Property Settlement after Stanford’s case: Is it business as usual?

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Date: 25 February 2014

Introduction

1. I propose to talk about the High Court case of Stanford v. Stanford\(^1\), decided in 15 November 2012.

2. Two days later, I attended a Law Institute family law conference, Martin Bartfeld QC and Minal Vohra spoke about property matters, including the court's treatment of debt and bankruptcies. Mr Bartfeld expressed concern about the judgment.

3. The question is, what changes has it made to people on the ground, like us, at the coalface?

4. It is all very well for the High Court to make new pronouncements which spark a debate amongst the intellectuals in our practice, but what real effect does the new judgment have or could it have?

Facts

5. The facts of the case were that Mr and Mrs Stanford were quite old.

6. Mrs Stanford had suffered a stroke and was admitted to care, initially in low care and subsequently in high care when she was diagnosed with dementia.

\(^{1}\) (2012)HCA 52(15 November 2012)
7. About nine months after Mrs Stanford was admitted to care, the daughter brought an application in the Family Court of Western Australia as Case Guardian, applying for the matrimonial home to be sold and the proceeds divided equally together with their other assets.

8. One very important factor here was that Mr Stanford was still at home at the matrimonial home in which the parties had lived for 40 years and was still providing for Mrs Stanford. That is, there had been no separation.

9. A Western Australian magistrate made orders dividing the property of the parties. The husband appealed to the Full Court of the Family Court of Australia.

10. The Full Court ordered that, on the husband's death, the sum which had been fixed by the magistrate at 42.5% of the marital property be paid to the wife's legal personal representative.

11. As you are aware, there was an appeal to the High Court. The High Court overturned all of the decisions of the lower courts, holding that it would not have been just and equitable to alter property interests of the parties to the marriage prior to the wife's death, and therefore, it was not appropriate to do so after she had died.

12. The Full Family Court had decided that many years of marriage and the wife's contributions, 'demanded that those moral obligations be discharged by an order for property settlement.'

13. The criticism made by the High Court of the Family Court was that the Family Court made no separate enquiry as to whether, had the wife not died, it would have made a property settlement order (@ paragraph 48).
14. It was not shown that the wife's needs during her life were not being met or would not be met.

15. Justice Hayden found that:
   - If the wife's needs had not been met, maintenance orders could have been applied for against the husband.
   - There was no need for a final order altering the interests of the parties when the husband was still living in his home of 48 years.

**What did the High Court hold?**

16. First, it is important to note that the High Court did not approve of the way in which the Family Court in *Hickey's* case² dealt with property settlements. It did not disapprove of Hickey's case either.

17. Those of us who have done any practice in family law, will know that there is a well rehearsed four-step process, of which has been in effect the nearly 30 years:
   - Identification and valuation of the property of the parties;
   - Identification and evaluation of contributions to the property (including property no longer owned by the parties);
   - Identification and assessment of the various matters in s 79(4)(d) to (g) including, to the extent they are relevant, the matters in s 75(2);
   - Consideration of matters of justice and equity.

18. The issue for us is whether this new approach by the High Court would require us to modify the advice which we give to our clients. The general opinion is that in the vast majority of cases, the effect of the advice would be no different to that
which has previously been given. However, there is a necessity, in view of Stanford's case, to exercise care.

19. The essence of the High Court's decision is that it is a statutory pre-condition of the court making a property settlement order, that it must be satisfied, that in all the circumstances, it is just and equitable to make the order. This is what is required by s79(2) Family Law Act 1975. (‘The Act’)

20. I will replicate parts of paragraphs 37 to 40 of the judgment in their entirety:

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.
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.
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"[26].
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).

What is the change of approach?

21. There are three fundamental propositions which can be extracted from Stanford (which it might be said has an effect of causing family law practitioners to change their approach necessarily).

23. The first is to apply a statutory precondition which used to determine whether it is just and equitable to make a property settlement order by identifying the existing legal and equitable interests of the property of the parties.

24. The second is to apply section 79, which is a power that should not be exercised by unguided judicial discretion. The question for any practitioner sitting in his office with a mountain of files and a desperate client who just wants to know a dollar figure, is what the hell is ‘unguided judicial discretion’? The court has tried to give an example, which is that one should not assume that the party's rights to interests in marital property should be different from those that then exist.

25. There is no right to have the property of the parties divided between them, which is fixed by the matters set out in s79(4) of the Act. That is, one cannot concentrate section 79 (4) without a separate consideration of S79(2).

**Just and Equitable Requirement**

26. How does one satisfy the test whether it is just and equitable to make a property settlement order? The courts are quite clear that the that requirement is usually satisfied where, as a result of a choice made by one and all both parties, the
husband and wife are no longer living in a marital relationship and there will not be our common use of property by the husband and wife.

27. Justice Young in *Sebastian v Sebastian* observed that where parties have involuntarily separated, it will be harder to prove it is just and equitable to make an order (at para 143).

28. My observation is that these situations would seem to be out of the ordinary. For example, it seems more common in this day and age that parties are living separated under the one roof for quite some period of time. It is not unusual for one party to be on title. This not unusually happen in circumstances where that party has received an inheritance, which is the property. It is also not unusual for parties or one party can be in complete denial of the separation. However, where one party can has communicated that the marriage is over, and the other is in complete denial of that fact, it would seem that the just and equitable requirement will be made out because the choice to end the common use of property has been made by one party.

29. Justice Young considered that what can be derived from Stanford is (at 144):
   - an identification of the party's existing legal and equitable interests in the property
An assessment of whether it is just and equitable to make an order, as required by section 79(2)

If it is just and equitable, an assessment of what order, applying section 79(4). And although this is not authorised, it may be useful to further categorise into separate consideration contributions and section 75(2) factors

What Do the Smart People say about this?

30. Professor Patrick Parkinson\(^3\) says, that to make an order under section 79, it is a statutory precondition that there is a finding that it is just and equitable to alter existing property rights\(^4\).

31. Professor Parkinson says that there is a need to reconsider property bought into a relationship by one or other party. What are we know as the dreaded 'initial contribution'. He says that the Family Court has struggled to articulate principled reasons which justify its practices for 'interfering with the existing legal and equitable interest of the parties to the marriage.' He says that, 'the gravitational pull of equality exercise is a powerful force in the absence of a principled reason\(^5\)."

\(^3\) Professor Parkinson is Professor of Law at the University of Sydney and President of the International Society of Family Lawyers

\(^4\) Australian Family Lawyer Vol 23 No 2. The plurality in Bevan No 1 disagreed with this at para 81.

\(^5\) Ibid p17
32. There is a tendency to treat property brought into the relationship or received by way of inheritance as property to which the other gains an entitlement through the passage of time⁶.

33. Professor Parkinson posits the question as to whether the justice and equity of the case can be met by asking the court to declare legal and equitable title and then to make consequential orders for sale. E.g.

- declare illegal and equitable title
- Or order the sale of property jointly owned (s78(2))
- Dismiss application for property alteration⁷

**RECENT CONSIDERATION OF STANFORD**

34. The Full Court has considered the judgment of Stanford in the case of *Bevan (2013) FamCA FC.*

35. This was a 40 year marriage. Wife was 64, husband was 66. The parties had largely lived apart for the last 18 years of the marriage. The husband went to live in England, leaving the wife with a power of attorney to deal with their assets. The trial judge assessed a net property pool at the time of trial at $1.069 million.

36. The trial judge awarded the wife 60% of the parties net property then in existence, which included a Homestead which was solely in the wife's name. The trial Judge

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⁶ ibid at 16
⁷ ibid at 17
relied upon representations which had been made by the Husband to the Wife before he went to England and since to the effect that he did not wish to make a claim against their joint property in Australia.

37. An issue also arose as to whether there should be an add-back in for investment losses caused by the wife during the period that the husband was away.

38. There were a number of complaints about the way in which the trial judge dealt with the property division; the Full Court found that a number of complaints of the trial judge’s findings demanded reconsideration. Primarily, the Full Court found that the unusual facts of the case demanded consideration of the justice and equity of making any order, quite independent of consideration of what the husband would have received had he pursued his claim earlier and not lead the wife to believe he would not pursue a claim at all. These were unusual facts, like Stanford, where the full Court found that the husband's long delay in bringing his application, in the face of repeated prior representations was highly relevant in the exercise of the section 79 discretion.

39. The Full Court held that the reminder in Stanford of the pivotal role of s79(2) is unlikely to have any impact in most cases, saying ‘it will serve as a reminder to trial judges that the precondition to making any order is a finding that it is just and equitable to do so.’ The Full Court of Bryant CJ and Thackray J went on to say(at paragraph 73):

...
73. The High Court in *Stanford* has laid down three “fundamental propositions” which will provide useful guidance to trial judges in approaching the task under s 79. These were recited above, and could be summarised thus:

1. Determination of a just and equitable outcome of an application for property settlement begins with the identification of existing property interests (as determined by common law and equity);
2. The discretion conferred by the statute must be exercised in accordance with legal principles and must not proceed on an assumption that the parties’ interests in the property are or should be different from those determined by common law and equity;
3. A determination that a party has a right to a division of property fixed by reference only to the matters in s 79(4), and without separate consideration of s 79(2), would erroneously conflate what are distinct statutory requirements.

40. Interestingly the Full Court referred to the analysis by Mr Bartfeld QC entitled 'Stanford and Stanford -- Lots of Questions -- very few answers ' at paragraph 88 as follows:

88. Mr Bartfeld opined that:
49. ... there is scope for taking into account the factors under s 79(4) in the exercise of the [s 79(2)] discretion. This can be accomplished, it is submitted, by treating the contribution factors and the factors under s 75(2) as having two simultaneous characteristics;

a. A discretionary characteristic, which is used to identify those matters which are relevant to enliven the exercise of the discretion. Thus the fact that a party has made substantial contributions, over a long period of time, which are not reflected in their asset holdings but which are reflected in the other party’s assets may found a basis for finding that it is just and equitable for an order to be made; and

b. An evaluative characteristic, which is used to measure the weight or to quantify the effect of a particular contribution.

50. The problem of conflation can easily be overcome by clearly identifying the use to which a factor is being put.

89. In our view, it will be less likely that the separate issues arising under s 79(2) and s 79(4) will be conflated if judges refrain from evaluating contributions and other relevant factors in percentage or monetary terms until they have first determined that it would be just and equitable to make an order. Ultimately, however, appellate error will not be demonstrated if it is possible to ascertain, either by reference to an express finding or by necessary inference, that the trial judge has given separate consideration to the two issues.

41. Justice Finn's short punchy judgment is worth a read. He also had some comments about Mr Bartfeld's paper. He did not think that there was much
assistance to be provided to the ordinary person by the introduction of concepts such as 'discretionary characteristics' and 'evaluative characteristics' in relation to factors in S79(4).

42. However, there is some merit in replicating what His Honour said from 156:

158. In this context it is also important to note the reminder given by the High Court in Stanford (at [39]) that there is no “community of property” in our law.
159. Given this reminder, there may well be validity in the question raised by Martin Bartfeld QC in his paper entitled “Stanford and Stanford – Lots of Questions – Very few Answers” (at [41]) as to whether the common approach of identifying a pool of all the property (which is owned by both parties) and dividing that pool according to a percentage assessed by reference to the matters in s 79(4) remains an appropriate approach (at least in all cases).
160. These reminders that the jurisdiction under s 79 is a jurisdiction to alter individual interests in title to property and that there is no community of property in this country, might also call into some question the current practices in relation to the treatment of property which is no longer in existence but which one party has had the use of (the so called “addbacks”), and perhaps also of the unsecured liabilities of one or both parties. It may well be that these matters should more strictly be considered in making findings under s 79(4)(e) (i.e. s 75(2)), or in an extreme case, when considering the question under s 79(2) as to whether it is just and equitable to make any order under s 79. But these questions do not arise in the present case, and are thus for another day.

43. In addition, His Honour posited that the question of whether it is just and equitable to alter the existing property interests in a particular case will be easily answered where both parties are seeking orders which alter their respected property interests. However this will be more difficult to answer in cases such as the case of Bevan, where one party seeks that no order be made.

44. The Court allowed the appeal and requested submissions from the parties.
The Result of BEVAN

45. The Court ultimately decided that it was not just and equitable to make any order altering the existing interests of the parties. The Husband submitted that he should receive 50%.

46. The Court ultimately held:

89. We must also take into account that the husband is now 68 years of age and has experienced some health difficulties. Although at the time of trial the husband was continuing to earn a good income, we accept that he is probably nearing the end of his working career. On the other hand, the husband has the benefit of good quality accommodation with his de facto wife in a home to which he has made at least some modest contribution, albeit we accept that his future occupation of the home will be dependent upon his de facto wife’s goodwill.

90. Balanced against these matters, we must also take into account the fact that the wife is nearly 66 years of age and that her earning prospects are also likely to be limited. In the event that we were, for example, persuaded to make orders as sought by the husband, the wife would undoubtedly be required to sell her home in M town – and indeed a sale may well become inevitable in the event we were to make any order for payment of a sum greater than that now proposed by the wife in her alternative proposition. We should say, however, that the possible sale of the wife’s residence is not a matter that figures prominently in our consideration, given that it is a common outcome of matrimonial proceedings that a party is required to dispose of their home.

91. Having given most careful consideration to the factors on both sides of this argument, we have determined that the extent of the representations made by the husband, the circumstances in which they were made, and the husband’s substantial delay in instituting proceedings are such that it would not be just and equitable to make any order interfering with existing interests in property.

92. This decision should not be seen as supporting a similar outcome in cases where there is delay, even long delay, in instituting proceedings, particularly given that the Act has its own limitation period. Nor should it be seen as setting a precedent for all cases where a party makes a statement of future intention concerning ownership of property. As we have been at pains to stress, s 79(2) confers a wide discretion, and therefore each case will turn entirely on the view taken by the judicial officer of the facts and merits of that case.

What are the real implications of this, if any, to my day-to-day practice?

47. Professor Parkinson considered that there were six subheadings which might require a practitioner to consider in property settlements.9

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8 Bevan & Bevan [2014] FamCAFC 19 (19 February 2014)

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Is there a pool?

- The Professor thought that in light of Stanford parties should refrain from talking of 'the pool' of property. He said that talking of the pool will tend to lead to an erroneous assumption that one or other party has the right to have the property of the party is divided between them or has the right to an interest in marital property which is fixed by reference to the various matters in s79(4).

Can you have add-backs in Step 1?

- Following Stanford, only in limited circumstances can 'add backs' be considered as notional property to be included at step one of the process.

- Add backs apply in circumstances where there has been a 'dissipation', for example, a party has transferred cash from a joint account, or has used a joint facility or joint account and to pay the legal costs.

- This issue was considered in a recent case of Watson and Ling (2013) FamCA 57. In that case Justice Murphy held that in certain instances money or property could be recognised as part of the existing legal or equitable interest of the disposing party (in cases of sham transactions or circumstances where it can be established that the property is held, for example, on trust by another for the disposing party).

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9 Op cit @ 12-14
Justice Murphy considered that add backs could potentially be treated pursuant to s75(2)(o), or it could be argued that the non dissipating party can be seen to have made a disproportionately greater indirect contribution to the existing legal and equitable interests if it can be established that BUT FOR the other party’s unilateral dissipation, those existing legal and equitable interests would have been greater or had a greater value.

Justice Finn’s comments in Bevan v Bevan at 160 would tend to support this.

Property under the control of a party

- Property to which the party has no legal or equitable title, for example, because it is property which is said to be his or her ‘alter ego’ could not be included in Step 1.

Equitable interests

- PP queries how far the Court should go in exploring the issue of equitable ownership. E.g. should the court consider claims under equitable doctrines like estoppel and the law of resulting trusts before going on to consider whether a statutory adjustment is required?
- PP thinks that it is unlikely that it will be necessary to consider equitable interests, but practitioners should give consideration to the doctrines afresh.
- BUT, the plurality in Bevan would seem to agree. At 77, the Court held:
Once it is recognised a court has power to alter both legal and equitable interests, it follows that it is necessary first to identify all property in which the parties have either a legal or equitable interest. Since the issue does not arise here, we will not express a concluded view about the post-Stanford controversy concerning the extent to which it is necessary to decide whether – as between the parties – the legal title accurately reflects their respective interests. However, where it is accepted that justice and equity require the making of an order, it would seem unnecessary to complicate proceedings by deciding whether one party has an equitable interest in property held by the other, since the ultimate outcome will not be determined by application of equitable principles but rather by reference to ss 79(4) and 75(2).

- But what of transfers made to third parties?

**Financial resources**

- Financial resources should still be included and identified early in the process.

**Superannuation**

- Professor Parkinson sees no reason to suppose that superannuation interests should not be identified as part of the first step.

**CONCLUSION**

- One cannot answer s79(2) until one looks at s79(4)

- The plurality in Bevan No 1 say that the four stage process illuminates the path and is of utility in what courts and practitioners do, but do not overlook s79(2)
• Query a situation where one party has made representations to another and whether reprehensible behaviour of one party might impact on the justice and equity of a court making a property settlement order

• Add backs should be included in a separate balance sheet, not is step 1, and could be treated as a relevant factor under s75(2)(o)

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