IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A7 of 2016

BETWEEN:

HALL
Appellant

and

HALL
Respondent

AMENDED APPELLANT'S SUBMISSIONS

Part I: Publication

1 This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2 This appeal concerns the spousal maintenance provisions of the *Family Law Act 1975* (Cth) (the **FLA**).

3 The key issues raised by this appeal are:

(a) What is the proper approach to be taken in assessing whether the statutory condition in s 72 of the FLA, that a party to a marriage is "unable to support herself or himself adequately", is satisfied "having regard to" the availability of a potential source of income in the form of a voluntary payment? In particular, can the Court properly conclude that a party to a marriage "is able to support herself adequately" by reason only that if she requested a stranger to the marriage to make such a voluntary payment to her, that payment would be made?

(b) Did the Full Court err:

(i) by setting aside the primary judge's order refusing to discharge an earlier order for interim spousal maintenance; and

(ii) by discharging the order for interim spousal maintenance made in favour of the appellant (the **wife**),

on a ground not raised at first instance or on appeal, and which could (had it been so raised) have been addressed by evidence led by the wife?

(c) Did the Full Court err by discharging the interim maintenance order on the basis of an inference that was not open to it?

Date: 18 March 2016
Barnes Brinsley Shaw Lawyers
Level 4/420 King William Street, Adelaide SA 5000
Att: Andrew Barnes

Filed on behalf of the Appellant
Telephone: 08 8110 2300
Fax: 08 8212 2646

Part III: Section 78B of the *Judiciary Act* 1903 (Cth)

4 The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and concluded that no notice is required.

Part IV: Citations

5 The citations for the decisions in the Family Court of Australia are:

(a) Full Court: *Hall v Hall* [2015] FamCAFC 154 (**Full Court Reasons**)

(b) Primary judge: *Hall v Hall (No 3)* [2014] FamCA 406 (**Primary Judge's Reasons**).

Part V: Factual background

Relevant statutory provisions

6 The provisions of the FLA relating to spousal maintenance are central to this appeal. Those provisions are found in Part VIII of the Act.

7 In summary, s 72 imposes a liability on one spouse (**Spouse A**) to maintain the other spouse (**Spouse B**) to the extent Spouse A is reasonably able to do so if Spouse B is "unable to support herself or himself adequately". Whether Spouse B is unable to support herself or himself adequately is determined "having regard to" the matters in s 75(2).

8 Section 75(2) lists matters relating (in the main) to the circumstances of the spouses, including, relevantly, each of their "income, property and financial resources" (sub-s (2)(b)).

9 Section 74 empowers the Court to make an order for the provision of maintenance that "it considers proper... in accordance with this Part". Section 75(1) provides that in exercising the power under s 74, the Court may only consider the s 75(2) matters.

10 Section 83 provides for the modification of a spousal maintenance order. The order may be discharged "if there is any just cause for doing so": s 83(1)(c). In exercising this power, the Court must have regard to ss 72 and 75: s 83(7).

The decisions below

Decisions of primary judge

11 On 23 October 2013 the wife applied for an interim spousal maintenance order. The order was interim in the sense that it was sought pending final resolution of the (still unconcluded) property settlement and spousal maintenance proceedings between the parties.[1]

12 The respondent (**husband**) opposed the application. One ground of opposition was that the wife had not satisfied the s 72 condition with respect to her inability to support herself. The husband argued that the wife's father had died in 2009 and the wife had not provided a copy of the will to the Court or any information about his estate. He argued that the wife might therefore "be entitled to an asset or financial resource or income that is not known".[2]

13 The primary judge found in favour of the wife, holding that because the terms of the will were not known, any possible entitlement under that will could not be taken into account.[3]

---

1 Section 80 sets out the general power of the Court in making orders under Part VIII. It provides, relevantly, that the court may make an order "pending the disposal of proceedings": s 80(h).

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

3 Ibid at [14], [20].

She concluded that the wife was unable to support herself adequately and the husband was reasonably able to provide maintenance to meet her reasonable needs.[4]

14 Accordingly, on 10 December 2013, the primary judge ordered that the husband pay the wife spousal maintenance in the amount of $10,833 per month pending final determination of the property settlement and spousal maintenance proceedings between the parties (**interim maintenance order**).

15 The husband sought leave to appeal the primary judge's order (**first appeal**). That application was heard by the Full Court together with the application for leave and appeal that is the subject of the present appeal to this Court.

16 In addition to the first appeal, the husband made a separate application to the primary judge for orders (*inter alia*) that the interim maintenance order be discharged or alternatively stayed pending resolution of the first appeal.[5]

17 The husband's application for discharge was based on "new evidence". That included evidence of the contents of the deceased father's will contained in an affidavit of the deceased father's former solicitor.[6] The affidavit confirmed that the deceased had not made any bequests to the wife,[7] but that the deceased had recorded, in clause 14 of the will, his "wish" that the wife should receive an annual payment of $150,000 from the V Group (a group of family companies).[8] On its terms, and as the Full Court found,[9] clause 14, which was expressed in precatory words, did not constitute an enforceable bequest.[10]

18 Nonetheless, the husband argued that the interim maintenance order should be discharged on the basis that the wife was "*entitled*" to receive the annual payment under the will.[11]

19 On 17 June 2014 the primary judge dismissed the application.[12] The husband sought leave to appeal this decision (**second appeal**).[13] Both the first appeal and the second appeal were heard by the Full Court on 12 November 2014. The application for leave in the first appeal was dismissed by the Full Court.[14] In the second appeal, with which the appeal to this Court is concerned, the Court granted leave and allowed the appeal.

20 On the first appeal, the husband contended, among other things, that the primary judge had erred in making the interim spousal maintenance order because, relevantly:

---

4 Ibid at [24]-[27].
5 Primary Judge's Reasons at [1] and [3].
6 Affidavit of Andrew Shaw sworn on 20 February 2014 (**Shaw Affidavit**). The will itself was not before the Court. It had been subpoenaed by the husband but the executor had objected to its production: see Full Court Reasons at [73].
7 Shaw Affidavit at [30], [35], [38]-[43].
8 Shaw Affidavit at [39].
9 Full Court Reasons at [132].
10 See Shaw Affidavit at [47]-[49].
11 Affidavit of husband dated 7 March 2014 at [36].
12 Primary Judge's Reasons at [52].
13 That appeal was SOA42 of 2014.
14 That application for leave to appeal (SAO82 of 2013) was dismissed by the Full Court: Full Court Reasons at [108].

(a) the primary judge failed to "draw the appropriate inferences" from the wife's alleged non-disclosure of, and failure to call evidence about, her assets (including her interest under her father's will);[15] and

(b) the primary judge erred in finding that the s 72 condition was satisfied in circumstances where the wife had not taken steps to "chase up or get in" her assets (meaning, it appears, that she had not, before making the application for interim spousal maintenance, taken all available steps to identify and/or pursue those assets).[16]

21 On the second appeal, the husband asserted that the primary judge:[17]

(a) erred in failing to take into account the wife's failure to call evidence as to, or make inquiry into, the value of her "known share entitlements, income and financial interests pursuant to the Will of her late father" (ground 1);

(b) erred in failing to consider the husband's application for discharge of the interim maintenance order (ground 6);

(c) erred in failing to consider "whether or not the circumstances of:

(i) the wife's "duty of disclosure and failure to call evidence" (ground 7.1); and

(ii) the "limited knowledge of the wife's entitlements pursuant to her late father's will" (ground 7.3),

were "sufficient circumstances for" the discharge of the interim maintenance order.

22 In the first appeal, the Full Court dismissed the application for leave finding, in relation to the issue of non-disclosure and the failure to call evidence, that the wife had in fact disclosed her assets, including her possible interest in her deceased father's will (which had been referred to in the wife's financial statement submitted to the Court, with the nature of the interest described as "not known").[18] It accepted that, at the time of the first application in December 2013, the evidence as to the nature of the wife's interest in her father's estate was unavailable. The wife had asked for a copy of the will but that request had been refused.[19]

23 In addition, the Full Court rejected the argument that the primary judge should have inferred from the wife's "failure to call evidence as to the value of her shares and her interest in the estate of her late father" that this evidence "would not have supported her case that she could not support herself adequately".[20] It reasoned that the rule in *Jones v Dunkel*, which was relied on by the husband, did not support the drawing of that inference.

24 The Full Court also rejected the proposed ground of appeal based on the asserted failure of the wife to "chase up" her assets[21] (being "the wife's shares and her interest in the estate of her late father"[22]). It found that the primary judge's approach on this issue was correct, saying: "we fail to see why it is necessary for a party applying for interim spousal

---

15 Full Court Reasons at [59] (grounds 1 and 2).
16 Full Court Reasons at [59] (grounds 7, 8, 9).
17 Full Court Reasons at [61].
18 Full Court Reasons at [68]-[75], esp at [71]; see also at [80].
19 Full Court Reasons at [73].
20 Full Court Reasons at [77]-[80].
21 Full Court Reasons at [86]-[97].
22 Full Court Reasons at [87].

maintenance on an urgent basis to actually 'get in' their assets before they can satisfy the threshold test" in s 72.[23] And in any event, the wife was not able to do this in respect of the assets in question which "provide[d] a complete answer" to the ground.[24]

25 In the second appeal, however, the Full Court granted leave and allowed the appeal. It rejected the husband's grounds relating to the wife's alleged failure to disclose her assets or call evidence about them (for the same reason that it had rejected those arguments in relation to the first appeal).[25] However, it upheld grounds of appeal 6 and 7.3 and set aside the primary judge's order on this basis.

26 In relation to ground 6, the Full Court held that the primary judge had erred because she "failed to consider, and indeed make any finding as to whether there was sufficient new evidence before her to discharge the interim spousal maintenance order".[26] It upheld the ground even though it asserted a *different* complaint to the effect that the primary judge had failed to consider the husband's application for discharge *at all*.[27]

27 In relation to ground 7.3, the Full Court held that the primary judge erred by failing to take into account evidence that "the wife was able to seek payment from V Group of $150,000 per year".[28] Again, the Full Court upheld the ground notwithstanding that the wife's ability to seek a voluntary payment from V Group was not a matter to which ground 7.3 was directed; rather, it was directed at the "limited knowledge of the wife's entitlements" under her late father's will.[29]

28 In upholding ground 7.3, the Full Court acknowledged that the deceased's wish "does not bind the executor".[30] However, it found that there were "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".[31] The "indications or inferences" were:[32]

(a) the wife has a good relationship with her brothers;

(b) the deceased's wish was addressed to the brothers;

(c) in the past, the brothers (perhaps via the V Group) had provided two luxury cars to the wife which had replaced two vehicles that had previously been provided to her; and

(d) there was no evidence that the wife had requested payment of the $150,000 or that any request, if made, had been denied.

29 Having granted leave, allowed the appeal and set aside the primary judge's order dismissing the husband's discharge application, the Full Court proceeded to address afresh the

---

[23] Full Court Reasons at [87].
[24] Full Court Reasons at [87].
[25] Full Court Reasons at [131] ("in relation to Ground 7.1, given our finding as to the issues of non-disclosure and the failure to call evidence in the first appeal, we do not consider that that part of Ground 7 has any merit") and [136] (holding that Ground 1 could not have succeeded, for the same reasons).
[26] See Full Court Reasons at [131].
[27] See the text of ground 6 at [61] of the Full Court Reasons.
[28] Full Court Reasons at [134].
[29] See the text of ground 7.3 at [61] of the Full Court Reasons.
[30] Full Court Reasons at [132].
[31] Full Court Reasons at [132].
[32] Full Court Reasons at [133]-[134].

husband's application to discharge the interim maintenance order.[33] The question, according to the Full Court, was to be answered by reference to whether there was "now evidence before the court that demonstrates that the wife is able to support herself adequately".[34]

30 In answering that question in the affirmative, the Full Court relied on the evidence referred to in paragraph 28 above. It also relied on a letter dated 3 November 2014 from one brother (the executor of the deceased's estate) addressed to the wife which confirmed her lack of any entitlements under the will of her deceased father,[35] and then went on to refer to the father's wishes expressed in clause 14. The Full Court relied on a statement in the letter to the effect that "[a]ny voluntary payment by [V] Group to you is entirely a matter for [V] Group and its Directors",[36] observing that "[i]mportantly, there is no suggestion [in the letter] that there would be any objection by this brother to such a voluntary payment".[37]

31 The Full Court did not refer to other statements in the letter, to the effect that the brother had determined that, as executor, he had "no obligation to you [the wife] in respect of those amounts" and "no power to compel [V] Group or its directors to take notice of wishes expressed in the Will".[38]

32 The Full Court concluded that "[t]he inference from the evidence is that, if requested, the wife would receive that benefit [ie the $150,000 annual payment], and we make that finding".[39]

33 As a consequence of making this finding, the Full Court held that the wife had not satisfied the condition in s 72. It discharged the interim spousal maintenance order with full retrospective effect.

Part VI: Appellant's argument

Ground 2.1

34 As noted, the Full Court purportedly upheld ground 6 of the husband's appeal grounds, which asserted that the primary judge had failed to consider his discharge application. It is not entirely clear whether it set aside the primary judge's order on the independent basis of this ground or whether it relied on ground 6 in conjunction with ground 7.3 (which asserted the failure to consider the wife's entitlements under the will).[40] To the extent the Full Court

---

[33] Full Court Reasons at [149]&ff. While the Court referred to this exercise as a "re-exercise of the discretion" undertaken by the primary judge, in truth it involved a determination of whether the central statutory precondition to the liability of the husband to pay maintenance to the wife had been satisfied: see the discussion in paragraphs 61 to 64 below.

[34] Full Court Reasons at [150].

[35] It was therefore directed to the question whether – as the husband contended before the primary judge and asserted by ground 7.3 of his appeal grounds – the wife had an *interest in the estate* which should be taken into account in determining her ability to support herself.

[36] Full Court Reasons at [151]. This letter was not before the primary judge. It was tendered by the wife on appeal and admitted by the Full Court without objection by the husband: [145].

[37] Full Court Reasons at [151].

[38] Affidavit of wife dated 3 November 2014, exhibit AH1 at [5.7], [5.9].

[39] Full Court Reasons at [152].

[40] See Full Court Reasons at [131], where the Court held that the primary judge had failed to consider whether there was "sufficient new evidence before her to discharge the interim spousal maintenance order" and that "[a]ccordingly, Grounds 6 *and 7* have merit".

relied on ground 6 as an independent ground for setting aside the primary judge's order, this was an error. The primary judge did not fail to consider the application before her. Nor did she fail to consider the 'new evidence' relied upon by the husband for that purpose.

35 The Primary Judge's Reasons must be read fairly, as a whole and in context. A suggestion that a judge has not considered, or properly considered an aspect of, a party's case is a "serious charge". [41] Such a suggestion should only be accepted where the record "persuasively suggests" that the judge has "failed to discharge that paramount judicial duty".[42] That high threshold is not met here.

36 Taken as a whole and read fairly, the Primary Judge's Reasons demonstrate the learned primary judge was seized of, and dealt with, the application:

(a) The Primary Judge's Reasons expressly refer on a number of occasions to the application before her as being, relevantly, for discharge of the interim maintenance order[43] (as well as for the discharge of injunctions preventing the sale or other dealings with the former matrimonial home[44]).

(b) They recite the husband's submissions that the new evidence relating to the wife's "interest in her late father's estate"[45] had "removed the basis upon which any spouse maintenance order could be made because the wife was able to support herself"[46] and supported the discharge of the injunctions relating to the matrimonial home.

(c) In relation to this submission by the husband with regard to the effect of the 'new evidence', the primary judge observed that "there remained considerable dispute about what interest, if any, the wife has in her late father's estate".[47]

(d) The primary judge noted that the wife "maintained that apart from the information concerning the ATO there was no new material which warranted further consideration of the existing orders".[48]

(e) The wife's submission in this regard was accepted by the primary judge, having regard to the terms of [44] and [45] of the Primary Judge's Reasons, the first of which adverts expressly to the evidence available at the time the interim maintenance order was made.

37 The Full Court accepted that the primary judge recognised that there was an application before her with regard to discharge of the interim maintenance order, and that the basis of it was the alleged 'new evidence'.[49] However it concluded that because the trial judge had expressly referred, in [45] of the Primary Judge's Reasons, only to the insufficiency of the new evidence to justify discharge of the injunctions (cf both the injunctions and the interim maintenance order), she had "failed to consider" the matter.[50] This was, with respect, clearly not so. Although it is true that the primary judge did not expressly advert to the application

---

41 Cf *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1610 [62]-[63] per Gleeson CJ, McHugh and Gummow JJ.
42 Ibid at [63].
43 See, eg, Primary Judge's Reasons at [1], [2], [13], [16], [29]
44 See Primary Judge's Reasons at [1].
45 Primary Judge's Reasons at [25], [29], [32].
46 Primary Judge's Reasons at [29].
47 Primary Judge's Reasons at [32].
48 Primary Judge's Reasons at [35].
49 Full Court Reasons at [131].
50 Full Court Reasons at [130]-[131].

to discharge the interim maintenance order at [45], her conclusion in that paragraph that the wife's "possible, but not yet determined, interest in her late father's estate" did not provide "sufficient reliable evidence upon which to discharge the injunctions" should be understood, in context, as applying to the application for discharge of the interim maintenance order as well.[51] The same arguments regarding the effect of the evidence had been made (and referred to earlier in the reasons) in relation to both applications. And, the evidence could hardly have sufficed to discharge the interim maintenance order if it was insufficiently reliable to ground a discharge of the injunctions.

38 Moreover, the Full Court's reasoning confuses the failure to make an (explicit) finding with respect to a submission with a failure to consider the application at all. It was the latter contention which the husband advanced through ground 6. And the former contention was, in any event, unsustainable: "[a] judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue".[52]

Grounds 2.2 and 3.1: lack of procedural fairness; unavailable inference

39 The Full Court failed to accord procedural fairness to the wife. It decided the appeal on a matter that was not raised at first instance (when evidence could have been led to deal with it) or on appeal. Essentially, the Full Court made this mistake twice: both when it set aside the primary judge's order dismissing the husband's application to discharge the interim maintenance order and when it discharged that order. Ground 2.2 of the wife's grounds of appeal should be upheld on this basis.

40 Moreover, the Full Court erred because its sole foundation for discharging the interim maintenance order was the drawing of an inference which was not open to it. It follows that ground 3.1 should also be upheld.

The Full Court erred in setting aside the primary judge's dismissal of the application

41 As regards the Full Court's setting aside of the primary judge's order on the purported basis of the husband's ground 7.3, the Full Court's errors can be summarised as follows (they are addressed substantively in the discussion of the discharge of the interim maintenance order, below).

42 First, the primary judge did not err in failing to consider the wife's ability to request the voluntary payment:

(a) The matter was not put by the husband in those terms. The primary judge could not err by failing to consider a matter that was not put to her.

(b) Since the husband did not contend that the interim maintenance order should be discharged because of the wife's ability to prevail upon the V Group or her brothers to make a voluntary payment to her, the wife had no opportunity to put on evidence in response which could have categorically negatived the availability of such a payment.

---

[51] Primary Judge's Reasons at [45].

[52] *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1610 [62] per Gleeson CJ, McHugh and Gummow JJ.

In those circumstances, it would have been a breach of procedural fairness for the primary judge to consider the matter.[53]

43 Second, even if it had been open for him to do so, the asserted error of the primary judge was not raised by the husband on appeal; indeed, the inference drawn by the Full Court as the foundation for discharging the order was expressly disavowed by counsel for the husband.[54] Nor was the supposed error squarely raised by the Full Court.

44 Third, even if the husband had contended that the wife would have received the payment had she asked for it, there was no evidence that would have permitted the primary judge to make that finding. The available evidence pointed directly to the contrary conclusion.

10 *The Full Court erred in discharging the maintenance order*

Ground 2.2: The Full Court failed to accord procedural fairness

45 The Full Court discharged the maintenance order on the basis of the inference it drew to the effect that the brothers would have caused the V Group to make a voluntary annual payment of $150,000 to the wife had she requested it.[55] This was not a matter in issue at first instance. The husband did not put his case on the basis that the annual payment was a "wish" that would be complied with if a request were made. Rather, he contended that the wife was *entitled* to the $150,000 annual payment under her father's will.[56]

46 Importantly, the terms of the will were a complete answer to this contention. Those terms demonstrated (as the Full Court accepted[57]) that clause 14 expressed no more than a wish on
20 the part of the deceased that "does not bind the executor".

47 Had the husband sought to argue that, despite the absence of any entitlement under the terms of the will, the wife would have received the annual payments had she asked, and that this was a sufficient ground to justify the conclusion that she was not unable to support herself within the meaning of s 72 of the FLA, she could:

(a) have tendered evidence in response, which evidence might have included evidence regarding the brothers' willingness or otherwise to follow their father's wish; the capacity of the V Group to make the payments; and any other evidence[58] relevant to determining whether the actual or potential availability of the payments affected the conclusion that she was unable to support herself adequately;

---

[53] *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 379, 381, [141], [146] per Heydon J (cited in *South Australia v Totani* (2010) 242 CLR 1 at 43 per French CJ.

[54] See paragraph 49 below.

[55] Full Court Reasons at [151]-[152]; see also at [132].

[56] See transcript at first instance at T.19.3-8; T20.1-23; T22.43-23.25; T33.13-34.28 (where counsel for the husband expressly recognised the distinction, for the purpose of ascertaining the existence of a resource or asset within the meaning of s 75, between characterisation of clause 14 of the will as expressing a "mere wish" as opposed to an "entitlement" of the wife); T73.34-39; T81.5-20; T95.4-5. See further affidavit of the husband dated 7 March 2014 at [36]. This affidavit was relied upon as articulating the husband's contentions, as no written summary of argument was filed by the husband: see T7.6; T72.34-35.

[57] Full Court Reasons at [132].

[58] For example, with respect to the timing of any payments, any conditions imposed on the making of the payments or the deployment of the funds, the value of the payments etc: see further below at paragraph 84.

(b) have made submissions on whether the potential availability of a voluntary payment, if requested, could satisfy the statutory test.

48 But the point was not raised in those terms. The wife therefore had no opportunity to adduce evidence to refute it, or otherwise to address it. In those circumstances it was a breach of procedural fairness for the Full Court to have decided the appeal and discharged the interim order on the ground that it did.[59] Once it is accepted that the matter was not raised before the trial judge, the conclusion that the wife has been denied procedural fairness must follow.

49 However the unfairness in the course adopted by the Full Court was compounded by the fact that the husband did not contend on appeal, either in his notice of appeal or his submissions, that the interim maintenance order should be discharged on the ground that it could be inferred that, should the wife ask for the payment, it would be forthcoming.[60] To the contrary, in oral argument counsel for the husband positively eschewed any suggestion that the Court could draw an inference of the kind ultimately drawn by the Full Court. In the context of his submissions on the *Jones v Dunkel* point referred to above, he was asked by Aldridge J, with apparent sarcasm, whether he was suggesting that "the court could draw an inference that because she hasn't said – asked her brothers for money, that if asked they would have given her whatever she wanted?". Counsel for the husband replied, "No. You can't go that far, your Honour. With – I'm not submitting that far".[61] In this respect it is also significant that the argument that the husband *did* press on appeal – that the wife should have failed below because of the *absence* of evidence as to her interest under the will – was antithetical to the ultimate conclusion of the Full Court, namely, that the wife should fail because the existing evidence was *ample* to support an inference that she would receive the precatory gift.

50 The availability of the inference, and its potential consequences, was not squarely raised by the Full Court during the hearing either. Even assuming (contrary to the above submissions) that it was open to the Full Court to decide the appeal on the basis of an inference not contended for by the husband, it could not do so without giving the wife notice and a proper opportunity to respond.[62] So much is "elementary".[63]

---

[59] *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1608 [51] per Gleeson CJ, McHugh and Gummow JJ; *Water Board v Moustakas* (1988) 180 CLR 491 at 496-7 per Mason CJ, Wilson, Brennan and Dawson JJ; *Suttor v Gundowda* (1950) 81 CLR 418 at 438-9 per Latham CJ, Williams and Fullagar JJ.

[60] See the discussion in the husband's written outline dated 26 September 2014, with respect to ground 7, at [10]-[15].

[61] See transcript of Full Court T34.16-21 (see further T11.9-15, eschewing a like inference in connection with the wife's shareholding as an asset she could access for the purpose of supporting herself). Counsel for the husband's oral submissions on the $150,000 payment were to the effect that the wife could not maintain she was unable to support herself when she had not "chased up all [her] assets" (T.34.38-39; T43.24-26) and that, in the absence of evidence from the wife as to steps she had taken, a generalised and ill-defined *Jones v Dunkel* inference should be drawn against her (T34.25, T42.23-24). Both of these submissions were rejected by the Full Court: Full Court Reasons at [77]-[80] and [86]&ff.

[62] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 149-150 [132]-[133] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Friend v Brooker* (2009) 239 CLR 129 at 169-174 [113], [114], [116]-[118] per Heydon J; *International Finance* (2009) 240 CLR 319 at 379 [141], [146] per Heydon J; *South Australia v Totani* (2010) 242 CLR 1 at 43 per French CJ ("Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process").

[63] *Friend v Brooker* (2009) 239 CLR 129 at 173, 174 [117]-[118] per Heydon J, referring to the "'elementary error' of failing to draw the attention of the parties, particularly the losing party, to the basis on which the losing party

51 The specific requirements of procedural fairness depend on context.[64] Here, in light of (a) the absence of any submission by the husband that the inference should be drawn; (b) the fact that the position actually contended for by the husband was directly inconsistent with the inference ultimately drawn by the Full Court; and (c) the husband's concession that an inference of the kind relied on by the Full Court was not available, it was incumbent on the Full Court to put the wife squarely on notice that it was minded to draw the inference and invite her to respond. The Full Court's questions regarding the failure of the wife to lead evidence that she had requested that her brothers make the payment – which were asked in the context of the husband's arguments in relation to the wife's asserted failure to "chase up" her assets and his *Jones v Dunkel* submission – on any view fell well short of this standard.[65]

52 Had the Full Court properly raised the matter, the wife could have made submissions in response, pointing out the reasons (discussed above and below) why no such inference was available and why, in any event, it could not support a finding of error on the part of the primary judge or the discharge of the interim maintenance order. Those submissions were a complete answer to the point. In those circumstances it was especially unfair for the Full Court to decide the appeal the way it did, particularly given that it decided the points actually raised by the husband against him.[66]

Ground 3.1: The Full Court relied on an inference that was not open

53 The Full Court also erred in law in discharging the interim maintenance order as it relied on an inference — that the wife would have received the annual payment if she requested it — that was not "reasonably open"[67] to it on the evidence.

54 In order to make this finding the Full Court needed to be satisfied of two things: (a) that the brothers, as controllers of the V Group, were willing to take steps to cause one or more group companies to make the annual payments; and (b) that the payments could or would actually have been made by the V Group. Neither finding was open on the evidence before the Court.

55 As to the first, the matters relied on by the Full Court (*viz*, those outlined in paragraphs 28 and 30 above), whether considered individually or cumulatively, fell well short of supporting an inference that the wife's three brothers (or any of them) were willing to procure group companies to make the annual payments or to take steps to do so. To the contrary, if any inference could be drawn, then having regard to the totality of the evidence it was that they were not so willing. The letter from the executor brother to the wife indicated she had no entitlement to the payments under the will; that even if they were legacies of the estate, there were no funds in the estate to make the payments; that, as executor, he had no power to compel the V Group to take notice of the deceased's wishes; and that "any voluntary payment"

---

was to lose". See, to the same effect, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2008) 228 CLR 152 at 165 [42]-[44] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

64 cf *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 16-17 [48].

65 See, eg, T52.28-31; T52.46-53.16; T53.46-54.4; T55.21-31. As senior counsel for the wife told the Court at T54.39-42, T55.7-15, there was no evidence as to why the wife had not asked for the $150,000 payment since "at the trial it was never put, 'Well, why don't you ask?'." Still less had it been put: "if you ask for the payment you will get it". And yet this was the basis upon which the Full Court determined the appeal against the wife.

66 See paragraphs 22 to 25 above.

67 Cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ; see also at 366 per Deane J.

was solely a matter for the V Group.[68] Not only was her brother unwilling to give any assurance to the wife about the payments, he was in fact cautioning her that there was no guarantee the payments would or could be made.[69] And, there was no evidence that any payments had, in fact, been made to the wife since the deceased's death in 2009; indeed, the brothers had not even told the wife about the contents of the will or the deceased's wish in relation to the payments.[70] Further, there is a real question whether the brothers would have agreed to make a payment to the wife in circumstances where it could be relied upon by her estranged husband to deny her spousal maintenance.

56 As to the second issue, the Full Court failed to consider whether the V Group could or would have made the payment even assuming the brothers were willing to take steps to procure it do so. The deceased's wish, although expressed in his will, was directed to the V Group. The contemplated payments, if made on the terms contemplated by clause 14, would constitute gratuitous gifts to the wife. The Full Court had to be satisfied that the payments were in the best interest of one or more of the companies in the Group so they could be made conformably with the directors' duties to those companies.[71] There was no evidence before the Court that went to this issue, let alone evidence sufficient to support the necessary finding.

Ground 3.2: The Full Court erred in its interpretation and application of s 72, 74 and 75

57 In discharging the interim maintenance order, the Full Court erred in its interpretation and application of ss 72, 74 and 75 of the FLA. Ground 3.2 of the appellant's grounds of appeal should be upheld by reason of these errors.

Construction of the statutory provisions

Legislative history

58 The spousal maintenance provisions have remained largely unchanged since the enactment of the FLA in 1975. That Act effected a "radical alteration" to family law in Australia by eliminating the fault principle as a ground for divorce and other matrimonial relief, including maintenance.[72]

---

[68] Affidavit of wife dated 3 November 2014, exhibit AH1 at [5.6]-[5.9].

[69] There would be little point in emphasising, as the letter did, the wife's lack of entitlement to funds if the executor brother proposed to take steps to ensure that she received the gratuitous payment from the V Group in any event.

[70] Affidavit of wife dated 12 March 2014, at [2].

[71] See eg *Walker v Wimborne* (1976) 137 CLR 1 at 6-7 per Mason J (Barwick CJ agreeing); *Weaver (as liquidator of Haburn Group Australia Pty Ltd v Harburn* (2014) 103 ACSR 416 at [96] per McLure P (Buss and Murphy JJA agreeing). Even if it might be implied that the Full Court reasoned that the brothers, as shareholders in the companies, might consent to the payments, or perhaps ratify them, this was not sufficient. Shareholders are not necessarily able to consent to or ratify a breach of directors' duties: see eg *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 at 523 [32] per Gleeson CJ and Heydon J. In any event, the deceased's wife was also a shareholder in some of the companies. The Full Court made no finding as to her amenability to group companies making the annual voluntary payments.

[72] *Magill v Magill* (2006) 226 CLR 551 at [98] per Gummow, Kirby and Crennan JJ. See also Explanatory Memorandum, Family Law Bill 1974 (Cth) p 1; Commonwealth Parliament, Senate Hansard, 13 December 1973, at p 2831 (Senator Lionel Murphy, Second Reading Speech); Commonwealth Parliament, *Report of the Joint Select Committee on the Family Law Act* (July 1980) at [1.5]-[1.14].

59 Prior to the enactment of the FLA, the entitlement to maintenance was governed primarily by considerations of "fault" rather than need.[73] Generally speaking, a wife could only obtain maintenance from a husband under the State regimes where he had deserted or willfully neglected her.[74] And the husband could avoid any maintenance obligation by pointing to wrongful matrimonial conduct by the wife. Likewise, the federal provision (which applied upon the institution of divorce proceedings[75]) required the Court to consider the conduct of the parties in determining maintenance applications.[76]

60 The FLA radically altered this position. It removed the element of fault from the analysis and instead anchored the entitlement to maintenance in, again generally speaking, the "twin aspects" of need and capacity to pay.[77]

Operation of the provisions

61 The provisions for spousal maintenance are found in Part VIII of the FLA. The key provisions are ss 72, 74 and 75. They operate as follows.

62 Section 72(1) establishes the liability to maintain as follows:[78]

> "***Right* of spouse to maintenance**
>
> 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 whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason,
>
> having regard to any relevant matter referred to in subsection 75(2)."

---

[73] For a discussion of the provisions as they existed prior to the enactment of the FLA, see *In the Marriage of Soblusky* (1976) 12 ALR 699 at 713-715. A more detailed discussion of the history of spousal maintenance laws can be found in Commonwealth Parliament, *Report of the Joint Select Committee on the Family Law Act* (July 1980) at [5.0]-[5.6]. See also Anthony Dickey, *Family Law* (6th ed, 2014) at Ch 27.

[74] See, eg, *Maintenance Act* 1965 (Vic) s 6; *In the Marriage of Soblusky* (1976) 12 ALR 699 at 714; Commonwealth Parliament, *Report of the Joint Select Committee on the Family Law Act* (July 1980) at [5.0]-[5.6]. Historically, maintenance was an obligation imposed on the husband in respect of his wife and children: see eg Anthony Dickey, *Family Law* (6th ed, 2014) at [27.100]-[27.150]. Under the State provisions that existed prior to the enactment of the FLA, a husband was only entitled to maintenance from his wife in very limited circumstances: see eg *Maintenance Act* 1965 (Vic) s 9.

[75] Or other proceedings under the Commonwealth Act, eg an order to void a marriage.

[76] *Matrimonial Causes Act* 1959 (Cth), s 84(1).

[77] *In the Marriage of Soblusky* (1976) 12 ALR 699 at 715. 'Need' is used as a convenient shorthand description only. It has been pointed out that use of this term may be misleading as there may be an important difference between need, on the one hand, and an inability to support oneself, on the other: see eg Anthony Dickey, *Family Law* (6th ed, 2014) at [28.100]; *In the marriage of Murkin* (1980) 5 Fam LR 782 at 784-785. For a general discussion of the application of the provisions and some policy issues raised by them see Family Law Council, *Spousal Maintenance: Discussion Paper* (July 1989).

[78] All emphasis added.

63 The scheme of s 72(1) is, therefore, as follows:

(a) Provided the relevant criterion is made out, one party to a marriage (Spouse A) is "liable" to support the other party to the marriage (Spouse B). That is to say, when the criterion is satisfied, Spouse A falls under a *legal obligation* to maintain Spouse B and Spouse B has a correlative "*right*" to be maintained by Spouse A.

(b) The liability applies only to "parties to a marriage"; there is no scope for the imposition of any liability to maintain on some stranger to the marriage.[79]

(c) The criteria that trigger Spouse A's obligation are as follows:

(i) first, Spouse B must be "unable to support himself or herself adequately" for one of three reasons, as to which regard must be had to the matters referred to in s 75(2);

(ii) secondly, Spouse A is only liable to maintain Spouse B "to the extent" he or she "is reasonable able to so so"; if Spouse A is not reasonably able to provide any maintenance, there will be no liability or correlative entitlement.[80]

64 Section 74, headed "Power of Court in Spousal Maintenance Proceedings", has two functions:

(a) First, it empowers the Court to make provision for maintenance.[81] The provision thus provides the mechanism for the enforcement of the liability created by s 72(1).

(b) Second, it gives the Court the discretionary power to decide what is "proper" maintenance.[82] The discretion relates to the quantum, timing and form of the maintenance order. It does not empower a court to refuse to order maintenance if the criteria in s 72(1) are satisfied; as noted, once those criteria are met, a liability to maintain arises in Spouse A.[83]

---

[79] The provisions apply to a "party to a marriage". The term is defined to include parties to a marriage that has been terminated by divorce or annulment: s 4(2). Part VIIIAB contains largely similar provisions for maintenance in respect of de facto partners: see esp ss 90SF and 90SE(1). This Part was added by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 (Cth).

[80] See eg Anthony Dickey, *Family Law* (6th ed, 2014) at [28.50]; *In the Marriage of Kajewski* (1978) FLC ¶90-472 at 77,428; *In the Marriage of Bevan* (1993) 19 Fam LR 35 at 39.

[81] The word "may" in s 74 ("the court may make such orders ...") is used in the sense of conferring power as opposed to a discretion: *Leach v The Queen* (2007) 230 CLR 1 at [38] per Gummow, Hayne, Heydon and Crennan JJ; *Samad v District Court (NSW)* (2002) 209 CLR 140 at [36] per Gleeson CJ and McHugh J; *Finance Facilities Pty Ltd v Federal Commr of Taxation* (1971) 127 CLR 106 at 124 per Gibbs J, 134-135 per Windeyer J (Barwick CJ agreeing), 138-139 per Owen J; *Ward v Williams* (1955) 92 CLR 496 at 505 per curiam.

[82] For a discussion of the approach to determining what is "proper" see, eg, *Brown v Brown* (2007) 37 Fam LR 59 .

[83] Cf *Samad v District Court (NSW)* (2002) 209 CLR 140 at [36] per Gleeson CJ and McHugh J. Some commentators and authorities suggest in passing that the Court has discretion as to whether to make an order even if the s 72(1) conditions are satisfied: see eg Anthony Dickey, *Family Law* (6th ed, 2014) at [29.30]; *Brown & Brown* [2005] FamCA 1165 at [290] cited in *Budding & Budding* [2009] FamCAFC 165 at [38]. And, there is at least one case where the court refused to order maintenance notwithstanding a finding that the s 72(1) requirements were satisfied: see eg *In the Marriage of F* (1982) 8 Fam LR 29 at 33 per Fogarty J (finding that husband was not required to pay maintenance where wife was in de facto relationship with another man who did not make any contribution to household expenses). These authorities should not be regarded as correct in light of the statutory language.

65 Section 75(2) sets out, exhaustively, the matters that a court must consider when it decides what is "proper maintenance" in the circumstances of a particular case: s 75(1). In other words, the s 75(2) matters are the relevant considerations both for the purposes of determining whether the s 72(1) criteria have been satisfied and in deciding the "proper" maintenance that should be ordered.

66 Section 75(2) lists 19 matters that a court must take into account. Central to this appeal is the meaning of "financial resource" in sub-s 2(b). Before turning to that issue the following points about the sub-s (2) matters should be noted:

(a) The matters primarily relate to the circumstances of the parties to the marriage.[84]

10 (b) The matters all relate to the parties' *financial* circumstances.[85]

(c) Sub (o) is a general provision that permits consideration of "any fact or circumstance" that the "justice of the case" requires be taken into account. That provision has been interpreted narrowly to permit consideration of financial circumstances only.[86]

67 Turning to the meaning of "financial resource" in sub-s (b),[87] the following observations can be made.

68 First, the "financial resources" of the parties implies an enquiry beyond income or property in respect of which a present legal entitlement exists.[88]

69 Second, the resource must be a *financial* resource. In context, "financial resource" must refer to something that can easily be converted to money or otherwise meet a financial need.

---

[84] Sub-section (m) is an exception. It permits the Court to take account of the financial circumstances of, in effect, a new domestic relationship of either spouse. See also sub-s (naa) which permits consideration of an order to be made under Part VIIIAB in respect of a person who is in a de facto relationship with one of the parties to the marriage. See also sub-s (ha), which permits the Court to take into account the effect of a maintenance order on the ability of a creditor to recover a debt.

[85] Sub-section (l) refers to the need to protect a parent who wishes to continue that party's role as a parent. From time to time this provision has been pointed to as an anomaly that is not clearly financial in character: see eg Anthony Dickey, *Family Law* (6th ed, 2014) at [29.420]; *In the Marriage of Sobhusky* (1976) 12 ALR 699 at 715-716. However, in the context of the other s 75(2) matters, this sub-s (l) should be understood as relating to the issue of earning capacity and therefore is also properly characterised as financial consideration. In other words, the Court may take a spouse's role as a parent into account in determining the extent to which it is reasonable that they work: cf *In the Marriage of Heeks* [1980] FLC 90-804 at 75,072.

[86] *In the Marriage of Sobhusky* (1976) 12 ALR 699 at 725; *In the marriage of Beck (No 2)* (1983) 8 Fam LR 1017 at 1021. Sub-section (o) was introduced on the recommendation of the Senate Standing Committee on Constitutional and Legal Affairs, *Report on The Law and Administration of Divorce and Related Matters in the Clauses of the Family Law Bill 1974* (October 1974) at [67(f)(ii)] on p 22. This report made a number of recommended amendments to the draft bill, including in respect of maintenance, most of which were adopted by the Parliament.

[87] While the Full Court did not explicitly characterise the wife's 'ability' to ask for the voluntary payment as a financial resource, the contentions of the husband on the application for special leave are premised on that characterisation: see Respondent's Summary of Argument at [31]. No other limb of s 75(2) was identified either by the Full Court or the husband as potentially relevant or applicable.

[88] See *In the Marriage of Kelly (No 2)* (1981) 7 Fam LR 762 at 769, 773 per Evatt CJ, Emery SJ and Nygh J. In that case, the Full Court construed "financial resource" as "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" (at 769, citing *In the Marriage of Crapp* (1979) 5 Fam LR 47 at 67 per Fogarty J).. The Oxford Dictionary, relied upon by Fogarty J in *Crapp*, defines "resource" as "a means of supplying some want or deficiency; a stock or reserve upon which one can draw when necessary".

70 Third, to be a "resource", the thing (whatever it may be) must be available to the party to supply his or her needs.[89] In other words, there must be "some degree of entitlement to, control over, or relative certainty of receipt of property".[90] A mere hope or expectancy will not suffice. Otherwise it is not a "resource" that can be "drawn on" to meet the spouse's financial need.

71 Finally, the resource should be available to the party at the time of the relevant inquiry. A *potential* resource that may be available in the future is not a financial resource "of" the party within the meaning of sub-s 2(b).[91]

The Full Court's errors

72 The Full Court reasoned that the wife was not unable to support herself within the meaning of s 72 because it found that if she had asked her brothers for the money referred to in her father's will, the payment would have been made. In doing so, the Full Court erred in its interpretation and application of the statutory provisions in two main respects.

73 First, the ability to request, at some point in the future, a voluntary payment from a stranger to the marriage could not constitute a "financial resource" within the meaning of s 75(2)(b); nor could it be taken into account under the catch-all provision in s 75(2)(o). To hold otherwise, as the Full Court did, was inconsistent with the explicit premise of s 72 which imposes the maintenance obligation on the other "party to [the] marriage". It was further inconsistent with the core concept of a 'financial resource' which implies an existing entitlement (albeit not necessarily a legal entitlement) to access the relevant source of financial support. Second, assuming it was entitled to consider the wife's ability to prevail upon her brothers to secure the potential voluntary payment, the Full Court failed properly to assess how that potential payment affected the wife's ability to support herself within the meaning of s 72(1).

Not a s 75(2) matter

74 The potential payment was not a "financial resource" within the meaning of s 75(2)(b) because:

(a) the wife had no entitlement that it be paid to her and had no control over her brothers (or the V Group) to secure payment;[92] and

(b) *unless and until* the wife made a request that it be paid, it could not be characterised as being "available" to her.

---

89 *In the Marriage of Kelly (No 2)* (1981) 7 Fam LR 762 at 769, 773 per Evatt CJ, Emery SJ and Nygh J.

90 *White and Tulloch v White* (1995) 19 Fam LR 696 at 702 per Fogarty, Kay and Hilton JJ.

91 This interpretation is supported by the following:

(a) The reference to income and property "of" a person in the first part of sub-s 2(b) can only be understood as referring to a present or existing entitlement. A potential entitlement to property or income that might arise in the future could not properly be described as being the income or property "of" a person. The same interpretation should apply to a financial resource.

(b) That may be contrasted with the second limb of s 75(2)(b) which makes relevant the capacity of a spouse for appropriate gainful employment. Under that second limb, a spouse's *potential* to earn income must be considered. This suggests that the first limb should be limited to a resource presently available.

(c) The statutory condition in s 72 looks at whether a spouse *is* able to support herself or himself. The inquiry is thus directed to the spouse's present circumstances.

92 See paragraph 70 above.

As to (b), it might often be the case that a party to the marriage has members of their family or social circle who would, if called upon, provide that person with financial assistance if they needed it. It does not follow that the possibility of such financial assistance constitutes a 'financial resource' of the relevant spouse. At the very least, if the provision of assistance is conditional on a request, it cannot be a financial resource *unless and until that request is made*. Here, the Full Court accepted that the wife had not asked for the money; this was the explicit premise of its decision.[93] At most, then, on the Full Court's own reasoning, the payment was a potential resource that would only be available to the wife *if* she asked for it in the future.

75 Moreover, although not considered by the Full Court, the potential payment was not a "fact or circumstance" which justice required ought be taken into account under s 75(2)(o). There may be circumstances where it would be appropriate to have regard to voluntary payments when assessing a claimant's entitlement to maintenance.[94] However, taking into account the potential for the wife's brothers to make or procure the making of an annual gift, should she ask for it, for the purpose of relieving the husband of his obligation under s 72 to maintain the wife, could not be "just" as it would subvert the meaning and underlying objects of the statutory provisions.

76 In this regard, the Full Court's approach was contrary to the purpose and structure of the maintenance provisions. There are several related features of the FLA which make it impermissible, when deciding whether a party to the marriage is able to support themselves, to have regard to the possibility that the spouse is in a position to ask a third party for support.

77 The *first*, and most obvious, problem with this approach is that it effectively transfers to a third party (often a family member) the statutory liability of one party to a marriage to maintain the other if the latter is unable to support themselves and the former is reasonably able to do so. If the Full Court is correct, a spouse may be relieved of their liability under s 72 to maintain their former partner simply because the latter has one or more people in their life upon whom they could prevail if they were in financial need.

78 The *second* problem is that it subverts the fundamental enquiry posited by the maintenance provisions, which is whether a spouse *is able to support herself or himself*. Instead, the Full Court's approach directs the inquiry to whether a spouse is able to be supported *by others* (in this case the wife's brothers or the family corporate group). As Nygh J explained in the context of a wife's application for maintenance in *Murkin*:[95]

> "In my opinion the issue is not whether the wife is receiving sufficient funds, but whether she is able to support herself adequately ie whether she can generate funds from her own resources or earning capacity to supply her own needs. *A woman who*

---

[93] Full Court Reasons at [134], [151].

[94] cf *White and Tulloch v White* (1995) 19 Fam LR 696 (a prospective inheritance is not a financial resource under s 75(2)(b) but may, depending on the particular facts and circumstances, be taken into account under s 75(2)(o)).

[95] *In the marriage of Murkin* (1980) 5 Fam LR 782 at 784-785 citing *Wong v Wong* (1976) 2 Fam LR 11,159 at 11,164 (emphasis added). See also *In the Marriage of Burton* (1979) FLC 90-610 at 78,130-131 per Opas J (holding that "assistance from a generous relative" is no bar to a maintenance order and may even support the proposition that the order be increased rather than discharged); *LMH & LEJ* [2002] FMCAFam 271 at [77] per Walters FM (appearing to accept that it would be contrary to "public policy" to "shift the burden of responsibility" for maintenance from the husband to one of the adult children of the marriage but that in this case the husband was not seeking that the adult child support his wife, just that the adult child support herself).

is dependant on payments of social security benefits, voluntary payments by a former husband or by friends and relatives is not able to support herself. She has to be supported by others."

This distinction is especially important where the spouse has decided not to seek assistance from third parties.

79 *Third*, the Full Court in substance imposed an *obligation* on the wife to ask her brothers for money. If she failed to do so, her financial need which had been found by the primary judge and accepted by the Full Court would not have been met.[96] Effectively to require the wife to go cap-in-hand to her brothers and the family companies for support is not a proper exercise of the Court's powers under s 74.

80 *Fourth*, the Full Court reversed the proper order of the inquiry, looking first to the willingness of *others* to meet the wife's need before requiring her husband to do so.[97]

81 *Fifth*, the impermissibility of taking into account a spouse's ability to prevail upon parties outside the marriage for gratuitous financial assistance is supported by the structure of the maintenance provisions. Section 72 enquires *only* into the circumstances of the parties to the marriage: their respective abilities to support themselves and their former spouse. In providing the exclusive framework for that enquiry, the s 75(2) factors focus, in turn, on the circumstances of the parties to the marriage, not third parties.[98] None is directed towards the existence or otherwise of facts and circumstances which would affect or be relevant to the Court's assessment of the ability of the benevolent stranger to the marriage to support the spouse financially.[99] These provisions confirm that the liability to maintain – and the object of the enquiry – is confined to the spousal relationship.

82 *Finally*, if accepted, the Full Court's approach would require a broad ranging inquiry – effectively ungoverned by s 75(2) – into the amenability and capacity of persons in a spouse's circle to providing assistance to that spouse in the event he or she requested assistance and was otherwise in need. This would have significant and far-reaching practical implications for the conduct of maintenance proceedings.

---

[96] See Full Court Reasons at [106]: "we have found that Her Honour has not erred in finding that the wife was unable to adequately support herself, that her reasonable needs were $10,833 per month and that the husband was able to make the required payment".

[97] A helpful analogy may be drawn to the treatment of social security benefits. Prior to 1987 there was a debate about how social security benefits, especially income-tested benefits, should be treated in the maintenance analysis. The better view, expressed by Fogarty J, was that the Court should look first to the maintaining spouse (the respondent husband) to fill any "need" of the applicant spouse and that the "public purse" should fill that gap only to the extent the maintaining spouse lacked capacity to pay. This followed from the "fundamental circumstance" that "the primary responsibility for maintenance" lies with the maintaining spouse: *In the Marriage of F* (1982) 8 Fam LR 29 at 32. The correctness of this approach was confirmed by the enactment of s 39 of the *Family Law Amendment Act* 1987 (Cth), which added s 75(3) to the Act. That section requires a court to disregard the entitlement of the applicant spouse to an income tested pension in exercising its power under s 74.

[98] While sub-s (m) does permit consideration of the financial circumstances of, in effect, another relationship of either spouse, once again the focus of the inquiry is on the position of the parties to the former spousal relationship. Likewise, s 82(4) provides that any maintenance entitlement of a spouse terminates upon the remarriage of that spouse (unless the court otherwise orders). In that event, the maintenance obligation shifts to the new spouse.

[99] Such an enquiry would clearly be required if the Full Court were right, and it were relevant to ascertain whether some third party was not only willing but able to provide the financial support required to permit the spouse to meet his or her needs.

No proper consideration of s 72 condition

83 Even assuming (contrary to the above submissions) that (a) the inference was open to the Full Court, and (b) the potential payment might be a financial resource or might otherwise be considered under s 75(2)(o), the Full Court did not properly consider whether the statutory condition in s 72 was satisfied.

84 In this case, an assessment of whether the statutory condition was satisfied required more than determining that, if asked, the V Group (or the wife's brothers) would make the payment. To determine whether the wife was able to support herself having regard to the potential payment, the Full Court was required to, but did not, consider matters going to the timing, availability and value of the payment – for example:

(a) when the payment was likely to be made, including whether it would be made immediately upon request (so as to fill the wife's acknowledged financial need as at December 2013) or at some other time (for example, at the end of the financial year);

(b) whether or not the payment would be made in a lump sum or by installments;

(c) whether the payment would be made each year until final resolution of the property settlement and spousal maintenance proceedings between the parties;

(d) whether the payment would be subject to any conditions, for example that the money be spent only on certain outgoings or expenses;

(e) whether the whole or any part of the amount would be advanced as a loan and what terms of repayment might be imposed.

85 In the absence of consideration of these issues it was impossible for the Full Court to reach any conclusion on the ability or otherwise of the wife to support herself during the relevant period.[100] This is especially so in an application for interim maintenance, where the purpose of the order is to enable the spouse to support herself for the short term.[101]

86 Further, in determining the value of the annual payment, the Full Court would have been obliged to turn its mind to whether the whole of the $150,000 should be taken into account in determining whether the wife satisfied the s 72 condition or whether some discount should be applied due to the possibility that the payment might not be made. There is a distinction between a question of whether a resource is available under s 75(2) — which must be proven on the balance of probabilities — and the question of the *value* of that resource for the purpose of satisfying the s 72 condition, which, it is submitted, is to be assessed by reference to the probability of the resource being available.[102] The Full Court's finding that the payment would be made if requested was necessarily a finding on the balance of probabilities (that is, there was at least a 51% chance of it being made). This may have been sufficient to find that the voluntary payment was a "financial resource" of the wife or otherwise to be taken into account under s 75(2). However, to value the resource and, therefore, properly determine whether the s 72 condition was satisfied, the Full Court had to assess how likely

[100] For the same reason, the Full Court could not, absent consideration of these matters, be satisfied that the payment was relevantly available to her, and thus a resource under s 75(2)(b).

[101] Cf *In the Marriage of Redman* (1987) 11 Fam LR 411 at 414-15 per Evatt CJ, Lindenmayer and Nygh JJ.

[102] Cf *Sellars v Adelaide Petroleum NL* (1992) 179 CLR 332 at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ, 367-8 per Brennan J.

it was that the full payment would be made (not merely that it was more likely than not that it would be).[103] Instead, the Court appears to have proceeded on the basis that the full value of $150,000 should be attributed (immediately) to the wife's financial resources.

87 Finally, the Court was obliged, but failed, to assess the extent to which an annual payment would actually meet the "reasonable needs" of the wife which the primary judge had assessed at $10,833 per month,[104] bearing in mind that – as the Full Court itself accepted – the wife was "not obliged to 'use up all of her assets and capital' in order to satisfy the threshold test in s 72.[105]

Part VII: Legislative provisions

10 88 The applicable legislative provisions are attached as Annexure A.

Part VIII: Orders sought

89 The orders sought by the appellant are:

(a) The appeal be allowed.

(b) Paragraphs 7, 8, 9 and 10 of the Orders of the Full Court of the Family Court of Australia in Appeal SOA42 of 2014 be set aside.

(c) Paragraph 1.3 of the Orders made by Dawe J on 10 December 2013 be restored.

(d) The Respondent pay the Appellant's costs of and incidental to this appeal and Appeal SOA42 of 2014 to the Full Court of the Family Court.

Part IX: Estimate of oral argument

20 90 The appellant estimates that it requires two and a half hours to present oral argument.

23

Dated: 18 March 2016

Wendy Harris
Phone: (03) 9225 7719
Fax: (03) 9225 8808
Email: harriswa@vicbar.com.au

30 Simona Gory
Phone: (03) 8600 1724
Fax: (03) 9225 8395
Email: simona.gory@vicbar.com.au

[103] For example, the willingness or ability of the V Group's controllers to have it make the payment may have depended upon assumptions as to future, as yet unknown, matters, such as the profitability (and the continued profitability) of the V Group companies.

[104] Full Court Reasons at [101]-[102], [106]; *Hall & Hall (No 3)* [2013] FamCA 975 at [32].

[105] Full Court Reasons at [91], citing with approval the Full Court decision in *In the marriage of Mitchell* (1995) FLC 92-601 at 81,995-996.

Annexure A

Part VIII—Property, spousal maintenance and maintenance agreements

71 Interpretation

In this Part:

marriage includes a void marriage.

re-marriage, in relation to a person who was a party to a purported marriage that is void, means marriage.

71A This Part does not apply to certain matters covered by binding financial agreements

(1) This Part does not apply to:

(a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or

(b) financial resources to which a financial agreement that is binding on the parties to the agreement applies.

(2) Subsection (1) does not apply in relation to proceedings of a kind referred to in paragraph (caa) or (cb) of the definition of ***matrimonial cause*** in subsection 4(1).

72 Right of spouse to maintenance

(1) 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 whether:

(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason;

having regard to any relevant matter referred to in subsection 75(2).

(2) The liability under subsection (1) of a bankrupt party to a marriage to maintain the other party may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt party if the court makes an order under this Part for the transfer.

74 Power of court in spousal maintenance proceedings

(1) In 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.

(2) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the maintenance of a party to the marriage; and

(b) either of the following subparagraphs apply to a party to the marriage:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before the proceedings are finally determined, the party became a bankrupt; and

(c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

(3) If a bankruptcy trustee is a party to proceedings with respect to the maintenance of a party to a marriage, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make

a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(4) The court must not grant leave under subsection (3) unless the court is satisfied that there are exceptional circumstances.

(5) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the maintenance of a party to the marriage; and

(b) either of the following subparagraphs apply to a party to the marriage (the ***debtor party***):

(i) when the application was made, the party was a debtor subject to a personal insolvency agreement; or

(ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

(c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

(6) If the trustee of a personal insolvency agreement is a party to proceedings with respect to the maintenance of a party to a marriage, then, except with the leave of the court, the party to the marriage who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

(7) The court must not grant leave under subsection (6) unless the court is satisfied that there are exceptional circumstances.

(8) For the purposes of subsections (2) and (5), an application for an order under this section is taken to be finally determined when:

(a) the application is withdrawn or dismissed; or

(b) an order (other than an interim order) is made as a result of the application.

75 Matters to be taken into consideration in relation to spousal maintenance

(1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

(2) The matters to be so taken into account are:

(a) the age and state of health of each of the parties; and

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the

earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(naa) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:

(i) a party to the marriage; or

(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide,

or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties to the marriage; and

(q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

(3) In exercising its jurisdiction under section 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

(4) In this section:

party means a party to the marriage concerned.

77 Urgent spousal maintenance cases

Where, in proceedings with respect to the maintenance of a party to a marriage, it appears to the court that the party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable.

77A Specification in orders of payments etc. for spouse maintenance purposes

(1) Where:

(a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a marriage, is made by consent or varies an earlier order), and the order has the effect of requiring:

(i) payment of a lump sum, whether in one amount or by instalments; or

(ii) the transfer or settlement of property; and

80 General powers of court

(1) The court, in exercising its powers under this Part, may do any or all of the following:

(a) order payment of a lump sum, whether in one amount or by instalments;

(b) order payment of a weekly, monthly, yearly or other periodic sum;

(ba) order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage;

(c) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;

(h) 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;

(i) impose terms and conditions;

(j) make an order by consent;

(k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice; and

(l) subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part.

(2) The making of an order of a kind referred to in paragraph (1)(ba), or of any other order under this Part, in relation to the maintenance of a party to a marriage does not prevent a court from making a subsequent order in relation to the maintenance of the party.

(3) The applicable Rules of Court may make provision with respect to the making of orders under this Part in relation to the maintenance of parties to marriages (whether as to their form or otherwise) for the purpose of facilitating their enforcement and the collection of maintenance payable under them.

(4) If a bankruptcy trustee is a party to a proceeding before the court, the court may make an order under paragraph (1)(d) directed to the bankrupt.

(5) If the trustee of a personal insolvency agreement is a party to a proceeding before the court, the court may make an order under paragraph (1)(d) directed to the debtor subject to the agreement.

(6) Subsections (4) and (5) do not limit paragraph (1)(d).

81 Duty of court to end financial relations

In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.

82 Cessation of spousal maintenance orders

(1) An order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the party.

(2) Subject to subsection (3), an order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the person liable to make payments under the order.

(3) Subsection (2) does not apply in relation to an order made before the date of commencement of section 38 of the *Family Law Amendment Act 1983* if the order is expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the time of the death of the person liable to make payments under the order and, in that

case, the order is binding upon the legal personal representative of the deceased person.

(4) An order with respect to the maintenance of a party to a marriage ceases to have effect upon the re-marriage of the party unless in special circumstances a court having jurisdiction under this Act otherwise orders.

(6) Where a re-marriage referred to in subsection (4) takes place, it is the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date of the re-marriage.

(7) Any moneys paid in respect of a period after the event referred to in subsection (4) may be recovered in a court having jurisdiction under this Act.

(8) Nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect.

83 Modification of spousal maintenance orders

(1) If there is in force an order (whether made before or after the commencement of this Act) with respect to the maintenance of a party to a marriage:

(a) made by the court; or

(b) made by another court and registered in the first-mentioned court in accordance with the applicable Rules of Court;

the court may, subject to section 111AA:

(c) discharge the order if there is any just cause for so doing;

(d) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;

(e) revive wholly or in part an order suspended under paragraph (d); or

(f) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.

(1A) The court's jurisdiction under subsection (1) may be exercised:

(a) in any case—in proceedings with respect to the maintenance of a party to the marriage; or

(b) if there is a bankrupt party to the marriage—on the application of the bankruptcy trustee; or

(c) if a party to the marriage is a debtor subject to a personal insolvency agreement—on the application of the trustee of the agreement.

(2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied:

(a) that, since the order was made or last varied:

(i) the circumstances of a person for whose benefit the order was made have so changed (including the person entering into a stable and continuing de facto relationship);

(ii) the circumstances of the person liable to make payments under the order have so changed; or

(iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative—the circumstances of the estate are such;

as to justify its so doing;

(b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;

(ba) in a case where the order was made by consent—that the amount ordered to be paid is not proper or adequate;

(c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

(3) Subsection (2) does not prevent the court from making an order varying an order made before the date of commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part.

(4) In satisfying itself for the purposes of paragraph (2)(b), the court shall have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician.

(5) The court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living.

(5A) In satisfying itself for the purposes of paragraph (2)(ba), the court shall have regard to any payments, and any transfer or settlement of property, previously made by a party to the marriage, or by the bankruptcy trustee of a party to the marriage, to:

(a) the other party; or

(b) any other person for the benefit of the other party.

(6) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate.

(6A) Where, as provided by subsection (6), an order decreasing the amount of a periodic sum payable under an order is expressed to be retrospective to a specified date, any moneys paid under the second-mentioned order since the specified date, being moneys that would not have been required to be paid under the second-mentioned order as varied by the first-mentioned order, may be recovered in a court having jurisdiction under this Act.

(6B) Where, as provided by subsection (6), an order discharging an order is expressed to be retrospective to a specified date, any moneys paid under the second-mentioned order since the specified date may be recovered in a court having jurisdiction under this Act.

(7) For the purposes of this section, the court shall have regard to the provisions of sections 72 and 75.

(8) The discharge of an order does not affect the recovery of arrears due under the order at the time as at which the discharge takes effect.