

OVERSEAS PROPERTY

Eight tips on add-backs

JACKY CAMPBELL, OCTOBER 2019

Add-backs in proceedings for the alteration of property interests under the *Family Law Act 1975* (Cth) (FLA) occur when the court adds back funds or other property to the property of the parties, when funds or other property has been used by one of the parties for their own purposes, usually after separation.

1. The categories of add-backs are not closed (*Layton & Layton* [2014] FamCAFC 126), but the most common categories were identified in *Omacini & Omacini* (2005) FLC 93-218:
 - Payment of legal fees;
 - Premature distribution of property;
 - Course of conduct designed to reduce the value of an asset or reckless or negligent conduct (*Kowaliw & Kowaliw* (1981) FLC 91-092).
2. Legal costs paid from a source which would otherwise be property of the parties will almost always be added back under the guidelines in *Chorn & Hopkins* (2004) FLC 93-204. This was recently re-confirmed by the Full Court of the Family Court in *Trevi & Trevi* (2018) FLC 93-858.
3. Reasonable living expenses will not be added back (*Omacini & Omacini* (2005) FLC 93-218; *Grier & Malphas* [2016] FamCAFC 84).
4. Following the High Court decision of *Stanford v Stanford* (2012) FLC 93-818, when dealing with an alteration of legal and equitable interests under s 79 FLA (or s 90M for de facto couples), add-backs were likely to be considered by a court under s 75(2)(o) FLA if they were dealt with at all. The concept of notional property being dealt with as part of the property pool was rejected (eg. *Bevan & Bevan* (2013) FLC 93-545).
5. Despite *Stanford*, adding back notional property and increasing the size of the property pool is still an option (e.g. *Trevi & Trevi* (2018) FLC 93-858; *Vass & Vass* [2015] FamCAFC 51).
6. The court is entitled to take a robust approach to the division of known property where there appears to be undisclosed property (*Weir & Weir* (1993) FLC 92-338).
7. It may be better to look at other options before the final settlement, so add-backs are not an issue, such as:

- 7.1. Partial property settlements;
 - 7.2. Injunctions to stop wastage;
 - 7.3. Freezing a mortgage or joint savings so withdrawals cannot be made.
8. Courts do not like add-backs and consider that they “be the exception rather than the rule” (*Gollings & Scott* [2007] FamCA 397; *Chorn & Hopkins* (2004) FLC 93-204), but clients love them.

October 2019

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