PRE-RELATIONSHIP AND EARLY CONTRIBUTIONS

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By

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Introduction

The intent of this paper is to explore the development of jurisprudence concerning significant property or other financial contributions made by one party at the commencement of a marital relationship or in the early years after its commencement - sometimes characterised as '*Pierce* contributions.' [2]

As well, in order to illustrate the difficulty of decision-making (and understanding that decision-making) in this area I have specifically surveyed a group of decisions by one judge of the Family Court – Carmody J – and I have made a number of practical observations as to trial preparation and evidence.

Background observation

The 4-step process [3] for decision-making in property cases is well known and needs no repetition by me. There can be no assumption of equality of contributions; [4] the assessment of contributions is not a matter of mathematics; [5] the assessment of financial and domestic contributions is an assessment of fundamentally different things; [6] domestic contributions should not be under-valued merely because they are not readily expressible in dollar terms; [7] and the s. 79 process is not intended to be an exercise in social engineering. [8]

Short propositions such as these, though apparently simple and unarguable, conceal a multitude of difficulties. Consider the following:

1. if you unpick s. 79(4) you find that a contribution may be:

   [a] direct;

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[1] Barrister-at-law, Sir George Kneipp Chambers, Townsville
[2] After *Pierce* (1999) FLC 92-844
[3] *Hickey* (2003) FLC 93-143
[4] *Mallet* (1984) Fam LR 449
[5] *Dickson* (1999) FLC 92-483
[6] *Ferraro* (1993) FLC 92-335
[7] *Clauson* (1995) FLC 92-595
[8] *Kennon* (1997) FLC 97-757

[a] As may be not infrequently observed, the Full Court did not clearly explain what factors led them to the conclusion that Justice Carmody's decision was beyond the generous ambit of discretion.

[b] I'm always puzzled by the false precision implied by the use of half percentage points. In this case, there seems no magic in 0.5%. [13]

[c] More importantly, by use of the language 'ought not have exceeded' the Court signals that this was the upper end of the range and that the facts permitted the allocation of a lesser contribution to the husband. But was it 65% or 63.5% or 61.75%? We are not told. But we can imply that if 67.5% is the upper limit of the 'generous ambit of discretion' then if Justice Carmody had selected say 62.5% as the husband's contribution then his decision would have been just as correct.

The jurisprudence

The starting point may be considered to be the decision of the Full Court in *Lee Steere* [14] where the court spoke of the 'special difficulty' where significant property has been brought into the marriage which 'cannot be matched' by the party who brings in little. The Full Court said [15]

> *Against this of course must be set the contributions ... the wife made during the marriage. The longer the duration of the marriage, depending on the quality and extent of her contributions, the more the proportionality of original contribution is reduced ... the proposition that the strength of a contribution made at the inception of a marriage is eroded not by the passage of time but by the off-setting contribution of the other spouse still holds true.*

In subsequent decisions of the Full Court there was some disagreement. See for example *Money* [16] where there was a debate between Justices Lindenmayer and Fogarty as to the correct approach. For present purposes, I need only cite a short passage from Fogarty J where he said

> *In an appropriate case in my view an initial substantial contribution by one party may be eroded to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party. I feel if I may say so with respect that (Justice Lindenmayer's) formulation to the contrary is unrealistic and does not correspond with common experience in the court in many of these cases.*

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[13] Even more strangely, the end result after s.75(2) factors was 37.6% to the wife
[14] (1985) 10 Fam LR 431.
[15] Also at page 443 of the reasons
[16] (1994) 17 Fam LR 814

More recently, there has been some re-consideration of this approach, arising from jurisprudence in the New Couth Wales Court of Appeal concerning *de facto* property cases.

For present purposes, those who want to examine the matter in detail might consider *Howlett v Neilson* [23], *Kardos v Sarbutt* [24] *Bilous v Mudaliar* [25] *Sharpless v McKibbon* [26] *Manns and Kennedy* [27] and *Baker v Towle.* [28]

In *Kardos*, Justice Brereton delivering the reasons for the Court of Appeal said that the approach of the trial judge of returning to the wife and husband their initial contributions at the original value and dividing the capital growth and assets between them equally gave manifestly inadequate weight and significance to the initial contributions of the parties in the (short) relationship. It treated the increments of capital value of an asset held at the outset of the relationship as "fruits of the relationship" when save for reduction in the mortgages they were not. It "excessively" eroded the initial contributions. [29] His Honour said:

> *The approach which was adopted in* Burgess v King *is one which gives due weight to the time value of money and recognises that capital gains are the product of the initial introduction of the property rather than of ongoing contributions. On the other hand, the approach adopted in* Howlett v Neilson *in my respectful opinion may in at least some cases result in the serious undervaluation of initial contributions. It treats any increment in capital value of an asset held at the outset of the relationship as if were part of the fruits of the relationship when it is not; it is the result of the asset having been held by one of the parties at the commencement of the relationship and not the result of joint efforts of wage earning homemaking and parenting and mutual support ... it disregards the "time value of money". It is likely to produce erratic results because under it the significance of any particular asset in the ultimate evaluation will depend on its value when it was introduced. If one party has a house worth $250,000.00 at the outset and it appreciates during the relationship to be worth $750,000.00 the contribution is of a house which at separation is worth $750,000.0 – not of money worth $250,000.00* [30]

The subsequent decision of *Bilous* concerned a relationship of about 11 years. By trial the pool of assets had a value of approximately $1.7 million. The trial judge awarded the husband approximately 20% of the asset pool with the wife retaining the balance. The wife was a medical practitioner and had come into the relationship already owning a successful medical practice together with a house. Justice Ipp with whom Justice Giles

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[23] (2005) 33 Fam LR 402
[24] (2006) 34 Fam LR 550.
[25] (2006) 35 Fam LR 55
[26] [2007] NSWSC 1498
[27] (2007) 37 Fam LR 489
[28] [2008] NSWCA 73
[29] A paraphrase of paragraphs 61, 64 and 69 of the report.
[30] Paragraph 61 of the report

indirectly from joint efforts of wage earning homemaking and parenting and mutual support. [34]

These disagreements in the jurisprudential approach were drawn to the attention of the Full Court of the Family Court in *Williams & Williams.* [35] Briefly the facts were – a 12 year relationship; throughout the marriage the parties had lived in a property that had previously been occupied by both the husband's father and his grandfather; said to be worth $940,000.00 at the commencement of the relationship, it was subsequently sold in 2004 for $2.7 million; at trial the property pool was worth approximately $3.7 million. The trial judge had awarded some 57% of that to the husband. When the matter was argued on appeal, Page SC made specific reference to the NSW decisions that I have referred to earlier in this paper.

After referring to the differences of opinion in the NSW Court of Appeal the members of the Full Court of the Family Court said this:

> *We think that there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised, or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties. Thus where the pool of assets available for distribution between the parties consist of say an investment portfolio or a block of land or painting that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value at the time of hearing or the time it was realised rather than simply pay attention to is initial value at the time of commencement of cohabitation. But in so doing it is equally as important to give recognition to the myriad of other contributions that each of the parties has made during the course of their relationship.* [36]

Thus the members of the Full Court [37] have given some weight to the argument of Justice Brereton about the "time value in money" but also taken on board the warnings that were given by Justice Ipp as to how this might not allow for a proper recognition of other contributions.

Some decisions of Justice Carmody

I have chosen 7 decisions of Carmody J where consideration was given to a sizeable initial contribution. They span the period April 2005 to January 2008. Four are trial

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[34] Paragraph 63 of the Report
[35] (2007) FamCA 313
[36] At paragraph 20 of the report
[37] Kay, Coleman and Stevenson JJ. It should be noted that Justice Coleman (as a trial judge) had previously relied upon *Kardos v Sarbutt* in *Cunoe and Cunoe and another* [2006] FamCA 158 and (sitting as a single appellant judge) in *W and W* [2006] FamCA 1368

could be justified upon five possible grounds *viz "intention, contribution, reliance, partnership and need"* [38]; the 'rationale' of section 79 *"[lying] in the binding nature of the marital relationship and its hallmark features of 'give and take'.* [39] Words such as "sacred covenant" "partnership of equals" "common goals" "joint venture" are peppered though the paragraphs. [40] Referring to the problem of early contributions, His Honour said:

> *The difficulty of reflecting substantially disproportionate contributions at the beginning of the marriage ...is ...still an acuate one. It is ordinarily just and equitable that that the differential is treated as significant but cases ... emphasis that that the disparity may be eroded over time and/or by the contributions of the parties during the course of the marriage. How and to what extent this is done is a difficult problem ... not susceptible to precise analysis. That is largely because it depends upon a number of variables such as the initial difference, the use subsequently made of those assets, whether or not they have increased in value due to the efforts of the parties or external forces, the length of the marriage and the size and impact of other contributions made in the intervening period.* [41]

CCD v AGMD (2006) 36 Fam LR 356 – decision by Full Court December 2006

5 year marriage, no children, she 58, he 72 at trial. Net assets in excess of $3.4M entirely sourced from husband's contribution except for $190,000.

At trial – contributions to husband 92.5%

On Appeal – contributions to husband assessed at 95%

In this decision, Justice Carmody had again embarked upon some philosophical discussion repeating his argument that *"intention, contribution, reliance, partnership and need"* are recognised justifications for the power to adjust property entitlements. [42] On appeal Justice Finn said:

> *In relation to the assessment of contributions I suggest that in the pluralist society of present day Australia little assistance is to be gained from a search by trial judges or indeed by intermediate appellate courts for the underlying*

[38] At paragraph 9 of the reasons
[39] At paragraph 14 of the reasons
[40] A close reading of paragraphs 5 to 56 is a most interesting exercise.
[41] See paragraph 45 of the report – the emphasis is by the author of this paper
[42] See paragraph 47 of the trial decision reported at *D & D* [2006] FamCA 245

In this decision His Honour referred to the decision of the Full Court in *Williams* [47] as supporting the proposition that an early contribution is *the appreciated not the initial value* [48] commenting as follows:

> *The increase should normally be credited solely or mainly to the contributor rather than equally shared because it cannot properly be regarded as the 'fruits of the relationship' . These cases suggest that ... a childless couple who make roughly equally contributions during the marriage will usually see a property order made leaving the bulk of assets remaining with the party contributing them.* [49]

Brodie and Brodie [2008] FamCA 26

11 year relationship – property pool now in excess of $4m - $1.35M of that a house introduced by husband. He also brought in other property and his interest in a professional practice. Contribution at the beginning was 90% of the pool then existing – these assets now represented 35% of the pool at trial.

Husband's contribution at trial – 75%

His Honour embarked upon a 150 paragraph assessment of what he described as "Resolving the problem of passive growth on non-marital assets". I cannot conveniently summarise this discussion – and it is well worth reading. His Honour particularly recites the criticism made by Professor Parkinson that the Family Court's approach to initial contribution assessment is

> *incoherent and irrational* [50]

and goes on to say that

> *[there are] legitimate questions about the validity of the current Australian family law approach to dividing so called matrimonial and non-matrimonial property between former spouses* [51]

His Honour later describes the approach arising from cases such as *Money, Kennon* and *Figgins* as

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[47] See footnote 35
[48] Op cit at 336
[49] Op cit at paragraph 336
[50] Parkinson P 'The diminishing significance of initial contributions to property' (1999) 13 AFLJ 1
[51] *Brodie* at paragraph 129

Looked at in tabular form one strives to find any practical guidance – any common factual thread. That Justice Carmody was 'wrong' in three cases out of seven [55] points to the difficulty in advising clients as to the potential outcome in these cases. If our approach can be neither mathematical nor philosophical, and assuming that Justice Carmody is correct in the criticisms he advances in *Brodie* then for practicing lawyers it means only that we must return to what has always been the task. What are the facts? What matters will most attract the exercise of judicial discretion?

Some practical tips for conducting trials

May I commence with an observation made by the Full Court in *Williams.* [56] The Full Court refused to interfere in the trial judge's decision on this basis:

> *Whilst it remains arguable that the trial judge did not give ample weight to the husband's contributions when measured not in terms of their initial value but in terms of their ultimate value to the parties, given the myriad of other contributions identified by the trial judge, the lack of evidence that would point clearly to the growth in the asset being attributed to forces other than the mutual effort of the parties ... we cannot say that this case falls outside of the acceptable range ...*[57]

The money at stake and the resources available to litigate will always have an influence upon the way in which a trial is conducted but assuming that there are no practical or financial impediments to trial preparation I suggest that the following matters bear consideration when you act for the person who introduced wealth early in the relationship:

1. though we most commonly adopt a global approach to contribution assessment, an asset by asset approach is permissible and may be especially useful where one party has introduced 2 or more significant assets at the commencement of the relationship. An investment property (or superannuation as in *Murphy*) may be treated differently to the property that became 'the family home';

2. in any event the assets brought into the relationship should, wherever possible be valued – too often our trial preparation concentrates on current value as distinct from past value;

3. more importantly, an analysis should be made of the reason why a particular asset has increased in value from the commencement to the end of the relationship *viz*

   [a] has the increase in value simply been market driven?

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[55] And arguably wrong in *S v S* as the reasoning process used there was the same as that criticised in *CCD v AGMD*

[56] See footnote 35

[57] At paragraph 36 – the emphasis is by the author

8. the value of subsequent financial contributions needs to be adequately particularised – even relatively small capital amounts (the $15,000 inheritance, the $25,000 redundancy) received during the later years of the relationship can become part of the off-setting equation.

9. most often we concede (quite properly) that domestic contributions are equal – but do you have special facts allowing you to argue otherwise? Entrepreneurial spouses (as with mere barristers) spend a lot of time away from home – was there an added 'burden' upon your client by virtue of that?

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