HIGH COURT OF AUSTRALIA

FRENCH CJ
GAGELER, KEANE, NETTLE AND GORDON JJ

HALL APPELLANT

AND

HALL RESPONDENT

Hall v Hall
[2016] HCA 23
8 June 2016
A7/2016

ORDER

Appeal dismissed with costs.

On appeal from the Family Court of Australia

Representation

W A Harris QC with P Kari and S Gory for the appellant (instructed by Barnes Brinsley Shaw Lawyers)

D F Jackson QC with D R Sulan for the respondent (instructed by Jordan & Fowler)

CATCHWORDS

Hall v Hall

Family law – *Family Law Act* 1975 (Cth) – Spousal maintenance – Conditions for making or discharge of interim spousal maintenance orders – Interim spousal maintenance order in favour of wife – Application to discharge by husband – Where wife's father's will expressed wish that wife receive voluntary annual payment from family business controlled by wife's brothers – Meaning of "financial resources" under s 75(2)(b) – Whether confined to present legal entitlements – Whether finding open on evidence that wife able to support herself adequately – Whether just cause for discharge of spousal maintenance order.

Courts and judges – Procedural fairness – Whether party on notice of possibility of factual finding being made – Whether party denied opportunity to lead further evidence.

Words and phrases – "financial resources", "source of financial support", "support himself or herself adequately".

Family Law Act 1975 (Cth), ss 72, 74, 75, 83.

1 FRENCH CJ, GAGELER, KEANE AND NETTLE JJ. This is an appeal from a judgment of the Full Court of the Family Court[1] which set aside an order of a judge of that Court[2] and in its place ordered the discharge of an interim maintenance order.

2 It is an objective of the *Family Law Act* 1975 (Cth) reflected in the obligation it imposes on the Family Court that proceedings under the Act are "not protracted"[3]. It is an objective of the Family Law Rules 2004 (Cth) that "each case is resolved in a just and timely manner"[4]. For reasons that are not apparent from the record, the objective of timeliness was not met in this case.

The spousal maintenance provisions

3 Part VIII of the *Family Law Act* governs, amongst other things, spousal maintenance. The gateway to the operation of Pt VIII in relation to spousal maintenance is in s 72(1). That sub-section provides that "[a] party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately … having regard to any relevant matter referred to in [s] 75(2)".

4 The liability of a party to a marriage to maintain the other party that is imposed by s 72(1) is crystallised by the making of an order under s 74(1). That sub-section provides that, "[i]n proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with this Part".

5 A court exercising the power conferred by s 74(1) is obliged by s 75(1) to take into account the matters referred to in s 75(2) and only those matters[5]. Those matters are presented as a comprehensive checklist. They include what s 75(2)(b) refers to as "the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate

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1 *Hall & Hall* [2015] FamCAFC 154.

2 *Hall & Hall (No 3)* [2014] FamCA 406.

3 Section 97(3).

4 Rule 1.04.

5 Section 75(1).

gainful employment". They also include, by virtue of s 75(2)(o), "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account".

6 A court in exercising its powers under Pt VIII may "make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order"[6]. The power to make the second or last of those forms of order – an order pending the disposal of proceedings or an order until further order – is within the general power conferred by s 74(1). Such an order has now long been referred to, in nomenclature which has come to receive statutory confirmation[7], as an "interim order" as distinct from a "final order".

7 It was established at an early stage in the history of the Family Court that the power to make an interim order under s 74(1) is separate and distinct from the power to make an urgent order that is separately conferred by s 77[8]. Section 77 allows the court to "order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable" if a two-part condition is met. First, it must appear to the court that a party to the marriage "is in immediate need of financial assistance". Second, it must be "not practicable in the circumstances to determine immediately what order, if any, should be made".

8 Unlike a court exercising the power to make an urgent order conferred by s 77, a court exercising the power to make an interim order under s 74(1) must be satisfied of the threshold requirement in s 72(1) and must have regard to any matter referred to in s 75(2) that is relevant[9]. No doubt, on an application for an interim order "[t]he evidence need not be so extensive and the findings not so precise" as on an application for a final order[10]. But there is nothing to displace the applicability to an exercise of the power conferred by s 74(1) of the ordinary standard of proof in a civil proceeding now set out in s 140 of the *Evidence Act* 1995 (Cth). A court determining an application for an interim order under

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6 Section 80(1)(h).

7 Section 74(8)(b).

8 *In the marriage of Pritchard and Pritchard* (1982) FLC ¶91-286 at 77,615.

9 *In the marriage of Redman and Redman* (1987) FLC ¶91-805 at 76,081.

10 *In the marriage of Redman and Redman* (1987) FLC ¶91-805 at 76,081.

s 74(1) cannot make such an order without finding, on the balance of probabilities on the evidence before it, that the threshold requirement in s 72(1) is met having regard to any relevant matter referred to in s 75(2).

9 If an order with respect to the maintenance of a party to a marriage is in force, whether that order be an interim order or a final order, a court has power under s 83(1)(c) to "discharge the order if there is any just cause for so doing". An order discharging an order may be expressed to be retrospective to such date as the court considers appropriate[11]. For the purpose of considering the exercise of the power to discharge an order, the court is specifically required to have regard to ss 72 and 75[12].

10 It was again established at an early stage in the history of the Family Court that an applicant for discharge of a maintenance order can seek to satisfy the court that the party in receipt of maintenance does not meet the threshold requirement of s 72(1), but that the requirement of s 83(1)(c) that there be "just cause for so doing" imports a need for the court to be satisfied of circumstances which justify the court considering that threshold requirement again[13].

The proceedings before the primary judge

11 The husband is a property developer. He was born in 1952. The wife is a medical practitioner. She was born in 1972. The husband and wife were married in 2001. They have two children. They separated on 26 September 2013.

12 The wife commenced proceedings against the husband by filing an initiating application in the Family Court on 2 October 2013. Three weeks later, she amended that initiating application to include a claim for a permanent spousal maintenance order as well as claims for both urgent and interim spousal maintenance orders.

13 In accordance with directions then made by the primary judge, the wife filed a Financial Statement on 8 November 2013. The Financial Statement disclosed that she was the owner of two luxury motor vehicles. She explained in an accompanying affidavit that the vehicles had been purchased for her by her brothers.

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11 Section 83(6).

12 Section 83(7).

13 *Astbury v Astbury* (1978) 4 Fam LR 395 at 397-398.

14 The wife's Financial Statement also disclosed that she had an "interest" in the estate of her late father, the value of which was not known to her. She explained in her affidavit evidence that her father had died on 9 July 2009, having started a family business in which she had never had any active role. She did not have a copy of her father's will and did not know the particulars of her father's estate. The business was run through a corporate structure controlled by her brothers.

15 The wife's application for an interim spousal maintenance order was heard on 9 December 2013 and determined the next day by the primary judge. The primary judge ordered that the husband pay maintenance to the wife in the sum of $10,833 per month pending the final determination of the proceedings.

16 In reasons for decision delivered orally[14], the primary judge described the application as having been made on an urgent basis and appears to have proceeded by reference to s 77 rather than to s 74(1). The parties have nevertheless been content at every subsequent stage of the litigation between them to treat the order then made by the primary judge as an interim spousal maintenance order made under s 74(1).

17 The primary judge explained in her reasons that the absence of information about the nature and extent of any interest of the wife in the estate of her late father meant that no such interest could be taken into account as a financial resource of the wife in determining the application for the interim order. The primary judge explained that she was satisfied on the evidence then before her of the wife's need for spousal maintenance and of the husband's ability to pay.

18 The husband afterwards sought to subpoena the wife's father's will. The husband was unsuccessful in obtaining the will, or a copy of it, but he did obtain some information about it. That information came in the form of an affidavit filed on 20 February 2014 in opposition to production of the will under the subpoena. The affidavit was sworn by a solicitor who identified himself as acting for one of three brothers of the wife in that brother's capacity as the executor of the father's estate. The solicitor deposed that disclosure of the will would give rise to concern for the personal safety and security of the family and that, for that reason, no application for probate had been made. Production of the will under the subpoena was opposed for the same reason.

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14 *Hall & Hall (No 3)* [2013] FamCA 975.

19 The solicitor explained in the affidavit that the property of the father dealt with in the will included shares in companies within a named group ("the Group"). He described the Group as "one of the largest business enterprises" in South Australia and said that it was "listed in the top 100 private companies in the BRW annual review of private business in Australia". The solicitor's affidavit explained that, under the will, all of the father's shares were given to the wife's three brothers and that none of the shares were given to the wife, apart from some shares which the will stated were to be given to her, but which she in fact already held before her father's death. The result, he explained, was that all of the shares in companies within the Group formerly held by the father had come by then to be held directly or indirectly by the three brothers.

20 The solicitor's affidavit set out in full what the solicitor deposed to be the only clause of the will which referred to the wife. The clause expressed the father's "wish" that the wife should receive from the Group a lump sum payment in cash of $16,500,000 on the first to occur of a number of specified events. One of the events specified was that the wife is divorced from the husband. The clause went on to express the father's "wish" that the wife should also receive from the Group an annual payment of $150,000 until the date (if any) of that lump sum payment of $16,500,000.

21 The solicitor proffered his opinion in the affidavit that "[a]s payment of those amounts to [the wife] is a mere wish of the deceased, [the wife] cannot compel payment, either against the executor of the estate (which has insufficient financial resources in any case), or against the [Group] (which is not bound to observe the terms of the Will)". He opined that the payment of any of those amounts to the wife was contingent upon the "willingness" of companies in the Group "to fund those payments to her from their own resources, notwithstanding that they have no legal obligation to make any such payment".

22 Having been unsuccessful in his attempt to obtain the will, but armed with the solicitor's description of it, the husband filed an application for discharge of the interim spousal maintenance order on 7 March 2014. The husband's affidavit filed in support of the application referred to the annual payment of $150,000 and to the payment of $16,500,000 deposed to in the affidavit of the solicitor as "benefits" which the father had conferred on the wife under the will. The husband further deposed that he did not know what steps the wife had taken to pursue her "entitlements" from the Group.

23 Five days later, the wife filed an affidavit in opposition to the husband's application. She deposed that she had recently spoken to one of her brothers, who had explained to her the contents of the will. Prior to that conversation, she said, she had no knowledge of the contents of the will. The wife conspicuously

said nothing in that affidavit about whether or not she had requested payment from the Group in accordance with the wishes of her father expressed in the will. She stated only that she had "not received any income or capital payment from my late father's estate".

24 The primary judge heard the husband's application for discharge of the interim spousal maintenance order together with other applications in the proceedings on 14 March 2014. The solicitor's affidavit was relied on at the hearing. The affidavits of the husband and wife were read. There was no cross-examination. The primary judge reserved her decision.

25 More than three months later, on 17 June 2014, the primary judge made orders which included an order dismissing the husband's application for discharge of the interim spousal maintenance order. The written reasons for judgment which the primary judge delivered on that day were deficient in failing to explain the basis for the order which she made dismissing the husband's application. Those reasons made no reference to any of the evidence, or even to the existence of an issue, about whether the wife might be able to obtain the annual payment of $150,000 from the Group pending the final determination of the proceedings.

The appeal to the Full Court

26 An application for leave to appeal to the Full Court was lodged by the husband on 14 July 2014. It was heard by the Full Court on 12 November 2014.

27 At the hearing before the Full Court, the wife adduced further evidence. The further evidence included a letter dated 3 November 2014 to her from the brother who was the executor of the will and on whose instructions the solicitor had acted in filing the affidavit in opposition to production of the will in answer to the husband's subpoena. The letter informed the wife in some detail about the "finalisation of the estate". The letter was careful to explain that neither the annual payment of $150,000 nor the payment of $16,500,000 were to be paid to the wife out of the estate and that "as executor" the brother had no obligation to her in respect of those amounts. The letter concluded with the statement that "[a]ny voluntary payment by [the] Group to you is entirely a matter for [the] Group and its directors, not the estate".

28 The judgment of the Full Court, from which the present appeal is brought, was delivered on 7 August 2015. That delay of nearly nine months in delivering judgment on an application for leave to appeal from the dismissal of an application for the discharge of an interlocutory order is unexplained. On any view, the delay is unacceptable.

29 The Full Court refused to go so far as to find that the primary judge had failed to consider the husband's application for discharge of the interim spousal maintenance order at all. The Full Court found instead that the primary judge recognised that there was an application before her to discharge the interim spousal maintenance order and that there was new evidence about which both parties made submissions. The Full Court nevertheless found that the primary judge erred in failing "to consider, and indeed make any finding as to whether there was sufficient new evidence before her to discharge the interim spousal maintenance order"[15].

30 In light of that failure of the primary judge to make findings, the Full Court turned to consider for itself whether or not just cause had been shown on the evidence then before it for the discharge of the interim spousal maintenance order. In so doing, it identified the critical question as whether "there is now evidence before the court that demonstrates that the wife is able to support herself adequately"[16].

31 The Full Court gave an affirmative answer. Accepting that the making of the annual payment of $150,000 from the Group to the wife in accordance with the father's wish expressed in the will would have been voluntary, the Full Court found that the wife would have received that payment if she had requested it of her brothers.

32 In drawing that inference from the limited evidence before it, the Full Court noted that the Group was controlled by the wife's brothers and that there was no evidence that the wife had requested her brothers to comply with their father's wish once she became aware of the relevant terms of the will. The Full Court saw nothing in the evidence to suggest that any such request, if made, would have been denied. The fact that her brothers had provided her with luxury motor vehicles indicated that the wife had a good relationship with them[17].

33 Granting leave to appeal and upholding the appeal, the Full Court set aside the order of the primary judge dismissing the husband's application. In its place,

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15 *Hall & Hall* [2015] FamCAFC 154 at [131].

16 *Hall & Hall* [2015] FamCAFC 154 at [150].

17 *Hall & Hall* [2015] FamCAFC 154 at [133]-[134], [151]-[152].

the Full Court ordered that the interim spousal maintenance order be discharged as on and from 10 December 2013.

The issues in the appeal to this Court

34 By special leave, the wife appeals to this Court from the judgment of the Full Court on two grounds. One alleges a failure of process, the other errors of substantive reasoning.

35 The failure of process which the wife alleges is that the wife's ability to request the Group to make a voluntary annual payment to her was not raised by the husband on appeal or at first instance. The husband's argument, she says, was only ever that she had a legal entitlement to payment. That was the only argument she ever had to meet. If it had been apparent that the husband was alleging that she was able to request that the Group make a voluntary annual payment, the wife asserts, she would have led further evidence.

36 The errors of substantive reasoning which the wife alleges are twofold. First, the wife says that it was not open on the evidence to infer that the voluntary annual payment would have been made to her if she had requested that payment. Second, the wife says that, even if it be the fact that the voluntary annual payment would have been made to her if requested, that fact could not constitute a proper basis for concluding that she was not unable to support herself adequately within the meaning of s 72(1). Her ability to obtain a voluntary payment by asking, she says, cannot be regarded as a "financial resource" within the meaning of s 75(2)(b), and the Full Court did not and could not form an opinion that it was a fact or circumstance which the justice of the case required to be taken into account so as to bring it within s 75(2)(o).

37 The husband for his part contends that the decision of the Full Court should be upheld on the basis that, on the proper construction of so much of the will as was put in evidence through the affidavit of the solicitor, the annual payment of $150,000 was not voluntary but was rather a matter of equitable obligation. For reasons which will become apparent, it will not be necessary to address that contention.

The wife was on notice

38 The wife's complaint about process involves a procedural nicety more befitting the jurisdiction of the early 19th century Court of Chancery than the jurisdiction of a statutory court in 21st century Australia. Having invoked that jurisdiction, the wife stood to benefit at the expense of the husband for so long as the interim spousal maintenance order remained in force.

39 The husband's affidavit filed in support of the application for discharge of the interim spousal maintenance order was unambiguous in identifying, as one of a number of considerations on which the husband relied to establish just cause for the discharge, the wife having the benefit of the annual payment of $150,000 as referred to in the will. The affidavit cannot fairly be read as confining the basis for the husband's reliance on that consideration to an assertion that the wife had a legal entitlement to obtain payment under the will to the exclusion of the wife having a practical ability to obtain the payment.

40 Nothing said on behalf of the husband can fairly be taken to have narrowed the basis on which the husband relied on the wife having the benefit of the annual payment of $150,000 as referred to in the will. It is true, as counsel for the wife submits, that an examination of the transcript of that argument reveals that the focus of the husband's argument was very much on the wife's ownership of shares and on what the husband's counsel then described as the "expression of intent" in the will that she receive the payment of $16,500,000. The transcript also reveals that the husband placed express reliance on the similar expression of intent in the will that she receive the annual payment of $150,000. The husband's counsel argued that "she has ... an entitlement to $150,000 if she chooses to pursue it".

41 The position of the husband before the Full Court was tolerably clear. The transcript reveals that the husband's counsel disclaimed any suggestion that he submitted that the Full Court should infer that the wife's brothers would have given her "whatever she wanted". The husband's counsel submitted, however, that the husband was relying on the reference to the annual payment in the will, combined with evidence that the wife was on good terms with her brothers, to found an inference that she would have received the annual payment of $150,000 if she had asked her brothers for it and that the inference was more readily to be drawn given the wife's failure to adduce evidence about it. That submission might well have been made with greater clarity and economy of language. But no one could have been in doubt that it was made.

42 That the availability of the annual payment to the wife was at the forefront of the case which the wife needed to meet as the respondent to the appeal was made evident by the presiding judge identifying to her counsel at the commencement of that counsel's address that the first of a number of topics on which the Full Court sought his assistance was "the significance of the $150,000 annual payment to the wife under the terms of the will". In the course of the ensuing argument, the following exchange occurred between counsel for the wife and one of the members of the Full Court:

> "[Counsel]: [Is] the point your Honour is bringing me to is that there's no evidence that she went beyond or over [the solicitor's] evidence and said, 'I'm told I'm entitled to this money. There's no compulsion on you to pay it. I would like you to pay it to me'.
>
> [Judge]: Yes.
>
> [Counsel]: Point well taken, your Honour. She could have done that to close what I would respectfully say was the last gate that was left slightly ajar but there is no reason on the balance of probabilities to suggest in the light of the history of this matter that it would be forthcoming."

43 The husband's counsel submitted in his reply that, if the husband was successful in demonstrating error on the part of the primary judge, he was asking the Full Court itself to infer on the evidence then before it that the wife would receive the payment if she asked for it. Counsel for the wife agreed that it was open to the Full Court to exercise for itself the power conferred by s 83(1)(c) on the evidence before it, not suggesting that the wife had been deprived of any opportunity to lead evidence at any earlier stage and not suggesting that there was any further evidence the wife then wanted to lead.

44 Throughout the proceedings, at first instance and on appeal, the wife was on notice of the risk of a finding being made that she would have received the annual payment of $150,000 if she had asked her brothers for it. The fair inference is that she chose to run that risk, hoping that it would not eventuate and conscious that such evidence relevant to that finding as she might adduce would not assist her case.

The finding was open

45 The Full Court's finding that the wife would have received the annual payment of $150,000 from the Group if she had asked her brothers was well open on the evidence.

46 Having received the benefit of their father's testamentary largesse and through it having obtained control of the Group, the brothers were at least under a moral obligation to honour their father's wish that the wife receive the payments from the Group to which he had referred in the will. The Group undoubtedly had the wherewithal to make the payments and there was no evidence to suggest amorality or personal animus on the part of any of the three brothers which might in turn suggest that they might not fulfil that moral obligation. To the extent that there was evidence of their attitude towards the

wife, their purchase for her of two luxury motor vehicles demonstrated that they were well-disposed towards her.

47 The terms of the affidavit of the solicitor, on instructions from the brother who was the executor of the father's estate, and of the letter from that brother to the wife put in evidence in the appeal to the Full Court, also assist in drawing the inference. Both documents were cleverly worded. By being so much at pains to explain that any payment from the Group to the wife would not be a matter of legal obligation but would be a voluntary payment for the Group to decide on making, the documents are most informative in what they do not say: that the Group (controlled as it is by the brothers) was inclined not to pay.

48 True it is that the wife had not received any payment from the time of their father's death. The reasons for that were wholly unexplored in the evidence. That evidentiary gap was within the power of the wife to fill. It was within the power of the wife to lead evidence to provide some explanation. Again, her failure to do so allows the inference to be drawn that such explanation as she was able to provide would not have assisted her case.

The conclusion was correct

49 The Full Court's finding that the wife would have received the annual payment of $150,000 from the Group if she had asked her brothers for that payment led directly to the Full Court's conclusion that just cause had been shown for the discharge of the interim spousal maintenance order, on the basis that the evidence demonstrated that the wife was able to support herself adequately and that the threshold requirement of s 72(1) therefore was not met.

50 To the extent that the wife's challenge to that conclusion is that the Full Court's finding of fact did not demonstrate that the wife was able to support herself adequately, the challenge has an air of unreality. Having found that the wife would have received the annual payment from the Group if she had asked her brothers for that payment, it was unnecessary, and would have been wholly inappropriate given the paucity of the evidence before it, for the Full Court to attempt to form any subsidiary conclusion as to the detail of the timing and mechanics of any such payment.

51 The burden of the wife's challenge is to the conclusion that the Full Court's finding that the wife would have received the annual payment from the Group if she had asked her brothers for it was not of a fact which fell within any of the matters referred to in s 75(2), relevantly in either s 75(2)(b) or s 75(2)(o), with the consequence that the fact found was incapable of being factored into the

s 72(1) analysis. That aspect of the challenge must also be rejected. The finding was of a matter within both s 75(2)(b) and s 75(2)(o).

52 The wording of s 72(1), it has been noted[18], seems to imply that each party should attempt to support himself or herself where that is reasonable having regard to the matters referred to in s 75(2).

53 The matters referred to in s 75(2)(b) are matters which bear on the practical ability of one party to support the other, and of the other party to support himself or herself. Hence the concluding reference is to the matter of "the physical and mental *capacity* of each of them for appropriate gainful employment". Hence also the opening reference to the matter of "the income, property and *financial resources* of each of the parties" cannot be confined to the present legal entitlements of the parties.

54 The reference to "financial resources" in the context of s 75(2)(b) has long been correctly interpreted by the Family Court to refer to "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency"[19]. The requirement that the financial resource be that "of" a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support. Thus, it has long correctly been recognised that a nominated beneficiary of a discretionary trust, who has no control over the trustee but who has a reasonable expectation that the trustee's discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation[20].

55 Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.

56 Here, on the Full Court's finding of fact, the annual payment from the Group was a financial resource of the wife so as to be a matter within s 75(2)(b). The payment was available to her if she asked for it. The availability of the

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18 *Astbury v Astbury* (1978) 4 Fam LR 395 at 398.

19 *In the marriage of Kelly and Kelly (No 2)* (1981) FLC ¶91-108 at 76,803.

20 *In the marriage of Kelly and Kelly (No 2)* (1981) FLC ¶91-108 at 76,803.

payment was the subject of specific provision in the father's will. The making of the payment was at least a moral obligation of the wife's brothers, who were in any case well-disposed towards her.

57 Section 75(2)(o) plainly extends to any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account as showing that a party to the marriage is or is not able to pay spousal maintenance or is or is not able to support himself or herself. The paragraph has accordingly long been correctly interpreted by the Family Court as permitting consideration by a court of "all of the financial matters which are relevant to [a] particular case"[21]. Nothing in the language or structure of s 75 prevents a fact or circumstance which falls within s 75(2)(o) being also a fact or circumstance which gives rise to a matter under another paragraph of s 75(2), including s 75(2)(b).

58 Because it bore centrally on the ability of the wife to support herself adequately, the availability to the wife of the annual payment from the Group was also a fact or circumstance in respect of which it was open to the Family Court to form the opinion that the justice of the case required that it be taken into account. The analysis of the Full Court shows that it formed that opinion. There was thus, in addition to a matter within s 75(2)(b), a matter within s 75(2)(o).

Order

59 The appeal should be dismissed with costs.

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21 *In the marriage of Beck and Beck (No 2)* (1983) FLC ¶91-318 at 78,167.

60 GORDON J. The Full Court of the Family Court of Australia discharged an interim spousal maintenance order in favour of a wife ("the ISM Order") by inferring "from the evidence", and finding, that "if requested, the wife *would receive* that *benefit*"[22] (emphasis added). The "benefit" was the "wish" of the wife's late father that the wife receive an indexed annual payment of $150,000 net of income tax from the V Group, a group of companies the father controlled. The wife's father died in 2009. The wife and her husband separated in September 2013. After her father died, the wife did not learn of her father's "wish" for more than four years and never received the so called "benefit". For the reasons that follow, it was not open to the Full Court to draw the inference and make the finding. The Full Court should not have discharged the ISM Order.

61 The spousal maintenance provisions of the *Family Law Act* 1975 (Cth) ("the Act"), the history of the proceedings before the primary judge and of the application for leave to appeal to the Full Court and a summary of the issues in the appeal to this Court are set out in the reasons for judgment of the other members of the Court.

62 It is unnecessary to repeat or amplify that analysis except to the extent necessary to explain why these reasons for decision reach a different conclusion on the second issue in the appeal to this Court – whether the Full Court correctly discharged the ISM Order based on that single inference and finding.

The application by the husband to discharge the ISM Order

63 After the ISM Order was made on 10 December 2013, but before the husband's application to discharge the ISM Order under s 83(1)(c) of the Act was heard by the primary judge on 14 March 2014, an affidavit was filed by the solicitor for the executor of the estate of the father in response to a subpoena served by the husband on the executor of the father's estate seeking production of the wife's father's will. The solicitor recorded that the principal purpose of the affidavit was to maintain confidentiality over the contents of the will.

64 The solicitor's sworn evidence was that the father had given no interest in any properties to the wife (his daughter), had given no shares he held to the wife and had given his personal effects and belongings to the wife's mother. The solicitor's evidence was that the will referred to the wife in cl 14 and Annexure B[23], but not otherwise. Clause 14 of the will, set out by the solicitor, stated:

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22 *Hall & Hall* [2015] FamCAFC 154 at [152].

23 Annexure B set out the shares owned by the wife in the various companies in the V Group. The wife held those shares before the will was made. Annexure B is not presently relevant.

"14.1 **([the wife] not involved in management and control)** My daughter [the wife] is not involved in the management and control of the [V] Group and its business operations and I intend by my directions in this Will that my sons [X] and [Y] and [Z] should, between them, manage and control the [V] Group.

…

14.4 **(gift to [the wife])** It is also my wish that, subject to clause 14.5 of my Will, [the wife] should receive from the [V] Group, a payment in cash of $16,500,000 ... I record that the gift of $16,500,000 to [the wife] (which I refer to as '**[the wife's] Entitlement**') is the amount that I have decided should be given to her and is not based upon any precise mathematical or valuation criteria.

14.5 **(payment of [the wife's] Entitlement of $16,500,000)** I direct that [V] Group should pay [the wife's] Entitlement to [the wife] only on the first to occur of any of the following events; that is:

(a) [the wife] is divorced from her husband [the husband]; or

(b) [the wife's] sixtieth (60th) birthday; or

(c) [AA] is wound up; or

(d) [BB] Family Trust is terminated or vested in its entirety; or

(e) the business assets of [BB] Family Trust, including goodwill, are sold or transferred to another entity or entities that are not owned or controlled by my sons or any of them.

14.6 **(CPI indexation of [the wife's] Entitlement)** I direct that [the wife's] Entitlement of $16,500,000.00 should be indexed to Adelaide CPI on each anniversary of my death.

14.7 **(annual distribution to [the wife])** It is my wish that [the wife] should also receive from [V] Group, until the date (if any) of payment of [the wife's] Entitlement under clause 14.5, an annual payment of One Hundred and Fifty Thousand Dollars ($150,000.00) net of tax from the date of my death (I call this '**[the wife's] Annual Distribution**').

14.8 **(CPI indexation of [the wife's] Annual Distribution)** I direct that [the wife's] Annual Distribution of $150,000.00 per year should be indexed to Adelaide CPI on each anniversary of my death.

14.9 **(manner of payment)** It is my wish that my sons [X] and [Y] and [Z] should cause [V] Group to pay [the wife's] Entitlement and [the wife's] Annual Distribution to [the wife] in accordance with this clause 14 in the manner that they believe to be most effective and beneficial for [V] Group and [the wife] at that time, *taking into account legal, financial, economic and taxation considerations existing at that time*. My sons must ensure that [the wife] receives a net amount equal to [the wife's] Entitlement and [the wife's] Annual Distributions after all applicable income taxes (including income tax assessable to [the wife] in respect of [the wife's] Entitlement and [the wife's] Annual Distributions), levies, duties and similar charges that may apply at that time, whether or not presently in existence. By way of example, if [the wife] is liable to income tax on [the wife's] Annual Distribution, then that Annual Distribution must be increased such that the net amount received by [the wife] after payment by [the wife] of that income tax is equal to the amount in clause 14.7 (as adjusted for CPI under clause 14.8).

14.10 **([the wife's] children)** I direct that, if [the wife] does not survive me, then my Executor must hold [the wife's] Entitlement and [the wife's] Annual Distribution upon trust for those of [the wife's] children who attain or have attained the age of twenty five (25) years, and if more than one then between them in equal shares." (emphasis in italics added)

65 The Full Court allowed the husband's appeal in relation to the primary judge's refusal to discharge the ISM Order and discharged the ISM Order on and from the date it had been made, 10 December 2013. The basis for discharging the ISM Order was that there was "just cause for so doing"[24]. The Full Court determined that there was evidence that demonstrated that the wife was able to support herself adequately[25]. The Full Court reached its conclusion and discharged the ISM Order based on an inference "from the evidence", said to support the finding that "if requested, the wife *would receive* that *benefit*"[26] (emphasis added).

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24 s 83(1)(c) of the Act. See also s 83(7) of the Act, which requires ss 72 and 75 of the Act to be taken into account.

25 See s 72(1) of the Act.

26 *Hall* [2015] FamCAFC 154 at [152].

Finding, inference and the evidence

66 The matter was rightly conducted on the premise that the wife had no right to any payment[27]. The wife's father had expressed a wish that his sons cause the V Group to make the annual payments but the expression of that wish created no right in the wife whether against the estate, the brothers or the V Group. The husband's case, that "if she asks she will get", depended critically on what one or more of her brothers and the V Group would do. It did not ultimately depend upon what the wife would do. There was no suggestion at any point in the proceeding that the wife and the brothers were or are working together to enhance the wife's claims against her husband.

67 There was no direct evidence that those who control the V Group (or, for that matter, those who control the estate) would, if asked, make a payment. The evidence relied upon by the Full Court was addressed in two places by that Court.

68 First, in considering whether to grant the husband leave to appeal against the primary judge's refusal to discharge the ISM Order, the Full Court stated[28]:

> "[W]e are concerned about [the primary judge's] failure to take into account one particular aspect of the information provided in the affidavit of [the solicitor], namely, that part of the wife's late father's will that specified that she *should receive* from the V Group an annual payment of $150,000, net of income tax, from the date of his death until she receives payment from the V Group of an amount of $16.5 million (also referred to in the will). *Plainly, this is an expression of a wish by the father for the wife to have this benefit and it does not bind the executor*, but there are *clear indications or inferences* to be made from the evidence before [the primary judge] *that the wife's brothers* (including the executor of the will), who now control the V Group, *would carry out their father's wish in this regard*.
>
> These indications or inferences are that the wife has a good relationship with her brothers, it is a wish of their father directed to the brothers and, *significantly, the brothers do already provide for the wife, presumably via the V Group* (but that is unclear on the evidence), by supplying her with late model luxury motor vehicles. At the time of the hearing before [the primary judge], the wife was the registered owner of a late model luxury convertible motor vehicle and a late model luxury four wheel drive, valued by the wife at a total of $265,000. *These vehicles*

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27 Subject to one matter discussed below at [83].

28 *Hall* [2015] FamCAFC 154 at [132]-[135].

replaced other brand new vehicles purchased previously for her on the same basis.

There was no evidence before [the primary judge] that the wife had requested her brothers to comply with their father's wish, once she became aware of the relevant terms of the will, nor that any such request had been denied. Thus, [the primary judge] erred in not taking into account the 'new evidence' *that the wife was able to seek payment from V Group of $150,000 per year, net of income tax, in addressing the application to discharge the interim order for spousal maintenance*.

We note of course that the payment of the $16.5 million was only payable on the happening of certain events and none of these events had yet taken place. Thus that amount could not be taken into account by [the primary judge]." (emphasis added)

69 Second, in drawing the inference and making the finding, the Full Court said[29]:

"The evidence relied on is as described above, namely, that in the will of the wife's late father he expressed the wish that V Group provide the wife with $150,000 per annum, net of income tax. To repeat, there is no evidence that the wife has requested this payment from her brothers, who it is common ground control V Group, or in particular, that any request that she has made for her father's wish to be carried out has been rejected. Indeed, in paragraph 5.9 of the letter from the wife's brother attached to the wife's affidavit of 3 November 2014, he states that '[a]ny voluntary payment by [V] Group to [her] is entirely a matter for [V] Group and its Directors'. Importantly, there is no suggestion here that there would be an objection by this brother to such a voluntary payment.

The inference from the evidence is that, if requested, the wife would receive that benefit, and we make that finding.

To also repeat, the evidence from where that inference can be made is that the wife has a good relationship with her brothers, it is a wish expressed in the will of their late father and the brothers provide the wife with late models of luxury motor vehicles, possibly through the V Group (although that is unclear on the evidence).

We also note, in considering the wife's financial circumstances generally, that she now has the benefit of a personal overdraft of $1 million, apparently obtained to meet her legal expenses and her living

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29 *Hall* [2015] FamCAFC 154 at [151]-[154].

expenses. Of course, that is a two edged sword though, in that any amount that she draws down from that overdraft immediately becomes a liability that she must repay."

70 In summary, the inference was drawn relying on the following facts and matters:

1. the wife had a "good relationship" with her brothers;

2. the father's will expressed a "wish" in relation to an annual payment;

3. the brothers had provided the wife with late model luxury motor vehicles;

4. the wife had not requested that a payment be made in accordance with the "wish" in the father's will; and

5. the brothers had not rejected such a request and there was no suggestion that the brother who was the executor would object to such a voluntary payment.

71 On the basis of that evidence, the Full Court found, on the balance of probabilities, that the wife would receive the "benefit" if she requested it. As explained below, in drawing that inference, the Full Court did not take into account the totality of the evidence, much of which did not support the inference being drawn, and, further and in any event, made a number of presumptions unsupported by the evidence in drawing that inference and making that finding.

Inference not open "from the evidence"

The "good relationship"

72 It is not clear what evidence the Full Court relied upon in concluding that the wife had a "good relationship" with her brothers. It is true that the brothers had provided her with the two luxury vehicles. There was also evidence that in the past they had given her gifts of money for furniture and effects for the family home. But that "good relationship", and the fact that the brothers had never expressly stated they would not make the voluntary payments referred to in cl 14 of the will, if requested, must be considered against the evidence that, when it came to the wife's position under the father's will, the brothers had not been forthcoming.

73 First, the father died in 2009. The wife was not provided with a copy of her father's will when he died. In December 2013, shortly after her separation from her husband and more than four years after her father's death, her request of one of her brothers for a copy of the will was rejected. The wife first learned of

the contents of the will in about February 2014 when the solicitor filed his affidavit and the wife subsequently had a conversation with one of her brothers.

74 In this context, it is important to record that the Full Court rejected a claim by the husband that the wife had failed to disclose and provide evidence of the value of her assets[30]. The Full Court stated that it was "beyond doubt that the wife revealed these assets and interests at the time of the hearing"[31] before the primary judge. That was unsurprising. At the hearing of the application for the ISM Order, the wife's financial statement had listed her shareholding in seven named private companies and specified an interest in the estate of her late father. The value of both the shares and her interest in the estate had been listed by her as not known.

75 Second, not only did the wife not know about the contents of the will, the wife had not received any income or capital from her father's estate.

76 The brothers' conduct since the father's death in relation to the will did not support a finding that the brothers would have caused the V Group to make a payment to the wife if requested. On the contrary, their conduct suggested an unwillingness to disclose the contents of the will to the wife and an unwillingness to comply with their father's stated wish in relation to the wife, their sister. In this respect, the wife's position stands in stark contrast to the position of a beneficiary of a discretionary trust who has no control over the trustee but has a reasonable expectation, by reference to past distributions, that the trustee's discretion will be exercised in their favour[32].

77 To the extent that it might be suggested that no payments were made to the wife under the will because she was living with her husband at the time of her father's death and did not need the money at that time, it must be remembered that the brothers had personally given the wife gifts of money while she was living with the husband to fund the purchase of furniture and personal effects for the home she shared with her husband. And further, to the extent that the brothers were under some "moral obligation" to honour their father's wish, there was no evidence that such an obligation had compelled them to do anything in relation to that wish since their father's death, before or after the wife's separation from the husband.

78 Nevertheless, assuming the conclusion that the wife had a "good relationship" with her brothers was soundly based, there are at least two

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30 *Hall* [2015] FamCAFC 154 at [67]-[69].

31 *Hall* [2015] FamCAFC 154 at [69].

32 cf *Kelly and Kelly (No 2)* (1981) FLC ¶91-108 at 76,803.

difficulties in relying on it to draw the inference. First, there is a difference between having a "good relationship" with a person and being willing to give them large sums of money on a regular basis. The latter does not necessarily follow from the former. Second, the payments were to come from the V Group, not the brothers in their personal capacity. Although the brothers controlled the V Group, it could not be assumed that they would have been willing to distribute money from one or more of the corporate entities and trusts which comprised the V Group to fulfil their father's wish. It is necessary to say something more about the relationship between the wife and the V Group.

The wife and the V Group

79 Clause 14 of the will contained a "wish" that the *V Group*, through the brothers, pay the wife an indexed annual payment of $150,000 net of tax.

80 It is clear that the wife could not herself do anything to ensure that the V Group complied with the wish in cl 14. The V Group comprised private companies and a series of discretionary trusts. The wife was a minority shareholder in the V Group (a fact that she had disclosed), but she had no control over the V Group. The wife had no involvement formally or informally in the decision making of the V Group or in relation to the operation of any of the trusts that formed part of the V Group. The wife had not been and was not a director of any company in the V Group and had no active role in the businesses conducted by the V Group.

81 Nor was there any evidence to suggest that the V Group would make a payment in accordance with the wish. The financial position of the V Group was not in issue. However, there is a distinction between capacity to pay and willingness to pay. In cl 14 of his will, the father had also expressed a wish that in causing the V Group to pay the wife, the brothers should take into account "legal, financial, economic and taxation considerations existing" relevant to the wife and the V Group at the time of any payment. Aside from the V Group being described as vast, there was no evidence about those considerations generally. The capacity of the V Group to pay was a matter that supported the inference, but it did not speak to willingness to pay.

82 The V Group was not bound to observe the wish and, as at the date of the appeal before the Full Court, had not done so for the more than four years since the father had died. The evidence disclosed that there had been five distributions to the wife of dividends from certain companies in the V Group – in 2000, 2001, 2002, 2007 and 2008 – all before the father died. But the wife had no fixed entitlement under any of the trusts in the V Group and, since her marriage, there was no history of distributions from any of those trusts to her. Further, there was no history of the V Group having made any voluntary payments to the wife.

83 In this Court, the husband made a faint appeal to *Countess of Bective v Federal Commissioner of Taxation*[33] to suggest that, in fact, the brothers were under an equitable obligation to comply with cl 14. This argument was not raised in the Full Court and was not developed in argument in this Court. It turns on the construction of the will, of which only cl 14 and some of Annexure B were in evidence. Even if cl 14 were to impose such an obligation, that is not a conclusion that could be reached without full consideration of the will. That cannot be done here. And to the extent that any indication about the existence of such an obligation can be gleaned from cl 14 alone, it would appear to point against its existence. The words used in relation to the making of an annual payment are precatory[34]. And the terms are substantially different from those in *Countess of Bective*.

84 When considered in this context, the fact that there was no evidence that the wife had made a request for a payment under cl 14 of the will was not determinative. At best, any such request would be an intermediate step to a payment being made, and does nothing to diminish the matters considered above about the V Group's willingness to make a payment.

Other evidence or the lack thereof

85 The above discussion demonstrates the difficulties with the Full Court's reliance on the wife's "good relationship" with her brothers and the wish. But there are a number of other matters which demonstrate that the inference drawn by the Full Court was not open.

86 First, contrary to the conclusions of the other members of the Court, it would not have been wholly inappropriate, given the paucity of the evidence before it, for the Full Court to attempt to form any subsidiary conclusion as to the detail of the timing and mechanics of any payment. The timing and mechanics of a payment were directly relevant to whether the wife was able to support herself adequately at any particular point in time. For example, assume that the wife requested the annual payments, and the brothers subsequently agreed to make the first payment 12 months from the date of the request. It may be that in 12 months' time, upon receipt of the payment, the wife would be able to support herself adequately. But that says nothing about whether the wife is able to support herself adequately in the intervening period. The Full Court had to find, on the balance of probabilities, that the wife would be able to adequately support herself from the point in time it discharged the ISM Order, namely 10 December 2013.

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33 (1932) 47 CLR 417; [1932] HCA 22.

34 See cl 14.7 of the will, which may be contrasted with cll 14.5, 14.6, 14.8 and 14.10.

87 Second, reference should be made to a letter sent by one of the wife's brothers (in his capacity as executor of the father's estate) to the wife, in which the brother stated that "[a]ny voluntary payment by [V] Group to you is entirely a matter for [V] Group and its directors". The letter is carefully worded – the brother did not state that there would be any objection by him to making a payment. But, in that letter, he did not speak for the other brothers or the V Group. The letter did not, itself, provide a foundation for inferring that the brothers or the V Group would not object to voluntarily making a payment. The letter must still be considered against the matters discussed above in the context of the "good relationship" with the brothers.

88 Third, the Full Court drew the inference based on "presumptions" that were not open on the evidence or were wrong. It was not open to the Full Court to find that the brothers provided for the wife by supplying her with late model luxury motor vehicles "presumably via the V Group (but that is unclear on the evidence)". There was no basis for that presumption. Moreover, the further finding that the luxury motor vehicles provided to the wife replaced other brand new vehicles purchased previously for her "on the same basis" was also without foundation or simply wrong. The evidence of the wife, which was not the subject of cross-examination, was that both vehicles were purchased for her by her brothers (not the V Group) and that, prior to that, she had traded in a vehicle that had been acquired for her by her husband towards the purchase of one of the new vehicles. In any event, there is a difference between the brothers, in their personal capacity, purchasing two expensive vehicles for the wife, and the V Group making a voluntary annual indexed payment of $150,000 net of tax.

89 Finally, the Full Court referred to the fact that the wife had secured the benefit of a personal overdraft of $1 million[35]. The Full Court properly identified that the overdraft was a two-edged sword – any amount that the wife drew down would immediately become a liability that she must repay. Not only was the overdraft a liability, the overdraft was secured by a guarantee from the wife's mother and was evidence that the wife was unable to adequately support herself.

Conclusion

90 For those reasons, the inference and finding were not open "from the evidence". The inference and finding were the sole basis for the Full Court concluding that the wife was able to support herself adequately. As a result, the appeal against the refusal of the primary judge to discharge the ISM Order should have been dismissed.

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35 *Hall* [2015] FamCAFC 154 at [154].

91 Consistent with authority, the "financial resources of each of the parties"[36] are not confined to the present legal entitlements of the parties and extend to include "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency"[37]. However, it cannot be said that the father's wish (for an annual payment to the wife, which had not been effected by the brothers or the V Group in the more than four years since the father's death) was a source of financial support which, if the wife requested, the wife could reasonably expect would be available to her to supply a financial need.

92 Her father (by the will) asked that an annual payment be made to the wife, but it had not been made. The wife had no right to a payment. Why would the wife asking for a payment be more pressing and persuasive than her late father's formally recorded wish? In the face of unwillingness by the brothers even to provide the will to the wife, there is no basis to infer that the wife's request would probably tip the balance.

Orders

93 The appeal should be allowed with costs.

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36 See s 75(2)(b) of the Act.

37 *Kelly* (1981) FLC ¶91-108 at 76,803. See also *Kennon v Spry* (2008) 238 CLR 366 at 388-389 [55]-[58], 399 [96]; [2008] HCA 56.