Stanford – Whatever happened to the four steps?

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Introduction

Judgment was delivered by the High Court in *Stanford v Stanford*[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, 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 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 first, before consider the other matters in s 79. 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 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, but attempts have been made by the Family Law Courts and lawyers to restrict its impact to a narrow band of cases. Although it is still early days, it is likely that the impact of *Stanford* will be significant and the "four step" approach may no longer be valid.

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

[1] [2012] HCA 52

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 was in his sole name as he had acquired it 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 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[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).

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[2] (2011) FLC 93-483
[3] (2011) FLC 93-483, at para 112
[4] [2012] HCA 52, at para 10
[5] (2012) FLC 93-495
[6] (2012) FLC 93-495 at para 58
[7] (2012) FLC 93-495,at para 52

Grounds of appeal to the High Court

The husband was granted special leave to appeal to the High Court.[8] 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.[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...
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> (b) if the court is of the opinion:
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> (i) that it would have made an order with respect to property if the deceased party had not died; and
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> (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 sub-section 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, 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]

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[8] [2012] HCA Trans 154
[9] [2012] HCA 52, at para 13
[10] (1986) FLC 91-767
[11] [2012] HCA 52 at para 24
[12] [2012] HCA 52 at paras 65-66

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 rejected the husband's argument that a s 79 order can only be made if the parties have separated. 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.

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. In support of the argument that a s 79 order can only be made if the parties have separated, 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. 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 where the matrimonial cause arose before a party's death by a property claim

[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 para 14
[15] [2012] HCA 52 at para 26
[16] [2012] HCA 52 at para 27

being made before death 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, in circumstances where during the marriage they had arranged their affairs in a particular way.

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.[17] 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 the "contribution bank account", but would not be relevant because of the finality of the property order.[18]

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." [19]

Relying on *Fisher v Fisher*,[20] 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."[21] 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."[22]

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..."

The manner in which the court must exercise 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."

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[17] section 83 of the Act
[18] *Stanford v Stanford* [2012] HCA Trans 206
[19] [2012] HCA 52 at para 29
[20] (1986) FLC 91-767
[21] [2012] HCA 52 at para 30
[22] [2012] HCA 52 at para 31

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 appears to be consistent with existing authority and practice, but the High Court majority rejected 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), rather than *after* looking at s 79(4). Section 79(2) and s 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 or "palm tree justice";
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, 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,[23] 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[24] that "[c]ommunity of ownership arising from marriage has no place in the common law."[25] 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

[23] [2012] HCA para 39
[24] [2012] HCA 52 at para 39
[25] *Hepworth v Hepworth* (1963) 110 CLR 309 at 317

Act.[26] The parties' rights must be "determined according to the law" not by reference to other, non-legal considerations.[27]

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

1. Identify and value the asset pool
2. Assess contributions under s 79(4)(a)-(c)
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*.[28] 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*[29] making 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 *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]

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[26] [2012] HCA 52 at paras 48,52
[27] [2012] HCA 52 at paras 48,52
[28] (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
[29] (1984) FLC 91-507
[30] A payment of $612,931 to the wife's legal personal representatives upon the death of the husband.
[31] [2012] HCA 52 at para 51

Prior to *Stanford*, the determination under s 79(2) of whether it was just and equitable to make an order, was 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 ..."[32]

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.

Now, 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. It is also 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 is it a 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? Did the High Court, by not referring to the "four step" process and by emphasising the importance of looking at the wording of the Act, reject the notion of a 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)."[33]

By contrast, an involuntary separation as occurred in *Stanford*, does not make it just and equitable of itself to make a property settlement order.[34] 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 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."[35]

The High Court majority emphasised that in relation to "just and equitable" it is not possible "to chart its metes and bounds."[36] In other words, it is not possible to chart the boundaries of what

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[32] *Hickey and Hickey and Attorney General for the Commonwealth* (2003) FLC 93-143 at p 78,386
[33] [2012] HCA 52 at para 42
[34] [2012] HCA 52 at paras 43-4
[35] [2012] HCA 52 at para 45
[36] [2012] HCA 52 at para 40

is just and equitable. The High Court majority referred[37] to the Full Court's first judgment and said that the Full Court was correct to conclude[38] 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:

- 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.

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. Although not all of the following were articulated in *Stanford*, possible 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
- Contributions and other matters in s 79(4) and s 75(2)
- The impact on third parties such as creditors and any trustee in bankruptcy
- Whether there is justification for a party to be relieved of the responsibility for a debt

So what does this mean for s 79?

Arguably, 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.

[37] [2012] HCA 52 at paras 46-7
[38] (2011) FLC 93-483 at para 119

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"[39] 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 presumption 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).

What next?

The *Stanford* approach to s 79 (and s 90SM) applications raises some obvious repercussions, and some less obvious ones. We are in 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 the practical problems are:

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) or is it simply enough for the parties to state their claims?
2. In determining whether it is just and equitable to make an order, in how much detail can the Court consider s 79(4) and s 79(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?
3. Can the Court determine, as some Courts already have, that if contested proceedings are on foot, that it is just and equitable to make a s 79 order because both parties seek one?
4. Is there 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.
5. What matters will courts consider in determining whether it is just and equitable under s 79(2) to make the order? Whilst 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."[40]
6. 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

[39] [2012] HCA 52 at para 42
[40][2012] HCA 52 at para 36

order?[41] This often occurred in the "fourth step" when considering s 79(2) which may no longer exist.

7. 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 such as against overseas assets before a court decides that it is just and equitable to make orders?
8. How will wastage and add-back arguments be considered?[42] Can an equitable claim underpin an add-back or notional property? Will legal costs still be added notionally back to the pool? If notional property cannot be created, will considering these issues under s 79(4) or s 75(2)(o) result in the same outcome? Will s 106B applications and early injunctions be necessary to protect the pool?
9. 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 keep assets away from the trustee.[43]

Excerpts from recent trial judge decisions

Watson and Ling [2013] FamCA 57, 12 February 2013, Murphy J

11. 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...

12. Provided the discretion is exercised judicially, it is at large; it is neither possible nor desirable to specify its "metes and bounds" ... Recognition is given to the fact that the circumstances of individual marriages (their nature, form and characteristics) can and do differ and those differences – the way in the which the parties have organised and lived their marriage/relationship – may be relevant to the exercise of the s 90SM(3)/s 79(2) discretion. Equally, provided that the questions required by s 90SM(3)/s 79(2) and s 90SM(4)/s 79(4) are seen as separate and applied as such, and not conflated, the enumerated factors within s 90SM(4)/s 79(4) can inform the s 90SM(3)/s 79(2) discretion together with any such other considerations as are properly relevant ...

13. 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...

15. The emphasis by the High Court in establishing the existing legal and equitable interests of the parties as a precursor to answering the question required by s 79(2)/s 90SM(3) can be

[41] *Mayne & Mayne (No 2)* (2012) FLC 93-510
[42] *Kowaliw* and *Kowaliw* (1981) FLC 91-092
[43] *Commissioner of Taxation and Worsnop* (2009) FLC 93-392 but cf *The Trustees of the property of John Daniel Cummins v Cummins* [2006] HCA 6

seen to derive from the fact that s 79/s 90SM is concerned with rights in property which "...have their source in [the] relationship..." but which "...are created by curial order..."; "... orders made under s 79 [cf s 90SM] ... perform a dual function by creating and enforcing rights in one blow, so to speak..." (per Mason and Deane JJ, *Fisher* at 453). Given that the relationship does not itself *create* interests in property, due recognition must be given to existing legal and equitable interests ...

27. The sum of $85,000 was drawn down by Ms Ling on one of the mortgages in her name. She paid those funds to various family members. This is explained as her being part of an "Asian Community Bank" arrangement within the Asian community. Ms Watson, on behalf of the estate, says in her affidavit that, "I seek an Order that the sum of $85,000.00 be added back into the asset pool as a notional asset and attributed to the Respondent."

29. 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* ... 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.

30. In many other cases, for example those which come within the convenient rubrics of "waste" (see *Kowaliw & Kowaliw* (1981) FLC 91-092) or "premature distribution" (see, for example, *Townsend*), 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.

31. Yet, of course, unilateral actions of the type described might very well be a consideration – indeed, in an appropriate case, an important consideration – in deciding if any order should be made altering the existing interests of a party or parties.

32. 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 be significantly greater, justice and equity may require recognition of the unfairness inherent in those circumstances in the terms of the orders to be made.

33. 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)) (see, for example, *Omacini & Omacini* [2005] FamCA 195; (2005) FLC 93-218, *Browne & Green* [1999] FamCA 1483; (1999) FLC 92-873 and *Cerini*). 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” (see, for example, *Antmann & Antmann* (1980) FLC 90-908). Nevertheless, it might be argued that the "non-dissipating party" can be seen to have made a disproportionally 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.

34. The assessment of the circumstance under discussion is, ultimately, a matter of discretion (see, for example, *Cerini* at [46] and *Townsend* at 81,654). Equally, however, authority dictates that it will be "the exception rather than the rule" (*Cerini* at [46]) 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* (see, for example, *Chorn & Hopkins* [2004] FamCA 633; (2004) FLC 93-204) will require further consideration in an appropriate case.

35. Importantly, of course, as has been emphasised in many authorities including those cited above, not every dissipation by a party can be seen to involve an affront to justice and equity; again the circumstances of the individual relationship must be assessed.

36. I do not consider that justice and equity requires the withdrawal and use of the money by Ms Ling to be taken into account.

Baglio & Baglio [2013] FamCA 105, 27 February 2013, Murphy J

181. As a result of those matters, the Court’s approach to s 79 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 ...

186. The parties are 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. In that respect, I repeat here what I said in *Watson & Ling*...

187. Despite the reservations I have, in light of the fact that *Stanford* was not decided at the time of the hearing (and neither party sought to re-open so as to argue any issues emanating from it) and the fact that the parties are agreed as to the treatment of legal fees, I have determined that it is just and equitable to treat that particular issue in the manner agreed between the parties.

188. The funds used by the mother to pay her legal fees were derived from the $100,000 AMP line of credit and the parties are similarly agreed that that should be included (albeit obtained post-separation by the mother). The whole of the $100,000 has been included as it is accepted that the mother used the approximately $10,000 remaining to purchase a motor vehicle which has also been included in the pool.

Daymond and Anor & Daymond and Ors [2013] FamCA 215, 9 April 2013, Murphy J

74. Here there was a "voluntary separation."[43] Property, in one form or another, was used commonly and decisions were made by each of the parties about property within the context of a 38-year relationship. Here it can be said that:

> "...the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumptions 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 [has been] brought to an end with the ending of the marital relationship."

Gaucho & Gaucho [2013] FamCA 120, 28 February 2013, Cronin J

161. Importantly, the plurality went on to say that whether or not to make an order is not to be answered by beginning with an assumption that a party has a right to have property divided or a right to an interest in “marital property” which is fixed by reference to s 79(4). Their Honours said:

> "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."

162. Thus, there must be a reason based upon the principles in the Act to interfere with the legal and equitable interests and to use the words of the plurality, "and whatever may have been (the parties') stated or unstated assumptions and agreements about property interests during the continuance of the marriage."

163. 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. ...

177. Counsel for the wife submitted that the wife should be given $78,000. He said that this was following the "four-step process of reasoning." Having regard to my reference in these reasons to the High Court’s decision in *Stanford*, I doubt very much whether the so-called four-step process is of assistance.

Friar & Friar and Anor [2013] FamCA 121, 1 March 2013, Murphy J

1. Central to proceedings instituted by the wife in which she seeks relief pursuant to s 79 ... is her additional claim, said to be based in constructive trust, in respect of a property the legal and equitable interests in which, prior to its sale in early 2012, vested in the husband and the second respondent ... who is his sister. ...

96. As it is the applicant who seeks to establish s 79 relief, the absence of evidence and submissions from her directly relevant to the questions required by s 79 causes me grave concerns as to whether I can do justice as between the parties without the further directions to which I alluded at the time. The parties should have the opportunity to address that which the section requires:

- In light of the decision in respect of "the wife’s trust claim" what does the evidence before the Court reveal as the existing legal and equitable interests of the parties and how did they derive;
- Should the Court exercise the discretion contained within s 79(2) of the Act and why by reference to the circumstances of this particular marriage and the "... express and implicit assumptions that

underpinned the existing property arrangements that have been brought to an end by the voluntary severance of the mutuality of the marriage relationship" (*Stanford* at [42]);

- If so, what is the evidence about the matters required to be considered pursuant to s 79(4) and what submissions are made in relation thereto;
- What is the evidence about the matters required to be considered pursuant to s 79(4)(e) – i.e. the so-called "s 75(2) factors";
- What orders reflect justice and equity by reference to the result arrived at by reference to the matters which s 79(4) requires to be taken into account.

Sebastian & Sebastian [2013] FamCA 191, 28 March 2013, Young J

140. The operation of s 79 was recently considered by the High Court in *Stanford v Stanford* (2012) 293 ALR 70; [2012] HCA 52; (2012) FLC 93-518. As was noted by Coleman J in *Martin & Crawley* [2012] FamCA 1032 at para 93, *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". ...

143. What is clear from the above is that *before* examining what order should be made pursuant to an assessment of the factors identified in s 79(4), the Court *must* be satisfied that pursuant to s 79(2) it is just and equitable to make an order. As was recognised by the High Court it will ordinarily be just and equitable to make an order where parties have voluntarily separated. Conversely, this consideration will be complex and harder to establish in cases where the parties are involuntarily separated. While the latter was the factual scenario that the High Court was faced with in *Stanford*, it is indeed a very rare situation and the uniqueness of the facts in that case must always be remembered. Generally this Court is faced with cases of voluntary separation, where ordinarily it will readily be established that it is just and equitable to make an order.

144. What can be derived from *Stanford* is that the following approach is strictly required by the Act:

- the identification of the parties' existing legal and equitable interests in property;
- an assessment of whether or not it is just and equitable to make an order, as is required by s 79(2); and
- if it is just and equitable to make an order, an assessment of what order should be made by applying s 79(4). Although not expressly authorised by the High Court, it may be useful to further categorise this last point into a separate consideration of contributions and s 75(2) matters as is commonly done by this Court.

145. There are two important matters that I discern from the above approach.

146. The first, as was stated by Coleman J in *Martin & Crawley* (at para 93) is that since *Hickey* (supra) the requirement to consider the justice and equity of the orders has generally been considered after "and largely in light of" the conclusions reached on 79(4) issues. What is now required, prior to any assessment of s 79(4), is that the Court must first be satisfied that it is just and equitable to make an order altering the interests of the parties in property.

147. The second and equally important consideration is whether or not the justice and equity requirement should be further considered after the Court has examined the s 79(4) and relevant s 75(2) factors. This uncertainty was commented upon by Coleman J in *Martin & Crawley* at para 199, where his Honour stated that:

> ...In the light of the High Court's decision in Stanford, two questions arise. The first is whether, having considered justice and equity earlier in these reasons, the issue requires

revisiting. If it does, the second question becomes, by reference to what statutory or other criteria that exercise is undertaken in a principled way. Second guessing what the High Court intended in that regard is a hazard a trial Judge does well to avoid.

148. This is an important consideration, given that for so many years this Court has frequently approached a s 79 division of property by considering the overall justice and equity of the orders as a fourth and final stage. There has been a long and unresolved debate as to what the Court may do at that final stage, that is whether or not the Court is permitted to make a further adjustment or whether that stage should be concerned only with the form and structure of the orders. There is now uncertainty as to whether or not that final stage is at all permissible.

149. I concur that a trial judge should avoid "second guessing what the High Court intended". But it is nonetheless useful to examine Coleman J's approach in *Martin & Crawley.*

150. In summary, his Honour found that it was just and equitable to make orders in the circumstances of the case, given that the marital relationship had ended and both parties sought that "their interests in their marital property should differ from their current interests". His Honour made that finding after identifying the parties' existing property, but before considering what orders were to be made as a result of considering the factors in s 79(4).

151. After then considering the s 79(4) contribution issues his Honour made a "preliminary" finding as to how the property of the parties should be divided. Notwithstanding any uncertainties following *Stanford*, his Honour then stood-back from the "preliminary" conclusion and assessed the justice and equity of his intended orders. In doing so, his Honour effectively considered the justice and equity requirement at two separate stages: first, in determining whether it was just and equitable for an order to be made and second, in determining whether the preliminary decision (reached after a consideration of the s 79(4) factors) was just and equitable.

152. It is my opinion that post-*Stanford* a Court is required to:

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

153. What remains uncertain is whether it is permissible for a Court to finally reflect upon and reconsider, on an overview basis, if the proposed orders are just and equitable.

154. My own approach at that final stage has been to reflect upon and then ask of myself the question of whether the orders are just and equitable in their division of property, their structure and particularly in their monetary outcome.

155. I asked Senior Counsel for both parties to make submissions on this issue. Both submitted that that this Court was still required to assess the overall justice and equity of the proposed orders, most logically at the final stage. They did not submit that *Stanford* had the effect of prohibiting this Court from doing so and I find that is wholly consistent with *Mallet v Mallet* ... and *Norbis v Norbis* ...as to the importance and role of s 79(2).

T & R [2013], unreported, 9 May 2013, Cronin J

16. In determining what is just and equitable, it is clear from the words of the provision and the statements of the *Stanford* Court that the assessments under s 79(2) and s 79(4) are not to be conflated. While some or all of the factors in s 79(4) may be relevant to the just and equitable

inquiry under s 79(2), it is not an exhaustive checklist. Therefore, once the Court has decided to use the power under s 79 to make an interim property order as it would be just and equitable to do so (79(2)), the pathway to be followed is that outlined in the legislation, which requires the next consideration to be the form that the order should take with regard to the indicia in s 79(4).

17. The facts of the case will determine the form the order should take to be just and equitable. In interim proceedings, the just and equitable inquiry encompasses both the circumstances at the time of the hearing and the likely effect on final orders (if any), to avoid the prospect of subsequent proceedings under s 79A.

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.

It appears that we are in for a period of uncertainty, while the Family Law Courts adjust to life post-*Stanford*. The early signs are that the four steps 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, 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.

For further discussion about the impact of *Stanford* see articles by the writer on *www.lawchat.com.au*:

- *Stanford*: An examination of s 79 by the High Court.
- *Stanford*: Implications for Trustees in Bankruptcy.
- Post *Stanford*: Making property settlement orders where parties are not separated or are involuntarily separated.