# A Warning to All

*Further timely instruction from the Full Court as to how*

*to treat on-going indirect post-separation contributions.*

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The recent decision by the Full Court in *Marsh & Marsh* [2014] FamCAFC 24 (25 February 2014) (Ainslie-Wallace, Murphy and Le Poer Trench JJ) serves to inform practitioners, as well as first instance judicial officers, how to approach determination of contributions in a wide range of property cases under sec 79(4)(a)-(e) of the *Family Law Act* (FLA). The didactic content of each of the judgments is well worth reading, for there is much to be learnt, or refreshed in this case.

It is particularly relevant to cases where a party has been freed up to develop a successful income earning capacity, whether by being enabled to pursue a rewarding career or to develop a flourishing business, while the other party attended to domestic and parenting duties, and performed such duties well. The essential feature is that the home-bound party must show that he or she made an indirect contribution to the income-earner's capacity to earn income or to acquire property. That capacity can be seen as a portable investment that is carried away by the income earner even after separation.

To the extent that submissions by practitioners might not always enhance the best administration of justice, the case assists advocates (including solicitor advocates) in framing their submissions, and in ensuring their affidavits include all relevant evidence, as would minimize unfortunate decisions, which may ultimately lead to costly remittals for retrial.

The risk of costs of re-trials must be minimized as much as possible, as the bulk of such costs have to be met by the individual litigants. There is no meaningful recompense from the government because judicial officers made mistakes. The amounts payable to private citizens pursuant to the so-called "costs certificates" under the *Federal Proceedings (Costs) Act* are notorious for being little more than a soggy poultice.

*Marsh* was not just a case of relatively high financial success achieved by the parties, but it was also a case of a long period of separation. Cohabitation lasted for about 21 years, followed by a period of about another 10 years between separation and trial, during which time the parties made significant contributions in their specialized spheres, and during which accrual of valuable assets and accrual of superannuation continued.

Firstly, in order to assess correctly contributions under sec 79, it is necessary to recognize that upon separation the values of direct and indirect financial and non-financial contributions by each of the parties do not necessarily cease, although the nature, form and characteristics of those contributions may change. The mere

duration of cohabitation does not lock in the period during which contributions are to be assessed.

Secondly, it is an error to start with the oft-heard phrase that "until separation, the contributions should be seen as having been equal", and then to proceed **to identify what further adjustment** should be made to the "contributions" finding (ie what should be the departure from "equality") to take into account the post-separation contributions of each party. This is particularly important in cases of long periods between separation and trial, but length of time is not of itself the critical issue.

Thirdly, the Court must consider the effect of sub-sec 75(2)(j), (k) and (n) and it is an error to ignore those provisions as "not relevant" just because the financially weaker party is not seeking maintenance.

Fourthly, it was a case where the Federal Magistrate confined his analysis to "percentage terms" and failed to assess the outcome of his orders in real dollar terms. Had he done so, he might have arrived at a different outcome.

In short, this was a case where the judgment was just "plain wrong".

Fifth, this was a case where the findings of the Magistrate did not enable the Full Court to re-exercise its discretion, thereby compelling the parties to undergo all of the cost and trauma, emotional and material, of a further trial.

The principal background features were that the parties had cohabited for 21 years and separated for about another 10 years before trial. The parties had determined that the husband was going to be the breadwinner and that he was going to be freed by the wife to pursue his career both in Australia and overseas. She, reciprocally undertook the responsibility for home-making and parenting of their three children.

At the time of separation, the children were 17, 14 and 10 years old. They lived with the wife, and the husband paid considerable sums to support the wife's household and the cost of meeting the children's reasonable needs. Over 10 years it he claimed that he had contributed about $1,285,000 towards property acquisition (including boats and real estate investments) and about $2.6 million for the "*benefit of the wife and children*".

The husband was successful in developing his career while being freed from the parenting and domestic duties undertaken by the wife. To facilitate the husband's advancement, the wife did not engage in outside employment for over 23 years. The disparity in income capacity of the parties was enormous. The husband's annual income was about $640,000 (or about $13,000 per week) plus very generous bonuses (eg over $500,000 in 2011 alone).

By contrast, the wife was on Centrelink Newstart Allowance.

The Magistrate determined the pool was as follows (despite various issues of inadequate disclosure, and questionable use of "add-backs", and some modest mathematical errors) –

Assets excluding superannuation, were found to be $3,106,313

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|---|---|
| Superannuation was found to be worth | $1,673,902 |
| Total was therefore | $4,780,215 |

His Honour noted that the assets had increased significantly in the 10 years since separation. Notwithstanding this enormous disparity of incomes, and the magnitude of assets, his Honour's assessments and reasoning leading to the erroneous orders were –

> That until separation, the contributions were equal. His Honour expressed himself -
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> 78 I would agree that the evidence would support an outcome of equal contributions being made as at the date of separation.
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> As to the period post-separation, the Federal Magistrate concluded that there was a need to make a further adjustment of 20% of the non-superannuation assets in favour of the husband. His Honour went on to say -
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> 78 ……. That said, given the significance of the financial contributions made by the husband post-separation, I am not satisfied that the evidence supports an overall assessment of equal contributions being made. A further adjustment should be made in the husband's favour and I am satisfied that the evidence supports a further adjustment in percentage terms of 20%.
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> 79 Consequently, I am satisfied that the evidence supports a contributions assessment outcome favouring the husband of 70% and 30% in favour of the wife.
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> 80 I am further satisfied that such determination should apply to both the net property pool (excluding superannuation) as well as to the superannuation assets. There is evidence before the Court that the husband's superannuation has increased from $388,426.00 to $1,673.902.00 since separation.

Justice Ainslie-Wallace observed at [54] "The effect of this determination in dollar terms, given the net value of the property of the parties (excluding superannuation) was found by the Federal Magistrate at [56] to be $3,106,313.00; 30 per cent of that in the wife's favour amounted to $931,894 and $2,174,419 to the husband."

Justice Ainslie-Wallace continued her analysis at [55], [56] and [57] said –

> 55 "In this case the contributions of the parties after they separated were different in kind and nature to those made during the relationship. Those of the husband were almost entirely made under s 79(4)(a) and those of the wife made pursuant to s 79(4)(c). Obviously the husband's contributions were of significant amounts of money. His ability to make the contributions was largely as a result of being able to build a career during the 21 years of the marriage during which the wife, by mutual agreement did not work outside the home but took on the role of homemaker and parent, a role in which, the husband said she had been and continued to be after separation "absolutely marvellous" [68]. *(emphasis added)*

> 56 To a degree, counsel for the husband accepted that in this case the parties' contributions continued after their physical separation however argued that during the same period, the husband was working and acquiring property and assets and these ought to be *sequestrated* in the sense that the wife made no contribution to their acquisition. (*emphasis added*)
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> 57 That argument must be rejected. It does not give account to the wife's continuing indirect financial contributions to the husband's income (albeit in a different way from that during the relationship with the husband).

That last sentence should not come as a surprise, although even recently there are still occasional decisions where a post-separation property is sometimes treated as a sec 75(2) factor without any recognition that the other party had made a "continuing indirect financial contribution" thereto. Admittedly sometimes a Court is led into that error by submissions, the makers of which should be cognizant of what was said in *Ferraro* (1993) FLC 92-335 at 79,569, which her Honour quotes at [58].

> 58 …. The issue here is not whether the wife made direct contributions to the conduct of the business. His Honour found that she had not. The facts are that the husband, particularly in the latter years, devoted his full time and attention to his business activities and thus the wife was left with virtually the sole responsibility for the children and the home. That latter circumstance is significant not only in relation to the evaluation of the wife's homemaker contributions under paragraph (c) but is important under paragraph (b) **because it freed** the husband from those responsibilities in order to pursue without interruption his business activities. *(emphasis added)*

At para 59 her Honour emphasized -

> 59 Further, in *Ferraro*, the Court rejected the trial judge's finding that the wife made no contribution to property acquired after separation and said (at CCH page 79,569) *(reference added)*:
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> > The wife continued to make a significant contribution to this post-separation property for the above reason and because she continued to make her contributions to it during that period under paragraphs (b) and (c).

The fundamental obligation is to assess "the entirety" of the parties' contributions, of any nature, and to evaluate the significance of those contributions. It is therefore wrong to tie the assessment of contributions to any particular asset. See *Farmer & Bramley* (2000) FLC ¶93-060.

Where parties have embarked on a way of life with "specialized roles" it is usually an error to attribute different ratios to the values of their contributions just because a separation has taken place. Specifically, it is an error to fail to recognize the real on-going benefit flowing to the breadwinner by way of the other party's indirect contributions to to the breadwinner's opportunities to develop career paths and income capacity, and capacity to accrue assets.

Clearly, this indirect contribution to that ongoing benefit endures beyond separation. However this observation depends on the evidence supporting such a finding. There are cases where a party has walked into a marriage where the other party has already had a flourishing business and a high income. If that applies, then the duration of the subsisting cohabitation may determine the extent of any indirect contribution.

Logically, indirect contribution to the husband's capacity continues post-separaation, and is independent of how many (if any) children may still be living in the wife's care. There is no need for there to be any continuing concurrency of parenting contributions in order for there to be continuing indirect contribution to the income earning capacity. It is important to be aware that there is a distinction between the indirect contribution to a husband's on-going capacity on the one hand, and the wife's post-separation contribution as a parent, on the other. If applicable, she must be given credit for the former, and in addition, she may also be making a direct contribution as a post-separation parent.

In some cases, the "freeing" of the husband to pursue his business interests, may also continue post-separation. Where applicable, a wife can claim to have made an indirect contribution to the husband's post-separation economic capacity, particularly where the freeing from parenting duties enables a husband to continue to expand his business, or to up-grade it with new plant and equipment or new or renovated premises.

It is in this wide context that Justice Ainslie-Wallace said in para 64, "*The wife has contributed to that ongoing earning capacity.*" See also para 65 where her Honour said –

> *"Clearly then the husband's submissions that the increase in property after separation should be regarded as being referrable to a contribution made only by him is to be rejected. It not only ignores the ongoing contribution of the wife to his income but further seeks, impermissibly, to confine contributions to a particular class or list of assets."*

This continuing economic capacity be recognized where a party has a business that involves asset development, and asset selling, eg a builder, whose business was developed during the marriage. The spec-built house constructed after separation constitutes a manifestation of the capacity that he was freed up to develop during the marriage. It also is a manifestation of potential income upon sale, but until sale, it is an asset in his hands.

In respect of each of these manifestations, the wife has made an indirect contribution. There is no basis for "sequestration" or quarantining of that asset.

Furthermore, it is suggested that there is no need for the capacity to arise from the conduct of a "business". It can arise from a hobby, or a part-time handyman occupation, or any skill built up during a relationship – eg, stock-market speculation.

None of the above observations diminish the importance in any given case of actual direct contributions by a spouse towards parenting. This direct contribution, to which sec 79(4)(c) applies, is *in addition* to the indirect contribution by the parenting spouse to the other party's economic capacity.

Conversely, the party who has facilitated the "freeing" of the primary income earner, often undergoes a personal fiscal detriment, like losing current workplace skills, or having no opportunity to accumulate superannuation entitlements, or enduring the consequences of work-related relocations, or being left with lengthy periods of sole responsibility for the children.

This is partly related to the relevance of sec 75(2)(k) even where no maintenance is sought, and this is discussed below in relation to the judgment of Justice Le Poer Trench.

The Federal Magistrate therefore fell into error by viewing the large "contributions" claimed to have been made by the husband, as being his alone, in that he failed to recognize that the husband retained the ongoing benefit of the wife's indirect contribution to his income earning capacity. His Honour then made the adjustment from 50/50 to 70/30 in the husband's favour of all assets, including superannuation.

In her Honour's words at [65]

> 65 Clearly then the husband's submissions that the increase in property after separation should be regarded as being referrable to a contribution made only by him is to be rejected. It not only ignores the ongoing contribution of the wife to his income but further seeks, impermissibly, to confine contributions to a particular class or list of assets.

When turning to the sec 79(4)(e) and sec 75(2) provisions, the Federal Magistrate made only a 10% adjustment in the wife's favour of the non-superannuation assets. She therefore received 40% of those assets and 30% of the superannuation to be paid sometime in the future.

Justice Ainslie-Wallace summed up the position at [82] when she said –

> 82 Given all the facts found by the Federal Magistrate and the evidence before him, the result of his determination is to leave the wife $1,242,525 plus $502,170 to be paid sometime in the future, a total of $1,744,695. The husband, on the Federal Magistrate's calculations is to retain $1,863,788 plus $1,171,732 in superannuation, a total figure of $3,035,520 together with his ongoing capacity to earn significant income and bonuses.

Justice Murphy identified the amount that the husband had to pay to the wife after taking into account that she was to retain the home, was $125,178.20. This amount was described by his Honour at [137] was less than 6 months of salary for the husband. It was also less than what the husband received in 2011 by way of bonus (AU$503,668) (at [123]).

His Honour gives clear guidance to trial judicial officers from para 104 ff in referring to the reasons of the Federal Magistrate.

> 104 First, I consider that [78] of the reasons in particular is redolent of his Honour having misled himself by, in effect, posing the question of **what adjustment** should be made to an **equal division** at separation to take account of contributions in the ten years or so post-separation. **The question to be addressed was what did an analysis and**

**weighing of *all* contributions of *all* types prescribed by s 79(4) made by *both* parties *across 31 years*** (the approximate 21 years of the cohabitation and the approximate 10 years after their separation) **suggest was a just assessment of contributions**. (See, for example, *In the Marriage of Aleksovski* (1996) 20 Fam LR 894, particularly per Kay J at 903).

105 For that same reason, it is not a matter, as is said at [67] of the reasons, of "competing" contributions by the wife "erod[ing] the significance of the husband's on-going financial and non-financial contributions" (see, for example, *In the Marriage of Pierce* (1998) 24 Fam LR 377, particularly at 385-6).

106 Inherent in the finding at [78] is the proposition that the contributions of all types recognised by s 79(4) made by both parties over 21 years in their "own spheres" (see, *Mallet v Mallet* (1984) 156 CLR 605 at 636, per Wilson J) results in contributions being assessed as equal, but the contributions of all types made by both parties in their own spheres over **31 years justifies a *disparity*** between them of 40 per cent or, in dollar terms over both assets and superannuation, of about $1.91million. In my view, that conclusion pays no, or no sufficient, regard to the significance of the **wife's contributions over 21 years**, the **impact of those 21 years of contributions** on the property and **income earning by the husband**, and the fact that **those significant contributions** (as his Honour found them to be, at [69]) **undoubtedly continued in the 10 years after separation**. *(emphasis added)*

107 The expression "post-separation contributions" has, of course, been used widely in many authorities within the context of discussions about the assessment of contributions. But, importantly, it is not the fact of separation or when contributions are made that is the delineator. It **remains crucial to analyse and weigh the nature, form and characteristics of all contributions across the whole of the period** under consideration. *(emphasis added)*

At [112] and [113] Justice Murphy highlights this continuing contribution by the parent post-separation.

112 However, it is equally clear that the very same decision by the parties to "specialise their respective roles" permitted (or required) the wife to contribute significantly more time and energy to the care of the household and the rearing of the parties' three children not just in the 21 years to separation, but in the 10 years after separation.

113 Although each party's respective role was conducted with increased exclusivity after separation, it was those *same* respective roles which continued. That is, each of the parties contributed within their "own spheres" in that respect in a manner similar to that which they contributed prior to separation. *(emphasis added)*

At [128] and [129] Justice Murphy identifies an omission by the Federal Magistrate to consider 75(2)(b) and (n), yet those considerations were "*important to informing (his) view*" that the adjustment of just 10% of the parties' property, was "*plainly wrong*".

Another example where no ground was pleaded as to an obvious error, is found at [131] and [132] where the Magistrate's conclusion that his orders "*should improve the earning capacity of the wife"* were without any evidentiary basis.

Setting aside a judgment upon appeal on grounds that have not been pleaded by the appellant, is not new law. See the High Court decisions in *Warren v Coombes* (1979) 142 CLR 531 at 553.

At [123] and [136] Justice Murphy refers to the failure of the Magistrate to have recorded an awareness of the disparity of incomes, nor is there any finding as to the wife's future income earning capacity, yet that is a "crucially important" factor under sec 75(2).

Justice Le Poer Trench noted at [161] and [162] that the Federal Magistrate had failed to consider the real impact of his findings in actual dollar terms, thereby not having the benefit of a valuable aid to assess a valid adjustment under sec 75(2).

> 161 In this case the Federal Magistrate's determination of the division of net assets and superannuation, based upon assessment of contributions pursuant to ss 79(4)(a) to (c), was expressed in percentage terms. The learned Federal Magistrate, **did not calculate, in dollars**, the **consequences for each of the parties resulting from that determination**. **Nor did he consider that difference** when he came to consider the matters referred to by him under ss 79(4)(d) or (e). The reason for that omission appears to have arisen, at least in part, from what was stated by him at [97] of his judgment which provided as follows: *(emphasis added)*
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> > 97 For the sake of completeness, I note that considerations under s.75(2)(h), (j) and (k) of the Act are not applicable here as neither party seeks final orders in respect of spousal maintenance. I also note that s.75(2)(c), (ha), (l), (n), (naa), (na), (p) and (q) as well as s.79(4)(f) and (g) of the Act are not applicable in the circumstances of this case.
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> 162 In relation to his Honour's determination that ss 75(2)(j), 75(2)(k) and 75(2)(n) were not applicable and/or relevant to the case, we conclude that determination is in error.

At [168] his Honour referred to *Browne v Green* (1999) FLC 92-873, where the Full Court considered how the phrase "*the party whose maintenance is under consideration*", found in ss 75(2)(g), (h) and (k), should be read when considering a property settlement application under s 79. Their Honours said:

> 67 It is fair to say that it has long been assumed in this Court that when s 75(2) is being applied in property settlement (as opposed to maintenance) proceedings, references in paragraphs (g), (h) and (k) to "the party whose maintenance is under consideration" can be read as references to a party to the proceedings with respect to property settlement. Such an assumption was made, for example, by Nygh J in

*Hirst and Rosen* (1982) FLC 91-230, and we were not taken to (nor are we aware of) any authority to the contrary.

At [174] his Honour said –

> 174 There is nothing in any of the ss 79(4)(d) to (g), or elsewhere in s 79 which requires a judge to calculate in dollar terms the differential achieved between the parties if the judge has apportioned assessment of contribution in percentage terms. Nevertheless, **it is a matter of common practice** developed by judges exercising jurisdiction under section 79 of the Act, to carry out such an exercise, **at least at the time matters relevant to section 79(4)(e) are considered**. **Section 75(2)(n), on one level at least, invites such an exercise**. Had the Federal Magistrate carried out such an exercise, in this case, he may have reached a different determination as to the amount of adjustment which was required under section 75(2).

This judgment is likely to make a difference in those cases where the primary parent facilitates the income-earning capacity of the other party. There will be various points of distinction.

Some cases will involve established businesses. It then becomes a matter of degree depending on the scale of the enterprise and the opportunity that the stay-at-home spouse has, in order to be able to make any indirect contribution. For instance, there might not be much by way of establishing the economic capacity of a husband, but if he has to work to keep the business viable, and is for that reason freed to do so, then the wife can argue to have made an indirect contribution to the maintenance and continuity of the business.

By their nature, businesses need to stay open and trade, just in order to continue to exist. This constant commitment to the continuity of a business, and the associated constant rejuvenation of them, means there is a lot of scope for indirect contribution to be made post-separation, but this does not mean that there is a reduction in the significance of the indirect contribution that facilitated the establishment of the business.

What if each of a number of children reaches adulthood after separation and become independent? Surely there will be no scope for any "pro-rata" reduction in the significance of the home-parent's contribution. The judgments in *Marsh* do not accord any special consequence flowing from the departure of the child who was 17 years old at separation and then lived separately in one of the post-separation properties.

This takes us to the next step – what if there are no children to be minded, or what if the children are living in a week-about parenting pattern? The answer may have to depend on various subtle arguments, but none of them can take away the importance of the initial indirect contribution that facilitated the establishment of the husband's economic capacity.

What I am suggesting is that on-going parenting, if any, must be treated according to its significance in any given case, but it must not be confused with indirect

contributions by the wife referable to the times when the husband was freed by the wife to establish his on-going economic capacity.

In this article I have used the terms “parties”, “spouse”, “husband” and “wife” not for the purpose of allocating a sexist role to either gender, but for the linguistic advantage that use of such terms makes it easier to illustrate the point being made.