

**Federal Magistrates Court CaseWatch - April 2008, by Jacqueline Campbell, Forte Family Lawyers, released April/2008**

**Our final program this month reviews decisions in the Federal Magistrates Court. There are quite a few this month. With me in the studio is one of our regular presenters, Jacky Campbell from Forte Family Lawyers. Jacky, thank you for joining us and welcome back.**

**Let's start with C and G, a 2007 decision of Hughes FM on an application to relocate a child from Australia to Malaysia. First, Jacky what was the background to this dispute?**

The husband, wife and child were all born in Malaysia and were Malaysian citizens. The husband and the wife met while studying in Canberra. They married in Malaysia in 1998 and were living there when the child was born in 2001. The wife came to Australia with the child in December 2005 without the knowledge or consent of the husband. She kept her location secret from the husband.

The wife commenced proceedings in August 2006 seeking sole parental responsibility, an order that the child live with her, reserving the time spent by the child with the husband and a restraint on the husband removing the child from Australia.

In response the husband sought the return of the child to Malaysia.

**On what basis did the wife oppose the child's return to Malaysia?**

There were five major planks of the wife's case. They were:

1. The husband had a volatile temper. He was aggressive, verbally abusive and physically violent during the marriage.
2. The child suffered from an autism spectrum disorder, the symptoms of which were exacerbated by the husband's aggressive behaviour.
3. It was not in the best interests of the child to spend substantial time with his father because there was a strong correlation between the child seeing his father and regression in the child's behaviour.
4. There were inadequate services and facilities to cater for the child's special needs in Malaysia, whereas they were readily available in Australia. The child was well settled and thriving as a result of having access to them.
5. Finally, the wife would not obtain a fair trial in Malaysia because the wealth, power and influence of the husband's family could be used to affect the outcome of legal proceedings.

**Malaysia is not a signatory to the Hague convention. Are there any useful precedents in such cases?**

Senior Counsel for the husband relied upon the 2005 House of Lords decision of *In re J (a child)*. (FC) [2005] UKHL 40. A young child was a citizen of the United States, the United Kingdom and Saudi Arabia. The family lived in Saudi Arabia. The marriage broke down when the mother and child were living in the United Kingdom while the mother did a one-year master's degree course. The mother applied to the English court for a divorce and a residence order. The husband applied for a stay of the proceedings and sought an order for the summary return of the child to Saudi Arabia.

The trial Judge said that he would have found it in the best interests of the child to be returned to Saudi Arabia except that the husband had raised, and subsequently withdrawn, allegations about the mother's association with another man. If the proceedings were dealt with in Saudi Arabia the best interests of the child might be seriously damaged if the husband raised those allegations again.

The Court of Appeal allowed the husband's appeal. But the House of Lords overturned the Court of Appeal, restoring the trial Judge's decision. In the course of her judgment, with which the three other Lords agreed, Baroness Hale of Richmond summarised the applicable principles as:

- Firstly, the welfare of the child is the paramount consideration.
- Secondly, the welfare principle may be specifically excluded by statute, such as domestic legislation giving effect to the Hague Convention. There was, however, no basis for extending the principles of the Hague Convention to countries which are not signatories to the Convention and in those cases the welfare principle remained paramount.
- Thirdly, the Court had power to order the immediate return of a child to a non Hague Convention country without a full hearing on the merits if it was in the best interests of the child to do so.

Kwon v Lee ([2006] FamCA 730; (2006) FLC 93-287), a 2006 case of the Full Court of the Family Court of Australia also dealt with the issue of the return of a child to a non Hague Convention country. Both parents and the child were Korean citizens. The mother commenced proceedings in Korea before unilaterally taking the child from Korea and ultimately to Australia. Korea is a non Hague Convention country. The mother commenced proceedings in Australia seeking an order for the child to live with her. The father sought the immediate return of the child to Korea. The matter was dealt with summarily. The mother's parenting application was dismissed and an order made for the return of the child to Korea.

The trial Judge used the "clearly inappropriate forum" test but also found that it was in the best interests of the child to be returned to Korea.

The Full Court considered the appropriate law to be applied was the best interests principle but the mother's appeal was unsuccessful as the trial Judge had also considered the matter having regard to the best interest principles.

### **On what basis did the Court decide that the child should be returned to Malaysia?**

FM Hughes was satisfied that it was in J's best interests that he be returned to Malaysia. His return would allow both parents to have a meaningful involvement in his life. It also allowed J to spend time on a regular basis with other significant people, such as his grandparents, and to enjoy his own culture in the company of other people who shared his culture. The "degree of connection" of J with Malaysia was a weighty matter and dictated that any dispute about his long term arrangements ought to be determined in that country.

The weight of the concerns initially raised by the wife was reduced by the evidence in the proceedings. For instance, the wife said she was much less concerned about the husband's violence, given the time that had elapsed since separation. Her concerns about the lack of treatment and therapy options for J in Malaysia were comprehensively dealt with by the evidence of Malaysian specialists.

### **Kocsis and Martin is a decision of Altobelli FM on the question of where the child should live. What was at issue here, Jacky?**

The mother had the care of two children from a previous relationship, E and Z, who were aged 6 and 9. The two children of the parties were B, aged 5 who lived with the father and A, aged 4 who lived with the mother. The mother dropped her application for B to live with her and only sought that A live with her. The father sought that both A and B live with him.

### **On what basis did the Court decide that the child in question should live with his father?**

The family had been involved with the Department of Community Services. The Department's concerns related to the neglect of the children and possible psychological abuse. All four children were the subject of notifications from time to time. An early file note of a home visit to the mother's

home created a disturbing picture of a home that was in a very poor state of cleanliness, with serious issues raised about hygiene and the mother's capacity to cope.

The mother needed to improve her basic parenting skills, including age-appropriate disciplinary methods and an understanding of child development. The department felt that she had insufficient coping skills, particularly as regards the behaviour of the children. They also had concerns about her ability to manage her finances and her isolation.

The mother agreed that she frequently spent time watching movies during the day and was on the internet at night. At a time when she was having financial difficulty providing food for the children, she incurred a very large telecommunications debt.

FM Altobelli said the mother was not a bad mother. She clearly loved her children and wanted to provide for them but, for some reason, lacked the capacity to do so.

The balance of the primary and additional considerations all pointed towards an order that A live with his father and be reunited with his brother, B. Both boys could maintain a meaningful relationship with their mother and their brothers, E and Z, by living with their mother each alternate weekend.

**Counsel for the wife suggested that the wife's parenting be supervised by a family consultant. What was the reaction of the Court to that?**

The mother argued that it was possible to leave A with her provided the Federal Magistrate made an Order under s 65L of the Act. The FM found that a **s 65L** order was not appropriate. The Department of Community Services had resources to assist the family well beyond the resources available through Family Consultants engaged through the Court. In any event, one of the additional considerations to be taken into account, under **s 60CC(3)(1)** was the making of an order that would be least likely to lead to the institution of further proceedings in relation to the child. Imposing a **s.65L** supervision requirement was almost necessarily predicated on the making of an interim order, or a final order that was potentially subject to review during the period of supervision. Ongoing litigation was not in the best interests of the children or the parents.

**Connor and Bourke was a case where the rights of grandparents were considered in relation to parenting orders. Why were the grandparents involved in this application?**

The parents each lived with their mothers, who were the grandmothers of the 5 year old child, the subject of the proceedings. There was an interim shared care arrangement. The mother had drug addiction problems, a recent violent relationship and in the past twelve months had been imprisoned several times for short terms. She supported the maternal grandmother's residence application. The father and his mother had arranged their working hours so that when the child was in their care so that one of them took the child to pre-school and the other collected her from school.

**What did His Honour have to say about the position of grandparents as regards children under the Act?**

Section 60B sets out the objects and principles underlying **Part VII**. The objects in s.60B(1) do not refer directly to grandparents or indirectly to other persons who might have an interest in children. It is focussed exclusively on children and their parents. Section 60B(2)(b) states:

*2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):*

*(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);*

The primary considerations in s.60CC(2) are, like s.60B(1), focussed exclusively on children and their parents. There is no reference to grandparents or other persons significant in the lives of children. However, the additional considerations in s 60CC(3) are broader in focus and encompass persons other than parents.

His Honour said that at best s 60B highlighted the importance of time and communication between children and their grandparents, but s.60CC sent out mixed signals about grandparents as people with whom children are to live.

Grandparents do not automatically have parental responsibility under s 61C. Only parents do. The presumption of equal shared parental responsibility when making parenting orders only applies to the child's parents.

Section 65C expressly recognises the right of a grandparent to apply for a parenting order. The standing of grandparents to seek orders in relation to children is, therefore, beyond doubt. It is the actual implementation of that right in the context of a dispute with a parent about where a child will live that is problematic. The discretion must be exercised by reference to s 60CC which sends out mixed signals because even though grandparents have standing, some of the most relevant primary and additional considerations do not refer to them.

The Court's power to make such a parenting order as it thinks proper (s 65D(1)) is expressly subject to the presumption of equal shared parental responsibility in s 61DA. Section 65DAA refers exclusively to parents, and not to other persons such as grandparents. Thus, **Part VII** seems to contemplate that parents, but not grandparents, might have equal time or substantial and significant time.

**Part VII** sends out mixed signals in relation to the position of grandparents. They clearly have standing to apply for orders, but insofar as the orders sought are that a child should live with them and such application is opposed by a natural parent, it is by no means clear that they rank equally with the natural parent.

His Honour said that it was highly unlikely that there was a legislative policy that favours natural parents over others such as grandparents. The Full Court of the Family Court has consistently rejected the notion that there is a presumption in favour of a parent as opposed to a non-parent, or that the 2006 amendments changed the law in this regard: *Hodak v Newman* [1993] FamCA 83; *Rice v Miller* [1993] FamCA 87; *Dennett & Norman* [2007] FamCA 57 (13 February 2007).

### **The Court awarded equal shared parental responsibility to the father, the mother and the grandmother. Why?**

There were serious issues of judgment on the mother's part which potentially exposed B to a risk of harm, and disentitled her from spending time with B except when supervised. But they did not disentitle her from being consulted about and participating in decisions about B's life, particularly in view of the close relationship that existed between the grandmother and the mother.

### **What was the basis of the Court's conclusions about living arrangements and access?**

Counsel for the mother and grandmother strongly urged against making changes in B's life. However, the evidence was that change was a constant feature in B's life. Over the last year B's mother moved in and out of her life. B was about to start school, one of the most significant changes in a child's life. The only constant pillars in her life were her grandparents and the father. Whilst the existing interim parenting arrangement had worked well, it needed to change because B was starting school. Given the inevitability of change, this was an opportunity to lay the foundation for long-term stability for her. If change had to occur, it may as well take place at a time when other change was occurring.

One of the strongest features of the maternal grandmother's case was that she was always available to care for B. The maternal grandmother and grandfather were retired and so they were exclusively available for B. By contrast, both the father and the paternal grandmother were working and much

was made of this fact. The father and the paternal grandmother seemed to have more than adequately provided the level of care that B needed while she was with them. They had arranged their working hours so that there was always someone there for her. The paternal grandmother had got her up and off to preschool, and then the father collected her from preschool and cared for her for the rest of the day. Their working arrangements did not create issues of their capacity to provide for her needs.

The FM considered that the orders were the ones least likely to lead to further litigation. Leaving B in the primary care of her grandmother would leave the lingering doubt, particularly with the passage of time, about how the mother's circumstances, be it incarceration, rehabilitation, relationships, etc, all might impact on B's well-being and thus precipitate a crisis leading to further litigation.

**Knight and Sullivan Number 2 is a decision of Lucev FM on the question of costs. What was the background here?**

The father unsuccessfully sought to vary parenting orders made by consent. The outcome of the application turned on the rule in Rice and Asplund. The Court concluded that:

*"The Father has failed to establish any sufficient material change to warrant variation of the orders sought by him, and only in one very minor respect has he established a material change. In that respect the Court has come to the view that the material change is not sufficient to warrant variation of the orders."*

The mother sought costs.

**On what basis were costs awarded against the father?**

The father's conduct of the proceedings fell significantly short of what might have been properly required, and was a factor which weighed heavily in favour of an award of costs to the mother.

The costs incurred by the mother were incurred because the father instituted and conducted the proceedings in a manner which resulted in him being wholly unsuccessful. Receipt of legal aid was a factor for the Court to consider under s 117(2A)(b). Having considered all the s.117(2A) factors, including the s 117(2A)(b) factor in so far as the taxpayer ought to be protected from having legal aid funds expended defending an application of such little merit, the Court considered that the circumstances justified the making of a costs order against the father.

**The mother had legal aid. What effect did that have on the decision of the Court?**

The fact that a person is in receipt of legal aid "is not by itself a barrier to the award of costs" and to "refuse to make an order for costs on the sole ground that a party is legally aided would be a gross injustice to the party".

The Court understood that any costs awarded to the Mother would effectively be offset against, and therefore reduce the amount of legal aid payable. This factor fell in favour of an order for the Father to pay those costs, especially because it transferred liability from the taxpayer to the party that caused those costs to be incurred

**English and English is a relatively unusual case, in that it involves an application to cease maintenance for an adult child. What was the story here, Jacky?**

The child had an intellectual disability. He was later diagnosed with schizophrenia and obsessive compulsive disorder in addition to his intellectual disability.

The main thrust of the Applicant's case was that his circumstances had changed significantly since the date of the child maintenance order in May 2001. He claimed that, although he was now

separated from his second wife, he had continued to make the mortgage and rate payments on a property in which she resided with their child and his wife's mother.

In addition, he paid \$112 per week, being the child support payable for the child of his second relationship as assessed by the Child Support Agency.

### **What legislation guides the Court in discharging maintenance for an adult child?**

The Applicant sought to discharge the adult child maintenance order. There was no suggestion by the Applicant that the amount of maintenance payable pursuant to that order should be suspended and/or decreased pursuant to **s.66S(2)** of the **Family Law Act**. However, it seemed to the FM to be appropriate that the court consider, on application to discharge an order, the alternatives provided in **s 66S(2)**, which were to:

- a. discharge the first order if there was just cause for doing so; or*
- b. suspend its operation wholly or in part and either until further order or until a fixed time or the happening of a future event; or*
- c. if the operation of the order has been suspended, revive its operation wholly or in part; or*
- d. vary the order so as to increase or decrease any amount ordered to be paid by the order; or in any other way."*

It is clear from that section that the court's primary task is to determine whether there is in fact "just cause" for the discharge or suspension or variation of the child maintenance order.

### **How did the Court dispose of the father's application in this case?**

The Court did not accept the evidence of the Applicant that his financial circumstances had changed sufficiently since the date the order was made in 2001. He could, for example, at any time have disposed of an unused caravan.

He could also cease making the mortgage payments on the property in which his second wife resided. His second wife could make a realistic contribution to her current accommodation costs, including the rates and mortgage.

No attempt had been made by the Applicant to readjust his finances.

His Honour was satisfied that, if he chose to do so, the Applicant could have reduced the amount of maintenance payable for the child of his second relationship by at least reducing the sum assessed by the Child Support Agency from \$112 per week to \$86.60 per week on the grounds of his existing child maintenance liability for the adult child, thereby providing further funds which the Applicant could use for his own living expenses and/or to meet the obligations to pay adult child maintenance.

### **Cable and Cable is a decision of Federal Magistrate Walters from April last year. It was a property dispute involving a dairy farm which involved an unusually large number of issues. What were the facts here?**

The husband was aged 50. The wife was aged 53. The parties cohabited for over 25 years until 5 February 2005. There were four adult children of the marriage.

At the commencement of cohabitation, the wife was employed as a nurse and the husband was employed as an electrician. They purchased a dairy property and lived and worked on the property.

Generally, the parties shared the duties associated with the conduct of the farm. At the same time, the husband continued to work as a self employed electrician. The wife was mainly responsible for the care of the children, and for home making.

According to the wife, the parties “lived practically separate lives” from approximately 1998. She remained in the home caring for the children and the husband spent evenings in a caravan located on the property.

For approximately eight months after the date of separation, the husband assisted the wife with the conduct of the dairy business. For about 13 months prior to the trial the husband ceased his involvement in the farm and it was conducted by the wife solely. The husband continued to work as a self employed electrician.

**There was considerable argument regarding the value to be attributed to the livestock on the farm, with estoppel being argued.**

The wife’s version of the pool was contained in documents filed in July 2006 (being the Thursday before commencement of the circuit at which the trial was earlier listed). The husband’s version of the pool was contained in documents filed at around the same time.

The value of the livestock recorded in the wife’s schedule was \$80,400. The value of the livestock recorded in the husband’s schedule was \$131,000.

The Court held that there was never a consensus between the parties as to the value to be attributed to the livestock. It was only after the wife indicated that she had resiled or proposed to resile from the figure of \$80,400 that the husband purported to agree to that amount. The value of the livestock remained a live issue at all times. There was never a time at which both parties could fairly and reasonably have understood that the value was not a matter in issue.

The valuation obtained by the wife was well out of time and was rejected by the Court, but at least the wife made an effort to obtain relevant, admissible evidence and place it before the Court. The husband made no such effort.

The Court said that the wife should have obtained a valuation at an earlier stage than she did. However, it was inappropriate and unconscionable to hold that the wife was bound, in some way, to adhere to the value that she earlier attributed to the livestock.

**What did the Court have to say on the allegations of violence and the Kennon factors?**

The wife described three serious sexual assaults that she alleged were perpetrated upon her by the husband. The third was clearly the most serious and could be described as a rape.

The wife also described three serious (non-sexual) assaults upon her by the husband.

The husband frequently (verbally) abused the wife, arguing with her and belittling her. On two occasions, following arguments in relation to financial matters, the husband threatened “to put a bullet in (the wife’s) head”.

The wife also asserted that the husband “...was cruel to the milking cows over the years”.

The Court said that the husband’s behaviour towards the livestock or other farm animals did not fall comfortably within the type of conduct envisaged in Kennon. The course of conduct referred to in Kennon was not limited to domestic violence, and was broad enough to incorporate other forms of behaviour, but the conduct must be “by one party towards the other”. The more indirect or remote that conduct becomes, the greater the importance of demonstrating that it had “a significant adverse impact” upon the other party’s contributions or, alternatively, that those contributions were made “significantly more arduous than they ought to be have been”. There was no evidence that the husband’s conduct towards the livestock caused any of the wife’s contributions to be significantly more arduous than they ought to have been.

It was, however, impossible not to conclude that the wife's contributions to the welfare of the family, and in the role of home maker and parent, were made significantly more arduous as a result of the husband's conduct than they ought to have been. Both children described the wife obsessively cleaning the house after incidents involving the husband. Further, they described the wife being upset and in need of comfort as a result of the husband's conduct. The wife herself described the husband's behaviour as impacting on her level of confidence.

**The husband also sought the exclusion of some creditors of the farm, on the basis of waste under the principles in Kowaliw. Did that succeed?**

His Honour was not satisfied that the wife had embarked upon a course of conduct designed to reduce or minimise the effective value or worth of the property available for distribution between the parties. Nor was he satisfied that she had acted recklessly, negligently or wantonly in any way. Whilst the Court has a discretion which would permit it to ignore or to discount the value of an unsecured liability in certain circumstances, he was not satisfied that such circumstances had occurred. The wife's debts to her creditors were neither vague nor uncertain – although they might require some analysis. There was no evidence that the debts were unlikely to be enforced, or that they were unreasonably incurred. Neither justice nor equity demanded, or even suggested, that the wife's liability to her creditors should be wholly or partly disregarded.

**What conclusion did the Court reach on contribution, and what adjustments were made for the section 75(2) factors?**

His Honour found that in all the circumstances (including the length of cohabitation), up to the point of separation, it would be fair to conclude that the wife's overall contributions were of greater significance or weight than those of the husband by approximately 6%, attributable entirely to the additional weight to be attributed to the wife's contributions to the welfare of the family as a result of the husband's conduct and its impact. Therefore, 53% of the overall property pool should be awarded to the wife on the basis of her contributions from the commencement of cohabitation up to separation.

The period from the date of separation to the date of trial was approximately 20 months. It was very brief when compared with the period of approximately 25 years from the date of cohabitation to the date of separation. After separation:

- a. The wife took over the running of the farm.
- b. The husband assisted the wife in the running of the farm for approximately 8 months.
- c. The husband continued to conduct the electrical contracting business, without assistance from the wife.
- d. The wife retained the net income from the farm and the husband retained the net income from the electrical contracting business.
- e. The wife made payments (from the farm income) towards the mortgage encumbering the farm property, thereby reducing the mortgage by approximately \$27,500.
- f. The husband was obliged to obtain rental accommodation.
- g. The wife also paid (from the farm income) approximately \$7,000 towards payments relating to a motor vehicle retained by the husband and used as his work vehicle.

The finding in respect of the wife's overall contributions should move from 53% as at the date of separation to 57% as at the date of trial.

The husband was in good health. The wife suffered from obsessive compulsive disorder, but was no longer taking medication for her condition.

The "pool" of property available for distribution between the parties included the husband's superannuation entitlements valued at \$71,346 and the wife's superannuation entitlements valued at \$19,379. It was agreed that the husband would retain his superannuation.

The most significant of the s 75(2) factors was that the husband had a greater earning capacity than the wife. Given the husband's estrangement from most of the children, the wife was likely to have to continue to support them (emotionally and, to some extent, financially) for some time to come. This was relevant under **s 75(2)(o)**. However, the husband would receive a substantial proportion of his property settlement entitlements by way of retention of superannuation benefits which were not presently available to him.

His Honour concluded that an appropriate adjustment of the parties' entitlements on the basis of s 75(2) factors alone increased the wife's entitlements by 3%.

The overall distribution of the property between the parties was 60% to the wife and 40% to the husband.

### **Murray and Murray is a decision of Altobelli FM on property matters. What were the facts?**

During the 23 years that the parties cohabited they each made diverse financial and non-financial contributions. The husband contributed \$20,000 towards the purchase of a home in which the parties lived at cohabitation. At cohabitation he also had three shops which were subsequently sold. In 1988 the husband received various sums when he retired. In 1997, he received a substantial inheritance from his father.

Whilst the wife had minimal assets at cohabitation, by 1985 she had received a property settlement of \$35,000. In 2005 she received an inheritance from her father's estate, and in 2006 an inheritance from her mother's estate.

### **His Honour had to consider first how the husband's liability to CGT should be dealt with.**

The husband argued that for the wife to retain the home would not be just and equitable to him. It would leave him with a volatile share portfolio with potentially high realisation costs. The risks associated with quantifying the contingent nature of this liability ought to be shared between the parties.

One of the problems with the husband's case was that he had known since May 2007 that his wife was seeking an order that the home be transferred to her. The hearing took place on 14 November 2007. He had ample time to formulate a definite proposal for the orderly disposition of assets so that he could fund the acquisition of a home, and to obtain evidence in admissible form of the capital gains tax implications. The argument that he would be left with a potentially volatile share portfolio is not persuasive because the risks of values fluctuating after the matter has been heard and determined is an ever constant risk faced by all litigants.

The Full Court of the Family Court provided guidance about the treatment of capital gains tax in the 1998 case of *Rosati v Rosati* [1998] FamCA 38; [1998] FLC 92-804:

There are four situations dealt with in *Rosati*. The Court found that this case was within the 3rd principle. It was satisfied that there was a significant risk that the asset will have to be sold in the short to mid term, and the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant **s 75(2)** factor. The weight to be attributed to that factor varied according to the degree of the risk and the length of the period within which the sale may occur.

The Court found that there was a significant risk that the husband would have to liquidate assets in order to re-accommodate himself thus triggering a potential capital gains tax liability of about \$43,559. That was best treated as a **s 75(2)** adjustment, rather than as a liability to be deducted from the pool of assets.

### **How did the Court deal with contribution and the section 75(2) factors?**

To merely give the husband credit for, in general terms, the cash value of what he brought in ignored that the present value to the parties of the assets was considerably greater. For example, to give credit to the husband for the inheritance he received from his father based on the value at the time of receipt ignored the reality that, on the evidence, it was invested, and these investments had grown significantly. It could not be said that the wife had made any meaningful contribution to the significant funds that existed as a result of the husband's inheritance.

To accept the husband's assessment of 75:25 contributions created a disparity of 50 per cent in his favour, or \$950,000 out of a pool of assets worth \$1.9 million. Having regard to the length of the marriage, the FM was not satisfied that this would be just and equitable for the wife. The parties cohabited for 23 years. The marriage was a social partnership as well as a legal partnership. The passage of time had to be taken into account in assessing the weight of contributions of a financial nature, particularly having regard to other contributions. This was not a scientific or mathematical exercise and there was clearly room for reasonable disagreement. In all the circumstances, the FM assessed contributions in favour of the husband as being 70 per cent.

The husband conceded there should be a five per cent **s.75(2)** adjustment in favour of the wife. She was older than the husband, would be left with less assets than the husband and did not have his investment management skills. Neither party was working, nor could they be expected to at their age. The wife argued an adjustment in the vicinity of 10 per cent.

His Honour found that a 10 per cent adjustment for **s.75(2)** factors was appropriate. It left the wife with 40 per cent of the pool of \$1.9 million. The disparity in the assets available to each of the parties in the later years of their lives was still significant and the husband had the ability to do far more with his share, even taking into account his desire to buy accommodation for himself.

However, the final **s.75(2)** matter to be taken into account was the contingent liability arising from the husband's need to realise investments in order to re-accommodate himself. The indicative liability of \$43,000 was 2.2 per cent of the total pool of assets. Rounding this off to 2 per cent, was an appropriate **s 75(2)** adjustment to make in the husband's favour. Accordingly, the **s 75(2)** adjustment was 8 per cent and the final amount available to the wife was 38 per cent of the pool. Of course, this adjustment only applied if the wife retained the former matrimonial home. If the home had to be sold, the appropriate split was 60:40.

**Jacky, thank you for reviewing these cases for us this month. Jacky Campbell is a partner with Forte Family Lawyers in Melbourne.**

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