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Is it Just and Equitable – Property Division in Family Law

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1. INTRODUCTION

> *"It is easy to assume that where parties have been together in a recognised legal relationship (whether a marriage or a de facto relationship) and during that relationship the parties have accumulated property, then it automatically flows that a property settlement will occur following separation.*
>
> *In the majority of cases this is true.*
>
> *But as the High Court in Stanford was quick to point out this is not always the case.*
>
> *There are matters due to their particular facts which cannot fall within that assumption and where it is not just and equitable to progress to an alteration of property.*
>
> *Granted, these cases are in the minority.*
>
> *But being in the minority does not mean that it is to be glossed over lightly."* Per Turner, J *Chancellor & McCoy* [2016] FCCA 53 (25 January 2016) paragraphs 62-68.

This paper will focus on the facts found to be relevant in two Family Law cases where the Court found that it was not "just and equitable" to progress to an alteration of property interests: *Stanford & Stanford* [2012] HCA 52.

In each of these cases the Court dismissed the respective Applications seeking alteration of property interests between the parties.

This had the effect that each of the parties retained whatever property was in their separate legal and equitable ownership at the time of the hearing. In both cases the party who initiated the proceedings had property in their sole name worth significantly less than the property in the other party's sole name.

The cases we are considering are *Chancellor & McCoy* which was upheld on appeal to the Full Court of the Family Court of Australia and the Western Australia case of *Fielding & Nichol* [2014] FCWA 77 per Thackray, CJ.

As practitioners, we need to be mindful that, just because parties are in a relationship such as would attract the operation of the *Family Law Act* 1975 (Cth) (herein after referred to as FLA) that it does not *automatically* follow that there will be an alteration of the existing legal and equitable property interests that each of the parties have.

When taking instructions from our clients, preparing their cases and advising them, we must take into account and consider the first step being that the Family Court shall not make orders for an alteration of the parties property interests unless it is first satisfied that in all the circumstances it is "just and equitable" to do so: FLA s79(2) for married spouses and s90SM(3) for de facto spouses.

2. *STANFORD & STANFORD* [2012] HCA 52 (15 NOVEMBER 2012)

We do not propose to go into the facts or embark upon a further discussion about Stanford about which there has been much legal debate and comment.

The relevant principles for the purpose of this paper are set out in their Honours judgment at:

> 35. *It will be recalled that s 79(2) provides that "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. The requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order.*
>
> 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: Mallet v Mallet [1984] HCA 21; (1984) 156 CLR 605 at 608 per Gibbs CJ. 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": Mallet v Mallet [1984] HCA 21; (1984) 156 CLR 605 at 608 per Gibbs CJ, nevertheless, three fundamental propositions must not be obscured.*
>
> 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.*
>
> 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: [1956] HCA 71; (1956) 98 CLR 228 at 231-232, 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: [1976] HCA 39; (1976) 136 CLR 248 at 257 Per Barwick CJ, Gibbs, Stephen & Mayson JJ:*
>
> > *"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".*
>
> 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": Hepworth v Hepworth (1963) 110 CLR 309 at 317 per Windeyer J; [1963] HCA 49. 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": Hepworth v Hepworth (1963) 110 CLR 309 at 317 per Windeyer J. See also Wirth v Wirth [1956] HCA 71; (1956) 98 CLR 228 at 231-232 per Dixon CJ. The question presented by s 79 is whether those rights and interests should be altered.

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": R v Watson ; Ex parte Armstrong [1976] HCA 39; (1976) 136 CLR 248 at 257. 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.*

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 (s71A) 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.*

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).*

It is clear from Stanford that the first step in the exercise of judicial discretion in any application seeking alteration of property interests before the Family Court is to determine whether the making of an adjustive order is "just and equitable" by first identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property: *Stanford* supra

It is a necessary component that there must be a finding by the Court that it is "just and equitable" to proceed to determine the property application ***before*** proceeding to apply what is generally known as the four step approach as set out by the Full Court of the Family Court of Australia in the case of *Hickey v Hickey and the Attorney-General of the Commonwealth (Intervener)* [2003] FamCA 395 (2003) FLC 91-143 of:

1. Identify and value as at the date of hearing property resources and liabilities of the parties;

2. Identify and assess the financial and non-financial contributions of the parties in accordance with s79 or s90SM;

3. Identify and consider whether there should be an adjustment in favour of either of the parties to take into account the factors listed in s75(2) or s90SFas the case requires;

4. Consider whether after applying the above three steps the proposed orders are "just and equitable".

3. FIELDING & NICHOL [2014] FCWA 77 (28 NOVEMBER 2014)

These proceedings concerned a heterosexual de facto couple in Western Australia who were in a de facto relationship for approximately 12 years.

Whilst the proceedings were in Western Australia pursuant to the provisions of the Family Court Act 1997 (WA), as Thackray, CJ, points out that the provisions of that Act exactly mirror the applicable provisions under the FLA.

He also refers to the parties as husband and wife respectively and for ease of reference so shall we.

The husband initiated the proceedings following separation. He sought an equal division of the assets. He ran his case on the basis that there should be an adjustment to the parties' property interests because of the length of the de facto relationship and because he anticipated that they would live the rest of their lives together.

The wife opposed the application and contended that it would not be "just and equitable" to make any orders altering property interests. She sought that the husband's application be dismissed, which would have the effect of each party keeping the real estate they owned at the start of the relationship and any assets that either of them held at the date of hearing.

At the time of trial assets in the wife's legal title were worth more (but not substantially more) than in the husband's legal title.

The matter was heard on 20 October 2014. Judgement was delivered on 28 November 2014. The husband was self-represented. The wife was represented by solicitors and counsel.

3.1 Summary of Facts

At the time of trial the husband was aged 74 and the wife aged 66. Both parties were retired but each received occasional income from the sale of various artwork.

At the time the parties started living together the assets were:

- The wife owned:
    (a) an unencumbered house with land at Nannup in Western Australia;
    (b) a car;
    (c) various bits of furniture;
    (d) pottery equipment; and
    (e) a tractor.
- The husband owned:
    (a) an unencumbered block of land at Biddelia in Western Australia;
    (b) a car;
    (c) various bits of furniture; and
    (d) other minor personal items.

The parties started living together in December 1998 when the husband and his son from a previous relationship (who was aged about 15), moved into the wife's home at Nannup. They resided in the wife's home throughout their relationship.

The relationship ended when the wife asked the husband to leave in July 2011 however, he did not move out until much later during May 2012.

3.2 Assets of the Parties

In his judgment Thackray, CJ sets out that:

> "*14. In considering whether it is 'just and equitable' to make any order altering existing property interests it is necessary first to determine what those interests are: Stanford v Stanford (paragraph 37). It was not asserted in the present matter that either party had an equitable interest in property owned by the other. The titles therefore reflect the existing ownership."*

His Honour then sets out at paragraph 15 of his judgement the parties existing interests in the property and their respective values, including liabilities, except for debt that the wife had incurred to pay her legal fees, as follows:

Assets	Husband	Wife
[Biddelia] land	$260,000	
Motor home	$33,000	
Ute	$12,500	
Camper trailer	$2,500	
Bankwest Reward Pension Account	$10,527	
Bankwest Smart E Saver	$33,249	
[Nannup] house and land		$525,000
Car		$13,500
Bankwest Reward Pension Account		$513
TOTAL	**$351,776**	**$539,013**
Liabilities		
AB Planning	$4,000	
Mortgage on [Nannup]		$72,114
Bankwest Zero Platinum		$1,645
TOTAL	**$4,000**	**$73,759**
TOTAL NET ASSETS	**$347,776**	**$465,254**

3.3 Just and Equitable Considerations

His Honour then proceeds to ask "is it just and equitable to make an order?"

He states that:

> *"17. …In arguing it would not be just and equitable to make any order altering property interests, counsel for the wife drew on the part of paragraph 42 of Stanford v Stanford highlighted above. Counsel argued that no "express or implicit assumptions" of the parties about their property were brought to an end by the termination of their relationship. On the contrary, their relationship had been conducted on the basis that neither would ever have any interest in the property of the other.*

18. *To appreciate this argument, it is necessary to understand that at the commencement of the relationship, the husband owned an unencumbered block of land at [Biddelia] and the wife owned her unencumbered home and surrounding land at Nannup. At the husband's insistence, the parties held their property separately throughout their relationship and maintained their finances almost entirely separately. The wife was content with this arrangement.*

19. *Accordingly, when the husband received a compensation payment of approximately $28,500, he deposited it into his own account. Also, when he sold a piece of art for $1,600 (which was much more than he normally received for his work), he kept that money for himself. The husband also insisted (and the wife accepted) that the motor home the parties acquired to travel around Australia would be his property, even though much of the cost was met from the parties' joint income."*

His Honour also discusses in some detail the non-financial contributions during the relationship of the parties at the following paragraphs:

"24. *The husband, with assistance from the wife, undertook work around the Nannup property. Some of this could be classified as maintenance, such as keeping up the firebreaks, but other work was done which the parties considered made the property more attractive. This included bringing native vegetation under control, making pathways through the bush, building garden beds and steps and installing various pieces of art and sculpture around the grounds. The husband placed heavy emphasis on the fact that these improvements were highlighted in the advertising material when the property was on the market between 2007 and 2010. The fact is, however, that the property did not attract any offers, notwithstanding it was for sale for years. There was also no evidence (save for a concession made by the wife in cross-examination that was the subject of an objection by her own counsel) that any of the work made a real difference to the value of the property. It should also be observed that the husband did not assert that he anticipated his work would lead to him acquiring any legal or beneficial interest in the property – the high point of his case was that the parties hoped to use some of the proceeds of sale to fund their proposed trip.*

75. *The parties lived in the Nannup home and only occasionally visited the block at Biddelia. Although I accept there was some maintenance and improvement carried out at Biddelia, this was very minor and much less than was done around the wife's property. In addition to the work done to the garden and bush surrounding the wife's home, the husband carried out some maintenance and improvement to the house itself. This included installing some skirting boards, bush railings and a fireplace surround, which improved the appearance of the home. However, the only work of any significance was a renovation of the kitchen to make it more spacious and practical, by demolishing some existing walls and fittings, and installing second-hand cupboards. To the extent there was disagreement about the magnitude of the work done, I preferred the evidence of the wife. In addition, the husband did other jobs, including plumbing, mowing, slashing, and smoothing out the driveway.*

> *76. The wife helped out with some of the work described above. She also did more of the housework than the husband, in that she did most of the cleaning, as well as washing and ironing for the husband (and his son during the five years he lived in the home). The wife very occasionally made items of clothing for the husband. She also handled the finances and was responsible for the bookkeeping, including maintaining the accounts associated with the sale of art and seeds. Cooking for the evening meal and washing up were generally shared equally, although the wife was probably responsible for a little more of the cooking overall, while the husband provided the wife with tea and toast in bed every day."*

In agreeing with the contentions as put by counsel for the wife, his Honour made findings and took into account the following matters. We are summarising them and the full wording of the judgement can be found at paragraph 52:

1. The husband insisted that the parties' financial affairs should be kept entirely separate;

2. The wife agreed with the arrangement at point 1;

3. The parties were mature, intelligent, and not in any way overborne by the other;

4. The assets were intended to and were kept entirely separate;

5. The majority of the assets that existed at the time of the trial were in exactly the same form in which they were held at the commencement of the relationship (except that the wife had borrowings over her property to fund her legal costs and for which she was solely responsible);

6. There was no evidence to suggest that the husband refrained from accumulating other assets, or otherwise changed his position, as a result of having the benefit of using the wife's home during their relationship and having assumed they would live out their days together;

7. Neither party made any provision in their respective Wills (except the wife changed her will at the husband's request to ensure he inherited her car in case he died while they were travelling);

8. The work done by the husband on the wife's property did not lead to a conclusion that it would be just and equitable to adjust existing property interests, especially given that the husband (and, for part of the time, his son) lived in the property free of rent;

9. The ages and state of health of both parties;

10. Each party had a significant asset which could be realised to meet their financial needs that could not be met from income (noting that, at the time of trial, the parties were both able to meet their necessary expenditure from their own income).

The finding at point 8 above needs to be read in conjunction with paragraph 24 of the judgement as, there was no evidence that any of the work made "a real difference to the value of the property" and, the husband did not assert that he believed or thought that his manual labour and work done would result in him acquiring any legal or beneficial interest in the property.

4. *CHANCELLOR & MCCOY* [2016]FCCA 53 (25 JANUARY 2016)

These proceedings concerned a same sex de facto couple who lived in Queensland and had been in a de facto relationship for approximately 27 years.

The final property applications were heard by Judge Turner of the Federal Circuit Court in Brisbane on 17 and 18 August 2015. Judgment was delivered on 25 January 2016.

Ms Chancellor was the applicant seeking a property division. Ms McCoy opposed a property division and sought orders that they each retain what they have. Judge Turner dismissed the application with the result that there was no adjustment of the property interests.

Ms Chancellor appealed Judge Turner's decision to the Full Court of the Family Court. The appeal was heard on 7 November 2016. Judgement was delivered on 2 December 2016. The appeal was dismissed.

4.1 Summary of Facts

At the time of the trial Ms Chancellor was 59 years of age and employed full time. Ms McCoy was 55 years of age. She was retired and was caring for her elderly parents. She had re-partnered.

The parties' relationship spanned 28 years, 27 years of which they lived together. It commenced in 1982 and ended when the parties separated under one roof in December 2010. They physically separated in December 2011 when Ms Chancellor moved out of the property they were living in and which was registered in Ms McCoy's sole name.

Throughout the relationship both parties were employed as teachers. Their careers progressed along parallel lines. They had similar superannuation schemes.

In 1983, Ms McCoy purchased a home in her sole name for approximately $51,000. The purchase was funded by her providing the deposit of $27,000 and the balance from mortgage funding. The parties commenced cohabitation in Ms McCoy's home in 1983.

Between 1983 and 1984, the parties renovated Ms McCoy's home. Ms McCoy provided the funds and Ms Chancellor assisted with the labour. In 1984, Ms McCoy's parents provided $35,000 to discharge the mortgage.

In 1986, Ms McCoy sold the home for $62,000 and used approximately $51,000 to purchase another property in her sole name. Between 1986 and 1987, the parties lived with Ms McCoy's parents during the week and in a cottage on Ms McCoy's property on weekends.

In 1987, Ms McCoy borrowed $45,000 from her parents to build a home on the property which the parties moved into later that year. Also in 1987 Ms McCoy made a will naming her parents as the beneficiaries of her estate.

During 1999 Ms McCoy started contributing more to her superannuation by salary sacrificing.

In 2002, Ms Chancellor purchased a house in her sole name for $187,000. The deposit came from $50,000 that she received from her uncle and the balance funded by a mortgage. She continued to live in Ms McCoy's property and rented her property to her sister to live in at a reduced rent.

Between 2002 and 2003, the parties renovated Ms Chancellor's property. Ms Chancellor provided the funds and Ms McCoy assisted with labour.

In 2006, Ms McCoy renovated her property and installed a swimming pool, using funds from her parents and her savings.

Each of the parties serviced their own mortgages.

Ms Chancellor's uncle died in January 2010. The parties separated under one roof in December 2010.

Following separation and in March 2011, Ms Chancellor received an inheritance from her late uncle's estate, which was valued in excess of $560,000 comprising a real property and cash of $165,000.

In December 2011 Ms Chancellor moved out of the property the parties had lived in.

In 2012 Ms McCoy re-partnered.

In March 2013 Ms Chancellor commenced the Family Court proceedings.

In April 2013 Ms McCoy retired.

During the relationship each of the parties acquired other assets such as machinery and equipment and cars.

4.2 Assets of the Parties

At paragraph 42 of the judgment Turner, J sets out a table of who owned what and the values of the parties' assets and liabilities at the time of the trial as follows:

Assets	Ms Chancellor	Ms McCoy
Property in Ms McCoy's sole name purchased during the relationship		$650,000
Property in Ms Chancellor's sole name purchased during the relationship	$385,000	
Property inherited by Ms Chancellor post separation from late uncle's estate	$350,000	
Shares	$7,940	
Shares		$71,878
Shares		$6,410
Shares		$3,002
Shares		$7,450
BMW motor vehicle	$17,000	
Boat	$4,250	
Toyota Prado		$30,200
Toyota Skid loader		$14,750
Isuzu truck		$9,000
Tools and equipment		$6,250
Horse float		$12,000
Superannuation	$204,177	
Superannuation		$887,724
TOTAL	**$968,367**	**$1,698,664**
Liabilities		
Bank	$91,996	
Bank	$155,980	
TOTAL	**$247,976**	
TOTAL NET ASSETS	**$720,391**	**$1,698,664**

It is immediately apparent that the asset which significantly affects the value of the property in the parties' respective legal and equitable ownership is the value of the superannuation in Ms McCoy's sole name.

4.3 Factors considered in determining whether it was "just and equitable" to make an order adjusting the property interests

Her Honour found 10 categories of considerations and made findings under each of them which were pertinent to her determination of the "just and equitable" question. In summary, they were:

1. The nature of the parties:

(a) Mature, educated and intelligent;

(b) High achievers in their profession;

(c) Similar employment conditions and opportunities;

(d) Employed full time during the relationship – except for a short period of leave;

(e) Neither party was overbearing of the other and there was no power imbalance in the relationship (she noted that they presented as very different in character).

2. The acquisition of property:

(a) Used their own funds and resources to acquire real property in their own name;

(b) Smaller purchases such as cars and boats were also acquired individually utilising their own funds;

(c) Only minor items were purchased jointly at equal cost – i.e.:

(i) Tinting for the windows in the extension to Ms McCoy's property;

(ii) Blinds for the extension on Ms McCoy's property;

(iii) A flat screen TV;

(iv) A recreational vehicle (which no longer exists);

(v) A camper trailer (which was retained by Ms Chancellor);

(vi) A ride on mower (which was sold during the relationship); and

(vii)Some items of furniture (which were shared and distributed at separation).

3. The direct financial contributions made to each other's real property:

(a) Ms Chancellor made some direct financial contributions to improvements to the first property owned by Ms McCoy by gifting a lead light window and to the second property owned by Ms McCoy of:

(i) The land clearing ($680);

(ii) Paint ($499);

(iii) Blinds ($1063);

(iv) Purchase of wire, chain wire, star pickets and white wire;

(v) Curtains for Ms Chancellor's room.

(b) Ms McCoy made no financial contributions to Ms Chancellor's property.

4. The indirect financial contributions made to each other's real property:

(a) Ms Chancellor made indirect financial contributions to the improvements on the first property owned by Ms McCoy via her father buying metal and

building balustrading on the deck and to the second property owned by Ms McCoy of:

(i) Family and friends helped with labour;

(ii) Ms Chancellor helped with labour;

(iii) At times Ms Chancellor did all the domestic chores to enable Ms McCoy to do labour.

(b) Ms McCoy made indirect financial contributions to the maintenance and repair of Ms Chancellor's property by contributing labour.

5. The sharing of day to day living expenses:

(a) During the whole of the relationship Ms Chancellor lived in properties owned by Ms McCoy;

(b) Ms Chancellor made the following contributions:-

(i) During most of the relationship Ms Chancellor paid $100 to $120 a fortnight Ms McCoy;

(ii) Ms Chancellor paid for half of the groceries;

(iii) Ms McCoy paid for bills on MasterCard in order to obtain points and Ms Chancellor reimbursed her in cash for her half share of the bills;

(iv) Ms Chancellor paid a total of $4,600 towards house insurances and Ms McCoy paid a total of $11,700 towards house insurances for her properties.

6. The separation of finances and financial independence:

(a) The parties did not have a joint bank account;

(b) Ms Chancellor, when unemployed between jobs for 4 to 6 weeks, withdrew monies from her superannuation fund to live off, whilst residing with Ms McCoy at the first property owned by Ms McCoy;

(c) Ms Chancellor borrowed $4,000 from Ms McCoy's parents to purchase a boat in her name. The monies were repaid with interest by Ms Chancellor to Ms McCoy's parents;

(d) Other than the financial contributions made by Ms Chancellor to the first property owned by Ms McCoy, Ms McCoy paid for all costs associated with all renovation, repair and maintenance of the property;

(e) Other than the financial contributions made by Ms Chancellor to the second property owned by Ms McCoy, Ms McCoy paid for all costs associated with the

building of the house and the renovation, repair and maintenance of the property;

(f) Ms Chancellor was solely responsible for all costs associated with the renovations, repair and maintenance of the property in her name;

(g) Since separation the parties had been solely responsible for all costs associated with their respective properties;

(h) Ms Chancellor has had sole use of the inheritance from the uncle apart from paying for a short holiday for the parties in Melbourne and $25,000 paid by her to Ms McCoy from the inheritance which the judge accepted was a gift out of the estate of the uncle, who from time to time had been cared for by the parties during the relationship;

(i) Since separation the parties both spent excessive amounts of money in litigation and had eaten into their financial resources to meet those costs.

7. The (omitted) business:

(a) For nine months the parties operated a (omitted) business with Ms Chancellor's brother;

(b) The parties worked after hours at the business;

(c) Neither party financially contributed to the business;

(d) Neither party received a wage from the business.

8. The lack of future plans or goals:

(a) The parties did not discuss or execute mutual Wills which left property to each other;

(b) The parties did not name each other as beneficiaries on superannuation policies;

(c) There was no evidence of life insurance policies where the other party was named as beneficiary;

(d) Ms Chancellor was not involved in any discussions with Ms McCoy's parents as to the various cash advances made to Ms McCoy and how that money would, if required, be repaid;

(e) There was a lack of evidence as to whether the parties would share their assets or superannuation upon retirement;

(f) There was a lack of evidence as to the future plans the parties may have had or goals that might have been shared had the parties not separated;

(g) It was never explained as to how the parties would spend their retirement given that Ms McCoy's parents lived with the parties and Ms Chancellor's property was being rented at reduced rent to her sister.

9. The lack of knowledge as to the financial situation of the other party

(a) Ms Chancellor lacked knowledge as to:-

(i) What money Ms McCoy had at the commencement of the relationship;

(ii) The amount of money being contributed to Ms McCoy's superannuation fund;

(iii) How the salary sacrifice worked in respect to Ms McCoy's superannuation;

(iv) When Ms McCoy commenced contributions to her superannuation fund;

(v) When Ms McCoy purchased her first property it was subject to a mortgage and when that money was paid out by Ms McCoy's parents;

(vi) Ms McCoy making out a will in favour of her parents;

(vii) How much Ms McCoy paid to purchase her second property;

(viii) How much Ms McCoy paid for the house and extension to the house on her second property;

(ix) The extent of the monies provided by Ms McCoy's parents;

(x) The purpose of the a Bank Line of Credit that Ms McCoy secured during the relationship;

(xi) How Ms McCoy acquired her share portfolio;

(xii) What savings Ms McCoy had.

(b) Ms McCoy lacked knowledge as to:-

(i) What assets Ms Chancellor had at the commencement of the relationship;

(ii) What happened to the sale proceeds of the (omitted) business;

(iii) How Ms Chancellor acquired the deposit for her property;

(iv) Whether Ms Chancellor was contributing to her superannuation fund;

(v) What savings Ms Chancellor had;

(vi) What property Ms Chancellor had as at the date of separation.

10. Lack of evidence

(a) There was lack of evidence from Ms Chancellor as to the alleged contributions made by her to the properties owned by Ms McCoy, with no receipts for work done, no bank statements showing withdrawals and no affidavits by friends or family members as to work performed on these properties;

(b) There was lack of evidence as to whether the financial and non-financial contributions made by Ms Chancellor to the properties owned by Ms McCoy increased the value of those properties;

(c) There was lack of evidence as to what the parties spent their respective monies on after the joint expenses were paid and Ms Chancellor paid the fortnightly sum to Ms McCoy.

Having considered the evidence under each of the 10 categories, her Honour found that it would not be "just and equitable" to alter the existing legal and equitable interests of the parties in any of the property. This decision was based on the following findings:

1. The parties conducted their affairs in such a way that neither party would or could have acquired an interest in the property owned by the other because:-

    (a) There was no intermingling of their respective finances;

    (b) The parties did not have a joint bank account;

    (c) Each party acquired property in their own name with there being little exchange of the detail of these acquisitions to the other party;

    (d) Each party remained responsible for their own debts;

    (e) Each party was able to use the remainder of their wages as they chose without explanation or accountability to the other party;

    (f) There was a complete lack of joint financial decision making;

    (g) There was the absence of sharing of any information with each other as to their financial situation or individual decision making;

    (h) Neither party made provision for the other party in the event of their death either by way of will, beneficiary to superannuation funds or beneficiary to life insurance policies;

    (i) The parties at the time of separation were unaware as to the worth of the assets acquired by each of the parties during the relationship and the decisions that had been made in respect to the acquisition of these assets.

2. There was no evidence that the financial and non-financial contributions made by Ms Chancellor to Ms McCoy's properties improved the value of these properties and no equitable interest by Ms Chancellor in the properties has been established;

3. Each party had the opportunity during the relationship to financially plan for their future given their profession and employment histories;

4. There was no evidence to support that either party was hindered in their individual financial decision making during the relationship;

5. For many years Ms Chancellor appeared to be in a more advantageous position as she did not own real estate nor gave any evidence as to any debts she had for those years, but this is not reflected in the pool of assets each party has retained since separation;

6. It is unfair for Ms McCoy, who had taken steps to maximise her future wealth, to have to share that wealth with Ms Chancellor who did not invest as wisely; especially in regard to maximising her superannuation benefits;

7. Ms Chancellor had demonstrated her continuing struggle with financial matters given the spending of the inheritance and the increase in her mortgage since separation, despite the earning of an income;

8. Although the alteration of property interests had been denied due to it not being just and equitable for such an alteration to take place, Ms Chancellor was still left with significant assets accumulated by her during the relationship, consisting of two houses, several motor vehicles and superannuation;

9. Further, Ms Chancellor has the capacity, unlike Ms McCoy, to accumulate more assets, with her ability to work and her ability to contribute to her superannuation fund: Per paragraph 59 of the judgment.

It is clear that the parties' lack of financial intermingling, knowledge of the others financial affairs during their long relationship and no planning as to their future financial relationship together were key factors in her Honour's decision that it was not just and equitable to make any property orders. Her Honour stated that whether the separation of finances was an intentional decision or not was irrelevant. What was relevant was that this was how the parties conducted their relationship for the entire and lengthy duration of it.

She considered that the payment of between $100 to $120 per fortnight for most of the relationship and how that was termed (i.e. mortgage repayment, rent or board) could not be viewed as financial intermingling but as financial assistance to the other party as the home owner who provided housing for the parties to live in during the entirety of the relationship.

4.4 The Appeal to the Full Court of the Family Court of Australia: *Chancellor & McCoy [2016] FamCAFC 256 (2 December 2016)*

One of the grounds of the appeal was that Judge Turner had erred by using the authorities of *Stanford* and *Fielding & Nichol* as reference points rather than considering an appropriate property settlement division in the case.

The Court found that there was some basis for the contention that *Fielding & Nichol* was used as a reference point because the Judge looked at the similarities and differences

between *Fielding & Nichol* and *Chancellor & McCoy*. However the Court found that she was entitled to consider those points as "there would be no error on the part of the trial judge if *Fielding & Nichol* had been used ***only as providing a structure*** for the way to approach the issue her Honour had to determine. In our view, this is what her Honour did." (emphasis added by the authors).

5. JUST AND EQUITABLE

Section 79 and s90SM confer wide discretion with each case turning entirely on the view taken by the judicial officer of the facts and merits of the case. This power is a discretionary power and is dependent on the facts of the case. Therefore no two decisions can be the same. The Court however does not have an unfettered discretion.

In *Stanford* the Court observed that it was not correct to answer the question of whether making an order is "just and equitable" by assuming, at first instance that a party has the ***right*** to have the property divided between the parties.

6. PRACTICAL CONSEQUENCES FOR PRACTITIONERS

Based on these cases, it is important to consider and take instructions from your client about:

(a) The legal and equitable ownership of all of the property and liabilities that each of the parties have at the date of commencement of their relationship;

(b) The legal and equitable ownership of all the property as the date of the Court;

(c) Obtain evidence including securing valuations of the property at point (a) and (b) above;

(d) How the parties arrange their day to day finances during the course of their relationship i.e.:

- Contributions to payment of household bills;
- Separate and or joint bank accounts;

(e) Any assets or liabilities acquired during the relationship and what the respective party did with them;

(f) If either of the parties made financial or non-financial contributions to property in the legal or equitable ownership of the other, did that create a legal or equitable interest in that property which is not reflected in the title to the property. Full details and documentary and/or other records/evidence of what those contributions were and the effect those contributions had on the value of the property;

(g) Their assumptions about the assets the parties had – was their relationship conducted on the basis that either party would solely have an interest in it, or not

withstanding the interest recorded on title that both would have an interest albeit unregistered or reflected on the title;

(h) Whether they refrained from accumulating other assets;

(i) Whether the parties shared any financial information;

(j) What their Wills provided;

(k) Superannuation beneficiaries;

(l) Future plans; and

(m) Planning together.

7. CONCLUSION

Thackray CJ points out in his decision of *Fielding & Nichol* that:

> *"43. While I accept that a finding that it is just and equitable to make an order will always be required, in most cases the court will not need to discuss the s 79(2) issue, because the cases will be conducted on the basis of acceptance by the parties that it is just and equitable to make some form of adjustment. In those cases, matters arising under s 79(4) will require discussion only when determining the way the adjustment is to be effected…"*

Judge Turner also warned against the assumption that property orders will flow from the existence of a marriage or a de facto relationship.

So as practitioners we need to consider whether we should be seeking adjustive orders or not. The decided cases give us some guidance as to the factors the Court has taken into account in determining whether or not to exercise their jurisdiction and discretion to adjust parties interests in property consequent on the breakdown of a martial or de facto relationship. Each case will be decided on its own particular facts.

It is clear that these cases will become increasingly relevant for the growing number of modern couples who choose to remain largely financially independent.

SCHEDULE A

FAMILY LAW ACT 1975 - SECT 79

Alteration of property interests

(1) In property settlement proceedings, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or

(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:
(i) either or both of the parties to the marriage; or
(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

FAMILY LAW ACT 1975 - SECT 75

Matters to be taken into consideration in relation to spousal maintenance

(1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

(2) The matters to be so taken into account are:

(a) the age and state of health of each of the parties; and

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(naa) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:

(i) a party to the marriage; or
(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties to the marriage; and

(q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

FAMILY LAW ACT 1975 - SECT 90SM

Alteration of property interests

(1) In property settlement proceedings, after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them--altering the interests of the parties to the de facto relationship in the property; or

(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship --altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:

(i) either or both of the parties to the de facto relationship; or

(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

(3) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account

(a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship or a child of the de facto relationship

(i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or

(ii) otherwise in relation to any of that last-mentioned property,

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship or a child of the de facto relationship:

(i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or

(ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

(c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and

(e) the matters referred to in subsection 90SF(3) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.

FAMILY LAW ACT 1975 - SECT 90SF

Matters to be taken into consideration in relation to maintenance

(1) In exercising jurisdiction under section 90SE (after being satisfied of the matters in subsections 44(5) and (6) and sections 90SB and 90SD), the court must apply the principle that a party to a de facto relationship must maintain the other party to the de facto relationship:

(a) only to the extent that the first-mentioned party is reasonably able to do so; and

(b) only if the second-mentioned party is unable to support himself or herself adequately whether:

(i) by reason of having the care and control of a child of the de facto relationship who has not attained the age of 18 years; or

(ii) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(iii) for any other adequate reason.

Note: For ***child of a de facto relationship*** , see section 90RB.

(2) In applying this principle, the court must take into account only the matters referred to in subsection (3).

(3) The matters to be so taken into account are:

(a) the age and state of health of each of the parties to the de facto relationship; and

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(c) whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years; and

(d) commitments of each of the parties that are necessary to enable the party to support:

(iii) himself or herself; and

(iv) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (4), the eligibility of either party for a pension, allowance or benefit under:

(iii) any law of the Commonwealth, of a State or Territory or of another country; or

(iv) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

(g) a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(i) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the de facto relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under section 90SM in relation to:

(iii) the property of the parties; or

(iv) vested bankruptcy property in relation to a bankrupt party; and

(o) the terms of any order or declaration made, or proposed to be made, under Part in relation to:

(i) a party to the subject de facto relationship (in relation to another de facto relationship); or

(ii) a person who is a party to another de facto relationship with a party to the subject de facto relationship; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(p) the terms of any order or declaration made, or proposed to be made, under Part VIII in relation to:

(i) a party to the subject de facto relationship; or

(ii) a person who is a party to a marriage with a party to the subject de facto relationship; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(q) any child support under the *Child Support (Assessment) Act 1989* that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship; and

(r) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(s) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship; and

(t) the terms of any financial agreement that is binding on a party to the subject de facto relationship.