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PROPERTY

# *Hsiao & Fazarri: The High Court considers gifts and fresh evidence*

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The High Court rarely grants special leave to appeal and does so even more infrequently in family law matters. When it does hear a family law appeal family lawyers expect that the outcome will either provide clarity as to an aspect of the law or change their understanding of the law. High Court cases such as *Mallet v Mallet* (1984) FLC 95-507, *Norbis v Norbis* (1986) FLC 91-712 and *Thorne v Kennedy* (2017) FLC 93-807 are examples of ground breaking judgments which changed the way the *Family Law Act 1975* (Cth) (FLA) was interpreted with respect to financial matters.

Sometimes the High Court leaves behind more questions than clarity in its wake. The repercussions of its foray into the proper approach to s 79 *Family Law Act* (FLA) in *Stanford v Stanford* (2012) FLC 93-518 created many uncertainties which remain 8 years later. An opportunity was missed in *Hsiao & Fazarri* (2020) FLC 93-990 to clarify and develop the principles set out in *Stanford.*

In *Hsiao,* the High Court dismissed 3:2 the wife's appeal against the dismissal of her appeal by the Full Court of the Family Court of Australia. The wife did not take part in the trial and the plurality in the High Court held that she could not rectify her case on appeal by presenting fresh evidence and different arguments. The minority said that the wife's failure to participate in the trial meant (at [56]) that "it may well be said that she bears a considerable responsibility for the way in which the matter miscarried", but still found that the appeal should be allowed.

**What did the High Court decide in *Stanford*?**

One of the several pronouncements made by the High Court plurality in *Stanford* regarding the operation of s 79 was raised in *Hsiao & Fazarri.* The plurality in *Stanford* said (at [37]) emphasising "existing" twice:

> "First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to common law and equitable interests of the parties in the property…
> The question posed by s 79(2) is thus whether, having regard to those *existing* interests, the court is satisfied that it is just and equitable to make a property order."

In cases such as *Bevan* & *Bevan* (2013) FLC 93-545 and *Goldsmith & Stinson and Ors* (2019) FLC 93-930 the Full Court of the Family Court considered whether or not it was necessary to decide whether - as between the parties - the legal title accurately reflected their respective equitable interests. In *Bevan* the Full Court said that it seemed unnecessary in many cases to do so (at [77]-[78]):

> "However, where it is accepted that justice and equity require the making of an order, it would seem unnecessary to complicate proceedings by deciding whether one party has an equitable interest in property held by the other, since the ultimate outcome will not be determined by application of equitable principles but rather by reference to ss 79(4) and 75(2).
>
> Nevertheless, there will be cases, of which *Stanford* may have been one, where the assertion (or lack thereof) of an existing equitable interest in property held by the other party may be of critical importance in deciding whether it would be just and equitable to interfere with the existing legal ownership. And of course it will always be important to determine whether one party has an equitable interest in property owned by a third party."

This approach was echoed in *Goldsmith & Stinson,* where the Full Court held that the wife's claim in equity should have been determined first, and if the primary judge had done this he might have taken a different approach to the s 79(2) enquiry as to whether it was just and equitable to alter the parties' interests in property. Another possible consequence of determining the wife's equitable claim first might have been a different assessment of contributions under s 79(4). In *Goldsmith,* unlike in *Bevan* and *Stanford*, the wife sought a declaration under s 78 FLA as well as orders under s 79. The Full Court held that if a s 78 declaration had not been sought the primary judge could have proceeded to the s 79 enquiry without first determining the wife's equitable interest in the property. Therefore, prior to *Hsiao* the statements by the Full Court of the Family Court as to whether and in what circumstances it is necessary to determine the legal and equitable interests of the parties before embarking on the rest of the s 79 exercise, were not very definitive.

**What were the issues before the High Court in *Hsiao*?**

The plurality and the dissenting minority had different views as to the issues before them. In five of her eight grounds of appeal the wife contended that the Full Court erred in upholding the property settlement order either because it was not open to the primary judge to be satisfied that it was just and equitable to make it or because the primary judge's discretion miscarried by reason as the primary judge's failure to take account of the wife's 50% legal interest in the property. The plurality held that neither proposition should be accepted. The other three grounds contended error in the Full Court's refusal to exercise the discretion conferred by s 93A(2) FLA to receive further evidence on appeal. The plurality said that the first issue was re-phrased by the wife in oral argument as whether the gift of a 40% interest in the property by the husband to the wife was voidable for undue influence (or pressure as described by the primary judge) or whether the gift had become absolute by virtue of a subsequent deed. The High Court plurality did not need to decide this first issue as by the time the matter was argued before the High Court the husband had changed his position and no longer contended that the wife had not been entitled legally and beneficially to her 50% interest in the property as joint tenant. The husband conceded that the transfer to the wife was not vitiated by pressure.

In relation to the second issue the High Court plurality found (at [8]) that in circumstances where the wife:

> "...made a deliberate choice not to participate in the trial and not to adduce the further evidence which was available to her, the Full Court was right to decline to receive it on the appeal."

As a result, the wife's appeal failed.

The minority, consisting of Nettle and Gordon JJ, dissented strongly and decided the case on the basis that the primary judge did not give proper effect to the existing legal and equitable interests of the parties.

The plurality considered that the primary judge had approached the matter on the basis that the wife was a joint tenant, and that the wife had accepted before the High Court that the trial judge did this. The minority disagreed with both of these conclusions.

**The facts**

The parties had a very short relationship. The wife was aged 44 years at the date of trial and the husband was aged 58 years. Their intimate relationship began in August 2012 when the husband was still living with his former wife. From March 2013 the parties spent nights together at each other's homes. Before the primary judge the husband contended that throughout their relationship and short marriage they maintained separate homes and whilst they lived together for intermittent periods they did not form a de facto relationship. The primary judge accepted the parties did not have a de facto relationship before their marriage.

The wife was not engaged in paid employment during their relationship and marriage but provided some limited assistance to the husband when they travelled internationally for his employment. They unsuccessfully attempted to have a child. The wife received various benefits from the husband including access to his bank and credit card facilities, payment of expenses, being made a beneficiary of a family trust, a contribution of $20,000 to her superannuation fund and a gift of a new motor vehicle. She also took $40,000 from an account controlled by the husband without his authority.

At the commencement of their relationship the husband had property of approximately $20m which reduced to around $9m following a property settlement with his former wife. By contrast the wife had minimal assets comprising a motor vehicle and some superannuation.

In April 2014 the husband purchased a property for $2.2m financed from his own funds and with borrowings secured against another property. At the time of the settlement of the purchase the husband gifted to the wife a one-tenth interest in the property. The parties were registered as

proprietors of the property as tenants in common in their respective shares. The property was uninhabitable at the time of purchase and the husband paid for renovations to the property but as at the date of the trial neither party had lived there. In December 2014 while the husband was in hospital suffering from a suspected heart attack, he signed a transfer which he said was signed under pressure from the wife to enable the property to be transferred to the parties as joint tenants. The transfer was registered in February 2015.

In March 2015 the parties executed a deed which confirmed that the parties were registered as joint tenants of the property. The wife argued in the High Court that the Deed confirmed the gift. In summary, the Deed provided *inter alia* that:

- If the wife predeceased the husband, the husband intended to gift $500,000 each to the wife's brother and sister;
- The Deed had no application if the parties did not own the property as joint tenants as at the date of the wife's death or if the husband predeceased the wife;
- If the parties separated and the property was still owned by the parties as joint tenants, any property settlement could take into account any payment made or to be made under the Deed;
- The payment to be made to the wife was $1 million if the parties had children together or half of the value of the property with a minimum of $1 million if the parties did not have children together.

On 22 August 2016 the parties married and 23 days later on 12 September 2016, they separated. At the time of the trial the property was valued at $3,070,000.

**The approach of the primary judge**

The matter proceeded before the primary judge without the wife giving evidence or making submissions. The High Court plurality held (at [22]) that the primary judge (reported as *Fazarri & Hsiao* (No 2) [2018] FamCA 447) approached the parties' respective applications to alter their interests in property correctly by first determining what those interests were. The primary judge noted that neither the fact of the marriage nor its ending carried with it an assumption that those interests should be adjusted. He was satisfied that it was just and equitable to make a property settlement order because at the time the property was purchased the parties intended that they would have a lasting relationship and live in the property and this expectation was unfulfilled.

The primary judge did not make detailed findings about what comprised the pool of net assets and its value. As the husband said that the wife was able to work, in the absence of contrary evidence from the wife, the husband's evidence was accepted as it was not implausible. Section 75(2) factors therefore played no part in the assessment of the parties' entitlements. Instead, the

primary judge focused on the contributions made by the parties and assessed the wife's non-financial contributions to the acquisition, conservation or improvement of the property to be modest if not nominal. He assessed the wife as having made a 10% financial contribution to the acquisition of the property being the 10% which had been gifted to her at the time of acquisition. He rejected the husband's contribution argument of a resulting trust in his favour with respect to the 10% interest (at [86]):

> "I struggle to see how the husband can be seen to be making a gift (albeit he may not describe it that way) and then come to the court and have the court accept that as he paid for the item in the first place, on strict contribution lines, he should have it back. In my view, that sort of approach offends justice."

He therefore rejected the husband's argument that as he provided all the funds to acquire the property the wife's legal interest was subject to a resulting trust in his favour and was satisfied that the wife received her initial one-tenth interest as a gift.

Perhaps due to the shortness of the marriage the primary judge did not adopt the usual approach of expressly identifying the property owned by each party at the commencement of the marriage and then decide how much weight they should be given. Initial contributions" in short relationships are normally given considerable weight (e.g. *Goodwin & Goodwin Alpe* (1991) FLC 91-192). If the primary judge had expressly described the initial contributions of the parties at the date of the marriage rather than at the commencement of their intimate relationship, it would likely have been noted that the wife brought a 50% interest in the property into the marriage. However, the primary judge only credited the wife with a 10% interest.

With respect to the balance of the wife's interest in the property the primary judge accepted that the husband had been "badgered" by the wife to give her an additional 40% interest and had therefore "pressured" the husband to make the gift. The primary judge accepted the husband's evidence as plausible, given there was no evidence from the wife.

As the effect of the primary judge's orders was to sever the joint tenancy, the terms of the Deed no longer applied and he considered it was unnecessary to give much attention to the Deed. He observed (at [28] of the High Court judgment) that this was "a short marriage of days and the relationship as a whole, [was] modest". The primary judge ordered the wife to transfer her interest in the property to the husband and the husband to pay her $100,000, in addition to the $80,000 she had already received by way of litigation funding. The effect of the primary judge's orders was to leave the wife with property of $430,000 and the husband with property in excess of $12m.

**The Full Court of the Family Court**

The Full Court of the Family Court dismissed the wife's appeal along with her application to file further evidence in the appeal. In holding that the wife had not established a proper basis for filing any further evidence, the Full Court noted that a deliberate failure to call evidence at trial ordinarily weighs heavily against the exercise of discretion. The wife conceded that almost all the documents and evidence that she sought to file by way of further evidence were available to her at the time of the trial.

The wife challenged the primary judge's finding that the transfer of the property to the parties as joint tenants was not to be seen as a gift because she had pressured the husband at a time when he was vulnerable. The wife argued that this finding failed to take into account the husband's "ratification and confirmation of that transfer by the terms of the deed" and the inference from its terms that in the event of a separation or divorce the wife was to receive the fair value of her interest. The Full Court rejected this ground noting the primary judge's express reference to the Deed and agreed with the primary judge's characterisation of the Deed and his finding that it had ceased operation. The Full Court also rejected the wife's argument that the finding of the husband's overwhelming financial contributions failed to take into account the wife's 50% legal interest in the property.

The Full Court rejected the wife's argument that the primary judge had failed to take the legal ownership of the property into account as required by *Stanford.*

**Special leave application**

In considering whether or not to grant special leave under the s 35A *Judiciary Act* 1903 (Cth), the High Court may have regard to any matters that it considers relevant "but is required to have regard to:

> "(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> > (i) that is of public importance, whether because of its general application or otherwise; or
> >
> > (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one\court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

Special leave was granted by Justices Gordon and Nettle in *Hsiao v Fazarri* [2019] HCATrans 196. The transcript of the special leave application does not reveal their reasons for granting special leave but relevantly they were the dissenting judges in the High Court appeal.

**The parties' positions in the High Court**

In oral arguments to the High Court the husband changed his position so that he no longer contended that at the time of the trial the wife was not legally and beneficially entitled to her 50% interest in the property as a joint tenant. This was, the minority pointed out, "a remarkable concession" by the husband because both at first instance and on appeal to the Full Court, he had successfully argued that the transfer of the property to the wife as joint tenant could not be considered a gift because it was made under pressure. The plurality did not refer to this change in the husband's position.

The husband argued before the High Court that while he conceded that the transfer was not vitiated by pressure and that there was a joint tenancy legally and beneficially, the matter had been dealt with properly both at first instance and on appeal in the exercise of the discretion created by s 79 consistently with the requirements set out by the plurality in *Stanford.*

The plurality and the minority disagreed as to the wife's position in the High Court. The plurality said the wife correctly conceded that the primary judge started the s 79 inquiry from the position that the wife was a joint tenant but argued unsuccessfully that the Deed was relevant. The minority considered the wife did not accept that the primary judge had the starting point of a joint tenancy and further found that the Deed was relevant to reinforce the joint tenancy and how the parties considered the property should be dealt with in the event of separation or death. According to the transcript of the hearing reported at [2003] HCA Trans 105, the wife's senior counsel stated in oral argument said:

> "First of all, we point out that it is not clear as a first step that the legal and equitable interest of the parties to the marriage are identified…
>
> The starting point of the judge's consideration should have been an unequivocal statement that there was a joint tenancy created by the gift, not simply to call into some sort of question whether the gift was freely given…
>
> Well, in the present case, in considering that question of whether something is just and equitable, the deed of gift should have been carefully considered by the court. It was not considered by the judge at first instance, and the Court of Appeal simply said the judge was aware of the deed of gift and that was sufficient."

The wife acknowledged in the High Court that the Deed was not a financial agreement under the FLA but maintained that its provisions were material to any assessment of whether it was just and equitable to alter the parties' interest in the property. Her position was summed up (at [49]):

> "Why, she asked, is it just and equitable for the court to disturb the parties' interests in the property without making reference to what they had themselves agreed?"

**The plurality view in the High Court**

The High Court plurality held that the primary judge had appreciated the necessity of identifying the parties' legal and equitable interests in property before determining whether it was just and equitable to make orders altering those interests. The marriage was brief and it was not shown to have affected the wife's earning capacity, and there were no children. The plurality concluded that the arguments pressed by the wife in the High Court were not put to the primary judge and the primary judge could not be criticised for not addressing them. In particular it was not put to the primary judge that he should treat the deed as an affirmation that precluded him from finding the transfer as void or voidable. The wife's position was that it did not matter as the Deed spoke for itself. There was no need for a further hearing when it was clear that the Deed was not properly considered, and if properly considered, it affirmed that the wife should have the value of one half of the property.

The High Court plurality interpreted the Deed as making provision in the event that the wife predeceased the husband at a time when they were separated or divorced and before any property settlement proceedings between them were completed. It could not be construed as requiring the husband to pay to the wife a sum representing half the value of the property in the event of their separation or divorce if they remained its owners as joint tenants.

Importantly, as the High Court plurality pointed out, the wife herself was seeking that the parties' legal and equitable interests be altered. She did not seek at trial to simply maintain her 50% interest in the property. Both parties sought relief that necessitated the severance of the joint tenancy.

The High Court plurality agreed with the Full Court that the lack of fulfilment of the parties' expectations that their marriage would be lasting, and that the property would serve as the place in which to share their lives, was a proper basis upon which the primary judge found it just and equitable to make a property settlement order. The Deed provided no reason to come to a different conclusion.

In relation to whether the trial judge distinguished between the 10% gift and the 40% gift, the plurality said (at [52]):

> "His Honour distinguished the transfer from the initial gift on the basis that the latter was, at best, done at the appellant's "insistence" while the former was done under "pressure" [from her. This distinction was drawn in the context of assessing the direct and indirect financial contribution, if any, made by the appellant to the acquisition, conservation and improvement of any of the property of the parties to the marriage. His Honour's conclusion that, unlike the transfer of the 40% interest, the initial gift should be treated as a financial contribution to the acquisition of the property, notwithstanding that the respondent paid the whole of the purchase price, reflected His Honour's assessment of the justice of the case. Implicit in the analysis, in the context of this short marriage, is His

> Honour's further assessment that the justice of the case did not warrant treating the appellant as having made a financial contribution of 50% to the acquisition, conservation and improvement of the property."

The High Court plurality held that the primary judge could not be criticised for not making a close examination of facts to determine whether the transfer of the 40% interest was voidable by reason of vitiating factors such as duress, undue influence and unconscionable conduct. Nor could the primary judge be criticised for failing to give more comprehensive reasons for the distinction drawn between the wife's acquisition of the initial 10% interest and her subsequent acquisition of the additional 40% interest in assessing the parties' respective direct and indirect financial contributions. The primary judge's reasons reflected the arguments that were put to him.

The High Court plurality was critical of the wife for not putting her case at the trial saying (at [53]):

> "The trial was the place to adduce such evidence and put such arguments as might favour a different finding as to the parties' respective financial contributions for the purposes of s 79(4)(a). The trial was not some preliminary skirmish which the appellant was at liberty to choose not to participate in without consequence. Her right of appeal … was not an opportunity for the appellant to make a case that she chose not to make at the trial. The court is invested with a wide discretion under s 79(1) to make such order as it considers appropriate. It should not be concluded that His Honour's assessment of the parties' respective financial contributions, in this singular case, was not open."

**The dissenting view in the High Court**

The minority in the High Court, consisting of Nettle & Gordon JJ, had a very different perspective to the plurality and their judgment has a cleaner structure with reasoning which is easier to follow and more persuasive. They concluded that, having considered that the wife's acquisition of an additional 40% interest was not subject to any vitiating factor (and so not voidable), the question was whether there was any principled reason for depriving the wife of its value. They found that this question had not been addressed by the primary judge.

The minority did not agree with the primary judge's finding of pressure because the reasons for this finding were not apparent and "pressure" is not an equitable ground in itself. It was relevant that the husband was a senior commercial partner in one of Australia's most prestigious law firms and he had the added benefit of his own solicitors' advice in the preparation and execution of the Deed. The minority found that neither undue influence, or unconscionable conduct were established.

In relation to the primary judge's application of *Stanford* the minority re-stated and emphasised the High Court plurality in *Stanford* (at [66]):

> "As the decision of this Court in *Stanford v Stanford* makes plain, the starting point in the determination of what is "just and equitable" for the purposes of s 79 of the *Family Law Act* is the determination, according to ordinary legal and equitable principles, of the

> *existing* legal and equitable interests of the parties in the property that is to be settled. So much follows from the text of s 79(1) (a) of the *Family Law Act* itself, which refers to *altering* the interests of the parties. But just as importantly, it is the statutory imperative to take into account the considerations stipulated by the legislature, including, critically, the existing interests of the parties that characterises the power conferred by s 79 as judicial power. Consequently, proper consideration of existing interests is of fundamental importance. In the present case, the primary judge failed to identify or give effect to the existing interests of the parties in a critical respect."

The minority contrasted the way that the primary judge gave full effect to the wife's initial 10% interest in the property in applying s 79, and his treatment of the increase of 40% to the interest as joint tenant. The 10% gift was given weight but the 40% gift was *not* taken into account in arriving at a just and equitable outcome under s 79 as her interest was abrogated by "pressure". The minority concluded (at [55]):

> "But … it was not open on the evidence to find "pressure" sufficient to vitiate the appellant's interest as joint tenant, and, in any event, the vitiating effect of such "pressure" as there may have been was negated by the respondent's subsequent execution of the deed of gift ("the deed"). As a result, the primary judge failed to give proper effect to the existing legal and equitable interests of the parties."

The minority concluded that treating the wife's 40% interest in the property as not a gift, and thus somehow to be disregarded in the settlement of property under s 79, was contrary to the need to recognise and adjust legal and equitable interests mandated by *Stanford*, and was an error of law.

The minority outlined the legal principles which it considered should have been applied by the primary judge (at [78]-[81]):

> "First, the existence of the appellant's 40 per cent interest in the property was not a "distraction". As was made clear in *Stanford v Stanford*, because that interest was one of the existing legal and equitable interests of the parties in the property to be settled, it should have been front and centre – the very starting point – in the determination of what was "just and equitable" for the purposes of s 79.
>
> Secondly, although the parties' respective financial and non-financial contributions, financial positions and earning capacities were unquestionably relevant considerations in the adjustment of the parties' existing legal and equitable interests in the property to be settled, and although, for the sake of argument (but no more), it may be supposed that it would have been open to the primary judge to conclude on the basis of his Honour's assessment of the appellant's contributions to the aggregation of the property and otherwise that she should be stripped of her 50 per cent interest in the property in return for a payment of $100,000 (plus $80,000 that had been advanced on account of costs), that is not what his Honour did. As has already been explained, the primary judge excluded the appellant's 40 per cent interest in the property from consideration as something other than a gift because it was the product of "badgering" and "pressure".
>
> Just as it is necessary for a primary judge closely to scrutinise the facts to determine whether it is open to find that a transaction has been vitiated by duress, undue influence, or unconscionable conduct, so too must an appellate court closely scrutinise the primary judge's findings and (subject to bearing in mind the advantages enjoyed by the primary

> judge) assess any challenge to the primary judge's conclusions in light of those facts and the applicable legal and equitable principles. The Full Court erred in their failure to do so.
>
> Thirdly, it is altogether unrealistic to suppose that the primary judge could have arrived at the same conclusion, or made the same orders, if his Honour had not treated the appellant's 40 per cent interest in the property as something other than a gift and therefore as such to be excluded from consideration. For even allowing for the primary judge's assessment of the exiguousness of the appellant's financial and other contributions, which the Full Court so much emphasised, what justice and equity could there be in stripping the appellant of the totality of her 50 per cent legal and beneficial interest in the property and conferring it on the respondent, who, on the evidence, was an extremely wealthy man with assets worth more than $9 million, in return for a payment to the appellant of $100,000 and $80,000 for legal costs previously advanced?"

The minority concluded that had the primary judge taken the wife's 50% interest into account, rather than only 10%, he should logically have awarded the wife approximately five times what she recovered.

**What did the High Court say about fresh evidence and disclosure?**

In hearing an appeal the Full Court of the Family Court has a discretion to receive further evidence. In *CDJ v VAJ* (1998) FLC 92-828 the High Court confirmed that the purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry. Among the factors the appeal court should consider is whether a new trial is required if the fresh evidence is admitted and whether it was likely that there would be a different result.

The wife unsuccessfully sought to lead fresh evidence in her appeal to the Full Court of the Family Court. The focus in the High Court was on two documents, which she suggested cast doubt on the husband's credit and demonstrated that he had engaged in "malpractice" in the conduct of his case at trial. There were also emails and other contemporaneous documents. The two documents were the transfer of land and a declaration to the State Revenue Office of Victoria to claim an exemption from the payment of duty on the transfer of land from one spouse or domestic partner to another. The transfer recorded the consideration for the transfer of the husband's 40 % interest as "Natural Love and Affection … for his domestic partner". The husband signed the declaration which stated:

> "I am the domestic partner of the transferor listed above. Although we are not married to each other we are domestic partners of each other and are living together as a couple on a genuine domestic basis (irrespective of gender)".

The wife submitted that the Full Court erred in failing to take into account the husband's failure to disclose the further evidence to the primary judge. The Rules of the Full Court of the Family Court (and the Federal Circuit Court) and the case law set out a broad duty of disclosure of all relevant documents. This obligation was explained by Smithers J in *Briese & Briese* (1986) FLC 91-713 (at pp 75,180-1) and has been quoted frequently since:

> "I believe that a person in the position of the husband in this case has a positive obligation to set out at an early stage his financial position in a clear and comprehensive manner … The need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance … [M]ere compliance with rules of court or practice directions does not alter the basic principle of the need for full and frank disclosure by the parties … There is an obligation on each party to act so as to provide a basis upon which the two of them are in a position to resolve the case by agreement, or proceed to a hearing, as expeditiously as may reasonably be done."

The plurality said that the discretion conferred on the Full Court under s 93A(2) FLA to receive further evidence in an appeal exists to serve the demands of justice, and commented that the wife's position was "distinctly unattractive". It was the wife's choice not to participate in the trial and submit evidence in reply to the husband's case. She was in possession of the relevant documents at the time or could have obtained them. The husband was therefore not in breach of his disclosure obligations.

The plurality emphasised the "main purpose" of the *Family Law Rules 2004* (Cth) set out in r 1.04 which is "to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case." Parties to proceedings under the Act are obliged by r 1.08 to act in a manner that is conducive to the promotion and achievement of that purpose. The plurality emphasised that the wife did not raise the evidence at the trial although she could have done so, and allowing the evidence in on appeal would have resulted in a new trial. The Full Court held that it had not been shown that the admission of the further evidence would have led to a different conclusion but the plurality held that even if the further evidence might have produced a different result, the Full Court's exercise of discretion was correct. As a result, the plurality concluded (at [44]):

> "the demands of justice would not have been served by receiving further evidence that would have necessitated a new trial in order to give the appellant an opportunity to present a case that she deliberately chose not to make at trial."

The High Court plurality was not critical of the husband for failing to produce the evidence at the undefended hearing before the primary judge. However, the plurality did not refer to the fact that the primary judge's conclusion was reached in circumstances where the husband conceded before the High Court what he had denied before the primary judge and the Full Court, namely that the wife was a joint tenant of the property and the gift of 40% of the property was valid. The minority did not need to consider whether the fresh evidence should have been admitted by the Full Court as the primary judge failed to give proper effect to the existing legal and equitable interests of the parties.

The husband succeeded in keeping the evidence out although it appears that the evidence supported the wife's position that she had been gifted 50% of the property by the husband.

**Conclusion**

Litigants, lawyers and the family law courts had much to gain if the High Court had provided a detailed examination of the issue of the effect of the gift of the 40% interest to the wife in providing a better understanding of the proper approach to s 79.

The minority's position was clear that the primary judge ought to have identified and given proper effect to the legal and equitable interests of the parties including the wife's 50% interest as a joint tenant before proceeding down the rest of the s 79 path. Unfortunately, the position of the plurality is less clear. It is difficult to reconcile how the plurality and the minority could have such different interpretations of the positions taken by the primary judge and by the wife in the High Court. The husband presented a different position before the High Court as to the wife's legal and equitable interests than he had at trial and before the Full Court of the Family Court. Whether or not the primary judge's starting point was that the wife was a joint tenant, his explanation as to why he did not take the 40% gift into account in assessing the wife's contributions was that the gift was made under "pressure", and the minority correctly found that "pressure" is not an equitable principle which can vitiate a gift.

There should not be complete liberty for parties to re-litigate a case on appeal which they failed to present at trial. It is, however, troubling that the duty of disclosure could not be relied upon to bring consequences upon a party who put one position to the primary judge (in a hearing which effectively proceeded as an undefended hearing) and the Full Court and another position to the High Court.

It is also an unsatisfactory state of affairs that the question has not been clearly answered as to whether it is necessary to first determine the legal and equitable interests of the parties before proceeding with the test of the s 79 considerations. Whilst in one earlier case the Full Court said that this preliminary step "seems unnecessary" in most cases and in another case it was found to be necessary because a s 78 declaration was also sought, neither the High Court plurality or minority in *Hsiao* endorsed either approach. Neither approach appears consistent with *Stanford*.

Fundamentally, the wife lost on appeal because she did not participate in the trial. The wife's failure to participate at trial, produce the evidence there which she sought to produce on appeal and present arguments which she later sought to make on appeal were fatal in her appeal to the High Court. The minority was more forgiving of the wife's conduct of the case than the plurality and accepted that the primary judge had the facts before him to reach the conclusions which the plurality considered to be correct, without the arguments being put by the wife. Whilst, it is difficult to draw any conclusions from *Hsiao* as to how to apply *Stanford, Hsiao* is a reminder of the importance of being properly prepared for a trial including being prepared to present all

relevant evidence and appropriate arguments. The right of appeal cannot be relied upon to rectify earlier omissions.

16 November 2020