Stanford: An examination of s 79 by the High Court, 13 December 2012

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Introduction

Judgment was delivered by the High Court in *Stanford & Stanford* (2012) FLC ¶93-518[1] on 14 November 2012. In a rare examination of the *Family Law Act 1975* (the Act) and particularly s 79, the High Court stated its views regarding:

- Whether an order for alteration of property interests can be made under s 79 if parties are not separated or are "involuntarily" separated. The High Court majority decided that a s 79 order can be made in these circumstances if it is just and equitable to do so.
- The proper approach to determining an application under s 79. The High Court majority emphasised that it is important to read and apply the Act. In particular, the High Court warned against conflating the requirements of s 79(2) and 79(4) and highlighted that on the correct interpretation of the Act, the court must first consider whether it is just and equitable to make the order. It did not refer to or expressly adopt the "four step" approach.

There is likely to be debate about the extent to which the views expressed by the High Court on s 79 change the law. The case involved an elderly couple involuntarily separated by circumstances. One party died during the course of the proceedings. The High Court did not appear to confine its views to the unusual factual circumstances of the case, but attempts may be made by the family law courts and lawyers to restrict its impact.

Background

The husband and the wife were physically separated by circumstances, not by intention. They lived apart after the wife had fallen so ill that she required full time care. The husband continued to visit her and set aside money for her use. The wife, acting by a case guardian, applied for orders under s 79 to pay for better care for her. The husband was also represented by a case guardian. Both parties' case guardians were their children from their previous marriages. Although it was the second marriage for both of them, they had been married for 40 years. The husband was aged 87 and the wife was aged 89. The husband had medical problems but was able to live in the former matrimonial home with assistance from his son. The home was in his sole name as it had been acquired by him after the break-up of his first marriage.

The matter was initially heard by a Magistrate of the Family Court of Western Australia, then twice by the Full Court of the Family Court and finally by the High Court of Australia.

The Magistrate determined the available assets of the parties and the contributions which each party had made, and ordered that the assets be divided on the basis of the parties' contributions as to 57.5% to the husband and 42.5% to the wife. This required the husband to pay to the wife the sum of $612,931 within 60 days, which he was unlikely to be able to do unless he sold the home.

The husband appealed to the Full Court of the Family Court. After the appeal was heard, but before judgment was delivered, the wife died. The proceedings were continued by her legal personal representative. The Full Court allowed the appeal[2] and concluded that the Magistrate had erred in a number of respects, including:

> "It is difficult to ascertain the reason why the Magistrate came to her conclusion *given the wife did not have a need for a property settlement as such and that her reasonable needs could be met in other*

> *ways particularly by maintenance*. In considering what was just and equitable under s 79 and s 75(2) the Magistrate was required to consider the effect of these orders on the husband and the fact that this was an intact marriage. Other than the forced separation of the parties by virtue of the wife being in a nursing home, the husband wished to remain in the home which had been the parties' home for in excess of 35 years, until such time as he could not reasonably remain there." [3]

The High Court cited part of this passage and added the emphasis.[4]

The Full Court invited the parties to make submissions about whether it should make orders or remit the matter for re-trial. The parties asked the Full Court to make orders. In its second judgment,[5] the Full Court ordered that on the husband's death, the sum which had been fixed by the Magistrate as representing 42.5% of the marital property, be paid to the wife's legal personal representatives. The timing of the payment was "important in order to do justice and equity to the husband under s 79(2) of the Act".[6] The Full Court said that "the many years of marriage [of the parties] and the wife's contributions demand that those moral obligations be discharged by an order for property settlement".[7] The Full Court did not, however, say that if the wife had not died it would have made an order or whether it was still appropriate to make an order as required by s 79(8)(b).

Grounds of appeal to the High Court

The husband was granted special leave to appeal to the High Court.[8] The Attorneys-General for the Commonwealth, New South Wales and Western Australia intervened.

The husband's case was based on two broad propositions:

> 1. There was no power to make s 79 orders because the parties were not separated and any property entitlements of the wife would not benefit the wife, but only benefit the three children of another marriage, being her previous marriage.
> 2. If there was power to make the orders, the Full Court should not have exercised that power because the requirements of s 79(8) were not met.[9]

Section 79(8) provides that if a party dies before s 79 proceedings are completed:

> "(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party ...
> (b) if the court is of the opinion:
>
> > (i) that it would have made an order with respect to property if the deceased party had not died; and
> > (ii) that it is still appropriate to make an order with respect to property;
> >
> > the court may make such order as it considers appropriate with respect to:
> > (iii) any of the property of the parties to the marriage or either of them ..."

Outcome in the High Court

All members of the High Court upheld the appeal. The husband's appeal succeeded primarily on the basis of s 79(8). The majority confirmed that s 79(8) should be interpreted in accordance with the two step process provided for in the subsection and described by the High Court in *Fisher* v *Fisher*.[10]

> "Section 79(8)(b) thus requires a court considering an application for a property settlement order which is continued by or against the legal personal representative of a deceased party to determine first,

> whether it would have made an order with respect to property if the deceased party had not died and second, whether, despite the death, it is still appropriate to make an order. Both of those inquiries require consideration of s 79(2) and its direction that the court not make an order unless 'satisfied that, in all the circumstances, it is just and equitable' to do so. It follows that, in cases where s 79(8) applies, a court must consider whether, had the party not died, it would have been just and equitable to make an order and whether, the party having died, it is still just and equitable to make an order".[11]

The High Court majority held that the Full Court failed to follow the above process in its second judgment. The majority referred to s 79(8)(b)(ii) and found:

> "That it was not shown that had the wife not died, it would have been just and equitable to make an order with respect to property. It follows that, after her death, it could not be found to be 'still appropriate to make an order with respect to property'."

Heydon J, in a separate judgment to the majority, upheld the appeal solely on the basis of s 79(8) but found that the wife had failed to demonstrate that the condition in s 79(8)(b)(i) was satisfied. Therefore, the condition in s 79(8)(b)(ii) did not arise.[12]

Both judgments upheld the appeal without remitting the matter for re-hearing.

Whether the parties had to be separated for s 79 to operate

The High Court majority summarised the husband's first argument[13] as to whether there was power to make orders where the parties were not separated:

> "The magistrate and the Full Court were said not to have had power because of two circumstances. It was said that this was an 'intact marriage' and that, upon the wife's death, the only persons to benefit if a property settlement order were made would be her children of a different marriage. These circumstances were said to require the conclusions that jurisdiction under the Act ... and the power to make a property settlement order (in s 79) were not engaged. This understanding of the Act was said to be supported by constitutional considerations about the scope of legislative power with respect to 'marriage' and 'matrimonial causes' in s 51(xxi) and (xxii)." [14]

The majority rejected the husband's argument that a matrimonial cause did not exist. The majority also rejected the husband's argument that a s 79 order can only be made if the parties have separated.

In support of the latter argument, the husband relied strongly on s 43(1), arguing:

> "Section 79, when read with s 43(1), did not permit the making of a property settlement order when, as here, the marriage between the parties was 'intact'. Section 43(1) states the principles that a court ... must apply ... and includes 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'." [15]

The majority said that the court is only required to "have regard to" the principles in s 43(1) and the principle relied on by the husband, being only one of several principles in s 43(1), did not "limit the conferral of jurisdiction".[16]

In argument before the High Court, the husband referred to the express jurisdiction in the Act to make a maintenance order during a marriage. Section 72 commences with the words "A party to a marriage is liable to maintain the other party ...". He distinguished s 72 from s 79 which does not expressly state that the power to make a s 79 order exists during a marriage. The husband did not point out that neither "matrimonial

cause" [17] nor s 79 expressly require a breakdown of the marriage. He argued that because it was a truly intact marriage, it was not enough to enliven the proper exercise of jurisdiction under s 79 that somebody agitated for a property settlement order. The court was not exercising a power to meet the wife's needs or her maintenance and it was not even an exercise to benefit her. In his view, there was no "matrimonial cause". He distinguished the facts from cases such as *Konitza and Konitza.*[18] The matrimonial cause in *Konitza* arose before the wife's death as she made a property claim before her death and the proceedings were continued under s 79(8). The husband argued that the claim in *Stanford* was different and was nothing more than third parties re-arranging the testamentary rights and interests of the parties to the marriage.

The husband submitted that a property order is very different from a maintenance order. A property order is a final order but a maintenance order can always be varied.[19] In an intact marriage, if an order for a property settlement is made to enable a party with a disability to have their own assets, this prevents a subsequent property order being made, taking into account all the contributions of the parties if the parties later separate. In other words, the jurisdiction to make an order under s 79 will have already been exhausted. The husband said that if a property order was made in those circumstances he might later paint the house, keep the garden or take food to the wife. These acts ordinarily add to the "contribution bank account", but would not be relevant because of the finality of the property order. The husband argued this helped to establish that there was no jurisdiction to deal with property in an intact marriage.[20]

In a de facto relationship it is absolutely clear that the property rights and interests of the parties cannot be enlivened until there is a breakdown of the relationship. Section 90SM(1) only covers "property settlement proceedings after the breakdown of a de facto relationship".[21] The husband argued that this limitation was implied into s 79. This was an interesting argument as it could also have been used to support the wife's case. By contrast to proceedings involving a de facto couple, s 79 and the definitions of "matrimonial cause" in s 4(1), do not explicitly require the separation of a legally married couple for a s 79 order to be made.

The High Court majority said that the wife's claim, albeit commenced by her case guardian and continued by her legal personal representatives, was a claim arising "out of the marital relationship" and therefore a "matrimonial cause" within the definition in para (ca) of s 4(1):

> "And when the wife died, the claim that was continued by her legal personal representatives was the claim that had been instituted on behalf of the wife, not some new or different claim. It remained a claim arising out of the marital relationship of the parties." [22]

Relying on *Fisher* v *Fisher,*[23] the High Court majority said that s 79(8) operated in this way, and "continues proceedings that would otherwise have abated upon the death of a party".[24] This was so even though:

> "Those who would gain from the making of an order in favour of the wife were not children of the marriage but children from the wife's earlier marriage."[25]

What is the proper approach to s 79?

The High Court majority gave guidance as to the proper approach to be taken to an application under s 79. However, it did not refer to or expressly endorse the "four step" approach which has been followed by the Family Law Courts in cases such as *Hickey and Hickey and Attorney General for the Commonwealth.*[26]

The High Court majority also appeared to take a different approach than was taken by the High Court in the leading authority on s 79 of *Mallet* v *Mallet*[27] and made only a minor reference to it. It is arguable that *Stanford* provides for a different approach to s 79 property applications than was taken in *Mallet.* The absence of references in *Stanford* to existing authorities (especially those of the Full Court of the Family Court) may have been a product of the nature of the case before the High Court (dealing with a specific factual scenario) and the manner in which the case was argued by the legal representatives.

In order to understand the High Court's views, reference must be made to the precise wording of s 79. Section 79(1)(a) gives the court power to:

> "make such order as it considers appropriate ... in the case of proceedings with respect to the property of the parties to the marriage or either of them — altering the interests of the parties to the marriage in the property ..."

Guidance as to how the court must exercise the power under s 79(1) is given in s 79(2) which provides:

> "The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order".

Section 79(4) requires the court to take into account certain matters such as contributions and the matters listed in s 75(2) so far as they are relevant in "considering what order (if any) should be made".

The High Court in *Stanford* warned:

> "To conclude that making an order is 'just and equitable' only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act." [28]

At first glance this appears to be consistent with *Mallet* and *Hickey*, but the High Court majority appeared to reject the notion that s 79(2) was an identifiable fourth step. The majority said that whether it is "just and equitable" to make an order under s 79(2) arises before the court looks at s 79(4), rather than after looking at s 79(4).[29]

In *Stanford* it was clear what "the order" would be,[30] but in most cases the court will not be able to identify "the order" unless the court first looks at the rest of s 79 including the matters in s 79(4). Section 79(2) refers to "the order" not "an order" or "any order" although s 79(4) refers to "what order (if any)". What order must the Court decide that it is just and equitable to make before it decides that it can make an order? The reference to "the order" is possibly a reference back to s 79(1) which entitles the court to make an "appropriate" order.

The primary judgment makes it very clear that s 79(2) necessitates a separate inquiry to that required by s 79(4):

> "Section 79(4)(a)–(c) required that the contributions which the wife made to the marriage should be taken into account in 'considering what order (if any) should be made' under s 79. It may be readily assumed that the length of the parties' marriage directly affected the extent of the contributions the wife had made. But, as already noted, the inquiries required by s 79(4) are separate from the 'just and equitable' question presented by s 79(2). The two inquiries are not to be merged. And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was still just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should be made by applying the matters listed in s 79(4)".[31]

In determining applications under s 79, the High Court set out the three fundamental propositions that it says must not be obscured:

> "First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to '*altering* the interests of the parties to the marriage in the

property' (emphasis added). The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.

Second, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In *Wirth v Wirth* (1956) 98 CLR 228 at 231–232, Dixon CJ observed that a power to make such order with respect to property and costs 'as [the judge] thinks fit', in any question between husband and wife as to the title to or possession of property, is a power which 'rests upon the law and not upon judicial discretion'. And as four members of this Court observed about proceedings for maintenance and property settlement orders in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 288 at 257:

> 'The judge called upon to decide proceedings of that kind is not entitled to do what has been described as "palm tree justice". No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down' ...

Third, whether making a property settlement order is 'just and equitable' is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised 'in accordance with legal principles, including the principles which the Act itself lays down' (*R v Watson, Ex Parte Armstrong* (1976) 136 CLR 248 at 257). To conclude that making an order is 'just and equitable' only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act." [32]

The High Court concluded that adhering to the above three fundamental propositions:

> "gives due recognition to 'the need to preserve and protect the institution of marriage' identified in s 43(1)(a) as a principle to be applied by courts in exercising jurisdiction under the Act. ... These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage." [33]

From the above passages it is clear that s 79(2) must be considered first. It is unclear whether s 79(2) is considered again as a separate step, with reference to s 79(4) or otherwise.

The position prior to *Stanford* was relevant in the various judgments in *Mallet*. For example, Gibbs CJ said in *Mallet* in relation to the s 79 discretion that it gives the court:

> "a very wide discretion to make such order as it thinks fit when it is satisfied that it is just and equitable that an order should be made (see sub s (1) and (2) of s 79) although there are some broad principles to which the Court is required to give effect, and some circumstances which it is required to take into account".[34]

The High Court in Stanford only made a limited reference to *Mallet*:

> "The expression 'just and equitable' is a qualitative description of a conclusion reached after the examination of a range of potentially competing considerations. It does not admit of exhaustive

> definition. It is not possible to chart its metes and bounds. And while the power given by s 79 is not 'to be exercised in accordance with fixed rules', nevertheless, three fundamental propositions must not be obscured".[35]

The "four step" approach which operated before *Stanford* and was used by the Family Law Courts and legal practitioners when considering s 79, was set out by the Full Court of the Family Court in cases such as *Hickey and Hickey*.[36] The "four steps" are:

1. Identifying and valuing the asset pool.
2. Assessing contributions under s 79(4)(a)–(c).
3. Taking into account the matters listed in s 79(4)(d)–(g) including the s 75(2) factors.
4. Determining whether the orders are just and equitable under s 79(2).

A less definitive approach was recently taken by a majority of the Full Court of the Family Court in *Martin & Newton*[37] where Bryant CJ and Thackray J said in relation to the four step approach:

> "But in our view, there is no requirement that the justice and equity of the order, as prescribed by s 79(2), must only be considered at the fourth (and last) stage. In our view, the requirement to make an order that is just and equitable permeates the entire decision making process, and it is not impermissible to consider it at an earlier point if the particular case requires it. We consider this is such a case." [38]

For a long time there were assumed to be only three steps under s 79, being the first three of the four steps referred to in *Hickey* above.[39] However, Gibbs CJ in *Mallet* said that the first described three steps (which were the middle two steps of Hickey):

> "First the Court must consider the extent to which either party has in the past contributed to the acquisition, conservation or improvement of the property; the contribution need not have been financial, but may include 'any contribution made in the capacity of the homemaker or parent': see 79(4)(a) and (b). Secondly, the Court must consider all those circumstances which relate to the present and future needs, and to the means, resources and earning capacity, actual and potential, of the parties: see s 79(4)(d) and 75(2)(a)–(m); these circumstances include 'the need to protect the position of a woman who wishes only to continue her role as a wife and mother' (s 75(2)(1)) and 'the effect of any proposed order upon the earning capacity of either party': see s 79(4)(c). In addition, the Court may take into account 'any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account: s 75(2)(o) and 79(4)(d)' ".[40]

It is difficult to see how the court can embark on those three steps without first identifying the pool, so the *Hickey* "four step" approach appears to be consistent with *Mallet*, particularly when reference is made to the other judgments in *Mallet* which emphasise s 79(2).

The words "just and equitable" were described by Dawson J in *Mallet* as being the "overriding requirement" of s 79.[41] They applied to the whole process of determining an order under s 79. Mason J said:

> "The section contemplates that an order will not be made unless the Court is satisfied that it is just and equitable to make the order (s 79(2)), after taking into account the factors mentioned in (a) to (e) of sec. 79(4). The requirement that the Court 'shall take into account' these factors imposes a duty on the Court to evaluate them".[42]

Therefore, Mason J clearly contemplated that s 79(4) should be looked at before s 79(2). Wilson J adopted an approach which appeared to "conflate" s 79(2) and 79(4) in the manner which the High Court majority in *Stanford* rejected:

> "What the Act requires is that in considering an order that is just and equitable the Court shall 'take into account' any contribution made by a party in the capacity of homemaker or parent. It is a wide discretion which requires the Court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of a particular case".[43]

Deane J also appeared to take a "conflated" approach saying:

> "In each case, the Family Court must pay regard to the matters specified in s 79(4) and determine whether it is just and equitable that any order be made and, if it is, what represents the appropriate order in the particular circumstances of the case before it".[44]

In the other major High Court case on the interpretation of s 79 before *Stanford*, *Norbis* v *Norbis*,[45] the High Court delivered three separate judgments. They took different approaches but each appeared to see a "just and equitable" order as an outcome rather than as a preliminary step or final step. For example, Mason and Deane JJ said in relation to the discretion under s 79(1) that:

> "Its exercise is conditioned by the requirement that it is just and equitable to make the order (s 79(2)), and that the Court take into account the matters specified in s 79(4) and the general principles embodied in s 43 and 81, so far as they are applicable".[46]

Brennan J said:

> "When a statutory discretion is to be exercised within prescribed limits according to what is 'just and equitable', as in the Family Law Act 1975 (Cth) (see s 79(2)), it is impossible to devise a controlling legal rule which will do justice and be equitable in every case which comes within those limits and falls within the scope of the rule. There will always be an exceptional case. If it were possible to predicate of a legal rule that its application to every case falling within its scope would invariably produce a just and equitable result, there could be no objection to its application. In such a case, however, the limits of the discretion would not be narrowed by judicial decision because the legal rule would be found to be implicit in the text of the statute ... Either approach [global or asset by asset] is capable of producing a just and equitable order".[47]

When there were assumed to be three steps, s 79(2) permeated the three steps, but was not considered to be a separate step.

The Full Court of the Family Court, in cases such as *Hickey*,[48] considered the determination under s 79(2) of whether it was just and equitable to make an order, to be an identifiable fourth step:

> "Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case ..." [49]

The articulation of a "four step" approach was in contrast to the view often adopted previously, that a s 79 order was "just and equitable" simply because the first three steps had been followed. The High Court majority in *Stanford* confirmed that the "just and equitable" requirement of s 79(2) is a separate and distinct requirement of s 79 but did not confirm the validity of the "four step" approach.

The "just and equitable" requirement

The High Court majority considered that the just and equitable requirement of s 79(2) is "readily satisfied" if the parties are, as the result of a choice made by one or both of the parties, no longer living in a marital relationship. In those circumstances:

> "It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. ... That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the Court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4)." [50]

By contrast, an involuntary separation does not show of itself that it is just and equitable to make a property settlement order.[51] However, the High Court majority disagreed with the husband that a court could not be satisfied that it was just and equitable to make a property settlement order where there was not a voluntary separation of the parties:

> "For example, demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order. It may be that there are circumstances other than need".[52]

The High Court majority emphasised that in relation to "just and equitable" it is not possible "to chart its metes and bounds".[53] In other words, it is not possible to chart the boundaries of what is just and equitable. The High Court majority referred[54] to the Full Court's first judgment and said that the Full Court was correct to conclude[55] that the Magistrate erred in not considering factors that bore on whether it was just and equitable to make a s 79 order, such as taking account of the consequences that would follow *for the husband* if a s 79 order were to be made in the terms sought by the wife. The husband would be required to sell the matrimonial home, in which he was still living, in circumstances where the wife's needs were met by the provision of full time care, a sum of money against future contingencies and the possibility, if it was needed, of a maintenance order.

In circumstances where parties are not separated, careful consideration will need to be given to matters which might make it just and equitable to make an order. Although not all of these were articulated in *Stanford*, possible matters include:

- whether the needs of a party can be met by a maintenance order
- whether future contributions by either party are likely
- whether a separation is possible or likely
- whether the use of "common property" continues
- the impact on the parties individually of a s 79 order
- a consideration of s 79(4).

So what does this mean for s 79?

Following the strong comments of the High Court majority setting out the three fundamental propositions which must not be obscured[56] some of which appear to be contrary to existing authority including *Mallet*, the decision in *Stanford* is suggestive, but not conclusive, of the view that the proper approach to a s 79 application is:

1. Identify the parties' existing legal and equitable interests as if they were not married. This requires looking at their individual interests rather than the "property of the parties" referred to in s 79(1) and 79(4), which is

the existing practice of legal practitioners and the Family Law Courts. The High Court majority, in the first paragraph of its judgment, referred to the definition of "property" in relation to s 79 cases (there being no definition of "property of the parties"). The definition of "property" is:

> "In relation to the parties to a marriage or either of them — means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".[57]

The pre-*Stanford* practice was to list only assets legally owned by the parties and their "financial resources". However, equitable interests such as constructive trusts, resulting trusts and estoppel interests also need to be identified. Part performance of contracts and laches may also be relevant. Legal interests (as opposed to legal ownership of assets) may include contractual and tortious claims. This requirement makes sense as interests can only be "altered" under s 79(1) if the court first determines what those interests are. The High Court majority requires that the legal and equitable interests of the parties be identified as if the parties were not spouses,[58] so without reference to their possible entitlements between each other under s 79. An example arising from *Stanford* is the possibility that the wife had a constructive trust claim against the husband's home.

The High Court majority agreed with the husband[59] that "[c]ommunity of ownership arising from marriage has no place in the common law".[60] It is unclear whether the Court was simply referring to there being no "community of property" in Australia unlike some other countries, or taking matters further. The High Court majority quite rightly rejected the Full Court's reliance on the "moral" claims of the wife and said that such claims lacked any legal foundation under the Act.[61] The parties' rights must be "determined according to the law" not by reference to other, non-legal considerations.[62]

2. Decide under s 79(2) whether it is just and equitable to make the order altering those interests, noting that if the parties are already separated the s 79(2) requirement will be "readily satisfied" [63] as the parties no longer have mutual use of property, but there is no presumption that all parties are entitled to s 79 orders. The requirement needs to be addressed and satisfied. If the parties are not separated, the s 79(2) requirement will need more attention. Although s 79 is a broad power, it is not exercised according to unguided judicial discretion. It is not "palm tree justice". There is no starting assumption that a party has the right to a property settlement.

3. Examine the matters in s 79(4) including the factors in s 75(2). It is unclear how these principles relate to the "four step" approach (if at all). Are there now only three steps or are there five steps with s 79(2) as both a first step and a fifth step but perhaps also permeating the other steps? Is s 79(2) a separate step or is it a threshold issue before embarking on a consideration of the rest of s 79?

What next?

The Stanford approach to s 79 (and s 90SM) applications raises some obvious repercussions, and some less obvious ones. There will undoubtedly be a period of uncertainty while the Family Law Courts and legal practitioners grapple with the meaning of *Stanford* and how to put it into practice. Some of those practical problems may include:

1. Does the court need to determine the legal and equitable interests of the parties and their values before assessing matters under s 79(4)? Without knowing what the interests are and their values, the court cannot determine whether it is just and equitable to make an order altering those interests. Or is it simply enough for the parties to state their claims? The court can then determine that as it is unlikely that any alteration of these interests will be effected consensually, it is just and equitable to make a s 79 order.

2. Will there be an expanded role for s 78 declarations as to property interests? In some situations, once the court makes declarations as to "existing title or rights in respect to property" under s 78 it may not be just

and equitable to make s 79 orders. If the parties have ordered their affairs in a particular way, the court may decide that no alteration of those interests is required.

3. If the court has to determine parties' claims to the equitable and legal interests, how will it do so? For example, will pleadings be required?

4. What matters will the Courts consider in determining whether it is just and equitable under s 79(2) to make the order? While the High Court said it "does not admit of exhaustive definition" and it is not possible "to chart its metes and bounds", the High Court majority constantly reminded of the necessity to follow the legislation and not have regard to matters not in the legislation such as "moral obligations".[64]

5. Will court forms need to change, such as the Initiating Application, Financial Statement and Application for Consent Orders. There needs to be space in the Financial Statements and Application for Consent Orders to set out the legal and equitable interests of each party (not simply the property owned by each party). The Applications need to set out the circumstances which justify the Courts being able to exercise jurisdiction on the basis that s 79(2) is satisfied. This seems to be necessary even if parties have separated, although the requirement will be more "readily satisfied" than if they are not separated. Outlines of Case and Trial Affidavits will need to address a broader range of issues. Balance Sheets will be more complex.

6. Will changes to the Rules be required regarding such matters as disclosure[65] and the procedure for making Consent Orders? [66]

7. Will superannuation be dealt with differently? Will the common presumption continue that the parties' interests be equalised in a long marriage or that there at least be a splitting order? [67] This often occurred in the "fourth step" of s 79(2) which appears to no longer exist.

8. How will s 106B applications proceed, particularly if there is no existing property? [68]

9. Will s 79(2) as a first step or threshold step mean that greater weight is given to the existence of an overseas pre-nuptial agreement or to the difficulties of enforcing orders against overseas assets before a court decides that it is just and equitable to make orders?

10. Will long-term spousal maintenance orders be made more frequently?

11. How will wastage arguments be considered? [69] Can an equitable claim underpin them?

12. What if one party is bankrupt? Will a non-bankrupt spouse be subject to greater challenges from trustees in bankruptcy? A wife who has benefited from the actions of a bankrupt husband, whether or not she conspired with him to defeat the creditors, may find s 79(2) in its new format a greater hurdle to keeping assets away from the trustee.[70]

Conclusion

Although there are some uncertainties, the High Court majority gave some clear directions as to dealing with applications under s 79. It is important to first set out the legal and equitable interests of the parties and not simply look at the property which is in their respective names. Then, it must be determined whether it is just and equitable to make an order altering those interests under s 79(2). It is not fatal to an application that the parties are not separated, however it will be more difficult to establish that is just and equitable to make the order. If the parties are separated the "just and equitable" requirement will be more "readily satisfied".

If it is just and equitable to make the order, s 79(4) (including the factors under s 75(2)) become relevant. Section 79(2) cannot be conflated with s 79(4) and considered only by reference to s 79(4). It must be considered separately. Perhaps the High Court was saying that the over-riding requirement is not s 79(2), but s 79(1), which requires that the order be "appropriate"? This may involve a greater focus on balancing the possibility of leaving existing interests as they stand rather than altering them under s 79. Alternatively,

the High Court might be saying that the Family Law Courts and legal practitioners have only been paying lip service to s 79(2) by merely considering it in passing after considering s 79(4) at length.

In any event, the High Court emphasised that the principles set out in the Act must be carefully followed. It is therefore insufficient to simplistically summarise s 79 without referring to the actual words used in the Act.

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Footnotes

1 [2012] HCA 52.

2 (2011) FLC ¶93-483.

3 (2011) FLC ¶93-483 at [112].

4 [2012] HCA 52 at [10].

5 (2012) FLC ¶93-495.

6 (2012) FLC ¶93-495 at [58].

7 (2012) FLC ¶93-495 at [52].

8 [2012] HCA Trans 154.

9 [2012] HCA 52 at [13].

10 (1986) FLC ¶91-767.

11 [2012] HCA 52 at [24].

12 [2012] HCA 52 at [65]–[66].

13 The expanded version of the husband's arguments in this article were obtained from his written submissions filed in the High Court and the oral arguments at the hearing of the appeal reported in *Stanford v Stanford* [2012] HCA 206.

14 [2012] HCA 52 at [14].

15 [2012] HCA 52 at [26].

16 [2012] HCA 52 at [27].

17 Section 4(1) of the Act.

18 [2009] FamCAFC 71.

19 Section 83 of the Act.

20 *Stanford* v *Stanford* [2012] HCA Trans 206.

21 The referral of powers by the states and territories of the Commonwealth and the definition of "de facto financial cause" contain the same restriction.

22 [2012] HCA 52 at [29].

23 (1986) FLC ¶91-767

24 [2012] HCA 52 at [30].

25 [2012] HCA 52 at [31].

26 (2003) FLC ¶93-143. See also *JEL and DDF* (2001) FLC ¶93-075, *Russell and Russell* (1999) FLC ¶92-877 and *Phillips and Phillips* (2002) FLC ¶93-104.

27 (1984) FLC ¶91-507.

28 [2012] HCA 52 at [40].

29 [2012] HCA 52 at [37].

30 A payment of $612,931 to the wife's personal representatives upon the death of the husband.

31 [2012] HCA 52 at [51].

32 [2012] HCA 52 at [37]–[38], [40].

33 [2012] HCA 52 at [41].

34 (1984) FLC ¶91-507 at p 79,110.

35 [2012] HCA 52 at [36] with a quotation from the judgment of Gibbs CJ. The references to "metes and bounds" and the "three fundamental propositions" are not in *Mallet*.

36 (2003) FLC ¶93-143.

37 (2011) FLC ¶93-490.

38 (2011) FLC ¶93-490 at [306].

39 For example, *Ferraro and Ferraro* (1993) FLC ¶92-335.

40 For example, (1984) FLC ¶91-507 at p 79,110.

41 (1984) FLC ¶91-507 at p 79,132.

42 (1984) FLC ¶91-507 at p 79,120.

43 (1984) FLC ¶91-507 at p 79,126.

44 (1984) FLC ¶91-507 at p 79,128.

45 (1986) FLC ¶91-712.

46 (1986) FLC ¶91-712 at p 75,167.

47 (1986) FLC ¶91-712 at p 75,176 and 75,178–9.

48 (2003) FLC ¶93-143.

49 (2003) FLC ¶93-143 at p 78,386.

50 [2012] HCA 52 at [42].

51 [2012] HCA 52 at [43]–[44].

52 [2012] HCA 52 at [45].

53 [2012] HCA 52 at [40].

54 [2012] HCA 52 at [46]–[47].

55 (2011) FLC ¶93-483 at [119].

56 [2012] HCA 52 at [37]–[38], [40].

57 Section 4(1) of the Act.

58 [2012] HCA 52 at [39].

59 [2012] HCA 52 at [39].

60 *Hepworth v Hepworth* (1963) 110 CLR 309 at 317.

61 [2012] HCA 52 at [48], [52].

62 [2012] HCA 52 at [48], [52].

63 [2012] HCA 52 at [42].

64 [2012] HCA 52 at [36].

65 Rule 13.01 Family Law Rules 2004 and r 24 Federal Magistrates Court Rules 2001.

66 Rule 10.15 Family Law Rules 2004 and r 13.04 Federal Magistrates Court Rules 2001.

67 *Mayne & Mayne (No 2)* (2012) FLC ¶93-510

68 The question as to whether an order under s 106B of the Act is determined before or after the court decides to exercise power under s 79 is unresolved. *SJZ and FHN* [2005] FamCA 756.

69 *Kowaliw and Kowaliw* (1981) FLC ¶91-092.

70 *Commissioner of Taxation and Worsnop* (2009) FLC ¶93-392 but cf *The Trustees of the Property of Daniel John Cummins* v *Cummins* [2006] HCA 6.