

MEMORANDUM

DATE: 28 July 2016

TO: Webinar attendees

FROM: Research Assistant to Dr Jacoba Brasch QC and BA/LLB Candidate, Jane Brouwers

Re: The s75(2) FLA "small asset pool" argument

Key Themes

Section 75(2) adjustments become more critical when the pool is small.

H & T [2002] FMCAfam 209

Per Bryant CFM at [19]:

What then is a proper adjustment under section 75(2)? The assets of the parties are modest and so is the superannuation. In some senses the smaller the asset pool the more critical the adjustment for other factors beyond contribution may be.

This statement has been endorsed by Myers J in *Bauer & Bauer* [2013] FCCA 1125 at [134] (see below); Coates FM in *Forth & Hoddle* [2008] FMCAfam 1318 at [52]; and by Roberts FM in *England & England* [2005] FMCAfam 204 at [92].

Bauer & Bauer [2013] FCCA 1125

Per Myers J at [134]-[135]:

The court is able to consider pursuant to section 75(2)(o) the issue of what is sometimes termed a "small asset pool" argument. Small asset pools can be problematic in property proceedings where there is insufficient assets to distribute between the parties to take into account both of their contributions and the 75(2) factors.

...

The pool of assets in this matter is one regarded by the court as small particularly in circumstances where there are insufficient assets to distribute between the parties taking into account particularly the husband's large initial contribution and also an adjustment to be made in favour of the wife pursuant to section 75(2). For this reason the adjustment in favour of the wife for section 75(2) is all the more critical in the outcome of these proceedings.

Bryant CFM in *H and T* [2002] FMCAfam 209 at [19] referred to and applied.

Sadler & Mistry [2015] FCCA 3407

Per Phipps J at [36]:

Given the small asset pool the real significance is the s90SF(3) considerations.

Kirby & Hodgson [2015] FCCA 372

Per Phipps J at [122]:

Given the small size of the property pool the matters under s.75(2) become particularly significant...

It is the real impact in money terms which is the critical issue, especially in small property pools

Kirby & Hodgson [2015] FCCA 372

Per Phipps J at [150]:

Because the estate is small I must look at the reality of the parties financial positions rather than simply percentage amounts.

	<p>Russell & Russell [1999] FamCA 1875</p> <p>In the context of the small asset pool, the Full Court of the Family Court made the following statement in regards to justice and equity at [80]:</p> <p><i>In our view, because of the impact which the amended orders would have on the wife's financial position, the making of those orders must be said to have required an independent exercise of discretion. Furthermore, it must be remembered in this regard that under s.79(2) of the Act, the Court is required to be satisfied that it is the <u>order</u> to be made which is just and equitable, <u>not</u> just the underlying percentage division of the net value of the parties' assets. Indeed we take the opportunity to emphasise that in what his Honour has termed "the fourth stage", that is, the consideration of whether the result is just and equitable, it is the justice and equity of the actual orders <u>not</u> of the percentage distribution which must be considered.</i></p>
<p>Small financial contributions must be looked at in the context of the small pool.</p>	
	<p>Bamford & Bank [2016] FCCA 958 Per Phipps J at [53]:</p> <p><i>The initial contributions towards the purchase of the house were \$250 by the applicant and \$1750 by the respondent. The respondent's parents contributed \$6700. These are modest amounts. The initial contributions were in 1992 and the parents payments over a period of time so they are affected by the passing of time. They are small amounts but have to be put in the context of the small property pool of \$123,300.</i></p>
<p>A small asset pool in combination with a disparity in earning potential between the parties will generally favour a s75(2) adjustment in favour of the party with the lower income.</p>	
	<p>Harper & Harper [2013] FCCA 1657 Per Harland J at [88]-[89]:</p> <p><i>The wife also submitted that she needs to rehouse herself and the children and that the small size of the pool she should receive a further adjustment because of this. I am not persuaded that there should be an additional adjustment to the wife because of the modest size of the asset pool. If there was a large disparity in income earning capacity as well as a small pool this submission would carry more weight.</i></p>
	<p>Gallo & Gallo-Semmens [2014] FCCA 398 Per O'Sullivan J at [76]:</p> <p><i>In my view, the adjustment for the s.75(2) factors of the property taking into account the size of the pool, the care of the children and most significantly, the disparity in the income earning capacity of the parties, should be 21.25 percent.</i></p>
<p>In a small pool property settlement, the party with the lower earning potential is not entitled to the entirety of the pool.</p>	
	<p>Marino & Salvai [2015] FCCA 222 Per Burchardt J at [253]:</p> <p><i>I note that no submission was advanced in terms by the wife to the effect that she should receive the entirety of the pool because of its relatively small size. Had such a submission been made, once again, I would not have been prepared to sustain it.</i></p>
<p>The (small) size of the asset pool is also a factor to be considered when assessing contributions.</p>	

	<p>Mitchell & Nevis [2014] FCCA 376 Per Brown J at [131]-[135]</p> <p><i>In all these circumstances [of the wife's overwhelming contribution], it is my finding that factors relevant to contribution greatly favour the applicant and it would constitute a marked injustice to her if this was not recognised by the court particularly given the small overall asset pool.</i></p> <p><i>However, I acknowledge that in the circumstances of a case like the present, it is highly artificial to speak of contributions in percentage terms. What matters to the parties is what any orders means to each of them in dollar terms and in respect of which items of property each is able to retain.</i></p> <p><i>The Full Court of the Family Court has recently pointed out that there is no requirement on a trial judge to allocate a specific percentage entitlement of property following the exercise under either section 79(4) or 90SM(4)... As a consequence, in most cases there will come a point where it is necessary to make the leap from words to figures and so move from a qualitative evaluation of contributions to one which is quantitative in nature.</i></p> <p><i>In this case given the small asset pool and the significance of the applicant's contributions, I consider that the starting point for any consideration of contributions in percentage terms is one of 70/30 per cent in Ms Mitchell's favour in respect of the non-superannuation assets.</i></p>
	<p>Justice and Equity in small asset pool property settlements</p> <p>The Court must look at the reality of the parties financial positions rather than simply percentage amounts</p>
	<p>Maybury & Maybury and Ors [2011] FMCAfam 540</p> <p>Per Coates FM at [191]-[192]:</p> <p><i>The justice and equity considerations are extremely important in this case. The pool is small, taking into account the creditors. Justice and equity, particularly relating to smaller pools, was addressed in H & T [2002] FMCAfam 209 where it was said: "Finally, in determining what order the court should make under section 79 the court must be satisfied in all the circumstances that it is just and equitable to make relevant orders. It is the justice and equity of the actual orders that the court must consider (see Russell v Russell (1999) FamCA 1875".</i></p> <p><i>The relevant statement in Russell v Russell, at paragraph 80, stated: "... because of the impact which the amended orders would have on the wife's financial position, the making of those orders must be said to have required an independent exercise of discretion. It must be remembered that under s.79(2) of the Family Law Act, the Court is required to be satisfied that it is the <u>order</u> to be made which is just and equitable, <u>not</u> just the underlying percentage division of the net value of the parties' assets. The Full Court took the opportunity to emphasise that in the consideration of whether the result is just and equitable, it is the justice and equity of the actual orders <u>not</u> of the percentage distribution which must be considered".</i></p>
	<p>Forth & Hoddle [2008] FMCAfam 1318 Per Coates FM at [64]-[67]:</p>

	<p><i>Having then made the determination as to the proper alteration which should be made when applying the law to the facts, I must step back and consider whether the proposed orders are just and equitable.</i></p> <p><i>A timely reminder was set out in H & T in considering this step: "Finally, in determining what order the court should make under section 79 the court must be satisfied in all the circumstances that it is just and equitable to make relevant orders. It is the justice and equity of the actual orders that the court must consider (see Russell v Russell (1999) FamCA 1875".</i></p> <p><i>Russell v Russell (1999) FamCA 1875 at [80] restated.</i></p> <p><i>This is a very small pool. Both parties have health concerns, but not where immediate or identified needs have to be met in the circumstances they are living in.</i></p> <p>At [94]:</p> <p><i>Being such a small pool, I cannot take into account what parties think may happen in the future although such may have been open in a larger pool, depending on the evidence. I have to consider whether either possible alteration is within the discretion, given that I have found that the husband has made a 20 percent contribution and the wife's need.</i></p>
	<p>Kirby & Hodgson [2015] FCCA 372 Per Phipps J at [150]:</p> <p><i>Because the estate is small I must look at the reality of the parties financial positions rather than simply percentage amounts.</i></p>
On less than ideal outcomes	
	<p>Marino & Salvai [2015] FCCA 222 Per Burchardt J at [256]:</p> <p><i>The Court is, of course, required to be satisfied that the property settlement is just and equitable. It should be noted that... and it may very well be that each party emerges with very little net resources whatever from this outcome. That is a great misfortune for them both, but in the circumstances I do not think that it produces an outcome other than one that is just and equitable. Just as with the mother, the father, too, has to pay his bills. These parties have litigated on a wide scale with what they always both knew was a small property pool. It is beyond the Court's power to make that property pool bigger. In my view, the conclusions I have reached are, indeed, just and equitable.</i></p>
	<p>Oldfield & Oldfield & Ors [2013] FCCA 213 Per Burchardt J at [82]:</p> <p><i>In the unfortunate circumstances of this case where the parties are arguing about small amounts of money, the above outcome (namely, a 60/40 division in the wife's favour of the husband's half share of the net equity of the home) is the best the Court can do to achieve an outcome that is just and equitable... It is regrettable that the parties have spent so much money arguing about such a small pool.</i></p>
On the need for finality.	
	<p>Tabe & Napier [2013] FCCA 1893 Per Small J at [10]-[11]:</p> <p><i>In fact the evidence is so uncertain in this case that I am tempted to decline to make orders at all and require the parties to engage in mediation or negotiation in order</i></p>

	<p><i>to resolve the matter. That would have been the sensible thing for the parties to do in relation to an asset of this size and in the evidentiary circumstances of this case.</i></p> <p><i>However, given the small size of the asset pool and the investment the court has already made in attempting to resolve this case, I will do the best I can to untangle the various transactions and make orders that I consider just and equitable in all the circumstances.</i></p>
Justice and Equity: Proper allocation of realisable/tangible assets and superannuation	
	<p><i>Buckley & Buckley [2015] FCCA 1594</i> <i>Per Henderson J at [145]:</i></p> <p><i>Given the small asset pool and that the wife is receiving, properly, the bulk of cash available I will make no further adjustment to either party's current entitlement to superannuation.</i></p>
	<p><i>Bucknell & Bucknell [2009] FamCAFC 177</i> <i>At [23]:</i></p> <p><i>An order in which one party receives no immediately realisable funds is uncommon. But of itself, that does not indicate any error. In our view, the result is responsive to the circumstances of the case which, as seen, involve a period of contributions to trial of about 10 years, a very young child in the primary care of the wife, a small asset pool and a significant disparity in earning capacities, favouring the husband.</i></p>

Prepared by:



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Date: 21/07/2016