



HIGH COURT OF AUSTRALIA

14 October 2020

HSIAO v FAZARRI
[2020] HCA 35

Today, the High Court, by majority, dismissed an appeal from the Full Court of the Family Court of Australia ("the Full Court"). The appeal concerned whether the Full Court erred by upholding a property settlement order ("PSO") under s 79(1) of the *Family Law Act 1975* (Cth) ("the Act") and refusing to exercise its discretion to receive further evidence on appeal.

More than two years before their marriage, the respondent husband made a gift to the appellant wife of a ten per cent interest in a residential dwelling ("the property"). Around eight months later, while in hospital due to a suspected heart attack and under pressure from the appellant, the respondent signed a transfer of land that gave her a further 40 per cent interest in the property. After the parties were registered as joint tenants, they executed a deed of gift ("the deed") which provided that, in the event the respondent survived the appellant while they remained joint tenants, he would pay approximately one half of the value of the property to her siblings. In August 2016 the parties married; 23 days later they separated.

In November 2016, the respondent commenced proceedings seeking a PSO to transfer the appellant's interest in the property to him. The appellant chose not to participate in the trial, which proceeded as an undefended hearing. The primary judge found that while the appellant had received her initial ten per cent interest as a gift, she had "badgered" the respondent to give her the other 40 per cent, with the consequence that the further interest could not be seen in the same light as the initial gift. His Honour determined that the lack of fulfilment of the parties' expectations, that theirs would be a lasting relationship and that the property would be the place they shared their lives, made it just and equitable to make a PSO. Observing that this was a short marriage and that the appellant's financial and non-financial contributions to the acquisition, conservation and improvement of the property of the marriage were modest, his Honour made orders, relevantly: severing the joint tenancy of the property; requiring the appellant to transfer her interest in the property to the respondent; and requiring the respondent to pay the appellant \$100,000.

Before the Full Court, the appellant contended the primary judge erred in failing to identify the existing legal interests of the parties, as required by s 79(1), by erroneously treating the transfer of the further 40 per cent interest as vitiated by pressure, and sought to adduce further evidence largely focussed on the circumstances in which she obtained that interest. The Full Court stated that none of this evidence, which the appellant had deliberately refrained from filing before trial, would have produced a different result and that it was not in the interests of justice to receive it on appeal. Their Honours upheld the determination that it was just and equitable to make the PSO.

Following a grant of special leave to appeal, a majority of the High Court agreed that the Full Court was right not to receive the appellant's further evidence and noted that, on the hearing, the appellant acknowledged that the primary judge accepted the parties were joint tenants. The appellant argued that the deed, which she contended contemplated a payment to her in the event of separation or divorce, was a material consideration that the primary judge failed to take into account. The majority stated the appellant's argument was premised on a misconstruction of the deed, and held

that her broader contention – that it was not open to the primary judge, in exercising the wide discretion conferred by s 79(1) of the Act, to be satisfied in this singular case that it was just and equitable to make a PSO or, if it was, it was not open to find that the appellant's financial contribution to the acquisition of the property was no greater than ten percent – should not be accepted. That conclusion was reinforced by the fact that the appellant had sought to impugn the primary judgment for its failure to respond to arguments that she deliberately chose not to present at first instance.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*