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Family Law Case Update #8: Property

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Elgin & Elgin [2014] FamCA 10

Coram: Justice Forrest

Registry: Brisbane

Facts

- Parties met in mid-1950s and married in 1960. Husband was 20 years old and wife 19 years old.
- Separated in June 2009 after relationship of 49 years.
- Three children born 1961, 1964 and 1971. Two now have their own child at time of trial.
- After married Husband started to manufacture and install EF products. Business succeeded and grew.
- Wife employed until married and then took up role of parenting couple's children and making their home
- When the children got older the wife owned and ran a small retail business where they lived
- In 1970 moved to Gold Coast, EF products business had grown national and in early 1990 the business was sold.
- Using the capital from this sale parties undertook first property development on Gold Coast, which took off and husband has since been developing property with great success.
- Wife also received an inheritance of \$1.3 million in 2003.
- Husband says he should receive 70% and the wife 30%.
- Wife seeks 52% to her and 48% to the husband.

Findings as to Property Pool

Agreed property

- In excess of \$40 million
- Apartment D, E Gold coast - \$2 million
- Apartment Melbourne \$1.45 million
- Apartment Melbourne \$1.95
- Suburb FG Queensland House \$346,282 equity

Property on which TJ made findings

- Wife's Savings \$170,994
- Wife's interest in company H Pty Ltd - \$609,679
- Husband's superannuation \$454,958



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- household furniture nominal
- Inclusion - Gold Coast units - \$425,000 and \$365,000, Apartment B - \$1.1 million - Husband alleged that these properties were gifts to his new wife - TJ not persuaded this was case and included in pool
- Inclusion of J Elgin Family Trust - Accepted husband's evidence he played little role in the trust, and as such this was excluded as property of the husband and an order made for husband transfer his control to his son.
- Inclusion of Husband's shares in company R Pty LTd - hub and son J Elgin own the two shares and are directors. Husband's evidence was that he held his share in the company on behalf of his son pursuant to an arrangements that had been in place for years - husband said that he had started company for his son and all profits went to him. Husband did not raise this as an issue prior to Trial. Commented "The husband has been represented throughout by very experienced family lawyers. If those matters were not within their knowledge, they should have been" [81]
- Inclusion of interest of Elgin Family Trust in Elgin Development Trust, valued expert as \$1.178 million - Husband said had not put any \$\$ into the trust, cannot accept that husband had no interest. - included value of \$1.8 million. TJ deducted loans recorded as assets on balance sheet - based on evidence from H these amounts were unlikely to be repaid.
- Elgin Finance Pty Ltd (dispute certain items in balance sheet) - single expert valued at \$38 million as at 30 June 2011. Amounts deducted to represent assets H gave evidence about that were unlikely to be repaid, as with evidence related to R Pty Ltd and Elgin Fa Trust he said many of the loans recorded were to friends/family in need and he would not be seeking the loans repayment or did not believe the loans would be repaid. Reducing value to \$35 million.
- Elgin Unit Trust - valued at \$10,562,000, loans again that will not be repaid, adjust value by deducting \$1,355,179

"The Husband said in his oral evidence in chief that these balance sheet entries represent money given to family friends or acquaintances in need, or money advanced over many years to entities owned by the parties' three adult children. He gave evidence that none of them would be recovered." para [120]

- T Unit Trust - valued at \$413,000, deducting loan of \$29K from amount
- Town IJ Property Development - unsold lots value \$5,940,600.
- Stage ZA of Town IJ Property development - gross total of \$5,616,000 for 52 lots. Deduction of \$1,996,812 referable to bringing Stage ZA up to handover.
- Commissions paid in respect sales of lots in Town IJ development between 1 July 2011 and 15 May 2012 - \$802,102
- S Unit Trust (33 unsold units in a development undertaken at Town JK) - \$9,937,775

Summary - found property of parties comes to \$44,319,922.



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Decision:

4". *What principally brings these two people to this Court is their current inability to agree on how that wealth should be divided. After having assured the Wife around the time of their separation that their wealth would be divided equally between them, the Husband says to this Court that it should be divided as to 70 per cent to him and as to 30 per cent to the Wife. For the Husband, it is submitted that this would justly and equitably reflect the disparity in their contributions over the years. The Wife seeks that their wealth be divided as to 52.5 per cent to her and as to 48.5 per cent to the Husband. For the Wife, it is submitted that this would justly and equitably reflect an equality of contribution throughout the years with a slight weighting in her favour to take account of her inheritance of \$1.3 million dollars in 2003.*

5. *I will be dividing the wealth of the parties equally between them. I will be making orders that I consider appropriately give effect to such a division having regard to my determination as to the actual property interests of the parties and the values that should be ascribed to them. I am, in all the circumstances of this case, satisfied that it is just and equitable to make the orders that I will be making to give effect to such a division."*

Evidence regarding the division of roles was essentially agreed between the parties. After their children reached adulthood - father sold off his company and started up property development business which became valuable.

Wife continued to be homemaker and also contributed \$1.3 million

Relevant to the case was the husband's support of his new wife, who had two daughters from her former marriage and then had a child with the husband.

Husband had already put several hundred thousand dollars into his new wife's failing business.

"Whilst the Wife capably and almost single-handedly performed the homemaking/parenting role, the Husband devoted himself to working hard in the business that was created. The totality of their efforts produced "success"; that is, if nurturing three children to happy, healthy and productive adulthood and developing a business into a very valuable, national organisation equates to "success". Whilst I acknowledge that "success" is a value laden concept, my own assessment of current community values is that achievement of these things just described, generally, are considered to be measures of success." para [178]

"The Husband's position advanced at trial is founded on the submission that up until the time when their youngest child became independent the parties' contributions would be assessed as equal. In essence, his submission is that then the Wife's contributions in the role of parent and homemaker changed dramatically, whilst he continued to contribute to the production of income and great wealth. His submission, as I understand it in simple terms, is that as his contributions, since the 1990's, have been productive of that great wealth and the Wife's have not, the weighing of their respective contributions throughout the 49 years of their marriage



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and in the years since their separation, should result in the substantial imbalance in his favour that the proposed 70/30 division reflects." [182]

Judge considered that although Court does not start from a place of equality, was conscious that contributions to welfare of the family need to "be recognised in a substantial and not merely token way" [184]

184. *"Although I am quite conscious of the clear authoritative rejection of the existence of a presumption of equality as a starting point in the assessment of contributions in this discretionary exercise, I am equally conscious of the authoritative pronouncement of the following propositions that go to informing the discretion (whether they are correctly described as "values" or otherwise):*

- *contributions by a spouse to the welfare of the family, including as a homemaker and a parent, should be recognized in a substantial and not merely in a token way;*
- *no nexus between a spouse's contribution and a specific item of property is required when the parties' contributions are being considered; and*
- *marriage is and should be regarded as a genuine partnership to which each party brings different gifts and when one party's efforts produce great wealth that is no reason, in itself, to disadvantage the other party."*

185. *"Having regard to these propositions, I respectfully agree with the view expressed by my judicial colleague, Cronin J, in Bulleen & Bulleen [\[2010\] FamCA 187](#); [\(2010\) 43 Fam LR 489](#) that to retrospectively distinguish between the value of the roles respectively adopted by the parties in the course of a very long marriage, who saw themselves as equals, merging their lives and each contributing to their common goals to the best of their abilities, is something fraught with the risk of injustice."*

Mention of "special skill" [187] *"Counsel for the Husband rightfully eschewed any argument that his client's contributions were made with "special skills" that should be given greater weight than the contributions of the Wife in the assessment of their contributions overall. As each party appeared to accept, there is little room for such argument in this Court any more."*

Court considered that Wife's contributions as homemaker and parent continued in a different form after the children had left home. The Court did not consider it was appropriate to apply a further adjustment in favour of the wife due to her contribution of \$1.3 million.



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Orders

- Husband pay to the wife sum of \$15,432,457
- Husband transfer to wife properties (A to G) in Gold coast and Melbourne
- Wife transfer to husband all her shareholdings, any right title or interest and any entitlement she has in entities set out in schedule to these orders (approximately 30) including self-managed superannuation funds, charitable trusts, unit trusts and family trusts
- Husband relinquish control of the Elgin Family Trust in favour of his son

192. *Equality of division of all of the property interests will result in each of the parties retaining or receiving property that I have determined to be valued at \$22,159,961 at the time of the trial. Given the fact that the parties are 74 and 73 years old respectively, I am quite satisfied that such a sum is more than sufficient to meet all of the needs of each of them for as long as each shall live, that is, even taking into account that the Husband is now fully supporting a new wife who is still a young woman, that women's own two children and their own young child.*

The \$22 million figure included the wife's superannuation interest in her self-managed fund.

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