

Tax Advantages and Corporate Responsibilities as Spouse Contributions

On 24 May 2016 **Bryant CJ, Murphy and Kent JJ** set aside the orders of **Stevenson J** made on 27 February 2013 in **Grier & Malphas [2016] FamCAFC 84** on appeal by the Wife and remitted the matter for re-hearing.

The issues at first instance related to the constitution of the asset pool and the proportions of the assets each of the parties should receive based on contributions (given that the Wife's greater future needs were not in dispute). The gravamen of the Wife's appeal which was endorsed by the Full Court was that the Trial Judge erred in finding that the Husband made greater contributions than the Wife in assessing contributions at 60/40 in his favour.

The parties began living together in 2000, married in 2002 and separated in 2009. The one child was born in 2007. Parenting orders were made in 2011 providing for the child to live with the Wife and spend time with the Husband. At the time of cohabitation, neither party had significant assets. However in early 2002 the Husband established a business which quickly proved to be very successful. In 2008 the husband sold his 50% interest for \$9.75M million.

While much of these funds had been dissipated by the end of 2012, the parties still had a substantial pool of non-superannuation assets to divide at the time of the trial totalling about \$3.7M.

The husband's position was that he should receive 75% of the pool for bringing a "skill set" into the relationship which generated most of matrimonial property. The wife's contention was that contributions were equal.

In their joint reasons **Justices Murphy and Kent** made various observations about the values of the different roles played by spouses in many marriages whose financial arrangements involve company and trust structures.

The Judges made the hardly controversial initial observations that:

- many Family Court property cases involve families in which differing roles have been adopted by the parties, with one of the parties focussing on the acquisition of capital and income for the family and the other the care of the home and the parties' children and often also taking on a further role of earning an income;
- importance must be attached to the role of each in the context of the family's particular circumstances; and
- the task of assessing the parties' respective contributions is notoriously susceptible to results upon which reasonable judicial minds differ because of the very wide discretion for which the Family Law Act provides.

However the further observations that followed are worth re-visiting:

- when the parties to a relationship earn income and derive capital through corporate/trust structures established primarily to minimise taxation, the indirect contribution of a party who is not involved in the day-to-day operation of those structures is sometimes overlooked;
- the "non-active" party can, in truth, be a significant contributor. The Court said long ago in **Lee Steere (1985) FLC 91-626** "it cannot be denied that the splitting of income tax is a direct and immediate financial benefit to the husband and to that extent a direct financial contribution on the part of the wife".
- "the issue of the wife's personal liability as a director of the companies ... is a matter of increasing relevance in recent times ... the 'days of the sleeping, or passive, director are well and truly over'".

The contribution made by the Wife, in playing her role within the corporate/trust structure through which the parties earned income; acquired capital and minimised tax in the process, was considered a significant matter. Quite apart from minimising tax during the course of the relationship, the Wife accepted and paid significant taxation emanating from the business and, more specifically, its sale.

The Judges noted that as the Trial Judge had given no consideration to either of these matters when assessing contributions she had failed to take account of a relevant contributions consideration.