Dr Jacoba Brasch QC
Barrister-at-Law | FLA Reg 67B Arbitrator
P 07 3211 3800 | F 07 3236 2730 | M 0438 301 956
jbrasch@qldbar.asn.au

Brisbane
Level 18, Inns of Court
107 North Quay
Brisbane Q 4000

Cairns
Macrossan Chambers
14 Spence St
Cairns Q 4870

Melbourne
Macrossan Chambers
Level 4, 488 Bourke St
Melbourne Vic 3000

Small pools

Should there be an adjustment

- *Stanford & Stanford* (2012) 247 CLR 108

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

The Pool

Negative pools

- Wilson FM (as he then was) decision mentioned – *PS & OS* [2007] FMCAfam 285 (11 May 2007) (available on austlii)

Add backs

- The exception not the rule: *C & C* [1998] FamCA 143 at para 46
- legal fees paid from joint assets is a commonly accepted category of add-back.[1]
- premature distribution type add backs: *Townsend & Townsend* (1995) FLC 92-569)

---

[1] *Chorn & Hopkins* (2004) FLC 93-204 at paras 57 to 60 and the line of authority thereafter up to and after *Stanford*, supra. See also *Vass & Vass* (2015) 53 Fam LR 373 at para 138 (original emphasis) where Senior Counsel for a party sought to argue that *Stanford* meant legal fees could not be added back any more

> There is no error committed *per se* in adjusting the parties' actual property interests by a calculation involving notionally adding back into the pool sums which have been dissipated by the parties. We reject any suggestion that the decision of *Bevan & Bevan* (2013) FLC 93-545 – or, more particularly, the decision of the High Court in *Stanford & Stanford* (2012) 247 CLR 108 - is authority for any necessary contrary solution. Some statements made by the High Court *may* lead to the conclusion that references to "notional property" as have been referred to in decisions of this court and at first instance *may* need to be reconsidered.

- add back of reckless, wanton or negligently disposed of matrimonial assets: *Kowaliw & Kowaliw* (1981) FLC 91-092
- A different way to think about add backs: *Kouper & Kouper (No 3)* [2009] FamCA 1080 Murphy J, having analysed relevant authorities, expressed this at [108]:

> Whilst, clearly enough, the authorities make it plain that the manner in which any dissipation of funds should be dealt with is a matter for the trial judge's discretion, and accepting that the discretion ought not, of course, be fettered, it nevertheless seems to me that (leaving aside the issue of paid legal fees) the authorities indicate that the issue can, conveniently, be approached by reference to five questions:
>
> (a) Is it contended that property (including money), that would otherwise be available for distribution between the parties if a s 79 order is made, has been dissipated with a consequential loss to the property otherwise potentially divisible between the parties at the date of trial?;
>
> (b) If so, is it alleged that the dissipation of property was in respect of things other than what, in the particular circumstances of this particular marriage, can be classified as "reasonable living expenses"?;
>
> (c) If it is asserted that any loss to the divisible property results from dissipation of property other than in respect of such expenses, why is it asserted that the result should be a sharing of that loss by the parties other than equally?
>
> (d) If it is contended that this be the result, why should there be an add back (which brings to account, dollar for dollar, such past expenditure in current dollars) as distinct, for example, from there being an adjustment being made pursuant to s 75(2)(o)?; and
>
> (e) How should either any "add back", or adjustment pursuant to s 75(2)(o), be quantified?

- Followed by the Chief Justice in *Shimizu & Tanner* [2011] FamCA 271
- But Strickland J in *Mayne & Mayne* [2011] FamCAFC 192 (23 September 2011) at 183:

> It is suggested that the decisions of the Chief Justice in *Shimizu & Tanner* [2011] FamCA 271 and Murphy J in *Kouper & Kouper (No. 3)* [2009] FamCA 1080 are definitive of the issues under discussion here. However, I do not agree. With respect, there is nothing new (or definitive) in those decisions. In both of those cases the ability to notionally add back assets to the asset pool is recognised albeit as the exception rather than the rule.

Add back or s75(2)(o)

- *Bevan & Bevan* (2013) FLC 93-545 at para 79

> We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage – and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property.

Negative contributions

- "*The concept of "negative contribution" having long been eschewed by well-settled authority*.". *JS and GP* [2006] FamCA 150; (2006) 35 Fam LR 88, citing *Antmann and*

Antmann (1980) FLC 90-908; *Kennon v Kennon* [1997] FamCA 27; (1997) FLC 92-757and *Spiteri and Spiteri* [2005] FamCA 66; (2005) FLC 93-214.

Domestic & Family violence: "Kennon"

- Two limbs: (1) the conduct, and (2) the conduct making contributions more onerous: for example, *Raine & Creed* [2013] FamCA 362 (24 May 2013) at para 97:

> As the Full Court in *Kennon* and in *Baldwin* pointed out there must be a link between the conduct of one party and the contributions which have been rendered more onerous because of that conduct.

- *Spagnardi*, unreported - attached

- Not limited to D&FV – see alcoholism in *Baldwin v Baldwin* [2010] FamCAFC 227 where the Full Court said at para 102:

> With or without the earlier decision in *Kennon v Kennon* (1997) FLC 92 -757, all that was necessary in this case was for His Honour to find, as he did, that the husband's problems with alcohol had made the wife's contributions to the welfare of the family more difficult and hence deserving of greater recognition than that which they might otherwise have received.

31.7.16