

FAMILY LAW - APPEAL FROM DECISION OF FEDERALMAGISTRATE PROCEDURAL FAIRNESS Appellant not shown ordersdrafted byrespondents solicitors prior to submission to FederalMagistrate for making. Family Law Act 1975 (Cth) Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR141 House v The King [1936] HCA 40; (1936) 55 CLR 499 APPELLANT: Mrs Kapoor RESPONDENT: Mr Kapoor FILENUMBER: CAM 1065 of 2003 APPEALNUMBER: EA 97 of 2007 PLACE DELIVERED: Canberra JUDGMENT OF: Finn J HEARING DATE: 28 November 2007 DATE OF ORDERS: 28 November 2007 DATE OF REASONS: 29 November 2007 LOWER COURT JURISDICTION: Federal Magistrates Court LOWER COURT JUDGMENT DATE: 22 June 2007 LOWER COURT MNC: [2007] FMCAfam 397 REPRESENTATION COUNSELFOR THE APPELLANT: Mrs Kapoor appeared on her own behalf COUNSEL FOR THE RESPONDENT: Mr Brzostowski SC SOLICITOR FOR THE RESPONDENT: Mazengarb Barralet Family Lawyers ORDERS MADE 28 NOVEMBER 2007: Thatthe appeal be allowed. Thatthe orders made by Federal Magistrate Brewster on 25 July 2007 be setaside. Thatthe matter be remitted to Federal Magistrate Brewster for the making of ordersto give effect to his reasons for judgment deliveredon 22 June 2007 on thebasis that the orders made on 25 July 2007 be treated as draft orders and bothparties have an opportunityto make brief submissions in relation to the form ofthose orders and the content of those orders but only in the sense that theorders give effect to the reasons for judgment delivered on 22 June2007. THE COURT REQUESTS that the matter be re-listed beforeFederal Magistrate Brewster with the greatest possible urgency. Inthe event the wife files a Notice of Appeal against any further orders made byFederal Magistrate Brewster to give effect to thereasons for judgment deliveredon 22 June 2007, then no filing fee will be payable by the wife and the appealwill be listed forhearing before the Honourable Justice Finn at the firstavailable date, with there being no necessity for the wife or the husbandtofile any further documents, or for there to be any procedural trial and to thisend the Appeal Registrar will advise both partiesof the hearing date for theappeal. Thattranscript be prepared and provided to the parties of any further hearing ofthis matter before Federal Magistrate Brewster. IT IS NOTED IN CONNECTION WITH THESE ORDERS that thejudgment of the Full Court delivered this day will for

all publication and reporting purposes be referred to as Kapoor and Kapoor. FAMILY COURT OF AUSTRALIA AT CANBERRA Appeal Number: EA 97 of 2007 File Number: CAM 1065 of 2003 Mrs Kapoor Appellant And Mr Kapoor Respondent REASONS FOR JUDGMENT Yesterday I made orders allowing an appeal by the wife, Mrs Kapoor, against orders made by Brewster FM on 25 July 2007 in property settlement proceedings between the wife and the husband, Mr Kapoor. I set aside those orders and I ordered that the matter be remitted to the Federal Magistrate for the re-making of the orders to give effect to the reasons for judgment delivered by him on 22 June 2007, but on the basis that the orders made by him on 25 July 2007 would be regarded as draft orders on which both parties should be given the opportunity to make submissions. These are my reasons for my orders made yesterday.

BACKGROUND On 1 and 2 May 2007 Brewster FM heard an application by the husband whereby he sought by way of property settlement, that the matrimonial home be sold and the proceeds divided equally between the parties, and the parties' superannuation benefits be shared equally between them. The wife sought that the husband's application be dismissed. On 22 June 2007 his Honour delivered his reserved judgment in relation to the husband's application. In that judgment he determined that the parties should share equally in the value of the matrimonial home, and that the wife's superannuation interest should be split between the parties with the husband receiving an amount using a base figure of \$145,000. However when he delivered his reasons for judgment on 22 June 2007, his Honour did not make orders to give effect to those reasons. Rather he gave the wife a further seven days to consider whether she wished to retain the matrimonial home, and he provided the following process for the drafting and making of orders to give effect to his reasons (emphasis added): 48. I do not propose to take out the orders in this matter at this stage. I will give the wife seven days to reconsider her decision not to retain the home. If within that time she notifies both the court and the husband's solicitors by letter that she wishes to pay the husband \$275,000 I will order accordingly. Those Orders will give her some time to pay the husband the amount due and will provide for a sale if it turns out that she is unable to borrow sufficient money. If no such letter is received I request that the solicitor for the husband to draft the orders I have foreshadowed. Given the wife's refusal during the hearing to face the realities of the situation confronting her, orders may be

necessary which are more specific and prescriptive than is usually the case. For example it might be appropriate for the selling agent to be specified rather than leaving it to the parties to sort out. The husband might wish to nominate a minimum sale price. Given that the wife contends that the property is worth much less than Mr Lovells valuation she can hardly complain if the husband wishes to leave a margin for error if no offer is made to buy the property for \$600,000. It might be appropriate to make specific orders as to co-operating with the agent. 49. The process I propose to adopt is as follows: (a) The wife has seven days to notify the court and the husband by letter if she wishes to retain the home. If such advice is received I will draft the appropriate Orders. (b) If no such letter is received the husband's solicitor is requested to draft Orders in accordance with this judgment. He is to send a copy of that draft to both the court and the wife. If the wife wishes to make submissions as to those Orders she is to notify the court and the husband's solicitor by letter within seven days of the date of those Orders being sent to her. I [sic] she does so I will either amend the Orders, decline to amend the Orders or re-list the matter for submissions. In any event I may delete or vary some of the Orders sought, add additional Orders or re-list the matter on my own motion. On 25 July 2007 his Honour made orders which stated that they were made in Chambers. It is unnecessary for present purposes to set out the orders. It is only necessary to say that they essentially provided for the sale of the matrimonial home and a division of the net proceeds equally between the parties, and for the splitting of the wife's superannuation interest using a base amount of \$145,000 for the husband's share. They also provided for a division of the parties' furniture and household effects according to lists to be prepared by the wife. On 21 August 2007 the wife filed a notice of appeal against his Honour's orders made on 25 July 2007. Included in the twenty-four grounds of appeal contained in that notice of appeal was the following ground as Ground 3: Appellant wife has been denied opportunity to make submissions to orders due to respondent [husband's] non-compliance to 22 June 2007 Federal Magistrate [sic] Court (FMC) judgment directions to send draft orders to appellant wife for putting her submissions. The wife's appeal was listed for hearing before me yesterday as a single Judge of the Appeal Division of this Court pursuant to arrangements made under s 94AAA(3) of the Family Law Act 1975. At the outset of the hearing yesterday, I raised with Senior Counsel for

the husband my concern that there was nothing in his written summary of argument, nor in any other material before me, to indicate what was the process by which the orders had actually been made, having regard to the directions in paragraphs 48 and 49 of his Honours reasons for judgment; nor was there anything to indicate whether in the event that the orders had been drafted by the husband's solicitor, they had first been shown to the wife to enable her to make submissions in relation to them. Senior Counsel for the husband was able to provide me with a copy of an email from the husband's solicitors to the Associate to Brewster FM dated 6 July 2007 attaching some draft orders (Exhibit 1 before me yesterday). However the email made no reference to the wife, nor to whether or not she had been given an opportunity to see and comment on the draft orders. Senior Counsel for the husband conceded that the draft orders had not in fact been sent to the wife before being sent to his Honour, although Counsel also told me that the orders as they issued from his Honours Chambers on 25 July 2007 were not entirely in accord with the draft submitted by the husband's solicitors on 6 July 2007. The wife informed me that the first she knew that the orders had been drafted and made was when she received them in the mail on 1 August 2007. I mention here that there was apparently no question but that the wife had not notified the court or the husband's solicitors that she wished to retain the home. Thus the husband's solicitors were obliged pursuant to his Honours directions to prepare a draft of the orders, but they were also clearly required to submit that draft to the wife for her consideration. The wife was able to provide me at yesterday's hearing with a copy of a letter which she had written to the Registrar of the Federal Magistrates Court on 22 October 2007 (Exhibit 2) in which she said (amongst other things): I have been denied opportunity to make submissions to the orders of 25 July 2007, where, as per the judgment of 22 June 2007 applicant [husband's] lawyers were asked to send draft orders to respondent wife for her submissions. I have stated in my affidavit of 07 Sept 2007 & affidavit of 17 Sept 2007 that I have been denied that opportunity. The affidavits referred to by the wife were also in evidence before me yesterday. In paragraph 3 of the first affidavit (Exhibit 3) the wife stated: I have been denied opportunity to making submissions to orders due to noncompliance by respondent [husband] to send draft orders to wife for making her submissions. In paragraph 4 of the second affidavit (Exhibit 4) (which was in fact sworn or affirmed

and filed on 19 September 2007) the wife stated: I have not been sent draft orders to put my submissions as was required of the lawyers for applicant [husband] in the judgment on 22 June 2007. It appears that the second of those affidavits was in support of an application (Exhibit 5) filed by the wife on 19 September 2007 in which, in addition to seeking a stay of the orders for the sale of the matrimonial home, she also sought an order that: ...the case ... be re-listed on the matters related to how orders are made for sale of my family home of ... and how orders are being misused. It also needs to be mentioned at this point that on 17 September 2007 the wife had appeared before Brewster FM (with the husband's solicitor also being present) seeking a stay of his Honours orders but only in relation to the orders relating to the splitting of the wife's superannuation interest. His Honour made an order which, at least in effect, granted that stay. However the transcript of the proceedings on 17 September 2007 contains the following exchange between his Honour and the wife which occurred after his Honour made his order effectively granting the stay: [THE WIFE]: Can I also ask if, on the matter of sale of house, if the matter can be re-listed as per your orders? FEDERAL MAGISTRATE: You will need to file an application about that. The only application before me is to stay the orders, stay the superannuation orders, that's the only application before me. [THE WIFE]: That's right Sir. FEDERAL MAGISTRATE: And it's the only application I propose dealing with, and I've just dealt with it. [THE WIFE]: I will do so, Sir. FEDERAL MAGISTRATE: Okay, thank you. [THE WIFE]: And I will - before I (indistinct) stay orders on the house, I will ask the matter to be re-listed. Thank you, Sir. It seems clear that it was in light of this exchange that the wife filed her application of 19 September 2007, which I referred to above, seeking both a stay of the sale of the home and a re-listing of the matter to enable her to make submissions in relation to the orders. I was also informed at the hearing yesterday that the matter had again come before Brewster FM on 29 October 2007 and that on that occasion his Honour stayed his orders relating to the sale of the home. The wife also told me (without objection from Senior Counsel for the husband) that the proceedings that day had been too brief for her to raise with his Honour her complaint regarding the preparation of the orders, which had been the subject of her letter to the Registrar of the Federal Magistrates Court on 22 October 2007. DISCUSSION AND CONCLUSION I thus formed and expressed the view at the

hearing yesterday that so far as the wife was concerned there had been a serious procedural irregularity, indeed unfairness to her, in that not only had she not been given an opportunity to comment on the draft orders before they were made and as required by his Honour's reasons for judgment, but also when she had applied to have the matter re-opened because of that irregularity, her application had not been heard. I mention here that Senior Counsel for the husband did not seek to dissuade me from this view. It is, of course, true that not every departure from the rules of natural justice or procedural fairness in proceedings leading to the making of orders, will result in an appeal against those orders being allowed (*Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141). It is also true that in many, if not most, cases in the family law jurisdiction, a litigant is not provided with, and indeed has no right to comment on, the ultimate form of orders when they are made. However in this case his Honour himself required that if a draft of the orders was to be prepared by the husband's solicitors, then that draft was to be sent to the wife for comment. As I have earlier said, that did not occur. It is further true that had the wife had the benefit of legal representation before me, her legal representatives may well not have pursued the complaint regarding the procedural irregularity in relation to the making of the orders. This would be likely to be so for the reason that the only remedy for the complaint would be a remaking of the orders after submissions from the parties as to form and content (but only to ensure that the content reflected the reasons for judgment). This course would be unlikely to provide the wife with the relief which, it seems clear, she is really seeking, and that is, relief from the substance of his Honour's reasons for judgment of 22 June 2007. Indeed I understood the wife to endeavour to persuade me that there was no point in my remitting the matter to his Honour for a reconsideration of his orders in light of any submissions she might wish to make because the orders were likely to be substantially the same and it was about the substance of his Honour's decision that she was really complaining. However, as I said on a number of occasions during the hearing, it is the wife's position as an unrepresented litigant which is of particular concern to me, and which prevented me from endeavouring to persuade her that the procedural unfairness which has been occasioned to her, can be overlooked for the reason that it has no practical significance because any new orders which

will be made by his Honour will not remedy the wife's complaint regarding the substance of his reasons for judgment. Furthermore, and again as I said during the hearing, it may well be very difficult for the wife to succeed in her appeal on the basis of any of her other grounds of appeal given the limitations on appellate interference with a discretionary judgment, as is the judgment in this case (*House v The King* [1936] HCA 40; (1936) 55 CLR 499). But my concern was that the wife's clear sense of grievance is likely to be further heightened should her appeal be ultimately dismissed in circumstances where she had been persuaded by me to abandon her one ground of appeal which clearly has substance, that is Ground 3, although its success is likely to have little ultimate practical significance. It was for these reasons that I reluctantly concluded that I had to allow the appeal on the basis of Ground 3, set aside all orders made by his Honour and remit the matter to him for further consideration as to the form of his orders and content (in the sense that the orders should reflect his reasons for judgment of 22 June 2007) in light of any submissions either party may wish to make. Once I had determined that the appeal should succeed and the orders be set aside on the basis of Ground 3, and the matter remitted to his Honour for the making of orders in light of any submissions which the parties may wish to make, I considered that it would not be appropriate for me to express any views on the wife's other grounds of appeal. It is important to emphasise (given the observations of the High Court in *Stead*) that this matter is not being remitted for a retrial but only for submissions in relation to the form and content (in the sense of the need to reflect the reasons for judgment of 22 June 2007) of the orders. It is also important to emphasise that it was the position of Senior Counsel for the husband, at least as I understood it, that there was no other course open to me other than that which I considered I had to adopt. It is obviously desirable that there be as little further delay as possible in this matter. To this end I included in my orders a request that the Federal Magistrates Court list this matter for further submissions with as much priority as possible; that a transcript of any such further hearing be provided to the parties; and that any appeal which the wife may then file against the new orders which his Honour may make, be heard by me as soon as possible without any further directions hearing or filing of material. Also the wife should not be required to pay a further filing fee on any further appeal. I certify that the preceding thirty-four (34)

paragraphs are a true copy of the reasons for judgment of the Honourable Justice Finn. Associate:

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