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Is a Smart Investment a Special Contribution?

There has, in the past, been a line of family law cases in which an adjustment has been made in favour of a spouse who has contributed to the matrimonial asset pool by utilising a "special skill". These "Special Contributions" were the centre of the recent case of *Kane v Kane* [2013] FamCAFC 205. In this case the husband made an investment in a particular company, purchasing shares to the value of $539,500. This investment occurred shortly after separation, without the consent of the wife, utilising funds from the couple's Self-Managed Superannuation Fund.

At the time of the trial, the shares were worth $1,850,000. The husband argued that he had utilised his "special skill", being his business acumen, to increase the value of the Superannuation Fund. The husband therefore argued that the investment should constitute a "special contribution" to the Superannuation Fund and the weight given to the contribution should reflect this. The Trial Judge dealt with the asset pool and Superannuation Fund separately. The marriage spanned thirty years and the non-superannuation asset pool was divided more or less equally by consent of the parties.

Contents

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However, the Trial Judge agreed with the husband and divided the Superannuation Fund into three and awarded two thirds to the husband citing his "special contribution".

On Appeal, the Full Court identified that dealing with the superannuation and non-superannuation pools separately had resulted in the husband receiving $1,140,098 more than the wife. In percentage terms, the effect of His Honour's Orders was that the husband would receive 63.55% of the parties' available assets and superannuation and the wife 36.45% thereof. The Full Court held that this way of dividing the party's assets was unsatisfactory and that His Honour should have looked at the asset pool in its totality. The Full Court held that after a long marriage such as this, His Honour's Orders were not "just and equitable". Although the Full Court acknowledged that the husband did demonstrate a "special skill", the weight attributed to that skill should not have resulted in such a large disparity. The wife's appeal was allowed and the matter was remitted for rehearing.

Japan Joins the Hague Convention

On 24 January 2014, Japan signed the Hague Convention on the Civil Aspects of International Child Abduction (1980) ("the Convention"). The Convention took effect for Japan on 1 April 2014. Japan is the 91st State to join the Convention, which includes Australia.

The Convention is designed to ensure the prompt return of children (under the age of 16) who have been wrongfully removed from their country of habitual residence. The primary intention of the Convention is to preserve the status quo child custody arrangement that existed immediately before an alleged wrongful removal or retention, thereby deterring a parent from crossing international boundaries in search of a more sympathetic court.

Courts in countries that are signatories to the Convention are required to ensure the immediate return of any child that has been wrongfully removed from their country of habitual residence to that country. Then the domestic courts may determine where the child should live and to make orders for the child to spend time with the other parent.

Japan becoming a Convention country is a significant development given that Japanese authorities have traditionally not recognised foreign parenting orders.

Child abduction cases in Japan have typically involved a Japanese mother returning from a Western country such as Australia to Japan and taking her child or children with her, either in breach of a Western court order or without the consent of the Western or non-Japanese father. This could mean the father may never see the child again. Until the ratification of Japan as a Convention country, there was no legal remedy to the non-Japanese parent in such a case.

In recent years there has been a significant increase in both the number of marriages and divorces between a Japanese spouse and a foreigner, including Australians. This has led to an increase in the number of "child abduction" cases involving Japan.

Although it's a long awaited achievement for Japan to join the Convention, it remains to be seen how proactive Japanese authorities will be to comply with the Convention expeditiously.

Child Support

Child Support is a payment from one parent to another to assist in meeting the expenses of raising children.

Many people use the Child Support Agency to assess the amount payable by the paying parent, which is done by reference to a formula which takes into account various factors including the parties' incomes, the amount of time the children spend with each parent and the ages of the children. The Child Support Agency can also be used to collect and distribute the funds to the recipient parent.

Parents are also able to enter into private agreements for the payment of Child Support. There are two different kinds of Child Support Agreement which are able to be entered into under the Child Support Assessment Act 1989: Limited and Binding Child Support Agreements.

A Limited Child Support Agreement is a less formal agreement which is intended to bind parties for a period of not less than three years. The Agreement must provide for Child Support payments be equal to or more than the relevant Child Support Agency assessment, and be signed, dated and in writing.

Limited Child Support Agreements can be varied by the Court if there is a significant change in circumstances of either party and can be terminated by one party by writing to the Child Support Agency provided that three years has passed since the Agreement was signed.

A Binding Child Support Agreement ("Binding CSA") is a written agreement between parties intended to bind the parties until the child to whom the Agreement applies reaches 18 years of age or

finishes their secondary education.

A Child Support Agreement is binding on the parties to the agreement if, and only if the Agreement is in writing; it is signed by all parties; the parties have obtained independent legal advice on specific issues; the Agreement includes a statement from a solicitor attesting to such advice having been given; the Agreement has not been terminated and one party has retained the original Agreement and the other has retained a copy.

The Court has the power to set aside Binding CSAs in very strict circumstances including where the Agreement was obtained by fraud or a failure to disclose material information; where a party to the Agreement, or their agent, exerted undue influence or duress in obtaining that agreement, or engaged in unconscionable conduct to such an extent that it would be unjust not to set aside the Agreement; or where exceptional circumstances have arisen since the Agreement was made and the applicant or the child will suffer hardship if the agreement is not set aside.

In order to terminate a Binding CSA, parties are able to enter into a new Agreement including a provision terminating the old Agreement. Alternatively, parties can enter into a Terminating Agreement ending the old Agreement.

Separation of Siblings

When parenting orders are sought for siblings the normal position for both parties is that siblings are kept together. However, for a small number of cases each year the Court needs to consider a request to separate siblings.

Recent cases indicate that approximately 50% of these relate to half siblings and it is common for there to be a significant age gap between the siblings. Another common feature is that one parent is seeking to relocate.

Where the separation of siblings is being contemplated there is no rule that can be applied to such cases and as is the case with all parenting orders the best interests of the child is paramount.

Normally there is a range of factors that are considered, specific to each matter. However a general principle commonly applied is siblings should not be separated except in special circumstances.

Typically the issue of separation is considered as a matter under section 60CC(3) *Family Law Act* when considering the nature of the relationship with other persons or the likely effect of separation from any other child.

In *Orbach v Schroder* [2012] FMCAfam 1324, 151 a significant factor was the relationship of the 13 year old child with her 18 year old sister. In granting the mother's

request to relocate the Court held that to separate the sisters would be a significantly adverse situation for the child.

Conversely in *Tyler & Tyler [*2013] FamCA 978 the violent behaviour of the teenage half-sister towards the mother was a significant factor in ordering a 7 year old boy to live with his father.

In considering the best interests of individual siblings an optimal outcome is not always possible for each. In *Deacon & Castle* [2013] FCCA 691 two sisters aged 9 and 11 were the subject of a parenting dispute, where the elder daughter had refused to see her mother for 18 months. The enmeshed relationship between the elder daughter and the father was the primary factor in ordering a switch of residency to the mother and a prohibition on the father contacting the family for 5 months. It was found that the younger daughter would benefit from ongoing contact with the father and a partial split was contemplated in the orders, but the best interests of the elder daughter prevailed.

A child's views may be relevant, however for children in their early teens and younger, while a factor to be considered, it is unlikely to be determinative. In *H & H* (1995) FLC 92-599 an 11 year old boy who had moved to live with his father of his own accord was returned to residency with the mother.

Another factor that occurs when considering the separation of siblings is whether it is preferable to make an order that would be least likely to lead to further proceedings. In both *Purcell v Smith* [2010] FamCA 1203, 170 and *Orbach v Schroder* [2012] FMCAfam 1324,159 the decision not to separate siblings was considered to be the best path to avoiding future litigation.

Contempt For Breach of a Court Order In Family Law Proceedings

The courts regularly have to deal with parties not complying with or breaching orders. Most of these breaches are considered as the general run of breaches and the courts have a range of measures available in response. However, each year there are a small number of instances in family law proceedings where individuals commit more serious breaches. In these instances the offender may be prosecuted for contempt.

The power to deal with a contempt of court is provided in section 112AP *Family Law Act* (FLA). This section requires that there has been a contravention of an order made under the FLA, and that the contravention is a flagrant challenge to the authority of the court.

A flagrant challenge involves conduct of an exceptional, striking or repeated nature. Recent examples of such conduct include proceeding to register a mortgage on a property without notifying the other party as required and abducting a child interstate twice.

Proceedings for contempt are normally brought by the other party, who has the burden of proof. Unlike many proceedings in family law a proceeding for contempt must strictly adhere to the procedural requirements due to the significant penalties available. The standard of proof required is beyond reasonable doubt, which is due to the quasi-criminal nature of the offence.

A successful application requires three criteria to be met. Firstly the person must have been aware of the order. Where a person is legally represented in court, but not present themselves, knowledge of the orders is not imputed. In such circumstances evidence is required to demonstrate actual knowledge. In *Ganem v Ganem* (No.2) [2013] FamCA 257 it was inferred that there was knowledge of the orders from four days after they were made, due to payments made in part compliance. Legal professional privilege is irrelevant to such inferences being drawn.

Secondly it is necessary the orders are understood by the person. Where orders can be shown to be ambiguous or uncertain then a charge of contempt cannot be supported.

Thirdly the breach must have been through a deliberate act and not one that was accidental or inadvertent. It is unnecessary to establish a deliberate intention to break … the order, but simply that the act breaching the order was a deliberate one. An act that is found to be done to deliberately breach the order would be considered an even more serious breach.

Should the elements be proven, then a charge may be dismissed should a reasonable excuse be provided for the breach. Unfounded allegations of child abuse has been rejected as a reasonable excuse, even with associated mental health issues.

Punishment options available to a court include a good behaviour bond, a fine or prison, with the option to suspend the sentence. A mother who took her son interstate twice in contravention of parenting orders was found guilty of 3 charges of contempt and sentenced to prison on all 3 and served 6 months.

Where an application is successful the court normally awards solicitor/client costs. Indemnity costs may be considered, depending on the conduct of the person charged, but this would normally require submission of a costs agreement and an itemised account.