What’s mine is yours

PRACTITIONERS MUST CAREFULLY CONSIDER THE NATURE AND EXTENT OF POST-SEPARATION CONTRIBUTIONS AND NOT PLACE GREATER WEIGHT ON THOSE OF A PURELY FINANCIAL NATURE. BY WILL STIDSTON

Practitioners often face an arduous task to advise clients as to the weight which courts will attribute to post-separation contributions and the manner by which they will be assessed. For example, will a court adopt a holistic and global approach\(^1\) to assessment or will an asset-by-asset analysis\(^2\) of pre and post-separation contributions be utilised.

It is imperative that practitioners have a thorough understanding of the weight likely to be attributed to post-separation contributions as a result of, among other things, an under-resourced family law system and associated delays between separation and judicial determination. Such an understanding may assist with negotiations and timely settlements to relieve this system.

What is property?

Please note that a detailed analysis of what constitutes property for the purposes of the Family Law Act 1975 (Cth)\(^3\) (the Act) and a complete analysis of s79 of the Act is beyond the scope of this article. This article provides a snapshot of those matters only.
In its simplest form, s4 of the Act defines “property” in relation to the parties to a marriage (or a de facto relationship) to mean “property to which those parties are, or that party is . . . entitled, whether in possession or reversion . . .”.

In Stanford & Stanford (Stanford) the High Court of Australia reiterated that determination of the parties’ property interests requires identification of the parties’ existing legal and equitable interests in property according to common law and equitable principles. Property interests therefore incorporate both legal and equitable interests in property which are to be determined and valued as close to the settlement or trial as possible.

**Alteration of property interests**

Section 79 of the Act conveys discretion on courts exercising family law jurisdiction to order an alteration of parties’ property interests. Such an order will only be made if it is just and equitable to do so having regard to the matters prescribed with s79 of the Act.

A court’s discretion in accordance with s79 of the Act was traditionally guided by a three step process. Following the decision in Stanford, and the Full Court’s decision in Bevan & Bevan, there is fertile ground to suggest there are now in fact five steps.

Quantum of steps aside for a moment, and while a stepped process may provide a guide as to how a court will exercise its discretion, such a process is not a statutory test per se. As held by Murphy J in Baglio & Baglio, the task required by s79 of the Act is essentially holistic.

**Categories of contribution**

Section 79(a)(a)–(c) of the Act requires a court to consider the parties’ direct and indirect contributions when determining a just and equitable alteration of their property interests. Contributions fall into three broad categories:

- **financial contributions to the acquisition, conservation or improvement of any property of the parties.**
- **non-financial contributions to the acquisition, conservation or improvement of any property of the parties**
- **contributions made to the welfare of the parties’ family, including any contribution made in the capacity of homemaker or parent.**

While the Act does not specifically refer to post-separation contributions, it requires a court to consider the parties’ contributions until trial and, implicitly, any contributions made by the parties post-separation.

**Fields & Smith**

In Fields & Smith the parties were married for approximately 29 years, having married in February 1979 and separated in 2008. The parties’ three children were born in 1980, 1982 and 1987. The children were all financially independent by the time of trial. The parties commenced the marriage with minimal property and they thereafter undertook what may be described as traditional roles. The husband became the primary financial contributor while the wife was the primary homemaker and parent.

Over the course of the marriage the husband built and sold homes in addition to his full time work. This enabled the parties to accumulate capital which was used to commence a construction company. While the husband was the “driving force” in that business, the wife was involved directly in relation to some of the aspects of the business, and also as a director and shareholder.

In 2006, the parties sold shares in their company to reduce their ownership from 100 per cent to 84 per cent. They also began construction of a new home which was unfinished at separation. The wife later completed the interior décor and furnishings.

In 2008, the parties separated – the husband had begun a relationship with a woman overseas the previous year. He started to spend greater periods of time out of Australia and remarried in 2009. A child of that relationship was born in 2010.

The wife was unwell for a significant period following separation. This prejudiced her capacity to attend directors’ meetings within the company. She nonetheless appointed agents to attend the meetings on her behalf.

At trial, Murphy J found the value of the parties’ net property interests to be valued between $22,321,000 and $39,816,000 and their interest in the company to be valued between $21,800,000 and $29,600,000.

Murphy J ordered that the husband retain 60 per cent of the parties’ property and that the wife retain the balance. He considered that there was inter alia: “a disparity in the contributions made by the respective parties . . . in what might be called the stewardship of the business. In addition, the parties’ children have been adults for the whole of the post-separation period and that fact . . . results in the nature and extent of the contributions made by each of the parties to the welfare of the family

**SNAPSHOT**

- Delays associated with the judicial determination of family law disputes have increased the number of cases in which courts must carefully consider and determine the weight to be attributed to the parties’ respective post-separation contributions.
- The Full Court of the Family Court of Australia’s decisions in cases such as Fields & Smith and Traek & Westlake serve as a reminder that practitioners must consider the totality of the parties’ respective post-separation contributions and ensure that they do not place greater weight on those of a purely financial nature.
being reduced accordingly. That is the more so for the wife whose pre-separation time was taken up primarily in that role”.  

The wife appealed, contending that she should receive 50 per cent of the parties’ property. The husband cross-appealed, contending that he should receive 70 per cent. The Full Court rejected Murphy J’s assessment of the parties’ post-separation contributions. In so doing, the Full Court considered it important that Murphy J had found that although there were “disputes between the parties about the nature of specific contributions each has made to the other’s “sphere” as broadly just described, in my assessment those disputes are all, in the scheme of things, minor . . .” and in terms of the business, that he saw “no reason to distinguish between the contribution made by the husband and that made by the wife”.  

Further, and in relation to contribution, the Full Court held that:  

“... the wife’s role as parent and homemaker may have reduced but she continued to contribute as a director and shareholder. There is nothing to suggest that because the wife’s contribution to the welfare of the family was less than it had previously been, it in any way reflected upon, or was connected to, the change in the asset position of the parties by the time of trial. Indeed, the evidence is clear in this case that what had been acquired and achieved up to separation simply carried on thereafter, albeit with differing contributions by the parties but reflecting what they had previously put in place”.  

The appeal was allowed and the parties’ property interests divided equally.

**Trask & Westlake**

In *Trask & Westlake* the parties commenced living together in about 1996 and were married in about 1998. They separated in February 2009. The parties had four children together who were 15, 13, 11 and nine years old at the time of separation. There was a delay of approximately four years between the parties’ separation and their trial. During that period, the husband:

- received income of $2,076,984 for the financial year ended 30 June 2010, $3,444,209 for the financial year ended 30 June 2011 and $1,042,426 for the financial year ended 30 June 2012
- received sums totalling $2,577,000 as a consequence of his employment and subsequent retrenchment
- became entitled to restricted share units with a net value of $187,397, albeit it was conceded that those units were to be treated as a financial resource as distinct from property.

At trial, the parties’ property was found to have a net value of $7,114,442. Aldridge J considered the parties’ contributions and found them to be equal despite the husband’s significant post-separation financial contributions. Further, he determined that the wife should receive a 10 per cent adjustment for prospective factors. Overall, the wife received 60 per cent of the parties’ property interests.

The husband appealed and contended that inter alia the assessment of his post-separation financial contributions could not be just and equitable.”
On appeal, the Full Court rejected the husband’s contentions and held that:

“The husband’s written outline of argument calculates the percentage of the total value of the property represented by the husband’s post-separation cash injections. That can be a useful measuring stick, but the assessment of contributions remains ‘a matter of judgment and not of computation’. ... That it must be so is emphasised by the fact that the percentage figure pertaining to direct financial contributions is being compared to the extremely important contributions made by the wife in maintaining a home as a single parent to four children dealing with the separation of their parents. Those contributions are not susceptible to any such mathematical calculation. His Honour plainly, and with respect correctly, recognised that the wife’s contributions did not cease upon separation but, rather, continued in circumstances made more difficult by the fact of separation. ... His Honour plainly accorded significant weight to those contributions”.

The Full Court dismissed the husband’s challenge to Justice Aldridge’s assessment of contribution but allowed the Appeal to amend the form of His Honour’s orders.

**Conclusion**

The tasks required by s79 of the Act and, in particular, the assessment and weight to be attributed to post-separation contributions is not clear cut. The discretion arising from s79 of the Act requires a court “to do justice according to the needs of the individual case, whatever its complications might be”.

Despite this difficulty, the above cases appear to highlight a continuation of the precedent set by cases such as:

- **Mallet v Mallet** where is was held that contributions to the welfare of the family should not be treated as less important or valuable than another contribution before separation or after
- **Williams v Williams** in which the Full Court upheld the trial Judge’s decision to include a personal injuries claim received by the husband four years post-separation into the parties’ settlement.

As a result, while each case must be determined on its own merits, practitioners should be mindful to consider the totality of the parties’ respective post-separation contributions and ensure that they not place greater weight on those of a purely financial nature.

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2. See, eg, Norbis v Norbis (1986) 10 FamLR 819.
4. Note 3 above, s4.
6. Note 5 above, per French CJ, Hayne, Kiefel and Bell JJ at 37.
7. Note 2 above.
8. Note 3 above, s 79(2).
10. See, eg, Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener) [2003] FamCA 395.
11. Note 5 above.
13. Note 12 above, para 72, per Bryan CJ, Finn and Thackray JJ.
15. Note 14 above, per Murphy J at 181.
16. Note 3 above, s79(4)(a).
17. Note 3 above, s79(4)(b).
18. Note 3 above, s79(4)(c).
21. Note 20 above.
24. Note 23 above, per Bryant CJ, May and Ainslie Wallace JJ at 53.
25. Note 23 above, per Bryant CJ, May and Ainslie Wallace JJ at 191.
27. Note 26 above, per Thackray, Ryan and Murphy JJ at 7. Note 19 above, per Bryant CJ, May and Ainslie Wallace JJ at 186.
28. Note 26 above, per Thackray, Ryan and Murphy JJ at 14.
29. Note 26 above, per Thackray, Ryan and Murphy JJ at 15.
30. Note 19 above, per Bryant CJ, May and Ainslie Wallace JJ at 186.