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Family Law Case Update #3: Property

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Hoffman & Hoffman [2014] FamCAFC 92

Coram: Faulks DCJ, Murphy and Watts JJ

Registry: Full Court - Sydney

An appeal from the then Federal Magistrates Court - Brewster FM.

Facts:

- Total property pool of approximately \$10 million.
- The parties had lived together for 36 years.
- Husband and wife each brought a property into the relationship. The husband - a flat and the wife - a house subject to a mortgage.
- The husband was a professional carrying on his own practice. The wife worked in the husband's practice until 1992, when she worked in the Public Service.
- The wife had raised the parties' four children.
- Husband argued special contributions at first instance, where Brewster indicated at para 36 of his judgment: *"Plainly the list of authorities provided by the husband indicates that my views are not shared by a number of judges of the Family Court and any appeal from my judgement may well be successful."*
- Husband argued that his special contributions derived from his assertions before the FM and before the Court that his "special skills and entrepreneurial flair" in property "acquisition, development and value adding" were instrumental in the parties having the real property which they did and says that he exercised "special skills and entrepreneurial flair and ingenuity in selecting, maintaining and trading shares...", para [7]
- Despite this Brewster FM had made orders, providing for an equal split of the parties' property, which resulted in the husband having to pay to the wife a cash sum of \$3 million and each party otherwise retained all property in their possession.

Grounds of Appeal (Issues)

- His Honour was bound to apply the principle of "Special Contributions" and his failure to do so amounted to an error of law;
- His Honour's discretion miscarried by failing to recognise and/or apply a principle of "special contributions";
- His Honour failed to take into account a relevant consideration namely the husband's "special skills and entrepreneurial flair".

Reasoning and Decision of Full Court

- Para 35 of Brewster FM: *"where the Court is dealing with a situation where there is a long marriage with children and where the parties have made contributions in different spheres it is usually inappropriate to give greater weight to one party's contribution than those of the other...There have been exceptions to this approach however. These have been in what are often call "big money cases"...then an adjustment has sometimes been made to reflect what is often termed the "special contribution"*
- Brewster FM - said did not need to follow *Mallet & Mallet* [1984] HCA 21 and *Marriage of Ferraro* [1992] FamCA 64 and that there was no binding rule as to 'special contributions'.
- "If in using the words "the principle (if it be a principle) of special contributions" (at [37]), the Federal Magistrate intended to hold that there is no "binding rule of law" of special contributions, we respectfully agree" (Para 29)
- To the extend the husband's grounds and arguments suggest that the Federal Magistrate erred in law by failing to recognise and/or apply a binding rule of law pertaining to "special contributions", they should in our view be dismissed by reference to the principles just outlined." Para 30
- Discussed decision of *Norbis*, role of Full Court to make guidelines and although may not amount to error not to follow a guideline, *"the failure to apply a legitimate guideline to a situation to which it is applicable may...throw a question mark over the trial judge's decision and ease the appellant's burden of showing it is wrong"* (para 35)

Is "Special Contributions" a legitimate guideline?

- The Full Court on establishing a guideline: *"the essential inquiry, however, is not one of categorisation or labelling; rather the task is to assess relevantly, whether the authorities reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion the sense earlier outlined."* (Para 45)
- The special contributions is not a legitimate guideline *"...if descriptors such as "special contributions" (or whatever adjective or noun are used to similar effect) are capable of expressing a principle applicable across all cases, or a particular category of case, the factual findings necessary to satisfy the epithet "special" or "extra" must be readily identifiable. They are not"* (Para 49)

- *Ferraro & Ferraro* the Full Court points to as the origin of "special contribution".
- *"It is in our view entirely impossible to articulate any other characteristic that might underpin any guideline relating to "special contributions" or what contributions with "special factors" might be. Any such categorisation, in our view, ignores the gender neutral language of s79...and is predisposed to discriminate against a spouse on the basis of roles which have been agreed (expressly or by evolution over time) within a legal institution which is, in the case of marriage defined to be the "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" and which in the case of de facto partners, requires a "couple living together on a genuine domestic basis" (Para 55)*

Special Skills as a relevant consideration

- *"The error, if there be one, is established by a failure to take account of a particular contribution or contributions made by the husband" (Para 75)*
- *The husband's challenge rests substantially on the existence of "special contributions" as something relevant of itself in the assessment of contributions. For the reasons earlier given, that argument should be rejected. The reasons must reflect an adequate consideration of all matters relevant to the exercise of the wide discretion inherent in [s 79](#) and his Honour's reasons do so adequately. para [80]*

Decision

- Appeal dismissed

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