” obligations of the parties or third parties.

What is a financial resource?

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 High Court majority said (at paras 54-56):

> “The reference to "financial resources" in the context of s 75(2)(b) has long been correctly interpreted by the Family Court to refer to "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency" (*Kelly & Kelly (No.2)* (1981) FLC 91-108). The requirement that the financial resource be that "of" a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support. Thus, it has long correctly been recognised that a nominated beneficiary of a discretionary trust, who has no control over the trustee but who has a reasonable expectation that the trustee's discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation (*Kelly & Kelly (No.2)* (1981) FLC 91-108).
>
> Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.
>
> 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."

Dissenting judgment

Gordon J gave a strong dissenting judgment. He summarised the facts and matters on which the inference was drawn (at para 7):

> "1. The wife had a "good relationship" with her brothers;
>
> 2. The father's Will expressed a "wish" in relation to an annual payment;
>
> 3. The brothers had provided the wife with late-model luxury motor vehicles;
>
> 4. The wife had not requested that a payment be made in accordance with the "wish" in the father's Will, and
>
> 5. The brothers had not rejected such a request and there was no suggestion that the brother who was the executor would object to such a voluntary payment."

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 had 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.

He said (at para 76) that the brothers' conduct did not support a finding that they would have caused the V Group to make a payment to the wife if requested.

> "On the contrary, their conduct suggested an unwillingness to disclose the contents of the Will to the wife and an unwillingness to comply with their father's stated wish in relation to the wife, their sister. In this respect, the wife's position stands in stark contrast to the position of a beneficiary of a discretionary trust who has no control over the trustee but has a reasonable expectation, by reference to past distributions, that the trustee's discretion will be exercised in their favour."

Gordon J used the same definition of “financial resources” as the majority. He agreed that it was not confined to the present legal entitlements of the parties and extended to include "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency". (*Kelly & Kelly (No.2)* (1981) FLC 91-108; see also *Kennon v Spry* (2008) FLC 93-388). He disagreed with the High Court majority in the application of that proposition to the present circumstances, saying (at para 91):

> “However, it cannot be said that the father's wish (for an annual payment to the wife, which had not been effected by the brothers or the V Group in the more than four years since the father's death) 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.”

He concluded that as the wife had no right to a payment, the wife asking for a payment was not more pressing and persuasive than her father's formally recorded wish. The brothers had been unwilling even to provide the Will to the wife, so there was no basis to infer that the wife's request would tip the balance in favour of the brothers making the payment.

Conclusion

The High Court majority in *Hall* possibly broadened the interpretation of a “financial resource” by finding that a “wish” expressed in a Will of a third party could amount to a financial resource and used to establish that a party to a marriage has the ability to support themselves and therefore is not entitled to maintenance from their spouse. The High Court majority was satisfied that the finding was open to the Full Court of the Family Court that the wife would have received the voluntary annual payment from her brothers if she asked for it. The moral obligation of the brothers was given weight.

The High Court majority drew an analogy between the rights of a discretionary beneficiary of a trust and the right of the wife to ask for a payment to be made to her pursuant to a wish expressed in Will that she receive annual payments.

By contrast, in a strong dissenting judgment, Gordon J rejected the broader interpretation of “financial resources” relied upon by the majority and the notion that the finding that the voluntary payment would have been made to the wife if she had asked for it. He distinguished her position from that of the beneficiary of a trust.

The application of *Hall* to future cases is difficult to discern. On the one hand, the majority said it was applying existing law as to the definition of a “financial resource”. On the other hand, the majority, if not broadening the definition of “financial resources”, applied it in somewhat surprising circumstances where there was little, if any, evidence that the wife had a reasonable expectation that the payment would be made if she asked for it.

The clearest message from the decision is that there are risks involved in running a case and not adducing evidence which might prove a point one way or another. In this case, the wife did not ask her brothers to make the voluntary payment and therefore could not and did not give evidence as to the response she received from **her brothers to** her request. Both the Full Court of the Family Court and a majority of the High Court were able to draw conclusions which were unfavourable to the wife because of the gap in the evidence.