

Acting for the Professional Entertainer/Athlete in Family Law Proceedings: Financial Considerations

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February 2011

Introduction

The legal representation of the professional entertainer or athlete in family law proceedings can be both enthralling and challenging. In my experience in acting for such clients, it soon becomes clear that lawyers will need to grapple with not only the usual array of issues arising out of a family law case, but also with various problems specific to their client's profession. This is never more apparent than in the division of assets upon the breakdown of an entertainer/athlete's marriage or relationship. The purpose of this note is to explore the specific family law problems that the lawyer will encounter in acting for the entertainer/athlete who separates.

Characteristics of the Entertainer/Athlete's Contract

The professional athlete that performs under a contract can be identified as falling into two distinct groups: (i) those who are part of a team/club/franchise; and (ii) those who perform individually. Athletes such as golfers and tennis players base their income on their performance at individual events and do not receive a fixed/base salary guaranteed under contract. Similarly, the income of entertainers (principally actors and musicians) is based on individual performance. As Kinser and Scott Dowling describes it, "Future Services = Future Income" ¹. Accordingly, this can make the valuation for family law purposes of an individual entertainer's/athlete's income very speculative. Athletes who are contractually obligated to an organisation usually do not present any difficulty in valuing the base rate of income as such income amount(s) is/are (or ought to be) clear from the contract.

Another aspect of the professional entertainment/athletic contract that is significant for family law purposes, is the issue of endorsements. An entertainer/athlete who has risen to prominence may be given the opportunity to endorse products and/or make personal appearances. In addition, the contracts of highly successful and prominent athletes may contain 'image clauses' which are more often than not linked to the endorsement by such athlete to an individual brand. Depending on the level of success of the individual, these opportunities could be huge - think David Beckham or Penelope Cruz.

The Family Law Act

Sections 79(2) and 90SM(2) gives the Court a broad discretion in altering interests in property between the parties to a marriage or a de facto relationship to make such orders as it considers appropriate. Fundamentally, the sections provide that the Court shall not make an order unless it is satisfied that, in all the circumstances, it is "just and equitable" to make such order. In arriving at a just and equitable outcome, the Court follows a four stage process that is well defined in Australian law. The process involves:

1. identifying and valuing the *net* property of the parties, usually at the date of trial;
2. considering the contributions of the parties to the conservation, acquisition and improvement of the asset pool;
3. considering the checklist of factors set out in Section 75 (2) of the Act pertaining to spousal maintenance and the needs of the respective parties in the future; and
4. a general exercise in discretion by the Court to consider whether the orders proposed by the parties are just and equitable.

It is against this framework that I propose to examine the special position of the entertainer/athlete.

Specific Problems

Special Skills

Since the mid-1990s there have been a number of cases where the 'extraordinary' or 'special' skills of one party to a marriage has resulted in a higher level of direct financial contribution being made to the matrimonial asset pool on the part of such party. As a matter of law, a party can make a special contribution to matrimonial property on account of his or her special skills. Whilst the cases that have concerned special skills have involved significant asset pools, there is no legal impediment to consideration being given to a party's special skill in a case involving a low-to-medium-range pool. The special skills consideration is controversial in nature as it relates only to the financial contributions of the parties and not to the party's homemaking and parenting contributions. Notwithstanding its controversial nature, the special skills consideration provides an appropriate recognition of a special contribution derived from exceptional skills and effort. As Guest describes it, "[i]t validates recognition of an individual's right to the value of his or her innate skills and intelligence" 2.

It is open to an entertainer/athlete to argue that his or her special skills as a professional have contributed significantly to the creation of the asset pool and that the Court ought to give such party appropriate recognition by way of a "greater slice of the pie". Whilst this

is a valid argument, such argument is open only as a contribution issue within the framework of the four stage process that the Court undergoes in dividing up marital property. As Guest puts it, "[i]t becomes a fact in issue that should be properly considered and weighed alongside the homemaker/parent contribution, *taking into account that the contribution of the latter afforded the other party the opportunity to do so*" 3. Indeed, recent cases such as *In the Marriage of Ferraro* 4 and *In The Marriage of Figgins* 5 have seen a movement by the Court towards treating a wife's non-financial contributions as equal to those of the husband notwithstanding that the husband's skills have created substantial wealth.

The special skills consideration can be a double edged sword for the entertainer/athlete who can seek to use same to obtain an adjustment in the division of the matrimonial pool reflective of the enhanced value given to the pool by that person's skills as a professional. On the other hand, the entertainer/athlete runs the risk of the Court enhancing the homemaker and/or parent contribution of the other party and treating such non-financial contribution as equal to that of the other party.

Section 75(2) and Spousal Maintenance

Once the asset pool has been identified and valued and the contributions of the parties have been considered, the next (third) step for the Court is to take into account each of the 17 factors set out in Section 75(2) of the Act, as far as they are relevant to the particular case. The Section 75(2) factors represents a checklist of matters that the Court must take into account in determining a party's entitlement to spousal support under the Family Law Act. Although applications for property orders and spousal support are separate proceedings, they may be dealt with by the Court in one hearing. Nonetheless, the Court is mandated to take into account the Section 75(2) factors, insofar as they are relevant in any given case, when determining a property case.

For the sake of brevity, I will not reproduce the entire checklist of factors here. Suffice to say that for the purpose of the entertainer/athlete who separates, the following factors would (broadly speaking) be relevant:

- age and state of health of the parties;
- income, property and earning capacity;
- care of a child of the relationship under 18 years of age;and
- standard of living.

Although each of the Section 75(2) factors are discrete, some do overlap with others. As Dickey argues "[m]ost of the considerations in s.75(2) are broadly economic in nature" 6

and focus on the ability of a party to adequately support themselves post-separation. As such, their consideration is relevant for the purpose of establishing a special need for financial assistance by such party over and above that which such party would be entitled to receive following an assessment of that party's level of contribution to the pool. In other words, a 'loading'.

The object of the factor relating to income, property and earning capacity is to bring into account both the actual and potential income of the parties, their current assets and all other 'financial resources' available to them. Financial resources means financial advantages that are either currently being enjoyed by a party, or are very likely to be enjoyed by such party in the future. It is no secret that professional entertainment/athletic contracts are lucrative. Discrepancies in the income and income-earning capacities of the professional and his/her spouse are relevant Section 75(2) factors to be considered in awarding spousal support and/or dividing marital property. On-going income earned post-separation from an endorsement contract arguably constitutes a financial resource in the hands of the entertainer/athlete.

A curious Section 75(2) factor is the one that requires the Court to consider "where parties have separated, a standard of living in all the circumstances that is reasonable". In some instances parties will not be able to enjoy their previous standard of living because the financial resources available to them would be inadequate for that purpose. The extent of the party's standard of living prior to separation is a highly relevant matter that the Court takes into consideration. In the case of *Wilson & Wilson*⁷ the Court declined to make provision for the post-separation continuation of a lifestyle regarded as lavish and extravagant.

Given the highly lucrative nature of the professional entertainment/athletic contract, the Section 75(2) factors touched upon in this note are relevant and may combine to award the spouse of such professional either a significant loading upon the division of assets and/or a substantial support award. It is a matter for the Court how much weight is placed on the Section 75(2) factors.

Binding Financial Agreements

Recent changes to the Family Law Act allow parties to enter into Binding Financial/Pre-Nuptial/Cohabitation Agreements in order to set out what they agree will happen to their assets in the event of the breakdown of their relationship. Such agreements can also set out what the arrangements will be in relation to spousal support upon the end of a relationship. This form of 'private ordering arrangement' is particularly relevant for individuals with accumulated wealth who want certainty in relation to the division of assets and the payment of support in the event of relationship breakdown. The parties to

a Binding Agreement must obtain specific legal advice prior to signing such Agreement and they must certify that they understand the nature and effect of the Agreement.

Such agreements can avoid the emotional and financial pressures associated with going to Court. Binding Financial Agreements offer the entertainer/athlete an option to avoid the lottery of litigation in the Family Court with the uncertainties described in this note.

Estate Planning

Aligned with the private ordering option of the Binding Financial Agreement, it would be highly prudent for the entertainer/athlete to have an up to date Will that reflects insofar as possible the arrangements set out in the event of death. It is important that any Binding Financial Agreement makes reference to the existing Wills of the parties and that there is no ambiguity existing between the arrangements set out in the Binding Agreement and the party's Wills.

It is vitally important that the entertainer/athlete review his/her Will upon the breakdown of their relationship. In the event of an irretrievable breakdown of a relationship, it might be appropriate for the entertainer/athlete to draft a new Will, if only for the purpose of disenfranchising an 'ex' from the estate of such professional.

Similarly, it would be important for the professional to consider an appropriate Enduring Power of Attorney in relation to either medical treatment and/or financial matters.

In Conclusion

". . . while the representation of the professional athlete [and entertainer] can be exceedingly challenging, it is rarely boring" 8. Given the complexities that today's professional entertainment/athletic contracts can present, the difficulties that can arise in valuing such contracts and the uncertainty surrounding how the income and assets of the entertainer/athlete will be characterised by the Court, it is important for the entertainer/athlete to take steps to protect their assets and future income streams. Consideration ought to be given to the proper drafting of Binding Financial Agreements and Wills as well as the provision of appropriate family law advice.

Endnotes:

1. K Kinser and R Scott Downing, "Family Law Issues That Impact the Professional Athlete" [1998] Vol 15, Journal of the American Academy of Matrimonial Lawyers" 337 @ p. 354.
2. The Hon P Guest, "Special Contributions in Big Money Cases - "Never Mind The Law, Feel The Politics"" paper presented at Anglo-Australian Colloquium, "The End of Equality?", Oxford, 2004 @ p.52.
3. Ibid @ p. 53 emphasis added.
4. [1992]111 FLR 124.
5. [2002] FLC 93-122.
6. A Dickey, *Family Law*, 4th edition, Thomson, Sydney, 2007 @ p.370.
7. [1989] 96 FLR 316.
8. Kinser and Scott Downing @ p.374.

This note is not intended to be legal advice and is not to be regarded as such.

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