

Family Law Case Update #11: Property

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Eufriksen & Eufriksen [2014] FAMCAFC 191

Full Court of Family Court at Sydney

FACTS:

- Appeal from Justice Stevenson- single judge in the Family Court
- Parties married for 20 years and had two children who were both adults at the time of trial.
- Wife had won \$2,000,000 in lottery following separation.
- The trial judge had found that the husband had very little equity in his assets at the date of marriage, at the date of marriage the husband had borrowed \$2.5 million, which was secured against properties in his name and he took out a further loan of \$900,000 to purchase the parties' former matrimonial home.
- The Trial judge found that the husband had withdrawn \$250,000 from the parties' joint term deposit in August/September 2008 and a further \$250,000 from April 2007 - April 2008, \$1.2 million April 2007 - April 2009 and \$200,000 April 2007 and April 2008.
- The husband had alleged these funds were used to keep his business going despite significant trading losses, however, the trial judge found there was a sum of \$635,000 which could not be traced.
- The trial judge ultimately had found that the parties' contributions should be given equal weight.
- The trial judge found the husband should be entitled to an adjustment of \$500,000 based on the wife's lottery winnings with the wife having \$4.5 million dollars at her disposal.
- Where husband proposed sale of parties retail business, Trial Judge ultimately ordering that husband be solely responsible for it going forward.

- There was evidence put the parties had attempted to sell the business in 2010 but were not successful.

What the Full Court said about the judgment: Dividing Property into Two Pools

3. *"Her Honour divided the parties' property at trial into "two pools" to distinguish between the wife's lottery winnings (and the assets derived therefrom) and other property of the parties. Ground 4(ii) challenges that approach. The basis for that challenge is the husband's broader contention that her Honour erred in finding that he did not contribute to the winnings."*

16. *The central proposition supporting grounds 1 and 2 is that her Honour erred in finding that the husband had very little equity in his assets as at the date of the marriage. Related to that contention is the submission that her Honour's determination that the parties' contributions to "Pool 1" were equal was outside the range within which reasonable disagreement is possible; rather, it is submitted that her Honour ought to have assessed the husband's contributions to the assets in "Pool 1" at not less than 66 per cent. ("Pool 1" comprised property independent of the lottery winnings and their derivative property and liabilities.)*

55. *Further, we are by no means satisfied that her Honour's approach was erroneous. Having made her contributions assessment, when the trial Judge turned to consider s 79(4)(e), her Honour properly recognised that s 75(2)(b) was a powerful factor. Expressed in simple terms, that factor assumed relevance because, as a result of her Honour's contributions assessment, the wife had over \$4.5 million at her disposal and the husband had just over \$1.2 million. As a result, her Honour determined that it would be just and equitable for the husband to receive \$500,000. Obviously enough, the source of that money was "Pool 2". It is only in that sense that "Pool 2" is "adjusted" by reference to s 75(2).*

ISSUES:

- Three main grounds of Appeal:
 - Treatment of the husband's assets at the commencement of the relationship
 - Treatment of money won post separation by the wife

- Form of Orders

Property - Decision

Lottery Winnings

- Wife had won 2 million in lottery winnings following separation, when considering these earnings the Trial Judge treated the lottery winnings as a "separate pool". The Full Court agreed this was the appropriate approach, the husband's argument was that the wife had used joint funds to purchase the lottery ticket.
- The Full Court said the "source of funds was not relevant" para [6].
- The Full Court said that "at the time the Wife purchases the ticket, some six months after separation, the parties had commenced a process of leading 'separate lives' including separate 'financial lives'" para [8]
- The Full Court applied *Stanford* saying that ultimately, it needed to be "just and equitable" to make orders splitting the lottery win and in this case it was not as if the parties were leading separate lives.
- As such the exclusion of the lottery winnings from the property pool and creating a separate lottery pool was an appropriate course adopted by the Trial Judge.

Husband's Assets at the Commencement of the Relationship

- Husband alleged that he brought to the marriage, properties and an interest in a company.
- At the date of the Trial, the parties' property (excluding the lottery win) comprised the husband's real properties and a further million dollars' worth of assets.
- Court re-iterated that when assessing the contributions it is "not the performance of a mathematical or accounting exercise" para [26]
- The Full Court was satisfied with Her Honour's approach.

Other grounds

- Another ground related to Husband's withdrawal of \$250,000 from the parties' Term Deposit.

- The husband denied he had used this sum for his sole benefit, however, the Full Court said Her Honour was open to make this finding as there were significant funds unaccounted for. The husband withdrew sums totalling \$1,050,000 from the term deposit between April 2007 and 2009.
- Another ground related to the Husband's contention that the trial judge should have added back as a notional asset the wife's unexplained expenditure of \$1.2 million from 2009.
- The Full Court noted the add-back issue had not been raised at trial and the husband could only make any new submission "in exceptional circumstances" [para 40].
- The Full Court indicated no error in the Trial Judge's approach, particularly where the wife had accounted for a substantial amount of the alleged missing \$1.2 million.
- Husband alleged that the Trial Judge should have made a larger adjustment in his favour but the Full Court agreed with the Trial Judge's approach.

Form of Orders

- Husband appealed against orders made by Trial Judge which required the husband to assume the entire risk associated with the continued management of and subsequent disposal of the parties' business interests comprising the V business, Eufrosin Pty Ltd and the parties partnership.
- The husband had proposed the sale of the parties' retail business as part of the orders instead of him having to bear the brunt of the sales responsibility.
- The Trial judge decided that the husband had operated the business for the past five years with no involvement by the wife, as such the Trial Judge ordered the husband take over the business.
- Full Court found that this was open to Her Honour, taking into account the \$500,000 cash adjustment, the fact the husband had been solely responsible for it, the agreed value of the business and the absence of evidence suggesting it could not be sold.

Orders

- Husband's appeal unsuccessful.
- Husband ordered to pay the wife's costs of appeal.



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The Court made reference to *Stanford's* case when discussing the issue of the purchase of the lottery ticket and it is interesting to note how the High Court decision continues to be referred to in judgments.

8. *"At the time the wife purchased the ticket, some six months after separation, the parties had commenced the process of leading "separate lives", including separate financial lives. That crucial matter, the importance of which is reinforced by the High Court in Stanford, renders reference to the sources of the funds or nomenclature such as "joint funds" or "matrimonial property" unhelpful in assessing what is just and equitable.*

9. *"That conclusion is entirely consistent with what this Court has said in a number of cases concerning the treatment of various gambling venture winnings, including Zyk and Zyk (1997) FLC 92-644 and Anastasio and Anastasio (1981) FLC 91-093."*

11. *"As this Court in Zyk made clear, the source of funds should not "determine the issue" of how a lottery win should be treated for s 79 purposes. What is relevant, in our view, is the nature of the parties' relationship at the time the lottery ticket was purchased. In our view, the authorities just cited, together with what was said by the High Court in Stanford regarding the "common use" of property, is sufficient to dispose of the husband's contention that her Honour erred in failing to find that he contributed to the wife's lottery win. At the time the wife purchased the ticket, regardless of the source of the funds, the "joint endeavour" that had been the parties' marriage had dissolved; there was no longer a "common use" of property. Rather, the parties were applying funds for their respective individual purposes.*

12. *In our view, whilst not expressed in those terms, her Honour's conclusion at [109] that "...the husband made no contribution to the money which the wife applied to purchase the winning [lottery] ticket in [early] 2009" was based on that premise. So much, in our view, is plain from her Honour's acceptance in [108] that it would be "pure sophistry" to credit the husband with any contribution to the funds used to purchase the ticket."*

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