Where there is a Will, there is a Relative

Final Chapter of *Stanford & Stanford* [2012] HCSA 59

by

George Brzostowski SC

Adjunct Professor, UC

www.brzostowski.com.au

Stanford was a case where there was no break-down of the marriage relationship, and where the husband continued to support the wife from his resources after she succumbed to dementia, and continued to visit her in a residential care facility about 3 times a week. Both parties were in receipt of their own Veterans' Affairs pensions. There was no evidence that the wife was under financial stress. There was no evidence that the husband had abandoned her financially.

Justice Heydon in a separate judgment summarized the adequacy of financial provision in very clear terms:

> "62 The first reason is that the wife's needs were met. The background to the first reason is that at the time when the application was instituted it was thought that provision of a capital sum for the wife would be "necessary or … at least be useful in securing suitable accommodation for her in an aged care facility." At the time judgment was delivered this was no longer the case. By then, "the wife's condition [fell into] the category of 'high care' [and] she [was thus] entitled to be cared for in an aged care facility without the need for a bond." Hence the wife's "reasonable needs could be met in other ways particularly by maintenance." In short, the provision of care funded by her pension and by the trust fund that the husband had created was sufficient to meet the wife's needs. If her needs ceased to be met in those ways, maintenance orders against the husband could be applied for and made."

The wife's case guardian commenced the property application, but following the Full Court's decision to allow the husband's appeal, and before any final property order was made, the wife died. The wife's daughters were substituted as respondents to the appeal, and the case was then continued under sec 79(8) of the *Family Law Act 1975* (FLA).

Purpose of Paper

This paper discusses not only the impact of the High Court's decision, but also examines how sec 79 FLA can be invoked without an intentional separation, and can therefore be used unfairly by a relative or other beneciary where a spouse becomes enfeebled or is no longer competent.

However as will be seen below, the assistance to be derived from the High Court's judgment is not confined to section 79(8) cases, but applies to all sec 79 cases and in

particular to cases where there is no decision by either party to sever the matrimonial relationship.

Short Background

This was a case of a very long second marriage for each of the parties, where each had children by their respective former marriages. There were no children of this particular union.

The wife moved in to live with the husband in the home he owned from his first divorce property settlement. The wife sold to one of her daughters her previous home which she retained after her first (and only) divorce. The husband's home continued to be registered in his sole name.

In 1994 the wife advised the husband that she had left her worldly goods in her will to her daughters. The husband's uncontroverted evidence was –

> "In 1994 [the wife] told me she was going to make a will leaving all her worldly goods to [C Rafter] and [G Brims] - excluding me entirely. Of this arrangement I accept and fully agree & told her so at the time. Have heard nothing more & certainly won't ask, so I don't know if it has happened.
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> While [C Rafter], [G Brims] and their families are decent people and we all got along well, I'm sure they hold no expectations of me, as you would have none of [the wife]."

Not surprisingly, the husband made a will in 1995 leaving his estate to his two sons and if one died, *per stirpes*, to any respective grandchildren.

The fact that in some cases the estate may stand to benefit if the parent was awarded a capital sum, is a fact of life, but it is not the purpose of this paper to attribute to any descendant of any person in any case, reported or otherwise, any selfish motive. It is however intended to highlight the potential misuse of sec 79 and the definition of para 4(ca) of the definition of "matrimonial cause" in an effort to bring about some legislative reform.

Notwithstanding the frequent creation of blended families, an elderly couple is still free to make such provision as they may each wish to make in their respective wills. They are also entitled to make arrangements for property ownership as appears to have suited them during their marriage. If one spouse dies ahead of the other, the ultimate fate of the survivor's property is determined by the provisions of the survivor's last will. This may or may not include the benefit of some property left to the survivor by the deceased spouse. Some spouses may choose to make mutual wills, but even in such cases there may be a claim by a descendant to create, or to augment the quantum of, a separate estate.

Sight should not be lost of the choice by some people to leave their estate to a charity or to a church, or anybody else for that matter. There is no prima facie entitlement for descendants to receive anything under the estate of a deceased relative.

The increasing frequency of blended families, the inevitable ageing of the population, and the increasing need for some of our elderly citizens to be placed in residential care, are all potential triggers that may prompt claims by the beneficiaries of either or both spouses trying to secure a maximum entitlement to their elderly parents' estates. In the worst case scenario, it will be necessary to guard against pre-emptive applications by people whose motives might not be as pure and altruistic as an initial reading of their applications and affidavits might suggest.

The Family Court is not the proper forum for testamentary issues. Even Supreme Courts do not undertake a re-writing of a person's will.

Justice Kay in a dissenting judgment in *Sterling & Sterling*[1] said –

> "26. ... [t]he pressures to ensure that each party to the marriage has an estate available to pass on to their descendants grows. The real protagonists in this type of litigation may often not be the parties to the marriage but their heirs and successors. An issue clearly arises as whether it is appropriate that the Family Law Act be utilised as the means by which the competing claims of the next generation should be aired.
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> ...
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> 33. It seems to me that marriage is not seen to be an institution that is entered into during such time as the health of the parties enables them to live together. The existence of the necessity for the parties to live in separate premises, brought about by the deterioration in the health of one or both of the parties, ought not be seen, of itself, as an appropriate trigger for the persons managing the affairs of one or other of the parties to successfully apply to have an order made under s 79. In my view, if a court is invited to resist the making of such an order, there ought be proper reasons elucidated as to why the court is intending to make an order in circumstances where it will provide no clear benefit to the party in whose name the order is sought. An order made in the course of a subsisting marriage may be a clear indication that the court is not willing to protect the institution of marriage as a union entered into for life."

Contrast the Position in *de facto* cases

In this context, the fact that the *Family Law Act 1975* (C'th) and the WA *Family Court Act 1975* grant the respective courts exercising jurisdiction under those statutes, a power to make orders under sec 79 even if the relationship has not broken down, should be an impetus for some legislative amendment. The current legislation permits this kind of litigation in the case of parties who are married, but there is no such entitlement for a case guardian to commence proceedings in the case of a disabled *de facto* partner. *De facto* property claims can only be commenced after a breakdown of the *de facto* relationship and within 2 years following that breakdown. The definition of a *de facto financial cause* in sec 4 of the FLA uses the words "… *after the breakdown of the de facto relationship*" in respect of both maintenance as well as property. This is due to the extent of the States' referral of powers, and the Commonwealth's power to legislate within the scope of the conferred powers under sec 51(xxxvii) of the Constitution.

There cannot however be any realistic (ie practical) justification for not making the breakdown of the marriage relationship a condition-precedent before a party to a

[1] *Sterling & Sterling* [2000] FamCA 1150

marriage (or a case guardian) can invoke the jurisdiction under Part VIII of the FLA. This would require re-visiting the definition of "*matrimonial cause*" in the FLA and/or by using the vacant space left by the revocation of the original 79(3) which prohibited the Court from making an order that had no nexus to proceedings for principal relief. The 1983 amendments to the definition of "matrimonial cause" were passed in the wake of the ruling by the High Court in *Russell v Russell*[2] and therefore there was particular caution to ensure the provisions fell within the Constitutional powers under sec 51(xxii). If the Commonwealth was to add a requirement that there be a breakdown of that relationship, it is hard to see how that could impact on the Constitutional validity of the rest of the legislative matrix.

There may occasionally arise very rare cases where a spouse for religious, cultural or psychological reasons will not want to "separate", but provision for them could still be made under the maintenance provisions.

The original nexus between principal relief and the exercise of power under the original sec 79, had 2 iterations. The first was in the original sec 79(3) which was repealed in the 1976 amendments, only to be re-enacted in a new form by the introduction of the original para (ca) in the definition of "matrimonial cause". After the 1983 amendment which inserted a new para (ca) that nexus was broken. This permitted parties to a marriage to seek property orders without having to wait until they qualified to apply for a decree nisi. It would appear to be a relatively simple exercise to amend para (ca) to make the breakdown of the marital relationship a condition-precedent.

The Stanford Litigation

At the time of the first trial the wife was already 88 years of age and the husband was aged 86. The West Australian Magistrate considered it "appropriate" within the terms of sec 79 to order that the husband pay to the wife (i.e. the case of guardian) the sum of $613,000 in 60 days. This decision is all the more remarkable when it is remembered that –

(a) the husband had not abandoned the wife financially;

(b) he had set up a trust fund for her benefit;

(c) the husband was still living in his home, which had been his place of residence for nearly 45 years since 1966, with his sole surviving son.

(d) the WA Magistrate had been assisted by proper argument that a maintenance order was a valid option (which option was later favoured by the Full Court).

The Magistrate's decisions are found at *S by her Case Guardian R and S by his Case Guardian S*[3]. The July 2011 proceedings focused on the issue whether the court had jurisdiction, and whether it should embark on hearing a property application even though the separation was not one where there was any severance of the *consortium vitae*. The September 2011 decision was the magisterial determination under sec 79.

[22] *Russell v Russell* (1976) FLC 90-039

[3] *S by her Case Guardian R and S by his Case Guardian S* [2010] FCWAM 26

It is not surprising that an appeal to the Full Court of the Family Court was successful - *Stanford and Stanford* [2011] FLC 93-483. That decision, handed down on 21 October 2011, simply set aside the magistrate's orders and granted costs certificates. There was a deliberate decision at that stage not to make "final orders" although jurisdiction to make such orders was not an issue. The core of the decision was that the magistrate failed to consider other suitable options, like making a spouse maintenance order, and failed to consider the impact upon the husband of the order that was made.

Not all separations have the same impact

As will be shown in the analysis of the High Court's decision, the fact of physical separation is not, on its own, in the absence of intention to sever the marriage relationship, enough to enable the court to find that an order under sec 79 would be "just and equitable".

As will also be shown, the court can make an order under sec 79 in any case where there has been an intentional separation. The parties' interests will then be determined by having regard to the considerations listed in sec 79(4) and by the application of common law and equitable principles.

If the separation is involuntary, in the sense that neither spouse has made a decision to repudiate the *consortium vitae*, then, before a court could form the view it would be "just and equitable" to make an order under sec 79, there must be specific proof of circumstances that would establish that it was "appropriate" to make any order altering the parties' interests in property, and furthermore, that the circumstances also satisfy the "just and equitable" criterion.

Therefore there is a need to recognize the nature of a separation.

What if there is no separation?

Both the magistrate and the Full Court refer to "separation" that has been forced upon the parties. Part of the argument before the High Court was that there was no jurisdiction where the marriage was still "intact". Contrary to that argument, that Statute does confer jurisdiction to make an order under sec 79 even though there is no breakdown of marriage. The focus then shifts to considerations of whether it would be possible to make an "appropriate" order in such cases, and whether any such order would be "just and equitable".

This interpretation of the Statute, which appears to be supported by the language itself, can lead to some unintended consequences.

The logical extrapolation of the cases so far decided on the present legislation, leaves it open for a case guardian, or a person with a power of attorney, to commence proceedings purportedly on behalf of a sickly spouse, before any degree of "separation" has occurred. There is, on present legislative language and the

interpretations bestowed upon it, nothing stopping a meddlesome relative from commencing proceedings even where the spouse is still in the main bedroom.

That scenario must surely have been beyond any parliamentary contemplation. The only words that may stand in the way of success of such an application are the words in sec 79(1), "such order as it considers appropriate"; the prohibition in 79(2) against making orders unless it is "just and equitable" to make them, and the power to adjourn the matter under sec 79(1B) "to enable the parties to the marriage to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings".

That is, with respect, a very thin form of mild discouragement, and certainly not of prohibition. Any application in such circumstances is likely to engender such distrust and emotional hurt as to destroy the marriage in any event. No dismissal of such an application could possibly rectify that harm. It is respectfully suggested that the present destructive option should be removed from the Statute.

Significance of sec 79(8)

Following the above decision by the Full Court, the wife died and her daughters were substituted as respondents to the appeal. The husband requested the Full Court to dismiss the property application under sec 79(8) and an order that the wife pay his costs. The wife requested the Full Court to re-exercise discretion, and order the husband to pay "*to the wife's legal representatives the sum of $612,931 upon the sale of the former matrimonial home or the husband's death, whichever occurs first*"

On 19 January 2012, the Full Court handed down its "re-exercise" decision which is reported in *Stanford and Stanford*[4]. Before turning to the reasons of the Full Court, it pays to recall the text of sec 79(8) –

> 79(8) Where, before property settlement proceedings are completed, a party to the marriage dies:
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> (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;
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> (b) if the court is of the opinion:
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> (i) that it would have made an order with respect to property if the deceased party had not died; and
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> (ii) that it is still appropriate to make an order with respect to property; the court may make such order as it considers appropriate with respect to:
>
> (iii) any of the property of the parties to the marriage or either of them; or
>
> (iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and

[4] *Stanford and Stanford* (2012) FLC ¶93-495

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

From para 51 the Full Court addressed the law under the heading “Relevant Law”.

51. In addition to the settled approach to determining property settlement proceedings we are particularly mindful in this case of the decision in *Fisher v Fisher* (1986) 161 CLR 438 where Brennan J said at 457-458:

> "Section 79(8) does not confer jurisdiction on the Family Court to entertain proceedings commenced after the death of one of the parties to the marriage. The proceedings to which it relates are proceedings commenced between the parties to a marriage with respect to the property of those parties or either of them arising out of the marital relationship or otherwise falling within par. (ca) of the definition of 'matrimonial cause' in s. 4(1) of the Act. The proceedings must have been a matrimonial cause commenced pursuant to s. 79(1). The death of a spouse will not always extinguish or satisfy the moral claims of the surviving spouse and children to which effect would have been given if the proceedings had been complete. Section 79(8) empowers the Family Court to give effect to the moral claims made in respect of the property of the spouses which was made available to answer those claims by the commencement of the proceedings, provided 'it is still appropriate to make an order with respect to property': s.79(8)(b)(ii). That qualification on the power, coupled with par. (ca)(i) of the definition of 'matrimonial cause', ensure that the jurisdiction is exercised only in cases where the moral obligations arising out of the marriage remains unsatisfied.
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> Section 79(8) provides machinery for the discharge of those moral obligations in priority to any rights in the property of a party to a marriage which arise by testamentary disposition to that party's property or by any other devolution of that property on that party's death. That is a law which governs an incident of marriage in that it provides the machinery for enforcing the moral obligation with respect to property arising from a spouse's marital relationship. It is a law with respect to marriage." (our emphasis)

52. In our view, the many years of marriage and the wife's contributions **demand that those moral obligations be discharged** by an order for property settlement. (emphasis added)

53. We are mindful of the fact that this is a case in which the marriage of the parties had not broken down when the proceedings were commenced and that the wife's claims were brought in order to provide her with access to funds which it was asserted she required for her support. Her death now removes the need for those funds. But in the course of the proceedings, the wife established that she had made contributions to the assets enjoyed by the parties during their long marriage, particularly the former matrimonial home, and in our view it continues to be appropriate to **allow the wife's estate the benefit of a share** of the property in which she has established an interest. (emphasis added)

54. Other particular factors that pertain to this case are the fact that the house was in the name of the husband and the wife had no legal interest to leave to her estate, and that orders can be made which will enable the husband to enjoy the assets of the parties until his death.

With respect to the Full Court, in *Fisher* the wife had commenced proceedings by filing a property application after actual (intentional) separation. Subsequent to filing the application she died. Therefore the "moral" obligations which Justice Brennan emphasized may have been appropriate in *Fisher* and any order under sec 79 could more easily be seen as "just and equitable".

Note however that what Justice Brennan said is still consistent with what the High Court decided in *Stanford*.

Do, or should, alleged moral obligations play a part?

Whether an estate of a party whose marriage had not broken down, has any "moral" entitlement to receive from the surviving spouse any capital, is far from established, and any such assumption is unwarranted.

Suppose the wife had left a will leaving her estate to a charity, church or even a foundation for animal welfare, or the preservation of a nature park? There is no room for "morals" in such circumstances, and none where the spouse had not expressed any intention or desire to divide the "matrimonial property" or to cause a sale and a dispossession of the still loving and committed spouse.

The "morals" approach cannot be sustained in many different circumstances, and frankly raise the risk of confusion. There are families where the quality of the relationships is such that a spouse does not want to leave any estate to particular relatives. A spouse who is older and frail may be happy to let the devolution of matrimonial property take place in accordance with the other spouse's will. Or each spouse may make a mutual will leaving everything to the survivor. Or there may be no wish to make, or to authorize the making of, any claim on the estate of the other spouse. Some people may be happy to let the laws of intestacy apply to their property.

In *Stanford* there was no evidence of any wish by the wife to leave any interest in any real estate to her daughters.

While mere separation might not be essential to enliven the exercise of jurisdiction to make an order under sec 79, it is respectfully suggested that the fact of involuntary separation alone, cannot give rise to any "moral" entitlement that can be justified by application of philosophy or logic.

Where the wife's legal personal representatives sought an order that, after fixing the sum payable to a little under $613,000, that the "*enforcement … be stayed until the first to occur of the following events (a) the sale (of the home) or (b) the death of the husband*", one may well ask what moral right did the wife's estate have to hamper a possible need by the husband to sell the home to permit him to down-size, or to permit him to go into a form of residential care himself?

With respect, it is also not clear how such an order, if made, would have been a manifestation of any discharge of any "moral" entitlement. Worse still, an illness of

one spouse may under the present legislation prompt or accelerate an application to pre-empt the operation of that spouse's last will.

The jurisdiction may be wide, but so may be the range of abuse.

The High Court Decision

The legal proceedings came to an end when the High Court handed down its decision on 15 November 2012 – *Stanford and Stanford* [2012] HCA 52.

The critical reasons for the High Court's decision to allow the husband's appeal are found in paragraphs 36-45, and 48 - 49. These passages are so important they do not readily permit paraphrasing, and are set out in full. The writer then respectfully offers an attempted explanation of what appears to be necessary to comply with the assistance given by the High Court in **Notes 1 - 9**. (The italicized words are an emphasis found in the judgment itself. References to footnotes are omitted by the writer) -

> 36 The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds. And while the power given by s 79 is not "to be exercised in accordance with fixed rules" nevertheless, three fundamental propositions must not be obscured.
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> 37 First, 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. So much follows from the text of s 79(1)(a) itself, which refers to "*altering* the interests of the parties to the marriage in the property" (emphasis added). The question posed by s 79(2) is thus whether, having regard to those *existing* interests, the court is satisfied that it is just and equitable to make a property settlement order.

Note 1: Para 37 In other words, start by identifying the existing legal and equitable interests of the parties according to ordinary common law and equitable principles. Next, having regard to those existing interests, is the court satisfied that it would be just and equitable to make an order altering those interests?

> 38 Second, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In *Wirth v Wirth*, Dixon CJ observed that a power to make such order with respect to property and costs "as [the judge] thinks fit", in any question between husband and wife as to the title to or possession of property, is a power which "rests upon the law and not upon judicial discretion". And as four members of this Court observed about proceedings for maintenance and property settlement orders in *R v Watson; Ex parte Armstrong.*

"The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down".

Note 2: Para 38 Although the power under sec 79 is broad, it does not permit unguided exercise of that discretion. The power rests upon the law and not upon discretion. The legal principles underlying its exercise include, but is not limited to, the principles laid down by the FLA. This means that the court is not confined to what is mentioned in 79(4). The citation for the case is *R v Watson; Ex parte Armstrong*[5]

39 Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that "[c]ommunity of ownership arising from marriage has no place in the common law". Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses". The question presented by s 79 is whether those rights and interests should be altered.

Note 3: para 39 The quotations are sourced in footnotes 26 and 27 of the judgment. See *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 per Windeyer J in para 2 of his Honour's judgment. *Wirth v Wirth* (1956) 98 CLR 228 at 231‑232 per Dixon CJ.[6]

Hepworth was a case where moneys for the property were contributed by both parties, but registered in the name of only one of them.

Whether an order is just and equitable, is not to be answered by any assumption that the interests are or should be different from those that already exist. Any application of sec 79 must be tested against the precepts that –

(a) community of ownership arising from marriage has no place in the common law, and that

[5] *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; (1976) FLC 90-059.

[6] *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 per Windeyer J. *Wirth v Wirth* (1956) 98 CLR 228 at 231‑232 per Dixon CJ.

(b) issues between spouses concerning ownership of property that is, or has in the past been, enjoyed in common, are to decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons.

40 Third, whether making a property settlement order is "just and equitable" is not to be answered **by beginning from the assumption** that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, **including** the principles which the Act itself lays down". 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.

Note 4: para 40 The process of determining the question whether an order is "just and equitable" must not start from any assumption that either party has a right to an interest in property which is fixed by application of 79(4) – including 79(4)(e). But this process must be performed in accordance with "legal principles", including the principles to be found in the FLA, but not limited thereto. An order that arises only from an application of 79(4) is not for that reason alone, to be considered to be "just and equitable". To do so would be to conflate the two statutory requirements, and a conflation thereof would constitute a failure to apply the principles laid down by the FLA.

41 Adherence to these fundamental propositions in exercising the power in s 79 gives due recognition to "the need to preserve and protect the institution of marriage" identified in s 43(1)(a) as a principle to be applied by courts in exercising jurisdiction under the Act. If the parties have made a financial agreement about the property of one or both of the parties that is binding under Pt VIIIA of the Act, then, subject to that Part, a court cannot make a property settlement order under s 79. But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with Pt VIIIA, how their property interests should be arranged between them during the continuance of their marriage, **the application of these principles accommodates that fact.** And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some *different* arrangement of their property interests in their individual or commonly held assets while the marriage continues, the application of these principles **again accommodates that fact**. These principles do so by **recognising the force of the stated and unstated assumptions**

between the parties to a marriage that the arrangement of property interests, whatever they are, **is sufficient for the purposes of that husband and wife during the continuance** of their marriage. The fundamental propositions that have been identified **require that a court have a principled reason for interfering with the existing legal and equitable interests** of the parties to the marriage **and whatever may have been their stated or unstated assumptions** and agreements about property interests during the continuance of the marriage. (emphasis added)

Note 5: Para 41 This important paragraph illustrates how the above principles accommodate and give due weight to parties' own agreements and arrangements as to how their property shall be held **during the continuation of their marriage,** even if they have not put their agreement into writing that complies with Part VIIIA. The important matter to be derived from the language of the High Court here is that the parties' arrangements must be given due recognition while the marriage continues, **and that therefore includes periods of any "involuntary separation" and seemingly would apply in any case of an attempt to use sec 79 where the marriage has not broken down.** Any court hearing an application by a party or case guardian seeking an order under sec 79 "during the continuance of the marriage" must have a principled reason for interfering with existing legal and equitable interests in the property of the parties or of either one of them. This part is of particular application to cases like *Stanford* regardless of whether sec 79(8) is being invoked or not. It would apply if neither party died before completion of the sec 79 proceedings provided neither spouse made a decision to terminate the relationship.

42 In many cases where an application is made for a property settlement order, the just and equitable requirement **is readily satisfied** by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common *use* of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a

property settlement order. What order, if any, should then be made is determined by applying s 79(4).

Note 6 para 42 This paragraph makes the following clear:

(a) Once there is a decision by one or both spouses to separate, there is no longer any continuance of the marriage, and there will then be no longer be any question of common use of any property.

(b) All the assumptions that may have under-pinned the property arrangements during the continuance of the marriage, have been brought to an end by the severance of the marriage relationship.

(c) Likewise any assumption that any adjustment could be brought about consensually as needed, are also brought to an end.

(d) In such a case, "it will be just and equitable" to make a sec 79 order.

(e) The quantum, nature or characteristics of such an order are then to be determined by the application of sec 79(4).

43 By contrast, the bare fact of separation, when involuntary, does not show that it is just and equitable to make a property settlement order. It does not permit a court to disregard the rights and interests of the parties in their respective property and to make whatever order may seem to it to be fair and just.

44 When, as in this case, the separation of the parties is not voluntary, the **bare fact of separation** does not demonstrate that the husband and wife have any reason to alter the property interests that lie behind whatever common use they may have made of assets when they were able to and did live together. Common use of some assets may very well continue, as it did here when the husband made provision for the wife's care and accommodation. Past arrangements that the parties have made about their property interests on the assumption, expressed or implicit, that those arrangements were sufficient and appropriate during the continuance of their marriage are not necessarily falsified. If both parties are competent, it can still be assumed that any necessary or desirable adjustment can be made to their property interests consensually. And if one of the parties has become incompetent it is not to be assumed that the other party lacks the will and ability to make those necessary or desirable adjustments.

Note 7: Paras 43, 44 These paragraphs make it clear that cases of involuntary separation are in a special category. The "bare fact of separation" does not, on its own, demonstrate that the spouses have any reason to want to alter their property interests. It would be necessary to identify facts that could justify a conclusion that it was "just and equitable" to make a sec 79 order.

45 Contrary to the submissions of the husband in this Court, there may be circumstances other than a voluntary separation of the parties marking the breakdown of their marital relationship in which a court may be satisfied that it is just and equitable to make a property settlement order. For example, demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order. It may be that there are circumstances other than need.

Note 8: Para 45 This paragraph is particularly apposite in cases where a spouse clings to the shell of a marriage relationship out of religious reasons, cultural pressure, like fear of precipitating "dishonor" on a family, or in cases of intra-domestic abuse, bullying or a spouse becoming a victim of the "battered wife/husband syndrome".

48 In its second judgment, the Full Court re-exercised the power given by s 79 of the Act and made a property settlement order. The Full Court said that the "many years of marriage and the wife's contributions *demand* that those *moral* obligations be discharged by an order for property settlement" (emphasis added). It described the outcome produced by its orders as "just and equitable". But otherwise the Full Court made no separate inquiry into whether, had the wife not died, it would have made a property settlement order. That inquiry required it to consider whether, had the wife not died, it would have been just and equitable to make a property settlement order. And because the Full Court did not consider whether it would have made an order if the wife had not died, it did not make any express inquiry into whether it was *still* appropriate to make an order.

Note 9: **Para 48** This illustrates presumably what the High Court would describe as an example of "conflating" the sec 79 enquiry with the sec 79(2) enquiry – ie the words used by the Full Court were "many years of marriage and the wife's contributions *demand* that those *moral* obligations be discharged by an order for property settlement". The sec 79(2) enquiry is made to flow automatically from the sec 79(4) enquiry because there was perceived to be some "moral obligation" which is not a component of sec 79(4) nor from any application of common law or equitable principles.

> If due weight was given to the fact that there was "no decision to separate", then it would have been difficult as a matter of logic to conclude in the circumstances of *Stanford*, that an assessment based on contributions, could have led to an order that was also "just and equitable". If the deliberations could not get to that point, the it would have been impossible to conclude that it would have still been appropriate to make an order under 79(8).

> 49 No basis was identified at first instance, on appeal to the Full Court, or in argument in this Court, for concluding that it was just and equitable to make *any* order dividing the parties' property between them. It was not shown that the wife's needs during her life were not being or would not be met. The legal personal representatives of the wife supported the Full Court's reasoning but pointed to no additional consideration as bearing upon this question.

In reaching its conclusion, the plurality say in para 51 that the enquiries under sec 79(4) and 79(2) are not to be merged. They also say:

> "And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was *still* just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should be made by applying the matters listed in s 79(4)."

In para 52 we see

> "Reference to "moral" claims or obligations is at the very least apt to mislead. First, such references appear to invite circular reasoning. On its face, the invocation of moral claims or obligations assumes rather than demonstrates the existence of a legal right to a property settlement order and further assumes that the extent of that claim or obligation can and should be measured by reference to the several matters identified in s 79(4). Second, the term "moral" might be used to refer to a claim or obligation that is based on the kind of contribution described in s 79(4)(b). …But nothing is gained by describing such a contribution as founding a "moral" claim or obligation. Moreover, if the word "moral" was being used in this context with some wider meaning or application, it is important to recognise that it is used in a way that finds no *legal* foundation in the Act or elsewhere. It is, therefore, a term that may, and in this case did, mislead. The rights of the parties were to be determined according to law, not by reference to other, non-legal considerations. The references by Brennan J in *Fisher v Fisher* to moral claims should not be misunderstood as suggesting otherwise."

This paragraph is a reiteration of the crucial need to comply with legal and equitable principles as well as what is set out in the FLA.

Conclusion

1 Where proceedings are continued under sec 79(8), the whole of the "needs" considerations have no longer any application. This means that in such cases, determination of what is "just and equitable" is to be achieved by application of common law and equitable principles as well as the terms of sec 79(4) excluding para (e) and, with one exception, any reference to sec 75(2). The exception is 75(2)(o) in what can only be rare cases.

2 Where the "separation" is involuntary, without any intention to sever the martial relationship, it would be rare that a court could find that the making of a sec 79 order would be "appropriate" and therefore it would not even reach the stage of asking the question whether it was "just and equitable".

3 Where there is a real parting separation, with the intention to sever the marital relationship, even if only unilateral, the parties' entitlements are to be determined by the application of sec 79(4). In such real parting separation cases, it will be "just and equitable" to make an order altering the parties' interests in property under sec 79 as all previous assumptions relating to common use of property, are also repudiated.

4 There must not be any conflation between the "fourth step", and the determination of whether the proposed order is "just and equitable". They are separate enquiries.

5 The logical conclusion is that determination of whether it is just and equitable to make an order altering parties' interest in property depends on the nature of the separation that has taken place. In most cases coming before the courts, and where both parties are still alive, there is no doubt that the marriage relationship has been severed, and therefore the determination that it is "just and equitable to make an order" altering interests, is answered easily. The quantum is determined on the basis of contributions and the sec 75(2) factors.

6 If there is an error in the quantum of the order, that is an error in the exercise of power under sec 79(4), including para (e) importing the provisions of sec 75(2), not in the determination of whether it is "just and equitable" to make **an** order altering interests.

7 In the assessment of contributions, there are no assumptions, and there is no community of ownership at common law just because the parties were married to each other. Parties to a marriage are to have their contributions assessed in just the same way as any other two people.

For readers interested in seeing how the arguments unfolded during the hearing on 4 September 2012 there is transcript available on Austlii at [2012] HCATrans 206. It bears good reading, but in the absence of official paragraph numbering (or even A4 pagination) references to it would be awkward at best and I leave it to the individual reader.

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George Brzostowski SC
Adjunct Professor UC
www.brzostowski.com.au