

FAMILY COURT OF AUSTRALIA

STANFORD & STANFORD

[2012] FamCAFC 1

FAMILY LAW – APPEAL – PROPERTY – Where the parties are of a considerable age and each have children to former spouses – Where the parties were physically separated due to the frailty of the wife and her need to live in a nursing home – Where the husband remains living in the former matrimonial home – Where the wife’s children ask that the former matrimonial home be sold and the proceeds of sale spent on the wife’s care – Where the orders of the Magistrate provided, inter alia, for the wife to receive the sum of \$612,931 – Where the husband maintained that he could only satisfy the orders by selling the former matrimonial home

FAMILY LAW – APPEAL – PROPERTY – Whether and if so in what circumstances can the court make an order for property settlement pursuant to s 79 where the marriage is still intact but where there has been the physical separation of the parties as a result of one of the parties health – Where the various options available in the alternative to the making of final orders were not considered – Where the Magistrate should have considered the possibility of making an order for spousal maintenance – Where it could not reasonably have been found that the wife needed a sum of money to provide for her financial future or that the level of care would improve by the making of a final settlement order – Where the Magistrate failed to give adequate reasons as to why her Honour considered the orders made to be just and equitable – Where although there was jurisdiction to make a property settlement order, the discretion to do so should not have been exercised in this case – Appeal allowed

FAMILY LAW – APPEAL – PROPERTY – Where the wife died before the discretion of the Magistrate was re-exercised – Where the requirements for the continuation of proceedings after the death of a party have been complied with – Where both parties agree that the Magistrate’s findings as to contribution should not be disturbed – Where a re-exercise of discretion was deemed appropriate – Where it was ordered that the wife’s legal personal representatives receive the fixed sum of \$612,931 upon the death of the husband – Where the order recognises the wife’s contribution-based entitlement to the property pool and protects the husband from a need to move from his home earlier than he would wish, allows for a capital sum to be provided should it become necessary for his care and avoids an incorrect assessment of the husband’s current and future needs – Should the home be sold prior to the death of the husband, and in the event that the payment is not made to the wife at that time, security for payment is required. Failing agreement as to the form of the security the parties are at liberty to apply to the Court

FAMILY LAW – COSTS – Parties to file written submissions as to costs

Family Law Act 1975 (Cth) s 75(2); s 79; s 79(2); s 79(8)

Family Law Rules 2004 (Cth) r 16.15(3)

Federal Proceedings (Costs) Act 1981 (Cth)

Fisher & Fisher (1986) 161 CLR 438
Konitza & Konitza (No 2) [2009] FamCAFC 213
Pavey and Pavey (1976) FLC 90-051
Sterling & Sterling [2000] FamCA 1150

APPELLANT: Mr Stanford by his case guardian K Stanford

RESPONDENT: C Rafter and G Brims the personal representatives of Mrs Stanford (Deceased)

FILE NUMBER: PTW 4187 of 2009

APPEAL NUMBER: WA 19 of 2010

DATE DELIVERED: 19 January 2012

PLACE DELIVERED: Brisbane

PLACE HEARD: By way of written submissions

JUDGMENT OF: Bryant CJ, May & Moncrieff JJ

HEARING DATE: By way of written submissions

LOWER COURT JURISDICTION: Magistrates Court of Western Australia

LOWER COURT JUDGMENT DATE: 27 January 2011

LOWER COURT MNC: REPRESENTATION [2010] FCWAM 15

COUNSEL FOR THE APPELLANT: Mr Dowding SC
Ms Brady

SOLICITOR FOR THE APPELLANT: Carr & Co

COUNSEL FOR THE RESPONDENT: Mr Berry

SOLICITOR FOR THE RESPONDENT: Ferrier Athanasiou & Kakulas

ORDERS

- (1) The husband by his case guardian pay to C Rafter and L Brims, the personal representatives of the wife, the sum of \$612,931 (without interest) (“the payment”) upon the death of the husband or at such earlier time as may be determined by the case guardian.
- (2) In the event of the sale of the former matrimonial home in the State of Western Australia prior to the death of the husband, and in the event that the husband’s case guardian does not determine to make the payment at that time, the husband’s case guardian is to provide security for the payment in a form acceptable to the personal representatives of the wife, and failing agreement there be liberty to apply to the Court as to the form of the security.
- (3) The costs of the submissions of each party in relation to the re-exercise be reserved. Should either party wish to seek costs then such application be made within 28 days accompanied by written submissions.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Stanford & Stanford* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT PERTH

Appeal Number: WA 19 of 2010

File Number: PTW 4187 of 2009

Mr Stanford by case guardian K Stanford

Appellant

And

C Rafter and L Brims the personal representatives of Mrs Stanford

(Deceased)

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 21 October 2011 for reasons which were then provided the Full Court allowed the husband's appeal against the orders of Magistrate Duncanson made 30 September 2011.
2. As said in those reasons, this appeal raised a question which is particularly relevant to contemporary Australian society, namely, "whether and if so in what circumstances, the Court should make an order for property settlement pursuant to s 79 of the *Family Law Act 1975* (Cth) ("the Act") where a marriage is still intact but where a physical separation has been forced upon the parties by reason of one of the parties' health".
3. The circumstances of the elderly parties in this case were such that the wife, by reason of her physical and mental frailty, required high care in a nursing home. In contrast, the husband was of considerably good health and wished to remain living in this home, which was within his ability. The proceedings were initiated by the wife's daughters who asked that the former matrimonial home be sold so that the proceeds of sale could be spent on care for their mother.
4. Having allowed the husband's appeal, we were informed that the wife had died and subsequently an order was made by a Registrar of the Family Court of Western Australia pursuant to s 79(8)(a) of the Act and Rule 16.15(3) of the Family Law Rules 2004 (Cth), substituting C Rafter and L Brims as parties to the proceedings bearing file number PTW 4187 of 2009.

5. It is accepted that the wife's daughters are now the parties in the appeal WA 19 of 2010.
6. Both the representatives for the husband and the wife have filed written submissions setting out the orders they seek and submissions relevant to those orders having regard to the death of the wife.
7. The husband is of the view that either the wife's application for property settlement should be dismissed pursuant to s 79(8) of the Act or that the application be stayed permanently. The husband also asks that the wife pay his costs of and incidental to the appeal.
8. It is now asked in effect, on behalf of the wife, that the Full Court re-exercise the discretion, that orders be made providing the husband pay to the wife's legal representatives the sum of \$612,931, with payment becoming due on the first occurring of either the sale and settlement of the former matrimonial home or the death of the husband.

BACKGROUND

9. In order to understand the context of this judgment, it is useful at the outset, to reproduce the short background provided in our 21 October 2011 reasons:
 9. The wife is 89 years and the husband 87. The parties were married in 1971, it was the second marriage for both the parties. This year the parties will have been married for 40 years. Their children from previous marriages are their respective case guardians.
 10. For 37 years the parties lived in the former matrimonial home at [an inner suburb of Perth] which is registered in the husband's sole name.
 11. The property was purchased by the husband and his first wife in February 1962. They obtained a war service loan in April 1964 secured by mortgage and built the house.
 12. In December 1966 the husband and his first wife were divorced. The home was subsequently transferred to the husband's sole name.
 13. In June 1968 the wife divorced her first husband. In December 1968 she won \$16,000 on Lotto and used the majority of her winnings to pay out the mortgages on her home in [a southern suburb of Perth].
 14. In April 1974 the wife sold her [southern Perth suburb] home to her daughter [C Rafter] and her daughter's husband for \$13,000. The daughter subsequently renovated and sold the property for \$64,000 in May 1979.

15. The husband and wife retired in 1989. They both then were entitled to a pension from the Department of Veteran's Affairs. The parties continue to receive pension payments.
16. The evidence in the trial revealed a number of important facts, none of which were regarded as controversial in the appeal hearing.
17. In March 1995 the husband made a will. He did not discuss the will with his wife. In a letter dated 27 March 1995 to his wife and his sons it was explained that as the wife intended to leave her estate to her daughters, excluding the husband, he provided for the wife to have a life tenancy in the [inner Perth suburb] home and for his estate to be divided equally between his sons or their children. The husband further explained that he was certain the wife's daughters would have no expectations of him, just as his sons would have no expectations from the wife. The wife was unaware of this letter.
18. The wife was appointed as the husband's carer on 1 March 2002. In August 2003 and February 2004 the husband suffered two strokes. He recovered well.
19. On 1 September 2005 the wife signed an Enduring Power of Attorney in favour of her daughters. The husband was not aware of this.
20. On 30 December 2008 the wife suffered a stroke. She was admitted into full time residential care and cannot return to reside in the former matrimonial home to live with the husband. The wife also suffers from dementia.
21. On 28 February 2009 the husband had a fall and was hospitalised but later returned to the home where he has continued to live with his son.
22. Although physical separation was forced upon them, it was at least the husband's case that the parties are still in a marital relationship. The husband continues to provide for the wife, he has placed \$40,000 into an account for her use. He visits her three times a week at the care facility.
23. On 8 March 2009 the husband signed an Enduring Power of Attorney appointing his son, [K Stanford] and [A Stanford], the wife of the husband's deceased son [R], jointly and separately to be his attorneys.
24. The wife's health and the extent to which her surroundings and treatment might benefit her was of major significance in the trial.

10. It is also useful to provide a short summary of the history of the appeal proceedings.
11. The appeal was from orders made on 20 September 2010 by Magistrate Duncanson, which inter alia provided, that the husband pay to the wife the sum of \$612,931 within 60 days and that upon payment the wife's interest in the former matrimonial home vest with the husband.
12. On or about 12 September 2011 the wife suffered a stroke and was admitted to C Hospital. The wife died in September 2011.
13. The parties by joint letter to the Court dated 6 October 2011 informed the Court of the wife's death and sought leave to file further written submissions addressing any issue the wife's death may have on the outcome of the appeal.
14. The matter was listed for directions before Moncrieff J on 14 October 2011.
15. The parties were informed on 18 October 2011 that the reasons for judgment of the Full Court would be delivered by May J from Brisbane on 21 October 2011.
16. The appeal was allowed and paragraphs 1, 2 and 7 of the orders made by the Magistrate were set aside. The orders set aside provided:
 - 1 The Respondent [**MR STANFORD**] shall pay to the Applicant [**MRS STANFORD**] the sum of \$612,931 within 60 days.
 - 2 Contemporaneously with the payment referred to above –
 - (a) all of the Applicant's interest, if any, in the [former matrimonial home], the personal property, bank accounts and household contents in the possession or name of the Respondent vest in the Respondent absolutely, and
 - (b) all of the Respondent's interest, if any, in the personal property and bank accounts in the possession or name of the Applicant vest in the Applicant absolutely.
 - ...
 - 7 The proceedings be otherwise dismissed.

Costs certificates were also granted to the parties pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth).

SUBMISSIONS OF THE HUSBAND

17. Counsel for the husband summarised the issues to be addressed at the commencement of the written submissions. Those issues as identified provided:
 1. The requirements for the continuation of proceedings after the death of a party not having been complied with in this case.

2. Whether the Full Court should re-exercise the discretion to make orders in substitution for those made by Her Honour Magistrate Duncanson, or whether the matter should be remitted for rehearing.
3. If the Full Court determines it should re-exercise the discretion, in the circumstances that have occurred since hearing the appeal, it is still appropriate for an order for property settlement to be made, particularly given the requirements of section 79(8) of the Act?
4. If the Full Court determines it is appropriate to make an order for property settlement, the effect which the [husband] says the death of his wife ought to have on the re-exercise of discretion.
5. The orders the [husband] now seeks the Full Court make, given the appeal has been allowed.

18. The husband asks that the following orders be made:

1. The wife's application for property settlement be either:
 - (a) dismissed pursuant to section 79(8) of the Family Law Act; or
 - (b) stayed permanently.
2. The Respondent pay the Appellant's costs of the appeal.
3. Such further or other orders as the Full Court deems appropriate.

19. The husband then addressed each issue in turn. For convenience we will use the same headings as adopted by counsel for the husband.

Issue 1

20. In our view the order made in relation to the trial proceedings translates to the appeal proceedings so that there is no impediment for this reason.

Issue 2

21. In their written submissions counsel for the husband maintained the position adopted at the hearing of the appeal, that should the appeal be allowed the Full Court should re-exercise the discretion, rather than remit the matter for re-hearing. A number of reasons were provided for adopting such an approach:

- (a) Both parties now seek this course of action.
- (b) The asset pool available for division is not in dispute.
- (c) The Full Court has the same capacity as the trial Magistrate to make findings pursuant to section 79 and section 75(2) of the Act.

- (d) It is preferable that a redetermination occur as soon as practicable, bearing in mind the [husband's] age and his state of health.
 - (e) A rehearing will be expensive for both parties and there will be further delays in having the matter finally determined, which is clearly undesirable having regard to the circumstances and means of the parties.
22. We are of the view that the unusual circumstances of this case demand that we re-exercise and there is consent from both parties to us doing so.

Issue 3

23. In regard to this issue the husband maintained his submissions made at trial, that no order for property settlement should be made, on the basis that such an order would not be just and equitable.
24. In the written submissions counsel for the husband made reference to paragraphs 69 and 112 of our reasons in allowing the appeal. It was then submitted that “given that an order for property settlement is not inevitable and there is no requirement for an order to be made, in the circumstances of this case it is not just and equitable for the Court to make an order for property settlement”.
25. Counsel for the husband also reiterated the evidence of the wife’s intentions, as recorded by the husband and which was not contradicted:
- In 1994 [the wife] told me she was going to make a will leaving all her worldly goods to [C Rafter] and [G Brims] – excluding me entirely. Of this arrangement I accept and fully agree & told her so at the time. Have heard nothing more & certainly won’t ask, so I don’t know if it has happened.
- While [C Rafter], [G Brims] and their families are decent people & we all got along well, I’m sure they hold no expectations of me, as you would have none of [the wife].
26. In seeking to justify the husband’s position a number reasons were provided as to why an order for property settlement is not just and equitable:
- (a) The wife did not take any step to end her marriage.
 - (b) The wife took no step to assert a desire to pursue a “property based entitlement”.
 - (c) The wife took no step to initiate proceedings for property settlement (or seek any other orders under Part VIII of the Act) herself in the Family Court.
 - (d) The evidence presented at trial was that both parties kept their finances separately from the other. There is no evidence that the wife would ever have sought to recover any “contribution based entitlement” to the assets of the parties’ marriage.

- (e) The manner in which the parties chose to manage their finances and property during their lengthy marriage should be respected and each should be entitled to devise it in the manner which they deem appropriate.
- (f) Given the Full Court's finding at RFD p 90 that "*the evidence revealed that a capital sum was no longer required to place the wife in an aged care facility suitable for her needs*", the proceedings for property settlement were not related to anything but a desire by the beneficiaries of the wife's Will to ensure the estate was enlarged.
- (g) If obtaining funds to improve the wife's care was the wife's Case Guardian's motivation, as was suggested by them at trial, an order for property settlement is no longer required because the wife has died.
- (h) Given that the Court is exercising jurisdiction under the Marriage Power, a claim under the Act for property settlement ought to be initiated by a party to a marriage, or for their benefit and not simply for the benefit of a potential beneficiary.
- (i) In circumstances where it is common ground that the consortium vitae has not broken down, the Court should be very reluctant to make any order under Part VIII (except for an order for spousal maintenance in an appropriate case) unless there are compelling reasons to do so.

27. It was submitted that "although the Court has determined it has jurisdiction to entertain the claim of the [wife]" it would not be just and equitable for substantive orders to be made.

28. It was said at paragraph 13 of the husband's written submissions:

It is clear from section 79(8)(b) that the Court must be satisfied about 2 matters prior to making an order for property settlement after the death of a party, namely that:

- (a) the Court would have made an order but for the death of the party;
and
- (b) it is still appropriate to make an order with respect to property.

29. Further it was said:

14. The Full Court has made it clear that for the purposes of s 79(8)(b)(ii), the onus of establishing that it is still appropriate to make a property order lies on the party who is seeking the order (see *Tasmanian Trustees Ltd (administrators of estate of Gleeson) and Gleeson* (supra) at p 78,085).

15. The [husband] is uncertain of the bases upon which the [wife] proposes to submit that the Court can be satisfied that it is still appropriate to make an order for property settlement in their favour. The [husband] reserves his rights to address this issue in any reply (sic) he deems it prudent to file after having reviewed the [wife's] submissions.
30. No further submissions have been filed.
31. Counsel for the husband, in regard to the appropriateness of making a property order, made reference to the dissenting judgment of Kay J in *Sterling & Sterling* [2000] FamCA 1150, and to the subsequent statement of the Full Court that “there is much sense in what his Honour said ...” in paragraph 71 of the reasons for judgment in allowing the appeal. It was said:
 19. The meaning of “appropriate” was considered by Kay J in *Sterling*. At p 40, his Honour provided 4 matters which he said might properly be considered by a Court determining whether or not to make an order pursuant to section 79 of the Act. Those matter were as follows:
 - “1. *The possibility that the children or other relatives of the respective spouses might try to pursue proceedings out of self-interest to influence their own inheritances, rather than out of consideration for the needs or wishes of the incompetent spouse;*
 2. *that competent spouses can pursue or oppose a proceeding out of concern for their own self-interest and the financial consequences to themselves rather than a desire to maintain the marriage relationship;*
 3. *that it might be inequitable to vest the competent spouse with absolute, final control over the marriage;*
 4. *the best interests of the incompetent spouse, keeping in mind possible legal obligations of that spouse to the other spouse and to potential heirs.”*
 20. In relation to the points discussed by Kay J in *Sterling*, the [husband] submits that the following facts in this case should be considered as relevant matters for this Court when determining whether it is still appropriate to make a property settlement order:
 - (a) The parties had an intact marriage.
 - (b) There is no evidence that the wife took any steps to determine the marriage relationship.

- (c) There is no evidence that the wife ever made any attempt during the marriage to alter the parties' financial arrangements, so as to increase her estate for the benefit of her heirs in the event she predeceased the [husband] (for example by becoming a co-owner of the former matrimonial home). The [husband's] evidence was that the wife advised him in 1994 that she would make a will leaving her worldly goods to her daughters, which was a matter be accepted ... The evidence of the [husband] in light of the wife's intention regarding her estate was, that at best, his wife should only ever be entitled to a life tenancy in the former matrimonial home, together with payment for her expenses ...
 - (d) On 23 April 1974 (i.e. during the marriage) the wife gifted her former matrimonial home from her first marriage, to one of daughters (sic). The evidence at trial was that the daughter subsequently sold the property and applied the sale proceeds for her own purposes ... The residue of the wife's estate (i.e. her savings) has been utilised by her daughters to fund this litigation. In one sense, the transfer of the wife's property to her daughter could be seen as a payment of an inheritance before the death of the donor.
 - (e) The wife herself did not seek an alteration of property interest in the Family Court. It is however, conceded that the Case Guardians sought orders for property settlement on her behalf.
 - (f) The wife will not now benefit from an order for property settlement.
 - (g) The people who stand to benefit are the same people who decided that the parties' marriage was at an end, commenced proceedings for property settlement and are continuing to pursue them after her death, notwithstanding their evidence as to their apparent motives to commence and pursue the proceedings.
21. The [husband] further submits that he has not opposed the proceedings commenced by his wife's Case Guardians because of motivations of self-interest. His opposition to the proceedings was, inter alia, based on the following:
- (a) The [husband] and his wife were not separated.

- (b) He was at all times on hand, willing and available to provide financial support in the form of maintenance to the wife to meet any of her needs.
 - (c) The [husband] stood to be ejected from his home if the orders sought by the wife's case guardians were made, which was not surprisingly of grave concern to him.
- 32. We are mindful that counsel for the husband also submitted that "the Family Court is not the appropriate forum where competing claims of parties' children should be litigated". In supporting this submission it was contended that "Parliament never intended the Marriage Power in section 51(xxi) of the Constitution and the Act made pursuant to that power to extend into the area of wills, and intestacy which are areas of State jurisdiction".
- 33. Reference was also made by counsel for the husband to *Fisher & Fisher* (1986) 161 CLR 438, where Gibbs CJ said at 75,594 "[w]e are not concerned to consider in what circumstances it would be appropriate to make an order that would benefit complete strangers, but clearly the discretionary power to make an order under section 79(8)(b) should not be exercised lightly".
- 34. In concluding the submissions on this issue it was said at paragraph 27:
 - ... it would be an unfortunate result if this case were to "open the floodgates" to permit inheritance issues to be litigated in the Family Court. Particularly, where members of the High Court in the *Sterling* special leave application were troubled by that being the result of the Full Court's decision in that case (see particularly the comments of Hayne J at p 240 and 255).

Issue 4

- 35. It was submitted that should the Full Court re-exercise the discretion of the Magistrate and determine that a property order should be made, the wife's death has had a "profound impact on the section 75(2) adjustment which ought to be made, i.e. that no adjustment should be made in her favour".
- 36. Counsel for the husband submitted that the wife no longer has s 75(2) needs, and that the husband's needs "are such that he should receive a section 75 (2) adjustment in his favour". In supporting this submission the husband relied on the following factors:
 - (a) The parties in this case had an intact marriage. At no time were the parties separated, other than physically by reason of the wife's health.
 - (b) The [husband] needs accommodation which the former matrimonial home provides.

- (c) The [husband] wishes to remain residing in the former matrimonial home until such time as he is no longer capable of doing so.
- (d) The [husband] will need to sell his home in order to satisfy an order for property settlement. The only other sources available to him with which he could meet an order for property settlement is the residue of the \$40,000 which was set aside to provide for the wife's needs, which is approximately \$43,000.
- (e) The [husband] is cared for by his son in the former matrimonial home.
- (f) The [husband] receives a veteran's pension from the Department of Veteran's Affairs and a disability pension.
- (g) He has generally good physical health and does not currently need to be hospitalised.
- (h) The [husband's] mental capacity has diminished following the commencement of these proceedings. As a result, his son and daughter-in-law are currently in the process of applying to the State Administrative Tribunal (WA) to be appointed as his joint guardians and administrators.
- (i) If the [husband's] health deteriorates in the future, it is likely that he will require access to funds to meet his medical costs. The likely quantum of any such costs is unknown.
- (j) The [husband] enjoyed a modest to comfortable standard of living during the marriage, in the residence which he owned pre-marriage and in which he has resided since it was purchased by him and his first wife in 1962.

SUBMISSIONS OF THE WIFE

37. It is asked on behalf of the wife that the Full Court re-exercise the discretion. It was acknowledged by the wife that the Court can only re-exercise such discretion pursuant to s 79(8)(b) of the Act, if the requirements of ss 79(8)(b)(i) and (ii) are affirmatively satisfied. Counsel for the wife then addressed the two questions in turn.
38. As to whether the Court would have made an order with respect to property as the wife had not died, it was said:
- 9.1 The Court would have made an order with respect to property if the deceased party had not died.
 - 9.2 In the circumstances of this case, the Court would, at the very minimum, have preserved the wife's rights with respect to her

property application by adjourning it generally while considering whether she required a maintenance order for her benefit.

9.3 The [wife] contends that an order adjourning the property settlement proceedings generally is an order ‘with respect to’ property.

39. In considering what order is appropriate, counsel for the wife submitted that a proper order would be one “which recognises the wife’s contribution-based entitlements to the property pool”. It was explained that the Magistrate’s findings as to “contributions were unchallenged and provide an appropriate point of reference for the Court’s consideration”.
40. In addition, it was said that “[t]he form of the order should recognise the husband’s occupation of the home and the timing of the payment of the wife’s entitlement should be deferred on the conditions stated in the proposed orders”.
41. The wife asks that the following orders be made:
 1. The husband shall pay to the wife’s legal representatives the sum of \$612,931.
 2. Enforcement of the said payment be stayed until the first to occur of the following events”
 - (a) the sale and settlement of [the former matrimonial home] in the State of Western Australia;
 - or
 - (b) the death of the husband.
 3. The husband’s application for costs be dismissed.

REASONS OF THE MAGISTRATE

42. Given that we have been asked to re-exercise discretion it is necessary to consider the reasons for judgment of the Magistrate. It is important to observe that the findings of fact by the Magistrate were not challenged. For convenience we will reproduce the summary as provided by us in the 21 October 2011 reasons:

33. At the commencement of the Reasons for Judgment her Honour identified the issues for determination. These were:
 1. Whether the Court has jurisdiction to make an order for property settlement having regard to the fact that the parties had not intended to separate and had not sought to determine financial issues between them prior to [the wife’s] illness.

2. In the event that the Court has jurisdiction, whether that jurisdiction should be exercised having regard to the matters referred to in 1 above.
 3. The quantum and nature of the contributions by each party to the pool of assets.
 4. The disposition by [the wife] of assets during the marriage in particular the [southern Perth suburb] property.
 5. The parties' respective future needs and whether there ought be any adjustment pursuant to s 75(2).
34. In paragraph 10 of her Reasons for Judgment her Honour indicated that she had determined the first two issues in the earlier hearing in the affirmative and her judgment dealt with the remainder of the issues identified.
35. It was explained that the parties were in agreement as to the value of the home and that there should be no adjustment in favour of either party for s 75(2) factors. The home was valued at \$1,375,000.
36. The orders sought by both parties were then set out. As this is of some relevance we also reproduce the orders that were sought:

Orders sought by [the wife]

6. The orders sought by [the wife] are contained in her Form 1 application filed 17 August 2009 and are as follows:
 1. The former matrimonial home situated at and known as ..., [inner suburb of Perth] in the state of Western Australia, be sold and the proceeds be divided equally between the parties.
 2. That the husband's superannuation entitlements and the parties combined savings be divided equally between the parties.
 3. That the husband pay the costs of and incidental to this application.
7. At the conclusion of her closing submissions Counsel for [the wife] handed up a Minute of Orders sought at trial dated 15 July 2010 which are as follows:

1. The costs personally paid by the wife's Case Guardian be indemnified out of the wife's estate.
2. The property known and situate at ..., [an inner suburb of Perth] vest in the Case Guardians to be sold on terms and conditions to be agreed between them, and the net proceeds be divided equally between the parties.
3. There be liberty to apply in order to implement the order contained in Paragraph 2 above.
4. The husband pay the costs of the wife's Case Guardian in respect of these proceedings.

Orders sought by [the husband]

8. The orders sought by [the husband] at trial were contained in his Minutes of Final Orders sought within the Papers for the Judicial Officer filed on 6 July 2010 which are as follows:
 1. The wife's Form 1 application filed 17 August 2009 and Amended Form 1 filed 15 September 2009 be dismissed.
 2. To the extent that the wife is unable to support or provide for her own financial needs, the husband pay to the wife such payments as deemed appropriate by the Court.
 3. The wife pay the husband's costs arising from and incidental to these proceedings.
 4. Should the Court determine that an order should be made for property settlement then the wife be restrained from taking any step to enforce until the death of the husband or the sale of his home, whichever is the earlier.
9. Although the husband's Minute refers to an Amended Form 1 application filed 15 September 2009, that was in fact an Amended application in a case filed on behalf of the wife and the orders sought therein did not form part of the wife's case at trial. The said application will be dismissed.

...

39. The Magistrate correctly found that the husband did not knowingly abrogate his financial responsibilities to the wife. Consequently, her Honour was not “satisfied that the consortium vitae has broken down for this reason or indeed any other reason, given that neither party intended to sever the marital relationship or to act as if it had been severed”.
40. Her Honour continued that “[t]he absence of an intention to separate is not however a bar to the Court exercising jurisdiction pursuant to s 79”.
41. Her Honour found that the elements of marriage as identified in *Pavey* “no longer exist for them even though that is not what either party intended”:
 25. The parties will never live together again. Most of the elements of a normal marital relationship have ceased to exist. Their marital relationship has diminished to 3 short visits by [the husband] to [the wife] each week. Although [the wife] did not initiate these proceedings or seek to determine the financial relationship between the parties before her stroke, the financial issues between the parties ought to be determined. [The wife’s] case is that she has contributed to the assets of the marriage and thus has an entitlement. She now needs a sum of money to provide for her future financially and she will benefit there from. [The husband’s] case is that [the wife’s] needs are being met and paid for from her income and there is no benefit to her by the making of an order under s 79. To the extent that her needs are not met, he will maintain her.
42. Of significance her Honour said at paragraph 26:

I consider that the financial aspects arising from the relationship of these parties ought be finally determined thus avoiding further proceedings between them. The fact that the parties did not intend to separate or intend the consortium vitae to break down does not, in my discretion, preclude me from exercising the jurisdiction which I have arising from the marital relationship.
43. The Magistrate found all the parties and their witnesses to be honest. Her Honour found:

38. [C Rafter] maintained throughout that her motivation in bringing and pursuing these proceedings was to obtain funds to provide a better standard of care for her mother. I accept that. It was clear that her mother's circumstances and the diagnosis of dementia are very distressing to her and [G Brims]. She was firmly of the view that the obligation to support her mother rested upon [the husband] and that he had failed to do so. Her mother was entitled to receive funds after 38 years of marriage which could be applied to her needs and improvement of her care.

39. [The husband] gave evidence. Prior to doing so I rejected the submission on behalf of [the wife] that [the husband's] case guardian, [the husband], should leave the Court while he did so, as he had not by that time given his evidence. I did this because a case guardian effectively acts in place of the party. [The wife] is completely incapacitated by her disability but [the husband] is not. The degree of disability determines the level of involvement of both the party and the case guardian. [The wife] had no involvement in the proceedings but [the husband] did.

...

44. On the most favourable view, both case guardians had as their primary motivation the interests of their respective parents. It cannot be ignored, however, that both had good reason to protect those interests, having regard to their likely inheritance.

44. The Magistrate found the parties pool of assets to be worth \$1,587,488. There are no liabilities. The pool, as found by her Honour is comprised of:

ASSET	HUSBAND	WIFE
Reward bank account		E 19,125
...		
Gold Term Deposit		E 8,854
...		
Gold Term Deposit		E 33,772
...		

Bankwest Trust account in husband's name ...	E 43,834	
Reward Bank Account ...	\$7,500	
Gold Term Deposit ...	Nil	
[Former matrimonial home] (agreed)	E 1,375,000	
Household contents	E 4,000	
Legal fees paid by Husband	95,403	
TOTALS	\$1,525,737	E \$61,751

45. In considering the parties' contributions her Honour said:

128. I consider that both parties made an initial contribution to the assets of the marriage, [the husband] did so by his ownership of the home and [the wife] by the introduction of the sale proceeds of the [southern Perth suburb] property into the marriage, which it is likely were utilised for the benefit of the parties notwithstanding that they kept their finances separate. [The husband's] contribution by way of the home should be recognised as it was the foundation of what is now the principal asset of the marriage.

129. During the marriage [the husband] made the greater financial contributions as his earnings were greater than those of [the wife]. Although [the wife's] earnings were less she made the greater contribution by way of home maker. Both applied their pensions to the payment of bills or the purchase of necessities. I consider the contributions during the marriage to have been equal.

130. Since [the wife's] stroke she has made no contribution to the assets and has been unable to do so. [The husband] continues to make a contribution to the assets of the marriage.

131. [The husband's] initial contribution of the home and his later more recent contributions should also be recognised. I consider that there should be a percentage adjustment of 7.5% in his favour for those contributions.

132. Exercising the very broad discretion which I have, taking into account the contributions of both parties in this long marriage and post separation I conclude that the overall percentage based on contributions should be 57.5% to [the husband] and 42.5% to [the wife].

43. There is no challenge to her Honour's assessment of contribution, which on the facts is appropriate.

44. During a consideration of s 75(2) factors the Magistrate said this of the evidence in relation to the husband, extracted from paragraph 46 of our reasons:

...

146. [The husband] is aged 86 years. He deposes that his state of health has declined since these proceedings commenced. He has become increasingly forgetful and anxious in stressful situations. He requires a carer to assist him in completing daily tasks such as shopping which he cannot complete on his own. After a fall in December 2009 [K Stanford] has lived with him as his registered carer and intends to continue to do so until [the husband] can no longer live at home.

147. Dr [R's] reported on 12 January 2010 regarding [the husband] as follows:

“[Mr Stanford] attended the surgery today and I examined him. In my opinion he is suffering from:

1. anxiety re the upcoming court action – no desire to have the anxiety worsened.
2. reduced mental capacity – as confused with pressure and reduced memory.

As a result wishes his son to act in his place”.

148. The property of the parties is as set out above. [The husband] receives the veterans' pension from the Department of Veterans' Affairs and a disability pension totalling \$481 per week.

...

153. It is not known whether [the husband] will move from his home in the future. He deposes that he will require substantial sums for his future care if he requires hospitalisation or aged care.
154. Ultimately, he may require residential care although that is certainly not contemplated by him or those caring for him at this time. He does not wish to leave his home but should he require residential care it is likely that the family home would at that time be sold. As with [the wife], the cost of [the husband's] future care is unlikely to remain static.
155. Neither party sought an adjustment to the percentage (based on contributions) as a result of the factors set out in s 75(2) of the Act. Both parties will have needs in the future and having considered the matter, I agree there should be no such adjustment.

REASONS OF THE FULL COURT – 21 OCTOBER 2011

45. The appeal was allowed. We allowed the appeal as we found merit in grounds 3, 4, 5, 6, 7, 8 and 9. In summary those successful grounds provided:

...

3. In failing to consider an order under s 72 of the Act for periodic maintenance, given the marriage was intact and the husband's concession that an amount of periodic maintenance would be paid to the wife if there was an established need.
4. In finding that the wife needs a sum of money and that the wife's level of care will improve by making a property settlement order.
5. In failing to appropriately consider the husband's s 75(2) factors. Namely, that it was likely that the husband would be able to remain in the former matrimonial home for the foreseeable future, that he would be required to sell his home to fulfil the property settlement orders and that he will suffer detriment as a result of the sale.
6. In failing to make an adjustment in the husband's favour for s 75(2) factors after having assessed the parties' contributions 57.5/42.5 per cent in the husband's favour.
7. In determining that it was just and equitable to make an order pursuant to s 79 of the Act, or in the alternative, erred in failing to provide adequate reasons as to why the orders were just and equitable.
8. In failing to consider the effect of the orders on the husband at the "fourth stage".

9. In failing to fulfil the duty to give adequate reasons about;
 - a) why it was just and equitable to make a property settlement order;
 - b) the effect on the husband (if any) on the wife predeceasing him;
 - c) why the financial issues between the parties needed to be finally determined, and;
 - d) why an order for periodic maintenance was not appropriate.
46. It was found by us that “although the Magistrate clearly had the power to make a property settlement order, she failed to consider the various options to a final order and in our view wrongly exercised her discretion”.
47. One of the main arguments on appeal was that it could not reasonably have been found that the wife needed a lump sum of money to provide for her financial future or that her level of care would improve by the making of a final property settlement order. In allowing the appeal we did not doubt the power of the Court to make such an order. However, the expert medical evidence provided by various doctors who had treated the wife was clear. Although the wife’s daughters wished her to be moved to another nursing home facility, where they thought she would receive better care, there was really no ascertainable medical benefit to the wife given the deterioration of her health, especially her level of dementia.
48. We were of the view that given the circumstances of the case, her Honour erred in failing to adequately consider the effect of the orders on the husband and in failing to also consider the possibility of making an order for spousal maintenance. In addition, we found that the Magistrate failed to give adequate reasons as to why she considered that the orders were just and equitable.
49. In reaching our determination it was said that “[i]n our view there are many aspects of this application which do not require an immediate order finally altering the interests of the parties in their property and particularly so where it would require the husband to leave his home of 48 years in which he is still residing”.
50. Having determined to allow the appeal, and being conscious of the fact that there may need to be a re-hearing, we were reluctant and it was unnecessary to comment any further in relation to other grounds and submissions. We said however, in making such a comment that “we would wish to convey that the rights of each party remain, including that property held by them be divided pursuant to the provisions of the Act”.

RELEVANT LAW

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

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

Section 79(8) provides machinery for the discharge of those moral obligations in priority to any rights in the property of a party to a marriage which arise by testamentary disposition to that party's property or by any other devolution of that property on that party's death. That is a law which governs an incident of marriage in that it provides the machinery for enforcing the moral obligation with respect to property arising from a spouse's marital relationship. It is a law with respect to marriage. (our emphasis)

52. In our view, the many years of marriage and the wife's contributions demand that those moral obligations be discharged by an order for property settlement.
53. We are mindful of the fact that this is a case in which the marriage of the parties had not broken down when the proceedings were commenced and that the wife's claims were brought in order to provide her with access to funds which it was asserted she required for her support. Her death now removes the need for those funds. But in the course of the proceedings, the wife established that she had made contributions to the assets enjoyed by the parties during their long marriage, particularly the former matrimonial home, and in our view it continues to be appropriate to allow the wife's estate the benefit of a share of the property in which she has established an interest.
54. Other particular factors that pertain to this case are the fact that the house was in the name of the husband and the wife had no legal interest to leave to her

estate, and that orders can be made which will enable the husband to enjoy the assets of the parties until his death.

RE-EXERCISE OF DISCRETION

55. Both parties agree that the findings of the Magistrate on contribution should not be disturbed. That results in the husband receiving 57.5 per cent and the wife 42.5 per cent of the asset pool agreed at \$1,587,488. Of this amount the wife has assets of \$61,751 and should therefore receive the sum of \$612,931.
56. The husband sought an adjustment on account of various factors in s 75(2). As he will, pursuant to the orders we intend to make, have use of the property until his death, in our view there is no need for a further adjustment
57. Although the circumstances were different in some respects, similar orders were made by the Full Court (Bryant CJ, Coleman & May JJ) in *Konitza & Konitza (No 2)* [2009] FamCAFC 213.
58. In the circumstances of this case we are of the view that although an order for property settlement requiring a payment to the wife's estate should be made, the timing of such disposition is important in order to do justice and equity to the husband under s 79(2) of the Act.
59. The proper order in this case is that the wife's legal personal representatives should receive a fixed sum of \$612,931 upon the death of the husband.
60. It is then a matter for the husband and his family to decide whether they wish to retain the home after his death, sell it earlier or at any other time pay the sum ordered to the personal representatives for the wife. Obviously, this order protects the husband from a need to move from his home earlier than he would wish, would allow for a capital sum to be provided should it become necessary for his care and avoids an incorrect assessment of the husband's current and future needs. The fixed sum order avoids any further arguments in relation to the value of the home.
61. There is no apparent reason why the sum should be paid earlier. In this, we have paid close attention to the submissions on behalf of the husband without denying the wife's moral entitlement.
62. Given the use of the assets by the husband during his lifetime, we consider this a just and equitable outcome but subject to providing some security for the wife in the event of a sale of the former matrimonial home during the lifetime of the husband. The form of security will depend upon the husband's circumstances at the time and his need for funds so we do not intend to proscribe any particular form of security.

COSTS

63. We intend to allow the parties to file further written submissions as to the costs of the written submissions concerning the re-exercise of discretion.

I certify that the preceding sixty-three (63) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Bryant CJ, May & Moncrieff JJ) delivered on 19 January 2012.

Associate:

Date: 19 January 2012