FEDERAL MAGISTRATES COURT OF AUSTRALIA

MADDOCK & MADDOCK & ANOR (No.2) *[2011] FMCAfam 1340*

FAMILY LAW – Property dispute – husband's father seeking repayment of $240,000 loan – wife denying loan and asserting $240,000 was a gift – assessment of proper characterisation of the advance – unusual circumstances – failure of parties to specify conditions for repayment – advance not a loan but major contribution to credit of husband – consideration of other contributions and s.75(5) factors.

Family Law Act 1975, s.75(2)

Jordan v Jordan (1997) FLC 92-736

Applicant:	MR S MADDOCK
Respondent:	MS MADDOCK
Intervener:	MR J MADDOCK
File Number:	MLC 6367 of 2010
Judgment of:	Burchardt FM
Hearing dates:	17, 18 & 19 October 2011
Date of Last Submission:	14 November 2011
Delivered at:	Melbourne
Delivered on:	13 December 2011

REPRESENTATION

Counsel for the Applicant:	Mr Mellas
Solicitors for the Applicant:	Kenna Teasdale Lawyers
Counsel for the Respondent:	Mr Puckey
Solicitors for the Respondent:	Rochelle Belcher
Counsel for the Intervener:	Mr Spicer
Solicitors for the Intervener:	Berry Family Law

IT IS NOTED that publication of this judgment under the pseudonym ***Maddock & Maddock & Anor (No.2)*** is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLC 6367 of 2010

MR S MADDOCK
Applicant

And

MS MADDOCK
Respondent

And

MR J MADDOCK
Intervener

REASONS FOR JUDGMENT

Introductory

1. This is a property dispute, the outcome of which is heavily dependent upon the case brought by the intervener, who is the father of the applicant husband. The intervener says the parties owe him $240,000.

2. Children's matters were originally in issue but have now been resolved and the Court will make orders by consent to dispose of that aspect of the matter.

3. The circumstances surrounding the alleged loan are extremely difficult to unravel, but for the reasons that follow I have concluded that the $240,000 is not repayable.

The facts

4. The husband was born [in] 1970 and the respondent wife [in] 1974. They appear to have met in 1990 (see husband's first affidavit) and commenced a relationship in 1992 at which time they were both relatively young. They married [in] 1995 and have two children; [X], born [in] 1998 and [Y], born [in] 2000.

5. The parties separated in February 2010 and the wife took out an intervention order against the husband on 15 April 2010.

6. The parties bought their first property in 1994 at Property R. It was purchased for $25,000 and the wife admits the husband's assertion (paragraph 21 of his first affidavit) that he contributed about $9,000 from his superannuation policy and that they borrowed about $18,000.

7. Neither of the parties appears to have had significant financial or other resources at the commencement of the relationship.

8. The parties subsequently bought land at Property E. The circumstances surrounding that purchase and the moneys which were certainly advanced by the intervener to enable the parties to make the purchase are at the core of the factual issues in dispute in the proceeding.

9. It should be noted that both parties contributed to the general wellbeing of the family through their employment and home commitments throughout the relationship. It is not in my view necessary to set out their endeavours in any detail although I should make it clear that I have had regard to all the materials before the Court. I note that the husband was employed for some years by [omitted] and his assertion that he developed financial skills in that time and otherwise is inherently probable.

10. It is important, however, to note that the husband was dismissed from [employer omitted], it would appear in late 2001, and thereafter found it very difficult to get further employment.

11. As a result of his difficulties, his parents-in-law employed him in 2002. He was paid a greater wage, it would appear, than the person who had previously been what in effect was an [occupation omitted]. Mr and

Mrs H. (the parents-in-law) described the husband's position as "[omitted]" in their [omitted] business.

12. The husband remained in that employment until 30 June 2010 and it is clear that the conclusion of that employment was interrelated with the matrimonial dispute.

13. It should be noted that both the intervener and Mr and Mrs H. provided assistance to the parties from time to time. Once again, it is not in my view necessary or appropriate to go through the substantial assertions made in this regard. I have, of course, had proper regard to all the materials filed. In my view, leaving aside the $240,000 provided by the intervener, the assistance provided to the parties by their respective parents seems to have been of roughly equal proportions.

14. I should make it clear in this regard that the grossly over-detailed initial account of the assistance provided to the parties by Mr and Mrs H. as described in their first affidavit (sensibly restrained somewhat in later affidavit material) was largely unpersuasive. The fact is that the various employment benefits provided to the husband from time to time by Mr and Mrs H. were scarcely so munificent as to convince me at least that they reflect some sort of additional benefit to the husband that, as it were, represents an excess over what his labour was worth.

15. Nonetheless, it is clear that the provision of a work car and various other benefits would have been of assistance to the husband and wife during their relationship.

16. It should also be noted that it is in the ultimate not disputed that the intervener lent the husband and wife $50,000 (wife's version) or $60-$70,000 (intervener's version) in August/September 2005 or May 2006. It is common cause that whatever the sum was and whenever it was advanced, it was repaid upon the completion of the sale of the Property R property.

The purchase of the former matrimonial home and the intervener's claim

17. Although, in my opinion, this property dispute has a number of complexities to it additional to the issue of the alleged loan, it was the alleged loan that occupied most of the evidence at the trial.

18. Because of the very unusual circumstances involved, it is appropriate to set out what people said about this in some detail. In his first affidavit filed on 14 July 2010, the husband said (paragraph 24):

> *"My father also loaned the respondent and I the sum of $240,468. This money was provided by way of three bank cheques in June 2005."*

19. The husband went on to detail the cheques and I note that one of them was said to be "deposit – $10,676". The husband's affidavit went on to say that the moneys had not been repaid and referred to the fact that the wife was asserting that they were a gift.

20. The wife's first affidavit filed 13 August 2010 did indeed assert that the moneys were not a loan but a gift. She referred to the fact that the moneys advanced in relation to the Property R property had been repaid. She also said (paragraph 13(a)):

> *"The moneys advanced to us for the Property E property was in the nature of a gift. I would not have accepted the funds had it been a loan as the applicant and I had a significant mortgage."*

21. The wife went on to depose:

> *"As to the matters alleged in paragraph 25 I admit that I considered the advancement by the Husband's father a gift and say that this was confirmed at a meeting in late February 2010 with the Applicant's father, Mr J Maddock. The funds were advanced by the Applicant's father on the basis of me being the mother to his grandchildren and in consideration of me enabling him, Mr J Maddock to have relationships with his grandchildren that he otherwise would not have had if not for me. I ensured that Mr J Maddock was invited to the children's birthday parties and Christmas celebrations. I was until the time of separation Mr J Maddock's medical power of attorney. Mr J Maddock had had a poor relationship with the Applicant following his divorce*

with the Applicant's mother. I was the instigator and facilitated its repair."

22. In his affidavit filed on 8 November 2010, the intervener set out his version of events. As it is of some length and includes matters of comment, I will paraphrase it. He deposed that he lent the amount of $240,768 and annexed what was said to be the relevant bank records. The first cheque was drawn on 22 July 2003 in the sum of $10,676 and the remainder was drawn in mid-2005.

23. The intervener deposed (at paragraph 2.2(a)) that it was originally his intention the purchase the property at Property E:

> *"in my own right for the applicant and respondent to live there. [Mr S Maddock] signed a contract to purchase the property in his name ... 'or nominee'. It was my intention that [Mr S Maddock] nominate me as purchaser. The property was referred to as being my property in conversations."*

24. The intervener deposed, as is ultimately common cause, that the wife was eventually placed solely on title as a result of concerns that the husband might attract personal responsibility for liabilities of a company of which he was a director. It was not in fact until some years after the purchase that it became known to the intervener that the wife was the only person on title.

25. The intervener went on to depose that there was no written contract as to the loan and that (paragraph 2.3(a)):

> *"[Ms Maddock] first approached me to request that I lend moneys to her and to [Mr S Maddock] so that they could purchase the property. The property was at that time, acreage and vacant land. She told me that she and [Mr S Maddock] did not have the money to fund the deposit. At her request, on 22 July 2003, I paid the sum of $10,676 by way of holding deposit so that she and [Mr S Maddock] have the opportunity to acquire the acreages property they wished to acquire."*

26. The affidavit also says (paragraph 2.3(c)):

> *"The agreement that I lend [Mr S Maddock] and [Ms Maddock] the moneys arose primarily in conversations between [Ms Maddock] and me. It was confirmed in conversations between me and [Mr S Maddock] and also with both parties."*

27. The intervener deposed that as he understood the agreement (paragraph 2.3(d)):

> *"that upon completion of the sale of the block of land or at such earlier time as they could effect or we may agree that I would be repaid the principal advanced by me".*

28. The affidavit also asserts (paragraph 2.3(e)) that the husband told the intervener that he and the wife intended:

> *"at such time as they have repaid the loan acquired by them to build the house on the property, that payments would be made to me to reduce the loan to them and ultimately to repay it in the same manner as [Mr S Maddock]'s brother had and as referred to later in his affidavit".*

29. The intervener deposed that he obtained the funds to assist the parties by withdrawing them from his self-managed superannuation fund. This had given rise to an interest charge which the intervener did not seek to have repaid.

30. The intervener's partner, Ms M., filed an affidavit on 8 November 2010. For these purposes, the most important part of her affidavit is paragraph 4 which gives a detailed description of a meeting that occurred on 11 February 2010 at the intervener's home. Ms M. deposes in terms that the wife admitted being indebted to the intervener for the moneys advanced by him. The conversation as deposed in paragraph 4(c)(iv) of Ms M.'s affidavit relevantly includes the words attributed to the wife "by the time they paid back the $200,000 plus they owe Mr J Maddock for the block of land, the bank I think is $350,000 on the mortgage, I cannot remember the exact figures, they may be lucky to come out with approximately $50,000 each".

31. While that extract appears in one sense perhaps poorly drafted because it is not clear that the latter words are not in fact uttered by Ms M., the earlier passage is clearly attributed to the wife.

32. In her trial affidavit filed 8 September 2011, the wife took issue with the amount of the alleged loan. She said that the $10,768 figure from July 2003 could not be accurate because the property had not even been found by her and the husband until November 2003. She annexed

as an exhibit a copy of the contract note showing receipt of the deposit in the sum of $10,000 on 10 November 2003. She went on to depose that settlement of the property had taken 18 months due to a dispute at VCAT over a subdivision, something that in the ultimate seems uncontroversial.

33. The wife did not repeat the phrase "in the nature of a gift" but referred to the advance as a gift simpliciter. She deposed at paragraph 9 that:

> *"The Intervener was prepared to gift us the funds on the basis that I would care for him in his old age and in the event of any infirmity. We discussed building a small dwelling on the property should this occur for the Intervener to live in."*

34. There are a number of other assertions as to conversations between her and the intervener but, in my view, it is not necessary to deal with them in any detail, although I should note the wife's assertion that the $50,000 alleged by her to have been advanced in May 2006 was put to completing Property E and was a loan which was repaid.

35. The husband's trial affidavit filed on 9 September 2011 in large part responds to the affidavits of the Hogans as to the circumstances of his employment. He also deposed that Property E had been sold for $715,000 with net likely proceeds to be approximately $360,000.

36. The intervener's second affidavit was filed on 11 October 2011. Relevantly, he conceded that he had made a mistake in respect of the assertion that the deposit had been advanced in the sum of $10,768 in July 2003. It is not necessary otherwise to detail the matters set out.

37. One other aspect of the matter I should deal with is the correspondence that passed between the lawyers for the parties about the alleged loan. This matter was first raised on 28 June 2010 by letter from Berry Family Law to the solicitors for each of the parties. It asserted that the principal sum of $240,000 was still owed and it sought confirmation that the debt was acknowledged.

38. The solicitors for the husband wrote back the very next day acknowledging the debt and confirming it in the total sum of $240,768 (the sum originally asserted by the intervener and now conceded to be inaccurate). The letter from Messrs CE Family Lawyers also said:

"Our client would be agreeable to interest being paid to your client in relation to the amount outstanding until such time as payment is made." Clearly the husband's case has been very closely aligned with that of his father since the start.

39. The correspondence from the wife's solicitors dated 7 July 2010 denied the loan and asserted that the sum advanced was a gift. That letter also asserted that if the advancement had been in the nature of a loan, with or without interest, it would not have been accepted.

40. That letter itself drew a response from Berry Family Law dated 9 July 2010 (exhibit R4) which asserted inter alia:

> *"From our instructions, the assertions made by your client are arrant nonsense and are disappointing indeed in that the moneys lent by our client were the sole reason by which your client and her husband were able to purchase their property. To repay this generosity in this manner does your client no credit."*

41. The letter went on to assert that if the matter was not conceded, costs would be sought on an indemnity basis.

42. I would interpolate at this stage and say that the bitterness obtaining between the parties, and it would seem to an extent their legal representatives, has been palpable. The case has been strenuously conducted and the wife and the intervener were all too obviously furious with one another during the time they were in the witness box.

43. Turning now to the oral evidence given, I should make it clear that I do not propose to go through the matters recorded in my notes seriatim or in any great detail. Having seen the witnesses give their evidence over a reasonably protracted period of time, I have formed clear conclusions as to credit and a clear view as to what the facts are.

44. The husband gave evidence first. In evidence-in-chief much of his remarks were addressed to his employment with the firm owned by Mr and Mrs H.. That evidence responded to assertions by Mr and Mrs H., adopted in effect by the wife, that he had been dishonest in some respects during his employment. Noteworthily, he raised for the first time, never previously indicated in any way in his affidavits, the proposition that Mr H. in particular connived a system of business

involving "black money" in circumstances that were designed to defraud the taxation authorities. There was also evidence given about an ultimately abortive mediation conducted before Mr Melilli of Counsel in 2010. It is sufficient for these purposes to note that although there would be a real issue as to the admissibility of any of that evidence, in the ultimate the mediator was not called and I do not regard the evidence as to what the parties may have said and done during it as being of any great assistance. In any event, their recollections now are necessarily coloured by their own direct interests and the march of events.

45. The husband was not a convincing witness. His demeanour was unpersuasive and his evidence about the alleged black money had all the hallmarks of being an endeavour simply to smear Mr and Mrs H.. Mr and Mrs H. gave evidence and in the case of Mr H. in particular, he was an impressive witness. I entirely accept his denials of black money in the business and find that this was a matter of invention by the husband.

46. So far as the critical evidence as to the loan was concerned, the husband's evidence was relatively ephemeral. He continued to depose that the advances were a loan and said that there were discussions between him and the wife as to how they would repay. He also said that he discussed with his father what would happen after the first mortgage was gone (I presume this to mean the mortgage on Property E). He made it clear that he supported his father's position including the application for his legal costs. He admitted that he had himself incorporated into his own affidavit material the error in his father's material as to the first payment advanced. When pressed in cross-examination as to what the terms of the loan agreement were, he said that it was an agreement to borrow enough to purchase the land, being $230,000 for the land plus stamp duty and costs. Despite saying that this was discussed on a couple of occasions, he was not able to give any dates or places as to where the discussions had taken place.

47. He gave evidence of a conversation in February 2004, at a summer-time barbecue, at which there were discussions as to the intervener helping the parties. As to when repayment was due he said that it was either a matter of paying out their loan first or paying him on a further

mortgage. He confirmed there was no discussion as to payment by a lump sum or term repayments. He confirmed there was no specific date for repayment. He said that once the ANZ loan was repaid they would decide whether to pay it out in a lump sum by a mortgage or pay his father periodically. There was no discussion about repayment when the block was sold as he never intended to sell it. He had never discussed repayment upon sale with his father. He said it was discussed that if he and his wife won Tattslotto they would repay but not otherwise. He confirmed that the $50,000 or $60-$70,000 loan had been repaid after Property E was sold. He also confirmed that the alleged loan from the intervener was not disclosed to the ANZ Bank when a mortgage was taken out to purchase the property and that this would have misled the bank.

48. The intervener adopted his affidavits as true and correct. He confirmed that he had not sought interest on the loan but seeks interest on the moneys that are presently held in trust following the sale of the property. He said that this was on the basis of legal advice. He said that he wanted the loan repaid by both of them as both were indebted to him. He confirmed that he had no idea what the terms of the husband and wife's home loan with the bank were. He had no idea how long the mortgage would take to repay although he was aware that the husband and wife were going to take out a mortgage. He confirmed that he was born in 1947 and would be eighty-eight in 2035 assuming that the loan on the mortgage was a 30-year loan. He confirmed that he did not know when he would be repaid and that there had been no discussion about this.

49. He confirmed that it was his initial idea to purchase the property and that he considered buying it in 2003 but changed his mind when the parties told him they wanted to buy it and needed a loan. He was clear that the moneys advanced were repayable. He confirmed that there had been no repayments of principal or interest either sought or made and that he had made no demands prior to separation. He did, however, confirm the repayment of the $50,000-$70,000 on the sale of the other property. He confirmed that he was aware when he advanced the funds that the parties would not have been able to afford the land and build the house on it from their own resources. He said, however, that he had no idea of their finances beyond that and was not aware that they

could not afford to repay him. He also gave evidence about loans to another son which had been repaid but in my view, the evidence does not go far enough to suggest some sort of similar fact finding as to practices upon the intervener's part.

50. Once again, despite the certainty of his view that the moneys advanced were a loan, he was unable to point with any clarity to any particular meeting or place or time as to when this had been agreed.

51. He confirmed that should he be repaid and receive his costs, the parties would be unlikely to obtain anything very much at the end and he said that this was unfortunate. I do not think that that is his position at all. The intervener's demeanour was, as I have already indicated, one of considerable anger and annoyance. He is clearly furious with his former daughter-in-law and I do not think he regards it as in any way unfortunate that she may be significantly financially damaged if he is successful. He is perfectly entitled to pursue his case but he is well aware that the net effect of it will be to disadvantage the wife. He went on to confirm, yet again, that there had been no term for repayment discussed and he would have allowed the parties to repay their mortgage either after 30 years or at some earlier time. He said words to the effect that it was to be repaid when they could repay it. He said that it was promised to him by the wife on 11 February 2010.

52. Under further cross-examination about the meeting on 11 February 2010, the intervener confirmed that he had offered assistance to the wife. She had played a message from the husband which naturally gave rise to concern on all sides. The intervener confirmed that he had said he would not see her without a roof over head. She could stay at his place with the children as long as she wished. In re-examination, he put the conversation as including the wife saying, "It looks like we will lose the house. When we pay you back the money we owe you we will have $50,000 each. I will give you a cheque at settlement."

53. It should be noted that that version had not been earlier articulated in his affidavits or in his evidence. It bears something of a similarity to the conversation asserted by Ms M. at a point when the intervener was not there. I find that the wife did not have any discussion of this sort with the intervener, although I shall return to the matter of Ms M.'s evidence later.

54. The wife's evidence about the alleged loan was consistent and clear. She was at great pains to describe the advances as a gift. She did so on a number of occasions unresponsively.

55. The wife used the phrase "gift" even where it was not necessary to do so. She denied that there had been any discussion of repayments or doing so in lump sums or otherwise. She said there were no real discussions with her husband. "It was a gift".

56. Under cross-examination by counsel for the intervener, the wife stuck to her position tenaciously. She said that she would never have accepted the funds if they had been a loan because it would have been beyond the financial capacity of her and her husband to repay them. Given the income of the parties at the time and the amount they borrowed, it is clear that that assertion is correct. She denied the versions contended for by the intervener and Ms M. of the meeting in February 2010. She confirmed that she had never told her own parents specifically about the gift, but asserted it was common knowledge and that the intervener had spoken to her father about it. She stuck to her assertion that there had been discussions about her looking after the intervener in his old-age and building a cottage on the property. She confirmed that she had never sent any kind of thank you note to the intervener for his generosity. She confirmed that she had a very good relationship with the intervener in 2005 and that he had in fact agreed to pay all school fees for the children.

57. The only other witness who gave any evidence about the loan was Mr H.. He gave evidence that he had had some discussion of an informal sort about it at a social event.

58. Although, as I have indicated, I did not find the husband to be a compelling witness, all of the other witnesses who gave evidence impressed me favourably. While they are plainly, at least in part, wrong as to their recollection of some of the events (for example, the intervener's significant error about when he first advanced the deposit for the property in 2003), I have no doubt that all were giving their evidence honestly.

59. I have equally no doubt that part of the intensity of this proceeding relates to the fact that the relationship between the intervener and the

wife, previously so good, has completely soured. In my view, the bitterness that has arisen between them affects the capacity of each of them to give their evidence in an objective and accurate way.

Findings about the alleged loan

60. In November 2003, the husband and wife found a large block of land they wanted to buy. They did not have the money to buy it and the intervener gave them the deposit.

61. I do not think that the intervener himself intended to buy this block. Had he wished to buy it, he plainly could have done so.

62. Rather, because of the affection he feels for his son and the very close relationship I find he then had with his then daughter-in-law, he agreed to help them out. In mid-2005 the time came for further completion of the purchase and the intervener once again made the relevant moneys available.

63. Curiously, given the very large amounts of money involved, the arrangements for the advancement of the funds was attended by absolutely no formality whatsoever.

64. It is clear beyond doubt that:

a) There was no term as to the repayment of the loan. According to the intervener's own evidence, the husband and wife could have repaid him when they paid out their mortgage in another 30 years' time, when he would be at a very advanced age.

b) No demand for repayment was ever made until separation.

c) I should accept that if the money had been described as a loan repayable on demand, the wife would not have accepted it. Her evidence in this regard was compelling. The parties simply did not have the capacity to repay it. Although the intervener may not have known their exact financial circumstances, he knew that they were not able to readily borrow this from a bank (or they would not have been asking him) and it is clear that he must have known, or at the very least strongly suspected, that repayment

was certainly a matter that would take place only, as he himself put it, as and when they were able to do so.

65. In one sense, the informal nature of these arrangements denies legal analysis. I do not think it was a gift. If someone gives you over a quarter of a million dollars, you tell the world about it. It is clear the wife never told her own parents in terms of this extraordinary bounty nor, it would appear, anyone else. Likewise, she never wrote a note of thanks, which an outright and clearly expressed gift would have been highly likely to have engendered.

66. To the contrary effect, however, I do not think that the arrangements can properly be described as a loan in the ordinary sense. Loans, if nothing else, have terms as to repayment. "Loan" is defined by the Butterworth's Australian Legal Dictionary as:

> *"The temporary transfer of an asset, usually funds, from a lender who controls the funds to a borrower in return for payment, usually in the form of interest. The asset must be returned either in one sum at the maturity of the loan or in periodic payments."*

67. What I find to have occurred is that various advances were made by the intervener in circumstances which at the time appear to have been remarkably workaday. I note that there is some question as to who the relevant interlocutors were (the wife asserts that she was not even in Australia at the time the contract was signed in November 2003). It seems to me far more probable than otherwise that the parties, whatever else they may have had in mind both in 2003 and in 2005, did not have in mind the creation of legal relations in any technical sense.

68. The moneys were simply advanced and nothing was said as to when they would be repaid and in what way. It is quite clear that it was not contemplated that the moneys would be repaid upon sale of the property. As the husband rightly asserts, the parties had no intention of selling it.

69. There is, however, one area of the evidence that does require to be addressed in more detail. That is the affidavit of Ms M.. She was not required for cross-examination and I accept the submissions of the intervener that I am obliged to accept her evidence as being true. This does not go perhaps so far as a rule of law, but in circumstances where

Ms M. had put her version of the events squarely before the Court, and where she was not required for cross-examination, in this instance at least I accept it in its entirety.

70. There is no doubt that the phrase I have earlier described, as to the moneys being owed to the intervener, was said. I do not accept the wife's denials. I note that she was, on any view on that day, in a state of very heightened emotion, being in fear of her husband and generally upset by the separation. I think this, together with the very natural tendency to reconstruct that has affected both her and the intervener, goes to explain the error.

71. Nonetheless, in the ultimate, even the alleged admission against interest by the wife to Ms M. is not decisive. I have already found that money was not advanced as a gift. Equally, however, for the reasons I have given, it was not a loan. It would be wholly contrary to the nature of the advance itself that it was felt that it was subject to an implied term that the moneys would be repayable upon separation. Separation was simply not contemplated.

72. In my view, the complete absence of a term for repayment or a mechanism for it to occur means that the ultimate characterisation of the advances is that they are not repayable. They were repayable at will.

73. I am absolutely clear in my mind that if the parties had not been separated, the intervener would never have asked for his funds. They would have been repaid as and when they were able to be repaid. The husband himself suggested that it would be repaid if they won Tatts-lotto. That was the true position. It is one that excludes the proposition that the $240,000 was compellably repayable.

74. I should finally say on this point that I have regard to the authorities cited including those giving rive to the "Elias" principle (see *Jordan v Jordan* (1997) FLC 92-736. The Elias principle does not apply here as no representations of the sort identified in *Jordan* were made.

The pool

75. Having thus disposed of the most significant forensic issue the parties raised, it is apparent that the pool consists of:

a)	the net proceeds of the sale of the house	$353,137;
b)	the [omitted] shares owned by the husband	$ 16,792;
c)	[omitted] shares	$ 2,278;
d)	Swarovski crystal (to be retained by the wife)	$ 18,705;
e)	The husband's superannuation	$ 57,719;
f)	The wife's superannuation	$ 66,000.

76. There is a dispute about two chattels. One is a 7 x 5 trailer and the other is a refrigerator. The wife asserts that both of these matters were allotted to her in an earlier chattel division. That proposition rather ignores the fact that the husband is still asserting they ought to belong to him.

77. The dispute about these items illustrates a degree of pettiness on the part of the parties and further illustrates the heightened emotions that obtain between them. The husband at least has a use for the trailer, in that he proposes to use it to move a ride-on mower. There is an agreed valuation of the trailer of $2,500. In the circumstances, he should retain it.

78. The wife should keep the fridge. She has an ongoing need for it. Its second hand value, once again, would be negligible.

Contribution issues

79. As I have earlier indicated in a general way, both the husband and the wife contributed in a non-objectionable and normal way towards the common good of the family throughout the relationship. No serious assertion has been made otherwise.

80. As I have already indicated in somewhat shorthand form, while it is clear that the wife's parents gave a certain measure of assistance, both

through the employment of the husband and otherwise, the figures totalled in the affidavit material filed by Mr and Mrs H. are in my view wildly exaggerated and unsustainable for the reasons I have already given.

81. The assistance given by the husband's father, the intervener, on the other hand, was very tangible and far more susceptible of quantification. It is conceded that he paid substantial amounts of school fees up until relatively recently and self-evidently, the $240,000 advance was a massive input.

82. All parties proceeded on the footing that in the light of the march of events, the contribution by the intervener should be held to the credit of the husband. In circumstances where the total pool is no more than about $517,000, an input of $240,000 is a very substantial one. I think that the proper calibration of the husband's input in the light of his father's contribution should be 15%.

The section 75(2) factors

83. The husband has suffered from a degree of mental ill-health over the years and his future health remains, in this regard at least, somewhat uncertain. His future employment prospects are poor. He presently works in a poorly paid position at [omitted]. Given his dismissal for misconduct by [omitted] and the unsatisfactory circumstances of the termination of his employment by Mr and Mrs H., his future employment prospects must be said to be very debatable.

84. On the other hand, it is clear beyond doubt to me that he will have the ongoing assistance of his father. He presently lives in a property owned by Ms M.. In light of the intervener's past conduct, I have no doubt whatever that if I had ordered the $240,000 to be repaid out of the proceeds of the sale of the matrimonial home, some, if not all of it, would be dispersed to the husband in any event.

85. The wife is in secure employment earning well over $100,000 per year. She likewise has the benefit of assistance from parents who are apparently comfortably off. She lives in a property owned by a family trust. She will, however, have the ongoing primary care of the two

children until they turn 18 and in all possibility, for some time thereafter.

86. In all the circumstances, it would be appropriate to order an adjustment of some 5 per cent in the wife's favour in respect to future needs. Counsel for the husband conceded that a small adjustment in the wife's favour was appropriate and I agree.

Just and equitable

87. Putting the matter shortly, if the $240,000 had been repayable, the amount available in the pool would have been only of the order of $270,000. In circumstances where, as I have already indicated, the husband would be likely to access some or all of the $240,000 on an interest free basis, I would have been minded to accept the submission made by counsel for the wife that she should receive the bulk of the resultant pool.

88. The net result of my primary methodology, if I may so describe it, would be to give to the wife 40% of the total property pool of $517,000. She would thus obtain about $200,000.

89. In all the circumstances, the wife should retain $200,000 from the total divisible pool of $517,000. It is my view a just and equitable result. Each party is to retain their superannuation. The wife is to retain the crystal. As I understand it, the husband is to retain the ride-on mower, which has an agreed value of $2,500 and if I understood it correctly, he proposes to sell his shares and give the resultant moneys to the wife. This seems to me to be an appropriate outcome, and I will hear the parties further as to what formal orders should be made to give effect to these conclusions.

I certify that the preceding eighty-nine (89) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Date: 13 December 2011