MAYFIELD AND HORNE

Order for arbitration under Family Law Act 1975 s.13E.

Heard: September 11th 2017

Further submissions made September 15th 2017

Decision and award: September 16th 2017 2017

Arbitrator: Prof. Patrick Parkinson AM

This arbitration was conducted as a half day hearing held at the University of Sydney Law School's moot court room. The parties were represented by counsel. Both gave oral evidence and were cross-examined. Subsequently, the parties submitted further information about certain disputed financial matters. The decision was handed down within 5 days of the hearing.

The names of the parties have been anonymised, consistently with the practice of the courts.

The facts

The parties were married for about 7 years, preceded by a short period of cohabation. Each had children from previous marriages. There were no children of the marriage. At the time they began living together, each of them had a house. Mr Horne's was larger and of greater value. They lived in his house, while Ms Mayfield's house continued to be occupied by another family member until it was sold about three and a half years later. For the majority of that time, Ms Mayfield met all the outgoings on the house, including the mortgage repayments, but did not receive a rental income.

The parties agreed that they kept their finances separate. There was no joint account. Ms Mayfield contributed money towards the outgoings on Mr Horne's house such as rates, water rates, water usage, phone, electricity, gas, internet costs and routine household maintenance. The arbitrator found that she paid approximately half of these outgoings. There was no mortgage on Mr Horne's house. Both spoke of her contributions as 'board'. Ms Mayfield said in oral evidence words to the effect that she never saw Mr Horne's bank statements and regarded his finances as none of her business. Conversely, he did not regard her finances as his business either.

At no stage were their assets ever joined or intermingled. At the end of the relationship, Mr Horne essentially had the proceeds of sale of the home he had brought into the marriage, while Ms Mayfield had the proceeds of sale of her home.

The assets

At the date of hearing, Ms Mayfield had assets of close to $200,000 while Mr Horne had assets close to $800,000. Each had about the same level of superannuation. During the course of the

marriage, Ms Mayfield made various loans and gifts to an adult son, the total of which was disputed. What was clear is that but for those gifts she would have had a stronger asset base at the date of hearing than was in fact the case.

Application of the law

Mr Horne's position was that it was not just and equitable to make any alteration to property rights. Ms Mayfield sought 40% of the combined assets of the parties.

The arbitrator found that neither party made any contribution to the acquisition of the real property in the name of the other. Ms Mayfield did make some small contributions to the improvement of Mr Horne's home, although most of the improvements were paid for by Mr Horne. She also contributed over $30,000 to a car for Mr Horne.

The evidence on contributions to household tasks was contested. The arbitrator found that Ms Mayfield did most of the cooking and household cleaning tasks. Mr Horne did most of the outdoor work.

Both were in their fifties. The main s.75(2) factors were that each of them had significant health problems. Mr Horne was unable to work at that time, and Ms Mayfield's capacity to work was likely to diminish over time.

The arbitrator took account of the decisions of the Family Court in *Watson and Ling* [2013] FamCA 57 (Murphy J), *Fielding v Nichol* [2014] FCWA 77 (Thackray CJ) and *Chancellor & McCoy* [2016] FamCAFC 256. These were all cases where the parties kept their finances separate and did not raise children together. In each case, there was no order to alter property rights.

The facts of this case were quite similar to the reported cases. If neither property had been sold at any time, the parties would have ended the relationship with not much more than they had began, and not much more than they would have owned if they had been friends 'living apart together' maintaining separate residences. Each would have owned real estate that had increased in value. It followed that apart from the increase in superannuation for each of the parties, which resulted from their respective jobs, there was limited financial fruit from the marriage relationship other than the inflationary increase in the values of their respective properties and, for Ms Mayfield, further growth through investing the proceeds of sale of her house in a savings account and adding to it once she was relieved of the need to repay the mortgage.

In terms of future needs, both parties had significant health issues, and there was no reasonable basis for concluding that the needs of either, based upon health issues, was greater than the other. For that reason, the arbitrator declined to make a s.75(2) adjustment on this basis.

In explaining the assessment of contributions, the arbitrator said this:

> In almost all marriages, there is a process of mutual benefit conferral. Each spouse confers benefits on the other – perhaps different kinds of benefits, but benefits nonetheless. Ms [Mayfield] argued, naturally enough, that she had conferred benefits on Mr [Horne]; not only her financial contributions beyond meeting a proportionate share of the living expenses, but also her s.79(4)(c) contribution in

terms of cooking, cleaning and the like. However, Mr Horne made contributions to her welfare and the welfare of the family constituted by their union as well. He did most of the outdoor work and household maintenance. He made contributions to their joint welfare in a variety of other ways. She benefited from the provision of a larger home while they were living together than she enjoyed before they met.

The homemaker and parent contribution has its real significance in cases where there is role specialisation in the marriage relationship, especially for women who stay at home or limit their workforce participation in order to look after children. The purpose of assessing the homemaker contribution is to recognise its significance in the overall socio-economic partnership, ensuring that women are not disadvantaged by their role specialisation. Parliament recognised that women's most substantial contribution to the marriage partnership may not be in terms of earnings from paid work, and that their contribution as homemaker and parent should not be undervalued in comparison with direct financial contributions from paid employment. This was explained by Fogarty J in *Waters & Jurek* (1995) FLC ¶92-635 at 82,378-9:

> In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests - as individuals and as a partnership....Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon...
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> An order under s.79 would be unjust and inequitable in its operation if it failed to address the manner in which the value of the parties' roles, adopted in the course of, and for the purposes of, the marriage, can be altered by the fact of separation.

In this case, both parties worked throughout their cohabitation together and there was no role specialisation of the kind described in *Waters & Jurek* in which one partner sacrificed workforce participation to take on a homemaker and parent role.

So the question is whether, in a relationship where there were no children of the union, ...the contributions in s.79(4)(c) justify an alteration in property rights not otherwise justified by financial contributions. It is not that the contribution to the welfare of the family is irrelevant in cases where the couple have no children or there is no such role specialisation. Parliament has required judges to take it into account without limiting it in this way. The problem is rather that in situations where there is no role specialisation as homemaker and parent, and each has maintained their participation in the workforce in circumstances unaltered by the marital relationship, there is very often no reasonable basis for saying that one party had contributed more to the welfare of the family constituted by the couple than the other one has.

Ms Mayfield had nonetheless made some contributions that needed to be recognised under s.79. The arbitrator awarded Ms Mayfield $45,000 on account of her contribution of funds during the course of the marriage, such as the $30,000 for the car, which benefited Mr Horne or improved his property.