

Witnesses Should be Seen and Heard

In the recent case of **Masih [2013] FamCA 221** a critical issue for determination by the Family Court was the disputed existence of a substantial amount of unsecured debt alleged to be owed by them to members of the husband's extended family and his network of friends.

The case had an additional layer of complexity and emotion associated with it by virtue of the fact that as their fathers were brothers, the parties were cousins.

Notwithstanding, they were married for 12 years and produced 3 young children who had remained in the primary care of the wife since the separation.

The wife completely denied the husband's claim that he owed family and friends hundreds of thousands of dollars being funds borrowed during the course of the marriage for the mutual benefit of the parties.

The trial was substantially devoted to consideration of evidence going to the question of whether these liabilities actually existed as the husband asserted.

However not one member of the husband's family nor one of the friends from whom the husband asserted that he had borrowed money swore an affidavit that was put into evidence or made themselves available for cross examination in respect of the issues relating to the alleged debts.

Despite the husband's own lengthy and detailed albeit contentious evidence in relation to the alleged debts, the Court dealt with them in an almost cursory manner by simply relying on the principle which emerged from the High Court decision of **Jones & Dunkel (1959) 101 CLR 298**.

When evidence could be called from a witness who one would expect a party to call and that witness is not called, the Court can infer that the evidence, if it had been called would not have assisted the party who could have been expected to have called the witness.

Based on that premise the Court completely disregarded the husband's uncorroborated evidence about the unsecured debts he claimed existed in identifying the net value of the parties' divisible matrimonial assets.

If some or all of the debts did in fact exist the husband was left to deal with them himself from his share of the asset pool.

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