

Putting a Price on the Date of Separation

In **Mahon [2015] FCCA 510 Judge Small** was required to fix the effective end point of a relationship in the context of a marriage in which three children were conceived and born after the date the husband claimed the parties had separated. These parties married in 1999. The husband said they separated in 2005 whereas the wife said 2012.

In practice, marriages take many forms and can be as varied as the people who enter them. Some couples live together some do not, either by choice or circumstance. Some couples admit the possibility of concurrent relationships with third parties while most would not countenance such arrangements. Some marriages produce children, others do not. The variations are myriad.

A corollary to the question of what constitutes a marriage is what constitutes a separation. There are many variations and indeed opinions and I'm sure not everyone would agree with the Judge's opinion in this instance.

The date of separation was relevant as the Husband bought a property with substantial borrowings in 2005, and the wife claimed it was part of the pool of assets to be divided between the parties. The case proceeded on the assumption that the treatment of the wife's contributions to that property depended on the date of separation.

On any view it was apparent that the parties did not live together for significant periods of time between 2005 and 2012. It was the wife's evidence that while the parties were married for thirteen years they actually lived together for less than five years, and apart for more than eight years.

The husband maintained that the parties had been separated and financially independent of one another since 2005 despite continuing to have a casual sexual relationship which subsequently produced their three younger children.

The question to be answered was did the parties' living arrangements after 2005 mean that the marriage continued until 2012, albeit in an unorthodox form, or did those arrangements constitute a final separation followed by an "on-again off-again" relationship albeit one involving at least one period of joint residence?

Judge Small agreed with the husband's submission that the wife could not be heard to say to Centrelink at various times since 2005 that she was separated from the husband and entitled to a single parent's benefit and Child Support yet still successfully seek to persuade the Court that they were not separated until 2012.

Clearly the parties maintained an intimate relationship after 2005 as indicated by the birth of three children and there were short periods of time when they lived under the same roof. However the Judge considered that such a relationship even involving as it did the birth of three children was not on its own proof of an ongoing marriage when balanced against other evidence and found as a matter of fact that the parties separated in 2005.

The Judge noted it is possible for one party to a relationship to believe that the relationship has ceased while the other party believes it to be continuing. However whether or not a relationship has actually ended is a matter of fact.

The wife's fall-back position was to claim an interest in the husband's property and superannuation entitlements by arguing that even if separated, he had applied monies to those assets which he ought to have applied to maintenance for her and the children. Thus, the wife claimed to have made indirect financial contributions to those assets, as a result of which he effectively held part of them on trust for her.

The wife's claim for spousal maintenance was also dismissed by the Judge who described it as an 'absurd' retrospective application which in any event covered a time when the wife said that she was still married to the husband. The Judge was even more dismissive of the wife's claim to have made indirect financial contributions to the husband's assets via unpaid child support payments as the wife had received some child support.

In any event, the Judge indicated her view was that a parent who argued that they ought be directly compensated for unpaid child support in a property settlement 'stands on very thin ice', despite the payment of child support being one of the factors to be considered under s.79(4) of the Family Law Act in so far as it incorporates s.75(2).