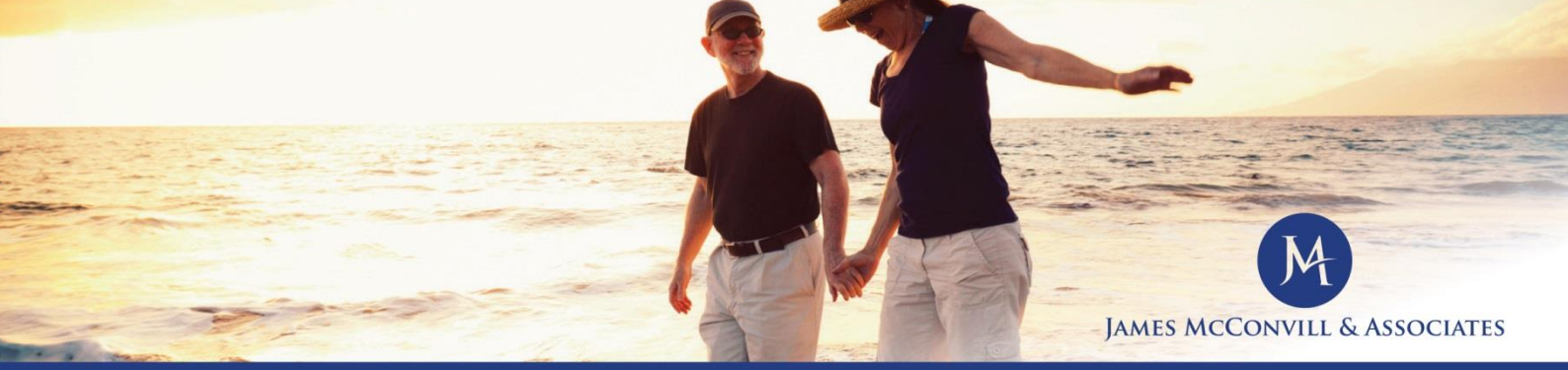


JAMES MCCONVILL & ASSOCIATES

Full Court of the Family Court of Australia Dismisses All Grounds of Wife's Appeal Regarding Distribution of Assets

Full Court clarifies scope of wastage argument and other points in property settlement case

In the recent case of *Charles and Charles* [2017] FamCAFC 3, Mrs Charles ("the Wife") brought an appeal against Mr Charles ("the Husband") regarding property settlement orders made by the Federal Circuit Court of Australia on 20 February 2015. Those orders provided that the Wife receive 55 per cent of the parties' non-superannuation assets and that the Husband receive 45 per cent. with superannuation to be divided equally.

Chief Justice Bryant and Justices Bennett and Thackray of the Full Court of the Family Court of Australia ("the Full Court") heard submissions against the 2015 property orders, while the parenting orders were not included in the grounds of appeal.

BACKGROUND

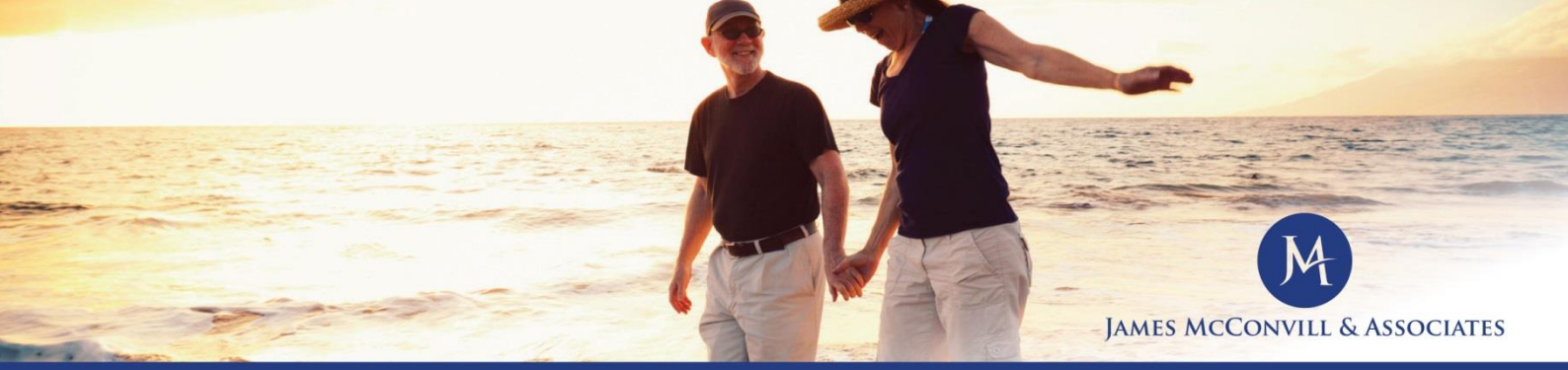
The Wife, 37 at the time of trial, was unemployed but acted as the full-time carer of the parties' two young children. The Wife received financial support from the government in the form of Centrelink benefits. She lived in the former marital home known as the "O Street Property" with the children. The house had an agreed value of $1.2 million with a mortgage value of $227,000. The Wife wished to retain the O Street Property.

The husband, 41 years old, had worked substantially in the financial services sector earning approximately $110,000.00 per annum at the time of trial. The Husband had purchased an investment property known as "The H Road Property" prior to the initiation of the relationship.

THE RELATIONSHIP

The parties' relationship commenced in or around 2003. They commenced living together in that same year. When cohabitation commenced, both parties were employed as financial services professionals, earning similar incomes. While both parties had assets upon cohabitation there was a dispute as to the exact initial financial contributions made.

The parties became engaged in 2004, spent some time in Japan teaching, and returned to Australia in 2006 where the Husband resumed a similar job in financial services. The Wife turned to other employment in the fitness industry and other areas. The parties married in October 2006. Following marriage, the parties bought and sold a property in Melbourne and later purchased the O Street Property which would be the matrimonial home. There was much dispute over the individual financial contributions to both properties for the years preceding the birth of the parties' first child, though it was agreed that when the parties had children the primary financial contributions came from the Husband.



SEPARATION

The Husband and Wife separated in May 2013. The Wife, at this time, obtained an intervention order which required the husband to leave the O Street Property. The Wife and the children remained at the property.

Following separation, the H Road Property was rented out by the Husband. The Husband paid child support following an assessment of $1900.00 per month. In May 2014, the Husband moved into the H Road Property where he lived at the time of trial.

THE TRIAL JUDGE'S DECISION

The primary judge found for a 55/45 per cent split in the favour of the Wife outlining that:

- the H Road Property be sold;
- the O Street Property be transferred into the name of the party of one of the parties.
- the Husband's $11,000 tax liability was to be included in the asset pool, accepting that her Honour would take this inclusion into account when assessing Section 79 and Section 75(2) of the *Family Law Act 1975 ("the Act")*.
- there was a significant dispute between the parties in relation to property and resources owned by them at the initial cohabitation but that ultimately it was determined that the Husband's initial contributions were approximately $390,000 and the Wife's likely $70,000.
- a gift of $50,000 in 2005 from the Husband's grandparents was a sole gift to the Husband and notdirected to the Wife.
- sixty per cent of the asset pool was entitled to the Husband and 40 per cent to the Wife.
- when giving regard to Section 75(2) of the Act, regarding matters of non-superannuation assets, the judge shifted the figure by 15% in favour of the Wife to a value of approximately, $250,000.
- her Honour relied on the Wife's significant care and provision for the children and reduced capacity for income following marriage.

THE APPEAL

On appeal, the wife challenged the primary judge's orders on the following grounds:

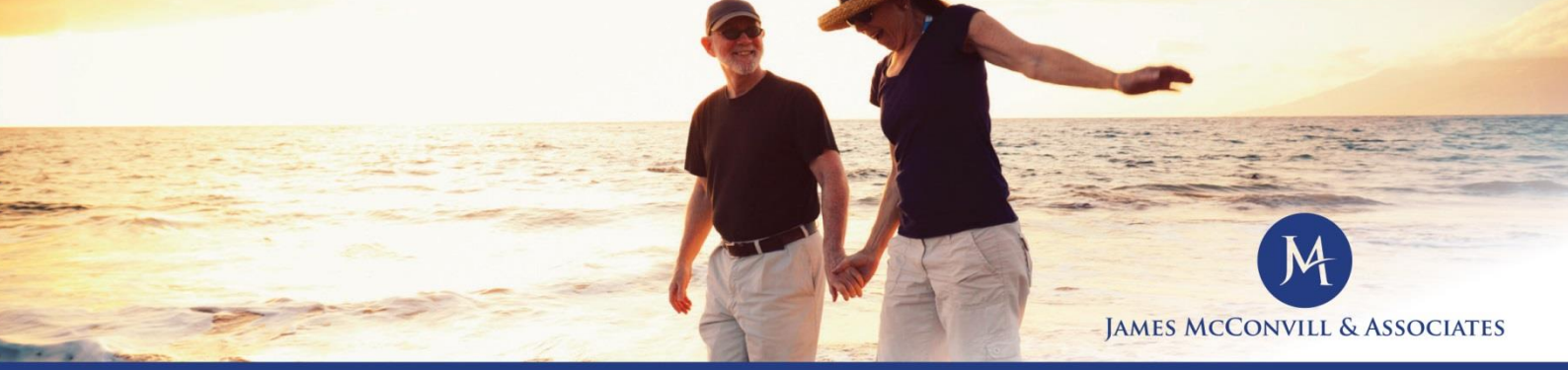
Grounds 1 and 2: That her Honour erred in disregarding the post-separation decrease in equity in the former matrimonial home and the share trading losses accrued by the Husband when making the judgment.

Ground 3: Her Honour omitted to consider the husband's long service leave entitlements.

Ground 4: That the tax liability and credit card liability were wrongly treated as part of the asset pool.

Ground 5: That the ultimate decision of the separation of assets was inaccurate including the adjustment of 15 per cent.

The Full Court determined as follows:



Grounds 1 and 2: In respect of the wastage claims of grounds 1 and 2, the Full Court accepted that the Husband had stopped paying the mortgage repayments without informing her following the assessment of child support. The Court, however, stated that the Wife's level of emotion regarding the wastage on the O Street Property was "disproportionate to the issue and the quantum involved", describing her manner as "angry".

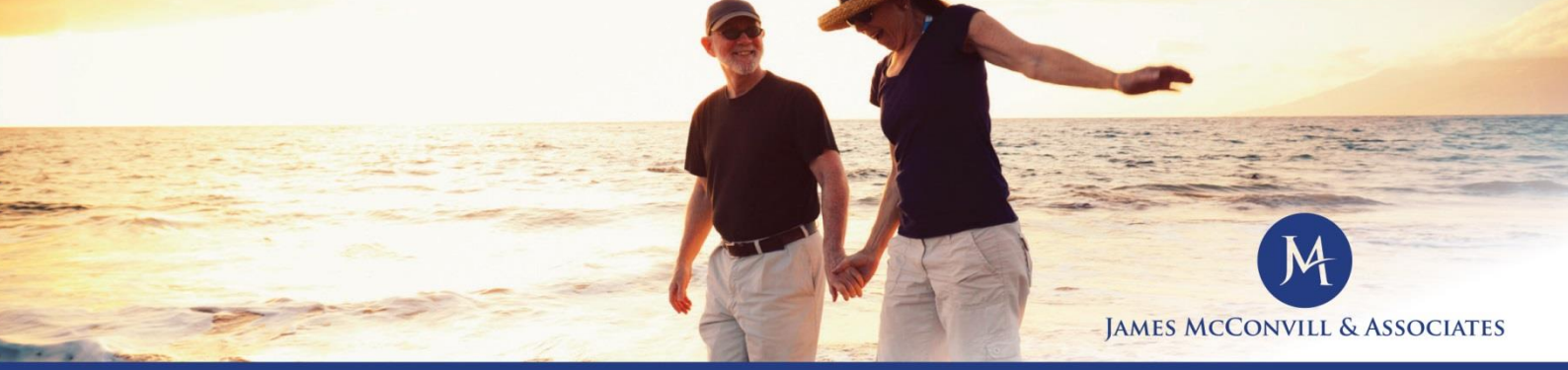
The Court found that simply deducting the said loss from the Husband's assets would not be appropriate as it would amount to an add-back in accordance with *Stanford v Stanford*. Their Honours found that the primary judge did not properly consider the principles arising from the case of *Kowaliw.* They did not find that his actions were reckless, negligent or wantonly enacted to reduce the asset pool.

The Court found that her Honour at trial found all matters relevant to the issue and exercised her discretion in not adding the sum back to the pool. There was therefore no error found in Ground 1. The Court was not persuaded that the husband had intended through his actions or through recklessness to diminish the parties' assets and further, not persuaded by the Wife's counsel that it was a question of wastage, regarding the Husband, in agreement with the trial judge as a "competent investor".

Ground 3: The Court did not entertain this ground of appeal regarding the Husband's long services leave. This was primarily as the evidence was not certain as to whether the long service leave entitlement could be taken as lump sum and also as there was no indication of when the Husband would take the said long service leave and that therefore it could not reasonably constitute a "financial resource of any substance".

Ground 4: According to the Chief Justice and Justice Bennett, counsel for the Husband submitted that the Wife had taken no issue with the inclusion of this item at in the asset pool at trial and that therefore the Full Court could not reasonably consider such a change in opinion on appeal. While Justice Thackray, in a separate judgment, disputed the total of the taxation bill, finding that it was $10,000 not $11,000 in total, he found that such a marginal difference considered by the trial judge should render it null. Therefore, he allowed that ground 4 also fail.

Ground 5: Finally, the Wife submitted that the Full Court overturn the primary judge's decision regarding the adjustment of only 15 per cent. Their Honours disagreed with the Wife's submissions. The bench made clear that it is the duty of an appellate court to be "slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight" (*Gronow*). As the Full Court did not find error with the primary judge on the discretionary assessment, it was found that the fifth and final ground of appeal must also fail and thus the appeal be dismissed.



COSTS AND CONCLUSION

In following *Elford & Elford* (2016) FLC 93-695, the Full Court reasoned that as the Wife had been "entirely unsuccessful in her appeal" that such a failure must be weighed against the circumstances. Their Honours ordered that the Wife pay the Husband's costs of and incidental to the appeal. In this case, ultimately the Court was not moved by the Wife's submissions that the Husband's wastage was in any way deliberately manufactured to reduce the asset pool. The other substantial ground of review, that the 15 per cent adjustment was in error, was dismissed briefly by the Court as their Honours were cautious to move from the primary judge's decision which was believed to be made appropriately and equitably.