

LITIGATION FUNDING ORDERS

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treatment of legal costs
post Stanford and Bevan

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INTERIM PROPERTY SETTLEMENTS AND THE TREATMENT OF LEGAL COSTS POST *STANFORD* AND *BEVAN*

I have found that family lawyers generally fall into one of 2 camps when considering the impact of the High Court of Australia's decision in *Stanford*.¹ There is one camp who submits that the decision can be limited to its extraordinary facts, and that its general comments on the way that a Court should approach its s79 decision, if it departs from the well established historical path, will not significantly impact the outcome of most family law property settlement disputes. Then there is the other camp that views *Stanford* as the end of the world as we know it.

Whilst the debate continues about whether *Stanford* really changes anything in relation to appropriate 'steps' to follow when determining a claim for a property settlement, the less high brow but arguably more pressing issue for family law litigants, is how a Court will deal with interim property settlement amounts and post separation dissipation of assets. In this paper I narrow the focus to the post *Stanford* treatment of interim property settlements used to pay legal cost and other paid legal costs.

Interim property settlements to fund legal expenses - a recap on the law

Until late 2009, the leading authority on the circumstances in which the Court will grant an interim property settlement to fund the litigation costs of one party was the decision of the Full Court in *Zschokke*.²

In *Zschokke* the wife was seeking \$40,000 as an unallocated lump sum advance to fund her costs of the proceedings. Ultimately she was unsuccessful in that application but the Full Court did set out the matters that ought to be taken into account in considering such an application.

¹ *Stanford v Stanford* (2012)87ALJR74

² (1996) FLC 92-693

The Full Court (comprising Justices Baker, Finn and Hannon) considered that there were four possible bases of power to make such an order:

1. pursuant to s74 (the maintenance power);
2. pursuant to s114 (the injunction power);
3. pursuant to s117(2) (the costs power); and
4. pursuant to s80(1)(h) (the Court's general power to make an interim order, with reference to s79).

Numbers 1 and 2 were not argued before the Full Court, and the Full Court expressed the view that the question of whether s74 or s114 allowed the Court to make an order of this type must remain open.

The Full Court found that the power to make an order for the provision of funds by one party to the other to fund their costs of the proceedings can lie from either s117(2) or s80(1)(h). If such an order is made, the Full Court held that the characterisation of the funds should be determined at the time the final property orders are made.

In considering whether the Court should make the order pursuant to s117(2), the Full Court found that the Court must have regard to the matters set out in s117(2A), albeit acknowledging that some of the matters set out in that sub-section would not be relevant to the making of an order of this type. The Full Court also found that *"...the requirement of justice...must remain a "basic" condition in the making of [such an order]"*.³ That requirement of justice includes an assessment of whether the applicant for the order is likely to receive a sum sufficient in the final property proceedings to make it *possible* for the interim amount to be taken into account if the trial judge chooses to do so.

In considering whether the Court should make the order pursuant to s80(1)(h) the Full Court held:

"...it would seem that regard should be had to the requirement in s79 that the orders be just and equitable and this would require the Court to undertake at least some brief consideration of the matters in s79(4) including those referred

³ *In the Marriage of E F and R Zschokke* (1996) FLC 92-693 at page 83217

*to in s75(2). If on a brief consideration of those matters, it seems likely to the Court that the party who is the applicant for the interim order for an advance of funds from the other party will be likely to receive by way of property settlement a sum sufficient to cover the advance, that would seem to be sufficient to enable the order sought to be made."*⁴

However the Full Court went on to also approve of the statements of the Full Court in *The Marriage of Harris*⁵. That case dealt generally with the question of the Court's power to make orders for an interim property settlement but did not specifically consider interim payments to fund litigation expenses. The Full Court found that the principles enunciated in *Harris* are equally applicable. In *Harris* the Full Court said that the matters to be taken into account when considering making an interim property settlement order are as follows:

"(1) The exercise of the power should be confined to cases where the circumstances presented at that time are compelling. As a generality, the interests of the parties and the Court are better served by there being one final hearing of s79 proceedings...

(2) It is an exercise of the s79 power. Consequently it must be performed within those parameters. Since it is not the final hearing the Judge is unlikely to have the final findings, but the exercise must fall within that general framework and the material available at that time.

*(3) Of necessity it is likely to be a somewhat imprecise exercise. Consequently, it must be exercised conservatively and the Judge must be satisfied that the remaining property will be adequate to meet the legitimate expectations of both parties at the final hearing, or that the order which is contemplated is capable of being reversed or adjusted if it is subsequently considered necessary to do so."*⁶

The Full Court in *Zschokke* identified three criteria relevant to the making of such an order:

⁴ Ibid, page 83216

⁵ (1993) FLC 92-378

⁶ Ibid

- whether one party was in a position of relative financial strength;
- the capacity of that other party to fund their own legal expenses; and
- the inability of the applicant to fund their legal expenses.

The Full Court re-visited the question of interim property settlement orders to fund litigation expenses in the 2009 case of *Strahan and Strahan (interim property orders)*⁷. On the re-exercise of discretion the Full Court ordered the husband to pay to the wife \$5,000,000 by way of interim property settlement. Justices Boland and O'Ryan delivered a joint judgment, and Justice Thackray delivered a separate judgement (but concurred with the making of the orders).

From the amount of the interim property settlement order, it is clear that this case involves a significant asset pool. At the time of separation the wife had \$6,723,695 in bank accounts. In his Financial Statement, the husband deposed to assets of \$35,504,700, liabilities of \$852,800 and financial resources of \$21,205,771. The question of what the asset pool comprises was a major issue of contention between the parties, with the wife asserting to the Full Court that the assets are "*in the order of hundreds of millions of dollars*" and the husband referring to a single expert's suggestion of \$60 million. The trial judge (Justice Strickland) observed that since the proceedings commenced in 2005 the wife had spent \$10.5 million in legal costs and there had been approximately 40 interim applications.

Before the trial judge, the wife sought a further \$5,000,000 by way of interim property settlement (she having already received interim property settlements totalling \$5,350,000). The trial judge awarded her \$1,000,000. The wife then appealed.

The trial judge found that there was no issue in the case (for the wife) with the first two of the three criteria set out in *Zschokke*. But in relation to the third of the criteria he referred to the husband's case that there were other alternative ways for the wife's costs to be secured other than by payment from the husband.

Justice Strickland then determined that *Harris* required him consider whether the wife had established *compelling circumstances* to warrant the making of the interim property order. The wife's argument was that there was still further work to be done to investigate the extent of the asset pool, and that this investigation was necessary

⁷ [2009] FamCAFC 166

to enable the wife to obtain just and equitable orders. The wife's solicitor asserted that she would not continue to act for the wife if funding for the estimated future costs was not found.

The trial judge found that there were no compelling circumstances. He found that the issue of the husband's alleged non-disclosure was not new in the case, and was a matter for the trial. He found that some of the categories of further work required, and the estimates of the costs of the further work to be performed, were unjustified at this stage of the case (for instance, \$500,000 to confer with and prepare affidavits for in excess of 50 witnesses).

However having found that there were no compelling circumstances, Justice Strickland went on to make an order for a payment of \$1,000,000. He identified three areas for which the wife required funds - to be represented at trial, to prepare and file evidence in relation to parenting issues and to address issues which might arise from the filing of the single expert's report.

The husband's senior counsel persisted with the argument in relation to the third of the criteria set out in *Zschokke* and argued that given the closeness of the trial, the wife's solicitors could take a charge over the wife's assets on the basis that their fees could be paid from the wife's property settlement. Justice Strickland rejected that argument on the basis that the husband's legal representatives were being promptly paid and that *"there is no basis...for requiring the wife to make such an arrangement with her solicitors."*⁸

The trial Judge then made his own assessment of the wife's costs to address the three outstanding areas that he had identified and fixed the amount of \$1,000,000.

On appeal, their Honours Boland and O'Ryan identified two stages to the hearing of an interim property settlement application pursuant to s80(1)(h).

*"...the first step is to resolve whether to exercise the power before a final hearing and if it is resolved to do so then the second step involves the exercise of that power."*⁹

⁸ *Strahan and Strahan (interim property orders)* [2010] FamCAFC 166 at paragraph 68

⁹ *Ibid*, paragraph 119

There was considerable argument about whether it is a correct reading of *Harris* to say that there must be a finding of *compelling circumstances* before the Court will consider exercising its power to make an interim property settlement order. Justices Boland and O'Ryan drew heavily on the 2008 judgment of Reithmuller FM in *Wenz and Archer*¹⁰ wherein His Honour found that the true test for an interim order was not whether or not there were compelling circumstances, but whether, "*in all the circumstances, it is 'appropriate'*".¹¹

Justices Boland and O'Ryan found that, in relation to the first stage when considering whether to exercise the power to make an interim property order:

*"...the 'overarching consideration' is the interests of justice. It is not necessary to establish compelling circumstances. All that is required is that in the circumstances it is appropriate to exercise the power. In exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s79 is a once and for all order made after a final hearing."*¹²

Their Honours considered that the following matters may be relevant to that first stage of the test:

- whether or not the applicant can meet the costs of their own legal costs;
- the bona fides of the application including the need for evidence of the applicant's likely costs of the litigation. Their Honours held that it was not a necessary pre-condition that the applicant's lawyers will not continue to act unless the costs are paid or secured; and
- possibly the relative financial position of the parties, although their Honours found that this would certainly be relevant to the second stage of the test.

Once the Court has decided it will entertain the exercise of the power to make an interim order, then at the substantive step of considering whether to make an order,

¹⁰ (2008) 40 FamLR 212

¹¹ Ibid, paragraph 131

¹² Ibid, paragraph 133

Justices Boland and O'Ryan approved of the second and third matters set out by the Full Court in *Harris*; that is:

- the provisions of s79 must be considered; with limitations given that it is not the final hearing. Their Honours found that there is no requirement of compelling circumstances in this step; and
- an assessment of the "*adjustment issue*" or "*claw-back issue*".¹³ That is, will the interim property order exhaust or exceed the applicant's s79 entitlement, or will the respondent be able to recover any over-payment?

Their Honours also considered whether the respondent is in a position of financial strength compared to the applicant and the capacity of the respondent to pay his or own legal costs would be relevant factors to take into account at the second step

Justice Thackray delivered a separate judgement. He agreed with Justices Boland and O'Ryan that there should be a two step approach to determining applications for interim property settlements, and he agreed that there is no requirement for the applicant to show compelling circumstances. Where the application is seeking funds for legal costs, Justice Thackray said:

*"...it is appropriate for the Court to give consideration to whether the claim for costs is "genuine" - ie. that a party is not bringing an interim application on a pretext. However, once the Court is satisfied that the claim is genuine, it should not "take a narrow view of the costs budget".*¹⁴

Treatment of Paid Legal Fees at Trial - A recap on the law

In the Full Court's 1996 decision *In the Marriage of Farnell & Farnell*¹⁵ the Honourable Justice Fogarty, in considering how to treat the husband's paid legal costs, said:

"Since legal costs due or paid by the parties is a circumstance which would exist in almost every property case, it is, at first sight, surprising, given the number of defended property cases which have been heard over the 20 year

¹³ Ibid, paragraph 137

¹⁴ Ibid, paragraph 228

¹⁵ *In the Marriage of Farnell & Farnell* (1996) FLC ¶92-681

history of this Court, that there is little by authoritative pronouncement or academic discussion on this question. However, I think that is explained by the general practice for Court on this issue.

It is a problem which is peculiar to the Family Court and specifically to financial matters in this Court. In other jurisdictions it would be unusual for a situation to arise where the size of the property in dispute may be impacted upon by the costs of one or both parties in litigating that issue. In addition, in other jurisdictions orders for costs ordinarily follow the outcome of the litigation and are not controlled by the particular provisions as to costs contained in the Family Law Act."

The year before, in its judgment *In the Marriage of Bland*¹⁶, the Full Court dismissed an appeal in a property case where the trial judge had not included as a liability each party's legal costs. In the course of his judgment, the Honourable Justice Baker commented:

"As the trial judge found, taking into account legal costs within the course of family litigation can frequently be an unrealistic and futile exercise. In most litigations in the Family Court the costs on each side would roughly be the same unless there are unusual circumstances which would require that one parties' costs exceed the other to a significant degree."

Since those early cases, the Court has developed a more sophisticated approach to the treatment of parties' legal costs pursuant to s79.

In *Farnell* the Full Court held that it was open to a trial judge to have added back paid legal fees as "notional property", and to exclude from the asset pool legal costs owing by one party as a liability.

The Honourable Justice Kay wrote a separate judgment in that case registering his disagreement with the statement made by the Honourable Justice Baker in *Bland*. Kay J referred to his reasons for judgment as part of the Full Court *In the Marriage of Gould*¹⁷ His Honour referred to a survey of the American Bar Association Family Law Section that indicated that wives, in particular, needed to spend more in legal costs

¹⁶ *In the Marriage of Bland* (1995) 19 Fam LR 325

¹⁷ *In the Marriage of Gould* [1994] Fam CA 75

than their husbands in order to achieve a "level playing field" in the litigation. Most of the lawyers surveyed said that wives had to spend more in legal fees than husbands. 91% of those surveyed said that wives had to pay more for discovery¹⁸.

In *DJM v JLM*¹⁹ the Full Court considered the impact and relevance of s117(1) of the Act in relation to the treatment of paid legal costs under s79:

"... s117 provides that each party to proceedings under the Family Law Act shall bear their own cost unless the Court otherwise orders. Failing to addback moneys expended by parties on costs frequently has the effect of defeating the policy of s117 by permitting the pool of available assets for distribution between the parties to be diminished by any moneys that either of the parties have managed to spend on their costs up to the date of trial. We are of the view that the normal approach ought to be to add costs already paid back into the pool. Whilst there may be cases where that approach is inappropriate, the reasons why it is not taken ought normally be spelt out."

As the law in relation to notional addbacks and premature distributions of property developed (for instance in *Townsend*²⁰), so did the law in relation to the treatment of paid legal fees, whether paid from pre or post separation assets or income, and legal costs outstanding as liabilities at trial.

The concluded view of the Full Court in relation to these various scenarios was set out in the well known decision of *Chorn & Hopkins*²¹. It can be summarised as follows:

- The treatment of funds used to pay legal costs remains ultimately a matter for the discretion of the trial Judge.
- In determining how to exercise that discretion, regard should be had to the source of funds.
- If the funds used existed at separation and are such that both parties can be seen as having an interest in them (on account of contributions)

¹⁸ Ibid, at paragraph 2

¹⁹ *DJM v JLM* (1998) ¶92-816

²⁰ *Townsend & Townsend* [1994] Fam CA 144

²¹ *Chorn & Hopkins* [2004] Fam CA 633

then such funds should be added back as a notional asset of the party who has had the benefit of them.

- If the funds used to pay legal fees have been generated by a party post-separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance) they would generally not be notionally added back as a notional asset; nor would any borrowing undertaken by a party post-separation for payment of fees be taken into account as a liability in the calculation of the net property of the parties.
- Funds generated from assets or businesses to which the other party has made a significant contribution or has an actual legal entitlement may need to be looked at differently from other post-separation income or acquisitions.
- Outstanding legal fees themselves are generally not taken into account as a liability.
- If in the exercise of discretion it is determined that legal fees already paid should be taken into account as notional assets, then normally any liability associated with the acquisition of the monies used to pay the legal fees should also be taken into account.
- Where a party has been ordered to release to the other party money to enable them to prosecute the proceedings, it could be expected that the fees would be added back²².

It should be noted that in *AJO & GRO*²³ a different Full Court in an appeal from a decision of the Family Court of Western Australia, referred to authorities discussed in *Chorn & Hopkins* but did not address *Chorn & Hopkins* and said the "normal approach ought to be to add costs already paid into the pool".

²² Summary by Boland J in her paper "Trends in the Full Court: Recent cases" 9th Australian Family Lawyers' Conference, Sabah 11-13 June 2005, as quoted by Ryan J in *Beklar & Beklar* [2013] FamCA 327, with Ryan J's addition of the final point.

²³ (2005) FLC 93-218

...And then came Stanford

In relation to the issue of 'addbacks', and more narrowly, the question of 'addbacks' for paid legal fees, there is one paragraph of the High Court's decision that has sparked controversy:

37. “...it is necessary to being consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s79(1)(a) itself which refers to the “altering the interests of the parties to the marriage in property”. The question posed by s79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order”. (emphasis from the judgment)

The facts of the case in *Stanford*, of course, had nothing to do with addbacks or notional property. It is curious, therefore, that the High Court chose to emphasise the word *existing* when referring to the legal and equitable interests of the parties. In the majority of cases it could be anticipated that the interests of the parties which existed at the date of separation will not be the same as the interests that exist at the date of any trial (or any settlement). The circumstances that might create such a change include interim property settlements, waste or reckless reduction of the asset pool by one or both parties, windfalls, sales of assets and reasonable use of assets to fund living expenses. A significant body of case law has been developed by the Family Court over many years to deal with those circumstances and to assist the Court to achieve a just and equitable result. Some of those well known cases and principles include the oft-quoted judgment of Baker J in *Kowaliw*²⁴ regarding reckless waste of assets, the treatment of premature distribution of assets in *Townsend*²⁵ and the principles I have referred to above regarding interim property settlements and treatment of paid legal fees. The question is how those principles can be accommodated, if at all, within the High Court's reasons in *Stanford*.

²⁴ Kowaliw & Kowaliw(1981)FLC 91-092

²⁵ Townsend & Townsend[1994]FamCA144

Waiting for *Bevan*

The Full Court delivered its first judgment in *Bevan & Bevan*²⁶ on 8 August 2013. It was the Full Court's first opportunity to comment on the decision in *Stanford*.

Between those two Full Court decisions, there were 2 important trial judgments delivered in the Family Court by judges who are both members of the Appeal Court. Both make comment about the relevance of *Stanford* to the question of addbacks, and in particular, addbacks for paid legal costs.

Watson & Ling [2013] FamCA 57

Watson and Ling is a decision of Justice Murphy delivered on 12 February 2013.

This is a case where one of the parties to the de facto relationship died during the course of the proceedings; the facts therefore being similar to the facts in *Stanford*. The main 'addback question' in the case was how to deal with a drawdown by the de facto wife of money from a mortgage, that money having been spent by the date of trial, and also the deceased de facto husband's disposal of assets after separation.

In relation to the general question of addbacks, the Judge said:

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 part of the establishment of the existing legal and equitable interests at trial - a task which the majority of the High Court in Stanford (at [37]) said it should be the first step in considering, pursuant to s 79(2) (see s 90SM(3)), whether it is just and equitable to make an order.*

²⁶ *Bevan & Bevan*[2013]FamCAFC116

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.*

The Judge went on to say that such conduct might be recognised pursuant to s 75(2)(o) or even in the assessment of contributions.

He refers to *Cerin*²⁷ that a direct dollar for dollar adjustment equivalent to the amount of the alleged dissipation of the pool to be *"the exception rather than the rule"*.

In relation directly to the question of addbacks for paid legal fees, his Honour said:

"it may be that aspects of the erstwhile treatment of legal fees pre Stanford (see, for example, Chorn & Hopkins) will require further consideration in an appropriate case".

***Beklar & Beklar* [2013] FamCA 327**

Beklar is a decision of Justice Ryan delivered on 10 May 2013. The case dealt directly with the question of how paid legal fees should be treated post-*Stanford*.

The case involved a marriage of 17 years. The parties had separated about 5 years prior to the date of trial. The net asset pool was about \$1,061,000. However the total paid legal fees of the parties was an additional \$782,000.

Her Honour said:

²⁷ [1998] FamCA 143

134. *"The issue of whether the loss should be notionally added back in to the asset pool, whether it constitutes a s75(2) factor or whether it should be dealt with another way is complex and discretionary".*

The wife had paid her legal expenses from a few sources - the parties' line of credit, funds provided by the husband pursuant to orders and money borrowed from her family.

The husband's legal fees were paid from his post-separation income and by a loan from his father. The husband had control of \$78,000 in savings at separation and he used that money to pay his day to day living expenses. The husband sought to take advantage of the principles in *M and M*²⁸(that assets used post separation for living expenses would not be added back to the pool) and in *Chorn & Hopkins* (that legal fees paid from post-separation income would not be added back to the pool).

Following on from the reasoning in *Chorn & Hopkins*, Counsel for the wife argued that unless the Court adopted an addback approach to both parties' paid legal fees, injustice would be visited upon the wife.

There was a discussion between the Judge and Counsel for the wife wherein the Judge suggested that the question could be resolved by application of s75(2)(o) factors:

"Counsel for the wife said such an approach tendered to be amorphous and lacked the transparency achieved if the amount was simply added back and redistributed."

The Judge found that the husband had embarked on a course of conduct in arranging his financial affairs *"almost certainty designed to maximise his chances of persuading the Court that the wife should not share in the savings he retained at separation"*.

The trial Judge dealt with the paid legal fees in two different categories - in summary, that portion of both parties' costs that had been paid from assets existing at the time of separation, and that portion that had been paid from post-separation income.

²⁸ M and M [1998] FamCA 42

In relation to the first category, the Judge found that the husband had taken about \$78,000 at separation, the wife had paid costs of \$273,000 which she had taken from funds in existence at the date of separation and there was a further \$90,000 interim costs order made in favour of the wife. The Judge dealt with those amounts as a s79(4) contribution factor:

154. All payments by [the wife] for legal fees constitute a premature distribution of property albeit it no longer exists. Although the final advance which the husband made was pursuant to a litigation expenses order, the transactions which made the payment possible ultimately reduced his equity in suburb E, required the sale of shares and that he borrow from his wife. In these circumstances when the parties' contributions and other factors are assessed, the full dollar value of these transactions must be taken into account. Although the application of settled authority would permit the inclusion of funds disbursed by way of premature property distributions in the identification of the parties' property, such an approach is not mandatory. In circumstances where that property no longer exists, the better course is to address these matters when considering the application of s79(4). Although submissions on this point were not made, this approach is more likely to accord with the gravamen of the discussion in Stanford in relation to the identification of the parties' legal and equitable interests in property at the date of hearing than does the "notional pool" concept which underpins much of the discussion in the legal expenses and addback cases.

The Judge found that the percentage based adjustment for all other contribution factors should be 60/40 in favour of the wife (due mainly to her greater initial contribution). The Judge made a further dollar amount adjustment for the legal fees paid from pre-separation assets. The total amount of costs paid from this source was:

Husband	Monies taken by husband at time of separation as at May 2008	\$78,402.47
Wife	Wife's costs paid to date	\$273,000.00

Wife	Interim Costs	\$90,000.00
	TOTAL	\$441,402.47

In effect the Judge dealt with that total amount as a separate notional pool of assets (but not added to the parties' legal and equitable interests). Her overall % finding on contributions was applied to that notional pool. If the husband was entitled to 40% of \$441,402.47 = \$176,560, then the \$78,402.47 would be deducted, leaving an overall further cash adjustment to the husband of \$98,158.51.

The Judge then dealt with the second category of paid legal fees (that portion of the husband's legal fees paid from his income) as a s 75(2)(o) factor - again as a dollar amount. Her Honour assessed all the other s 75(2) factors as requiring an 8% adjustment in favour of the wife. In relation to the additional dollar adjustment for the husband's payment of legal fees from his post-separation income, Her Honour found:

206. *As was mentioned earlier, the husband paid his \$418,584 in legal expenses from post-separation income and bonuses. In no small part he was able to do so because of the significant contributions made by the wife to his earning capacity and her ongoing care of the children. After all, it is significantly because the parties' maximised the husband's opportunity for career advancement and the wife relinquished hers that she lacked income from which she could pay her legal expenses and he had the income to pay his. It is also beyond dispute that had he chosen not to spend this significant amount of money in this manner, it is likely that a considerable proportion of it would have been appropriately available for distribution between the parties. There is real force in Counsel for the wife's submission that if the wife's paid legal expenses is bought into account at full value, so too should the husband's. Any other approach would visit a significant injustice on her.*

207. *As was mentioned earlier, the husband borrowed from his father for his legal expenses. That liability has not been included in the parties' list of property and liabilities and thus requires consideration here. The \$70,000 which the husband borrowed from his father bridges the gap between the slightly smaller amount that the wife paid for hers, and his.*

In those circumstances, the loan from his father will be disregarded and only his legal fees minus that amount will be taken into account pursuant to the sub-section. It follows that the husband's paid legal expenses are taken into account in the amount of \$349,584. From this amount the wife will receive half. Although it is accepted that she made a significant contribution to the husband's ability to earn this income, it must be recognised that this is income earned after separation through his efforts. For this reason, although I contemplated an adjustment made by reference to the outcome of the application of my findings made pursuant to s 79(4); such an adjustment to this item would be excessive. Thus an adjustment in the amount of \$174,792 will be made in the wife's favour.

Such a dollar adjustment might be misconstrued as a costs order. Her Honour however addresses this concern and confirmed that she had not made an adjustment to enable the wife to pay her legal expenses, but rather to ensure that the treatment of paid legal cost is approached in a fair and just manner.

The Full Court delivers Bevan

The Full Court's (first) decision in *Bevan & Bevan*²⁹ was delivered on 8 August 2013. It is not a case that deals with addbacks. However it does contain *obiter* remarks from all three appeal Judges about how the comments in *Stanford* might apply to cases involving addbacks.

In their joint reasons for judgment, Bryant CJ and Thackray J said:

73. *The High Court in Stanford has laid down three "fundamental propositions" which will provide useful guidance to trial Judges in approaching the task under s79. These...could be summarised thus:*
1. *Determination of a just and equitable outcome of an application for property settlement begins with the identification of existing property interests (as determined by common law and equity);*

²⁹ [2013] FamCAFC 116

2. *The discretion conferred by the statute must be exercised in accordance with legal principles and must not proceed on an assumption that the parties' interests in property are or should be different from those determined by common law and equity;*
3. *A determination that a party has a right to a division of property fixed by reference **only** to the matters in s79(4), and without separate consideration a s79(2), would erroneously conflate what are distinct statutory requirements.*

74. *The first "fundamental proposition", which requires identification of existing legal and equitable interests in property, is nothing new, since "property" has always been understood as incorporating equitable, as well as legal interests.*

Their Honours refer to the definition of property in *Jones v Skinner*³⁰ :

Property is the most comprehensive of all terms which can be used in as much as it is indicative and descriptive of every possible interest which the party can have.

And then:

71. *Stanford will also serve as a reminder that the four step process "merely illuminates the path to the ultimate result". Any future restatement of that process should incorporate acceptance of the fact that the power to make an order adjusting property interests is conditioned upon the Court finding that it is just and equitable to make an order.*

In relation to the question of addbacks, their Honours said:

79. *We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the*

³⁰ (1836) 5LJ Ch 85

marriage - and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s79(4) and in particular s75(2)(o) gives ample scope to ensure a just and equitable outcome in dealing with the unilateral disposal of property.

Justice Finn delivered separate reasons for judgment, and in relation to the question of addbacks said:

160. *These reminders that the jurisdiction under s79 is a jurisdiction to alter individual interests entitled to property and that there is no community of property in this country, might also call into some question the current practices in relation to the treatment of property which is no longer in existence, but which one party has had the use of (the so called "addbacks"), and perhaps also of the unsecured liabilities of one or both parties. It may well be that these matters should more strictly be considered in making findings under s79(4)(e) (ie s75(2)), or in an extreme case, when considering the question under s79(2) as to whether it is just and equitable to make any order under s79. But these questions do not arise in the present case, and are thus for another day.*

While we wait for a binding statement from the Full Court....?

There is no definitive binding statement from the Full Court on the treatment of addbacks, interim property settlements and paid legal fees post *Bevan*. The following is a chronological summary of those trial judgments since the decision in *Bevan* that deal with the treatment of legal costs in s79 adjustments.

Keckwick & Claseby³¹

Addback approach

Decision of Justice Stevenson of the Family Court of Australia delivered 23 August 2013.

Both parties conceded that three interim property settlement amounts paid to the wife totalling \$240,000 should be added back to the property pool.

³¹ [2014] FamCA 625

The Judge declined to include as liabilities either party's unpaid legal costs.

Beatson & Beatson³²

Addback approach

Decision of Justice Fowler of the Family Court of Australia delivered 2 September 2013.

Whilst noting the decision in *Bevan*, His Honour said:

87. *With respect to paid legal fees (which each of the parties in this case seek to have added back against the other), notwithstanding the comments made in Bevan, the jurisprudence of this Court informs us that this is a discretionary matter for the trial Judge; Chorn & Hopkins.*
89. *Considering the comments made in Bevan, it is not in the Court's view appropriate that it should embark on an attempt to divide non-existing assets, except to the very limited extent proposed by Chorn & Hopkins in relation to paid legal fees which, it is noted, both parties seek to have added back against the other.*

The amounts of money involved were \$20,000 to be added back as against the wife and \$46,000 to be added back against the husband.

Truman & Truman³³

s75(2)(o) % adjustment approach

Decision of Justice Fowler of the Family Court of Australia delivered 9 October 2013.

The husband's legal costs paid to the date of trial were \$212,445.

The wife's legal costs paid to the date of trial were \$217,496, part of which was funded by way of a number of orders for interim property settlement made in her favour and part by way of a loan from the wife's mother treated as a liability in the balance sheet.

Each party asked the Court to addback at trial the then non-existent assets.

54. *This Court does not follow the practice of adding back and dividing non-existent assets. There is no warrant for doing so in the Act. That once fashionable practice was one which assisted in pointing perhaps*

³² [2013] FamCA 655

³³ [2013] FamCA 765

the way to a just solution; however, there exists plenty of opportunity for the Court to come to a just and equitable assessment as to source and application of funds in its consideration of contributions under s79(4) and matters referred to in s75(2), and also in particular s 75(2)(o).

His Honour adopted the course suggested in *Bevan* of making a % adjustment for paid legal fees (and the interim property settlements) under s75(2)(o). He declined to include the debt owing by the wife to her mother in the asset pool.

Peabody & Peabody³⁴ Addback approach to interim property settlement s79(4) contributions % assessment on remainder
Decision of Judge Sexton of the Federal Circuit Court of Australia delivered 28 November 2013.

It was accepted that the husband had paid his legal fees from income earned by him after separation, and therefore his paid legal fees shouldn't be included into the balance sheet.

The wife had received an interim property settlement of \$127,000, of which she had applied \$106,722 to legal fees.

Her Honour took into account the wife's other post-separation expenditure in her assessment of each parties' contributions (including the wife's paid legal fees from sources other than the interim property settlement).

However, she added back the interim property settlement of \$127,000 in the balance sheet as funds held by the wife. Her Honour held:

...these funds were paid to the wife by way of an interim property distribution, and, as agreed by the wife's Counsel in that interim hearing, were paid on the basis that they would be included in the wife's assets at final hearing.

Although not referred to in that part of the judgment, it was earlier noted by the Judge that it had been agreed that the husband had paid that interim property settlement by drawing funds from his bank account and from his superannuation fund.

³⁴ [2013] FCCA 1980

Idoni & Idoni³⁵**s75(2)(o) \$ adjustment approach**

Unreported decision of Justice Benjamin of the Family Court of Australia delivered 30 October 2013.

The husband had taken \$25,000 from a line of credit towards payment of his legal costs. The Judge made a s75(2)(o) adjustment in favour of the wife of \$12,500, providing her with equality in terms of legal costs paid by the husband out of the funds, on top of other s75(2) factors.

Panton & Panton³⁶**s75(2)(o) % adjustment approach**

Decision of Judge Harland of the Federal Circuit Court of Australia delivered on 23 December 2013.

In relation to a range of addback issues (including an amount taken by the husband from a mortgage to pay legal fees), Her Honour said:

...in my view in light of Stanford & Stanford and Bevan & Bevan, it is not appropriate to addback notional property which no longer exists. The proper course is to make an adjustment pursuant to s75(2)(o). In my view this is appropriate because it reflects the reality of the situation and achieves the same outcome.

Despite having said that it would have achieved the same outcome, Her Honour made a percentage adjustment in the s75(2) factors, rather than a dollar amount reflecting the exact nature of the amount of the potential addbacks.

Jackson & Shea³⁷**No addback of interim property settlement
S75(2)(o)% approach**

Decision of Justice Berman of the Family Court of Australia delivered 12 February 2014.

There was a \$100,000 interim property settlement in favour of the husband. The wife sought to addback that amount. The Judge made a finding that part of \$100,000 had been used by the husband on legal fees. The matter was complicated because the source of funds used by the wife to pay the interim property settlement was a trust entitlement which the wife argued she had overdrawn and become a

³⁵ [2013] FamCA 874

³⁶ [2013] FCCA 2263

³⁷ [2014] FamCA 72

liability. The Judge separately declined to include that alleged liability in the asset pool.

His Honour found that bringing into account the interim property settlement:

...would have a level of artifice which is difficult to rationalise given my finding that no liability in respect of the D personal account should be included as a liability of the wife.

Instead, he decided to take into account the parties' respective paid legal fees as a s75(2)(o) factor favourable to the wife (in percentage terms, not dollar terms).

There is an interesting suggestion by the Judge, in response to the wife's submissions that it would not be just and equitable to make any order for property settlement, that the interim property settlement "*may have thereby predetermined the issue*" in relation to whether it was just and equitable to make a property settlement order "*although the making on the consent of the parties may not be sufficient*".

Todd & Todd³⁸

s75(2)(o)% adjustment approach

Trial decision of Justice Berman of the Family Court of Australia delivered 27 February 2014.

This was a case involving addbacks for dissipation of assets at separation. There had also been an interim property settlement payment to the husband. In relation to the addback approach, His Honour said:

92. *Following Stanford, I consider that whilst it is still open to a Court to consider the appropriate way forward is to add property back to the interests of each of the parties, such an outcome would be rarer and may well be restricted to those circumstances where there is a realistic possibility that the property might be retrieved.*

The Judge took into account monies spent by each of the parties as a s75(2)(o) factor.

³⁸ [2014] FamCA 101

Harradine & Harradine³⁹**Addback approach**

Judgment of Justice Dawe of the Family Court of Australia delivered 28 March 2014.

In that case, interim property orders were made to fund some of the wife's legal costs. Legal fees paid by the husband of \$192,912 and legal fees paid by the wife of \$181,431 were added back by the Judge. In addition, at the conclusion of the trial but before judgment was delivered, the Judge made a further interim property settlement amount in favour of the wife of \$100,000. The trial judgment provided that that \$100,000 is to be deducted from the amount payable to the wife.

Smart & Smart⁴⁰**Addback approach**

Decision of Justice Forrest of the Family Court of Australia delivered 17 April 2014.

In this case both parties argued at trial that there should be notional addbacks for various items, including legal fees spent by each party. The wife had paid \$27,604.25 in legal fees (\$10,000 of which had been paid to her by the husband via an interim property order and \$16,000 of which was found to the Judge have been paid by the wife using money she had withdrawn from the parties' bank account), and the husband had paid \$70,443 in legal fees (the entire source of funds being unclear on the evidence, but \$55,856 being paid from the parties' pre-separation capital).

Justice Forrest held that although the Full Court in *Bevan* said that 'notional property' 'is unlikely to constitute 'property of the parties to the marriage or either of them', "*I do not consider that such observations altered the fact that the determination of the appropriate way to deal with unilateral pre-trial disposition of property is a matter within the discretion of the trial judge*".

His Honour found that it was still appropriate to have regard to the Full Court's previous decisions in *Chorn & Hopkins*, *Omacini and Cerini*:

Of course, notionally adding an amount to a list of assets does not create property which is amenable to adjustment itself, but, in my view, amounts notionally added may certainly be considered along with actual property and superannuation interests that are amenable to adjustment by the Court's

³⁹ [2014] FamCA 188

⁴⁰ [2014] FamCA 262

Landt v Thatcher⁴²**Addback approach**

Unreported decision of Judge McGuire of the Federal Circuit Court of Australia delivered 4 September 2013.

At the date of hearing there was little or no property. The wife was an undischarged bankrupt. She had superannuation of \$32,860 and the husband had superannuation of \$65,000. However, post-separation the wife took \$90,000 from a mortgage and she claimed she had given it to her son. There were serious questions about the wife's disclosure in relation to that amount.

The Judge decided to treat the \$90,000 as being an asset which remained available to the wife.

In dealing with *Bevan* His Honour said:

These Courts are at times confronted with a situation where the property pool, either with legal title or equitable interest, has been dissipated or completely disposed of by the time of trial. Traditionally, Family Courts have applied a notional "addback" which theoretically returns to a pool of property assets which no longer exist or are no longer in the hands of the parties. A close reading of the judgment in Stanford and Bevan suggests that this might not be the correct approach. I question, however, the pragmatism which often confronts trial Judges if such a situation applies. Surely, justice and equity is incompatible with one party dissipating a property pool in their own favour but arriving at the trial claiming that there are no actual assets. To put it simply, there would be no satisfaction in the other party having to address such a situation under s75(2)(o) and in theory being given a greater percentage of a minimal pool on account of that subsection. To my mind the common justice and equity on occasions demands that there are notional "addbacks". To do otherwise in such a situation as that now before me produces nonsense and thus the court in Bevan left open such a course of "exceptional circumstances". The factual platform now before me is one of those situations. Consequently, I am satisfied that the wife either had available to her the \$90,000 from the final refinancing or, alternatively, it should be added back to the pool on account of her wanton, reckless or negligent advancement

⁴² [2013] FCCA 1194

to her son. To deal with it pursuant to s75(2)(o) would be to visit an injustice on the husband as there are in reality no other assets to which orders can attach.

The Judge ordered that the wife pay to the husband \$90,000.

The nature of interim property settlements

As can be seen from the above summary of recent cases, different approaches have been taken to the treatment of interim property settlement amounts at trial. Of concern to litigants, particularly the party that has paid the interim property settlement, is that the amount paid is recognised in some way in the overall, final settlement. A notional addback of the amount paid is generally the most transparent way to satisfy that concern.

It is worth considering the nature of the power exercised by the Court when making an interim property settlement, and how the exercise of that power sits within the broader s79 adjustment process. This is important because one of the considerations in making an interim property settlement order in accordance with the principles in *Strahan* is the 'adjustment or claw-back issue'. Can any overpayment be 'clawed back' in the final exercise of the s79 adjustment?

In 2008 the Full Court considered the nature of the interim property settlement power in the context of the introduction of the superannuation splitting regime. The transitional provisions provided that the regime did not apply in cases where there was already a s79 order in place, other than an interim order.⁴³ In *Gabel & Yardley*⁴⁴ the Full Court held:

*...the Court's power to make orders with respect to settlement of property is not necessarily exercisable at only one time, and can properly be exercised by a succession of orders until the power to make orders with respect to property is exhausted.*⁴⁵

And:

⁴³ Family Law Legislation Amendment (Superannuation) Act 2001, sections 4 and 5.

⁴⁴ [2008] FamCAFC 162

⁴⁵ Ibid. para 57

The circumstances in which the Court would be likely to vary or reverse earlier orders altering interests in property will depend on the circumstances of the individual case. Matters such as the disposition of property transferred, the length of time since the original orders were made, the extent to which the parties had acted in reliance upon the orders and whether the orders were made by consent or otherwise would all be matters relevant to the question of whether any variation of partial orders affecting the parties' interests in their property should be made. Nevertheless, if there is only one exercise of power under s79, albeit that occurs in a series of stages and by the making of a number of orders, the orders must ultimately be just and equitable between the parties.⁴⁶

Delivering a separate judgment, but agreeing with the orders proposed by the majority, Finn J put the practical effect of an interim order in this way:

...an alteration of an earlier order may be necessary to ensure that the final order or final exercise of the s79 power is just and equitable. If such an earlier order was not altered by the final order, it would become in effect (in its unaltered form) a paragraph or clause of the final single order (as it would if it was the subject of alteration).

Seen in that context, could the emphasis by the High Court in *Stanford* on the word *existing* (legal and equitable interests), perhaps refer to the time that the Court first exercises its s79 power by the making of an interim property settlement order.

The March 2014 decision of Justice Cronin in *Yeh & Jyu*⁴⁷ highlights this 'timing' question. In that case he ordered the husband to pay to the wife \$1,150,000 by way of interim distribution of property, accepting that only some of that would be used by the wife for legal fees and that the balance represented part of her overall entitlements. The case was put that if the husband had conceded that the wife was entitled to 40% of the net asset pool on an overall basis, it was unfair to not give the wife access to some of "her" entitlement pending final trial. The question then remains what happens if the wife spends all that money prior to trial?

⁴⁶ Ibid, para 73,

⁴⁷ [2014] FamCA 162