

WELCOME BACK TO THE FORTE FAMILY LAW NEWSLETTER

It has been a while between newsletters but the Forte Newsletter is back! We have some new staff members and have seen more changes to family law.



Our team (from top left): Wendy Kayler-Thomson, Evelyn Young, Louise Fairbairn, Byron Leong, Kate Whitehouse.

(Front row from left) Bronwyn Drummond, Kepler Ryan and Jacky Campbell.

Stanford – the High Court decision

In *Stanford v Stanford* (2012), the High Court of Australia, in a rare examination of the property settlement provisions of the *Family Law Act 1975*, considered:

- Whether an order to alter property interests can be made if parties are "involuntarily" physically separated;
- The proper approach to determine a property settlement.

The husband and wife were married 37 years and were in their late 80s. As the wife required full-time nursing care they were physically separated, but not by intention. The husband visited her and set aside money for her use. The wife, acting by a case guardian (due to her incapacity) applied for a property settlement. The husband also had a case guardian. The case guardians were the parties' children from their previous marriages.

At trial, the court ordered that the property be divided on the basis of the parties' contributions as to 57.5% to the husband and 42.5% to the wife. The husband had to pay the wife \$612,931 within 60 days, almost certainly requiring a sale of the home which was in his sole name.

The husband appealed to the Full Court of the Family Court. Before judgment was delivered, the wife died. The Full Court allowed the appeal, ordering that on the husband's death, a sum representing 42.5% of the home be paid to the wife's estate.

The husband was granted special leave to appeal to the High Court. His case was based on two broad propositions:

- There was no power to make final property orders as the parties had not separated;
- If there was power, the court should not have exercised it because the requirements for making orders after a party's death were not met.

Outcome in the High Court

The High Court upheld the appeal primarily on the second ground. The Full Court had not found, as required by the Act:

- if the wife had not died it would have made an order;
- it was still appropriate to make an order.

The majority rejected the husband's argument that a property order can only be made if the parties have separated. However, for a couple in a de facto relationship the legislation expressly requires a separation.

The proper approach to property orders

The High Court majority in *Stanford* warned that to conclude that making an order is "just and equitable" *only* because of and by reference to other factors such as contributions, earning capacity and care of children without a separate consideration of the just and equitable requirement would "conflate the statutory requirements and ignore the principles laid down by the Act." Whether it is "just and equitable" to make a property order arises *before* the court looks at other factors not *after*.

The High Court did not refer to or expressly adopt the usual "four step" approach to property matters of:

1. Identify and value the asset pool
2. Assess contributions
3. Consider other matters including factors such as earning capacity and health
4. Determine whether the orders are just and equitable

Therefore, there is uncertainty as to whether the four step approach still applies, particularly as the High Court looked at whether it was just and equitable to make an order early in the process rather than as a final step.

The High Court in *Stanford* set out three fundamental propositions that "must not be obscured":

1. Identify the *existing* legal and equitable interests of the parties as if they were not married without reference to their possible property entitlements. The previous practice was to only list legal interests and "financial resources". The court must then consider whether it is just and equitable to alter the parties' interests.
2. The property power is a broad power, but that does not mean unguided judicial discretion or "palm tree justice";
3. There is no starting assumption that a party has the right to a property order.

The just and equitable requirement is "readily satisfied" if, due to a decision of one or both of the parties, the parties no longer live in a marital relationship and no longer have the common use of property. If the parties are not separated a closer examination of the issue is required. It is not possible, however, "to chart the metes and bounds" of what is just and equitable.

What next?

It is important to read and apply the Act. In particular, the High Court warned against conflating the Act's requirements. There will undoubtedly be a period of uncertainty while the courts and legal practitioners grapple with the meaning of *Stanford*. The High Court majority gave some direction but there is debate as to whether the "four step" approach still applies.

We can advise you as to how this important decision may effect your rights and entitlements.

Jacky Campbell

Family Violence Amendments

On 7 June 2012 the Family Violence amendments came into practice. The amendments increase the emphasis on protecting children from violence and abuse by:

- broadening the definition of family violence
- forcing courts to place greater weight on the need to protect the child from physical or psychological harm
- removing the "friendly parent" provision

Expanded definition of family violence

Courts must now take a much more open view of family violence. The broader definition includes non-physical forms of violence, such as:

- stalking
- repeated derogatory taunts
- intentionally damaging or destroying property
- intentionally causing injury or death to an animal
- withholding financial support needed to meet reasonable living expenses
- preventing a family member from making or keeping connections with family and friends
- unlawfully depriving a family member of their liberty

It is no longer necessary to show that it was reasonable for the family member to be fearful. It is sufficient that the behaviour caused the family member to be fearful.

Exposure to family violence occurs if a child sees or hears family violence. This includes:

- overhearing threats
- seeing or hearing an assault
- comforting a member of the family who has been assaulted
- cleaning up after an assault or being present when police or ambulance officers attend an incident

A change in emphasis for shared parenting

Courts must place a greater emphasis on protecting children from physical or psychological harm over objective of children having a meaningful relationship with both parents. Exposure to family violence can be as harmful to a child as actual family violence. The child's best interests must be the paramount consideration and a child must not be exposed to an unacceptable risk of family violence.

Removal of friendly parenting

The friendly parenting provision required the court to consider which parent is more likely to facilitate a relationship between the child and the other parent. This consideration has been removed and there is a greater focus on the extent to which each of the child's parents has fulfilled or failed to fulfil their obligations to maintain the child. This includes participation in

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decision making, communication, and time spent with the child. The court will look at how well each parent has fulfilled the responsibilities of parenthood when considering arrangements for the child.

New Court procedures were introduced to ensure the implementation of the family violence amendments.

We can assist you with the new procedures and how the amendments apply to you.

Louise Fairbairn

International Child Abduction and the Hague Convention

International relationship breakdowns can create unique problems, particularly if one parent wants to return to their country of birth to live with their family. The *Hague Convention* is an international treaty which attempts to minimise international child abduction by providing a procedure for the prompt return of children to their home country.

On 1 February 2013 the *Hague Convention* came into force between Australia and Singapore, Albania and the Ukraine. It is now in force between Australia and 81 other states.

Forte Family Lawyers has acted in numerous *Hague Convention* matters and can assist you if your child has been removed to or from Australia by his or her other parent or if you have removed your child to or from Australia.

If you suspect that your child may be abducted, you should act quickly. It is usually easier and less emotionally harmful for a child when safeguards are put in place to prevent him or her leaving Australia than it is to seek a child's return. It is also cheaper and less stressful for the parents.

When a child is abducted from Australia to a *Hague Convention* country, the left behind parent's lawyer should contact the Australian Central Authority, which liaises with the appropriate Central Authority overseas. The overseas Central Authority can assist the left behind parent by commencing *Hague Convention* proceedings in the foreign Court.

If a child is abducted to a non-*Hague Convention* country, whether the child is returned to Australia will be determined by the parenting laws of that country.

When a child is abducted to Australia from a *Hague Convention* country, the relevant State Central Authority (the Department of Human Services, in Victoria) commences *Hague Convention*

proceedings on behalf of the left behind parent. The left behind parent is usually a witness in the proceedings and will need a lawyer to prepare affidavits, negotiate and generally act on their behalf.

Under the *Hague Convention*, the child will be returned to their home country if all of the following apply:

1. the application is made within one year of the child being removed to or retained in Australia, unless the child has not settled in his or her new environment
2. the child is under 16 years of age
3. the child habitually resided in a *Hague Convention* country immediately prior to the removal or retention
4. the left behind parent was exercising rights of custody in relation to the child and the child's removal to or retention breached those rights

The Court *may* refuse to make an order for the child's return if the abducting parent establishes any one of the following:

1. the left behind parent was not exercising rights of custody when the child was removed or retained
2. the left behind parent consented or acquiesced
3. there is a grave risk that the return would expose the child to harm
4. the child objects to being returned
5. the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

Please contact us if you need legal advice in relation to international child abduction.

Kepler Ryan

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