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Stepping in

The full court speaks on Stanford

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A recent Family Court decision could have considerable ramifications for property settlement cases.

There has been considerable conjecture about the future application of well-established principles in family law property cases since *Stanford & Stanford* [2012] HCA 52 *(Stanford)*.[1] Two significant areas of uncertainty are the ongoing application of the well-known 'four-step' approach to the determination of property settlement matters as well as the use of 'addbacks' and consideration of notional property in cases involving wastage.

In the decision of *Bevan & Bevan* [2013] FamCAFC 116 (*Bevan*), the full court of the Family Court of Australia delivered its first judgment considering the High Court's decision in *Stanford*. The decision goes some way towards resolving the uncertainty and has important ramifications for the future conduct of family law property cases.

The four-step approach

Prior to *Stanford*, applications under s.79 of the *Family Law Act 1975* (Cth) (the FLA) were generally determined by reference to the four-step approach enunciated in various cases and spelt-out by the full court in *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395.[2] The four-step approach required a court hearing a property settlement case to:

- make findings about the identity and value of the assets, liabilities and financial resources of the parties;
- assess the contributions of the parties, financial and otherwise (as set out in ss.79(4)(a) to (c) of the FLA), and determine their contribution-based entitlements;
- assess the various (primarily prospective) factors of ss.79(4)(d) to (g) (including the factors set out in s.75(2)) of the FLA and determine what (if any) adjustment should be made on the basis of those factors; and
- consider what order was just and equitable in all the circumstances of the case.[3]

The requirement that the court not make an order unless satisfied that, in all the circumstances, it was just and equitable to do so (as set out in s.79(2)), was recognised as the "overriding requirement".[4]

In *Stanford*, the future of the four-step approach was thrown into doubt by the High Court. In particular, the court made the following comments:

- "First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order

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- No order adjusting property interests will be made unless it is just and equitable to do so.
- The traditional four-step approach to the determination of property settlement matters continues to be valid.
- It's unlikely that the practice of 'adding back' wasted or dissipated assets and considering them as notional property will continue to be accepted.
- Wasted or dissipated assets are likely to be considered either as part of the court's analysis of the parties' contributions or under s.75(2)(o).

...",[5]

- "The inquiries required by s.79(4) are separate from the 'just and equitable' question presented by s.79(2). The two inquiries are not to be merged";[6] and
- "To conclude that making an order is 'just and equitable' only because of and by reference to various matters in s.79(4), without a separate consideration of s.79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act".[7]

While the High Court did not expressly overrule the four-step approach, it did not approve it, and its ongoing applicability was left in doubt. First instance decision makers were divided on the impact of the decision on the four steps, and there was uncertainty over whether it was necessary to embark on a determination of whether it was just and equitable to make an order prior to consideration of the other matters covered in those steps.[8]

The decision in Bevan

In *Bevan*, the full court addressed the issue of the ongoing applicability of the four-step approach to property cases. The majority noted that despite the express requirement in s.79(2) that no order be made unless it was just and equitable to do so, it had been common practice for litigants to assume that justice required their claims to be assessed by reference to s.79(4), even if they sought that there be no adjustment between the parties.[9]

The majority also noted that this approach was consistent with the observations of the High Court in *Stanford*[10] to the effect that in many cases, the just and equitable requirement would be readily satisfied by observing that as the parties' marriage had ended, there would no longer be common use of property, and the express and implicit assumptions that underpinned the existing property arrangements had been brought to an end.[11]

Their Honours observed in *Bevan* that, although there would be some cases in which determination of whether it was just and equitable to make any order would require separate and careful deliberation,[12] the reminder in *Stanford* of the pivotal role of s.79(2) was unlikely to have any impact in the vast majority of cases, other than as a reminder to trial judges that it was a precondition to the making of orders that it be just and equitable to do so.[13]

The majority specifically rejected the notion that an enquiry on whether it was just and equitable to make any order was a 'threshold' issue, describing such a characterisation as misleading, because the initial enquiry is about the legal and equitable interests of the parties; and because the corollary of the prohibition in s.79(2) on making an order unless it is just and equitable to do so is that if the court does make an order, such an order itself must be just and equitable.[14]

The full court in *Bevan* further indicated that although "the requirement to consider the s.79(4) matters in determining whether it is just and equitable to make any order provides fertile ground for the conflation of the two different issues, which the High Court has warned against",[15] they considered that "it would be a fundamental misunderstanding to read *Stanford* as suggesting that the matters referred to in s.79(4) should be ignored" in determining whether it was just and equitable to make an order[16] and that the ss.79(2) and 79(4) issues were "intertwined".[17]

Finn J, in a separate judgment, indicated that the point in the decision-making process at which the question of whether it is just and equitable to alter the property interests of either party is to be addressed depends on the circumstances of each case.[18] Her Honour held that while findings of fact concerning the parties' financial history (that is, their contributions), their present circumstances and future prospects would be of assistance, such findings cannot be conclusive in determining whether or not it is just and equitable to make an order altering the parties' property interests.[19] Her Honour went on to explain that, having determined that it is just and equitable to make an order altering property interests, the manner or extent of such alteration will then be determined having regard to the various considerations in s.79(4).[20]

The majority suggested that while it would be preferable for trial judges to refrain from evaluating contributions and other

relevant factors in percentage or monetary terms until they have first determined that it would be just and equitable to make an order, appealable error would not arise where it was possible to ascertain, either by reference to an express finding or necessary inference, that separate consideration had been given to the two issues.[21]

Ultimately, the full court in *Bevan* appears to have concluded that the four-step process remains good law. However, the majority warned that it should not be treated as "a statutory edict, when in fact it is no more than a shorthand distillation of the words of a statute which has but one ultimate requirement, namely not to make an order unless it is just and equitable to do so"[22] and indicated that "any future restatement of that process should incorporate acceptance of the fact that the power to make any order adjusting property interests is conditioned upon the court finding that it is just and equitable to make an order."[23]

Addbacks

Prior to the decision in *Stanford*, in circumstances where a party had deliberately or recklessly wasted matrimonial property or where there had been a premature distribution to one of the parties, that property could be 'added back' into the parties' pool of assets and treated as notional property.[24]

In *Stanford*, the High Court held that "it is necessary to begin 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"25 [emphasis in original]. In light of the requirement to ascertain and focus on the parties' existing legal and equitable interests, it appears that there is much more limited scope for the use of 'addbacks' and consideration of notional property in cases involving wastage or premature distribution of matrimonial assets.

In *Watson & Ling* [2013] FamCA 57, Murphy J expressed a view that in some cases, such as those involving sham transactions, disposal of assets may affect the legal title but not the equitable title to such assets, and the remaining equitable interest would remain with the disposing party to be identified in accordance with *Stanford*.[26] However, his Honour indicated that in many other cases, legal and equitable title will have passed with the disposal of property, and such property could not be seen as forming part of the "existing legal and equitable interests of the parties," meaning that the practice of adding back notional property was at odds with the decision in *Stanford*.[27] His Honour suggested that such conduct might be considered at s.75(2)(o), which requires consideration of "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account" or as part of the assessment of the relative contributions of the parties as a factor to be considered in favour of the non-dissipating party.

The full court in *Bevan* declined to express conclusive views on the ongoing viability of the practice of adding back notional property dissipated by a party to the marriage, as the facts in *Bevan* did not require determination of this issue. However, a small number of comments in the majority judgment appear to be consistent with Murphy J's reasoning in *Watson & Ling*, and it would therefore appear likely that such an approach will be adopted by the full court if an appropriate case comes before it.

Having noted that "of course it will always be important to determine whether one party has an equitable interest in property owned by a third party",[28] the majority in *Bevan* indicated that "'notional property', which is sometimes 'added back' to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute 'property of the parties to the marriage or either of them', and thus is not amenable to alteration under s.79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage - and potentially an important part." Their Honours went on to note that "s.79(4) and in particular s.75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property".[29] Similar comments were made in the separate judgment of Finn J.[30]

Conclusion

While it is necessary to keep in mind that no order adjusting property interests will be made unless it is just and equitable

to do so, following the full court's decision in *Bevan*, practitioners may proceed on the basis that the traditional four-step approach to the determination of appropriate outcomes in property settlement matters continues to be valid. Although a small minority of cases will require separate consideration of whether it is just and equitable to make any orders, and this is not to be conflated with the matters set out in s.79(4), this is not a threshold issue, nor a discrete step requiring reformulation of well-established principles.

The situation regarding addbacks is less clear, but from the comments made by the majority in *Bevan* it would appear unlikely that the pre-*Stanford* practice of adding back wasted or dissipated assets and considering them as notional property will continue to be accepted. It is likely that wastage or premature dissipation of assets will be considered either as part of the court's analysis of the parties' respective contributions or as a factor under s.75(2)(o). This departure from previously well-accepted principles will have significant ramifications for the way in which cases should be presented.

ENDNOTES

1. For detailed consideration of the potential ramifications of the decision in *Stanford*, see P. Parkinson, "Family property law and the three fundamental propositions in *Stanford v Stanford*", *Australian Family Lawyer* (2013) 23(2); J Campbell, "*Stanford* - the High Court Decision" retrieved from the lawchat website on 24 September 2013, *tinyurl.com/k6dbe8g*; W. Stidston, "*Stanford v Stanford*: A tale of two enquiries" retrieved from the Westminster Lawyers website on 24 September 2013, *tinyurl.com/qyrkjut*; the Hon. Stephen O'Ryan QC and P Doolan, "Property settlement after *Stanford*: What has the High Court said and what does it mean for family lawyers?", paper presented at the Law Council of Australia Family Law Intensives 2013; Martin Bartfeld QC, "*Stanford v Stanford* - Lots of questions, very few answers", *Issues with Discovery and Disclosure in Family Law 2012* (2013).
2. See also *Omacini & Omacini* [2005] FamCA 195; *Lee Steere & Lee Steere* (1985) 10 FamLR 431; *Ferraro & Ferraro* (1992) 111 FLR 124; *Clauson & Clauson* (1994) 18 FamLR 693; and *Townsend and Townsend* (1994) 18 FamLR 505.
3. *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395 at [39].
4. *Mallett v Mallett* (1984) 156 CLR 605 at [647].
5. *Stanford & Stanford* [2012] HCA 52 at [37].
6. Ibid at [51].
7. Ibid at [40].
8. See, for example, *Erdem and Ozsoy* [2012] FMCAfam 1323; *Martin & Crawley* [2012] FamCA1032; *Watson and Ling* [2013] FamCA 57 (*Watson and Ling*); and *Wolter & Wolter* [2012] FamCA 1133.
9. *Bevan & Bevan* [2013] FamCAFC 116 at [68].
10. Above n.5 at [42].
11. Above n.9 at [69] and also [164] per Finn J.
12. Ibid at [85].
13. Ibid at [70].
14. Ibid at [86].
15. Ibid at [85].
16. Ibid at [84].
17. Ibid at [87].
18. Ibid at [66].

19. Ibid at [169].
20. Ibid at [170].
21. Ibid at [89].
22. Ibid at [72].
23. Ibid at [71].
24. *Kowaliw & Kowaliw* (1981) FLC ¶91-092; *Townsend & Townsend* [1994] FamCA 144; *Milankov & Milankov* [2002] FamCA 195; and *Omacini & Omacini* [2005] FamCA 195.
25. Above n.5 at [37].
26. *Watson & Ling*, above n.8 at [29].
27. Ibid at [30]. See also *Beklar & Beklar* [2013] FamCA 327.
28. Above n.9 at [78].
29. Ibid at [79].
30. Ibid at [160].

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