


# Full Court of Family Court Clarifies Test to Set Aside Financial Agreements

## Full Court finds that a material change in circumstances requires hardship to be established before Financial Agreement

In *Fewster & Drake* [2016] FamCAFC 214 (4 November 2016), Justices Strickland, Aldridge & Kent of the Full Court of the Family Court of Australia delivered a judgment regarding an application by Mr Drake to set aside the parties' Cohabitation and Separation Agreement set aside.

### INTRODUCTION

The husband and wife, born in 1942 and 1967 respectively, began cohabiting in 2004 and were married in 2006.

Prior to the marriage, the wife owned a property at referred to in the judgment as "Suburb J" and the husband owned a property at "Suburb C". The husband also had the use of a property at "D Town" which was owned by "E Pty Ltd" as trustee for the "Fewster Family Trust". Initially the husband was the controlling shareholder of the company and appointor of the Trust and beneficiary. Later, in 2011, he resigned as the appointor and relinquished his beneficiary claims. The following year "H Pty Ltd" replaced E Pty Ltd as trustee. H Pty Ltd was a company controlled by the husband and the children from his previous relationship.

During the early stages of the relationship the husband requested that the couple enter into a Cohabitation and Separation Agreement ("the Agreement"). The agreement would provide for the wife to have a right to live in the D Town property after his death.

Following their marriage, the husband's solicitor proposed various options that would give the wife a continuing right to occupy the D Town property and enclosed a draft agreement. In early November 2006, the husband's solicitor confirmed that the husband intended to leave the assets of his first marriage to the children of that marriage. A further draft of the proposed Agreement was provided. In late November 2006, the wife agreed to sign the agreement if it was limited only to the D Town property and that she would retain the right to seek spousal maintenance which was excluded by the draft Agreement. Following minor changes at the wife's request, it was signed in December 2006. The parties had two children born in 2007 and 2009.

### THE PRIMARY JUDGE'S DECISION

The primary judge considered the property distribution under the Agreement. He set out the facts below:

a) Both parties made no financial contribution or had any entitlement regarding their separate assets in the schedules of the Agreement.
b) On termination:
    a. Each would retain the assets in the separate schedules attached to the Agreement including any property or income arising thereafter; and
    b. Any jointly acquired real property would be sold and the parties would be reimbursed for their respective contributions to the price including 10 per cent interest calculated on a daily basis from the date of contributions until the date of sale with the balance of proceeds of the sale to be divided between the parties in proportion to their investment.



c. That any personalty such as furniture and effects jointly acquired by joint contribution be divided by agreement on a "two lists basis";
d. That there be a release of claims against the other under the *Family Provision Act* 1982 NSW with an obligation to make a joint approach to the Supreme Court of New South Wales for the approval of the release.

The primary judge considered the importance of the second child born two years after the agreement was entered into. His Honour found that the wife's evidence that she was the primary carer for the children and homemaker was agreed upon. She had, further, worked on the parties' property and in the husband's business.

His Honour accepted that the agreement provided for the parties to retain their respective assets as at the date of agreement and any acquired joint property to be divided. He believed she would have "little expectancy to any interest in acquired joint property where at the time of agreement she had prospective capacity to make a contribution."

In determining the grounds of application, the trial judge relied heavily on the decision of *Pascot & Pascot* [2011] Fa,CA 945 ("*Pascot*"). He expressly adopted its conclusions (his reliance would later be criticised by the Full Court). His Honour referred to *Pascot* whereby, according to his Honour, like in the present case, there was no allowance for homemaker and parenting contributions in that agreement. In that case, the financial agreement was set aside.

Considering *Pascot*, the Judge said the Agreement stated that the parties intended their marriage to be permanent but desired to contract out of Part VIII of the *Family Law Act* 1975 (Cth) (the "Act") excluding the right to spousal maintenance against each other. He found that the Agreement was silent as to the wife's prospective role as a primary care giver and homemaker but acknowledged that contributions might be made financially and non-financially to the acquisition, conversation and improvement of assets and resources within the matrimonial home.

To the Trial judge's mind, the birth of the second child and potential birth of a third child was relevant in that it had a major impact on the underlying circumstances at the time of the Agreement. It meant that, as there was no provision for the birth of future children in the agreement (including the second child who was born after the Agreement was signed) the wife's prospective financial responsibility grew substantially with the change while her entitlement diminished. He saw this as creating "hardship" for the wife.

The judge found that setting aside the agreement would allow the wife to make an application for spousal maintenance (ie a maintenance payment to an ex-spouse in a lump sum or by periodical payments) orders under s 72 and 79 of the Act. He found that setting aside the Agreement was the "only" remedy.

**FULL COURT DECISION REGARDING THE AGREEMENT**

Section 90k(1)(d) of the Act permits the Court to set aside a financial agreement or termination agreement if, and only if the Court is satisfied that:

> "since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the Court does not set the agreement aside".

Few cases have considered this section of the Act, however in *Pascot* Le Poer Trench J said that there must be circumstances that have arisen since making the Agreement, being circumstances of a "material" nature relating to the care, welfare and development of a child of the marriage. He said further that where the child or the applicant, if she has



caring responsibility for the child, will suffer hardship if the Court does not set the agreement aside, the Court may set the agreement aside.

The Full Court was critical of the trial judge's heavy reliance on this judgment. Their Honours found that the judge in Pascot omitted a key part of the 90K(1)(d) provison in neglecting the critical words, "as a result of that change". These words, they said, provide a necessary connection between the changing circumstances and the hardship.

By failing to use this linking term and applying the *Pascot* test, the judges believed the primary judge erred. The Full Court also found problems with the judge in Pascot's definition of "material". For their part, they did not see the benefit of substituting other words for those used in the Act as they believed it could become misleading.

The husband further submitted that hardship was incorrectly interpreted within the ambit of 90K(1)(d). The Court accepted the husband's assertion that the words, "as a result of change" indicated that the relevant hardship with which the section was concerned was that which is caused by the change in circumstances. The Court also accepted that the term "hardship" rightly carried its ordinary meaning and therefore found that the trial judge erred in his application of the meaning of hardship as it related to the wife's ability to access spousal maintenance (pursuant to the relevant sections, section 72 and 79, of the *Family Law Act*). Therefore, with the misapplication of hardship and the misconstruction of s 90K(1)(d), it was decided that the husband's ground of appeal was established.

The order setting aside the Agreement was to therefore reversed. The Court left the question open as to whether it would be able to predetermine the issue and remitted for a further hearing. The turning point for this case was the link between the "changed circumstances arising from the care, welfare and development of a child" and the "hardship" suffered by the child or the person with caring responsibility. In the Full Court's mind, this hardship must result from the change in circumstances for the requirements of the section to be satisfied.

**FULL COURT DECISION REGARDING THE AWARD OF SPOUSAL MAINTENANCE**

The husband submitted that the primary judge erred in his decision to award interim maintenance because his Honour:

a) Wrongly presumed that the wife should not have recourse to capital to support herself;
b) Failed to take into account that the order for maintenance was an interim order pending the hearing of the property proceedings between the parties in approximately nine months; and
c) Failed to take into account the wife's concession that "she had an unexercised capacity for part-time employment amounting to no more than $600 per week".

The primary judge found that the financial agreement was to be set aside and allowed the wife's application for spousal maintenance. It was accepted that the wife was permitted to seek an order for spousal maintenance before exhausting her capital resources. The case law considered at first instance, however, did not establish that the capital of a person seeking spousal maintenance is always to be *entirely* disregarded. Instead, where capital is retained and not used for day to day support this must be taken into consideration alongside all other factors.

At trial this issue was oversimplified. The Full Court, further, saw merit in the husband's submissions that the trial judge did not act on the basis that there would be property proceedings and therefore allowed the appeal against the order for spousal maintenance.

The orders were set aside and the application was remitted for rehearing.