Being Punished for Misbehaving

The parties who featured in the decision of **Baglio [2013] Fam CA 114** may have enjoyed a relationship of only five years in total duration but the issues it generated took nearly three years and a 67 page judgment to unravel.

Each party introduced relatively significant assets from non-matrimonial sources to the relationship and along the way produced one lucky child.

The wife introduced real estate at the outset (initially worth an unencumbered $470K, now worth $605K with a mortgage of $100K)) and later $60K from the sale of a pre-existing investment, whereas the husband received a cash inheritance of $415K about half way through the relationship. The husband applied about half of his inheritance toward the acquisition of four investment properties to which the wife also applied some of her funds.

A significant issue in determining the parties' respective financial settlement entitlements was the husband's conduct in relation to the post-separation sales of the parties' investment properties which the wife claimed caused a loss of approximately $180,000 leaving a net pool of only $600K (including the amounts they each introduced).

While the Court has tried to avoid endorsing the concept of "negative contributions", it's certainly still open to it to find that one party's conduct resulted in a loss to both by reducing the net values of their assets, even if it prefers to address such issues by finding that the other party has made a proportionately 'greater contribution' to the preservation of the property interests by reason (for example) as in this case their thwarted efforts to:

- maximise a sale price; or
- minimise any avoidable increase in a mortgage liability.

In this case the husband was found to have caused significant losses of equity as a result of his unreasonable refusal to sell the investment properties for the amounts initially offered when they were later sold for much less. Furthermore the husband also failed to:

- apply rental proceeds received by him in reduction of the mortgages over the properties; or
- make mortgage payments while living in one of the properties.

In financial cases such as this the first question to be answered is whether the actions or inactions were unjust or caused an injustice and if so, how might that injustice be addressed.

The Judge concluded that the net value of the parties' property had been diminished as a direct result of the husband's conduct and whether or not it was the husband's intention to produce that outcome, it would be unjust for the parties to equally share those adverse consequences.

However regardless of whether it makes any practical difference or is just a matter of semantics, the Judge preferred to address this by crediting the wife with having made a greater contribution by attempting to preserve the assets in the post-separation period rather than treating the husband as having made a 'negative contribution'.

Without distinguishing between the pre and post-separation contributions the Judge assessed the parties' respective overall contributions in the proportions of 65/35 in the wife's favour which produced a $180K difference in the division of their $600K pool of assets.

An additional 7.5% adjustment was incorporated into the judgment (producing a 72.5/27.5 outcome) to address the disparity in the parties' perceived future financial needs reflecting the husband's greater income and the wife's responsibility for the primary care of their daughter.