ASSESSING INTERESTS AND CONTRIBUTIONS IN FAMILY LAW PROPERTY CASES

Author: Emma Swart

Date: 21 November, 2014

Assessing interests and Contributions in Family Law Property Cases

Emma Swart, Barrister, Foley's List, Victorian Bar

Since the High Court handed down it's decision in *Stanford v Stanford* [1] there has been a flurry of academic commentary and informal debate among family lawyers about the effect of the decision on the "4 step" approach to property division[2] and longstanding practice of "adding back" to the pool of assets to be divided between parties, amounts for assets which are no longer in existence at the time of trial. In this paper, I propose some practical guidance for family lawyers in how to assess clients' legal and equitable interests in property and how to assess contributions. As case studies for the exercise, I use the two recent cases on long separation, Bevan[3] and Marsh[4] as they themselves are interesting cases and they highlight some of the difficult issues in assessing interests and contributions. Both cases involved married couples, but the exercise is the same for this part of preparing a defacto property case.

I use the phrase "assessing interests" in place of the first stage of the traditional 4 step approach of "Identifying and valuing the Asset Pool" as I want to draw attention to the requirements of s79(1) & (2) of the *Family Law Act 1975* highlighted by the High Court in *Stanford* (or s90SM for defacto matters). In order to consider an order altering the interests of the parties in property, the court must first identify what those interests, both legal and equitable, are (and then only alter them if the court considers that it is just and equitable to do so).

On a practical level, the task of assessing interests is a task of populating a table of Assets and Liabilities. What goes in it, what stays off it and what to do with the things you would like to put in it but that no longer exist at the time of trial.

---

[1] [2012] HCA 52

[2] *Hickey v Hickey and the Attorney General for the Commonwealth of Australia (Intervenor)* 2003 FLC 93-143

[3] *Bevan & Bevan* (2013) FLC 93-545; [2013] FamCAFC 116 (8 August 2013); *Bevan & Bevan* (2014) FLC 93-572; [2014] FamCAFC 19 (19 February 2014) (re-exercise of discretion)

[4] *Marsh & Marsh* (2014) FLC 93-576; [2014] FamCAFC 24 (25 February 2014)

The second focus of the paper is assessing contributions. This is familiar ground as it was the clear second step of the 4-step approach – to assess the financial and non-financial contributions of the parties to particular assets, to the asset pool generally and to the welfare of the family.

On a practical level, the task of assessing contributions is a task of populating a chronology. Good chronologies are incredibly useful documents for barristers in trials. They highlight the key facts and allegations in a case. Many solicitors have not worked out how to use chronologies in case preparation and spend long hours creating them just before trial for Case Outline documents for the court in a format that isn't of great use to anyone. Chronologies can be incredibly useful documents for solicitors too if they are used as a working document to summarise the key facts and allegations as the case is being investigated. The chronology then becomes the structural guide for the client's affidavit, ensuring that material is organised in a structured way and that key elements of the case are covered.

Case 1 - Bevan

Bevan & Bevan (2013) FLC 93-545; [2013] FamCAFC 116 (8 August 2013) Joint judgment Bryant CJ and Thackray J; Finn J

Bevan & Bevan (2014) FLC 93-572; [2014] FamCAFC 19 (19 February 2014) Joint judgment Bryant CJ and Thackray J; Finn J (re-exercise of discretion)

Facts

The parties were married in 1972 and had 2 sons born in 1975 and 1976. When they married the parties had no significant assets but did well financially until the 1990s when they suffered a financial crisis. In 1994 the husband left for a life at sea. In 1995, the husband gave the wife a power of attorney and told her that she could retain all the Australian property for herself and the children. The husband eventually settled in England where he worked as a medical professional. The husband was in a relationship in the UK from 1997–1999.

The wife attended to difficult litigation with the husband's brother-in-law over a trust, which finally settled in 2002, and the wife invested the $1.4 million net proceeds buying a house (with a mortgage) in her own name. From 1994 the husband continued to trade in the Australian shares acquired during the marriage, which fluctuated wildly and were sold from 2000 to 2003 possibly for $400,000, which probably was paid into the parties' Australian bank accounts.

From 1994 to 2004, the parties spent time together in Australia and shared expensive overseas holidays paid for from the Australian resources. The wife helped care for the husband's mother before she died in 1997 and the husband received an inheritance in around 2002 of $58,000 (though the husband was confused about dates and thought the amount was $200,000). The husband worked in Australia for a while and helped with some renovations to prepare the wife's home for their son's wedding in 2004, staying in a separate room and using the joint account for his pay and expenses.

The husband moved in with his partner in the UK again in 2006 in a home owned by her with a 70,000 pound mortgage. The husband paid 700 pounds a week to an account for board, lodging and joint expenses.

In 2007, the wife extended the mortgage by $1 million to invest in shares and lost most of the investment in the global financial crisis.

After the parties divorced on 22 July 2010, the husband issued s79 proceedings on 20 July 2011.

At trial, the wife's home was worth about $2 million with $268,000 left from the originial mortgage and $938,000 for the investment loan. There were various chattels, notably only a car in the husband's name. Of the assets held at trial, only some artwork and jewellery were originally held by the parties when they lived together.

Jordan AJ delivered a judgment at the end of the trial on 7 December 2012.

Trial Judge's Decision

His Honour found that contributions from 1972 to 1994 were equal but gave the wife an extra 10% for the events after 1994 so 60:40 with no adjustment under s75(2). His Honour found the net property pool to be $1,069,000. This meant taking into account other assets (not including any interest the husband may have had in his partner's property), the husband would receive 45.7% of the net proceeds of sale of the wife's home.

The Appeal

The wife appealed on 4 grounds and was given leave to add 2 further grounds.

Summary of Grounds 1, 3 & 4 - That it was not just and equitable to make the orders pronounced, or any orders at all (trial Judge conflated consideration of s79(2) and s79(4)).

Ground 2 – That the trial Judge erred in refusing to make an adjustment for s75(2) factors.

Ground 5 – That the trial Judge erred in including the remaining art collection and the wife's jewellery in the asset pool.

Ground 6 – If the trial Judge made findings about the husband's contributions after separation in the order of $400,000 for share sales in 2000, further money from share sales after 2000 and any more than $58,000 from his inheritance, those findings were incorrect.

The Joint Judgment of Bryant CJ and Thackray J (2013)

Appeal allowed and adjourned for further submissions.

Grounds 1,3 & 4 – Found for appellant wife

At 111 “we consider his Honour erred in saying there was “no requirement to consider what representations the parties may have made during the marriage or subsequent to separation”. In our view, such representations clearly could be relevant in determining whether it was just and equitable to make an order adjusting existing interests”.

At 117, “We also consider his Honour erred when at [106], he took into account, against the interests of the wife, the fact that the “informal arrangements” between the parties were not formalised at any time during the 18 years in which they lived largely separate lives.”

At 123, “Although he was therefore at liberty to pursue his claim, the husband’s long delay in bringing it, in the face of repeated prior representations, was highly relevant in the exercise of the s79 discretion.”

Ground 2 – Found for appellant wife

At 133, “Given his Honour’s findings about the contributions made by the husband during his relationship with his current partner, we consider the fact that the husband had accommodation available to him was a matter that should have been considered under s75(2).

Ground 5– Not found

At 138, “The trial Judge was entitled to bring into account the remaining artwork and jewellery that had been valued.”

Ground 6– Found for the appellant wife

At 145, “With respect to his Honour, and recognising that his reasons were given almost *ex tempore*, the absence of clear findings about the shares and the inheritance, and the absence of mention of them in the contribution discussion, leaves us in doubt about the path of reasoning followed in assessing contributions.”

The Separate Judgment of Finn J (2013)

Agree with joint judgment reasons and appeal allowed and adjourned for further submissions.

At 156, “Trial Judges need to identify clearly, and at an early stage of their reasons for judgment, which party has the legal or equitable title to a particular item of property.”

At 160, “… might also call into question the current treatment of property which is no longer in existence … (the so-called “addbacks”), and perhaps the unsecured liabilities of one or both parties.”

At 166, There can be no hard and fast rule as to when the question under s79(2) must be answered.

The Joint Judgment of Bryant CJ and Thackray J on re-exercise of discretion (2014)

Appeal allowed, husband permitted to argue for an increased pool, husband’s application for a property settlement dismissed, husband left with his legal debts and whatever equitable interest he may have in his partner’s home in the UK, no order for costs but costs certificates for each party.

- Pool increased to $1,125,000 by including 2 artworks promised to the sons.
- All the property in the pool was held by the wife except the husband’s car (The previously joint art collection was gifted to the wife by the husband by his representations that she could have everything in Australia).
- The husband repeatedly told the wife the assets in Australia were hers, even after he received his inheritance of around $58,000 from his mother’s estate.
- The court would need a principled reason to interfere with the existing legal and equitable interests of the parties.

- The husband was unable to say where his inheritance was spent but it was received before the parties paid for holidays for themselves and the children and the wedding of a son, so it was unlikely to have been spent solely for the benefit of the wife.
- It is not possible to arrive at any definitive finding about the share portfolio due to the absence of any documentary evidence but it would largely have been put together whilst the parties were cohabitating and after it was liquidated the husband continued to tell the wife that she could keep all the Australian assets.
- The husband's contributions whilst in Australia working in 2001 and 2004 do not carry weight as the amounts were not substantial and he was living out of the joint account to which his pay was contributed.
- Both parties are now in their 60s with limited work prospects left.
- Husband has access to good quality accommodation.
- Wife may have to sell home if husband is to be paid (not greatly significant).
- Given extent and circumstances of husband's representations and the substantial delay in issuing proceedings, it would not be just and equitable to make any order interfering with the existing interests in property.

The Separate Judgment of Finn J on re-exercise of discretion (2014)

Agreed with joint judgment but raised concern that a party who did not cross-appeal should not be able to argue an increase in the pool.

Assessing the interests of the parties

The task of the court is to identify the legal and equitable interests of the parties in property (and debts) at the time of trial.

In the Bevan case, the Assets and Liabilities table at trial looked like this –

Asset/Liability	**Amount**
[M town] property	$2,000,000
Husband's vehicle	$4,000
Wife's vehicle	$14,000
Wife's household furniture and effects	$20,000
Remaining art collection	$56,000
Investment shares and banking	$162,000
Wife's jewellery	$19,000
TOTAL	**$2,275,000**
Less liability secured against the property	$1,206,000
NET PROPERTY POOL	**$1,069,000**

The Full Court specifically commented that it would have been useful if the table had identified which party held each asset and liability as that was what was required of the legislation but in any event the exercise was easy as the husband only owned his vehicle.

A preferred table would have looked like this –

Asset/Liabilities of Wife	**Amount**
[M town] property	$2,000,000
Wife's vehicle	$14,000
Wife's household furniture and effects	$20,000
Remaining art collection	$56,000
Investment shares and banking	$162,000
Wife's jewellery	$19,000
TOTAL	**$2,271,000**
Less liability secured against the property	$1,206,000
TOTAL PROPERTY OF WIFE	**$1,065,000**
Assets/Liabilities of Husband	
Husband's vehicle	$4,000

Joint Assets/Liabilities	**NIL**
NET PROPERTY POOL	**$1,069,000**

On the re-exercise of the discretion by the Full Court, the table would have looked like this -

Asset/Liabilities of Wife	**Amount**
[M town] property	$2,000,000
Wife's vehicle	$14,000
Wife's household furniture and effects	$20,000
Remaining art collection	$56,000
Investment shares and banking	$162,000
Wife's jewellery	$19,000
Artworks promised to sons	*$56,000*
TOTAL	**$2,271,000**
Less liability secured against the property	$1,206,000
TOTAL PROPERTY OF WIFE	**$1,121,000**
Assets/Liabilities of Husband	
Husband's vehicle	$4,000
Husband's Equitable interest in partner's English property	*Not specified*
Legal Debts	*Not specified*
Joint Assets/Liabilities	**NIL**
NET PROPERTY POOL	***$1,125,000***

In some cases it is useful to draw the court's attention in stark numbers to the effect of a party helping him or herself to assets prior to trial. Notionally adding back the property onto the balance sheet satisfied this need but after the

comments in *Bevan* above, add-backs should not be regarded as routine inclusions but a party's expenditure is taken into account pursuant to section 75(2)(o) -

> *"any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account"*

I suggest adding a further heading in the balance sheet "Matters to be taken into account under s75(2)(o)" and including the amounts in that separate section. For example in Bevan, the husband may have wished to include "Wife's loss from share trading $938,000". This gives the matter impact in comparison to the other matters in the Balance Sheet.

Case Study 2 - Marsh

Marsh & Marsh (2014) FLC 93-576; [2014] FamCAFC 24 (25 February 2014)

Separate Judgments Ainslie-Wallace, Murphy, Le Poer Trench JJ

Facts

Husband and wife born in 1958, married in 1979 when both were working full-time, wife had little by way of assets, husband had some savings, a car and some superannuation.

Husband commenced with employer in 1981 and was still with same employer at trial. Wife worked until first child born in late 1983, two more children in 1986 and 1990, had not returned to paid employment at date of trial.

Family moved to different states and different countries with the husband's work and moved into the family home in 2000, husband moved out and parties separated in December 2000 after a 21 year marriage when the children were 17, 14 and 10.

Husband continued to work and pay for the family's expenses after separation.

Divorce finalised January 2008, wife applied June 2010 and was granted leave to proceed out of time in July 2010. At trial, there had been 10 years post-separation.

The Non-super pool was $3,106,313. The Husband's super was $1,673,902.

There were disputes about the value and tax on the husband's shares in his employer company, tax on shares sold in 2010 and value of his share in a boat. There was a further issue about how to treat the wife' paid legal costs.

The husband argued that he had made virtually all of the financial contributions post-separation of $1.285 million and $2.6 million for the benefit of the wife and children post-separation.

There were no children under 18. The wife had some health problems.

The husband earned $640,000 per year or $13,000 per week, the wife $467 per week from Centrelink and board from the youngest child.

Federal Magistrate's Decision

Federal Magistrate Monahan (as he then was) ordered on 19 January 2012 that the wife have 40% of the non-super pool and 30% of the superannuation.

He accepted the husband's calculations on financial contributions but also found that the wife had made a significant contribution to the family. He allowed the husband 20% on each of the super and property pools.

He allowed the wife 10% for s75(2) factors on the property pool only leading to 40% and 30% on the superannuation pool.

Grounds 2 & 3 - The 70% contribution based assessment in favour of the husband and the 10% adjustment to the wife on s75(2) factors were outside the reasonable range of discretion.

Ground 1 was a minor calculation issue which was dismissed. *Ground 4* was a disclosure argument which was also dismissed.

Appeal allowed and remitted for rehearing, Costs certificates granted for the appeal and rehearing.

Ainslie-Wallace J wrote the lead judgment and noted that Grounds 2 & 3 should be allowed as the decision was clearly outside the reasonable range of discretion. The wife had made significant contributions to family post separation whilst the husband was overseas for prolonged periods and therefore also contributed to the husband's significant earning capacity.

At 104, Murphy J noted that it was an error to assume that as the parties had agreed that contributions should be regarded as equal up to the date of separation, the task was to consider what departure there should be from 50/50. "The question to be addressed was what did the analysis and weighting of all contributions of all types prescribed by s79(4) made by both parties across 31 years (the approximate 21 years of the cohabitation and the approximate 10 years after their separation) suggest was a just assessment of contributions."

At 120, "Yet, the foundation for the property transactions which occurred subsequent to separation was the property acquired during the marriage and the husband's income acquired through advancement in his employment. The wife contributed significantly to each."

Le Poer Trench J added an additional error whereby his Honour had found that s75(2)(k) (the duration of the marriage and the extent to which it has affected a party's earning capacity) and s75(2)(n) (the terms of any order made or proposed under s79 in relation to the property of the parties) did not have application as there was no application for spousal maintenance.

Le Poer Trench J added a comment that whilst the legislation does not require a Judge to do more than express a judgment in percentage terms, it is useful and advisable to calculate and compare the amounts each would receive in dollar terms, to test if it is just and equitable pursuant to s79(2) and if his Honour

had done so, he would have seen that the husband was to receive $1,912,086 more than the wife out of a pool of $4,780,215.

Assessing Contributions

Using the case of *Marsh* as the example, contribution arguments could be documented in a chronology as follows –

Date	**Event**	**Document/ Evidence Reference**
1958	Husband born	
1958	Wife born	
1979	Marriage. Both working full-time, wife had little by way of assets, husband had some savings, a car and some superannuation.	Wife's affidavit, para XX Husb affidavit, para XX
1983	First child born, wife ceases full-time work and does not return to the paid workforce.	Wife's affidavit, para XX
1986	Second child born	Wife's affidavit, para XX
1990	Third child born	Wife's affidavit, para XX
Date	Parties move with children to Country A with husband's employment, husband travels for work, wife cares for children.	Wife's affidavit, para XX
Date	Husband earns high	Husband's affidavit, para

	salary and supports family	XX
2000	Parties return to Australia and purchase matrimonial home for xx	Wife's affidavit, para XX; Purchase documents subpoenaed from conveyancer
December 2000	Separation (21 year marriage), wife remains in home with children (17,14,10), husband continues to pay expenses for family whilst working overseas and leaving care of children to wife.	Wife's affidavit, para XX
2010	Husband stops paying expenses, wife applies for Centrelink ($467 per week), Husband earning $13,000 per week	
July 2010	Husband says made all financial contributions post-separation of $1.285 million and $2.6 million for the benefit of the wife and children post-separation.	Husband's affidavit, para XX
July 2010	Wife applies for property orders	

Many of the details of the Husband's financial dealings should also be included in the table as should specific events to so with the wife's support of the husband's income earning ability and her contributions to the family.

The third column on the Chronology is particularly significant but is not prescribed in any court form. Where documents are annexed to affidavits, the precise annexure should be listed along with the paragraph reference. Where documents are able to be tendered directly without an affidavit, the document itself should be listed (noting the section of the *Evidence Act* upon which you rely for tender is icing on the cake).

When opening a file, start a chronology. When new facts are discovered, add them into the chronology and when affidavits are prepared, add in the paragraph and annexure references. If there are significant factual disputes, highlighting the "she say, he says" conflicts in bold will alert you to the evidentiary disputes and the need for corroborating evidence.

Conclusion

The case of *Bevan* gives practical guidance of how to assess parties' interest in property for trial, with the Full Court demonstrating a re-exercise of discretion on appeal. It reminds us to document which property is held by each party separately or jointly, to be careful about assuming that amounts can be added-back at trial, to remember that equitable interests need to be identified as well as legal interests and not to assume that property interests will be altered at trial. It is a useful example to demonstrate how to populate a Balance Sheet in the post-Stanford practice of Family Law.

The case of *Marsh* is a reminder that contributions to property should not be calculated post-separation with mathematical precision and that a party's contribution to the career and income-earning potential of the other partner should not be overlooked. I have used it as an example to show how to use chronologies to track contribution arguments and prepare cases for trial (and early settlement!)