

## Recent Property Settlement Cases Impacting Your Practice under s 79

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Too much has happened in the past 12 months for this paper to cover all developments under s 79 *Family Law Act 1975* ("the Act"). The focus will be on the High Court decision of *Stanford v Stanford* and cases considering its impact on the four step process, the just and equitable requirement and add-backs, with a brief reference to recent cases on contributions.

### ***Stanford* – Are there still the four steps?**

Judgment was delivered by the High Court in *Stanford v Stanford*<sup>1</sup> on 14 November 2012. In a rare examination of 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 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, it warned against conflating the requirements of s 79(2) and s 79(4) and highlighted that the court must first consider whether it is just and equitable under s 79(2) to make the order.

The "four step" approach which the Family Law Courts have used for many years to determine applications for the alteration of property interests under s 79 was not expressly considered by the High Court, which said that whether making an order was just and equitable under s 79(2) must be determined, before considering the other matters in s 79. By contrast, under the "four step" approach, s 79(2) is considered last.

The case involved an elderly couple involuntarily separated by circumstances. The wife required nursing home care and died during the course of the proceedings. The High Court upheld the husband's appeal against an order for a payment to the wife's estate after the husband's death. The majority allowed the husband's appeal primarily on the

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<sup>1</sup> (2012) FLC 93-495

ground that the Full Court of the Family Court did not address the requirements for making orders after a party's death. The minority judgment agreed, but did not deal with the broader issues under s 79.

There is debate about the extent to which the views expressed by the High Court on s 79 change the law. The High Court did not appear to confine its views to the unusual factual circumstances of the case. Although it is still early days, it is likely that the impact of *Stanford* will be significant. It is possible the "four step" approach is no longer valid,<sup>2</sup> and that add-backs will be dealt with only under s 79(4) or s 75(2)(o) rather than as notional property. The circumstances in which courts may find it is not just and equitable to make an order are another uncertainty.

### *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 about 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 had been acquired by the husband after the break-up of his first marriage and it was in his sole name.

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 was likely to require a sale of 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<sup>3</sup> 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

<sup>2</sup> *Bevan & Bevan* (2013) FLC 548. The majority said (at para 65) that the High Court neither approved nor disapproved the four step process.

<sup>3</sup> (2011) FLC 93-483

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.<sup>4</sup>

The High Court cited part of this passage and added the emphasis.<sup>5</sup>

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<sup>6</sup> 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".<sup>7</sup> 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".<sup>8</sup> The Full Court did not say, however, as required by s 79(8)(b), that if the wife had not died it would have made an order or whether it was still appropriate to make an order.

#### *Grounds of appeal to the High Court*

The husband was granted special leave to appeal to the High Court.<sup>9</sup> His 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.<sup>10</sup>

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...

<sup>4</sup> (2011) FLC 93-483, at para 112

<sup>5</sup> (2012) FLC 93-495, at para 10

<sup>6</sup> (2012) FLC 93-495

<sup>7</sup> (2012) FLC 93-495 at para 58

<sup>8</sup> (2012) FLC 93-495, at para 52

<sup>9</sup> [2012] HCA Trans 154

<sup>10</sup> (2012) FLC 93-495 at para 13

### *Outcome in the High Court*

All members of the High Court upheld the appeal. The husband's appeal succeeded 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 sub-section and described by the High Court in *Fisher v Fisher*.<sup>11</sup> The Full Court majority said:

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.<sup>12</sup>

The High Court majority held in its second judgment that the Full Court failed to follow the above process. 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, upheld the appeal solely on the basis of s 79(8) as 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.<sup>13</sup>

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 considered the husband's argument that a s 79 order can only be made if the parties have separated, and rejected it. Prior to *Stanford* there was uncertainty as to whether s 79 orders could be made in intact marriages. In a de facto relationship, the property rights and interests of the parties cannot be enlivened under s 90SM unless and until there is a breakdown of the relationship. Consistently with the referral of powers to the Commonwealth from the States and Territories, s 90SM(1) expressly only covers "property settlement proceedings after the breakdown of a de facto relationship." The High Court refused to imply this limitation into s 79.

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<sup>11</sup> (1986) FLC 91-767

<sup>12</sup> (2012) FLC 93-495 at para 24

<sup>13</sup> (2012) FLC 93-495 at paras 65-66

The husband relied strongly on s 43(1)(a), 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."<sup>14</sup>

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."<sup>15</sup>

In argument before the High Court,<sup>16</sup> 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, as the latter section does not expressly state that a s 79 order can be made during a 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. It was not an exercise to benefit her, but to benefit her children from her former marriage. He said there was no "matrimonial cause" and distinguished the facts from cases where the matrimonial cause arose before a party's death by an application under s 79 being made before the applicant died and the proceedings 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. He argued that the parties had ordered their affairs in a certain way during the marriage and he had placed funds in a bank account for the wife's use. He said that the Court should not interfere with these arrangements, particularly in circumstances where the marriage was intact.

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.<sup>17</sup> 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. 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

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<sup>14</sup> (2012) FLC 93-495 para 26

<sup>15</sup> (2012) FLC 93-495 at para 27

<sup>16</sup> Some 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

<sup>17</sup> Section 83 of the Act

the "contribution bank account", but would be irrelevant because of the finality of the property order.<sup>18</sup>

The High Court majority rejected the husband's argument. It 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.<sup>19</sup>

*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. It emphasised the importance of referring to the wording of the Act. The precise wording of s 79 is therefore important to understanding the High Court's views. 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...

A restriction on the manner in which the court exercises the power under s 79(1) is set out 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) (which include incomes, earning capacities, care of children and the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt) so far as they are relevant in "considering what order (if any) should be made".

The High Court 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.

At first glance this seems to be consistent with existing authority and practice, but the High Court majority appeared to reject the notion that s 79(2) was a step to be undertaken at the end of the process. 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),

<sup>18</sup> *Stanford v Stanford* [2012] HCA Trans 206

<sup>19</sup> (2012) FLC 93-495 at para 29

rather than *after* looking at s 79(4). Sections 79(2) and 79(4) are separate inquiries and the "two inquiries are not to be merged."

In determining applications under s 79, the High Court 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 entitlements under s 79. The court must then consider whether it is just and equitable to alter the parties' interests;
2. Section 79 is a broad power, but that does not mean unguided judicial discretion;
3. There is no starting assumption that a party has the right to a s 79 order.

The pre-*Stanford* practice was to list only assets legally owned by the parties and their "financial resources". However, following *Stanford*, legal and equitable interests need to be identified. Equitable interests include interests as a beneficiary of a constructive trust or a resulting trust and estoppel interests. 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. The requirement makes sense, as interests can only be "altered" under s 79(1) if the court first determines what those interests are. The legal and equitable interests of the parties must be identified as if the parties were not spouses,<sup>20</sup> 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 claim as the beneficiary of a constructive trust against the husband's home.

The High Court majority agreed with the husband<sup>21</sup> that "[c]ommunity of ownership arising from marriage has no place in the common law."<sup>22</sup> This may have simply been a reference to there being no "community of property" in Australia, unlike some other countries. In any event 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.<sup>23</sup> The parties' rights must be "determined according to the law" not by reference to other, non-legal considerations.<sup>24</sup> It is not "palm tree justice".<sup>25</sup>

The "four step" approach which operated before *Stanford* was used by the Family Law Courts and legal practitioners when making s 79 orders. It required the Court to:

1. Identify and value the asset pool
2. Assess contributions under s 79(4)(a)-(c)

<sup>20</sup> (2012) FLC 93-495 para 39

<sup>21</sup> (2012) FLC 93-495 at para 39

<sup>22</sup> *Hepworth v Hepworth* (1963) 110 CLR 309 at 317

<sup>23</sup> (2012) FLC 93-495 at paras 48,52

<sup>24</sup> (2012) FLC 93-495 at paras 48,52

<sup>25</sup> *Stanford v Stanford* (2012) FLC 93-495 at para 38 quoting from *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248 at 257

3. Take into account the matters listed in s 79(4)(d)-(g) including the s 75(2) factors
4. Determine whether the orders are just and equitable under s 79(2).

The High Court majority did not refer to or expressly endorse the "four step" approach taken in cases such as *Hickey and Hickey and Attorney General for the Commonwealth*.<sup>26</sup> The High Court majority appeared to take a different approach than was taken by the High Court in the (previous) leading authority on s 79 of *Mallet v Mallet*<sup>27</sup> making only a minor reference to it. A less definitive approach to the "four steps" was taken by a majority of the Full Court of the Family Court in *Martin & Newton*<sup>28</sup> 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.<sup>29</sup>

The High Court in *Stanford* expressly warned against "conflating" s 79(4) and s 79(2). It is arguable that "permeating" is not the same concept as "conflating". According to the *Oxford English Reference Dictionary* "conflate" means to "blend or fuse together (esp. two variant texts into one)". The word "permeate" means to "penetrate throughout; pervade; saturate".

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*.<sup>30</sup> When there were assumed to be three steps, s 79(2) was not considered to be a separate step. However, Gibbs CJ in *Mallet* 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 s 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).<sup>31</sup>

<sup>26</sup> (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

<sup>27</sup> (1984) FLC 91-507

<sup>28</sup> (2011) FLC 93-940

<sup>29</sup> (2011) FLC 93-940 at para 306

<sup>30</sup> For example, *Ferraro and Ferraro* (1993) FLC 92-335

<sup>31</sup> (1984) FLC 91-507 at p 79,110

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.<sup>32</sup> They applied to the whole process of determining an order under s 79. As in *Martin and Newton*, this appears to give s 79(2) the status of "permeating" 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 s 79(4). The requirement that the Court "shall take into account" these factors imposes a duty on the Court to evaluate them.<sup>33</sup>

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 s 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.<sup>34</sup>

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.<sup>35</sup>

In the other major High Court case on the interpretation of s 79 before *Stanford*, *Norbis v Norbis*,<sup>36</sup> the High Court delivered 3 separate judgments. Each judgment took a different approach 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) to make an "appropriate" order 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.<sup>37</sup>

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<sup>32</sup> (1984) FLC 91-507 at p 79,132

<sup>33</sup> (1984) FLC 91-507 at p 79,120

<sup>34</sup> (1984) FLC 91-507 at p 79,126

<sup>35</sup> (1984) FLC 91-507 at p 79,128

<sup>36</sup> (1986) FLC 91-712

<sup>37</sup> (1986) FLC 91-712 at p 75,167

The Full Court of the Family Court, in cases such as *Hickey*,<sup>38</sup> 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...<sup>39</sup>

The High Court majority in *Stanford* confirmed that the "just and equitable" requirement of a s 79(2) is a separate and distinct requirement of s 79 but did not approve or disapprove of the validity of the "four step" approach. There are very few references in *Stanford* to existing authorities.

In *Stanford* it was clear what "the order" would be,<sup>40</sup> 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 enables the court to make an "appropriate" order. Is "appropriate" the over-riding requirement of s 79 or the final step of the s 79 process, rather than "just and equitable"?

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).<sup>41</sup>

Although it is clear that s 79(2) must be considered first, there are many uncertainties. It is unclear how the three "fundamental propositions" outlined by the High Court majority relate to the "four step" approach (if at all). Is s 79(2) a first step or threshold issue before embarking on a consideration of the rest of s 79? Is s 79(2) considered again as a separate step, with reference to s 79(4) or otherwise? Are there now only 3 steps or are there 5 steps with s 79(2) as both a first step and a fifth step, and perhaps also "permeating" (but not "conflating") the other steps? Is the final step an examination of whether the order is "appropriate"? Did the High Court, by not referring

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<sup>38</sup> (2003) FLC 93-143

<sup>39</sup> (2003) FLC 93-143 at p 78,386

<sup>40</sup> A payment of \$612,931 to the wife's legal personal representatives upon the death of the husband.

<sup>41</sup> (2012) FLC 93-495 at para 51

to the "four step" process and by emphasising the importance of looking at the wording of the Act, reject the notion of any process involving structured steps?

*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).<sup>42</sup>

By contrast, an involuntary separation as occurred in *Stanford*, does not make it just and equitable of itself to make a property settlement order.<sup>43</sup> The High Court majority disagreed with the husband. It found that a court can be satisfied that it was just and equitable to make a property settlement order where there was an involuntary 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.<sup>44</sup>

The High Court majority emphasised that in relation to "just and equitable" it is not possible "to chart its metes and bounds."<sup>45</sup> In other words, it is not possible to chart the boundaries of what is just and equitable. The High Court majority referred<sup>46</sup> to the Full Court's first judgment and said that the Full Court was correct to conclude<sup>47</sup> 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.

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<sup>42</sup> (2012) FLC 93-495 at para 42

<sup>43</sup> (2012) FLC 93-495 at paras 43-4

<sup>44</sup> (2012) FLC 93-495 at para 45

<sup>45</sup> (2012) FLC 93-495 at para 40

<sup>46</sup> (2012) FLC 93-495 at paras 46-7

<sup>47</sup> (2011) FLC 93-483 at para 119

If the parties are already separated, the s 79(2) requirement will be "readily satisfied"<sup>48</sup> as the parties no longer have mutual use of property, but there is no presumption that all parties are entitled to s 79 orders. Consideration still needs to be given to the matters which make it just and equitable to make an order. Possible circumstances where it may not be just and equitable to do so include:

- Where the parties kept their financial affairs separate;
- Where the relationship was very short;
- Where an overseas pre-nuptial agreement sets out how the parties will order their affairs in the event of a separation;
- Where the rights of a third party (e.g. a creditor) will be impinged by an alteration of property interests;
- Where the recognition of legal and equitable interests is consistent with the way the parties ordered their affairs during the relationship and no further adjustment is appropriate.

A factual scenario where the parties' interests might be left where they are, is where there is little or no joint property and the parties each own property in their own names which is roughly equivalent to their entitlements after considering the matters set out in s 79(4) including s 75(2). The wife may own the home in which she wants to live with the children for whom she has the primary care. The husband may have significant superannuation entitlements. This was how the parties ordered their affairs during the relationship. Is it just and equitable to make an order under s 79 which will result in the wife receiving a split of the husband's superannuation and having to take out a mortgage to pay a cash sum to the husband or perhaps sell the home?

Another example may be where one party owns the business assets and the other party solely owns the home so it is quarantined from the business operations. If the existing interests of the parties are equivalent in percentage terms to their likely entitlements taking into account the matter under s 79(4) including s 75(2), is it just and equitable to alter these interests? The parties ordered their affairs in a certain way during the relationship. Is there justification for the Court to intervene and alter these interests because the parties are separated and only one party wants to alter them?

In circumstances where parties are not separated, once the court has identified the equitable and legal interests of the parties, it may not be just and equitable to make any order under s 79 altering those interests. The s 79(2) requirement needs greater

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<sup>48</sup> (2012) FLC 93-495 at para 42

attention than if the parties are separated. Important matters to consider 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

*So what does this mean for applications under s 79?*

There are many possible interpretations of the High Court's views on how s 79 applications should be considered. One possible approach to a s 79 application is:

1. Identify the parties' existing legal and equitable interests in property as if they were not married. This requires looking at their individual interests.
2. Decide under s 79(2) whether it is just and equitable to make the order altering those interests. The requirement needs to be addressed and satisfied.
3. Examine the matters in s 79(4) including the factors in s 75(2).
4. Consider whether the proposed order is "appropriate".

Another interpretation of *Stanford* is that there is no justification for a "step" approach at all. The High Court may be saying that s 79 must be read and applied carefully but not in any set formulaic way.

One of the many uncertainties is, in determining whether it is just and equitable to make an order, in how much detail can and should the Court consider s 79(4) including s 75(2)? Perhaps this can be described as the "pancake" argument. How do you know how much milk to put in to make a perfect pancake until you have first mixed the other ingredients? How else does the Court determine whether it is just and equitable to make the Order? Although there are no "metes and bounds" to the s 79(2) discretion, surely s 79(4) is one of the relevant matters?

### **Messages from the trenches**

The Full Court of the Family Court delivered its first judgment on the interpretation of *Stanford* on 8 August 2013, *Bevan & Bevan*,<sup>49</sup> which is discussed later in this paper.

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<sup>49</sup> [2013] FLC 93-545

However, trial judgments which have considered the effect of *Stanford* remain important in considering the effect of *Stanford*.

In *Watson and Ling*<sup>50</sup> Murphy J said that the "circumstances of the parties' relationship (its nature, form and characteristics) is plainly important to the exercise of the s 90SM(3)/s 79(2) discretion".<sup>51</sup> This approach uses words which do not appear in either *Stanford* or the *Family Law Act* but were used by the Full Court of the Family Court in *Dickons & Dickons*.<sup>52</sup> Murphy J appeared to reject the "four step" approach. He said:

As a result of those matters, the Court's approach to s 79/s 90SM may be less compartmentalised than what a strict or unthinking adherence to four (or three) "steps" might otherwise reveal. The task is essentially holistic; is it just and equitable in the particular circumstances of the particular relationship or marriage under consideration to make an order and, if so, its terms must similarly meet that criteria. Of course, holistic though the approach is, it must be referenced to what the Act requires and care must be taken to ensure that the Court's reasons make that clear...<sup>53</sup>

In *Gaicho & Gaicho*<sup>54</sup> Cronin J expressed doubt as to whether the four step approach still existed. In relation to the just and equitable requirement he said:

In many marriages such as this one, the process discussed by the High Court will be simple because of the recognition of joint interests either by registration or by common usage. Indeed, as I have pointed out, the parties sought an adjustment of their interests (despite the absence of agreement as to its extent) and by inference, they acknowledged that leaving the other party with those interests was not just and equitable...<sup>55</sup>

In relation to the four step process he said:

Having regard...to the High Court's decision in *Stanford*, I doubt very much whether the so-called four-step process is of assistance.<sup>56</sup>

In *Sebastian & Sebastian*<sup>57</sup> Young J agreed with Coleman J in *Martin & Crawley*<sup>58</sup> that *Stanford* "raises doubt as to whether the 'four step' approach remains permissible, and, if it does, how the requirements of s 79(2) are addressed".<sup>59</sup> Young J concluded that post *Stanford* a court is required to:

- o first, identify the existing and therefore divisible property of the parties;
- o secondly, evaluate whether it is just and equitable to pronounce an order; and

<sup>50</sup> [2013] FamCA 57

<sup>51</sup> [2013] FamCA 57 at para 11

<sup>52</sup> [2012] FamCAFC at para 154 per Bryant CJ, Faulks DCJ and Murphy J

<sup>53</sup> [2013] FamCA 57 at para 13

<sup>54</sup> [2013] FamCA 120

<sup>55</sup> [2013] FamCA 120 at para 163

<sup>56</sup> [2013] FamCA 120 at para 177

<sup>57</sup> [2013] FamCA 191

<sup>58</sup> [2012] FamCA 1032 at para 93

<sup>59</sup> [2013] FamCA 191 at para 140

- o thirdly, assess what orders should be made upon a consideration of all of the s 79(4) factors, including the matters referred to in s 75(2).<sup>60</sup>

In *Swarb & Swarb*<sup>61</sup> Coleman J said that "just and equitable" had two meanings:

It remains only to consider whether the proposed orders are "just and equitable". The expression now appears to have two incarnations: the broader requirement discussed by the High Court in *Stanford v Stanford* ... and the seemingly narrower requirement imposed by s 79(2) of the Act."<sup>62</sup>

In *Alexiou & Alexiou*<sup>63</sup> Le Poer Trench J identified a different 4 step process than *Hickey*:

1. Identify the property of the parties and the legal and equitable interests they each hold in such property.
2. Consider whether in the particular circumstances of the case it would be "just and equitable" to make an order altering any of the parties' interests.
3. "Assuming the Court is satisfied that it is just and equitable to make an order altering the parties' interests in their property then the process for determining what order to make requires the Court to:
  - o Determine the value of the parties' net assets, superannuation and resources;
  - o Assess the contributions of the parties pursuant to s 79(4)(a),(b) & (c);
  - o Take into account the matters set out in s 79(4)(d),(f) & (g);
  - o Consider the relevant s 75(2) factors."
4. "Before making a property order, having addressed the matters referred to above, the Court is to only make an order which it considers to be just and equitable in the particular circumstances of the case..."<sup>64</sup>

"in the circumstances of this case I determine that result to be just and equitable."

At the end of the process and found that he dealt with s 79(2) twice<sup>65</sup> arguably, his process is an 8 or 9 step process.

In *Newman & Newman*<sup>66</sup>, Watts J considered that the post *Stanford* approach meant that his task was a three step process although with the sub-steps it is arguably a 5 step process. He also referred to "just and equitable" as being a consideration twice in the process:

- "41.1. Identify according to ordinary common law and equitable principles and then value the property, assets, financial resources and liabilities of the parties;
- 41.2. Determine whether it is just and equitable to make an order altering those interests and if so;
  - 41.2.1. Identify relevant contributions and assess them;
  - 41.2.2. Consider relevant matters referred to in s 79(4)(d) – (g) FLA;
- 41.3. Determine what order adjusting the property, assets and liabilities of the parties is just and equitable."<sup>67</sup>

*Bevan & Bevan*

<sup>60</sup> [2013] FamCA 1032 at para 152

<sup>61</sup> [2013] FamCA 404

<sup>62</sup> [2013] FamCA 404 at para 121

<sup>63</sup> [2012] FamCA 1146

<sup>64</sup> [2012] FamCA 1146 at para 113

<sup>65</sup> [2012] FamCA 1146 at para 308

<sup>66</sup> [2013] FamCA 376

<sup>67</sup> [2012] FamCA 376 at para 41

In *Bevan & Bevan*<sup>68</sup> the primary issue before the Full Court was whether the trial Judge erred in concluding it was just and equitable to alter existing property interests when the parties had largely lived apart for 18 years and the husband had told the wife she could retain the assets. He moved overseas and left her with the control of their assets in Australia. Like *Stanford*, the facts were unusual.

The majority said in relation to the four steps:

Although the four step process has been regularly applied, the Full Court has stressed it is no more than a means to an end, since the statutory obligation is to alter existing interests only if it is just and equitable to do so. Thus, in *Norman & Norman*,<sup>69</sup> the Full Court (Finn, May and Murphy JJ) said:

It is the mandatory legislative imperative (to reach a conclusion that is just and equitable) that drives the ultimate result. For all its usefulness and merit as a "disciplined approach" or a "structured process of reasoning"... , the "three-step" or "four-step" approach merely illuminates the path to the ultimate result<sup>70</sup>.

The majority also referred to the joint judgment of the Full Court prior to *Stanford* in *Martin & Newton*<sup>71</sup> which confirmed that the four step approach was not legislatively mandated but "simply the preferred approach" and that " 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."

The majority said in relation to the High Court's views on the s 79 process:

Although the High Court did not disapprove the four step process, we accept it was not approved either...However, the High Court's decision serves to refocus attention on the obligation not to make an order adjusting property interests unless it is just and equitable to do so.<sup>72</sup>

In relation to s 79(2) and s 79(4) the majority seemed to accept the "pancake argument" and said (at para 84) that "it would be a fundamental misunderstanding to read *Stanford* as suggesting that the matters referred to in s 79(4) should be ignored in coming to a decision as to whether it was just and equitable to make an order."

In relation to conflating s 79(4) and s 79(2) the Full Court said:

This requirement to consider the s 79(4) matters in determining whether it is just and equitable to make any order provides fertile ground for potential conflation of the two different issues, which the High Court has warned against. However, this potential will not be realised in many cases because of what the plurality said at [42] about the "just and equitable" requirement being "readily satisfied". But there will be a range of cases, of which arguably the present is a good example, where determining whether it is just and equitable to make *any* order altering property

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<sup>68</sup> (2013) FLC 93-545

<sup>69</sup> [2010] FamCAFC 66 at para 60

<sup>70</sup> (2013) FLC 93-545 at para 61

<sup>71</sup> (2011) FLC 93-490

<sup>72</sup> (2013) FLC 93-545 at para 65

interests will not be so clear cut and will therefore require not only separate but very careful deliberation.<sup>73</sup>

The Full Court considered it unhelpful and misleading to describe the separate enquiry as to whether it is just and equitable to make an order as a "threshold" issue. Their reasons for this were stated as:

1. First, as was emphasised in *Stanford*, the initial enquiry is to determine the existing legal and equitable interests of the parties.
2. Secondly, although s 79(2) is cast in the negative and amounts to a prohibition against making any order unless it is just and equitable to do so, the corollary is that if the court does make an order, such order itself must be just and equitable...The just and equitable requirement is therefore not a threshold issue, but rather one permeating the entire process.<sup>74</sup>

This analysis is interesting and there will undoubtedly be further judicial discussion as to the distinction (if any) between "permeating" and "conflating."

### **What's new in contributions?**

A consideration of contributions under s 79(4), whether as step two of the four step process under *Hickey & Hickey* or otherwise, remains relevant following *Stanford v Stanford*.

In *Petruski & Balewa*<sup>75</sup> the Full Court emphasised the discretionary nature of the assessment of contributions. It said:

The task of assessing contributions under s 79 of the Act is an holistic one; what is required is to evaluate the extent of the contributions of all types made by each of the parties in the context of their particular relationship.<sup>76</sup>

The Full Court in *Petruski* cited from the Full Court in *Lovine & Connor*<sup>77</sup> and emphasised that assessments of contributions were made in percentages rather than in precise dollar terms:

No amount of devotion to mathematics is capable of transforming a discretionary exercise involving many component parts, each mostly unamenable to precise computation, into one of aggregating separately finely calculated components to reach an overall outcome...

As part of the process of ultimately determining just and equitable orders under s 79 there is included a complex of discretionary assessments and judgments of many components of contribution, only some of which are capable of measurement in money terms and then often only in historical, rather than present, money terms. Any dictate to the effect that in the course of assessment each disparate component part

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<sup>73</sup>(2013) FLC 93-545 at para 85

<sup>74</sup>(2013) FLC 93-545 at para 86

<sup>75</sup>[2013] FamCAFC 15

<sup>76</sup>[2013] FamCAFC 15 at para 49

<sup>77</sup>[2012] FamCAFC 168

or kind of contribution must be assigned a discrete and identifiable value or percentage is antithetical to the nature of the discretion involved.<sup>78</sup>

The Full Court confirmed that the discretion is wide and that reference to other cases is usually unhelpful, saying:

Counsel for the wife...cited a number of first instance decisions where the court had, in relatively short marriages, assessed the percentage entitlements of the parties at levels similar to that contended for by the wife to indicate that the result reached by his Honour departed so much from the results in these cases that his Honour was plainly wrong. We consider such an exercise to be unhelpful. The task to be undertaken by a trial judge in applying ss 79(2), 79(4) and 75(2) of the Act requires the trial judge to consider the particular circumstances of the case before him or her in determining whether any and if so what order should be made. What another judge may do in another case on the basis of the facts in that case can rarely if ever determine what is done in the case at hand.<sup>79</sup>

In *Jarrott & Jarrott (No 2)*<sup>80</sup> the Full Court made property orders following a successful appeal by the husband. The Full Court did not accept that the trial Judge erred by including the husband's post-separation inheritance of \$110,000 in the asset pool, but for the purpose of re-exercising Her Honour's discretion, considered it preferable to treat the inheritance as a separate asset. It said:

That is because the inheritance was received after the separation of the parties, and the wife made no contribution, direct or indirect, financial or non-financial, to its acquisition, conservation or improvement. In those circumstances, however viewed, and at whichever "step" it is considered, the significance of the inheritance ultimately turns on its impact as a financial resource of the husband pursuant to s 75(2) of the Act.<sup>81</sup>

The total pool including the inheritance was about \$2.18 million. The trial Judge made a 5% adjustment in favour of the husband for post-separation contributions, largely consisting of his inheritance. This resulted in a disparity of 10% in his favour or \$200,000. The Full Court was not satisfied that this disparity was appropriate. Re-exercising the discretion, it excluded the inheritance from the pool and made a 2% adjustment for contributions of \$45,000, making a disparity of \$90,000. It then made an adjustment under s 75(2) for the husband's post separation inheritance. As other factors under s 75(2) also favoured the wife, a 10% adjustment was appropriate.

Interestingly, the outcome for the parties differed little after two Full Court hearings. Whilst the husband was successful in his appeal, increasing his entitlements of the pool from 65% to 68% and kept his inheritance out of the pool, he had to pay the wife about \$722,000 rather than \$765,000.

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<sup>78</sup>[2012] FamCAFC 168 at paras 41-2

<sup>79</sup>[2012] FamCAFC 168 at para 74

<sup>80</sup>[2012] FamCAFC 72

<sup>81</sup>[2012] FamCAFC 72 at para 74

## Inheritances

In *Sinclair & Sinclair*<sup>82</sup> Cronin J usefully outlined earlier inheritance cases. The parties had over \$7 million of assets. Most, if not all, were contributed by the wife who received an inheritance from her father many years before. The parties married in 1959, had 3 children who were adults and separated in either 1970 or 1985/86. The husband sought an order that he retain assets of about \$1.8 million.

His Honour concluded that about three-quarters of the pool was unrelated to the direct contributions of the parties themselves. The parties contributed equally to the remaining one-quarter. He assessed the husband's contributions as 12.5% of the pool of \$7.3 million or \$912,000.

Cronin J said in relation to using a quarantine approach rather than any of the other options for dealing with an inheritance:

Isolating or quarantining an inheritance must be cautiously done to ensure that earlier important contributions to the family in particular, are not ignored. As will be seen by the evidence here, there is a distinct possibility of that happening if the focus is entirely on the assets received by the wife from inheritances and gifts.<sup>83</sup>

Many of the inheritance cases referred to by Cronin J involved inheritances received later in the marriage or post separation.

## Waste and add-backs

A party may try to convince the court that the other party has made a negative rather than a positive contribution to the assets thereby "wasting" rather than increasing the value of the assets and that this negative contribution should be added back to the pool as a notional asset. The leading case is *Kowaliw & Kowaliw*.<sup>84</sup> Another significant case is *Weir & Weir*<sup>85</sup> where the Full Court said that if there is found to have been deliberate non-disclosure, the Court "should not be unduly cautious about making findings in favour of the innocent party."<sup>86</sup> Following the *Weir* line of authority can result in the Court assuming the existence of non-disclosed assets and adjusting the known assets accordingly.<sup>87</sup>

A reconsideration of these principles following the High Court's decision in *Stanford v Stanford* is underway. For example, in *Watson & Ling*<sup>88</sup> the sum of \$85,000 was drawn down by Ms Ling on one of the mortgages in her name and paid to various family members. The application for an order that the sum of \$85,000 be added back into the asset pool as a

<sup>82</sup>[2012] FamCA 388

<sup>83</sup>[2012] FamCA 388 at para 23

<sup>84</sup>(1981) FLC 91-092

<sup>85</sup>(1993) FLC 92-338

<sup>86</sup>(1993) FLC 92-338 at p 79, 593

<sup>87</sup>E.g. *Mezzacappa & Mezzacappa* (1987) FLC 91-583;

<sup>88</sup>[2013] FamCA 57

notional asset and attributed to Ms Ling was refused by Murphy J. He considered that the options for recognising conduct which amounted to "waste" or the "premature distribution" of the existing legal and equitable interests of the parties were pursuant to s 75(2)(o)<sup>89</sup> or within the assessment of contributions. He said that the "non-dissipating party" might have made "a disproportionately greater indirect contribution to the existing legal and equitable interests...if it is established that, but for the other party's unilateral dissipation, those existing legal and equitable interests would have been greater or had a greater value."<sup>90</sup>

Murphy J did not consider "that justice and equity requires the withdrawal and use of the money by Ms Ling to be taken into account."<sup>91</sup> Considering the effect of *Stanford* on add-back arguments, Murphy J said:

Where, but for the disposal of money or other property by one party, legal or equitable interests in it would have been part of those existing at trial, it may be possible to assert, in the particular circumstances of a case, that the money or property is nevertheless to be considered as part of the existing legal or equitable interests of the disposing party (sham transactions and circumstances where it can be established that the property is held, for example, on trust by another for the disposing party are examples). The investigation of issues of that type might be seen to be part of the establishment of the existing legal and equitable interests at trial – a task which the majority of the High Court in *Stanford* (at [37]) said should be the first step in considering, pursuant to s 79(2) (cf s 90SM(3)), whether it is just and equitable to make an order.

In many other cases, for example those which come within the convenient rubrics of "waste" ... or "premature distribution" ..., legal and equitable title to the money or property will have passed. It could not be said that the money or property is part of the "existing legal or equitable interests" of a party or the parties. The notion that such money or property should be treated as a "notional asset" or "notional property" appears to run contrary to the thrust of the decision in *Stanford*: at issue is the consideration of two separate questions, the first of which is whether *existing legal or equitable interests* should be altered...

Where the Court has determined that it is just and equitable to make an order pursuant to s 79(2) or s 90SM(3) and there is clear evidence that one party has engaged in conduct and, but for that conduct, the legal and equitable interests of a party or the parties (or the value of those interests) would have been significantly greater, justice and equity may require recognition of the unfairness inherent in those circumstances in the terms of the orders to be made.

How might that be recognised? First, consistent with existing authority, it can be recognised pursuant to s 75(2)(o) (cf s 90SF(3)(r))...Secondly, it might be contended that it might be recognised within the assessment of contributions. This Court has long eschewed the notion of "negative contributions"...Nevertheless, it might be argued that the "non-dissipating party" can be seen to have made a disproportionately greater indirect contribution to the existing legal and equitable interests (for example to their preservation) if it is established that, but for the other party's unilateral dissipation, those existing legal and equitable interests would have been greater or had a greater value.

The assessment of the circumstance under discussion is, ultimately, a matter of discretion ... Equally, however, authority dictates that it will be "the exception rather

<sup>89</sup> e.g. *Omacini & Omacini* (2005) FLC 93-218, *Browne & Green* (1999) FLC 92-873

<sup>90</sup> [2013] FamCA 57 at para 33

<sup>91</sup> [2013] FamCA 57 at para 36

than the rule" ... that a direct dollar adjustment equivalent to the amount of the alleged dissipation of the pool is made to the otherwise entitlement of a party. It may be that aspects of the erstwhile treatment of legal fees pre-*Stanford*...will require further consideration in an appropriate case.<sup>92</sup>

In *Baglio & Baglio*<sup>93</sup> Murphy J reiterated his statements in *Watson & Ling* and said in relation to add-backs:

The parties also agreed that \$90,000 should be "added-back" to the pool in respect of the mother's legal fees. In my view, the role of "add-backs" or more specifically, the concept of "notional property" in property proceedings may need to be revisited in light of *Stanford*. The emphasis on the predominance of *existing* legal and equitable interests raises concerns over the place of "notional" assets or a "notional pool" as a means of dealing with a finding of inequity or injustice arising from the use by one party of property or funds which, but for that use, would have been part of the legal and equitable interests of the parties at trial...<sup>94</sup>

In *Bateman & Bowe*<sup>95</sup> Murphy J adhered to the principles he expressed in *Watson & Ling* in circumstances where the parties had been separated for three years and there was a dispute about how matters which had occurred post-separation should be taken into account. He noted that:

- Addbacks are "the exception rather than the rule"<sup>96</sup>
- Existing legal and equitable interests in property should be valued at the date of trial save in "exceptional circumstances"<sup>97</sup>
- Parties are not expected to go into a state of suspended economic animation after separation pending the resolution of their financial arrangements.<sup>98</sup>

Murphy J also said:

A particular consideration in that respect is that an addback brings to account, in current dollar terms and in current circumstances, a dollar for dollar accounting of past actions undertaken in past circumstances expressed in past dollar terms. It is, axiomatically, a mathematical exercise occurring within a broader overall assessment of contributions, including post-separation contributions, and the exquisitely discretionary s 90SF(3) considerations which is quintessentially not a mathematical exercise ...

The sum of \$20,000 was identified as payable in respect of legal fees and it seems relatively clear that it was used in that way. It is, then, susceptible to being added back ... However, I do not consider it just and equitable to do so. The payment was made within the broader post-separation financial circumstances about to be discussed which, in my judgment, do not point to justice and equity requiring the sum to be added back.<sup>99</sup>

Much of the \$250,000 which the husband contended had disappeared following the sale of a real property had been used by the wife reasonably in the support of herself and the

<sup>92</sup> [2012] FamCA 57 at paras 29-31, 32-34

<sup>93</sup> [2013] FamCA 105

<sup>94</sup> [2013] FamCA 105 at para 186

<sup>95</sup> [2013] FamCA 253

<sup>96</sup> At para 50 relying on *C & C* [1998] FamCA 143 at para 46

<sup>97</sup> At para 35 relying on *M & M* [1998] FamCA 42

<sup>98</sup> At para 36 quoting from *Marker & Marker* [1998] FamCA 42 at para 2.11

<sup>99</sup> [2012] FamCA 253 at paras 51, 57

child including school fees and mortgage payments. The husband made no financial contributions to the support of the wife and the child for five months of this period.

Le Poer Trench J in *Alexiou & Alexiou*<sup>100</sup> referred to *Stanford* and said:

The section speaks of "the property of the parties to the marriage or either of them". It makes no reference to notional property. It makes no reference to the property being ascertained at a time other than the apparent date of determination. The court has to make an order which is just and equitable. The ability to have regard to an unusual fact in a case is provided for in s 79(4)(e) which requires the court to have regard to the matters referred to in s 75(2) so far as they are relevant. Section 75(2)(o) enables the court to "take into account" "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken to account."

In the particular circumstances of this case I propose to take this aspect of the parties' income and expenditure post separation into account under section 75(2) when I come to consider same.<sup>101</sup>

In *Bevan & Bevan* the Full Court considered *Stanford*. In relation to add-backs the majority in *Bevan* said:

We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage – and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property...<sup>102</sup>

Finn J agreed and also queried whether the courts were properly treating the unsecured liabilities of one or both parties.

Although waste, add-backs and notional property arguments were difficult to succeed in pre-*Stanford*, they are now even more difficult. This raises many issues of concern, such as:

- Will parties feel encouraged to exercise "self-help" or otherwise dissipate assets because if they are taken into account at all, it will be by way of a percentage adjustment which is unlikely to match the dollar amount removed from the pool?
- Will there be greater litigation at an interim stage to try to avoid dissipation of the pool? Will parties seek injunctions, seek interim property orders to give one or both parties access to funds in a formal manner which can be taken into account as at the final hearing as having been made under s 79 (rather than rely on informally

<sup>100</sup>[2012] FamCA 1146

<sup>101</sup>[2012] FamCA 1146 at paras 246-7

<sup>102</sup>(2013) FLC 93-545 at para 792

agreed distributions), join third parties and seek recovery of property transferred under s 106B?

### Special skills

Between 1999 and 2006 there was a series of cases in Australia and England dealing with significant asset pools ("big money cases") and "special", "extra" or "extraordinary" skills, factors or contributions. There was controversy then about whether "special" skills should be given extra weight and, if so, in what circumstances. Part of the controversy related to "special" skills only being given weight with respect to financial contributions and not for homemaking and parenting contributions. In circumstances where a "special" financial contribution had been made, the homemaking parent had usually also made a significantly greater contribution in their role.

The debate was recently revived in two trial judgments. As of 20 August 2013, judgment had not been delivered by the Full Court with respect to the appeals in those cases, *Kane & Kane*<sup>103</sup> and *Smith & Fields*.<sup>104</sup>

In *Kane*, Austin J rejected the wife's argument that her contributions in a 29 year marriage were equal to those of the husband. He awarded the \$4.2 million asset pool on a contribution basis only as to 63.5% to the husband and 36.5% to the wife. Austin J noted the husband's skills in selecting and pursuing the investment in the shares of a particular company.

In *Smith & Fields* Murphy J also dealt with a 29 year marriage. The pool was between \$32 and \$40 million, of which the husband was awarded 60%. Murphy J said:

Whilst *some* assistance may be rendered by the use of expressions such as "special skills" or "special" or "extraordinary" contribution, in my view, the use of such expressions is apt to mislead and to obscure, rather than illuminate, the task at hand. The real danger lies in the promulgation of a notion that, by establishing "special contribution" or "special skills" – whatever the expression, or the indicia comprising any such expression might be said to be – a result of a particular type, or a particular range, should follow. That is an improper fetter on an "extraordinarily wide" discretion. It smacks of a presumption antithetical to what the section requires.

However unsatisfactory or uncomfortable an "extraordinarily wide" discretion may feel for a trial judge, it is the exercise of precisely that which the section requires and it is precisely that which confronts a trial court – albeit informed by the mandatory considerations inherent in s 79....The very wide discretion inherent in s 79 requires the Court "... to do justice according to the needs of the individual case, whatever its complications might be." (*Norbis v Norbis* (1986) 11 CLR 513 at 520). That necessarily involves an acknowledgement that the circumstances of each marriage are different and that it is to those particular circumstances to which the discretion must be applied.

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<sup>103</sup>[2011] FamCA 480

<sup>104</sup>[2012] FamCA 510

Shape can be given to that task, in my view, by looking at the nature, form, characteristics and origin of the property comprising the "property of the parties or either of them"...Those matters can bear upon an analysis of the parties' respective contributions. (The contributions that each party has made to, for example, a superannuation interest over 29 years might be seen to be different in character to those made by each party to, for example, an inheritance received a year before separation). Further shape can be given to the task by examining the nature and form of the matrimonial partnership; to what Deane J in *Mallett* referred to (at 640) as "...a practical union of both lives and property..." The nature and form of the particular union can, too, bear upon an analysis of contributions. Did each of the parties contribute physically, emotionally and financially to their union? Did the parties plan and execute decisions together or was their partnership, despite in law being a "marriage", anything but a manifestation of any such practical unity?<sup>105</sup>

Murphy J expressly rejected the notion that justice and equity required a distinction to be drawn between the contributions of the parties by reason of the husband being possessed of "special skills" or because his contributions could be described as "special". He based his determination that the husband had made greater contributions than the wife on his analysis of the nature, form and characteristics of the contributions of varying types made by each of the parties". He assessed contributions as 60/40 in favour of the husband because of the ingenuity and stewardship which the husband had brought to the business outside of the other contributions made to the business by each of the parties. Those factors were particularly important in creating an extremely successful business, particularly in the context of an industry prone to economic vagaries. The husband's input into the design of the buildings which the business built and sold was also a significant contribution.

The husband's Counsel, Mr Kirk SC, prepared a useful table of "comparable big money cases" which His Honour repeated<sup>106</sup> and summarised the outcomes in:

- *Ferraro & Ferraro* (1993) FLC 92-335
- *JEL v DDF* (2001) FLC 93-075 (*Lynch*)
- *Mclay & Mclay* (1996) FLC 92-667
- *Phillips & Phillips* [1998] FamCA 1551
- *Webster & Webster* (1998) FLCF 92-832
- *Whitely & Whitely* (1992) FLC 92-304

Murphy J considered that it was appropriate to consider earlier decisions but they should not fetter the wide discretion saying:

Reference to counsel's table shows a range of entitlements to the wives in those cases (and it might be observed that in each case it is the wife who receives the lower proportion of the assets) of between 27.5 per cent and 40 per cent. I do not propose to descend into a detailed analysis of each of those decisions; doing so is, in my view, contrary to the principles to which I have earlier referred. I am also

<sup>105</sup>[2012] FamCA 510 at paras 26-8

<sup>106</sup>[2012] FamCA 510 at para 87

conscious of the fact that authorities different to those collated might be produced in an alternative table and be said to be illustrative of a different "range" – a difficulty inherent in all non-exhaustive comparisons. Nevertheless, results arrived at by an appellate court in other cases where there is a reasonable degree of comparability with the case under consideration cannot, if the jurisprudence is to have a genuine semblance of consistency (despite the wide discretion within it), be simply cast aside as irrelevant.<sup>107</sup>

## Conclusions

Although there are uncertainties, the High Court majority in *Stanford* 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 look at their property and financial resources. 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 parties to a marriage are not separated, however it will be more difficult to establish that it 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. The extent to which s 79(2) continues to "permeate" the rest of s 79 when the Court assesses contributions and other matters is unclear, particularly following the Full Court's first pronouncement on the effect of *Stanford* in *Bevan*, where it considered "permeate" to be distinguishable from "conflate" and did not rule out using the four step process in the future.

Legal practitioners and their clients are facing a period of uncertainty, while the Family Law Courts adjust to life post-*Stanford*. The early signs are that the four steps may no longer exist and that the days of notional add-backs of the full dollar amounts spent by one party are gone. This may lead to more litigation - injunctions, joining third parties, interim property orders and s 106B applications.

The "four steps" are looking very shaky and the structure that is replacing them is being built without either a planning permit or a building permit.

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<sup>107</sup>[2012] FamCA 510 at para 89