



FAMILY LAW CASE STUDY: POST-SEPARATION CONTRIBUTIONS

JACOBSON & JACOBSON (1989) FLC 92-003

BACKGROUND ON THE CASE

In this case, the parties (Husband and Wife) were married in 1960, and separated in 1984. However, their property dispute did not come before the Court for a final hearing until 1988, some four (4) years later. There were five (5) adult children of the relationship. The youngest daughter, who was eighteen at the time of the hearing, was born with permanent brain damage.

At the time of the hearing, the parties had the following “matrimonial property” (property accumulated during the relationship):

1. \$20,000 being a partial property settlement provided to the wife post-separation;
2. The sale proceeds of a prawn trawler to the value of \$31,653.02;
3. Approximately \$11,848 cash in the bank in the Husband’s name at separation;
4. \$4,300 being the surrender value of a Life Policy; and
5. A liability of approximately \$500 relating to sale of the trawler.

Based on the above, the Trial Judge found the net value of the couple’s asset pool to be \$67,301 [1].

APPLICATIONS MADE BY BOTH THE HUSBAND AND WIFE

Originally the Wife, in her application, requested that the moneys held in trust by the Husband’s solicitors plus any interest accrued be paid to her, and that the balance of the sale price of the trawler (that at that point remained outstanding given it was paid in instalments) be divided 80/20 in the Wife’s favour.

She then amended her application, requesting that the funds she sought to be paid to her from the Trust account of the Husband’s solicitor be paid by way of both a property settlement and a lump sum maintenance settlement. By the time of the trial, the balance of the sale proceeds of the trawler had already been paid and the Wife had already received, (as a partial property settlement) the sum of \$20,000.

At trial, the Wife sought the following orders:

1. 100% of the proceeds of sale of the trawler by way of a lump sum maintenance and property settlement (noting she had already received \$20,000); and
2. that the Husband pay her legal costs.

In response, the Husband sought orders requesting:

1. Reimbursement for the expenses of maintaining the trawler that he had paid post-separation from the proceeds of sale of the vessel; and
2. that the balance of the proceeds of the sale of the trawler be divided equally, with the \$20,000 partial property settlement provided to the Wife to form part of the share the Wife was entitled to receive as part of the equal division.

WHAT POST-SEPARATION CONTRIBUTIONS DID THEY BOTH MAKE?

As noted above, the parties' youngest daughter was born with permanent brain damage and required special assistance and parenting which was provided to her solely by the Wife post-separation.

The Wife's financial contributions post-separation was the investment of the \$20,000 she had received as part of a partial property settlement, that was earning her on average \$40 a week, of which she then used for her living expenses. Additionally, the Wife had saved approximately \$1,000 by the trial date.

Nine months following separation, the Husband purchased a home with a \$10,000 deposit. The balance of the purchase funds was obtained by way of a bank loan secured by a mortgage. Prior to the matter coming before the Court, the Husband had already repaid the mortgage, plus interest. Additionally, the Husband has spent \$5,000 erecting a fence on the property. The property was valued at \$53,000 at the time of trial.

The Husband had also bought a car, and furniture for his new home to the value of \$3,500. In addition, the Husband paid \$30 per week child maintenance for the youngest daughter and gave the Wife a lump sum payment of \$700.

In 1987, the husband also purchased a block of land, jointly with his son. The purchase funds for this property again comprised of a deposit made by the Husband, and a bank loan secured by a mortgage. At the date of the hearing, the Husband continued to service the mortgage over this property. His son had similarly obtained a loan and which he continued to service. Additionally, the Husband and the son purchased a fence for the property. It was concluded that the Husband's equity in the additional property was in the range of \$6,000 to \$16,000.

The Husband had also made contributions in the amount of \$16,748.00 to the maintenance of the prawn trawler which had been operated by both parties prior to separation. A mortgage on the trawler was discharged after the Husband received a refund on his 1983 – 1984 tax return. He subsequently sold the Trawler and netted \$50,000 from the proceeds of sale. A pre-settlement agreement saw the Wife receive \$20,000 from the sale proceeds to be regarded as a partial distribution in respect to the property settlement. The proceeds of sale of the trawler at the date of trial was \$31,653.02.

It is noted here that the various assets acquired by the Husband post-separation were not included in the matrimonial pool at separation, and where the Husband submitted that the Wife had made no contribution to the acquisition of these properties.

THE COURT RULING

The Court found that the parties' contributions at the time of separation (which included initial contributions and contributions during the relationship) as equal. His Honour found:

- Post-separation, the Wife continued to provide care for the youngest child. As part of this, the Court also deemed that the Wife had future needs factors as a result of her inability to find work due to the care of the youngest child, and being out of the workforce for as long as she had.
- The Husband had managed to establish himself quiet quickly in the four (4) years since separation, did not have the burden of caring for another, and was in a position to earn significant income in the years that followed.
- The Husband has benefitted from tax losses that accrued during the relationship, by being able to offset those losses against future income earnings. The Wife was unable to take advantage of this benefit after separation as she had earned no taxable income, and would be unlikely to in the future, due to her inability to find work.

- Based on this, the Court ruled that the Wife had made contributions to the benefits the Husband had derived from the tax losses. Noting that \$10,000 of credits were found to comprise the \$16,784 the Husband spent on the trawler, and it was therefore just and equitable for her to benefit from this.
- While the Husband had in fact spent \$16,748 on the trawler post-separation, he did not need to be reimbursed for this amount. His Honour considered the Husband had received the benefit of tax refunds that were obtained as a result of offsetting his post-separation income against tax losses accumulated during the relationships and that related to the trawler.

As a result of these findings, the Court made the following Orders:

1. The Wife, receive all of the sale proceeds of the trawler being the sum of \$31,653.02 (plus any interest accrued), minus the costs of the Husband's solicitors in relation to the sale of the trawler (being an amount of no more than \$500). [2]

In respect of the Wife's Costs Application, the Trial Judge found:

2. That the Husband pay the Wife's costs to the value of \$3,968, within 28 days. [3]

THE APPEAL

The Husband appealed the trial judge's decision and the matter was then heard in the Appeal's Division of the Family Court of Australia. The Husband's grounds of appeal were as follows:

1. The learned trial Judge made an error in finding the Husband had \$20,000 in a bank account when considering the husband's financial position.
2. The learned trial Judge made an error in holding, that no part of the sum of \$16,748.00 the Husband spent on the trawler should be deducted from the list of divisible assets.
3. The learned trial Judge made an error in finding, that the Wife was entitled, equally with the Husband, to share in tax refunds obtained by the Husband after separation, especially in light of the losses incurred by the trawler operation.
4. The learned trial Judge made an error in finding, that the Wife's earning potential was restricted to her then current performance and earnings.
5. The learned trial Judge made an error in ordering that the Wife receive \$51,150.00 from the total matrimonial pool of \$67,301.00.
6. That the costs order be dismissed.
7. The learned trial Judge had made errors of law and fact in making his decision.

The Husband's Appeal was dismissed, and he was again required to pay the Wife's costs. The Court reached this decision by finding that grounds 2 – 7 (listed above) were not made out. In respect of the first ground, while the Court did find that there had been an error, it was considered that the error did not affect the conclusion that the trial Judge reached, nor the outcome.



WHY WAS THE HUSBAND'S APPEAL DISMISSED?

In order to look at how post-separation contributions assessed, we will look at grounds 2, 3 and 5, which relate to the trawler sale, the tax losses that were offset and the Wife's total costs awarded.

In respect of grounds 2 and 3, the Full Court accepted the Trial Judge's findings that the \$10,000 tax refund received by the Husband after separation and by virtue of the tax losses obtained during the relationship, formed part of the \$16,748 that was spent by the Husband on the trawler and that he wanted refunded. The husband claimed, amongst his numerous submissions, that:

1. The Husband's post-separation income was "after acquired property" to which the Wife had made no contributions.
2. If one party saves money or accumulates assets solely from post-separation efforts, these will be credited to that party.

The Court on appeal did not accept the first submission above and considered the Wife had contributed to the Husband's post-separation income by continuing to care for their youngest daughter, allowing the Husband to engage in income earning activity. The Wife's substantial contributions during the relationship also allowed the Husband to gain the employment, training and education, that allowed him to have the earning capacity he had post-separation. In regards to the second submission above, the Court held it was not always the case that assets accumulated solely from post-separation assets would go to that contributing party. Instead the Court said this approach was only appropriate where the other party has made no contributions at all towards the acquisition of those assets.

In respect of ground 5, regarding the Wife's share in the asset pool, the Husband submitted that it was not fair or equitable for there to be a sharing of the property other than on a 50/50 basis and given numerous matters, among those being that:

1. The Husband's post-separation acquisitions were as a result of his hard work and living frugally.
2. In order to achieve his current financial position, the Husband had to spend significant time working at sea.
3. The Wife had not made a request for maintenance from the Husband, and the Wife had rejected an offer by the Husband to pay her maintenance. [4]

In considering these, the Full Court found that while the Court accepted that the Husband had to work particularly hard to gain the financial position he achieved post-separation, the Wife still assisted the Husband in these acquisitions by caring for the youngest child, and by contributing to the approximately \$11,000 liquid funds available to him in his bank account at the date of separation. The Court also considered that the Husband's work also reflected the non-financial contributions made by the Wife both during the relationship and post-separation.

The Court also considered the total asset pool of both parties at the date of trial. The Court here found that while the parties presented only the assets available at the time of separation for division, *section 79 of the Family Law Act* makes available for distribution all assets at the date of trial, regardless of where or when they were acquired.

In making a final judgement and considering all of the above, the Husband was awarded 60% of the total asset pool available at the date of trial. Meaning that his post-separation contributions were considered and adjusted, despite the Wife taking all of the property available at separation.

WHAT DOES THE OUTCOME OF THIS MATTER TELL US ABOUT POST SEPARATION CONTRIBUTIONS?

What this case tells us is that post-separation contributions can range from the use of funds left standing in the account of one party, tax credits or an application of tax losses to the benefit of one party over the other, and the ongoing care of children post-separation, and the acquisition of property. Irrespective of how remote or insignificant a contribution is post-separation; it will still be considered by the Court, and the Court deems it inappropriate to separate pre-separation and post separation assets.

in this case, the trial Judge dealt with the assets accumulated during the court of the relationship separately to the post-separation contributions, so that in determining the share of the pool, the wife retained 76% and the husband retained 24%. However, because all of the assets should have been included in the pool, the division of property was actually 60% to 40% in favour of the Husband (excluding the maintenance component). Therefore, considering the Husband's post separation contributions.

In summary, when looking at contributions made post-separation, it is important to consider the following:

1. What was the duration of the marriage and the separation period?
2. Are there children of the relationship, and who is primarily responsible for their care?
3. How were the post-separation assets obtained? i.e., were they obtained from pre-separation assets or resources?
4. Did the other party make an indirect contribution resulting in the asset being acquired?

REFERENCES

[1] Jacobson & Jacobson (1989) FLC 92-003 at [2].

[1] Ibid at [12].

[1] Ibid at [13].

[1] Ibid at [51].