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OVERVIEW OF CHANGES IN THE LAW

Hot cases in family law 2016

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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 - Hall
- The definition of “financial resource”
- Life expectancy - Fontana
- A lottery win early in the marriage
- Add-backs
- Bankruptcy basics
- Whether a financial agreement can be both a s 90B and a s 90UC financial agreement
- Redundancies, LSL and personal injury damages
- Valuing funds in the payment phase
- Campbell

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.