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Family Law Case Update #4: Property

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Shakir & Shakir [2014] FamCA 796

Coram: Justice Watts

Registry: Sydney

Facts

- The matter concerned both property and parenting arrangements.
- Total net assets and liabilities= \$2,259,384.00
- Parties married in 1994, their first child M was born in 2006 (8 years) and the second child was born in 2008 (5 years).
- The parties separated on a final basis on 30 June 2012.
- When the parties started living together, the wife worked as a graduate at a major bank. The husband was working self-employed in a retail business.
- The husband took a year off his employment to obtain a vocational certificate.
- He continued working self-employed until 2010 for a demolition company. He then suffered a cardiac arrest and was hospitalised for 6 days and then had to undergo rehabilitation. From 2011 to January 2012, husband was employed as duty manager at an entertainment venue working 12 hour night shifts 3 days per week.
- When the husband had surgery on 19 August 2011 the wife paid for this.
- The wife alleges the husband was fired in January 2012 but husband says he resigned.
- Husband also had a history of taking drugs and had a criminal conviction.
- The wife took five and a half months maternity leave after her first child was born and the child was then placed in fulltime care whilst mum returned to work. The wife took a further 6 months off on maternity leave after birth of second child.
- Between 2007 and 2012 the wife employed a number of au pairs who lived in the household and from 2009 the wife employed a fulltime nanny.



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- The parties separated between December and March 2007 and 26 February until June 2012, prior to the final separation. Each time the husband left the matrimonial home.
- After the parties separated, the husband moved into his sister's home.
- Wife, at the time of trial, was a highly paid senior executive manager.
- The children primarily lived with the father.
- Parties had agreed on assessment of contributions as to 65% to wife and 35% to husband.
- Husband not working, Husband lived with Mr Y and children. Mr Y was in critical health and awaiting a heart transplant. Husband received a carers pension in relation to Mr Y.

Property Issues

Treatment of Wife's IPO Share rights as financial resource or asset.

Reasons and Decision

IPO - Treatment by the Court

- The share rights arose from the float of her employer company on the ASX in 2014.
- After the float of the wife's employer company she was offered new terms of employment, as part of those terms the wife was granted share rights to a value of \$500,000 as at the date of the employment contract 22 April 2014.
- The rights were expressed to be subject to vesting conditions i.e. receipt of several tranches on 2016, 2017 and 2018.
- The IPO rights are not transferrable or saleable.
- Wife had no plans to leave her current employer.
- Concluded that the wife's IPO share rights were "property".
- The value of the shares was uncertain as such the Judge took the approach that the settlement would be deferred until after the anniversary dates of each of the share tranches.

Contributions

Husband initially contributed overseas land worth \$39K and shares in family construction company.

Wife had no substantial assets.



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Wife's financial contributions based on incomes alone have been substantially greater than the husband's and equated to a disparity of more than \$2.2 million between 2007 and 2012.

Wife said she paid all of the parties' mortgage repayments and the equity in certain properties allowed the husband to draw on the mortgage to pay for business expenses.

From 1994 until 1998 the parties lived in a property owned by Company D - the husband's extended family's company. The parties didn't pay rent.

Between 2008 and 2012 the parties resided with Mr Y on a rent free basis, the Wife alleged she paid \$10K to Mr Y in 2008.

Judge did not accept husband was primary carer of the parties' children.

Judge accepted that the wife made significant contribution as homemaker and parent during the marriage.

Judge accepted that the wife was responsible for the housework that the au pairs and nanny did not do.

Wife significant contributions post separation to maintain and acquire assets to support family.

Finding as to contributions 65% - 35% in the wife's favour.

335. *During final submissions, both parties contended that a finding should be made that contributions were made as to 65 per cent by the wife and 35 per cent by the husband. The difference between the parties' positions was that the wife's submission related to a pool of assets that did not include her IPO share rights, whereas the husband's submission was that the contribution finding should also apply to that property. I have found the share rights are property.*

336. *The wife gained these rights as a result of her work for X Company over a twenty year period (the parties were together for 18 years of that time). Over the time of her advancement in the company, she honed her skills. The duration of time over which she did that is of particular relevance (see [61] in Hoffman & Hoffman [2014] FamCAFC 92). I do not accept the submission by counsel for the wife that because the IPO grant was two years after the separation the husband cannot point to any relevant contribution. All the contributions the husband has made across the twenty years both pre and post separation are relevant (see Farmer & Bramley [2000] FamCA 1615; [2000] FLC 93-060 particularly Finn J at [56] and [57]).*

337. *I find that it is not appropriate to treat the wife's IPO share rights any differently to other assets when considering assessing contributions to them.*

338. *The husband should receive 35 per cent of the value of the wife's share rights by way of contribution.*



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Adjustment

- The Judge found there should be a 20% adjustment in favour of the husband.
- Based on the discrepancy between the parties financial resources.
- Husband had care of Mr Y, who could only walk for six minutes - he could not drive and could not function around the home.
- Evidence demonstrated the husband had failed to exercise his earning capacity.
- Judge found that Mr Y was a financial resource for the husband - and that the husband in time would receive \$208K from a Trust of which the husband was found to be the sole beneficiary
- Wife's superior earning capacity was the "most weighty" factor in considering any adjustment.

Maintenance

- The husband overestimated his expenses.
- Further, based on what the husband would receive under the settlement, the Court found that the husband had the capacity to pay for his reasonable needs from that settlement.

Orders

- Husband be paid all monies in the controlled money account
- Wife pay to husband \$691,847 in cash.
- There be a split from Ms Shakir's superannuation fund of \$170,984 to the husband.
- IPO Orders:

20. On or before each of 30 June 2016, 30 June 2017 and 30 June 2018 the wife pay to the husband an amount calculated by multiplying 62,893 x 55 percent x the share price of the shares in X Australia Ltd ("X") as at 23 May 2016, 23 May 2017 and 23 May 2018 respectively after deducting from each of these three amounts the liability the wife has to pay taxation referable to her receiving 62,893 shares in X (the wife's taxation liability) at those dates respectively.

21. On or before 23 May 2016, 23 May 2017 and 23 May 2018 the wife will inform the husband in writing as to the amount of the proposed payment to



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him and how the amount of that payment has been calculated. In the event there is any dispute about those calculations and in particular the relevant share price or the taxation payable, the parties shall agree upon an expert to advise about those matters and failing agreement it shall be Mr MM from MM Associates Pty Ltd or his nominee.

- Spousal maintenance orders dismissed - that is no further adjustment was considered appropriate for spousal maintenance due to the factors outlined above.
- In relation to non-superannuation assets, the end result was a 55/45 division of assets in the husband's favour.

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